The Senate met at 9:30 a.m., on the expiration of the recess, and was called to order by the Hon. WILLIAM S. COHEN, a Senator from the State of Maine.

PRAYER

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

"As the harts panteth after the waterbrooks, so panteth my soul after Thee O God. My soul thirsteth for God, for the living God.


"Thou hast made us for Thyself, O Lord, and restless are our hearts until they repose in Thee."

Our need of Thee is expressed so beautifully in these words of King David the psalmist, and St. Augustine, ancient theologian and philosopher, eternal God. Our souls languish for Thee—our spirits are starved for Thee. Awaken us, O Lord, to the barrenness of our lives—the emptiness when we do not come to Thee, wait upon Thee, take time for Thee. In the whirlwind of activity, give us grace to turn to Thee in quietness for strength and renewal. Help us to hear Thy still small voice calling us out of busyness to the nourishment of our souls. Lead us beside still waters, gentle Shepherd. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

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

The clerk read the following letter:

U.S. Senate, President pro tempore, Washington, DC, September 17, 1986.

To the Senate:

Under the provisions of Rule I, Section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable William S. Cohen, a Senator from the State of Maine, to perform the duties of the Chair.

STROM THURMOND, President pro tempore.

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

RECOGNITION OF THE MAJORITY LEADER

The Acting President pro tempore. The majority leader is recognized.

Mr. DOLE. I thank the distinguished President Officer, the Senator from Maine (Mr. Cohen).

SCHEDULE

Mr. DOLE. Mr. President, under the standing order, the leaders have 10 minutes each.

Then we have a flurry of special orders, seven in all—Senators HAWKINS, PROXMIKE, MURKOWSKI, SASSER, BROYHILL, CHAFEE, and LEVIN—not to exceed 5 minutes each. I ask unanimous consent that the order for Senator TANZLE be vitiated.

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

Mr. DOLE. Then we have morning business, not to extend beyond 10:30 a.m.

Sometime between now and 10:30, it is my intention, if we can work it out, to turn to H.R. 5205, the Department of Transportation bill. If we can do that, we will postpone the cloture vote on the Rehnquist nomination until 3 o'clock.

There will be votes throughout the day and into the evening. I am not certain how late. I indicate to all Members that, depending on when the votes come, we hope to have a window, roughly between 6 and 8 o'clock. It could start a little later and run a little longer, but it will be in that timeframe.

VISIT OF PRESIDENT AQUINO

Mr. DOLE. Mr. President, last evening, I was pleased to join with the minority leader and the chairman and ranking member of the Foreign Relations Committee, in sponsoring a resolution of welcome to Philippine President Aquino. She will meet the President today, and, of course, we are all looking forward to her appearance on Capitol Hill tomorrow, including an address to a joint meeting of both Houses.

When President Aquino first came to power, there was, almost inevitably, a near-euphoria which gripped the Philippines and, for that matter, Washington, too. By her remarkable performance, President Aquino richly deserved all the praise she received. But, as she herself noted, governing is a much bigger task than aspiring to govern. And, as President, she has been confronted with more than her fair share of tough problems.

So, as we make preparations to greet President Aquino tomorrow, I want to comment briefly this morning on three of the problems which I see as at the top to the agenda of United States-Philippine relations.

ECONOMIC PROBLEMS TOP AQUINO AGENDA

Clearly the top priority for President Aquino is the very serious economic problems which plague her country—a huge foreign debt; a continuing shortage of foreign exchange; serious unemployment; and a whole range of other economic troubles. The reality is that, while we may be able to provide some additional aid, our own severe budget problems rule out large sums of new assistance. So, the private sector and private enterprises will have to be the main engine for any effective program of economic stabilization and growth, supplemented, I hope, by additional aid from Japan and other nations with their own large stake in a stable, prosperous Philippines.

The Aquino government is to be commended for the reality with which it has confronted its economic dilemma. Especially noteworthy is the stress it has put to date on the revitalization of the private sector, the importance of a cooperative agreement with the private banks, and the relatively openness to foreign investment. I know those topics fit prominently into President Aquino's U.S. schedule. Let us hope all those will continue to be high priority items for her Government.

INSURGENCIES THREATEN PHILIPPINE SECURITY

A second area of great concern to the Aquino government, and to many of us here in this country and Congress, is the serious security situation within the Philippines. Manila has to cope, simultaneously, with not one but two menacing insurgencies. And the Aquino Government will have a long way to go to bring its own military forces up to the level where it can deal effectively with the military threats it faces.

President Aquino is committed to a serious exploration of a negotiated settlement with both the Muslim and the Communist insurgents. She is to be commended for seeking a peaceful settlement. Regrettably, though, as all too often happens in these kinds of cases, her good faith attempts so far appear to be running into an insurgent stone wall, especially from the Communist group, the so-called New People's Army.

This is primarily a matter for the Aquino government to deal with, of
CONGRESSIONAL RECORD—SENATE September 17, 1986

Mr. DOLE. Mr. President, today we kick off a marathon birthday celebration for the U.S. Constitution. For it was on September 17, 1787, that President James Madison signed what Chief Justice Warren Burger calls "the most perfect document ever known from the hand and the mind of man."

This past weekend, Annapolis, MD, was the site of the formal opening of the 3-year national observance of the Constitution's 200th birthday. The distinguished chairman of the Judiciary Committee, Senator Thurmond, paraded the pageantry of Constitution celebration. But we ought to help in every course, but we cannot not just as a matter of meeting our commitments to a good friend, and helping keep the Philippines a stable ally, but also because, somewhere down the road, if the Communist insurgency continues to grow and expand its operations, both of our bases in the Philippines are going to be mighty tempting targets.

In fact, we have to take special care even now—and the Philippine Government has to make this a top priority, too—to maintain the physical security of those bases in the face of what is already probably a substantial threat from terror-type attacks. I do not want to cry wolf, or raise any false alarms, but I also do not want to pick up the paper someday and read about a Beirut-style attack by some Communist terrorists on barracks at Clark or Subic.

BASES VITAL TO U.S. SECURITY ROLE IN PACIFIC

There is, of course, the major issue of the bases themselves. Clark and Subic have served well the interests of both the United States and the Philippine Governments. They play a vital role in our overall security posture in the Pacific. Without them, or comparable facilities elsewhere, the United States simply could not meet its security responsibilities in that part of the globe.

I welcome President Aquino's commitment to abide fully by the bases agreement at least until 1991. I understand that there are good reasons why, right now, she might not want to commit herself publicly beyond that date. But I also know—and I expect she will hear during this visit—that there is a strong feeling in this country that those facilities—or, again, similar facilities elsewhere—are going to be needed long past 1991. And there is some concern about the viability of Clark and Subic for that longer term, especially in the absence of some kind of expression from the Philippine Government that it too, sees merit in their continued operation. At the appropriate time, I hope she will be prepared to address with our President some longer term plans for the bases, and the role they play in advancing the security interests of both the United States and the Philippines.

A NEW PAGE IN UNITED STATES-PHILIPPINE RELATIONS

Mr. President, when President Aquino assumed office, it represented the turning of a page in United States-Philippine relations. The story written so far on the news pages has been a positive one, of friendship and cooperation. President Aquino's trip, I am sure, will be yet another significant chapter in that ongoing story. I welcome her to Washington, forward to seeing her and hearing her message tomorrow.

CONSTITUTIONAL BIRTHDAY

Mr. BYRD. Mr. President, I share the distinguished majority leader's sentiment with respect to the visit to our country by the Philippine President, Mrs. Aquino.

The bases are of extreme importance not only to our own national security, but also to the distinguished majority leader pointed out, but equally important, as he pointed out, to the Philippines themselves. I, too, look forward to welcoming and to hearing Mrs. Aquino tomorrow.

FOREIGN DEBT

Mr. BYRD. Mr. President, the United States continues to pile up foreign debts to pay for rapidly expanding imports, according to data released by the Commerce Department yesterday. We all know that our trade deficit has cost millions of U.S. production is displaced by rising imports and lost exports. Less well known are the long-term costs of our huge trade deficits and mounting foreign debts.

When this administration took office in 1981, the United States was the world's largest creditor. Americans owned $106 billion more in assets abroad than foreigners owned here. By the end of 1985, the United States had gone from the position of world's largest creditor to the position of world's largest debtor with a net foreign debt of $107 billion. Think of that! From the world's largest creditor in 1981 to the world's largest debtor in 1985.

This year, the United States will add another $105 billion to that debt, if the trend for the first half of the year continues. And by 1988 if that trend continues, this country's foreign debt will exceed that of all of Latin America combined.

During the last 5 1/2 years, our exports have fallen and we have paid for soaring imports only by selling off our assets. In fact, foreigners have expanded their ownership of U.S. assets by 126 percent since the beginning of 1981. At that time, foreigners held $501 billion worth of American assets. As of June this year, they held more than twice that amount, $1.13 trillion in American assets, mostly bank deposits and bonds earning high interest rates.

The United States is destined to continue pawning off its assets until we gain control of the trade deficit, now running at a rate of $180 billion.

And we sell more and more assets to foreigners, we must increase our payments of interest, dividends, and profits to those foreigners.

We are not robbing Peter to pay Paul in this country. We are talking about dividends, interest payments, and profits to foreigners.

RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. Under the previous order, the Democratic leader is recognized.
We have already made a permanent sacrifice of tens of billions of dollars to our standard of living. For example, our payments to foreigners on their investments in the United States already exceed $69 billion at an annual rate. That’s a 64-percent increase since the beginning of 1981.

By running up such large foreign debts, we have also sacrificed some of its ability to manage the economy. For example, in recent months, there has been much debate over how much to reduce interest rates to spur the economy. But the major factor preventing lower rates has been the worry that it would displease our foreign lenders and cause problems in our financial markets.

The administration has ignored the problems of trade deficits and foreign debt for too long. We are paying a steep and growing price for the administration’s neglect. The disturbed confidence in our markets once again as the Commerce Department statistics were announced yesterday.

Mr. President, I ask unanimous consent that a report containing and commenting upon the most significant of the statistics from this the Commerce Department’s announcement be printed in the Record.

There being no objection, the report was ordered to be printed in the Record, as follows:

"Looking ahead, the stability of our capital assets and the continued ability to never before on the willingness of foreigners to continue to place growing amounts of money in our markets... We are in a real sense living on borrowed money and time."—Paul Volcker, Chairman, Federal Reserve Board, Washington Post, February 21, 1985.

"Billions of dollars of foreign capital... has been invested in the United States... because of the best and safest investment in the world today."—President Ronald Reagan, News Conference, September 17, 1985.

PAWNING OFF AMERICA’S FUTURE

The U.S. is sinking ever deeper into foreign debt, and is paying a heavier and heavier price for the massive debts already accumulated. When this Administration took office in 1981, the U.S. was the world’s largest creditor. It owned $106 billion more assets abroad than foreigners owned here.

By the end of 1985, however, the U.S. had become the world’s largest debtor, with a net foreign debt of $107 billion. This year, the U.S. will add another $86 billion to that debt, if there is a continuation of the trend shown by today’s Commerce Department’s announcement.

Since this Administration took office, our exports have fallen and we have paid for soaring imports only by selling off our assets. In fact, foreigners have expanded their ownership of U.S. assets by 126 percent since the end of 1980.

As a parent of young children long before coming to the U.S. Senate, I was working to educate our children about the dangers of illegal drug use. As chairman of the Alcohol and Drug Abuse Committee in the Senate I have fought constantly to increase the ADAMHA block grants. That means alcohol, drug abuse, and mental health.

Since 1982, we have seen ADAMHA funding climb from $428 million to $490 million in 1987. The Acting President pro tempore under objection, it is so ordered.

Mr. BYRD. I thank the Chair.

RECOGNITION OF SENATOR HAWKINS

The ACTING President pro tempore. Under the previous order, the Senator from Florida is recognized for 5 minutes.

TWO KEYS TO THE WAR ON DRUGS: DRUG EDUCATION AND THE MILITARY

Mrs. HAWKINS. Mr. President, we are at a crossroads in a war and the time has come to take stock, to evaluate what is working and what is not. As the Senate approaches many solutions, it becomes increasingly important to look at actual records of effectiveness in the so-called war on drugs.

The illegal drug merchants fight for the control of our society through the most basic principle of economics—supply and demand. To be truly effective, the war on drugs must take the same approach.

First, let us examine the demand side. As I said here on the floor last Thursday, we rush off in a hundred different directions trying to fight the drug problem. But never has this body concentrated properly on educating our children about drugs.

As a parent of young children long before coming to the U.S. Senate, I was working to educate our children about the dangers of illegal drug use. As chairman of the Alcohol and Drug Abuse Committee in the Senate I have
veilance military/civilian surveillance system and from two balloon-borne radars which provided coverage off the coast of my State of Florida.

Recent testimony in the Appropriations Committee went on for nine pages about DOD assistance to law enforcement.

We are in the war—but we are not winning the war. They want to do so. They want to "yes" obviously have not read my mail. Every day I receive a stack of letters. They tell me, Senator if you really wanted to stop the flow of drugs, you would take some real action. You would get the military involved.

Mr. President, to me that suggests that much more can be done. Time after time, DOD gives assurances—to the White House and to us. Still, the American people do not perceive that there is enough action. And I must say, neither do I.

The DOD continues to assert that it has little or no role in this war.

That is not acceptable to this Senator, Mr. President. The Congress did not go to the trouble of amending the post-Communist structuring of the budget to have our wishes ignored. Perhaps we should stretch the definition of who qualifies for drug education. Maybe in addition to schoolchildren from kindergarten and up, we might include drug education to one other group, generals, admirals, and the Secretary of Defense.

RECOGNITION OF SENATOR PROXMIRE

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Wisconsin is recognized for not to exceed 5 minutes.

KEY SCIENTIST SAYS NO TO SDI

Mr. PROXMIRE. Mr. President, there is a fascinating struggle going on in this country right now for the Nation's soul. The battleground is the strategic defense initiative (SDI) or star wars. We in the Congress decide on the resources we will commit to pushing the United States ahead in the nuclear arms race? Or should they turn their back on material advantages and devote their energies to cancer research, to building a healthier and stronger country?

The way our most competent scientists have come down on this will surprise many. As many as 3,700 science and engineering professors, including 15 Nobel Laureates and 57 percent—that is right more than half—of the faculties at the Nation's top physics departments, have signed a petition pledging to refuse SDI funding. That is an impressive negative vote. And yet it still leaves thousands of the Nation's physicists available for SDI. Could this revolt of so many of the Nation's scientists play a role in preventing the achievement of the President's dream?

In the September 22 issue of Newsweek, reporters who have investigated this problem conclude:

Many scientists doubt that SDI will ever work, especially if it can't attract—and keep—the best and brightest minds in science.

The story is told in the decision of one young scientific genius named Peter Hagelstein. Hagelstein is the author of the x-ray laser that made some experts believe that a star wars system might just possibly succeed. A book by William Broad, a New York Times science reporter, describes how Hagelstein came to the Livermore Lab in 1976. Hagelstein didn't even know that the Livermore Lab was a "bomb shop" at the time. He had been working on a critical aspect of cancer research, particularly on a medical x-ray laser that could make three-dimensional holographic images of molecular structures inside the body. Livermore had the equipment, and as Hagelstein says, "It had nice people." So he stayed.

In 1979, Hagelstein found his colleagues studying in trying to develop an x-ray laser weapon. They faced a technical problem that could make three-dimensional holographic images of living cells and molecules in the body, gathering clues to cancer and other diseases. As one physicist said, it suggested a feasible design for an x-ray laser powered by a nuclear explosion. According to one Livermore physicist, Hagelstein "got least for the time on helping to advance America's cause in the critical technological arms race with the Soviet Union. In spite of his success, Hagelstein continued to be frustrated and decided that he could not accept star wars work and would be most effective not at shooting incoming missiles but at knocking out satellites such as those carrying defensive systems. In an article in the Washington Post, Boyle Rensberger reports that a Livermore physicist said Hagelstein's leaving would be "a very big loss because when we need a computer solution for a major problem, he's the person we turn to."

So, Mr. President, this struggle for the Nation's soul or arms control versus the nuclear arms race goes on. The loss of that man is more important than any decision made by the Government itself, the Congress or the President.

Mr. President, I ask unanimous consent to include the articles to which I have referred in the September 22 issue of Newsweek and in a recent edition of the Washington Post be printed at this point in the Record.

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

A CRISIS OF CONSCIENCE

For a brilliant scientist, the allure of the Strategic Defense Initiative is hard to resist: Star Wars traffics in some of the most challenging problems in physics, assuages the conscience by promoting defensive weapons systems funding, which haven't been seen since the Apollo program. But no less a scientist than the architect of the X-ray laser that inspired SDI has decided that he can resist it all. Last week Peter Hagelstein resigned from Lawrence Livermore Laboratory, a friend of Hagelstein said Hagelstein "got frustrated." Hagelstein continued to be frustrated. A friend of Hagelstein said Hagelstein "got frustrated."

Hagelstein's defection from the ranks of Star Warriors closes a chapter in one man's life but raises larger questions about SDI. When Hagelstein, now 32, joined the lab in 1976, "they convinced him that it would be a fruitful environment to work in," says Livermore physicist M. Stephen Maxon, a friend, "but I doubt they talked much about weapons." By all accounts Hagelstein hoped to use the unequaled facilities at the lab, near San Francisco, to pursue his dream of an X-ray laser that could make three-dimensional holographic images of living cells and molecules in the body, gathering clues to cancer and other diseases. Then one Livermore physicist suggested a feasible design for an X-ray laser powered by a nuclear explosion. According to one Livermore physicist, Hagelstein "got..."
sucked into" developing his still-classified design. By 1980 it was clear that Hagelstein's laser, Excalibur, offered a potent new force in weapons research and development. "Peter had fallen under the spell [of Livermore]," says the physicist, "and felt psychologically trapped."

That was bad enough for a shy, piano-and-violin-playing scientist who, says MIT's Robert Adler, "did not intend to do work on weapons." But lately it has become clear that Excalibur would be most effective not at shooting down incoming missiles, as SDI is supposed to, but at knocking out satellites such as those that carry the defensive systems. "The X-ray laser is becoming just another weapons system," says a member of the Federation of American Scientists. "That makes the high moral purpose of the thing just hard to maintain."

Hagelstein's departure could slow SDI's X-ray program, whose funding is due to double to $390 million next year. "It will take longer to generate ideas for new X-ray lasers," says Maxon. Hagelstein is not alone: 3,700 science and engineering professors, including 26 Nobel laureates and 67 of the faculty's at the nation's top 20 physics departments, have signed a petition pledging to refuse "funding for anything that will support the [SDI] program."

Space test: So far the academic boycott hasn't noticeably impeded SDI. In a $150 million experiment carried out this month and announced last week, SDI passed its first wholly space-based test. Sensors on one stage of a Delta rocket tracked and monitored the exhaust plume from another, just as a defensive weapon would track an ICBM. As a grand finale, one stage overtook the other and smashed into it at 6,500 miles per hour. Based on this success, says project manager Lt. Col. Michael Rendine of the Air Force, "I believe that the program of intercepting missiles is going to be a lot easier than we thought." But many scientists doubt SDI will ever work, especially if it can't attract—and keep—the best and brightest minds in science.

TROUBLED LASER SCIENTIST QUITTING WEAPONS WORK

(By Boyce Rensberger)

Peter Hagelstein, the brilliant but ethically troubled young scientist whose invention of the X-ray laser was a key factor in creation of the Strategic Defense Initiative, is quitting weapons research to become a college professor, the Lawrence Livermore National Laboratory announced yesterday.

Hagelstein went to Livermore hoping to create an X-ray laser for medical research but who, as one colleague put it, "got sucked into weapons work." He is joining the Massachusetts Institute of Technology next month as an associate professor in the electrical engineering and computer science department, which does no weapons research. At Livermore, one of the nation's two nuclear-weapons research centers, Hagelstein invented the laser that is supposed to be able to destroy high-flying warheads in flight.

Soon after the device worked in an underground test, Livermore's Edward Teller, the hydrogen-bomb pioneer, began pushing President Reagan to step up research on antimissile weapons, an effort that became the principal mission of the SDI program, which does no weapons research and which is supposed to be a defense development center, not a weapons research system.

"Hagelstein initially worked on his laser but gradually became acquainted with simmers of the weapons program," said the young scientist now at MIT. "I felt psychologically trapped."

Hagelstein came to Livermore in 1975 as a promising mathematician and physics student at MIT. Unusually well-rounded for the kind of interdisciplinary research he had cultivated at MIT, Hagelstein told President Reagan to step up research on antimissile weapons, an effort that became the principal mission of the SDI program, which does no weapons research and which is supposed to be a defense development center, not a weapons research system.

He was recruited to Livermore by the little-known Hertz Foundation. Created by John D. Hertz of rent-a-car fame to counter what he perceived as a Soviet security threat, the foundation identifies bright young science graduates, offers lucrative fellowships for further study and funnels most of the brightest into Livermore.

The foundation, with Teller on its board, is based in the lab's home town of Livermore, Calif. At age 20 and dreaming of a medical X-ray laser that could make three-dimensional holographic images of molecular structures inside the body, Hagelstein, according to William Broad's book "Star Warriors," had never heard of the weapons lab.

"I came pretty close to leaving. I didn't want to have anything to do with it," he told Broad. "Anyway, I met nice people, so I stayed."

Hagelstein initially worked on his laser but gradually became acquainted with Simmers of the weapons program. In 1979, according to the book, Hagelstein realized that colleagues working on the X-ray laser weapon faced a technical problem that he could solve. Responding mainly to the intellectual challenge, he offered his solution, which was accepted and gradually became part of the weapons program.

Steve Maxon, a Livermore physicist, said Hagelstein's departure would be "a very big loss because when we model a computation for a new problem, he's the person we turn to."

Hagelstein could not be reached for comment yesterday. A friend, who asked not to be identified, said the young scientist now wants to do work that will "benefit all mankind."

MYTH OF THE DAY: THERE ARE PERSUASIVE MORAL ARGUMENTS IN FAVOR OF CAPITAL PUNISHMENT

Mr. PROXMIRE. Mr. President, the myth of the day is that there are persuasive moral arguments in favor of capital punishment.

What are the moral arguments that have been put forward by advocates of capital punishment? Charles Whittier of the Library of Congress has summarized some of them, while, of course, remaining neutral as to their merits. Let me review briefly some of the points noted by Mr. Whittier.

Proponents of capital punishment, maintain that society has the right—and, indeed, obligation—to punish and that punishing serves to affirm the moral order by treating lawbreakers as responsible moral agents.

Death penalty advocates argue further that the first priority of the State is to establish justice and protect the common good against threats to the well-being of the community. Capital punishment, in their view, reinforces the moral order and authority of the State. Its imposition, they argue, is designed to strike that sense of moral indignation that is aroused in society generally by the crime of murder. They declare that the demand for retribution is grounded in the moral order as well as in necessities of State. They often cite the failure of rehabilitation to bring about lasting change.

Many capital punishment proponents stress that there is, in their opinion, a commonsense practical de­terrence inherent in the death penalty. They maintain that while abuses or flaws in the legal system should be re­moved in the moral order as well as in necessities of State, they urge that due process in capital cases be made swifter and simpler so that the law knows no partiality.

Many religious supporters of the death penalty note that capital punishment is imposed for murder in the Hebrew Bible and that the capital punishment is considered a part of the community by giving expression to the moral order and authority of the State. They declare that the death penalty is nowhere forbidden in the Constitution. They contend that abuses in the social or legal system do not diminish the obligation of the State to punish, where appropriate and necessary.

Are these positions persuasive? Not in my view, Mr. President. Rather, I find the moral case in opposition to the death penalty to be superior in substance and merit. Again, I draw upon the work of Charles Whittier of the Library of Congress in spelling out the moral arguments against capital punishment, once again with the caveat that Mr. Whittier has very ably summarized these arguments without taking a stand pro or con.

As Mr. Whittier notes, opponents of capital punishment assert that the rightful—that is, the moral—purpose of corrections institutions and the incarceration of lawbreakers is reform and rehabilitation, not punishment or vengeance. They maintain that re­venge is an unworthy motive for society to pursue and that the possibility of error—with the resulting execution of an innocent person—should preclude any attempt to impose a capital sentence. The death penalty is irrevocable and final.

Many death penalty opponents argue that because each person has an intrinsic dignity and right to life, capital punishment compounds the origi-
nal capital crime and violates the moral order of society and the religious order of the community. By treating criminals as objects to be disposed of, the death penalty degrades all who are involved in its enforcement as well as the victims. Those against the death penalty further argue that there is no conclusive evidence in support of the deterrent effect of capital punishment and that reliance on the death penalty neglects the larger societal factors that nourish crime: poverty, oppression, and injustice.

Many religious opponents of the death penalty cite the ethic of love and of reverence for life exemplified in the New Testament and in other religious teachings. Still others maintain that capital punishment is unconstitutional because it is intrinsically "cruel and unusual" and has come to be regarded as such over time.

Finally, many object to the death penalty as inherently flawed by the inequities of the legal system and its alleged responsiveness to the power of money as well as to the influence of discrimination in numerous areas. Therefore, they argue, the impact of the death sentence is likely to fall more heavily on the poor and on minorities.

Mr. President, in assessing the moral arguments for and against capital punishment so ably assembled by Charles Whittier, I find it to be a myth to assert that there are persuasive moral arguments on the "pro" side of the ledger.

RECOGNITION OF SENATOR BROYHILL

The ACTING PRESIDENT pro tempore, Under the previous order, the Senator from North Carolina is recognized for not to exceed 5 minutes.

ILLEGAL DRUGS

Mr. BROYHILL. Mr. President, I rise to associate myself with the remarks of the Senator from Florida and to address an issue that I feel is on the lips of almost every American. That is the concern about illegal drugs and drug abuse. I think that drugs are rippling apart families while drug abuse is threatening to destroy our traditional way of life.

The daily news media are full of tragic stories of drug abuse and those who have fallen victims to it—teenagers, young adults, and parents, too. Drugs are undermining our schools. They are costing us in the workplace.

I feel that the news media have performed a great service in helping to raise public awareness of the drug problem. Never before have I seen the public, especially of this present generation, more aware of the problem, more concerned about it, than in the past few years. The polls reveal that the public's No. 1 concern now is the persistent spread of illegal drugs.

I find that the Congress is aware of the problem and is ready to take steps and strong measures against illegal drugs. The other body has already passed legislation. Many of us in the Senate have been working to write stronger legislation. I have no doubt that the Congress will pass and send to the President legislation that will prove effective. However, I know that this alone will not solve the problem.

Congress and the President can spend all of the money that they can find to fight the drug problem but it will never be enough unless the American people also take up this cause. The problem is not unique to North Carolina and every State must join in this war on illegal drugs, because nothing less than a total commitment from all Americans cannot and will not succeed.

Parents can make sure that their children are aware of the dangers of illegal drugs. Workers can cooperate with employers to assure that the workplace environment is drug free. Members of business and civic groups can sponsor antidrug educational public awareness programs. And, of course, citizens can cooperate with our law enforcement officials and other groups to stem the flow of illegal drugs. This requires more intensive searches at our borders, and making sure that we are working with other nations to stem the tide of drugs across our borders.

So I call on the President to take whatever steps that he can, even to the extent of calling back for consultation our ambassadors from those countries which may face problems related to the production and transportation of drugs. These special consultations should include Members of the House and the Senate so that whatever measures are taken will complement the President's foreign policy on this issue.

Mr. President, everything is not rosy in this area. We must take strong action. It is to succeed in winning the battle against drugs.

RECOGNITION OF SENATOR CHAFFEE

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The PRESIDING OFFICER. Under the previous order, the Senator from Rhode Island (Mr. CHAFFEE) is recognized for not to exceed 5 minutes.

Mr. CHAFFEE. Thank you, Mr. President.

GENERAL ACCOUNTING OFFICE REPORT ON TEENAGE PREGNANCY

Mr. CHAFFEE. Mr. President, the General Accounting Office has just completed a report which I requested on the problem of teenage pregnancy. The report provides alarming but useful documentation on the extent of pregnancy among teenagers in the United States.

GAO reports that few government programs of proven effectiveness are in place to address this problem. But the study offers us opportunities to find an effective solution, and I commend GAO for its outstanding efforts.

Teenage pregnancy is one of the most distressing and challenging problems facing our young people. Teenage parents pay a heavy price in a lifetime of lost opportunities, and this is deeply troubling for those of us who want our young people to have the best chance for fulfillment, and for a future filled with happiness and a sense of well-being.

While the overall birthrate among teenagers has declined in the last 15 years, the birthrate for teenagers under 15 has declined very little. The birthrate for unmarried women aged 15 to 17 years has risen from 23 births in 1,000 in 1972 to 30 births in 1,000 in 1983.

The growth in the number of births to single teenage girls poses special problems for teen mothers and their babies, because of the deep cycle of poverty which these families face. Not only are younger mothers less likely to be married, but are substantially more likely to drop out of school. The younger the mother, the less likely it is that she will complete high school by the time she is in her twenties.

The child is even at greater risk than the parent. A baby born to a young mother is significantly more likely to be born to a poor family and therefore faces a substantially higher risk of death or birth defects. Babies of teen mothers are also much less likely to receive well child care, and more likely to face the frightening experience of hospitalization within the first 5 years of life. Nothing is as tragic as unnecessary birth defects or death of a baby. Many such heart-breaking outcomes could be prevented.

The study reveals that 70 percent of teen mothers who have their first child before age 15 do not complete high school by age 20. Over half of those aged 15 to 17 also do not complete their education. The consequences for teen mothers who drop out of school are huge. Many such vulnerable products are lives spent on the
margin of society with dependence on our welfare system. It has been estimated that the Federal antipoverty efforts, including the Head Start program, are targeted to the economically dependent poor, consisting of one-third of the nation's population. Although we have increased the budget for these programs, it is not clear how much the relative cost for teenage parenthood is approximately $10 billion a year in health and welfare benefits. Yet the GAO report points out that there is only one federal demonstration program which is targeted to preventing teenage pregnancy and providing services to pregnant and parenting teenagers and their families. The Adolescent Family Life Program had an appropriation of $15 million in this fiscal year. Nine other Federal programs may provide prevention services and services to pregnant teenagers, but the extent to which they serve this population or how much money is spent is not known.

While the Federal Government has been slow to address the problem of teenage pregnancy, local communities have initiated many worthwhile projects to confront this national tragedy. These projects attempt either to prevent unwanted teenage pregnancy and childbearing, or to provide services to help pregnant teenagers and teenage mothers to avoid negative outcomes for both mother and child.

In a State and a number of innovative programs have been initiated to assist pregnant and parenting teenagers. These programs are located in various settings and offer a wide range of services. They aim to promote healthy birth outcomes, to encourage and enable teenage mothers to remain in school and to discourage future pregnancies. An initial evaluation of these programs is very encouraging, and the possibility of replicating these programs in other areas of the State as well as the Nation is promising.

The General Accounting Office investigation reveals some positive results for the prevention projects. The report also identifies some approaches with positive short-term effects on repeat pregnancies, childbearing, and child health status, and the reentry of teen mothers to school. In crafting new programs, the GAO suggests that they be kept administratively simple, that flexibility be encouraged, and that resources be targeted to unmarried, pregnant, or parenting teenagers. In addition, the GAO emphasizes the need for sound evaluation of projects undertaken in the future. We need to learn what works, for whom and why, and then disseminate that information for adoption in the other areas of the Nation.

Millions of teenagers and their children are adversely affected by the serious consequences of early childbearing. This problem needs to be approached as part of the problem of teenage pregnancy and family planning. The teenage pregnancy problem must be directed at all teenagers. We must work to improve the outcomes of teenage childbearing by providing improved medical, nutritional, educational opportunities and counseling services. I believe a continued emphasis on programs in this area will be essential as we attempt to reshape Federal antidumping efforts.

I have introduced legislation in the Senate to provide increased Federal support to the States for services to teenage mothers and their children, in order to reduce health risks and increase self-sufficiency and independence. I will be modifying this legislation in view of the findings of the GAO report.

Teenage Pregnancy—500,000 Births a Year But Few 'Tested Programs' Should not immobilize us, but motivate us into constructive action. The Federal Government must make a stronger commitment to the crisis of teenage childbearing. Investment in pregnancy prevention and programs for pregnant and parenting teens will have enormous future returns in both human and fiscal terms. Mr. President, I ask that the full text of this study be printed at this point in the Record.

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

**TEENAGE PREGNANCY: 500,000 BIRTHS A YEAR BUT FEW 'TESTED PROGRAMS'**


B-2233573.

Hon. John H. Chafee, U.S. Senate, Washington, DC.

Dear Senator Chafee: In your January 9, 1986, letter, you asked us four questions on teenage pregnancy. These questions asked for information on the extent of teenage pregnancy, programs already in place, the effectiveness of these programs, and how to make them more effective.

Our major findings are that the problem is particularly severe and growing for unmarried mothers under 18 years old, that only one federal demonstration program is focused exclusively on the problem, and that the evidence from demonstration programs, while sparse, suggests two types of future legislation. If expansion of services is essential, the first type of legislation would be flexible but targeted and would include both prevention and postpregnancy services. The second would involve well-evaluated demonstrations of prevention and postpregnancy services that would be targeted, flexible, and innovative.

To obtain this information, we conducted an evaluation of the four bills in which we used four procedures. We analyzed the main features of two congressional bills, reviewed available statistical data on the extent of teenage pregnancy, examined the characteristics of federal and nonfederal programs, and reviewed evaluation studies on the effectiveness of prior programs for assisting pregnant and parenting teenagers, as well as teenagers at risk of becoming pregnant. We compared the evidence we found to the features of the proposed legislation. (A description of our objectives, scope, and methodology is in appendix I.)

We found that the extent of teenage pregnancy has increased during the past decade but that birthrates for teenagers declined during the past three years. Despite the overall decline, the birthrate for unmarried teenagers actually increased. Thus, of the 600,000 births to women younger than 20 years old in 1983, 70 percent to unmarried teenagers, young women at particularly high risk of the negative consequences associated with teenage childbearing. Furthermore, the birthrate for teenagers 17 years old or younger did not decline as rapidly as the birthrate for teenagers 18 and 19 years old.

The programs responding to concern about teenage pregnancy have tried two general approaches. The first represents efforts to prevent teenage pregnancy. The second provides services to teenagers who become pregnant and parenting teenagers. Within these two general approaches, we identified somewhat distinct strategies that differ in the location within which services are provided, the types of services that are provided, and who they are provided to.

Our analysis of two key bills—your proposal in S. 938 and Senator Daniel P. Moynihan's proposal in S. 1194 to amend the Aid to Families With Dependent Children (AFDC) program—reveals several differences in the approaches that are offered. Your proposal is targeted on a particular group (poor teenagers younger than 18), it is flexible with respect to the comprehensive services that could be provided to pregnant teenagers and their families. The Senator Moynihan's proposal is more broadly inclusive (including teenagers eligible for AFDC and selected young women with children younger than 18), it is prescriptive (in the sense that a specific set of services is to be provided), it involves prevention and postpregnancy services, and it is administratively complex because it entails extensive coordination across five Federal programs.

Many Federal programs are currently relevant in some measure to pregnant or parenting teenagers. The Adolescent Family Life Program (AFLP), is uniquely targeted to preventing teenage pregnancy and to providing services to pregnant and parenting teenagers and their families. Nine other Federal programs may provide services to these groups; three make teenagers a primary target group. Unfortunately, there is very little information on how much money these federal programs spend and on whom these programs spend it.

With the two legislative proposals in mind, we asked, "What is known about the effectiveness of prior projects on teenage pregnancy?" Although common sense, logic, and prior research can provide useful information, we focused our review on evaluations of projects similar to those proposed in the two bills. Evaluations of the prevention-only projects revealed some positive results but, in general, no consistent or large effects on fertility or contraception. For the postpregnancy projects, we reviewed the evidence of two types of short-term effects on repeat pregnancy, child health status, and the return to high school. However, flaws in the research designs limit the utility of this evidence for structuring new legislative proposals. Specifically, few of these studies had credible measurement designs, and the research designs were credible, the ability to generalize...
from them to typical service settings is uncertain and the long-term benefits of these services are unknown. Therefore, the assessment of outcomes extended beyond 24 months.

However, these studies did reveal implementation problems that should be anticipated when new programs are developed. For example, the lack of public support and barriers to client participation were identified as important obstacles to program operations. Media campaigns and other special attention to these factors during a new program's development could improve its chances for success.

With regard to your question on the implications of our review for future legislation, two tactics seem feasible. First, if expanding the provision of services is essential, it would seem justifiable to target services to the teenagers who have the highest risk of experiencing negative consequences—that is, young and unmarried teenagers. In addition, flexibility is warranted, since we uncovered no convincing evidence to support the notion that the most comprehensive services were more effective than the least comprehensive. Program implementation and coordination problems argue for administratively simple program structure.

Second, our review points to a role for the federal government that, as an alternative to legislating programs that expand the provision of services, would feature the promotion of innovations, sound comprehensive evaluation of these innovations, and the dissemination of programs (or their components) that work. The rationale for this is twofold. First, we identified numerous state and local programs that seemed promising, but the evidence for their effectiveness was frequently either lacking or ambiguous. While there is a large eligible population, we do not know whether the services on which these projects depend are adequately available in many localities. Consequently, we can neither say how much a full-scale program might cost nor argue for installing it before the evidence is in. Second, many innovative ideas are being tried across the nation, and plausible approaches are emerging. For example, the sexual decision-making among unmarried teenagers. Identifying and testing these ideas, with the thought of disseminating practices to state and local agencies, could be a cost-effective way for the federal government to help address public concern about teenage pregnancy.

The Office of Adolescent Pregnancy Programs of the U.S. Department of Health and Human Services reviewed a previous draft of this report, and their comments were considered in writing the final report. Since we relied upon summaries of APL interim findings, agency officials offered us access to the original source material. We were unable to review the material in time to include it in this report. Officials told us, however, that we had accurately portrayed the state of the art in the evaluation of teenage pregnancy programs.

Copies of this report will be made available to persons who request them. If you have any questions or would like additional information, please call me (202-275-1854) or Dr. Lois ellin Datta (202-275-1370).

Sincerely, ELEANOR CHELMISKY, Director.
for younger teenagers (15 to 17) did not de­
crease as much.1 The birthrate for very young teenagers (younger than 15) barely declined at all: 1.2 in 1,000 gave birth in 1972, and in 1982, the rate was 1.1 (Table 1). The rate for unmarried teenagers (15 to 19) rose from 23 in 1,000 in 1972 to 29 in 1,000 in 1983, resulting in 270,000 births (30 in 1,000) in 1983. It appears that not only are younger mothers less likely to have married or com­
pleted high school by the time of a birth but that also the younger the mother, the less likely she is to have completed school by the time she reaches her twenties. (See table lines of article.)

The numbers of births to unmarried 
teenagers vary by state

We analyzed unpublished National Center for 
Health Statistics data by state on births in 1983 to unmarried teenagers. As Table 2 on the next page shows, the prevalence of such births differs dramatically according to state of residence.

Seven states had 10,000 or more births to unmarried teenagers: California, Florida, Il­

linois, New York, Ohio, Pennsylvania, and Texas. Eleven states had fewer than 1,000 such births: Arkansas, Delaware, Idaho, Mont­

tana, Nevada, New Hampshire, North Dakota, Rhode Island, South Carolina, South­

vermont, and Wyoming. About 80,000 babies were born to unmarried teenagers in these states and the Dis­

ctrict of Columbia, in which the last decenni­
al census showed that nearly 15 percent or more of the population earned incomes below the poverty level: Alabama, Arkansas, the District of Columbia, Georgia, Ken­
tucky, Louisiana, Mississippi, New Mexico, North Carolina, Rhode Island, South Dakota, Tennessee, Texas, and West Virgin­ia.

CURRENT APPROACHES AND PROPOSALS FOR 
ADDRESSING TEENAGE PREGNANCY

Communities across the nation currently offer a broad range of programs addressing teenage pregnancy. The programs generally attempt either to prevent unintended teen­
age pregnancy or to provide services to assist pregnant teenagers and teenage moth­
ers in planning for the future. Al­
mong these activities and nine other grant programs that provide services relevant to teen­
age pregnancy for the general population. The legislative proposals by Senator Chafee and Senator Moynihan would create new grant programs to expand services targeted exclusively to pregnant and parenting young women.

Existing programs describe a wide variety of approaches

Reviews of the programs literature, which include surveys of state and local govern­
ment agencies, have uncovered a wide variety of approaches to preventing pregnancy and providing assistance to teenagers who are pregnant or mothers. Although some local sponsors provide both prevention and assistance services, we have separated these two program types, for convenience. Projects frequently resemble hybrids. We found the five types of prevention programs and five types of service programs that we list in Table 3 and Table 4.

The current Federal role is limited

The size of the federal government’s role in the variety of existing programs is not precisely known but appears limited. While several federal agencies relevant to teenage pregnancy programs, informa­
tion on the number of pregnant and parenting teenagers was recorded and on the amount of federal funds spent on this sub­
population is available at the federal level for only one of these programs. Only one program serves teenage mothers exclusively—the APL program. Its fiscal year 1986 appropriation was $15 million, and it funded a special demonstration projects and research on the antecedents and consequences of the problem of teenage pregnancy.

Three grant programs have pregnant and parenting teenagers as a target group: Family Planning Services (which targets all pregnant and parenting, women); Family Planning Services for the Disadvantaged, under the Job Train­ing Partnership Act (JTPA); and the Special Supplemental Program for Women, Infants, and Children (WIC). National in­
formation on funds allocated to teenagers through these programs is not maintained.

Six programs are somewhat relevant to poor pregnant and parenting teenagers: the maternal and child health block grants and the social services block grants for community health centers, employment services and job training grants (demo­
rstrations under the JTPA) and state and community services block grants. Na­

tional information on funds allocated by these programs to pregnant and parenting teenagers is not maintained.

Although the expenditures of these pro­
grams on teenage pregnancy are not known, the Federal role seems to be more limited than that of state and local governments. Federal funds have been transferred to state and local governments with little success. The national survey of the 153 State Departments of Health and Human Services in 1983 found that 85 percent reported welfare or social service funds. Of those that reported welfare or social service funds and 47 percent received federal funds: Neither the amount received nor the source of funding is known.

The legislative proposals we reviewed, 2 among more than 20 current proposals on teenage pregnancy, both provide for new services exclusively for pregnant and parenting young women. They differ in flexibility and scope of services, types of clients, and complexity of administrative ar­

rangements.

Senator Chafee’s bill, S. 938, proposes a flexible service program that would provide any of a variety of assistance and support services for pregnant teenagers and young mothers. The proposal’s objectives are rela­
tively modest: to provide assistance and improve the availability of comprehensive services to these young families (see figure 2 on the next page). Only one outcome is explicit mentioned to prevent unintended repeat pregnancies among these young mothers.

In contrast, Senator Moynihan’s bill, S. 1194 (section 6), proposes a highly prescriptive program of specific assistance and sup­port services intended to help poor young mothers achieve self-sufficiency and avoid long-term welfare dependence. Several ob­jectives are explicitly mentioned: ensuring the health of mother and infant by enabling the mothers to complete high school and acquire job skills and employment; and, thus, economic self-sufficiency. This propos­al concentrates on preventing the negative economic consequences typically associated with teenage childbearing by targeting services to young women who have completed high school and by requiring participation in a program leading to a diploma.

Preventive assistance service bill also proposes a pregnancy-prevention program that is operational more flexibly than his service pro­
gram but similarly specific on strategies for meeting its objectives. This program as­sumes that a lack of alternative education and career plans is a precipitating factor of teenage pregnancy. Although the programs are prescriptive, requiring that all the

services otherwise available, directed at the

local one. A national survey of the 153 largest U.S. cities in 1979-80 asked local health and education department officials about special programs for pregnant teen­

agers. Of the 127 responding cities, 90 re­
ported that special programs were provided by one or more sources: 87 percent re­
ceived federal funds, 59 percent received state and federal funds, and 53 percent received local funds. Neither the amount nor the source of total funds was reported.

State and local funds came predominantly from federal funds. Federal funds came primarily from the block grants for mater­
al and child health and for social services. Across these grant programs, 76 percent of these cities reported that education funds were a source of support for spe­
cific programs for pregnant teenagers, 53 percent reported health funds, and 48 per­
cent reported welfare or social service funds.

Current proposals to expand services for teenage pregnancy

The legislative proposals we reviewed, 2 among more than 20 current proposals on teenage pregnancy, both provide for new programs exclusively for pregnant and parenting young women. They differ in flexibility and scope of services, types of clients, and complexity of administrative ar­

rangements.

Senator Chafee’s bill, S. 938, proposes a flexible service program that would provide any of a variety of assistance and support services for pregnant teenagers and young mothers. The proposal’s objectives are rela­
tively modest: to provide assistance and improve the availability of comprehensive

services across two executive agencies (the U.S. Department of Health and Human Services, HHS, and the U.S. Department of Labor, DOL), and five programs (the programs...
under the Job Training Partnership Act and the maternal and child health block grants, social services block grants, and the family planning programs, together with the Community Work Experience and the Work Incentive programs, CWEP and WINE.

The effectiveness of programs
Care is needed in interpreting the data we present on the programs' effectiveness. Flaws in most of the study designs leave open the possibility that factors other than program participation influenced the results. Further, the projects reported in the literature may not represent all projects operating around the nation, many of which do not have published evaluations. Finally, we attempted to identify the most important studies, but some were unavailable during the short period of our review and others may have eluded our search.

The theory on the effectiveness of preventing pregnancy is limited.
We reviewed all the studies of projects we identified in our search as having pregnancy prevention as an objective, regardless of a project's approach. However, there was only limited information on their effectiveness on this objective. Only 14 of the 24 studies provided comparison data, and only 2 of the 5 interim evaluations of the AFL projects on the prevention of pregnancy included comparison data. (The results of these 13 studies are shown in table III.2 in appendix III. The outcome data from the 24 studies that have the most confidence are highlighted in the table.) Our analysis indicated the following.

The information on effectiveness is limited, but there were some positive results and no demonstrated failures. For example, an interim evaluation of Reckless Teenage Pregnancy Prevention programs, in a variety of settings, results in a wide range of services, but the effectiveness of only a few have been tested empirically. Only a few of the projects we reviewed provided the full range of services under the conditions proposed in Senator Moynihan's bill. (In tables III.4 through III.8, we show the services and strategies employed in these projects.)

We found no strong evidence that providing comprehensive services produced results that were more positive than the results of providing a more restricted set of services. Positive results were found for the more comprehensive as well as the less comprehensive projects.

There were few convincing tests of the value of peer counselors. Most of the within-study comparisons did not specify the services received by the comparison groups. Many of the studies did test the value of peer counselors' services in addition to the full range of services, but no positive results consistently across the many case-control studies, it did not find positive results consistently across the many case-control studies, it did not find positive results consistently across the many case-control studies, it did not find positive results consistently across the many case-control studies, it did not find positive results consistently across the many case-control studies, it did not find positive results consistently across the many case-control studies, it did not find positive results consistently across the many case-control studies, it did not find positive results consistently across the many case-control studies, it did not find positive results consistently across the many case-control studies, it did not find positive results consistently across the many case-control studies, it did not find positive results consistently across the 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extent of teenage pregnancy and its serious consequences could help gain program support. Research and evaluation suggest providing greater attention to the needs of the other barriers. The case-management approach required in Senator Moynihan’s proposal is designed with the receipt of more service and more types of services. The proximity and accessibility of school health clinics is reported to permit better followup and, thus, improve teenager’s use of contraceptives or how many adolescents were served whether all relevant services were provided. Thus, the prior state and local reactions to teenage pregnancy have resulted in some of the federal block grants and other federal funds were spent on adolescents or how many adolescents were served by programs using public funds (see Item A32 in the bibliography). This is partly because of the absence of reporting requirements for expenditures under the social services and maternal and child health programs, the two block grants that constitute the major source of relevant federal funds. The available evaluation reports do not indicate that only a small proportion of these funds were to programs serving teenagers.

More importantly, 26 states in the 1985 survey discussed above responded that existing services in their states were inadequate for addressing the needs of pregnant and parenting teenagers. In the 1979-80 survey of the 153 largest U.S. cities of the 127 cities that responded indicated that they had special programs for pregnant teenagers, usually sponsored by a local education agency. The most common types of service were counseling (92 cities), special education (84), nutrition (84), family life (78), and other services (77). Care was the most frequently mentioned least of newborns and teenage pregnancies was followed by job and vocational assistance (31), funds (23), continuing education (22), and parenting education (30).

3. What is the cost of providing services? The available evaluation reports do not provide information sufficient for determining the cost of comprehensive or coordinated services. Very few reports described their program costs, and those were in quite different calculation procedures. At one extreme, a hospital-based comprehensive program estimated that it cost $775 per mother and child beyond the cost of the pregnancy for making social referrals and providing weekly family planning and group counseling sessions during the pregnancy and 2-year follow-up period. The $775 included overhead for administration and space but excluded the hospital salaries and other overhead associated with the basic perinatal health services. At the other extreme, Burt and Sonenstein estimated, from their review of several comprehensive service projects, that the 1-year costs of a comprehensive package ranged from $5,426 to $7,664 for pregnant clients ($5,500 to $5,592 for clients entering the program after delivery, depending on when the client began receiving AFDC (see Item A3 in the bibliography). These costs included all medical and educational services as well as AFDC benefits and child support.

The varying definitions of cost and their resulting values reflect one of the crucial difficulties in estimating the costs of the programs proposed. If many of the intended services are already available through other funding sources, the costs of coordination could be limited to the salary of a case manager and the associated overhead. However, if the intended services do not already exist or are operating at full capacity, additional funds will be required to provide services under the intentions of the bill. Since there is no adequate current information on the services that are now being provided or on whether their programs are being operated at full capacity, it is not possible to estimate the costs of the proposed programs.

S. 1194 proposes that funds for comprehensive service and prevention programs together not exceed 2 percent of the federal share of a state’s expenditure for the AFDC program. In fiscal year 1986, the federal share of AFDC expenditures (including administrative expenses) was $8.96 billion for all states; 2 percent of this would represent $179 million, far in excess of the $116,890, the smallest amount, but it had 781 births to unmarried teenagers in 1983, resulting in $116,890 per potential client. In contrast, California would receive the largest amount, $33,075,170, but it had 28,941 such births in 1983, resulting in $1,174 per potential client. These figures may vary: they are based on the difficulty to allocating resources equitably for these programs.

Options for future legislation

Since there appears to be an unmet need for services for pregnant teenagers, but much uncertainty about which services are most effective, we believe that two distinct avenues could be pursued in future legislation: (1) expanding services where they are inadequate, and (2) encouraging well-evaluated demonstrations of innovative, flexible, and clearly targeted programs.

OPTION I: THE EXPANSION OF SERVICES

If the expansion of service programs is essential to ensuring adequate flexible, and administrative simplicity are likely factors of their success.

Targeting unmarried women younger than 18 years old seems justified by trends in fertility and by studies suggesting that most of these women are poor and their children most at risk. Targeting high-incidence states or the states with few existing resources may also be justified. Flexibility in terms of how these funds can be provided seems justified by the lack of evidence on the benefit of specific groups of services and by the relatively high cost of comprehensive services.

Administrative simplicity seems justified by the need for extensive coordination across agencies and funding sources and by the concerns that have been reported about programs on teenage pregnancy. Since pregnant teenagers, who are selected high-risk teenagers will automatically reduce the administrative complexity of a program. For example, services to very young teenagers will require less coordination with agencies responsible for job training, unless enrollment periods are planned for longer terms than provided for in past demonstration projects and fully operational service projects.

OPTION II: SUPPORTING INNOVATION

Alternatively, federal efforts addressing teenage pregnancy could be focused on a three-pronged approach that encourages innovative models, evaluates them, and disseminates those that have been tested and appear to be promising. While the APL legislation mandated demonstration and evaluation of innovative approaches, it did not mandate the characteristics of those evaluations and it limited the funds for evaluation to 5 percent of each project grant. Federal, state, and local reactions to teenage pregnancy have resulted in the development and implementation of quite different approaches. For example, Wisconsin law requires teenagers’ parents to assume financial responsibility for the costs of caring for a teenager’s infant; some programs in other
states encourage greater and more productive communication and understanding between teenagers and their parents regarding sexuality. There is little available evidence on the effectiveness of these approaches—neither too new nor yet comprehensively evaluated—but on the surface, they appear promising and have received considerable media attention.

Within the past few years, new research studies have pointed to other promising approaches that include providing vocational assistance to young fathers, providing academic assistance and counseling to teenagers at risk of dropping out of school before pregnancy, and developing a pregnancy-prevention curriculum from models of the influence of beliefs and attitudes on the behaviors conducive to general good health. Some of these approaches, such as providing job training and job-search assistance to fathers, are being implemented under the AFL program, but comprehensive evaluative information is not yet available.

In our brief review, we were unable to examine all of the research of a large body of research on the prevention of teenage pregnancy and the consequences of teenage childbearing. A partial picture of nation-wide AFL activity and the effort to complete a study that may help identify promising practices for future innovations is available. Federal support of innovative programs is certainly not a new concept, but our review of prior evaluations shows that, despite a substantial investment of effort, there is little credible evidence on how well, if at all, these programs work. Deciding whether a program model is promising enough to be considered by other state and local agencies depends on sound evaluative evidence. Without reliable evaluative information on the specific programs that might be implemented, it is difficult to specify how to conduct evaluations so that technically sound and useful evidence will be produced. However, some general features can be outlined. Given the emphasis on identifying whether programs work, why they work, and for whom they work, the following evaluation considerations should be addressed.

To determine whether innovative services or programs of an innovative character will be successful and will have an impact, it is essential to evaluate the results of each program carefully, to determine changes important to the program. The designs must include a basis for comparison. The evidence from past programs means, unfortunately, that decisions about new programs and the programs' effectiveness must be based on common sense, logic, and plausible theory rather than on empirical data and knowledge.

1. The evidence is also consistent with an opportunity to encourage innovation, evaluation, and the dissemination of tested program models. That is, rather than inventing limited resources in the provision of services, resources could be targeted toward learning what works, for whom, and why. The programs that are then fund successful could be disseminated for adoption in the other areas of the nation that need them.

(Appendix I: Objectives, Scope, and Methodology)

In January 9, 1986, letter to the Comptroller General, Senator Chafee initially asked us to identify what implications the available statistical and program information had for structuring new legislation concerning teenage pregnancy among the poor. Specifically, he asked:

1. What information exists about the extent of teenage pregnancy among the poor?
2. What types of programs have been initiated to deal with the problem of teenage pregnancy?
3. How effective have these programs been in achieving their objectives? What factors contribute to their success or failure? Are some program arrangements more cost-effective than others?
4. Are there promising programs, administrative arrangements, or financing mechanisms that should be considered in future legislation?

Our preliminary work uncovered a range of current efforts to address teenage pregnancy that were too broad to allow us to comprehensively assess the implications for all possible legislative efforts that might be pursued. It was our belief that to gain the attention of the Senate, these findings must be clearly stated and published. Our criteria for defining the problem of teenage pregnancy were used to identify and describe the following projects and policies that have been evaluated and monitored:

1. Programs for the prevention of teenage pregnancy.
2. Programs for addressing the consequences of teenage pregnancy.
3. Programs for the rehabilitation of teenage parents.

Our objectives for this review were to identify, evaluate, and synthesize information relevant to the feasibility of two new program proposals and their likely success in achieving their objectives. We refer to our general methodology as an evaluation planning review, a process that involves synthesizing information on the conceptual design of the proposed programs. This analytical framework is selective, it does not attempt to be comprehensive by reviewing all possible studies, but in order to identify promising programs, they decided to limit the evaluation process to two types of programs:

1. Programs for the prevention of teenage pregnancy.
2. Programs for the rehabilitation of teenage parents.

We used evidence from prior evaluations, statistical information systems, and knowledge of social programs, and we assessed the extent to which the legislative proposals are likely to achieve their specified goals. We did not attempt to survey the research on the antecedents and consequences of the problem of teenage pregnancy. Our review for this report had four major steps.

1. We reviewed the features of the two legislative proposals to determine (a) the nature of the problem the programs are intended to address, (b) the activities and operational settings of each program, and (c) the assumptions in the proposals about how their strategies are intended to achieve their policy objectives.

2. We identified the most important published empirical evidence on our topic and previous efforts to address it.

3. We evaluated findings from published studies of previous efforts, taking research characteristics and data quality into account in order to assess the evidence on whether the proposed programs are likely to achieve their policy objectives and (b) likely problems of implementation, operation, and management.

4. We reviewed these findings to the features of the two pieces of proposed legislation. Our description of this methodology is summarized below.

(Appendix II: Analyze Proposals)

We analyzed each bill for its key features in order to select the most appropriate evidence to review. The proposed eligibility criteria for services, service providers, and recipients are depicted in figures 5-7: they established prevention and comprehensive services for the dual focus of our review. (We did not attempt to review all projects providing services to targeted groups.) In order to evaluate the evidence on whether the proposed programs are likely to achieve their policy objectives and (b) likely problems of implementation, operation, and management.

We compared these findings to the features of the two pieces of proposed legislation. Our description of this methodology is summarized below.

(Appendix III: Analyze Proposals)

We began our search for the most important literature with a broadly focused examination of 13 computerized bibliographic files: ABI/Inform and Economic Literature Index (which cover business topics); ASI, NTIS, PAIS, and Social SciSearch (which cover technical reports, mostly governmental); CIS (for congressional documents); and CITN, DLisit, CANAR, ERIC, Health Planning and Administration, Psych Info, and Sociological Abstracts (which cover reports from the social science community). Our search terms were intentionally broad, because we wanted to find as many relevant articles as possible. Some of each file was generally restricted to documents published after 1980.
The computerized searches yielded more than 100 references, many with abstracts. Two staff members screened these references and selected the items that appeared to be relevant. To 16 main topic areas, classifying them into four main categories: reports of prevention and service projects, summaries of such projects and discussions of general policy, research on the size and scope of the issue, and summaries of research on the antecedents and consequences of the problem of teenage pregnancy.

Next, our staff members reviewed the bibliographies of the research studies and reviews to identify other studies that might have been missed in the computerized searches. They also contacted a number of experts in demography and relevant programs to identify work in progress and elicit nominations of their own. A total of 71 experts from government and non-government agencies were contacted. All contacts were included in the bibliography. The experts included Martha Burt, Urban Institute; Josefine Card, Sociometrics Data Archive on Adolescents and Families; Martha Hill, Card, Social Issues on Adolescents; Martha Hill, Sociometric Data Archive on Adolescents; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; 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Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, National Center for Health Services; Martha Hill, Nation...


B. PREGNANCY PREVENTION


C. COMPREHENSIVE SERVICES


Table 2.—Number of Births to Unmarried Teenagers in 1983 by Age and Percentage of Persons in Poverty by State

<table>
<thead>
<tr>
<th>State</th>
<th>15 or younger</th>
<th>16-17</th>
<th>18 or younger</th>
<th>Poverty rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>12,699</td>
<td>11.3</td>
<td>11.3</td>
<td>12.0</td>
</tr>
<tr>
<td>Alaska</td>
<td>619</td>
<td>10.1</td>
<td>10.1</td>
<td>12.4</td>
</tr>
<tr>
<td>Arizona</td>
<td>4,364</td>
<td>14.8</td>
<td>14.8</td>
<td>12.4</td>
</tr>
<tr>
<td>Arkansas</td>
<td>3,475</td>
<td>15.6</td>
<td>15.6</td>
<td>12.7</td>
</tr>
<tr>
<td>California</td>
<td>7,091</td>
<td>10.2</td>
<td>10.2</td>
<td>12.1</td>
</tr>
<tr>
<td>Colorado</td>
<td>5,677</td>
<td>10.0</td>
<td>10.0</td>
<td>11.8</td>
</tr>
<tr>
<td>Delaware</td>
<td>598</td>
<td>8.8</td>
<td>8.8</td>
<td>11.3</td>
</tr>
</tbody>
</table>

Note: Percentages do not add to 100 because of rounding.


### Table 2—Number of Births to Unmarried Teenagers in 1983 by Age and Percentage of Persons in Poverty by State—Continued

<table>
<thead>
<tr>
<th>State</th>
<th>18 or younger</th>
<th>17 or younger</th>
<th>16 or younger</th>
<th>Poverty Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>District of Columbia</td>
<td>1,562</td>
<td>707</td>
<td>48</td>
<td>18.9</td>
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<tr>
<td>Florida</td>
<td>13,273</td>
<td>6,443</td>
<td>505</td>
<td>15.0</td>
</tr>
<tr>
<td>Georgia</td>
<td>7,077</td>
<td>1,276</td>
<td>170</td>
<td>17.8</td>
</tr>
<tr>
<td>Hawaii</td>
<td>1,197</td>
<td>452</td>
<td>13.0</td>
<td>16.0</td>
</tr>
<tr>
<td>Idaho</td>
<td>1,019</td>
<td>406</td>
<td>14.0</td>
<td>14.0</td>
</tr>
<tr>
<td>Illinois</td>
<td>16,183</td>
<td>7,565</td>
<td>505</td>
<td>11.5</td>
</tr>
<tr>
<td>Indiana</td>
<td>8,077</td>
<td>1,276</td>
<td>170</td>
<td>17.8</td>
</tr>
<tr>
<td>Iowa</td>
<td>2,096</td>
<td>947</td>
<td>947</td>
<td>9.4</td>
</tr>
<tr>
<td>Kansas</td>
<td>2,175</td>
<td>968</td>
<td>42</td>
<td>20.2</td>
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<tr>
<td>Kentucky</td>
<td>2,724</td>
<td>1,790</td>
<td>1790</td>
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</tr>
<tr>
<td>Louisiana</td>
<td>6,419</td>
<td>1,111</td>
<td>2321</td>
<td>14.9</td>
</tr>
<tr>
<td>Maine</td>
<td>4,427</td>
<td>1,665</td>
<td>1665</td>
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<td>Maryland</td>
<td>2,892</td>
<td>1,206</td>
<td>1206</td>
<td>9.1</td>
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<tr>
<td>Massachusetts</td>
<td>6,078</td>
<td>1,741</td>
<td>1741</td>
<td>8.9</td>
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<tr>
<td>Michigan</td>
<td>3,076</td>
<td>1,245</td>
<td>1245</td>
<td>8.3</td>
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<tr>
<td>Minnesota</td>
<td>7,092</td>
<td>3,099</td>
<td>3099</td>
<td>24.5</td>
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<tr>
<td>Mississippi</td>
<td>5,886</td>
<td>2,711</td>
<td>2711</td>
<td>17.4</td>
</tr>
<tr>
<td>Missouri</td>
<td>4,048</td>
<td>1,711</td>
<td>1711</td>
<td>10.5</td>
</tr>
<tr>
<td>Montana</td>
<td>770</td>
<td>338</td>
<td>338</td>
<td>12.4</td>
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<tr>
<td>Nebraska</td>
<td>1,324</td>
<td>566</td>
<td>566</td>
<td>10.4</td>
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<tr>
<td>Nevada</td>
<td>781</td>
<td>363</td>
<td>363</td>
<td>10.5</td>
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<tr>
<td>New Hampshire</td>
<td>699</td>
<td>294</td>
<td>294</td>
<td>11.8</td>
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<tr>
<td>New Jersey</td>
<td>5,065</td>
<td>2,093</td>
<td>2093</td>
<td>9.7</td>
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<tr>
<td>New Mexico</td>
<td>2,394</td>
<td>793</td>
<td>793</td>
<td>12.7</td>
</tr>
<tr>
<td>New York</td>
<td>18,349</td>
<td>8,158</td>
<td>8158</td>
<td>13.7</td>
</tr>
<tr>
<td>North Carolina</td>
<td>4,012</td>
<td>1,824</td>
<td>1824</td>
<td>12.5</td>
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<tr>
<td>North Dakota</td>
<td>539</td>
<td>272</td>
<td>272</td>
<td>12.8</td>
</tr>
<tr>
<td>Ohio</td>
<td>13,275</td>
<td>5,529</td>
<td>5529</td>
<td>10.5</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>2,585</td>
<td>1,277</td>
<td>1277</td>
<td>12.3</td>
</tr>
<tr>
<td>Oregon</td>
<td>5,886</td>
<td>2,711</td>
<td>2711</td>
<td>17.4</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>11,714</td>
<td>5,367</td>
<td>5367</td>
<td>10.5</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>916</td>
<td>403</td>
<td>403</td>
<td>10.9</td>
</tr>
<tr>
<td>South Carolina</td>
<td>5,529</td>
<td>2,608</td>
<td>2608</td>
<td>10.9</td>
</tr>
<tr>
<td>South Dakota</td>
<td>5,529</td>
<td>2,608</td>
<td>2608</td>
<td>10.9</td>
</tr>
<tr>
<td>Tennessee</td>
<td>7,575</td>
<td>3,934</td>
<td>3934</td>
<td>10.7</td>
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<tr>
<td>Texas</td>
<td>18,061</td>
<td>9,040</td>
<td>9040</td>
<td>14.0</td>
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<tr>
<td>Utah</td>
<td>2,394</td>
<td>1,096</td>
<td>1096</td>
<td>12.5</td>
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<tr>
<td>Vermont</td>
<td>463</td>
<td>187</td>
<td>187</td>
<td>12.4</td>
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<tr>
<td>Washington</td>
<td>6,182</td>
<td>2,979</td>
<td>2979</td>
<td>14.4</td>
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<tr>
<td>West Virginia</td>
<td>503</td>
<td>217</td>
<td>217</td>
<td>11.5</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>4,559</td>
<td>1,948</td>
<td>1948</td>
<td>8.5</td>
</tr>
<tr>
<td>Wyoming</td>
<td>1,322</td>
<td>458</td>
<td>458</td>
<td>7.1</td>
</tr>
<tr>
<td>Total</td>
<td>274,070</td>
<td>125,441</td>
<td>125,441</td>
<td>12.5</td>
</tr>
</tbody>
</table>

* Percentage of all persons whose incomes were below the poverty level in 1979 (for those whose poverty status had been determined).

### Table 3—Services Provided in Five Reported Types of Pregnancy Prevention Programs

<table>
<thead>
<tr>
<th>Program type</th>
<th>Typically included</th>
<th>Possibly included</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elementary education</td>
<td>Discussion of family life, sex education, interpersonal relationships, or family planning.</td>
<td></td>
</tr>
<tr>
<td>Interpersonal skills discussion</td>
<td>Outreach workshops and seminars on stress management, interpersonal relationships, or family planning.</td>
<td></td>
</tr>
<tr>
<td>Parent education programs</td>
<td>Outreach workshops and seminars on parenting, child development, peer support groups, and family communication.</td>
<td></td>
</tr>
<tr>
<td>Family planning clinics</td>
<td>Educational programs, counseling, or support groups for family planning.</td>
<td></td>
</tr>
<tr>
<td>Comprehensive health clinics</td>
<td>Routine health care, physical examination, education, and counseling.</td>
<td></td>
</tr>
</tbody>
</table>

### Table 4—Services Provided in Five Reported Types of Postpregnancy Programs

<table>
<thead>
<tr>
<th>Program type</th>
<th>Typically included</th>
<th>Possibly included</th>
</tr>
</thead>
<tbody>
<tr>
<td>Postnatal care and mental health education</td>
<td>Medical exams and care, mental health and counseling, and nutrition and diet education.</td>
<td></td>
</tr>
<tr>
<td>Family planning programs</td>
<td>Family planning services, nutrition and child development, intensive training in mother-child care, and mental health education.</td>
<td></td>
</tr>
</tbody>
</table>

### Table 5—Estimated Population of Programs Proposed in S. 935 and S. 1194

<table>
<thead>
<tr>
<th>Program type</th>
<th>Eligibility</th>
<th>Approximately number</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. 935 Program A</td>
<td>Pregnant teenagers younger than 18 years old, or pregnant or mothers of children younger than 16 years old.</td>
<td>1,048,819</td>
</tr>
<tr>
<td>S. 1194 Program B</td>
<td>Women younger than 25 years old, pregnant or mothers of children younger than 16 years old.</td>
<td>1,073,500</td>
</tr>
</tbody>
</table>


Mr. CHAFFEE. I do not think there is a single program that the Federal Government or any government can invest in that has a greater return not only in the form of preventing dollars being spent in future years by preventing these problems from arising, but also from ensuring against the heartbreak and tragedy that comes with these teenage mothers. It's bad news for babies, having babies. That is the situation.

The old adage is an ounce of prevention worth a pound of cure. In this area it is clear that is true.

I hope that our Federal Government, and encouraging the States likewise in the future, can do far more not only to assist these teenage mothers during this pregnancy, but to provide proper prenatal care, information on what type of diet and assistance in obtaining proper diet but also helping these youngsters when the baby is born.

Of course, the best thing of all is prevention. That can come through education to these young people while they are in school.

So, Mr. President, this is a program I am deeply committed to. I hope we can do more on this, and I think there is a great deal more on this in the future. Thank you.

**RECOGNITION OF SENATOR MURKOWSKI**

Mr. MURKOWSKI. The PRESIDING OFFICER (Mr. CHAFFEE). Under the previous order, the Senator from Alaska [Mr. MURKOWSKI] is recognized for no more than 5 minutes.

Mr. MURKOWSKI. I thank the Chair.

**CHINESE ARMS SALES**

Mr. MURKOWSKI. Mr. President, I would like to call to the attention of my colleagues a situation of growing concern and that is the matter of Chinese arms sales by the People's Republic of China to other nations.

Mr. President, I have a particular interest in this matter as chairman of the Pacific and East Asia Subcommittee of the full committee of the Foreign Relations Committee. My interest is intense. I have addressed the issue on several occasions. I would like to call to your attention, Mr. President, to the fact that China, like many nations, sees arms exports as a profitable and steady source of foreign exchange as well as a means of increasing its influence in international affairs.

In many cases, its exports support the same governments or groups as we do—the Khmer non-Communist resistance, freedom fighters in Afghanistan and Governments such as Egypt, Pakistan, Sri Lanka, and Thailand.

However, in the case of the reported large exports of increasingly sophisticated weapons to Iran, our interests and policies could be adversely affected.

As we know, the war between Iran and Iraq began over 6 years ago. It has cost thousands of human lives and immense material losses, and remains today a grave threat to the stability of an extremely important region.

Iran has prolonged the war despite Iraqi willingness to end the conflict, and there is concern for the future among many observers if Iran has arms supply and unlimited time to press against Iraq's defenses.

It is therefore a matter of great concern that China has become now the third largest supplier of arms to Iran without apparent regard for strategic political consequences the Iranian success would have if, in the gulf conflict and throughout the Middle East, the Iranians basically overcame the Iraqis.

As noted in the attached article from the August 26, 1986, Washington Post which I ask unanimous consent be inserted in the Record as if read, in that article China has consistently denied selling arms to Iran, although...
private officials have suggested that some Chinese export corporations might be doing so unbeknownst to official ministers. Despite being no objection, the article was ordered to be printed in the RECORD, as follows:

CHINA NOW LARGEST SUPPLIER OF ARMS TO IRAN

(By Richard Harwood and Don Oberdorfer)

During the past six months China has become the largest arms supplier to Iran, delivering at least $300 million worth of missiles and other military hardware despite U.S. efforts to stop the shipments, according to administration officials.

China is shipping military shipments to Iran—including heavy tanks, a version of the MiG21 aircraft and rocket launchers—making the warship of China’s arms sales to Iran, adding a new element of uncertainty to the six-year war between Iran and Iraq.

These reports come amid renewed concern in Washington about the balance of power in the bloody war. Attacks on oil facilities, shipping and other economic targets in the Persian Gulf region have mounted on both sides in recent weeks, and Iran is reportedly preparing to launch a large-scale ground offensive in the next two months. Until now, Iran has not been an important customer and no ثنائي has been seen by the U.S. defense firm.

The introduction to Iran of new arms is a setback to U.S. efforts over several years to characterize China as a regional arms exporter against Iran, and administration officials fear it could upset the tenuous military balance between the combatants.

The Chinese have consistently denied any arms shipments to Iran despite repeated objections in Peking from the U.S. ambassador to China, Winfield Lord, according to administration sources.

Chinese officials, however, have informally told a U.S. official that the arms sales are justified because Iran is using the weapons to aid the anti-Soviet guerrillas in neighboring Afghanistan. This argument was not accepted by the administration because of the type of weapons involved, which are said so far to include surface-to-air missiles, anti-aircraft missiles and other arms.

Perhaps the greatest U.S. concern has arisen from persistent reports that China has been selling Iran with J6 jet fighters, a Chinese version of the Soviet MiG21 and similar in some respects to the U.S.-made F-16. The J6 has not yet been seen in Iran, according to U.S. and foreign sources, but a State Department official said “it does appear” that China has agreed to supply the J6s.

If the J6 shows up on the Persian Gulf battlefield, it will be the first replacement aircraft received by Iran since the early days of its war with Iraq. According to the International Institute for Strategic Studies, Iran has only “perhaps 80 serviceable combat aircraft on the air.” The institute, reported by the institute to have about 500 combat planes in service and has access to numerous replacement from the Soviet Union and France.

The institute reported last fall that China and Iran signed a $5 billion agreement in March 1985 covering the supply to Tehran of J6 fighters, T99 tanks, heavy artillery, multiple rocket launchers and surface-to-air missiles. A State Department official said that this report has not been confirmed but that “there definitely were some agreementsnext" of uncertain proportions.

Until recently North Korea was considered Iran’s steady arms supplier and its sales are said to continue. But the Chinese deliveries in the past six months have put Iran at the top of the list, according to U.S. officials.

China in the past also has been an important supplier to Iran worth $1.5 billion of arms between 1979 and 1983, according to the U.S. Arms Control and Disarmament Agency. Defense Department officials said that now “the Chinese are selling with both hands” to the two sides in the Iran-Iraq war.

Several explanations have been offered for the Chinese decision to sell arms to Iran. Some sources called it essentially a business decision on the part of a Peking government in severe need of foreign exchange. Iran is thought to pay for weapons in oil or in hard currency obtained by selling oil.

Another dimension, several sources said, is international geopolitics and China’s anti-Soviet stance. By strengthening Iran, a threatening neighbor on the Soviet Union’s border, China is adding to the difficulties facing Moscow, according to this line of reasoning.

Moscow has not sold weaponry to Iran for several years and has repeatedly urged an end to the fighting. In private talks in Stockholm this June, Assistant Secretary of State Richard W. Murphy reportedly urged his Soviet counterpart, Vladimir Polyakov, to stop the supply of arms to Iran from Eastern European allies of the Soviet Union. Polyakov made no commitments, according to administration sources, and the matter is likely to be raised anew at U.S.-Soviet discussions of regional issues at the State Department beginning today.

Mr. MURKOWSKI. In the past 6 months alone China has delivered over 300 million dollars’ worth of missiles and other military hardware. And there is an indication, Mr. President, that another battle tanks including the aircraft of the Chinese F-7 fighter, as well as ground-to-ground missiles, may be in the offering in the purchase price, according to reports from Iran, the anti-Soviet state which has a real interest and role in supporting the Afghan resistance, and China’s political relations with Iran are beneficial in promoting this trend.

Mr. SMITH. It is therefore a matter of great concern that China has become the largest supplier of arms to Iran without apparent regard for the strategic political consequences Iranian success would have in the Gulf and throughout the Middle East.

As noted in an article from the August 26, 1986, Washington Post, China consistently has denied it is selling arms to Iran, although private officials have suggested some Chinese export corporations might be doing so unbeknownst to official ministers.

In the past 6 months alone China has delivered over 300 million dollars’ worth of missiles and other military hardware.

There is some indication that main battle tanks, the Chinese F-7 jet fighter and ground-to-ground missiles may be in the pipeline.

China has stated that Iran is an anti-Soviet state which has a real interest and role in supporting the Afghan resistance, and China’s political relations with Iran are beneficial in promoting this trend.

We seek to impress on China that any—and I repeat any—arms sales to Iran would be damaging to United States and the Gulf States interests.

Some have questioned our growing military cooperation with China, given reports of Chinese arms sales to Iran, although there is no indication any United States arms are involved. Our willingness to consider and approve exports of military equipment to China is based upon a thorough and careful assessment of the strategic benefits both nations obtain from an increase in China’s defensive capabilities. It is important that Beijing understand our resolve concerning arms sales to Iran.

RECOGNITION OF SENATOR SASSER

The PRESIDING OFFICER. Under the previous order, the Senator from Tennessee (Mr. Sasser) is recognized for not to exceed 5 minutes.

PROGRAM TRADING

Mr. SASSER. Mr. President, last Thursday, September 11, the Dow Jones industrial average dropped by a record 86.61 points. It dropped an additional 34.77 points the following day.

Thursday and Friday represented the two largest trading days in history, with 240.5 million shares changing hands on Thursday and 240.5 million shares changing hands on Friday. Such large trading volumes, with declining prices, raise some very serious questions about what is happening in the stock market. While it is true that Thursday’s decline was “only” 4.6 percent, compared to the 12.9 percent of 1929, this was indeed a precipitous decline and it is an event, that must be carefully examined.

There are several leading theories on the market’s volatility last week. Some suggest that we are witnessing the side effects of program trading. As many of my colleagues know, trading programs, operated on behalf of large institutional investors, are computer-controlled and designed to take advantage of large swings in computer picks up disparities at a certain level, between stock market prices and the prices for futures contracts covering groups of stocks, a trading program is triggered into action by computers.

Just this sort of trading is thought by many to have started last week’s
troubling market slide. As trading programs operated by computers began placing large sell orders, other traders followed suit. The net effect was a change Commission, in June, Thursday's block-related activity was grams operated by computers began the market to be between 10 and 12 percent. One trader's estimate of Thursday's block-related activity was 40 percent.

Not all market analysts, I hasten to add, are satisfied with this theory. There are those who contend, with some validity, that what we saw last week was a growing concern about the well-being of the nation's economy, with primary concern over interest rates and prospects of inflation. Many observers do not believe interest rates will fall further, in large part because of the continuing failure of Japan and West Germany to lower their own rates. Moreover, the possibility of a rate increase looms in many minds: some recently columnists say that the 11 percent deficit continues to increase upward pressure on the interest rates for Government bonds.

The potential recurrence of inflation came to be the concern there was a rumored leak of Commerce Department data showing retail sales above what forecasters had predicted. A possible further increase in gold prices was signaled by an increase to over $400 an ounce for the first time in 2 years, just 9 days before the decline. There are faint signs of life in the oil cartel. And the dramatic expansion in the market supply, fueled by several quarters of ever-lower interest rates, some economists speculate, lays the groundwork for inflation.

Mr. President, I cannot say with certainty that triggered last week's market plunge. In all likelihood, we saw several factors combining to push the market dramatically down. However, several questions were raised by this incident. Program trading is a purely technical exercise. Fundamental economic conditions are not considered. The question comes: Is it wise to allow computers to dictate the market's course without regard to true economic conditions? Should we be looking more closely at potential problem spots in our economy? I do not think most observers are ready to push the panic button, but are we prepared to deal with a languid national economy which the market may be foreshadowing?

Mr. President, answers to these questions may soon be forthcoming. Throughout the next 2 weeks, several key economic indicators will be released. New figures should give us further insight as to the health of our economy.

And many are suggesting that we will see a positive side to program trading this Friday. On Friday, September contracts on the Standard & Poor's 500 stock index futures expire. In addition, options written against stock indexes and options on individual stocks will also expire on Friday. These three simultaneous expirations happen four times a year. When they do, we have what is known as the "triple witching hour." We do not know what direction the triple witching hour will take the market. We do know that program trading is a relatively new and unexamined market tool and one with potentially profound effects on the stock market. Events of the next few weeks may well suggest that those of us on the Senate Banking Committee take a closer look at the intricacies of this trading device known as program trading where the quarterly of the trading is the computer.

Mr. DOLE. Mr. President, I ask unanimous consent that the text of Dr. Fleming has written an excellent article entitled "Understanding the Terrorist Threat." It summarizes the findings of the conference on "State and Local Government Responses to Domestic Terrorism." At this conference, a number of leading authorities on this subject, including our distinguished colleague, Senator Dole, sought to familiarize State and local law enforcement officials from across the United States with the terrorist threat to our Nation, with counterterrorist studies and activities conducted by the Federal Government, and to discuss ways in which all levels of Government can cooperate in developing counterterrorist programs.

Dr. Fleming has written an excellent article entitled "Understanding the Terrorist Threat." It summarizes the findings of the conference on this important topic and merits the attention of my colleagues. I therefore ask unanimous consent that the text of Dr. Fleming's article be included in the Record at the conclusion of my remarks.
There being no objection, the text was ordered to be printed in the RECORD, as follows:

UNIVERSITY OF SOUTHERN CALIFORNIA STANDARDS FOR CIVIC EDUCATION AS A MEANS OF PREVENTING TERRORIST THINKING (By Dr. Horace W. Fleming)

(Editor's Note: The author is Director of the Strom Thurmond Institute of Government and Public Affairs at Clemson University.)

Until recently, it seemed that the American people had become resigned to living with the threat of terrorism. Terrorists' acts of seemingly random violence had become no less repulsive in our thinking, but there was some reassurance in the fact that the usual targets of these terrorists were far distant from our own shores.

Then came the autumn raid on Libya in April, and this seemed to change. We were suddenly standing toe-to-toe with the lead--all-time high in 1985:

The University of Southern California plans to begin an inter-collegiate program on terrorism. The program will be conducted by the Institute of International and Area Studies.

There is a serious problem in making the American people aware of the nature of this type of terrorism. This problem was reached an all-time high in 1985: 480 incidents, 854 fatalities. Only seven incidents occurred that year in the United States. In the first six months of this year, 23692 incidents were recorded.

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

TERRORISM: THREATS, RESPONSES, AND REFORM (By William H. Moyar)

Mr. ZIMMERMAN. Mr. President, I rise today to take this opportunity to pay tribute to the 149 law enforcement officials who lost their lives last year while diligently performing their duties. More than 50 of these deaths were the result of felonious assault; the rest were caused by tragic accidents and mishaps. Although the cause of death may have been from officer to officer, the quality of the contributions they rendered did not. For these dedicated men and women, and for the officers who gave their lives in years past, we can only hope that the recognition we give here today will help their families and friends to realize that these officers did not die in vain.

The finest public servants and the most outstanding citizens make up our country's police forces. They are the individuals who man the thin blue line that protects law-abiding citizens from injury and loss of property and life. I can only hope that the recognition we give here today will help their families and friends to realize that these officers did not die in vain.

Finally, state and local law enforcement agencies should anticipate terrorist threats, and they should be prepared to be included in a local plan of protection can be an important deterrent.

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how small or large. From all ethnic groups, men and women. Every one of these officers gave their all to protect the lives and properties of the citizens of America. Over the years, men and women have given their lives in the battle against crime in this great land, during 1985.

Law enforcement Officers are lost upholding the American principles throughout the World, as they wage their war against our enemies. The Law Enforcement Officers continue their never-ending war against the lawless elements in the United States. These officers continue their unceasing battle against the criminals of America. They really deserve the title, “Soldiers of Peace”. Over and above the list of Officers slain by felonious assault, there are dozens more who have succumbed due to heart attacks, accidents, daily tension and trauma caused by the unusual changing of shifts and the heartrending duty of taking another person’s life in the performance of duty. This constant strain often results in a complete breakdown and sometimes has resulted in an Officer’s suicide. The suicide rate of Law Enforcement Officers far exceeds any other vocation. Our “ROLL CALL OF HEROES” does not include the thousands of Officers who have suffered from physical and mental violence, which have caused them unbearable pain and hardship, many times leading to their death, long after their injuries had been secured. Each one of us are aware of these unknown and forgotten tragedies? Only the bereaved family and Brother and Sister Officers realize these victims have suffered undue pain and gave their lives just as surely as those who have died instantly. Although their names are not listed, they too are heroes and we should not forget them. May they, with those listed below, rest in eternal peace with the heavenly saints above.

We are respectfully indebted to the United States Congress, especially to former Congressman Barry M. Goldwater, Jr. of Arizona, who has continued to honor our fallen Brothers and Sisters. Thank you and may The Good Lord Bless every one of you.

Respectfully yours,

Vincent D. Penn, Jr.,
National Chaplain,
Fraternal Order of Police.

LAW ENFORCEMENT OFFICERS KILLED DURING CRIMINAL ACTION—1985

(Date of death, name of victim officer, address of victim officer’s agency)

January 1, 1985—Officer Carlos A. Velazquez Colon, Police of Puerto Rico, G.P.O. Box 70616, San Juan, Puerto Rico 00936.

January 24, 1985—Sergeant Craig A. Nollmeyer, Tacoma Police Department, 930 Tacoma Avenue, South, Tacoma, Washington 98405.

January 25, 1985—Patrolwoman Deanna S. Rose, Overland Park Police Department, 8900 Antioch Street, Overland Park, Kansas 66212.

January 26, 1985—Deputy Game Warden James C. Vines, Alabama Department of Conservation and Natural Resources, 64 North Union Street, Montgomery, Alabama 36110.

January 29, 1985—Sergeant Joseph M. Cournoyer, Metropolitan Police Department, 300 Indiana Avenue, Northwest, Washington, D.C. 20001.

February 2, 1985—Detective Gary L. Ward, Oklahoma City Police Department, 700 Couch Drive, Oklahoma City, Oklahoma 73102.


February 14, 1985—Officer John T. Scanlon, Robblndale Police Department, 1415 Hubbard Avenue, North, Robblndale, Minnesota 55422.

February 18, 1985—Patrolman Robert A. Way, North Charleston Police Department, Post Office Box 10150, North Charleston, South Carolina 29411.


February 26, 1985—Deputy Barry L. Penney, Roane County Sheriff’s Office, 317 Church Avenue, Ronceano, Virginia 24018.

March 2, 1985—Trooper James A. Proemsdorf, Missouri State Highway Patrol, Post Office Box 548, Jefferson City, Missouri 65102.

March 4, 1985—Patrolman John Falls, Pine Bluff Police Department, 200 East Eighth Street, Pine Bluff, Arkansas 71601.

March 4, 1985—Sergeant Isidro Rodriguez, Manvel Police Department, 12900 Salazar, G.P.O. Box 70166, San Juan, Puerto Rico 00936.

March 7, 1985—Crimal Investigator Enrique Salazar Camarena, Drug Enforcement Administration, 1500 Third Street, Northwest, Washington, D.C. 20537.

March 10, 1985—Patrolman Kevin J. Williams, Huntsville Police Department, 1240 11th Street, Huntsville, Texas 77340.

March 12, 1985—Patrol Officer Harvey G. Lawson, Jr., Clarksville Police Department, Post Office Box 1147, Clarksville, Virginia 23927.

March 15, 1985—Officer Malcolm Powell, Plainfield Police Department, 200 East Fourth Street, Plainfield, New Jersey 07060.

March 19, 1985—Patrolman Leonard R. Lesinski, 1023 E. Collura, Milwaukee Police Department, 749 West State Street, Milwaukee, Wisconsin 53233.

March 21, 1985—Chief Billy E. Jones, Lebanon Police Department, Post Office Box 430, Lorenzo, Texas 79343.

March 27, 1985—Officer Thomas E. Strunk, Billerica, Massachusetts 01821.

March 27, 1985—Patrolman Ronald J. Turek, Elai Township Police Department, 575 Cedarcrest Drive, Duncansville, Pennsylvania 16635.

March 31, 1985—Officer Thomas E. Rigs, San Diego Police Department, 801 West Market Street, San Diego, California 92101.

April 4, 1985—Sergeant James A. Bevis, Jackson County Sheriff’s Department, Post Office Box 919, Marianna, Florida 32446.

April 4, 1985—Agent Pablo Ramirez Morales, Police Department, 401 P.O. Box 70166, San Juan, Puerto Rico 00936.

April 6, 1985—Deputy Clifford E. Sanchez, San Bernardino Sheriff’s Office, 351 North Arrowhead Avenue, San Bernardino, California 92401.


April 11, 1985—Sheriff George E. Goare, Webster County Sheriff’s Department, Post Office Box 55, Preston, Georgia 31834.

April 13, 1985—Trooper Leo Whitt, Virginia State Police Department, Post Office Box 24742, Richmond, Virginia 23221.

April 15, 1985—Trooper Jimmie E. Lineberry, Mississippi State Police Department, Post Office Box 568, Jefferson City, Missouri 65102.

April 20, 1985—Patrolman John R. Tucker, Port Gam Police Department, Post Office Box 336, Port Gay, West Virginia 25514.

April 23, 1985—Officer Dale E. Eggers, Seattle Police Department, 610 Third Avenue, Seattle, Washington 98104.

April 24, 1985—Corporal J.N. Schulte, Mobile Police Department, 51 Government Street, Mobile, Alabama 36602.

April 25, 1985—Patrolman Phillip B. North, Atlanta Police Department, 175 De­catur Street, Atlanta, Georgia 30303.

May 1, 1985—Trooper Oren S. Hindman, South Dakota Highway Patrol, 500 East Capitol Avenue, Pierre, South Dakota 57501.

May 8, 1985—Agent in Charge William R. Swain, Oklahoma Bureau of Narcotics and Dangerous Drugs, Post Office Box 53344, State Capitol Station, Oklahoma City, Oklahoma 73125.

May 10, 1985—Officer Ignatius J. Charlie, Alakanuk Police Department, Alakanuk, Alaska 99654.


May 20, 1985—Deputy Charles W. Biles, Morgan County Sheriff’s Office, Post Office Box 668, Decatur, Alabama 35601.

May 31, 1985—Officer John W. Mann, Trafford Police Department, Post Office Box 97, Trafford, Alabama 35172.

June 1, 1985—Deputy George L. Arthur, Los Angeles County Sheriff’s Department, 211 West Temple Street, Los Angeles, California 90012.

June 3, 1985—Lake Ranger Darrell E. James, City of Duncan, City Hall, Post Office Box 969, Duncan, Oklahoma 73533.

June 5, 1985—Patrolman Johnnie C. Corbin, St. Louis Metropolitan Police Department, 1200 Clark Street, St. Louis, Missouri 63103.

June 18, 1985—Officer Harold L. Vitale, Saugus Police Department, 6 Taylor Street, Saugus, Massachusetts 01906.

June 30, 1985—Deputy Adrian Salazar Aguilar, Bexar County Sheriff’s Office, 218 South Laredo Street, San Antonio, Texas 78204.

July 12, 1985—Detective Wayne G. King, Chicago Police Department, 121 South Laramie Street, Chicago, Illinois 60605.

July 14, 1985—Patrolman Gerald W. Mork, Iola Police Department, 165 North Main Street, Iola, Wisconsin 54945.

July 16, 1985—Officer Timothy W. Whittington, Charlotte Police Department, 825 East Fourth Street, Charlotte, North Carolina 28203.

July 29, 1985—Officer Henry Bunch, San Jose Police Department, 201 West Mission Street, San Jose, California 95110.

August 10, 1985—Officer Myron J. Massey, Fairfield Police Department, Post Office Box 177, Fairfield, Alabama 35064.
CONGRESSIONAL RECORD—SENATE

September 17, 1986

The President pro tempore of the Senate, Mr. JOSEPH R. BIDEN, Jr., presiding.

Mr. BIDEN. Mr. President, on September 10 my distinguished colleague from Delaware, Mr. BRADLEY, addressed the National Press Club on the national life—our continued preeeminence or decline—for decades to come.

Economically, our deficits and international debt pose challenges greater than any since the Depression.

On critical issues of social justice, the Reagan years have raised, but left unresolved, profound questions about the role of government in addressing human needs not met by the market.

In the Judiciary, the bastion of our democratic system, the American people must determine whether in denying further power to those who would impose a new and radically conservative interpretation of the Constitution and the Bill of Rights.

And in national security policy—the very basis for our survival as a people and as an outstanding American effort that produced this mushrooming atomic bomb that we should not be allowed to do.

The Daniloff issue underscores our profound differences with the Soviet Union, and is an outrage which should be handled without a spirit of compromise. But in the continuing American debate, which reflects the freedom we possess and Soviet citizens do not, this episode should not be allowed to distract attention from the bankrupt, hypocritical, and years. The Daniloff issue underscores our profound differences with the Soviet Union, and is an outrage which should be handled without a spirit of compromise. But in the continuing American debate, which reflects the freedom we possess and Soviet citizens do not, this episode should not be allowed to distract attention from the bankruptcy, hypocrisy, and arrogance of the Reagan Administration's policy on nuclear arms control, which cannot be negotiated at a summit, which has an historic urgency precisely because of the superpowers' adversarial relationship, and which should proceed without linkage to transitory issues, however severe.

Eternal God, Our Heavenly Father, we pray that You will comfort their survivors who bear the burden of their sorrows. We ask Thee to lift up their spirits and remove all rebellion from their hearts. Help them to realize that their loved ones have earned the Heavenly reward for the dedicated work they have accomplished. We pray. Almighty God that our deceased comrades will rest in Thy loving care and we will all be reminded on that glorious day of Resurrection. This we ask in the honor of Thy name both now and forever more.

THE REAGAN ADMINISTRATION AND NUCLEAR WEAPONS

Mr. BRADLEY. Mr. President, on September 10 my distinguished colleague from Delaware, Mr. BRADLEY, addressed the National Press Club on the important subject of the nuclear arms race. His speech entitled "The Reagan Administration and Nuclear Weapons," is an important contribution to the ongoing discussion and debate on this fundamental issue. I ask unanimous consent that this timely and thoughtful analysis be inserted in the Congressional Record.

There being no objection, the analysis was ordered to be printed in the Record, as follows:

THE REAGAN ADMINISTRATION AND NUCLEAR WEAPONS

Weapons: A Legend of Mythology; A Future Less Secure

(Remarks by Senator Joseph R. Biden, Jr., to the National Press Club)

Members of the National Press Club, ladies and gentlemen, I appreciate the opportunity to speak to the Press Assembly on the nuclear arms race-specifically, the ominous failure during this Administration of efforts to contain that race.

The American Context

Let me first place the issue in context. I believe that the period now before us, starting with the Congressional elections in November and culminating in the Presidential election of 1988, represents a political watershed more significant than any in a generation. The "American Century," as described by Henry Luce in the 1940's, and as a new century approaches, the people of the United States confront questions that will shape our national life—our continued preeminence or decline—for decades to come.

Economically, our deficits and international debt pose challenges greater than any since the Depression.

On critical issues of social justice, the Reagan years have raised, but left unresolved, profound questions about the role of government in addressing human needs not met by the market.

In the Judiciary, the bastion of our democratic system, the American people must determine whether in defending further power to those who would impose a new and radically conservative interpretation of the Constitution and the Bill of Rights.

And in national security policy—the very basis for our survival as a people and as an outstanding American effort that produced this mushrooming atomic bomb that we should not be allowed to do.

The Daniloff issue underscores our profound differences with the Soviet Union, and is an outrage which should be handled without a spirit of compromise. But in the continuing American debate, which reflects the freedom we possess and Soviet citizens do not, this episode should not be allowed to distract attention from the bankruptcy, hypocrisy, and arrogance of the Reagan Administration's policy on nuclear arms control, which is moving to eliminate the entire framework for our survival as a people and national security.

On October 1, 1985—Deputy Walter L. Martinez, Jr., of the New York Police Department, 432 Avenue A, 1301 Franklin Street, Houston, Texas 77004.


On October 4, 1985—Special Agent Robin L. Americans, Federal Bureau of Investigation, 2721 North Central Avenue, Phoenix, Arizona 85004.

On October 7, 1985—Officer Pedro A. Burgos, LaCourt, Office Pilar H. Lopez, Officer Martinez H. Martinez, 4616 Díaz, Police of Puerto Rico, G.P.O. Box 70186, San Juan, Puerto Rico 00936.

On October 9, 1985—Officer Richard Leet, Baltimore Police Department, 601 East Fayette Street, Baltimore, Maryland 21202.

On October 11, 1985—Lieutenant G. D. Hones, Anderson County Sheriff's Department, 704 Avenue A, Palestine, Texas 75801.

On October 12, 1985—Deputy Walter L. Martinez, Jr., of the New York Police Department, 1301 Franklin Street, Houston, Texas 77004.

On October 15, 1985—Patrolman John R. Meleurs, Harbour Police Department, 655 96th Street, Bal Harbour, Florida 33154.


On December 6, 1985—Officer Jackie C. Gray, Sr., of the Nashville Police Department, 306 Indiana Avenue, Northwest, Washington, D.C. 20001.

On December 10, 1985—Deputy Donald E. Rice, Eaton County Sheriff's Department, 117 West Harris Street, Charlotte, Michigan 48813.

On December 12, 1985—Officer Manuel A. Aquino, Guam Police Department, 237 West O'Brien Drive, Agana, Guam 96910.

On December 13, 1985—Patrolman Vaughn E. Kee, Mount Pleasant Police Department, Post Office Box 296, Mount Pleasant, South Carolina 29464.

1985 National Police Prayer

Eternal God, Our Heavenly Father, we pray that You will comfort the souls of our departed Brother and Sister Officers. They have paid the supreme sacrifice in protecting the lives and properties of the citizens of America. We bow in humble reverence to the memory of these brave officers whose labor on Earth are over. We pray that You will comfort the survivors who bear the burden of their sorrows. We ask Thee to lift up their spirits and remove all rebellion from their hearts. Help them to realize that their loved ones have earned the Heavenly reward for the dedicated work they have accomplished. We pray. Almighty God that our deceased comrades will rest in Thy loving care and we will all be reminded on that glorious day of Resurrection. This we ask in the honor of Thy name both now and forever more.
of a Hindu holy poem: "I am become Death, the shatterer of Worlds."

Since then, man has survived in the nuclear age through a combination of wisdom and luck, a little reason and a lot of luck. Knowledge of the atom has proliferated among men and nations. The temptation to use it for destruction has been kept at bay by the awesome destructive potential of nuclear weapons. Knowledge of the weapon has kept the temptation at bay, and the weapon at bay has kept the temptation at bay.

But the temptation grows stronger. The weapons become more powerful, the potential for destruction grows larger. The temptation to use the weapon for destruction grows stronger. The weapons become more powerful, the potential for destruction grows larger.

And so it is that we find ourselves in a world where the temptation to use the weapon for destruction grows stronger. The weapons become more powerful, the potential for destruction grows larger.

The President's dangerously ingenious notion of erecting a "strategic space shield" contravenes that equation. And by radically reinterpretting the ABM Treaty—a reinterpretation unilaterally advanced by the United States—Carter's policy is that much more dangerous. The President's dangerous notion of erecting a "strategic space shield" contravenes that equation. And by radically reinterpretting the ABM Treaty—a reinterpretation unilaterally advanced by the United States—Carter's policy is that much more dangerous.
A considerable irony of the various U.S. proposals is that they have also contained elements directed directly to basic American interests and doctrine. The “zero option” proposal, for example, would have deprived NATO of the theater-nuclear deterrent so essential to maintaining the “flexible response” doctrine and thereby to the strategic “coupling” of the Atlantic alliance. And a certain START II proposal, if implemented, would have involved an actual intensification of MIRVed missile forces on the side of the Soviets needed for the enhancement of nuclear stability. Even more illogical was the proposal to ban mobile missiles, which would have undoubtedly increased our vulnerability had we not already increased our effort to escape ICBM vulnerability through the new Midgetman.

This latter curiously apparently resulted from an unhappy alliance that has plagued arms control throughout this Administration—between strategic targets in the Pentagon, who are obsessed with retaining the ability to target all Soviet missiles, and anti-arms-control officials who are only too pleased to see the U.S. make unacceptable offers. The upshot has been a series of proposals that have been both non-negotiable but also, paradoxically, inconsistent with U.S. concepts of deterrence and nuclear stability even if accepted by the Kremlin.

“Massive” Soviet violations: a false excuse to scuttle SALT

While the White House is continuing seriously has been useful in explaining six years of failure to progress in arms control, a fourth myth has been needed for an attack on the SALT II agreement, and the one cap the deployment of MIRVed missiles and bombers carrying cruise missiles—has been fully ad

The Administration has now adopted a policy that the President already has renewed the arms control as a codification of forces that would exist anyway.

To compare this new negotiating position with the superpowers could now be, had SALT II been ratified six years ago, which this new policy on cuts of perhaps 20-30% in missile warheads, while allowing substantial growth in buffer forces—in a pattern which would increase the U.S. force trends. In short, the Administration has now adopted a policy that the President already has renewed the arms control as a codification of forces that would exist anyway.

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tens, which could be increased to overwhelm our defenses. Such limits on offensive forces would be an important step in the negotiated agreement—meaning arms control.

We could "share the system," as the President has proposed, again apparently under the belated influence of Woodstock. Sharing of logic, sharing of technology, sharing of Star Wars defensive system would be unsound, because to know the technology is to know how to defeat it. And on a practical level, it is preposterous, because such a system would embody all of our most advanced technology—defensive, offensive, and otherwise. One can only imagine the conversation that would ensue if the President's technological dream were suddenly realized and he had a lengthy meeting with Secretary Weinberger, in which he would have said that the time had come to "share the system."

As to the technical realities, the plain and widely recognized truth is that a comprehensive system of population defense simply will not work—something even Assistant Secretary Perle reportedly acknowledges in his private conversations with our allies.

First, even under the rosiest predictions about the ABM Treaty, it would take about 40 years to field a defensive system capable of stopping a large number of the Soviet missiles that exist now would penetrate any system we could put in place in 40 years. Given the inevitable development of Soviet countermeasures, any hope for a leak-proof missile defense will require an ever-receding horizon. Current research, moreover, has yet even to envisage a defense against an attack that "comes in under" this mythical space shield—either with bombers, cruise missiles, or low-trajectory missiles fired from submarines near the American coast, not to mention nuclear devices transported through even more elemental means.

CONSEQUENCES OF MYTHOLOGY

To say that Star Wars will not work, however, is not to say that the President's quixotic initiative is already inflicting serious damage on American interests.

It has confused our national debate, perhaps deliberately so, about the direction of American nuclear strategy.

It has diverted valuable R&D resources, at a time when the best American talent is needed to take the critical steps necessary to strengthen our competitiveness in the global marketplace.

Commitment to the Atlantic Alliance by raising doubts about America's commitment to the collective defense, and also about the reliability of American leadership in the conduct of East-West relations.

It threatens strategic deterrence by undermining the ABM Treaty, which ensures our ability to share aggression with the nuclear response that is fundamental to the credibility of NATO doctrine.

It has failed to behave the wrong way, inducing greater Soviet research on defenses while raising the prospect of expanded Soviet missile forces to penetrate any U.S. defenses erected.

And finally, for so long as it remains non-negotiable, Star Wars constitutes a major impediment to the disarming and arms control agreements that have buttressed American security for several decades; and without these, the President's own nuclear force posture constitutes one of the most reckless and irresponsible acts in the history of modern statecraft.

AN HISTORIC TURNING POINT

The past six years have demonstrated that the world can survive in the short term without prohibitive arms control. But while the Reagans have enjoyed some success in propagating their smoke-screen of mythology, what they have not done—what they could not do—is change these fundamental realities of the nuclear age:

first, that Soviet forces will, like our own, remain capable in any foreseeable future of inflicting massive global destruction on a scale almost beyond the imagination;

second, that the essential calculus of mutual nuclear deterrence, recognized years ago, will not be altered even by the dreams of Presidents;

third, that actual reductions in nuclear weaponry will not occur by negotiated agreement, and that such agreement will never occur without related agreement on defensive systems; and

fourth, that arms control represents an effective means—and our best hope—of enhancing nuclear stability and reducing the risk of war.

finally, that arms control can be accomplished not by bluff and compulsion but only by quiet strength and a serious will to negotiate.

One may speculate that President Reagan has come to understand these truths. The compelling question about the remainder of his presidency is whether, given the competing voices and ideological forces in his own Administration, he can and will set accordingly. The answer to that question, as it emerges, will shape a major turning point, for good or ill, in our nation's history and the world's.

If the President moves to seize his opportunity, the agenda of a comprehensive program of arms control progress lies clearly before us:

1. On defensive systems, the ABM Treaty must, if possible, be preserved—and not with the current caveat that we will adhere only until our defensive systems are ready to function, as has been the case with the SDI program. The Secretary of Defense has been urged by former Defense Secretaries Brown, Schlesinger, Laird, and McNamara, and numerous other distinguished officials in past Administrations to have made clear to the Congress that the United States must clearly limit SDI to a genuine research program intended to hedge against danger and deter any Soviet "break out" from the ABM Treaty—and to examine the possibilities of stabilizing point-defenses—but not aimed at erasing a comprehensive population defense. Talks on the ABM Treaty should also focus on developing detailed definitions of key terms in the treaty, while adding clear restrictions on the testing of ASATs and anti-tactical ballistic missile systems.

2. On offensive systems, the two sides should agree to remain within the SALT II sublimits until a replacement agreement can be reached. In the SALT II talks on long-range systems, the U.S. must adjust a position that has been non-negotiable because, by disaggregating missiles from bombers, it disproportionately affects Soviet forces. A compromise must be sought entailing a trade-off between U.S. superiority in bombers and Soviet superiority in missile weight.

Meanwhile, INF may be dealt with in one of two ways. An agreement could place equal power to counterbalanced, but not equal, theater-based missiles, with Soviet Asian-based missiles balanced (implicitly) by British and French nuclear forces. Such an agreement could allow INF to be included in and capped under the strategic aggregates negotiated in SALT II.

Any new agreement placing the superpower arsenals under common limits should, this time, be promptly ratified in treaty form, and should include an agreed rate of reduction compatible with maintaining nuclear stability. Such a regime would allow each side considerable flexibility in configuring its forces within the agreed ceilings—what I call a "shrinking free-mix"—and would provide for the gradual, predictable drawdown that could inspire mutual confidence.

(3) Simultaneously, compliance issues must be dealt with through the renewed commitment to reach resolution. Issues surrounding "new" types of missiles and allowable numbers of test launches must essentially be addressed from scratch, since they arise from previous agreements worded too vaguely. (The neatly inevitable qualification on test-ban talks of "as interpreted" to the recent issue of Foreign Policy by Ambassador Ralph Earle, U.S. negotiator of SALT II.)

(4) Finally, on testing, the United States should be prepared to ratify existing treaties limiting nuclear testing and either to resume negotiations on a limited Test Ban or to seek agreement on gradual reductions in the threshold and the number of tests.

But while a treaty on testing could play a constructive role in an overall pattern of conventional arms control, it is clear that the requirement that limiting the testing of nuclear explosive devices in itself holds the key to stopping the arms race; such technology is already too well developed and the main advances and dangers now arise from other technologies. Accordingly, the highest priority must be given to efforts to constrain the deployment of strategic defenses and offensive delivery systems.

If the agenda of a comprehensive agenda would not change the nature of the Soviet Union; that we cannot expect to accomplish. Nor, despite this Administration's early preoccupation with the dangers posed to NATO by Soviet force levels which the Kremlin does not wish to make. But we can manage the other competing forces of the world by competing energies into regimes of cooperation that enhance the security of both sides. I refer in closing to Winston Churchill, whose name the Reagans often invoke. As well as any leader in the 20th century, that great British prime minister understood that we must be prepared for all eventualities, and prepared to compete and negotiate to contain these dangers posed to our partners in Europe. But Churchill was a statesman, not an ideologue—a man who perceived interna tional affairs in much the same way he brought wisdom and galant rhetoric to the pursuit of rational public purpose. Churchill wanted in facility against appeasement...
CONCLUSION OF ROUTINE MORNING BUSINESS

The PRESIDING OFFICER. If there is no further morning business, morning business is closed.

DEPARTMENT OF TRANSPORTATION AND RELATED AGENCIES APPROPRIATIONS ACT, 1987

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate now turn to the consideration of H.R. 2505, the Department of Transportation Appropriations bill.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 2505) making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1987, and for other purposes:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Transportation and related agencies for the fiscal year ending September 30, 1987, and for other purposes, namely:

TITLE I—DEPARTMENT OF TRANSPORTATION

OFFICE OF THE SECRETARY

Salaries and Expenses

For necessary expenses of the Office of the Secretary of Transportation, including not to exceed $30,000 for allocation within the Department of official reception and representation expenses as the Secretary may determine: $938,000 for the immediate Office of the Secretary, $469,000 for the Immediate Office of the Deputy Secretary, $5,300,000 for the Office of the General Counsel, and $75,000 for the Office of the Assistant Secretary for Policy and International Affairs, $2,096,000 for the Office of the Assistant Secretary for Budget and Programs, $2,295,000 for the Office of the Assistant Secretary for Governmental Affairs, $20,030,000 for the Office of the Assistant Secretary for Traffic Administration, $400,000 for the Office of the Assistant Secretary for Public Affairs, $746,000 for the Executive Secretarial, $396,000 for the Contract Appeals Board, $20,000 for the Office of the Deputy Secretary for Civil Rights, $478,000 for the Office of Commercial Space Transportation, $1,750,000 for the Office of Essential Air Service, $565,000 for Regional Representatives, and $3,732,000 for the Office of Small and Disadvantaged Business Utilization, $51,000,000, of which $3,000,000 shall remain available until expended and shall be available for the purposes of the Minority Business Resource Center in this or any other Act may be used for business opportunities related to any mode of transportation.

Transportation Planning, Research, and Development

(Including Transfer of Funds)

For necessary expenses for conducting transportation planning, research, and development activities, including the collection of national transportation statistics, and university research and internships, to remain available until expended, $33,549,000, of which $1,300,000 shall be derived from imputed balances of "Salaries and Expenses".

Working Capital Fund

Necessary expenses for operating costs and capital outlays of the Department of Transportation Working Capital Fund not to exceed $64,560,000; $66,500,000 shall be paid, in accordance with law, from appropriations made available by this Act and prior appropriation Acts to the Department of Transportation, together with advances and reimbursements received by the Department of Transportation.

Payments to Air Carriers

For payments to air carriers of so much of the compensation fixed and determined under section 419 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1389), as is payable by the Department of Transportation, $62,000,000, to remain available until expended.

Coast Guard

Operating Expenses

For necessary expenses for the operation and maintenance of the Coast Guard, not to exceed $6,000,000, of which $1,000,000,000, of which $63,857,000, shall be derived from unobligated balances of "Pollution Abatement and Control Fund".

Coast Guard Reserve Training

(Including Transfers of Funds)

For all necessary expenses for the Coast Guard Reserve, as authorized by law, maintenance and operation of facilities and supplies, equipment, and services, $653,857,000, of which $7,000,000 shall be derived from unobligated balances of "Pollution Abatement and Control Fund".

Research, Development, Test, and Evaluation

For necessary expenses, not otherwise provided for, for basic and applied scientific research, development, test, and evaluation; maintenance, rehabilitation, lease, and operation of facilities and equipment, as authorized by law, $23,800,000, to remain available until expended: Provided, That there may be credited to this appropriation any proceeds derived from the sale of services or products, or the transfer of technology, under agreements made in the Department of Transportation: Provided further, That any such written warrant shall not apply in the case of any system or component thereof that has been furnished by the Government to a contractor: Provided further, That the Secretary of Transportation may provide for a waiver of the requirements for a warrant where: (1) the waiver is necessary in the interest of the national defense or the warranty would not be cost effective; and (2) the Committees on Appropriations of the Senate and House of Representatives are notified in writing of the Secretary's intention to waive and reasons for waiving such requirements: Provided further, That any such written warrant shall not cover combat damage: Provided further, That the funds under this Act shall be available for the construction of a business resource center in this or any other Act may be used for business opportunities related to any mode of transportation.

Acquisition, Construction, and Improvements (Including Recession)

For necessary expenses of acquisition, construction, rebuilding, and improvement of aids to navigation, buoys, lighthouses, vessels, and aircraft, including equipment related thereto; to remain available until September 30, 1991, $210,850,000, $251,700,000: Provided, That the Secretary of Transportation shall issue regulations requiring that written warranties shall be included in all contracts with prime contractors for major systems acquisitions of the Coast Guard: Provided further, That any such written warrant shall not apply in the case of any system or component thereof that has been furnished by the Government to a contractor: Provided further, That the Secretary of Transportation may provide for a waiver of the requirements for a warrant where: (1) the waiver is necessary in the interest of the national defense or the warranty would not be cost effective; and (2) the Committees on Appropriations of the Senate and House of Representatives are notified in writing of the Secretary's intention to waive and reasons for waiving such requirements: Provided further, That any such written warrant shall not cover combat damage: Provided further, That the funds under this Act shall be available for the construction of a business resource center in this or any other Act may be used for business opportunities related to any mode of transportation.

Offshore Oil Pollution Compensation Fund

For necessary expenses to carry out the provisions of title III of the Outer Continental Shelf Land Act Amendments of 1978 (Public Law 95-372), $1,000,000, to be derived from the Offshore Oil Pollution Compensation Fund: To remain available until expended.

A bill (H.R. 2505) making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1987, and for other purposes: $30,000,000.
that available appropriations are not ade­quate to meet the obligations of the Fund, the Secretary of Transportation is author­ized to issue to the Secretary of the Treasury notes or other obligations in such amounts and at such times as may be neces­sary; Provided, That none of the funds in this Act shall be available for the implementa­tion or execution of programs the obligations for which are in excess of $60,000,000 in fiscal year 1987 for the “Offshore Oil Pol­lution Compensation Fund”.

DEEPWATER PORT LIABILITY FUND

For necessary expenses to carry out the provisions of section 18 of the Deepwater Port Act of 1974 (Public Law 93-627), $1,000,000, to be derived from the Deepwa­ter Port Liability Fund and to remain avail­able until expended. In addition, to the extent that available appropriations are not adequate to meet the obligations of the Fund, the Secretary of Transportation is author­ized to issue, without fiscal year limitation, notes or other obliga­tions in such amounts and at such times as may be necessary; Provided, That none of the funds in this Act shall be available for the implementa­tion or execution of programs the obligations for which are in excess of $50,000,000 in fiscal year 1987 for the “Deepwater Port Liability Fund”.

BOAT SAFETY

(LIQUIDATION OF CONTRACT AUTHORIZATION)

For payment of obligations incurred for recreational boating safety assistance as authorized by Public Law 92-75, as amended, $15,000,000, to be derived from the Boat Safety Account and to remain available until expended; Provided, That none of the funds in this Act shall be available for the planning or execution of programs the obligations for which are in excess of $15,000,000 in fiscal year 1987 for recreational boating safety assis­tance; Provided further, That no obliga­tions may be incurred for the improvement of recreational boating facilities.

FEDERAL AVIATION ADMINISTRATION

HEADQUARTERS ADMINISTRATION

For necessary expenses, not otherwise provided for, of providing administrative services to the headquarters of the Federal Aviation Administration, including but not limited to accounting, budgeting, legal, public affairs, and executive direction services for the Federal Aviation Adminis­tration, $34,500,000.

OPERATIONS

(INCLUDING TRANSFER OF FUNDS)

For necessary expenses of the Federal Aviation Administration, not otherwise provided for, of including administrative expenses for research and development, and for es­tablishment of air navigation facilities, and carrying out the provisions of the Airport and Airway Development Act, as amended, or other law authorizing the expendi­ture of funds for similar programs of air­port and airway development or improve­ment, purchase of personal property notes, and purchase of forgone professional services for replacement only, $32,797,447, of which not to exceed $691,048,000 $500,000,000 shall be derived from the Airport and Airway Trust Fund: Provided, That there may be credited to this appropriation funds received from Federal, state, local au­thorities, other public authorities, and private sources, for expenses incurred in the main­tenance and operation of air navigation fa­cilities: Provided further, That, at a mini­mum, the air traffic control on-board em­ployment level shall be 15,000 by September 30, 1987; Provided further, That none of these funds shall be available for new appli­cants for the second career training pro­gram (or for a pilot test of contractor main­tainers program) under section 55231(f)(2) of title V, United States Code, as amended by striking “December 31, 1988” and inserting “April 1, 1986” in lieu thereof: Provided further, That section 3844(h) of title V, United States Code, is amended by inserting “April 1, 1986” in para­graph (2) and inserting “April 1, 1986” in lieu thereof: Provided further, That in the event that the Federal Aviation Administra­tor employs civilians subject to section 3844(h) of title V, United States Code, not to exceed $10,000,000, to be derived from the Airport and Airway Trust Fund and to be available for obligation by the Federal Avia­tion Administration as of the effective date of December 31, 1987, for the purpose of funding such employment: Provided further, That any such funding shall be reported to the Committee on Appropriations of the Senate and the House of Representatives.

FACILITIES AND EQUIPMENT (AIRPORT AND AIRWAY TRUST FUND)

(INCLUDING TRANSFER OF FUNDS)

For necessary expenses not otherwise provided for, for acquisition, establishment, and improvement by contract or purchase, and hire of air and navigation and experimental facilities, including initial acquisition of nec­essary sites by lease or grant; engineering and service testing including construction of test facilities, during “April 1, 1985” in para­graph (2) and inserting “April 1, 1986” in lieu thereof: Provided further, That any such funding shall be reported to the Committee on Appropriations of the Senate and the House of Representatives.

CONGRESSIONAL RECORD - SENATE September 17, 1986

RESEARCH, ENGINEERING, AND DEVELOPMENT (AIRPORT AND AIRWAY TRUST FUND)

For necessary expenses, not otherwise provided for, for research, engineering, and development, in accordance with the provi­sions of the Federal Aviation Act (49 U.S.C. 1301-1842), including construction of experi­ment programs, the obligations for which are in excess of $141,700,000, to be derived from the Airport and Airway Trust Fund and to remain avail­able until expended: Provided, That there may be credited to this appropriation funds received from States, counties, municipal­i­ties, other public authorities, and private sources, for expenses incurred for research, engineering, and development.

GRANTS-IN-AID FOR AIRPORTS (LIQUIDATION OF CONTRACT AUTHORIZATION) (AIRPORT AND AIRWAY TRUST FUND)

(INCLUDING RESCISSION)

For liquidation of obligations incurred for airport planning and development under section 305 of Public Law 93-627 and amended, and under other law authorizing such obligations, and obligations for noise com­patibility planning and programs, (fiscal year 1987) ($800,000,000) ($800,000,000), to be derived from the Airport and Airway Trust Fund and to remain available until expended: Provided, That none of the funds in this Act shall be available for the planning or execu­tion of programs the commitments for which are in excess of $3,914,000,000 in fiscal year 1987 for grants-in-aid for airport planning and development, and noise compatibility planning and pro­grams, notwithstanding section 506(c)(4) of the Airport and Airway Improvement Act of 1982; Provided further, That, $50,000,000 of the appropriated amount shall be available for airport development and planning pur­suant to section 505(a) of the Airport and Airway Improvement Act of 1982 is hereby rescinded.

OPERATION AND MAINTENANCE, METROPOLITAN WASHINGTON AIRPORTS

For expenses incidental to the care, oper­ation, maintenance, improvement, and pro­motion of the federally-owned civil airports in the vicinity of the District of Columbia, including purchase of six passenger motor vehicles for police use, for replacement only, $6,682,000: Provided, That there may be credited to this appropriation funds received from Federal, state, local authorities, or private sources, for expenses incurred in the maintenance and operation of the federally-owned civil airports.

CONSTRUCTION, METROPOLITAN WASHINGTON AIRPORTS

For necessary expenses for construction at the federally-owned civil airports in the vi­cinity of the District of Columbia, including purchase of six passenger motor vehicles for police use, cleaning, and repair of uniforms; and arms and ammunition, $35,000,000: Pro­vided, That there may be credited to this appropriation funds received from Federal, state, local authorities, or private sources, for expenses incurred in the maintenance and operation of the federally-owned civil airports.

$7,000,000, to be derived from the Airport and Airway Trust Fund and to remain available until expended: Provided, That there may be credited to this appropriation funds received from States, counties, municipal­i­ties, other public authorities, and private sources, for expenses incurred for research, engineering, and development.

$5,000,000, to be derived from the Airport and Airway Trust Fund and to remain available until expended: Provided, That there may be credited to this appropriation funds received from States, counties, municipal­i­ties, other public authorities, and private sources, for expenses incurred for research, engineering, and development.
CONGRESSIONAL RECORD—SENATE 23701

September 17, 1986

MOTOR NATIONAL and Washington Dulles International Airports.

AVIATION INSURANCE REVOLVING FUND

The Secretary of Transportation is hereby authorized to make such expenditures and investments, within the limits of funds available pursuant to section 1306 of the Act of August 23, 1958, as amended (49 U.S.C. 1536), and in accordance with section 104 of the Government Corporation Control Act, as amended (31 U.S.C. 9104), as may be necessary in carrying out the program set forth in the budget for the current fiscal year for aviation insurance activities under said Act.

AIRCRAFT PURCHASE LOAN GUARANTEE PROGRAM

The Secretary of Transportation may hereafter issue notes or other obligations to the Secretary of the Treasury, in such forms and denominations bearing such maturities, and subject to such terms and conditions as the Secretary of the Treasury may prescribe. Such obligations may be issued to pay any necessary expenses required pursuant to any guarantee issued under the Act of September 7, 1957, Public Law 85-307, as amended (49 U.S.C. 1624 note). None of the funds in this Act shall be available for the implementation or execution of programs the obligations for which are in excess of $75,000,000 during fiscal year 1987. Such obligations shall be redeemed by the Secretary from funds authorized by this section. The Secretary of the Treasury shall purchase any such obligations, and for such purpose shall as a public duty undertake to assure the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as now or hereafter in force. The purposes for which securities may be issued under such Act are extended to include any purchase of notes or other obligations issued under the subchapter. The Secretary of the Treasury may sell any such obligations at such times and price and upon such conditions and as he shall determine in his discretion. All purchases, redemptions, and sales of such obligations by such Secretary shall be treated as public debt transactions of the United States.

For the settlement of promissory notes issued to the Secretary of the Treasury, $73,224,900, to remain available until expended, together with such sums as may be necessary for the purpose of converting such notes.

FEDERAL HIGHWAY ADMINISTRATION

LIMITATION ON GENERAL OPERATING EXPENSES

Necessary expenses for administration, operation, and research of the Federal Highway Administration, not to exceed $202,750,000, to be paid, in accordance with law, from appropriations made available by this Act to the Federal Highway Administration together with advances and reimbursements provided by the Federal Highway Administration: Provided, That not to exceed $39,288,000 of the preceding amount shall remain available until expended: Provided further, That, notwithstanding any other provision of law, there may be credited to the fund hereunder appropriated such sums as may be necessary, to be derived from the Highway Trust Fund, and to remain available until expended, of which $10,000,000 is hereby appropriated, to

HIGHWAY SAFETY RESEARCH AND DEVELOPMENT (HIGHWAY TRUST FUND)

For necessary expenses in carrying out provisions of title 23, United States Code, to be derived from the Highway Trust Fund and to remain available until expended: Provided, That not to exceed $100,000 of the amount appropriated herein shall be available for "Limitation on general operating expenses": Provided further, That none of the funds in this Act shall be available for the planning or execution of programs the obligations for which are in excess of $10,000,000, in fiscal year 1987 for "Highway-related safety grants".

[AIRLINE-HIGHWAY CROSSINGS DEMONSTRATION PROJECTS]

For necessary expenses of certain railroad-highway crossings demonstration projects as authorized by section 163 of the Federal-Aid Highways Act of 1973, as amended, and subject to the terms and conditions as he shall determine, all of the amounts provided during fiscal year 1987 for such purposes shall be available until expended.

FEDERAL-AID HIGHWAYS (LIQUIDATION OF CONTRACT AUTHORIZATION) (HIGHWAY TRUST FUND)

For necessary expenses in connection with the liquidation of certain non-revenue-producing contracts authorized under any Act of Congress, not to exceed $13,036,000,000, to be derived from the Highway Trust Fund and to be used for any purpose he may determine.

INTERMODAL URBAN DEMONSTRATION PROJECT (HIGHWAY TRUST FUND)

For necessary expenses to carry out a project under the laws, not otherwise provided for, to be derived from the Highway Trust Fund, and to remain available until expended, of which $10,000,000 is hereby appropriated, to

HIGHWAY SAFETY AND ECONOMIC DEVELOPMENT DEMONSTRATION PROJECTS (HIGHWAY TRUST FUND)

For necessary expenses to carry out construction projects in the State of Mississippi on the Interstate Highway 55 South, Highway 72, on State Route 6 from Pontoclo to Oxford, on U.S. Highway 82 from I-55 to Starkville, and on U.S. Highway 72 from Corinth, Mississippi, to the Tennessee state line, that demonstrates the safety and economic benefit of widening and improving highways, and to carry out projects in connection with the upgrading of certain highways for the purpose of improving the economic development of the area, not to exceed $9,000,000, to be derived from funds appropriated to the Secretary of the Treasury from the Highway Trust Fund:

Motor Carrier Safety Grants [LIQUIDATION OF CONTRACT AUTHORIZATION] (HIGHWAY TRUST FUND)

For payment of obligations incurred for motor carrier safety grants, as authorized by law, $18,000,000, to be derived from the Highway Trust Fund and to remain available until expended: Provided, That none of the funds in this Act shall be available for the planning or execution of any such programs the obligations for which are in excess of $10,000,000 in fiscal year 1987 for "Motor carrier safety grants":

HIGHWAY SAFETY RESEARCH AND DEVELOPMENT (HIGHWAY TRUST FUND)

For necessary expenses in carrying out provisions of title 23, United States Code, to be derived from the Highway Trust Fund and to remain available until expended: Provided, That not to exceed $100,000 of the amount appropriated herein shall be available for "Limitation on general operating expenses": Provided further, That none of the funds in this Act shall be available for the planning or execution of programs the obligations for which are in excess of $10,000,000, in fiscal year 1987 for "Highway-related safety grants".

For necessary expenses to carry out provisions of section 155, title 23, United States Code, to remain available until expended, $10,000,000.

For necessary expenses of certain access highway projects, as authorized by section 155, title 23, United States Code, to remain available until expended, $10,000,000.

Baltimore-Washington Parkway (HIGHWAY TRUST FUND)

For necessary expenses, not otherwise provided for, to be derived from the Highway Trust Fund and to be withdrawn therefrom at such times and in such amounts as may be necessary.

DEMONSTRATION PROJECTS

For necessary expenses in connection with the upgrading of certain highways for the transportation of nuclear waste generated during defense-related activities, not to exceed $10,000,000, to be derived from the Highway Trust Fund and to remain available until expended.

For necessary expenses to carry out a highway project to depress a highway in Shawnee, Oklahoma, that demonstrates methods of improving air service to a small community by extension of a runway over a depressed road, $1,887,000, to remain available until expended.

EXPRESSWAY GAP CLOSING DEMONSTRATION PROJECT

For necessary expenses to carry out a highway construction project along State Route 111 in north-central California that demonstrates methods of reducing motor vehicle congestion and increasing employment, $7,800,000, to be derived from funds appropriated to the Secretary of the Treasury from the Highway Trust Fund:

[INTERMODAL URBAN DEMONSTRATION PROJECT (HIGHWAY TRUST FUND)]

For necessary expenses to carry out the provisions of section 124 of the Federal-Aid Highway Amendments of 1974, $11,000,000, to be derived from the Highway Trust Fund.

For necessary expenses to carry out construction projects in the State of Mississippi on the Interstate Highway 55 South, Highway 72, on State Route 6 from Pontoclo to Oxford, on U.S. Highway 82 from I-55 to Starkville, and on U.S. Highway 72 from Corinth, Mississippi, to the Tennessee state line, that demonstrates the safety and economic benefit of widening and improving highways, and to carry out projects in connection with the upgrading of certain highways for the purpose of improving the economic development of the area, not to exceed $9,000,000, to be derived from funds appropriated to the Secretary of the Treasury from the Highway Trust Fund:

Motor Carrier Safety Grants [LIQUIDATION OF CONTRACT AUTHORIZATION] (HIGHWAY TRUST FUND)

For payment of obligations incurred for motor carrier safety grants, as authorized by law, $18,000,000, to be derived from the Highway Trust Fund and to remain available until expended: Provided, That none of the funds in this Act shall be available for the planning or execution of programs the obligations for which are in excess of $10,000,000 in fiscal year 1987 for "Motor carrier safety grants":

HIGHWAY SAFETY RESEARCH AND DEVELOPMENT (HIGHWAY TRUST FUND)

For necessary expenses in carrying out provisions of title 23, United States Code, to be derived from the Highway Trust Fund and to remain available until expended: Provided, That not to exceed $100,000 of the amount appropriated herein shall be available for "Limitation on general operating expenses": Provided further, That none of the funds in this Act shall be available for the planning or execution of programs the obligations for which are in excess of $10,000,000, in fiscal year 1987 for "Highway-related safety grants".
remain available until expended, for the projects identified under this head on Route 301 in the District of Columbia, provided all funds appropriated under this head shall be exempt from any limitation on obligations for Federal-aid highways and highway safety construction programs.

[AIRPORT ACCESS DEMONSTRATION PROJECT (HIGHWAY TRUST FUND)]

For necessary expenses to carry out a demonstration project in the vicinity of the Ontario International Airport in San Bernardino County, California, for the purpose of demonstrating methods of improving highway access to an airport that is projected to incur a substantial increase in air service, $4,000,000, to remain available until expended and to be derived from the Highway Trust Fund: Provided, That such funds shall be exempt from any limitation on obligations for Federal-aid highways and highway safety construction programs.

[HIGHWAY SAFETY IMPROVEMENT DEMONSTRATION PROJECT (HIGHWAY TRUST FUND)]

For the purpose of carrying out a coordinated project of highway improvements in the vicinity of Pontiac and East Lansing, Michigan, that demonstrates methods of enhancing safety and promoting economic development through widening and resurfacing of the state and federal primary system and on roads on the Federal-aid urban system, there is hereby authorized to be appropriated $32,000,000, to be derived from the Highway Trust Fund and to remain available until expended, of which $7,000,000 is hereby appropriated: Provided, That all funds appropriated under this head shall be exempt from any limitation on obligations for Federal-aid highways and highway safety construction programs.

[HIGHWAY-RAILROAD GRADE CROSSING SAFETY DEMONSTRATION PROJECT (HIGHWAY TRUST FUND)]

For the purpose of carrying out a coordinated project of highway-railroad grade crossing separations in Minoa, New York, that demonstrates methods of enhancing highway-railroad grade crossing safety while minimizing surrounding environmental effects, there is hereby authorized to be appropriated $50,000,000, to be derived from the Highway Trust Fund and to remain available until expended, of which $3,000,000 is hereby appropriated: Provided, That such funds shall be exempt from any limitation on obligations for Federal-aid highways and highway safety construction programs.

[NUCLEAR WASTE TRANSPORTATION SAFETY DEMONSTRATION PROJECT (HIGHWAY TRUST FUND)]

For necessary expenses for a project to construct a relief route in the Los Alamos area of New Mexico, that demonstrates methods of enhancing the safety, capacity, and operation of the Theodore Roosevelt Bridge on I-66, connecting the Commonwealth of Virginia and the District of Columbia, provided the funds appropriated under this head shall be derived from the Highway Trust Fund and to remain available until expended: Provided, That such funds shall be exempt from any limitation on obligations for Federal-aid highways and highway safety construction programs.

[NATURAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (HIGHWAY TRUST FUND)]

For necessary expenses to carry out a demonstration project in the vicinity of the New Orleans International Airport in Jefferson Parish, Louisiana, for the purpose of demonstrating methods of improving highway access to an airport that is suffering from commuter congestion and is in the process of extending its main east-west runway, $5,000,000, to remain available until expended and to be derived from the Highway Trust Fund: Provided, That such funds shall be exempt from any limitation on obligations for Federal-aid highways and highway safety construction programs.

FEDERAL RAILROAD ADMINISTRATION

[OFFICE OF THE ADMINISTRATOR]

For necessary expenses of the Federal Railroad Administration, not otherwise provided for, including authorized expenses associated with the House and Senate Committees on Appropriations: Provided, That none of the funds in this Act shall be available for the planning or execution of a program making commitments to guarantee new loans under the Railroad Revitalization and Rehabilitation Act of 1970, as amended, and that no new commitments to guarantee loans under sections 5(a) or 211(b) of the Railroad Reorganization Act of 1973, as amended, shall be made: Provided further, That none of the funds in this Act shall be available for the acquisition, sale, or transfere of Washington Union Station without the prior approval of the House and Senate Committees on Appropriations: Provided further, That notwithstanding any other provision of law, the funds available under this head, $10,000,000, shall be available for necessary expenses for rail assistance authorized by section 5(q) of the Department of Transportation Act, as amended, to remain available until expended: Provided further, That $7,500,000 of the fiscal year 1987 funds available under section 5(n) shall be made available for use directly under sections 5(h)(2)(B) and 5(h)(3)(C) of the Department of Transportation Act, as amended, notwithstanding any provisions therein to the contrary: Provided further, That each State shall be entitled to and no more than $50,000 under the combined provisions of section 5(h)(2) and section 5(i), notwithstanding any provisions therein to the contrary: Provided further, That the State may obligate all such funds in the fiscal year 1987 funds available under section 5(h)(2) until such State has obligated all funds granted to it under this Act in the fiscal years prior to the beginning of fiscal year 1982, other than funds not expended due to pending litigation: Provided further, That a State denied funding by reason of the preceding proviso may still apply for and receive funds for planning purposes.

RAILROAD SAFETY

[RAILROAD SAFETY] For necessary expenses in connection with railroad safety, not otherwise provided for, $28,790,000 of which $28,424,000 is available for obligation for "Alcohol safety incentive grants" authorized under 23 U.S.C. 408: Provided, That none of the funds in this Act shall be available for the planning or execution of programs authorized under section 5(h)(2) of Public Law 95-659, as amended, for programs, the total obligations for which are in excess of $131,040,000 in fiscal years 1983, 1984, 1985, and 1986, and 1987: Provided further, That such funds shall be exempt from any limitation on obligations for Federal-aid highways and highway safety construction programs.

RAILROAD RESEARCH AND DEVELOPMENT

For necessary expenses for railroad research and development, $9,800,000 of which $8,490,000 is available for obligation for "Alcohol safety incentive grants" authorized under 23 U.S.C. 408: Provided, That none of the funds in this Act shall be available for administering the provisions of 23 U.S.C. 402: Provided further, That the funds available for obligation for "Alcohol safety incentive grants" under section 23 U.S.C. 408, $5,000,000, is hereby rescinded.

25702 CONGRESSIONAL RECORD—SENATE September 17, 1986
road-community-police grade crossing safety improvement project.

NORTHEAST CORRIDOR IMPROVEMENT PROGRAM

For necessary expenses related to Northeast Corridor improvements authorized by title VII of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 851 et seq.), $11,962,000, to remain available until expended.

CONRAIL LABOR PROTECTION

Any unobligated balances of funds provided for the "Conrail work force reduction program" in excess of $3,456,500 that are not required for reimbursement of termination allowances for terminations effected not later than September 30, 1986, paid to Conrail as agent for the Board, shall be made available for Conrail labor protection, as set forth herein,

provided further, That none of the funds provided for in this or any other Act shall be made available until expended.

GRANTS TO THE NATIONAL RAILROAD PASSENGER CORPORATION (INCLUDING TRANSFER OF FUNDS)

To enable the Secretary of Transportation to make grants to the National Railroad Passenger Corporation for passenger losses incurred by the Corporation, capital improvements, and labor protection costs authorized by 45 U.S.C. 856, to remain available until expended, $613,000,000, of which $11,000,000 shall be derived from unexpended balances of Conrail work force reduction funds available for the Corporation, as agent for the Board, together with such sums that are available from Conrail work force reduction as of September 30, 1986 in excess of $3,456,500, are provided. That none of the funds herein appropriated shall be used for lease or purchase of passenger motor vehicles or for expenses of the Board or any officer or employee of the Corporation, unless the lease or purchase is for the benefit of the public and the lease is made upon such terms and conditions as may be prescribed by the Board.

CONRAIL COMMUTER TRANSITION ASSISTANCE

For necessary expenses of Conrail commuter transition assistance, not otherwise provided for, $5,000,000, to remain available until expended.

URBAN MASS TRANSPORTATION ADMINISTRATION

ADMINISTRATIVE EXPENSES

For necessary administrative expenses of the urban mass transportation program authorized by the Urban Mass Transportation Act of 1984, as amended (49 U.S.C. 1601 et seq.), and 23 U.S.C. chapter 1, in connection with these activities, including hire of passenger motor vehicles and services as authorized by 5 U.S.C. 1109, $31,000,000, of which not to exceed $500,000 shall be available for the Office of the Administrator.

REDEEMABLE PREFERENCE SHARES

Notwithstanding any other provision of law, the Secretary is hereby authorized to issue and sell, and the Secretary of the Treasury is hereby authorized to purchase, redeemable preference shares, to remain available until September 30, 1986, and sell, and the Secretary of the Treasury until such date shall purchase fund anticipation notes, guaranteed by the Corporation and any guaranty commitments shall be made during fiscal year 1987.

For necessary expenses related to the urban mass transportation program authorized by the Urban Mass Transportation Act of 1984, as amended (49 U.S.C. 1601 et seq.), and 23 U.S.C. chapter 1, in connection with these activities, including hire of passenger motor vehicles and services as authorized by 5 U.S.C. 1109, $31,000,000, of which not to exceed $500,000 shall be available for the Office of the Administrator.

RESEARCH, TRAINING, AND HUMAN RESOURCES

For necessary expenses for research, training, and human resources as authorized by the Urban Mass Transportation Act of 1966, as amended (49 U.S.C. 1601 et seq.), and 23 U.S.C. chapter 1, in connection with these activities, including hire of passenger motor vehicles and services as authorized by 5 U.S.C. 1109, $17,400,000. Provided, That there may be credited to this appropriation any funds received from municipalities, other public authorities, and private sources, for expenses incurred for training.
CONGRESSIONAL RECORD—SATELLITE

September 17, 1986

For necessary expenses to carry out the provisions of sections 9 and 18 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1601 et seq.), $2,000,000,000, to remain available until expended: Provided, That notwithstanding any other provision of law, before apportionment of these funds, $16,500,000 shall be made available for the purposes of section 18 of the Urban Mass Transportation Act of 1964, as amended: Provided further, That, notwithstanding any other provision of law, of the amount available for operating assistance under this Act, no more than $541,786,487 may be used for operating assistance in urbanized areas with a population of 1,000,000 or more.

DISCRETIONARY GRANTS (LIMITATION ON OBLIGATIONS) (HIGHWAY TRUST FUND) None of the funds in this Act shall be available for the implementation or execution of programs in excess of $1,018,000,000 in fiscal year 1987 for grants under the contract authority authorized in section 21(a)(2)(B) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1601 et seq.), administered by the Urban Mass Transportation Administration. $950,000,000 $1,190,000,000, to be derived from the Highway Trust Fund and to remain available until expended.

INTERSTATE TRANSFER GRANTS—TRANSIT For necessary expenses to carry out the provisions of section 14 of Public Law 96-184, $217,239,000 $285,000,000, to remain available until expended.

ST. LAWRENCE SEAWAY DEVELOPMENT CORPORATION The Saint Lawrence Seaway Development Corporation is hereby authorized to make such expenditures, within the limits of funds and borrowing authority available to the Corporation, and in accord with law, and to make such contracts and commitments without regard to fiscal year limitations as provided by section 104 of the Government Corporation Control Act, as amended, as may be necessary in carrying out the programs set forth in the Corporation’s budget for the current fiscal year and for the fiscal year following.

LIMITATION ON ADMINISTRATIVE EXPENSES Not to exceed $1,018,000,000 $1,990,000 shall be available for administrative expenses provided that amounts so computed on any basis, including not to exceed $3,000 for official entertainment expenses to be expended upon the approval or authority of the Secretary of Transportation: Provided, That Corporation funds shall be available for the hire of passenger motor vehicles and aircraft, operation and maintenance of aircraft, uniforms and allowances therefor, as authorized by law (5 U.S.C. 5901-5902), and $18,000 shall be available for services as authorized by 5 U.S.C. 3109.

EISENHOWER LOCK REPAIR For necessary expenses to repair and rehabilitate Eisenhower Locks located near Massena, New York, $2,000,000, to remain available until expended.

RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION RESEARCH AND SPECIAL PROGRAMS For necessary expenses to discharge the functions of the Research and Special Programs Administration, for expenses for conducting research and development, and for grants-in-aid to carry out a pipeline safety program, as authorized by the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979, $19,250,000, of which $5,000,000 shall be available only for natural gas and hazardous liquid pipeline safety grants-in-aid, and of which $7,050,000 shall remain available until expended: Provided, That there may be credited to this appropriation funds received from States, counties, municipalities, other public authorities, and private sources for expenses incurred for training: Provided further, That of the funds made available for grants-in-aid, the sum provided over and above the amount made available for this purpose in fiscal year 1986 shall be used only for expenditure of additional enforcement personnel beyond the personnel level in each State as of September 30, 1986. OFFICE OF THE INSPECTOR GENERAL SALARIES AND EXPENSES For necessary expenses of the Office of the Inspector General in carrying out the provisions of the Inspector General Act of 1978, $1,975,000,000, to remain available until expended.

TITLE II—RELATED AGENCIES ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD SALARIES AND EXPENSES For necessary expenses for the Architectural and Transportation Barriers Compliance Board, authorized by section 502 of the Rehabilitation Act of 1973, as amended, $1,990,000.

NATIONAL TRANSPORTATION SAFETY BOARD SALARIES AND EXPENSES For necessary expenses of the National Transportation Safety Board, including hire of passenger motor vehicles and aircraft; services as authorized by 5 U.S.C. 3109, but at rates for individuals not to exceed the per diem rate equivalent to the rate for a GS-18; uniforms, or allowances therefor, as authorized by law (5 U.S.C. 5901-5902), $22,240,000, of which not to exceed $500 may be used for official reception and representation expenses.

INTERSTATE COMMERCE COMMISSION SALARIES AND EXPENSES (INCLUDING TRANSFER OF FUNDS) For necessary expenses of the Interstate Commerce Commission, including services as authorized by 5 U.S.C. 3109, and not to exceed $5,000 for official reception and representation expenses, $474,900,000.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY INTEREST PAYMENTS For necessary expenses for interest payments, to remain available until expended,
$51,683,569: Provided, That these funds shall be disbursed pursuant to terms and conditions established by Public Law 98-184 and the Interstate Bond Repayment Participation Agreement.

TITILE III—GENERAL PROVISIONS

Sec. 301. During the current fiscal year applicable to the Department of Transportation shall be available for maintenance and operation of aircraft; hire of personnel for transportation of aircraft; purchase of liability insurance for motor vehicles operating in foreign countries on official department business; and uniforms, or allowances therefor, as authorized by law (5 U.S.C. 5901-5902).

Sec. 302. Funds appropriated for the Panama Canal Commission may be apportioned notwithstanding section 3679 of the Revised Statutes, as amended (31 U.S.C. 1341), to the extent necessary to permit payment of such pay increases for officers or employees as may be authorized by administrative action pursuant to law that are not in excess of statutory increases granted for the same period in corresponding rates of compensation for other employees of the Government in comparable positions.

Sec. 303. Funds appropriated under this Act for expenditures by the Commission for the construction of rail-highway crossings under section 322(a) of title 23, United States Code, or under section 216(a)(2)(B) of the Urban Mass Transportation Act of 1964, as amended, shall be available for obligation until expended.

Sec. 304. Appropriations contained in this Act for the Department of Transportation shall be available for services as authorized by 5 U.S.C. 1902, and (1) for transportation of said dependents between schools serving the area which they attend and their places of residence when the Secretary, under such regulations as may be prescribed, determines that such schools are not accessible by public means of transportation on a regular basis.

Sec. 305. None of the funds appropriated in this Act for the Panama Canal Commission may be apportioned unless in conformance with the Panama Canal Treaties of 1977 and any law implementing those treaties.

Sec. 306. None of the funds provided in this Act may be used for planning or construction of rail-highway crossings under section 322(a)(title 23, United States Code, or under section 701(a)(5) or section 703(1)(A) of the Railroad Revitalization and Regulatory Reform Act of 1978, as amended.

(1) School Street crossing in Groton, Connecticut; and

(2) Broadway Extension crossing in Storington, Connecticut.

Sec. 307. None of the funds in this Act shall be used for the planning or execution of any project where the expenses of, or otherwise compensate, non-Federal parties intervening in regulatory or adjudicatory proceedings before the Commission are included in the cost of said projects.

Sec. 308. None of the funds in this Act shall be used to assist, directly or indirectly, any State in imposing mandatory State inspections fees or sticker requirements on vehicles that are lawfully registered in another State, including vehicles engaged in interstate commercial transportation that are in compliance with Part 396—Inspection and Maintenance of the Federal Motor Carrier Safety Regulations of the United States Department of Transportation.

Sec. 309. None of the funds appropriated by this Act shall remain available for obligation beyond the fiscal year or may be transferred to other appropriations unless expressly so provided herein.

Sec. 310. Notwithstanding any other provision of law, total amounts of contract authority authorized in section 21(a)(2)(B) of the Urban Mass Transportation Act of 1964, as amended, shall be available for obligation until expended.

Sec. 311. None of the funds in this Act or any prior Act shall be apportioned or allocated to all the States for any fiscal year, except as otherwise authorized by the Act.

Sec. 312. (1) For fiscal year 1987 the Secretary shall apportion the obligation limitation for Federal-aid highways by allocation in the ratio which sums authorized to be appropriated are reflected in the current Federal-aid highways and highway safety construction which are apportioned or allocated to each State for such fiscal year. The sums authorized to be appropriated are reflected in the current Federal-aid highways and highway safety construction which are apportioned or allocated to all the States for such fiscal year.

(b) During the period October 1 through December 31, 1986, no State shall obligate more than 75 percent of the amount distributed to such State under subsection (a), and the total of all State obligations during this period shall not exceed 15 percent of the total amount distributed to all States under such subsection.

(c) Notwithstanding subsections (a) and (b), the Secretary shall—

(1) provide all States with authority sufficient to prevent lapses of sums authorized to be appropriated for Federal-aid highways and highway safety construction which have been apportioned to a State, except in those instances in which a State indicates its intention to lapse sums apportioned under section 104(b)(5)(A) of title 23, United States Code;

(2) after August 1, 1987, revise a distribution of the funds made available under subsection (a) if a State will not obligate the amount distributed during that fiscal year and redistribute sufficient amounts to those States able to obligate amounts in addition to those previously distributed during that fiscal year; and

(3) give priority to States which have large unobligated balances of funds apportioned under section 104 of title 23, United States Code, and giving priority to those States which, because of statutory changes made by the Surface Transportation Assistance Act of 1983 and the Federal-aid Highway Act of 1981, have experienced substantial proportional reductions in their apportionments and allocations; and

Sec. 313. None of the funds in this Act shall be used for administrative expenses, and the Federal lands highway program.

Sec. 314. The limitation on obligations for Federal-aid highway construction programs for fiscal year 1987 shall not apply to obligations for emergency response funds authorized under section 118 of the Surface Transportation Assistance Act of 1978, as amended, and the Detroit, Michigan, area until a source of funds has been approved in accordance with Michigan law.

Sec. 315. (a) None of the funds in this Act shall be used for administrative expenses, and the Federal lands highway program.

Sec. 316. The Secretary is directed to implement the Department of Transportation Assistance Act of 1978, section 916, to the extent necessary to permit the Construction and Maintenance of the Federal Motor Carrier Safety Regulations of the United States Department of Transportation under section 125 of title 23, United States Code, obligations under section 157 of title 23, United States Code, projects covered under section 147 of the Surface Transportation Assistance Act of 1978, section 9 of the Federal-Aid Highway Act of 1981, subsections 131(b) and (j) of Public Law 97-494, section 118 of the National Visitors Center Facilities Act of 1968, or section 320 of title 23, United States Code.

Sec. 317. (a) None of the funds in this Act shall be used for administrative expenses, and the Federal lands highway program.

Sec. 318. None of the funds in this Act shall be used for administrative expenses, and the Federal lands highway program.

Sec. 319. The City of Linden, New Jersey, and its successors and assigns shall be hereby released from all the terms, conditions, reservations, and restrictions contained in the deed dated February 27, 1947, by which the United States conveyed certain real property to the City of Linden, New Jersey, for airport purposes.

Sec. 320. None of the funds in this Act shall be used to implement section 404 of title 23, United States Code.

Sec. 321. (a) ADOPTION OF THE FEDERAL HIGHWAY ADMINISTRATION ENFORCEMENT PROGRAM—The Secretary of Transportation shall conduct an evaluation of the Federal Highways Administration's enforcement program to determine the extent to which those enforcement activities contribute to the avoidance of violations of Federal-aid highway laws. The report shall include:

(1) a comparison of end-of-year staffing levels by inspector category to staffing goals and a statement as to the currency and va-
ldility of the staffing standards on which the goals are based;
(2) schedules showing the experience, in years, of inspectors, inspector supervisors, and the extent to which inspectors have received all the mandatory or recommended training;
(3) a description of the criteria used to set annual work programs and an explanation of how these programs ensure compliance with inspection programs and Federal regulations and safe operating practices;
(4) a comparison of actual inspections performed during the fiscal year with the annual work programs disaggregated to the field locations;
(5) a statement of the adequacy of the internal management controls available to ensure that field managers are complying with inspection priorities and minimum inspection standards, and to collect and analyze inspection data;
(6) the status of the Department's efforts to identify the inspection programs and Federal regulations to include technological, management, and structural changes taking place within the various transportation modes, including a listing of the backlog of proposed regulatory changes identified as being critical to safety;
(7) a list of the interim and permanent measures of effectiveness—"best proxies" standing between the ultimate goal of accident prevention and other program activities that are being used to evaluate progress in meeting program objectives, the quality of program delivery, and the nature of emerging safety problems;
(8) a listing of all enforcement actions taken, including all civil penalties, during the year, including the inspector's name and address of each organization against which an enforcement action was taken, the reason for the action, and the type of action taken;
(9) a listing of the total amount of civil penalties assessed closed by fiscal year beginning with fiscal year 1977; and
(10) a set of safety statistics covering each of the last ten years that best depict the safety record of each transportation sector regulated by departmental inspectors.

(b) LONG-RANGE NATIONAL TRANSPORTATION STRATEGIES STUDY.—The Com­mission shall undertake a long-range, multi-modal national transportation strategies study. The purpose of the study shall be to forecast long-term needs and costs for developing and maintaining facilities and services to achieve a desired national transportation system in the year 2015. The modes to be included are interstate and other priority highways and roads, mass transportation-rail, pipelines, and aviation. The study shall include detailed analyses of transportation needs within six to nine metropolitan areas that have diverse population, development, and demographic patterns, including at least one interstate metropolitan area. The long-range transportation planning study shall address such issues as:

(1) the need to continue a national transportation planning program and program to further social, environmental, and mobility goals and objectives of the Nation;
(2) public and private fiscal support, growth-related, the demographic character of population, geographic differences, and projected development or decline in specific regions;
(3) the current and future material and human resource needs that include facilities and equipment, employee requirements, and training and educational needs for the necessary manpower;
(4) the market potential— including future travel demand, the shift in industry, developments and configurations that may affect transportation needs;
(5) the development of existing transportation networks can be further developed to meet future travel and goods movement demands in view of cost, land use, environmental, social, economic, and technological considerations; and
(6) the Federal public strategies and costs by mode of transportation necessary to achieve and maintain a desired transportation system in the year 2015.

This study shall be submitted to Congress on or before December 31, 1987.

(c) ESSENTIAL AIR SERVICE OPTIONS STUDY.—The Secretary of Transportation shall con­duct a study of the impact to small end remote communities of the discontinuation of essential air service subsidies. The study shall:

(1) identify, those communities which are likely to be affected by a discontinuation of such subsi­dies, the Secretary shall identify various methods of continued air transportation support.

In presenting these methods, the Secretary shall give financial and support options for each. The study shall be conducted with appropriate consultation with affected regional transportation agencies.

The study shall transmit the study to Congress by February 1, 1987.

Sec. 324. Within seven calendar days of the obligation date, the Urban Mass Transportation Administration shall publish in the Federal Register an announcement of each obligation pursuant to sections 3 and 9 of the Urban Mass Trans­portation Act of 1964, as amended, including the grant number, the grant amount, and the transit property receiving each grant.

Sec. 325. Of the amounts available under the contract authority authorized in section 21(a)(2)(B) of the Urban Mass Transportation Act of 1964, as amended, $9,001,532 shall be made available to the City of Philadel­phia, Pennsylvania, in reimbursement of the Federal share of extraordinary costs in­curred in construction of the Center City rapid transit system.

The Secretary shall publish such certification in the Federal Register not later than 10 days after the certification is made to the Secretary.

Sec. 329. (a) Section 112(b) of title 23, United States Code, is amended by striking out "to the Secretary that—"

(b) The Secretary shall publish such certification in the Federal Register not later than 10 days after the certification is made to the Secretary.

(ii) The Secretary shall publish such certification in the Federal Register not later than 10 days after the certification is made to the Secretary.

Sec. 329. Of the funds in this Act shall be used to enforce any rules, poli­cies, guidelines, or regulations for the delay tran­sit grants or condition their award on the methods or means by which providers of air transportation services are required to comply, or on the extent or amount of services or functions to be carried out by various private air transportation service providers which in any way condition, establish pref­erence for, or otherwise base or withholding of Federal assistance under this Act on the nature of the local transit plan­ning or decision making process, or the deci­sions made as to the choice of public or pri­vate providers for the provision of mass transit services or functions: Provided, That it is not the intent of this section to super­cede the existing statutory requirements of sections 901, 801, and 802 of the Urban Mass Transportation Act of 1964, as amended.

Sec. 328. Section 324 of the Department of Transportation and Related Agencies Appropriations Act, 1986 (Public Law 99-190; 99 Stat. 1288) is amended—

(1) in subsection (e), by striking "a deter­mination" and inserting in lieu thereof "the certification"; and

(2) by striking subsection (d) and inserting in lieu thereof the following:

(1) Removal or Limitation.—Subsec­tions (a) and (b) shall cease to be in effect if the Chairman of the Board of the Metropoli­tan Transportation Authority (a public au­thority of the State of New York) certifies to the Secretary that—

(a) a loss of revenues has resulted from the limitation imposed by subsection (a); or

(b) such limitation has resulted in other traffic problems.

The Secretary shall publish such certification in the Federal Register not later than 10 days after the certification is made to the Secretary.

Sec. 329. (a) Section 112(b) of title 23, United States Code, is amended by striking out "to the Secretary that—"

(b) The Secretary shall publish such certification in the Federal Register not later than 10 days after the certification is made to the Secretary.

(ii) The Secretary shall publish such certification in the Federal Register not later than 10 days after the certification is made to the Secretary.

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Sec. 329. (a) Section 112(b) of title 23, United States Code, is amended by striking out "to the Secretary that—"

(b) The Secretary shall publish such certification in the Federal Register not later than 10 days after the certification is made to the Secretary.

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providing for terms and conditions related to the contractor's business in South Africa in accordance with a State or local law if such recipient first enters into an agreement with the State or local government that any provision prohibited as a result of such prohibition or limitation which are in excess of the costs that would otherwise have been incurred.

SEC. 330. PROHIBITION ON LANDING RIGHTS OF SOUTH AFRICAN AIRCRAFT.

(a) Prohibition. The Secretary of Transportation shall prohibit the takeoff and landing of any aircraft by a foreign air carrier owned, directly or indirectly, by the Government of South Africa or by South African nationals.

(b) Exceptions for Emergencies. The Secretary of Transportation may provide for such exceptions from the prohibition set forth in subsection (a) as the Secretary considers necessary to provide for emergencies in which the safety of an aircraft or its crew or passengers are threatened.

(c) Extension.-The Secretary of Transportation shall issue such regulations, licenses, and orders as are necessary to carry out this section.

SEC. 331. SUITABILITY OF AIR TRAFFIC CONTROLLERS WHO PARTICIPATED IN THE 1981 STRIKE.

(a) Authority To Appoint or Reinstate Certain Former Airliners. Air Traffic Controllers.-Air traffic controllers whose appointments were terminated on account of the strike of air traffic controllers which began on or about August 3, 1981, shall, if they have not, as a class, been considered unsuitable for appointment or reinstatement in the Federal Aviation Administration, determinations of suitability for appointment or reinstatement to any such position shall be made on a case-by-case basis by the Office of Personnel Management in accordance with part 373 of title 5 of the Code of Federal Regulations (as in effect on June 1, 1986).

(b) Any person may be appointed or reinstated under this subsection only if such individual is qualified, or would, after appropriate retraining, be qualified, for the position involved.

(c) Restriction on Payment of Fine.- A fine imposed under subparagraph (A) on an individual for an act or practice constituting a violation may not be paid, directly or indirectly, by the person committing the violation itself.

(d) Seizure and Forfeiture of Aircraft.- Any aircraft used in connection with a violation of this section or any regulation, license, or order issued to carry out this section shall be subject to seizure by and forfeiture to the United States. All provisions of law relating to the seizure, forfeiture, and condemnation of articles for violations of the customs laws, the disposition of such articles, the proceeds from the sale thereof, and the remission or mitigation of such forfeitures shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under this paragraph, insofar as such provisions of law are applicable and not inconsistent with the provisions of this section; except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Department of the Treasury shall, for purposes of this paragraph, be exercised or performed by the Secretary of Transportation or by such persons as the Secretary may designate.

(d) Definitions.-

(1) Aircraft and Foreign Air Carrier.-The terms "aircraft" and "foreign air carrier" have the meanings given such terms in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. App. 1001).

(2) South Africa.-The term "South Africa" includes-

(A) the Republic of South Africa,

(B) any territory under the administration, legal or illegal, of South Africa; and

(C) the "bantustans" or "homelands", to which South African blacks are assigned on the basis of ethnic origin, including the Transkei, Bophuthatswana, Ciskei, and Venda.

(3) South African National.-The term "South African national" means-

(A) a citizen of South Africa; and

(B) any partnership, corporation, or other entity organized under the laws of South Africa.

(4) Authority To Evasions.-This section and the regulations issued to carry out this section shall apply to any person who undertakes or causes to be undertaken any transaction with the intent to evade this section or such regulations.

(5) Exclusions For Emergencies.-The Secretary of Transportation shall issue such regulations, licenses, and orders as are necessary to carry out this section.
The PRESIDING OFFICER. H.R. 5205, an act making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1987.

Mr. ANDREWS. I thank the Chair.

Mr. President, today I am pleased to present to the Senate the fiscal year 1987 Transportation appropriations bill. Let me point out that we have a very narrow window of opportunity to move this bill. The Senate is constrained to vote at 1:30 today on another matter. If we can finish this bill by 1:30, which my colleagues from Florida and I feel we can do, we do not have to return after 8 p.m. and finish it. I am sure that thought will bring smiles to most of our colleagues.

Mr. President, the bill as reported by the committee contains new budget authority totaling $10,197,746,569.

There are further limitations on the trust fund programs of $13 billion. Combined, these two provisions essentially provide for a freeze at last year's levels for the many transportation programs funded in the bill.

Both the budget authority and associated outlays estimated by CBO show this bill to be in compliance with the Transportation Subcommittee's allocation under section 302(b) of the budget resolution.

For aviation, the bill provides additional funds for safety-related personnel and sets a 15,000 employment floor on the air traffic control work force. The airport grant program is funded at $1 billion, and vital aviation capital investment and aviation research is kept on track.

The Coast Guard appropriations exceed last year's level for both the operations and capital account—both to wage the war on drug smuggling as well as to maintain all of the other missions of the Coast Guard.

Might I point out, Mr. President, our subcommittee has long recommended the use of the Navy's Hawkeyes by the Coast Guard to aid not only in drug interdiction, so important to all of us in this Nation, but perhaps to aid in the search and rescue missions they are uniquely capable of. It is cost-effective. It gives the naval technicians the training they need and it makes a lot more sense than just plowing holes in the air while they search dummy targets to use these sophisticated aircrafts on planes to interdict drugs coming into this country as well as to be available for search and rescue missions.

For the Federal-aid highways program, the bill sets the obligation limitation at $13 billion. This is a cut of $125 million from the current fiscal year 1986 level and is a reduction of $225 million to the level established for fiscal year 1987 in the Consolidated Omnibus Budget Reconciliation Act.

At $591 million, the funding for Amtrak is cut from the level provided for fiscal year 1986 allocations and allowed transportation under the budget resolution also necessitated cuts in the transit trust fund and the amount allowed for transit operating assistance. Mr. President, I point out to my colleagues and the country as a whole, that the level we have provided allows the continuation of Amtrak service on all the routes that they had served last year. Amtrak is moving more steadily toward being in the black and is doing a good and a cost-effective means of operating.

In conclusion, I point out that the bill also contains the House-passed provision permitting selective rehire of fired air traffic controllers. I am sure there will be later discussion of this important matter. I mention this fact now, however, so that my colleagues understand that in the unanimous consent agreement I shall propose to offer, not only to strike an amendment, including an amendment to strike this section, is foreclosed.

Let me, Mr. President, at this time yield to my good friend, the senior Senator from the State of Florida, the man who is the ranking Democratic member of this subcommittee and the individual on whom we have depended for great, good advice and cooperation in the development of these bills over the years.

Mr. CHILES, Mr. President, I rise to support the transportation bill reported by the Appropriations Committee and to support the comments just made by Senator ANDREWS, chairman of the Transportation Subcommittee. The bill before the Members, I believe, strikes a good balance among the many Members, areas, and regions of the country. Over the last 9 months Senator ANDREWS and I have received many suggestions and requests from our colleagues here in the Senate. An effort has been made to accommodate those many requests.

Mr. President, as the chairman of the subcommittee just noted, our recommendations are within the 302(b) allocations. In fact, we are more than $403 million below the allocation for budget authority and just under the allocation for outlays set at $26.9 billion by the committee's 302(b) allocation.

Within the totals recommended are a number of important items.

For example, we have recommended that within the totals recommended for Coast Guard operations, we have placed a floor of approximately $373 million on what the Coast Guard must use for its drug interdiction activities. This represents an increase of almost 8 percent from the amount spent by the Coast Guard last year for these same purposes. Further, while the administration requested only $77.1 million for the Coast Guard Program, we have included a more realistic total of $251.1 million for that program. While the budget resolution assumed $318 million for this account, I am pleased that within the limitations of our 302(b) allocations we have been able to include a more realistic amount for this important program of the Coast Guard.

The bill includes a number of important features to help ensure aviation safety. For example, we have required a total of 15,000 air traffic controllers, up from the 14,484 controllers that were on board at the end of August. We have added funding for an additional 138 aviation safety inspectors and we have rejected the administration proposal to delete the aviation field maintenance and flight service station personnel.

For the highway programs, we have recommended an obligation ceiling of $1 billion, an amount that is substantially more than what was included in the budget resolution. This funding level will help us maintain our systems of highways and complete the remaining gaps in the system. Highway traffic safety grants are recommended at a level of $121 million, up $11 million from the amount requested by the administration. This will allow greatly to accelerate priority initiatives to reduce highway deaths—especially programs focused on reducing fatalities caused by drunk driving.

The bill includes small reductions for transit funding compared to the 1986 post-Grinnell-Rudman level and it is $32 million below the House level. We have, however, rejected the proposal of the administration to essentially eliminate the transit program and our bill is $2.4 billion over the amounts requested by the administration for transit programs. I know many of the Members had interest groups that had hoped for an even higher level but this is not possible within the constraints of our spending limits.

Finally, the bill includes $591 million for Amtrak to ensure the continuation of the national system.

Mr. President, I will not take more time with Members to comment further on this bill. I would, however, like to compliment the staff that has worked on this bill. Mr. Andrews and to thank the staff that worked on our side for the minority
Mr. ANDREWS. Mr. President, I thank my colleague for his generous remit. I remember working with the staff on both the Republican and Democratic sides for the outstanding job they have done in making sure that nothing has been overlooked, in making sure the results of our hearings have been transferred into the product before you.

Mr. President, I now ask unanimous consent that the committee amendments to H.R. 5205 be considered and agreed to en bloc, provided no points of order under rule XVI be waived thereon, and that the measure, as amended, be considered as original text for the purpose of further amendment.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows: The Senator from Texas [Mr. Gramm], for himself and Mr. Thurmond, proposes amendment numbered 2843.

On page 64, beginning with line 6, strike out all through page 65, line 15.

Mr. Gramm. Mr. President, this amendment is a simple amendment and I will not belabor the obvious point. In fact, we have voted on this issue before. It has been hotly debated. The American people have looked at it. The President made a courageous decision in 1981 to implement a policy that had been sustained by the Congress; but, if this bill were adopted unamended, that policy would be reversed.

I hope we can debate the policy, not the fine points of the legislative language. But the truth is that section 323 of this bill entitled “Suitability of air traffic controllers who participated in the 1981 strike,” in essence removes the prohibition that the President implemented in 1981 after he found that those controllers who had engaged in the strike were unsuitable for FAA employment because they had violated the law and their oath of office.

This provision in section 323 removes that prohibition and requires the FAA to consider for employment those controllers who had been on strike, who violated the law, who violated their oath of office.

Under the civil service statutes, the FAA had been prohibited from keeping records on individual strike behavior. That would leave no factual basis for refusing to hire aircraft traffic controllers who violated the law and who violated their oath. Job applicants would only be judged on the basis of their experience; experience they already have; and, in the process, many people who violated the law, who violated their oath of office, who left the Nation at risk, would be reemployed.

I submit, Mr. President, that those who stayed on the job, those who served the public and the Nation, would be penalized in the process. Some 1,000 of those who stayed on the job, who withstood peer group pressure, who lived up to the requirements of the law and their oath of office, are now eligible to retire. I submit that many of these people would retire if they were forced back into a situation where those who violated the law and their oath of office, those who brought extreme pressure on them to engage in an unlawful activity, in violation of their oath, were now brought back into the workplace.

So we could go into a long and detailed discussion of what this amendment does and what it does not do, but the bottom line is simple. In 1981, Ronald Reagan made a courageous decision. We had Government employees, air traffic controllers, who violated the law and their oath of office by striking. The President gave them an opportunity to go back to work. Some decided to go back to work and some decided not to go back to work. Those who decided not to go back to work were fired and barred from future employment.

The provisions of the bill before us would repeal that action, would force the FAA to reinterview and consider those who violated the law and their oath of office. In that interview process, as required by the civil service laws of the land, they would be unable to consider individual behavior and, in the process, we would put back to work people who violated the law and their oath of office.

I believe the policy in 1981 was correct. The Congress supported it then. In subsequent action, Congress has supported from time to time as that decision has been challenged. It was the right decision. I think it has served the public well.

We have gone through difficult days, Mr. President, in rebuilding our air traffic control system, but we have done it. We will meet the mandated 14,480 work force level for fiscal year 1986 and we fully expect the goal of 15,000 controllers by the end of fiscal year 1986.

So the issue is clear. The President made a decision to ask people who refused to comply with the law and their oath of office to leave public employment. The question is now: Are we going to reverse that decision and undercut a courageous decision the President made in 1981, a decision that we have supported consistently since that time? Will we allow people who violated the law and the oath of office to be reemployed by the Federal Government, while those who had the courage to abide by the law, to abide by their oath, are penalized in the process?

That is the issue. I hope my colleagues will reaffirm their previous position, will support this amendment, and will strike the provisions of the bill that would make air traffic controllers who violated the law and their oath of office again eligible for employment by the Federal Aviation Administration.

I yield the floor.

Mr. LAUTENBERG addressed the Chair.

The PRESIDING OFFICER (Mr. Kasten). The Senator from New Jersey is recognized.

Mr. LAUTENBERG. Mr. President, I rise in opposition to this amendment which would strip section 323 from this bill. Section 323 removes the bar, established by the President, against the rehiring of air traffic controllers dismissed in 1981. Section 323 is a significant, but limited provision.

The language in this bill is identical to that adopted by the House. The language does not mandate that the Department of Transportation do anything. There are those, myself among them, who believe that this rehiring of controllers who violated the law and their oath of office would make the rebuild of our air traffic control system was far behind schedule.

Mr. President, our Nation today does not have sufficient experienced air traffic controllers to cope with the demand for air travel. The controllers on the job are stretched too thin and under too much stress. Morale in the system is no better today than it was in 1981 at the time of the Patco strike. These facts of life in the air traffic control system are confirmed by the findings of the General Accounting Office and management studies, such as the Jones report, commissioned by the FAA itself.

The result of the stress and strain on this system is a margin of safety that is razor thin. In the final analysis, it is the Federal Government and the U.S. Congress that is responsible for those who board airplanes—our families, our children—and put their weight in our aviation safety system. When that faith is breached, the public will not only at the FAA, but at we in the Congress, will be sure that agency and oversee its activities.

Mr. President, we can hide behind the numbers of controllers offered by the FAA and adopt the agency's conclusion that everything is just fine. But you do not have to go far to see that it is not so. Just watch the evening news or read the morning newspaper.
On May 14, the National Transportation Safety Board reported that the FAA facility at Chicago's O'Hare Airport was understaffed and that, unless sufficient personnel were provided, safety could not be assured and traffic would have to be curtailed. There were 2 planes carrying 244 people came within 20 feet of a collision on the runway at O'Hare.

On November 10, 1985, two planes collided over Cliffside Park, NJ. Six people were killed, one of them on the ground. Controller error was definitely a factor in that crash.

The year 1985 was the worst year in aviation safety since 1977. Indeed, the friendly skies are not proving to be friendly at all.

Also, 1985 saw a dramatic increase in the number of near misses. Less than 2 weeks after the tragic AeroMexico disaster in California, which claimed more than 80 lives, 2 planes carrying 150 people came within 500 feet of yet another disaster.

Approp, in 1981 there were 344 full performance level air traffic controllers at the New York Area Air Traffic Control Center. In September 1985 there were 158. In Los Angeles there were 21 in 1981 and 141 in 1985. At key en route control centers across the FAA has established a goal of having 75 percent full performance level controllers. But at places like New York, Los Angeles, Chicago, they are far behind schedule.

The experience drain in the air traffic control system is going to get worse before it gets better. Changes in Federal retirement and tax policy are, according to FAA Administrator Donald Engen, going to lead to "a significant increase in retirements among all FAA occupational specialties."

Mr. President, the Secretary of Transportation objected to this provision when it was before the Appropriations Committee. She indicated that all the Congress had to do was give the Department a target and it would meet it. And the FAA claims to have met its target for fiscal year 1986, claiming that they now have met the 14,480 controller goal established by the Congress.

I urge my colleagues to study the testimony of the GAO on August 14 before the House Subcommittee on Investigations and Oversight. The GAO criticized the method employed by the FAA in reporting the controller work force. The GAO maintains that the FAA counts as controllers personnel, like air traffic assistants, who are not controlling traffic. In addition, the FAA does not count personnel, like online supervisors, who do control traffic.

The GAO examined the FAA report on the controller work force at the end of June using its more realistic count of actual controllers and found that the FAA's count of 14,262 controllers was actually 14,080.

The FAA has criticized the GAO for counting new recruits to the FAA Training Academy as developmental controllers. Given the washout rate of 40 percent at the academy, many of these controllers never deal with one airplane.

The GAO has punched holes in FAA's rosy forecasts. If the FAA took a true count of full performance level controllers and did not lump those qualified on all positions with more limited operational controllers, the problem of experience in this work force would be more apparent to the layman. As of June 30, the FAA's own goals called for it to have 4,296 full performance level controllers at the 20 key control centers nationwide. The GAO found only 3,381 such controllers, a difference of about 900 short.

At the rate the FAA is going, it will be 7 years before it meets its full performance level goals at Miami; 6 years at Indianapolis; 4 years at Jacksonville; and 3 years at Fort Worth, New York and Chicago. In the 2 years it will take the FAA to reach its experience at Atlanta, that airport will be dealing with a 29.9 percent growth in traffic.

Accepting the FAA's calculation of its work force might allow us to put the problem out of our minds, but the serious experience problems in this system are not going to yield to a smokescreen.

Mr. President, it is said that the administration cannot do a suitability test on former controllers. They say they don't know the bad guys from the many controllers who went along with their union, but otherwise committed no acts of violence. I find that a curious contention.

On August 12, 1985, the Office of Personnel Management issued a bulletin explaining the suitability of former controllers for jobs in all Federal agencies except the FAA. The language in the bill simply extends this suitability determination one step further to the FAA itself. It is fair to say that OPM can make these determinations, but the FAA in fact do make such determinations.

Finally, Mr. President, it is said that rehiring former controllers will ruin morale. Nothing ruins morale more quickly than consistently being understaffed, under too much stress and not having the resources to do the job.

There is not anyone working in those towers who is not nagged and beset by the problem of having to miss something that they have to pay attention to. That is the distinction. That is the morale factor.

That is the situation the air traffic control system finds itself in today. I do not find reports of drug abuse and predictions of heavy retirement indicators that everything is fine.

The Appropriations Committee spent the better part of fiscal year 1986 pressing the FAA for reliable information on experience levels in the controller and inspector work force. The FAA has provided additional support to make up the mindless reductions that are going to result in this agency as a result of the budget cutting process. If the FAA is right, the American people will not be as safe as they are today and the country feels the same way.

It is time we provided some relief to our aviation safety system. The controllers who have been punished. They lost their jobs, their pensions and, in some cases, their families. Vengeance is not a worthy motivation for our Nation.

The Appropriations Committee has always been the travel public. The ones we put at risk are our families, friends, and at times ourselves. That is what we are talking about. We have had a plague of persistent punishment in this thing, and it is time to put that behind us. We ought to get on with the job we have of protecting the health and well being of our society and put aside this petty nonsense of saying that an agency that is grossly understaffed cannot use people who have had the experience and have passed the test of time.

It is also time to provide relief to the travelling public. It is time to bolster the margin of safety. It is time to cut the delays at our airports. It is time to relieve the stress suffered by the controllers on duty today.

All section 323 of this bill does is provide the executive branch with the
authority to rehire some of those dismissed in 1981 on a selective basis. It does not mean we replace all, simply says here is a resource that maybe we ought to discuss.

Mr. SIMON addressed the Chair.

Mr. SIMON, Mr. President, with all due respect to my good friend from Texas, who ordinarily tries to get the facts before he tosses in an amendment, I think he is wrong on this one. It should be defeated, as I hope he will be. But let me make one recommendation to him.

In his State of Texas, visit the air traffic control center, wherever it is, for Fort Worth-Dallas. Frankly, that is what I did in Illinois. We have Aurora, IL, not far from Chicago, which handles traffic for O'Hare and much of the Midwest. I have been getting these conflicting stories of, does this make sense?

First of all, I believe that you cannot strike against the Federal Government. We cannot tolerate that. To that extent I agree with the Senator from Texas.

But we have problems. In 1984, we had a record number of air deaths and a record number of near misses.

In the first 7 months in 1985, it surpassed 1984. I do not know what the 1986 figures will be.

But I do know this, and here I would urge my colleagues to reconsider, if that is possible, this point.

I went to Aurora, IL, and talked to the air controllers.

Mr. President, may we have order in the Chamber?

The PRESIDING OFFICER. The Senate is in order.

Mr. SIMON. I went to Aurora, IL, and I talked to air controllers, just going down the line talking to people, and I talked to the people in charge. I would guess I talked to 20 or 30 people.

Of the 20 or 30 people I talked to, all but one said, "We have a problem and the only sensible way is on a selective basis to bring back some of the experienced controllers."

I think he will find, I say to the Senator from Texas, if he visits the counties in the Dallas-Fort Worth area, supervisory personnel and the actual controllers, everyone saying the same thing.

The question at this point is, and I think my colleague from New Jersey put it well, not how we discipline some people but the question is air safety. The reality is we are going to improve air safety with this language in the bill.

I also agree that you cannot just massively take back everyone. That is why this bill calls for some screening.

The other point, as has been made by my colleague from New Jersey, is that it does not mandate a thing.

I would make one other point to my colleague from Texas. I would urge him to talk to people high in this administration who are knowledgeable in this area and ask them off the record what they think. I am not talking about the Secretary of Transportation. I have no doubt that she is concerned, though I have not discussed this with her. Talk to people very high in the administration who understand this area and ask them not what the administration's position is, but what they think is right for air safety.

While I have not discussed this specific amendment with them, I have discussed the general situation.

I think this language is sound language. I urge the amendment of my colleague be defeated.

The PRESIDING OFFICER. Is there further debate?

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

Mr. Andrews. Mr. President, let me respond to the amendment of my colleague.

The bill as reported contains the House-passed provision which allows rehiring of controllers fired in 1981. This is not mandated by any Federal labor regulations, but to address a serious safety situation.

My subcommittee has held repeated hearings throughout the years in which testimony has been given to review the "up again, down again" level of air traffic controllers. The facts according to the FAA are that 14,484 controllers were on board as of August 31, 1986, but of this level, only 9,352 are full performance level. The balance are either developmental controllers, including students at the FAA Training Academy, or air traffic assistants, whose job it is not to control traffic but to help the actual controllers.

I believe the FAA should have discretionary authority to add selectively to its ranks from the former controller work force. I think recent events underscore the need for experienced controllers, especially at the busiest facilities.

I see the record number of controller retirements and feel we are too far from the goal necessary to deal with the increasingly crowded air space.

The critics of this provision will say that it undermines the President's Executive order prohibiting from FAA employment any controller who struck. I feel the past 5 years' prohibition has delivered the President's message loud and clear. No Federal employee should take comfort from this air traffic controller rehire provision because the message from the President is unchanged.

What will change is that where FAA determines safety needs are unmet, it will have the selective authority, Mr. President, to augment its work force with experienced personnel.

The rehire will create a morale problem, opponents say, with those controllers who stayed on the job.

Again, the FAA is not required to put back on duty anyone who was an activist during the strike. The bill requires the Office of Personnel Management (OPM) to make a suitable determination before rehire. Despite the administration's claim that no method exists to make such a determination, 500 striking controllers were brought back since 1981.

OPM can conduct background checks to weed out bonafide strike leaders.

Last, let me point out my frustration with the administration on this language.

The House sent over this permissive language after narrowly defeating stronger language mandating rehire of 500 controllers for each of the next 2 years. Early on, the subcommittee was told the administration could live, but reluctantly, with this permissive approach.

After the subcommittee endorsed the permissive language, the word came up that no language was acceptable. We worked steadily since August 5, the date of the markup, to satisfy the administration that the language be permissive and selective, but the position taken downtown is all or nothing.

Let me read from a House hearing transcript of Thursday, June 12. When asked for FAA's guidelines to implement rehire legislation, the administration witness said: "The administration policy is not to rehire so we just haven't put any staff time and effort into how we might implement that law"—the law being the mandatory rehire bill.

Mr. President, I find that irresponsible. Congress recognizes the need and desires to provide an extra margin for safety, we hope the administration would work with the Congress on the proper method of implementation. That is why we were concerned, that is why the language is in the bill as it is.
Mr. President, I have no further request for time. I shall be glad to have the roll called.

Mr. GRAMM. Mr. President, I can be brief. I would like to respond briefly by making a couple of remarks.

First, in 1981, we had an illegal strike by people who violated their oath of office. They—not the President—put the health and safety and lives of those who use air travel in this country at risk.

We have fought back from very difficult circumstances. We have worked hard to rebuild the air traffic control system. We have made great progress, progress that many—obviously the strikers—did not believe we could make. To come back now and reverse the policy would penalize those who stayed at their posts, those who stood their ground and abided by the law and their oath of office. To bring back into employment the people who put us at risk to begin with, would be inherently wrong.

Our distinguished colleague from New Jersey speaks with eloquence about a shortage of troops in the army. I submit, Mr. President, that we have rebuilt the army. It is not totally rebuilt but after coming all this way, after four years of work, after not giving in to the temptation to take the easy, politically expedient way out, let us not bring back into the army today those who deserted the army and created the peril.

I think the issue is clear. I urge my colleagues to support this amendment.

Mr. LAUTENBERG addressed the Chair.

The PRESIDING OFFICER. Is there further debate? The question is on agreeing to the amendment.

The Chair is in doubt. (Time for the question.)

The PRESIDING OFFICER. The yeas appear to have it. The yeas have it.

The amendment (No. 2843) was agreed to.

Mr. GRAMM. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. ANDREWS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. ANDREWS. Mr. President, I make a point of order that a quorum is not present. Prior to making that point of order, again, the leadership has told us to move expeditiously. I know of no further amendments to this bill. There have been some amendments talked about. We have now been debating the bill for about one-half hour. It is our intention to go to third reading as rapidly as possible.

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.

The legislative clerk proceeded to call the roll.

Dodge City has 15 passenger and freight cars and three locomotives on hand, and the railroad has spent about $1.3 million of the rolling stock it needs to get underway.

Mr. ANDREWS. I thank the Senator from Kansas for bringing this project to the attention of the Senate, and I will try to work out a satisfactory arrangement in conference.

AVIATION SAFETY AND H.R. 5205, THE FISCAL YEAR 1987 TRANSPORTATION APPROPRIATIONS BILL

Mr. BYRD. Mr. President, the funds provided in the fiscal year 1987 Department of Transportation and related agencies appropriation bill, H.R. 5205, represent the Federal commitment to the development, maintenance, and operation of an efficient national transportation system. The funds provided in this legislation address problems in a number of different areas. Of particular interest are the provisions relating to appropriations for the Federal Aviation Administration and to address the problem of aviation safety.

Mr. President, last year was the worst year for commercial aviation in the United States since 1977, according to National Transportation Safety Board statistics. Those statistics indicate that there were 526 fatalities in 1985 from all U.S. carriers, compared to 655 fatalities in 1977. Such statistics have been underscored most recently by the tragic collision of Aeromexico's flight 488 with a small private plane in the skies over Los Angeles late last month.

In the light of such statistics, and the reports of increasing numbers of commercial flight incidents, the American public has become increasingly concerned about aviation safety.

Domestic commercial passenger aviation industry has undergone explosive growth in the years since the enactment of airline deregulation in 1978. Unfortunately, the Federal Aviation Administration is in danger of being overwhelmed by the increased number of commercial flights, aircraft, and airline personnel. As is the most apparent manifestations of the airline industry's growth since 1978.

Congress has been more than willing to provide the FAA with the resources necessary to ensure aviation safety. This commitment to aviation safety remains undiminished. Indeed, despite the severe fiscal constraints imposed by the Nation's massive budget deficits. In this bill Congress is appropriating $2.769 billion for FAA operations in fiscal year 1987.
Mr. President, it should also be noted that the growth in the airline industry is expected to continue into the future. This will bring increased burdens on FAA traffic control systems. Unless we can manage the increasing volumes of air traffic which will be using the Nation’s airspace, the FAA, for example, expects the number of aircraft operating at major, large, and small airports to increase 46 percent by 1997.

### SUMMATION

Mr. President, the funds provided in H.R. 5205 for FAA operations are further evidence of the intention of the Congress to control this vehicle and the an adequate margin of aviation safety. With the support of the administration, we can move expeditiously.

Mr. SPECTER. I would like to engage in a conversation with the distinguished chairman of the Transportation Subcommittee to discuss several matters of importance to Pennsylvania.

H.R. 5205 as reported from the House gave a classification to a vehicle that will be manufactured in my home State, called the Maxi-Cube vehicle. I understand that this classification was not needed to allow this vehicle to run on Federal highways. The U.S. Department of Transportation has reportedly spent years studying a classification for this vehicle but has failed to make a determination. This has prevented a potentially great transportation product from being used, thus denying the manufacturing jobs associated with the production of this vehicle and the potential benefits to transportation that would result in its use. H.R. 3129, the House highway authorization bill, includes identical language as that contained in H.R. 5205. Legislative action is required because the U.S. Department of Transportation has no yet acted. I should report that 32 States have approved this vehicle. The Senate Appropriations Committee struck the House language.

Because this vehicle is so important, I bring this to the Senator's attention for his consideration in the bill report ed from conference. I must repeat that this action would simply classify a vehicle system that was not in existence when the act was passed in 1982 and was, therefore, not classified. I am just urging that this be given a regulatory category so that it can be regulated, I am asking for no exceptions for weight or length.

Mr. ANDREWS. The Senator brings important facts to light. I will carefully consider his request.

Mr. SPECTER. Other matters of concern are the Basin Street rail crossing in Allentown, PA, Route 220 between Altoona and Tyrone, and the Mon Valley Expressway.

The Basin Street project is sorely needed to correct a traffic tie-up problem which has plagued the Lehigh Valley for more than a decade. The Route 220 project would close an 11.9-mile gap in multilane limited access roadways. Pennsylvania Turnpike and the Tyrone Bypass, I am seeking authorization for both of these projects in S. 2405, the highway authorization bill.

The Mon Valley Expressway would be a new road to be funded with toll proceeds, but which will require a Federal contribution to be successful. I am supporting an amendment to S. 2405 that would allow Federal aid to highways being constructed as toll roads.

I would request that the chairman through his offices encourage the U.S. Department of Transportation to perform studies and provide technical assistance to expedite planning and these important projects. I have assurances from members of the Public Works Committee that both Basin Street and Route 220 will be authorized in S. 2405.

Mr. ANDREWS. The Senator has brought forward important requests. I will be happy to work with him and the Department to help move these projects forward.

Mr. SPECTER. I thank the Senator for his assistance on these matters and the support that he has already provided for so many important transportation matters for Pennsylvania and the country.

### A STUDY OF OILSPILL PREVENTION IN RESTRICTED WATERWAYS

Mr. LAUTENBERG. Mr. President, I rise to address an issue of great importance to New Jersey, the Delaware River region, and all of our coastal areas. The issue of oilspills.

Oilspills are devastating accidents. They result in destruction of natural resources, and they imperil our wellbeing. Spills also require significant expenditures of time, effort, and money by State and Federal agencies, and they represent a valuable commodity by the oil companies.

Last week, the Viking Osprey, a 700-foot tanker, spilled almost 300,000 gallons of crude oil over a 12-mile stretch of the Delaware as it docked at a facility in New Jersey. On Friday, I toured the spillsite with Coast Guard officials. The scene was devastating. The impact of this spill is being felt in New Jersey, Pennsylvania, and Delaware. It will be months before the full extent of damage is known, or cleanup efforts are complete.

This was not an isolated incident. Within the last year, this same stretch of the Delaware has seen three major spills. Last September, the Sunoco Grand Eagle spilled 435,000 gallons of crude oil over the stretch of the Delaware as it docked at a facility in New Jersey. In this case, the tanker ran aground, rupturing a tank. It then freed itself to head upriver, spilling its oil along the way. The incident was not reported to officials for 9 hours.

In March, the Intermar Alliance crashed into a pier at Marcus Hook, PA. One of its tanks was ripped open, resulting in the release of 189,000 gallons into the river.

Mr. President, almost 1 million gallons of oil have been spilled into the Delaware River in the last year. In addition, there have been several minor tanker incidents which, fortunately, have not resulted in spills. This is an unacceptable situation. We need to find out why recurring oilspills threaten the Delaware River and precious natural resources.

The Coast Guard has the responsibility to respond to oilspills. It has the expertise in assessing causes of oilspills and is best able to recommend means of preventing these spills.

Mr. President, our coastal waterways are fragile and important ecosystems. They cannot continue to absorb the impacts of oilspills. With my colleague from Maine, Senator MITCHELL, I recently introduced legislation to enhance our ability to clean up spills. That legislation is vital in our efforts to control the effects of oilspills. But, we also need to prevent spills.

Mr. President, I would like to ask the distinguished managers of the bill for their views on this matter. My suggestion would be for the Coast Guard to conduct a thorough study to investigate the causes of the Delaware River oilspills and to recommend steps to prevent their repetition. Such a study should include the consideration of modifications in tanker construction and operation standards, crew training, local familiarization, the need for adequate equipment, improvements in navigation aids, and other approaches with the potential for reducing the likelihood of discharges of oil in our waters. The results of this study should then be made available in a report to the Congress within 1 year.

Mr. ANDREWS. Mr. President, I thank the distinguished Senator from New Jersey for bringing this important matter to the attention of the Senate. I am aware of the Senator's concern over this issue, and share his interests in its importance to the coastal areas.

I agree that such a study could be an asset in efforts to prevent oilspills, and I concur with the Senator's view that it should be conducted using available funds. The areas he would like to see addressed in a study are comprehensive, and essential to consider in a thorough study of the problem of oilspills in the Delaware River and other waterways. I look forward to working...
with my colleague in efforts to ensure that the study he described will be conducted by the Coast Guard. It would be my intention to further address the Senator's concern by including in the statement of the ranking minority member, Senator Chiles, for his views on this matter.

Mr. CHILES. Mr. President, I would also like to thank the distinguished Senator from New Jersey for raising this important issue. The study he outlines will serve an important role in efforts to prevent the repetition of such spills. I look forward to working with my distinguished colleagues in efforts to address this issue through a study conducted by the Coast Guard.

Mr. LAUTENBERG. Mr. President, I thank the distinguished Senator for his support of this important study, and I look forward to working with the distinguished chairman and ranking minority member on appropriate language directing the Coast Guard to use available funds to conduct a study on recent oil spills in the Delaware River and spill prevention.

Mr. DANFORTH. Mr. President, I am considering offering an amendment to the Transportation appropriations bill, H.R. 5205, and would like to engage in a colloquy with my distinguished colleague, Senator Andrews, the chairman of the Transportation Appropriations Subcommittee.

Mr. President, my amendment would reduce substantially deaths and injuries on our highways and would provide us with another weapon in the war on drugs and alcohol abuse. My amendment would increase the appropriation for the Motor Carrier Safety Assistance Program [MCSAP] from $30 to $60 million in fiscal year 1987.

At present, the MCSAP provides grants to States for inspections of truck and bus equipment. These efforts are long overdue. For example, in the first 5 months of this year a Maryland inspection team funded by a MCSAP grant inspected 17,000 vehicles. Maryland found that over 5,000 of these vehicles had unsafe brakes. Over 2,500 had inadequate lighting. Others had defective steering, coupling devices, and tires. Almost 13,000 of the over 72,000 trucks of those inspected, were in such bad shape that they were immediately put out of service.

We have made some success, but this is only the tip of the iceberg. Although 49 jurisdictions are using these grants, many of the unsafe trucks and buses are going undetected. They simply pull off the side of the road and wait for the inspection station to close down or take an alternate route with no inspectors. By increasing appropriations for MCSAP we will have enough inspectors so that unsafe trucks are not allowed anywhere to run and nowhere to hide. Inspectors can work through the night when most of the unsafe trucks and buses run, and they can set up inspection stations on routes that were formerly "safe havens" for dangerous vehicles.

Catching dangerous vehicles is only part of the problem, however. The Senate has before it the Commercial Motor Vehicle Safety Act of 1986 (S. 1903), which provides for inspections of drivers for drug and alcohol use, improved commercial driver licensing, and a computer link to stop the multiple license problem.

An increase in MCSAP's appropriations is needed to accomplish these goals. The MCSAP appropriation must be increased so that inspectors can catch those who either take drugs or drink alcohol and get behind the wheel of trucks carrying an average of 60,000 to 80,000 pounds or buses carrying dozens of innocent passengers. With the assistance of the CB radio, drugs are sold at virtually every truck stop. In the country, drug abuse by these drivers is a menace to us all that must be stopped. Its dangers were demonstrated recently when a truck driver, who reportedly had cocaine, amphetamines, and marijuana in his cab, shot and wounded the 7-year-old son of country singer Ricky Skaggs. The driver claimed he fired the shot because the child's mother cut too closely in front of his truck.

Increased appropriations for MCSAP grants are also needed to improve commercial driver licensing. At present, after taking a regular motor test in a compact car, you or I could get a license that is a grant of authority to drive an 18-wheeler across the country. In fact, only 12 states require a license applicant to take a driving test in the type of truck or bus he or she is to be licensed to operate. MCSAP grants could help States to pay examiners and set up test facilities so they can give meaningful written and driving tests.

Finally, additional MCSAP money is needed to help establish a computer link between the States to communicate commercial drivers license information. Commercial drivers currently shuffle multiple licenses like a deck of cards. They spread their traffic violations, and thus maintain a "good driver" rating regardless of the number of violations they accumulate. The States could use this computer link to determine whether a license applicant had another license, and to see that all of a commercial driver's violations, including violations involving driving under the influence of drugs or alcohol, were placed on a single license.

Mr. President, S. 1903 is one of the cornerstones of the majority leader's drug initiative. He recognizes that drug abuse is a problem for truck and bus drivers just as it is for others in our society. When drugs are openly bought and sold at virtually every truck stop in the country, things have gone too far. This is not our time's crime. Truck and bus accidents kill 5,000 people a year and injure thousands more. We must provide money for additional inspections to catch drivers who use drugs.

Mr. ANDREWS. I agree with Senator Danforth that MCSAP is a very important and successful effort to make our highways safer. I am a strong supporter of this program and unfortunately, my subcommittee is operating under strict budgetary restraints and I believe that Senator Danforth's proposed amendment, could well correct these concerns.

I understand that the text of S. 1903, the Commercial Motor Vehicle Safety Act of 1986, which would authorize $60 million for MCSAP in fiscal year 1987, is part of Governor Dole's legislative package for combatting drug abuse. Under S. 1903, MCSAP moneys would be used to catch truck and bus drivers who operate vehicles under the influence of drugs. If S. 1903 is approved by the Senate as part of this important initiative, I want to assure Senator Danforth that my subcommittee will work with him toward seeing that MCSAP is fully funded in the continuing resolution.

Mr. DANFORTH. Mr. President, I would like to thank Senator Andrews for his views on this important matter. I would also like to thank the Senator from North Dakota for his support of this program and for his commitment to work toward fully funding this program. I look forward to working with him to meet this goal. With those assurances, I will not offer any amendment to the bill.

Mr. DOMENICI. Mr. President, I rise in support of the Department of Transportation and related agencies appropriations bill as reported by the Senate Appropriations Committee.

I commend the distinguished chairman of the subcommittee, the Senator from North Dakota, and the distinguished chairman of the full committee, the Senator from Oregon, for bringing this bill to the floor in accordance with the budget resolution for both budget authority and outlays.

Mr. President, H.R. 5205 as reported provides $10.2 billion in budget authority and $9.3 billion in outlays for fiscal year 1987 for the Department of Transportation, the Interstate Commerce Commission, and other transportation-related activities.

Taking into account outlays from prior-year budget authority and other adjustments, the bill is $0.4 billion in budget authority and less than $50
September 17, 1986

CONGRESSIONAL RECORD—SENATE

23715

milllion in outlays under the subcommittee's section 302(b) allocation under the fiscal year 1987 budget resolution. The bill's credit activity, comprising a total of $0.1 billion in direct loans, is also consistent with the subcommittee's 302(b) allocation.

I would note that the subcommittee's 302(b) allocation is based on budget resolution assumptions that include significant increases for several transportation programs. Specifically, I note that the budget resolution assumed fiscal year 1987 budget authority increases above a freeze level of $0.5 billion for the FAA and $0.4 billion for the Coast Guard.

I urge the adoption of the bill as reported, and I urge my colleagues to oppose any amendments that will significantly increase the outlays associated with this bill.

Mr. President, I ask unanimous consent that tables showing the relationship of the reported bill to the subcommittee's section 302(b) spending and credit allocations, the House-passed bill, and the President's budget request, and a summary of total appropriations action to date, be printed in the Record.

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

TRANSPORTATION SUBCOMMITTEE SPENDING TOTALS—SENATE-REPORTED BILL

(in billions of dollars)

<table>
<thead>
<tr>
<th>Fiscal year 1987</th>
<th>Budget authority</th>
<th>Outlays</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outlays from prior-year budget authority and other actions</td>
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<td>$71.2</td>
</tr>
<tr>
<td>H.R. 3005, as reported in the Senate</td>
<td>10.2</td>
<td>26.9</td>
</tr>
<tr>
<td>Adjustment to conform mandatory programs to budget resolution assumptions</td>
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<td>-0.1</td>
</tr>
<tr>
<td>Subcommittee total</td>
<td>10.2</td>
<td>26.9</td>
</tr>
<tr>
<td>Senate subcommittee 302(b) allocation</td>
<td>10.6</td>
<td>26.9</td>
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<tr>
<td>President's request</td>
<td>7.0</td>
<td>25.3</td>
</tr>
<tr>
<td>House-passed level</td>
<td>10.1</td>
<td>27.0</td>
</tr>
</tbody>
</table>

| Subcommitteetotallcomparedto: | 
| Senate subcommittee 302(b) allocation | -0.4 |
| President's request | -0.4 |
| House-passed level | -0.1 |

Mr. President, I ask unanimous consent that tables showing the relationship of the reported bill to the subcommittee's section 302(b) spending and credit allocations, the House-passed bill, and the President's budget request, and a summary of total appropriations action to date, be printed in the Record.

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

TRANSPORTATION SUBCOMMITTEE CREDIT TOTALS—SENATE-REPORTED BILL

(in billions of dollars)

<table>
<thead>
<tr>
<th>Fiscal year 1987</th>
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<th>Loan guarantees</th>
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</thead>
<tbody>
<tr>
<td>Senate subcommittee 302(b) allocation</td>
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<td></td>
</tr>
<tr>
<td>Senate subcommittee 302(b) allocation</td>
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<td>President's request</td>
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<td></td>
</tr>
<tr>
<td>House-passed level</td>
<td>+0.1</td>
<td></td>
</tr>
</tbody>
</table>

Note—Details may not add to totals due to rounding.

Mr. GORTON. Mr. President, I congratulate Senator Andrews, the chairman of the Appropriations Subcommittee on Transportation and Related Agencies, and the Appropriations Committee as a whole, for their work on this bill. I would like to take this opportunity to call attention to a very important provision in the report accompanying the bill which earmarks funds for fiscal year 1987 for the Downtown Seattle Transit Tunnel. This project is of enormous importance to the Greater Seattle metropolitan area.

The Seattle bus tunnel is the result of a long-term effort by local, city, county and metro government officials, and the downtown business community. When completed, the tunnel will provide transit facilities in downtown Seattle to meet the area's future commuter transit needs and alleviate bus congestion in the downtown area. The success of this joint effort is obvious. The Seattle bus tunnel has been rated by the U.S. Department of Transportation as the most cost-effective transit project in the entire country. In addition, the tunnel has the near unanimous support of local elected officials as well as the Downtown Seattle Association.

The project consists of a two lane bus tunnel extending north from Union Station near the Kingdome up Third Avenue to Pine Street, at which point it continues east bound to Ninth Avenue near the new convention center. In addition to these two portal stations, there will be three underground stations along the route, accessible by elevator, escalator, or stairs from the buildings above.

The tunnel is designed for new dual-mode buses that will switch from diesel to electricity when entering the tunnel and switch back to diesel upon exit. This innovative concept accomplishes the major obstacle of reducing diesel emissions in the downtown area.

Metro and the city of Seattle will provide surface improvements above the tunnel, such as new curbs and roadways, lighting and traffic control systems, greenery, bus shelters, sidewalk furniture and vending equipment. Metro also is adding a trolley circulator with new routes connecting the downtown business core with the Denny Regrade, First Hill, the International District, Pioneer Square, and the waterfront.

Along with the reduction of diesel emissions, there are other significant...
benefits attached to this project. It addresses the issue of downtown bus congestion without eliminating traffic or transportation facilities, thus avoiding harm to the downtown business community. It also provides a continuous passage through downtown Seattle for suburban commuters, thus avoiding the inconvenience of an extra transfer. City staff predicts that substantial congestion without eliminating traffic or harm to the downtown business community will be less than those incurred by continuing current services amid growing downtown congestion.

Mr. President, the Seattle bus tunnel is an excellent example of the type of innovative, cost-effective, and environmentally sound major project that can be built when local government and the private sector work together to meet community needs. Again, I thank the distinguished chairman of the subcommittee and the members of the full committee for recognizing the value of this project.

HIAWATHA AVENUE

Mr. DURENBERGER. Mr. President, the House-passed Department of Transportation Appropriations bill for fiscal year 1987 contained $1 million for an Intermodal Urban Demonstration project located in Minneapolis, MN. This project, first authorized by Congress in 1974, would entail upgrading approximately 5 miles of T.H. 55/Hiawatha Avenue from CASH 62—the Crosstown Highway—to Franklyn Avenue in Minneapolis. Approximately $2.75 million was provided in the fiscal year 1986 DOT Appropriations bill for design of the project, and it was the hope of the two Senators from Minnesota that the committee would see fit to accept the House recommendation on funding for this project. Could my good friend, the distinguished chairman and Senator from North Dakota, enlighten me as to why funds for this important project were deleted?

Mr. ANDREWS. Mr. President, as the distinguished ranking member, Senator CHILES, will confirm, the committee found itself unable to fund any of the demonstration projects contained in the House bill. Having reviewed my good friend's letter requesting funds for this project shortly before the committee acted on the bill, it was with great reluctance that I moved to delete the House projects. It is an unfortunate fact of life, but the House Appropriations Committee accorded a higher level of funding to the Transportation Subcommittee than the Senate Appropriations Committee did. Faced with less money to work with, Senator CHILES and I had no choice but to delete funding for demonstration projects.

Mr. CHILES. Mr. President, the Senator from North Dakota's description of the committee's predicament is entirely correct. I, too, noted the letter from the senior Senator from Minnesota and regretted that the committee was unable to accommodate his request.

Mr. DURENBERGER. Mr. President, I thank both Senators for their explanations, and would like to pose one final question. When this item is brought up for discussion in conference with the House of Representatives, how receptive would my two friends, the chairman and ranking member, be to the House position?

Mr. ANDREWS. Mr. President, as I explained in previous discussions with both of the distinguished Senators from Minnesota, it is very difficult to promise any Member that the Senate will recede to the House on an issue prior to the conference. However, having personally experienced the horrible traffic congestion leading to the Minneapolis/St. Paul airport, I am sensitive to the House position.

Mr. CHILES. Mr. President, while I have not had the pleasure of sitting in traffic in subzero temperatures, I can imagine that it has prompted many a Minnesotan to spend the winter in Florida. While I would be reluctant to support anything that might hurt Florida's tourism industry, I want to assure both Senators that I will try to accommodate the House of Representatives on this project.

Mr. DURENBERGER. Mr. President, I thank both Senators for their courtesy, and wish them luck in conference.

Mr. BOSCHWITZ. Mr. President, I would like to associate myself with the remarks of Senator DURENBERGER, and want to thank both Senator ANDREWS and Senator CHILES for their consideration of our request.

□ 1200

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

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

The full call was read a third time, the question being, Shall it pass? On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The bill clerk called the roll.

Mr. SIMPSON. I announce that the Senator from Utah [Mr. GARR], is necessarily absent.

Mr. CRANSTON. I announce that the Senator from Hawaii [Mr. MARSU-NAGA], is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 87, nays 11, as follows:

[Rollcall Vote No. 364 Leg.]

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

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

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

Thebill having been read the third time, the question is, Shall it pass? On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The bill clerk called the roll.

Mr. SIMPSON. I announce that the Senator from Utah [Mr. GARR], is necessarily absent.

Mr. CRANSTON. I announce that the Senator from Hawaii [Mr. MARSU-NAGA], is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 87, nays 11, as follows:

[Rollcall Vote No. 264 Leg.]

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

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

The bill was read a third time.

Mr. ANDREWS. Mr. President, I move to reconsider the vote by which the bill, as amended, was passed.

Mr. DURENBERGER. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. ANDREWS. Mr. President, I move that the Senate insist on its amendments and request a conference with the House of Representatives thereon, and that the Chair be authorized to appoint conference committees on the part of the Senate.

The motion was agreed to, and the Presiding Officer (Mr. KASTEN) ap-
pointed Mr. ANDREWS, Mr. COCHRAN, Mr. ABBON, Mr. KASTEN, Mr. D'AMATO, Mr. HAYFIELD, Mr. CHILES, Mr. STENNIS, Mr. BYRD, and Mr. LUTENBERG confer on the part of the Senate.

Mr. DOLE. Mr. President, I thank my distinguished subcommittee chairman, Senator ANDREWS, and also Senator CHILES for their expedient handling of the transportation appropriations bill.

I must say I was responsible for some delay. They completed action in less than 2 hours. I thank them for their effort.

PRODUCT LIABILITY

Mr. DOLE. Mr. President, I will yield to the distinguished Senator from Alabama in just a minute. But I now would like to turn to S. 2760, Calendar No. 856, product liability.

I think unanimous consent that the Senate now turn to the consideration of Calendar No. 856. S. 2760, product liability.

Mr. HOLLINGS. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. DOLE. Mr. President, I will move to that later.

I would like to yield now to the distinguished Senator from Alabama who has been trying to make a statement on the Rehnquist nomination for some time.

NOMINATION OF WILLIAM HUBBS REHNQUIST AS CHIEF JUSTICE OF THE UNITED STATES

Mr. HEFLIN. Mr. President, as a U.S. Senator I approach the advice and consent responsibility mandated by the Constitution as a solemn duty. I approached this nomination with an open mind. I came neither to praise nor to condemn. I came not as an advocate, a detractor nor as a blind supporter. I came to endeavor to do my duty fairly and justly. I came to judge.

I look at the position of Chief Justice of the United States and I see a position of power, a position that makes great demands on an individual, but one that allows an individual to do great things. I see a power that extends over sovereign States and over the humblest of individuals. But I also see a somewhat impossible situation for any nominee to fulfill this role. No one individual is equipped or capable of being the embodiment of all we see in the position of Chief Justice of the United States.

The thing not to say we strive for less than excellence in those we nominate to sit on the Supreme Court, or in those we ask to lead that Court, but that we admit and acknowledge that our Supreme Court is made up of individuals just like you and me. Some may be small in stature but may be wise, some may be more liberal, some may be more conservative, some may have had better opportunities, some less, some may be more outspoken, some may be more introverted. But each of the nine in his or her own way are very important to the whole—and each brings to the Court the experiences that shaped their lives.

There are those who fear that Justice Rehnquist through his legal acumen will sway less-entrenched members of the Court. It was once said that "one man plus courage equals a majority."

If confirmed, Justice Rehnquist's tenure as Chief Justice will be judged not by his consensus-building abilities but rather by his devotion to a fair and just interpretation of the Constitution. That will be the standard by which all nine of the members of the Court will be judged.

The next Chief Justice will lead the Court and this Nation into a new generation. He will shape not only our future but the future of our children. I wish I could predict what the future holds. I do believe, however, that times will be difficult, and the Supreme Court in the years to come will be faced once again with issues that permeate to the very core of individual beliefs and convictions.

And I look at this Court and the uncertainty of the times ahead and I asked myself, if this nominee is worthy of the task? I have resolved that question in my own mind in the affirmative, but the journey to reach this decision was far from easy.

I have great respect for my colleagues that oppose this nomination. And the issues that have been raised since I have been a Senator to me. The voter harassment issue, the failure of Justice Rehnquist to recuse himself in Laird versus Tatum, the memorandum written as a Supreme Court clerk in 1953 concerning Brown versus Board of Education, and his alleged insensitivity to the rights and struggles of minorities, women, and disadvantaged citizens. His opponents do not question his legal ability or, in my opinion, his judicial temperament.

□ 1240

But they strike at the heart of what makes a judge judicial— his fairness and above all his credibility. If proven, these allegations would not only taint a man's judicial career but might destroy it. And in the process they would chip away at the very foundation of the institution itself.

I am not saying these are not legitimate questions. They are. I am not saying they should not be asked. They should. But I am saying that after listening to the witnesses, after considering the timeframe in which these incidents occurred, I am not persuaded that Justice Rehnquist is unfit for service as Chief Justice of the United States.

The respect those who testified in opposition to Justice Rehnquist's nomination, for I cannot think of a more difficult position in which to find oneself. I believe the testimony was motivated by nothing more than a deep sense of doing what each personally believed was right. Most worthy examples of courage and commitment.

In trying to resolve charges and allegations with the answers of Justice Rehnquist and his witnesses, it is simply impossible to conclude that Justice Rehnquist is unfit for service. As the years passed by, the powers of suggestion, the dimness of recollections, the accuracy of identification from photographs alone must be considered with other human frailties in evaluating events, documents, and positions.

But my inquiry did not end in 1960, or 1964, or 1968. Because the story does not end there. There is another chapter—15 years of service on the Supreme Court as an Associate Justice.

We are not talking about a judge with no judicial record. I can't be blind to his record as a jurist, scholar, and writer. Justice Rehnquist has built a judge's career that most judges only dream about. He has achieved a reputation for integrity and honesty among his colleagues on the bench.

I also read the testimony given by the American Bar Association to try and understand how people can reach such different conclusions about one man. The ABA testified that they interviewed Justice Rehnquist's colleagues on the Supreme Court and that the support for Justice Rehnquist was virtually unanimous. This is extremely important because I believe there must be a great sense of family among these nine even though philosophies are divergent and strongly held. I cannot believe that if one of the members of the Court felt that elevation of William Hubbs Rehnquist to be Chief Justice would be detrimental to the institution itself that he or she would have remained silent. These nine have devoted their lives not just to an institution but to the Constitution, and their commitment to that oath is stronger than any commitment to an individual.

There are liberals on the Court; there are conservatives on the Court, and there are swing individuals on the Court. Those swing individuals are the important ones who will make decisions in the future and have made decisions in the past.

But to me the fact that Justice Rehnquist has earned the respect of those in the community in which he lives, the Supreme Court of the United States, was most persuasive. Within that community where he has earned...
the respect for his honesty, for his integrity, for his credibility, that are so necessary in a world with widely divergent views. There are those who whom we would say are the most liberal members of the Court, there are those who we would say are to the far right of the Court, and we would say there are those who are moderates and in the middle. But from the report as given to us by the American Bar Association, which has interviewed each of them, the support for Justice Rehnquist is virtually unanimous.

I am sure that such respect is not easily won nor easily maintained. He has led closely with his peers for nearly 15 years. No one could fool or mislead this group during that time with the issues that have confronted this group during that period of time. Those who are being asked to elevate William Hubbs Rehnquist to the position of highest honor that can be bestowed on a member of the legal profession.

I know that there are those who question Justice Rehnquist's sensitivity to civil rights of minorities and women. I do not agree with every opinion of Justice Rehnquist. In fact, I find myself in disagreement with many. But I do not believe those opinions are so extreme as to be unreasonable. Every stream has a right bank and a left bank. There is no question that Justice Rehnquist's views are always close to the right boundary of the stream, but they are nevertheless within the mainstream of modern judicial thought.

Chief Justice of the United States is an awesome responsibility and an awesome obligation. It takes an individual with broad shoulders—one with a strong backbone, sensitive perceptive, some obligation. It takes an individual with broad shoulders—one with a strong backbone, sensitive perceptive, some obligation.

In light of the fact that today, September 17, 1986, we are observing the 190th anniversary of the signing of our Constitution, it is extraordinary appropriate, indeed, to be considering the nomination of the Chief Justice who must lead in preserving and protecting the Supreme Court, the Federal courts, the State courts, and the public. Serving them all well, equally, all fairly. And your legacy will not only be compelling but complete.

The Chief Justice is not really first among equals. Maybe in his own community, perhaps on the Court, but really he is one among many. Our Government is set up with four branches. The President, the Congress, the courts and the forgotten branch—the American people.

It must never matter that an individual is black or white, rich or poor, male or female. Equal justice is only just if equally applied. In the words of a former Vice President:
September 17, 1986

CONGRESSIONAL RECORD—SENATE

25719

human and decent presence” wherever he was observed.

In addition, Dr. Freedman was highly concerned with the fact that Justice Rehnquist recognized the importance of “cultivating a private self dedicated to the development of his powers of creativity, of humane understanding, and of cultural appreciation.”

I agree with Dr. Freedman that these qualities will lead Justice Rehnquist to bring distinctness to the office of Chief Justice, and will assist him in preserving and protecting the ideals and principles our forefathers embodied within the Constitution. I pray that God will be with him as he carries out this extraordinarily difficult task which I hope he is able to perform as Chief Justice of the United States.

NOMINATION OF WILLIAM REHNQUIST TO BE CHIEF JUSTICE

Mr. MATHIAS. Mr. President, on August 14, I voted with the majority of my colleagues favorably to the Senate the nomination of William Rehnquist to be Chief Justice of the United States. Today, with the same office record that available to the Judiciary Committee on August 14, and with the benefit of further reflection on the issues presented by this nomination, I have decided that when the Senate votes on whether to confirm this nomination, I will vote “no.”

Since the committee voted, several memorandums written by the nominee when he was Assistant Attorney General for the Office of Legal Counsel have been made public. These memorandums help to underscore the point that Justice Rehnquist’s views are at the periphery of the current Court. In the case of the memorandum on the equal rights amendment, they provide a glimpse of his views—at least, the views he expressed years ago—on an issue as to which he had not expressed a view in his capacity as Associate Justice. But while the publication of these memorandums have not made it any easier for me to support this nomination, they also do not, by themselves, provide any basis for withdrawing that support.

My decision is based primarily on my concerns about Justice Rehnquist’s decision not to recuse himself from consideration of the case of Laird versus Tatum when it was before the Supreme Court in 1972, and about the way in which Justice Rehnquist has explained that decision. This issue has troubled me throughout the Senate’s consideration of the nomination. After the hearing ended, I submitted further questions to Justice Rehnquist on this issue. His answers failed to put my doubt to rest. I ask unanimous consent to print my written questions to Justice Rehnquist on this issue, and his responses to me, be printed in the Record at the conclusion of my remarks.

Mr. MATHIAS. The facts about Mr. Rehnquist’s statements before a Senate subcommittee on the facts and the legal issue presented by Laird versus Tatum have long been a matter of public record. The new ingredient is the question of his participation in fashioning the very policy attacked in that litigation: The role of military intelligence operatives in conducting surveillance of organizations of American citizens.

Justice Rehnquist’s answer to my question to him on this subject is that he had no recollection of any participation in formulating policy on this issue. It is plausible that, after 17 eventful years, Justice Rehnquist’s present recollection on this subject is faint. But what is at issue here is his recollection of Laird versus Tatum was argued in 1972, just 3 years after the Office of Legal Policy, which Mr. Rehnquist headed, struggled with its counterpart in the Department of the Army on this question.

I also asked Justice Rehnquist what consideration he gave to his participation in policymaking when he decided not to recuse himself from Laird versus Tatum. He answered that his memorandum opinion addressed “all considerations that in my judgment were relevant to whether or not he should sit on the case. This conclusion is hard to accept.

I explored this gnawing question with Prof. Geoffrey Hazard of Yale Law School and the principal draftsman of the 1972 ABA Code of Judicial Ethics, and a nationally recognized expert on judicial ethics. I ask unanimous consent that Professor Hazard’s letter to me dated September 8, 1986, be printed in the Record at the conclusion of my remarks. Professor Hazard concludes that it was “implausible” that Assistant Attorney General Rehnquist was not involved in formulating the surveillance policy. In reaching that conclusion, Professor Hazard draws inferences that I believe are reasonable. Mr. Rehnquist had just received an appointment that would mark a very respectable culmination to one’s professional career. If the legal and policy responsibilities entrusted to his small office were that of negotiating with the Army on behalf of the Justice Department. The issue, of course, was of great significance: these factors suggest that this was not an assignment that one would entirely delegate, nor that one would soon forget. Given his familiarity with the case, he should not have addressed it when it came before the Court.

Professor Hazard also noted that Justice Rehnquist should have been sensitive to the fact that he was a potential witness in the discovery phase of the case. Instead, Justice Rehnquist’s vote broke a deadlock, resulting in dismissal of the case, and thus ensuring that there would be no opportunity for discovery.

Finally, Professor Hazard discussed the 1972 memorandum opinion in which Justice Rehnquist explained his decision to participate in the case. He pointed out that the memorandum opinion addressed only the facts of public record. It makes no reference to his role in developing military surveillance policy, a role that had not yet been made public.

Professor Hazard’s conclusion on this point is strong, and bears quotation. Justice Rehnquist’s addressing the public record—known grounds of recusal, but omitting reference to the confidential ones, would have been proper only if he had forgotten the role he played in the Justice Department. Had he handled the surveillance policy negotiations, and that himself was involved to a substantial extent. If when writing his opinion on Laird versus Tatum, Justice Rehnquist had not forgotten his involvement in the surveillance policy negotiations, then his opinion constituted a misrepresentation to the parties and to his colleagues on the Supreme Court. In such a matter, a lawyer or judge is expected to give the whole truth.

The accusation that Justice Rehnquist was less than candid with the Supreme Court of the United States—the institution he has been nominated to head—is a serious one, and I am not prepared to make it. But I am sufficiently troubled by the real possibility that he acted improperly in failing to recuse himself from the case of Laird versus Tatum that I can no longer cast my vote in favor of his confirmation as Chief Justice.

Mr. MATHIAS. The facts about Mr. Rehnquist’s answers to questions submitted by Senator MATHIAS.

1. Document 1(i) transmits a draft memo from the Secretary of Defense and Attorney General to the President on a plan for response to civil disturbances.

A. What was your personal role in the preparation of this document?

B. With particular regard to the portion of the document concerning civil disturbance planning and intelligence operations prior to outbreak, what was your personal role in its preparation?

C. What was your role in arriving at the recommendation concerning the deployment of the Army Intelligence Command?

1. The Army Intelligence Command, may assist in this effort; (ii) the U.S. Army Intelligence Command should
not ordinarily be used to collect intelligence of this sort?

D. In 1964, Mr. Robert Jordan, General Counsel of the Army during early 1969, testified before the Senate Judiciary Committee that the Department of Defense was committed to "deengage military intelligence organizations from the collection of information dealing with civil disturbance matters," and that the language (referred to above) was authorizing a domestic role for military intelligence first appeared in the March 25 draft prepared by your office and transmitted over your signature. Does this accord with your recollection? If not, how does your recollection about the drafting of this portion of the document differ?

E. At the time that you considered the motion to recuse yourself from hearing Laird v. Tatum, what consideration, if any, did you give to your participation in the preparation of Document 1 (I), and in discussions leading up to it, or in development of policy on domestic use of military intelligence, in considering whether or not you should recuse yourself? Since no reference to this participation appeared in your memorandum, did you conclude that it was irrelevant, or did you omit reference to it for any other reason?

F. While you were in the Justice Department, what was your knowledge of, and your understanding of the formulation of the policy on, use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities?

Answer:

A. I have no recollection of my personal role in the formulation of the policy.

From the text of the transmittal memo I assume that the plan was primarily drafted by staff members in my office and in the Office of Solicitor General, Counsel of the Army, and was reviewed by me.

B. Answer same as to A.

C. Answer same as to A.

D. I have no recollection of how the language referred to in question C first appeared in the draft.

E. Laird v. Tatum is a case in which I wrote a memorandum opinion, explaining my reasons for declining to recuse myself. The opinion described my reasoning at that time regarding all considerations that in my judgment bore on the issue.

F. I have no recollection of any participation in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities. I do not think I had any first-hand knowledge as to the use of the military to conduct surveillance or collect intelligence, though I may have been briefed with such information as was necessary to enable me to testify before congressional committees or to publicly discuss legal questions.

YALE LAW SCHOOL
New Haven, CT, September 8, 1986

CHAIRS, MATHES
U.S. Senate, Senate Russell Office Building, Washington, DC

DEAR SENOAR MATHES: You have asked my opinion forthwith respecting the propriety of the conduct of Justice William Rehnquist in regard to Laird v. Tatum.

The essential facts as I have been given them are as follows: Laird v. Tatum was a suit to enjoin a certain Government information-gathering program that was adopted in 1969. The case was brought to the Supreme Court by the Government's appeal from a decision of the Court of Appeals, which had held that the legislation was unconstitutionally broad. The effect of the Court of Appeals' decision was that the plaintiffs could have proceeded to the discovery stage to test the propriety of the program.

In his opinion for the Court of Appeals, Justice Rehnquist reversed, holding that the plaintiffs lacked standing and hence that the suit should be dismissed without going into the merits. Justice Rehnquist participated in that decision and, since the decision was 5-4, cast a vote necessary to the result.

When Laird v. Tatum came before the Supreme Court, a motion to recuse Justice Rehnquist was filed by the plaintiffs. They argued that Justice Rehnquist was disqualified by reason of his prior relationship to the case. They contended that the Department of Justice was actively involved in the plaintiffs' suit, that the Justice Department was opposing the plaintiffs, and that his recusal would be necessary to prevent a conflict of interest.

In his opinion in Laird v. Tatum, Justice Rehnquist stated that "I never participated, either of record or in any advisory capacity . . . in the government's conduct of the case Laird v. Tatum." He added that he was "irrelevant if he was counsel in the transaction out of which the case arose, a basis of disqualification that was well recognized at law."

Justice Rehnquist appears also disqualified because he was a potential witness at the time the Army entered into the transaction out of which Laird v. Tatum arose.

In his testimony before the Senate, Justice Rehnquist rejected the contention that he was disqualified, stating that he was "irrelevant if he was counsel in the transaction out of which the case arose, a basis of disqualification that was well recognized at law."

Second, when the case of Laird v. Tatum was before the Supreme Court it was Justice Rehnquist's responsibility on his own initiative to recuse himself from any decision concerning his disqualification. It was not the party's responsibility to raise such matters, although they had a right to do so if they had access to the necessary facts. In his opinion in Laird v. Tatum, Justice Rehnquist stated that he had not been counsel in the "case," i.e., the litigation that ensued after his involvement in the transaction, and, second, to his state­ments in public and as a spokesperson for the Justice Department before the Senate.

Thus, Justice Rehnquist addressed only his recusal from the case in the opinion he was expected to give the whole truth.

In his testimony before the Senate he denied having knowledge of "evidentiary facts" that would make his disqualification evident. He added that his disqualification was not "evidentiary facts" but facts relating to the "subject matter" of the litigation.

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When I introduced the first Federal product liability bill in the Senate in 1981, the American people were largely unaware of how severe the product liability crisis was. Today, however, because of the overall liability crisis, the lives of everyone in our society have been adversely affected by our tort system. All over the country, the liability crisis is changing the way we live, and the product liability crisis is the No. 1 problem for consumers in America.

Small businesses across the country are shutting down because they cannot get liability insurance coverage, and manufacturers of everything from football helmets to child-safety seats are halting production because of high liability insurance costs. Society pays a high price for this situation.

A few years ago there were four U.S. companies manufacturing a measles vaccine. Today, because of the high cost of liability insurance, there is only one.

A Milwaukee company has designed a new safety braking device for lawn-mowers, but they cannot afford to market it. If they did, their product liability insurance would rise from $18,000 to $200,000 a year. That is their product liability insurance by making a decision to market a new product which would be a safety product for lawn-mowers.

Researchers at Stanford University have pioneered the development of a miraculous new artificial skin, which can save the lives of thousands of burn victims in our country each year. Yet, they cannot get insurance for their life-saving innovation—no conventional insurance company will touch them because of the product liability risks.

Under the current, crazy system, the liability crisis threatens to deprive us of vaccines, anesthesiology equipment, and hundreds of other products that are, on balance, very good for society as a whole.

Unless changes are made, these products will no longer be available, or they will be available only at a much higher cost, or they will be made only by foreign manufacturers and thousands of American businesses and jobs will be lost. A recent survey in my home State of Wisconsin revealed that a full 10 percent of small businesses in our State must close their doors if something is not done about the current liability crisis. This 10 percent of small businesses was forced to get insurance at all or unable to get insurance at affordable rates.

That is why I say that the product liability crisis is the No. 1 consumer issue of our times.

We have had 4½ years of hearings and I think if one point comes out in hearing after hearing, testimony after testimony, it is widespread agreement that the current system of product liability tort law is a national disgrace. The exorbitant costs of this system, where more money goes to the attorneys than to injured victims, are passed along to the consumer in the form of higher prices for American goods. We have reached the point where over one-third of the cost of an ordinary step ladder goes solely for liability insurance. The American people are fed up with this hidden attorney’s fee tax on every product they buy.

In addition to driving up product prices for consumers, the product liability explosion is closing U.S. manufacturing plants, destroying jobs, crippling American manufacturers' ability to compete with foreigners, discouraging product innovation and improvement, and driving a wide variety of goods and beneficial products—from life saving vaccines to football helmets—off the market.

The product liability explosion threatens everyone in America who uses, sells, or manufactures products. Most of S. 2760 is the product of an overwhelming, bipartisan consensus on the product liability issue. A core proposal, encompassing most of the key aspects of S. 2760, passed by a 15-1 vote in the Commerce Committee. Only one member of our committee still believes that a Federal solution to the product liability explosion is inappropriate.

We achieved this consensus on such complicated issues as the statute of repose, the system of attorney’s fee taxes, a uniform fault standard for product sellers, subrogation lien elimination, penalties for attorneys who bring frivolous suits and cause undue delays, punitive damage clarification, and provisions relating to admissible evidence and to proper sites for claims arising in foreign countries.

All of these provisions will provide uniformity, clarity, and certainty in the law which will reduce transaction costs and provide a fairer system for product users, sellers, and manufacturers.

I believe that S. 2760 is a good, sound bill which will go a long way toward alleviating the liability crisis. However, I believe a return to the concept of fault in our tort law is absolutely essential to restore fairness and predictability in the law.

Recent cases have held manufacturers liable when they were totally innocent. Several courts have held manufacturers liable for failing to warn about dangers which were unknowable at the time. One court held a manufacturer liable where there was no injury to the plaintiff—only a fear of future injury. Other courts have held manufacturers liable for injuries to the plaintiff where the plaintiff has
unreasonably altered and misused the manufacturer's product.

Such decisions punish the innocent indiscriminately with the guilty, and those who have never done anything wrong for chances of recovery. This is a system that hurts businesses and consumers as well as our competitive position in world markets. Moreover, the unpredictability and increased cost have been linked to the increasing cost and unavailability of liability insurance. Because of the serious burden on interstate commerce created by these product liability problems, Federal legislation is needed.

Today, consumers are caught up with manufacturers and product sellers in a product liability litigation system that has been characterized as a legal lottery, a system in which identical cases can produce startlingly different results. It is a system in which those injured by defective products are often unable to recover the damages they deserve or must wait years for recovery. Moreover, injured victims with the severest injuries tend to receive far less than their actual economic losses, while those with minor injuries are overcompensated.

This system is as costly as it is unpredictable and inefficient. According to the Rand Institute for Civil Justice, the annual transaction costs of the tort system—the costs of litigation and attorneys fees—are estimated to be between $15 and $19 billion. These costs exceed the compensation received annually by plaintiffs and they are passed on to consumers as increased burdens on commerce.

S. 2760, as reported, addresses these problems by making a number of significant reforms that are applicable in all product liability actions in State and Federal courts. This bill has evolved over the past few years out of efforts begun by Senator Kasten, Senators Danforth and Dworkin, and others. It is a bill that has been shaped by the Commerce Committee during 8 days of executive session.

The development of this bill has been a long and complex process. At the beginning of this Congress, on January 3, 1985, Senator Kasten introduced S. 100, the Product Liability Act. This bill would have preempted State laws that could conflict with Federal rules and standards of liability governing the recovery of damages for injuries caused by defective products. This bill was substantially the same as S. 44, which was defeated by the Commerce Committee during the 98th Congress, but which was not considered by the full Senate prior to adjournment.

At an executive session on May 18, 1985, S. 100 was defeated by an 8-8 vote. Prior to that markup, Senators Domenici and Gore had introduced amendments in the nature of a substitute to S. 100, each of which would have established alternative expedited claim systems for limited recovery of damages in product liability cases. After S. 100 was defeated, the committee held hearings on both amendments in June 1985. Then instructed the Commerce Committee staff to draft a proposal that combined elements of all these measures, and this proposal was eventually introduced as S. 199 in December.

S. 199 would have combined an alternative compensation system with uniform Federal standards, providing faster compensation for injured victims and greater certainty for manufacturers. However, S. 199 did not receive the level of support that I had hoped for. Manufacturers were concerned about the costs of the compensation system, while consumers feared that the uniform standards would make it more difficult for injured victims to recover. Both groups were concerned that the liability standard for the alternative compensation system was overly complex and would lead to costly litigation. All agreed, however, that the present system is deeply flawed and reform is badly needed. While I still believe that S. 199 is a sound and fair proposal, I directed the staff to draft a new proposal that would address these concerns.

S. 2760 dispenses with the complex liability standard of S. 199. Instead, it creates incentives for manufacturers to assume limited liability in product liability cases, and thus to resolve such cases quickly. The system's high transaction costs, which presently exceed the compensation that is received by victims. Because of the political opposition that negligence-based liability standards have produced in the past, S. 2760 does not include such standards. This bill will not make it more difficult for victims to recover for injuries caused by those products.

This is not a perfect bill, but it is a bill that addresses the common interests of manufacturers, product sellers, and those injured by defective products. It does so by reducing transaction costs and providing greater predictability and certainty as to the rights and responsibilities of all those involved in product liability disputes.

This measure's reforms of the product liability system include a new, expedited settlement system that would create incentives for both plaintiffs and defendants to resolve liability disputes quickly in the initial stages of litigation. This settlement system provides greater certainty that those injured by defective products will be made whole for their actual losses without the excessive costs and delays of litigation.

In addition, S. 2760 modifies the doctrine of joint and several liability. It eliminates joint and several liability for so-called noneconomic damages—damages for pain and suffering. This provision was presented to the Commerce Committee as an amendment. The joint and several liability standard is not the system's high transaction costs, which presently exceed the compensation that is received by victims. Because of the political opposition that negligence-based liability standards have produced in the past, S. 2760 does not include such standards. This bill will not make it more difficult for victims to recover for injuries caused by those products.

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tion of the doctrine of joint and sever­al liability that makes one defendant pay for the misconduct of another. This provision is a compromise. It takes a balanced approach to the problem by limiting application of joint and several liability to situations where it is defensible on public policy grounds. Excessive liability might otherwise be uncompensate­ted. This distinction between economic and noneconomic loss is consistent with the underlying policy of joint and several liability to make the injured party whole. It does not preclude the claimant from being made whole for actual losses, while limiting a defend­ant’s liability for noneconomic losses to that portion for which the defend­ant is responsible.

With respect to punitive damages, the bill establishes a higher burden of proof and a uniform standard of liability; it requires clear and convincing evidence that the harm suffered was the result of manifestlyคอน­scious, flagrant indifference to the safety of persons who might be harmed by a product. Moreover, this measure contains a Government standards defense that bars the im­position of punitive damage awards in cases involving drugs or aircraft when these products have been subjected to premarket approval by the appropri­ate Federal agency.

S. 2760 also imposes a uniform liabil­ity standard for product sellers who are not manufacturers. Moreover, it provides that any damages awarded in a product liability action shall be re­duced by any workers’ compensation benefits recoverable by the plaintiff for the same harm, and it significantly reduces transaction costs in such cases by elimin­ating the employer’s subroga­tion lien. These are important re­forms.

This measure establishes, as well, uniform statutes of limitations and re­pose for product liability actions. It establishes a rule barring recovery in product liability actions by plaintiffs who are legally intoxicated and more than 50 percent responsible for their harm. In addition, it establishes sanc­tions to be imposed by courts on attor­neys who file frivolous lawsuits or delay litigation without good cause.

Other reforms in S. 2760 include a forum non conveniens rule that cre­ates a presumption that when a for­eign plaintiff sufers a product-related injury overseas, that claim should be brought overseas. This bill establishes uniform rules as to admissible ev­i­dence, and limits the use of evidence of subsequent remedial measures taken by manufacturers after harm has occurred.

This bill also imposes penalties for the deceptive concealment of ma­terial relevant to product liability ac­tions. It requires the Secretary of Commerce to provide Congress with an annual report analyzing the impact of this legislation on product liability insurance.

I believe that this is a fair and bal­anced bill that effectively addresses the product liability problem. It ad­dresses the dissatisfaction of both manufacturers and consumers with the present product liability system. Manu­facturers face rising legal de­fense costs, and cannot predict the scope of their liability. Excessive man­agement time is diverted from produc­tion to assessment of legal claims, and the uncertainties of the system deter the development of new products or product settlements that are linked to net economic loss, thus reducing both uncertainty and transaction costs. The workers’ compensation subrogation reform will also reduce transaction costs. Privoluous claims will be discour­aged by provisions that impose sanc­tions on attorneys who bring such claims. The reforms of joint and sever­al liability, forum non conveniens, product seller liability, and punitive damage standards will increase pre­dictability and fairness.

Consumers suffer under the present system as manufacturers do. Not only does the present system force injured victims to endure excessive costs and delays; it is unable to com­pensate them in proportion to their losses. Numerous studies have found that the tort system grossly overpays people with small losses, while under­paying those with the most serious losses. In contrast, the expedited set­tlement procedures of S. 2760 would ensure that victims are fully compen­sated for all their losses. Not only would they be compensated for their lost earnings and medical expenses, as these losses are incurred, but they would also receive full rehabilitation costs. These costs would be paid in full by the manufacturer, regardless of whether the claimant’s own careless­ness was a partial cause of his injuries. And this compensation would be avail­able within a few months after the filing of the complaint, in contrast to the present system in which claims take many years to resolve.

Thus, both manufacturers and con­sumers will benefit from this legisla­tion.

I recognize, however, that there is at least one element of this measure that has generated a great deal of contro­versy. Specifically, S. 2760 cap on pain and suffering awards that limits a de­fendant’s liability when a valid settle­ment offer is rejected. I also recognize that if this cap had been removed from the bill the Commerce Commit­tee probably would have approved this measure by a margin greater than the 79-20 vote it received.

I would like to explain in greater detail the rationale for this limitation on pain and suffering awards, which is imposed as an incentive for settlement in the most serious cases—those in­volving disfigurement, and loss of life, limb, or bodily function. This cap is in­tended as an incentive for defendants in such cases to offer payment of all of an injured person’s actual economic losses that are not reimbursed by the person’s insurance, plus $50,000 for pain and suffering. This cap only applies if there is such an offer and it is rejected by the plaintiff. It is not an across-the-board limitation on recovery for pain and suffering in all product liability cases.

S. 2760 also imposes a cap on pain and suffering when an offer to pay actual economic losses is rejected in those involving less serious inju­ries. This cap is the lesser of two times the injured party’s economic loss or $50,000. Although such cases make up the overwhelming majority of product liability dis­putes, less than ½% of all cases does not seem to be a major concern. It is the $250,000 limitation on pain and suffering recovery in the most serious cases that has provoked the most con­trover­sy. Several members of the Com­merce Committee, including Senator Inouye and Senator Stevens, have ex­pressed great concern about this cap on pain and suffering in cases invol­ving severely injured persons.

This is an extremely volatile and emotional issue. But it is important to note that the $250,000 cap is not mere­ly a relief measure for manufactu­rers as some have suggested. The issue here is not the size of pain and suffering awards or how such awards have grown. The issue is how to pro­vide the same relief for the seri­ously injured person, because the data shows that recovery in the average product liability case is de­layed for years and that the tort system grossly overpays people with small losses, while underpaying people with the most serious losses.

How, then, does a $250,000 cap help such people who are grossly under­compensated. It helps them because such a limitation on liability reduces the unpredictability of the litigation system and is a compelling incentive for defendants to offer to pay the seri­ously injured person’s actual losses, as they are incurred, plus an additional $100,000, and to do so in the initial stage of litigation—not 5 years down the road, when the average product li­ability claim is paid.

During committee consideration of this proposal, Senator Inouye elo­quently described the plight of many of those who have been severely in­jured and who are burdened by pain and suffering for the rest of their lives. Some of them are able to recover their economic losses and to receive some payment for their pain and suf­fering. But it is important to remem­ber that many of these seriously in-
Serious injured and who has severe injuries and who has severe injuries and who has severe injuries. Finally a plaintiff, who has really been injured and who has severe injuries and who has severe injuries. And they also face different results. And they also face different results. And they also face different results.

The purpose of the $250,000 cap is to give these severely injured persons greater certainty of being paid in full for their out-of-pocket losses along with an additional $100,000. It is not a meaningful idea to deprive the injured of just recompense but a trade-off of predictability for defendants for certainty of recovery for those who have been injured.

Those injured by defective products seek full, swift, and more certain recovery. Manufacturers and product sellers, and their lawyers, and the scope of their liability. Manufacturers, product sellers, and consumers seek to reduce the excessive transaction costs of product liability disputes. The settlement of all the cases, with its limits on liability is intended to address these concerns. I believe that one of the most important components of a meaningful product liability bill is such a system for fairly compensating victims without forcing them through the long and costly ordeal of protracted litigation.

Mr. President, I do not believe that the so-called $250,000 cap should block Senate consideration of this important legislation. I remain flexible on this issue and it is time for the Senate to act on this measure and to consider alternatives to the $250,000 limitation on noneconomic loss.

Mr. President, I want to say just one additional word about by far the most controversial aspect of this product liability and product liability reform, and that is the question of whether there should be a cap on recovery for pain and suffering. It is controversial. It is emotional. People argue that there should be no cap, particularly for serious injuries, no cap on pain and suffering awards.

I want to explain very briefly the reason why the Commerce Committee adopted the concept of caps. The problem today is not that people who are seriously injured recover too little or too much, but rather that so often they do not recover at all. Their cases drag on in court year after year after year. The more severe the injury, the longer the litigation.

The claim that has been correctly called the lottery system. You enter the lottery and you see what happens. The more severe the injury, the longer the lottery seems to go on. Defendants, through their lawyers, delay and finally a plaintiff, who has really been seriously injured and who has severe financial difficulties going along with the injury, is forced to settle rather than keep the thing going on forever. And it is not just in this country, we are now paying more to lawyers and for court costs than is going to plaintiffs in product liability cases. We spend too much. It is a disgrace to the country.

The reason for the caps is very simple. What we attempted to fashion in the Commerce Committee is an incentive system so that both plaintiffs and defendants would believe that it was in their interests to settle out of court, short of full-fledged litigation.

So we developed a system which attempted to provide meaningful economic incentives for settlement. In the case of a plaintiff who is willing to settle and the defendant rejects the settlement effort and the plaintiff prevails, we would have the defendant pay the attorneys' fees of the plaintiff. But in the case of the defendant, where the jury determines that the defendant is unable to pay the attorneys' fees even if he wanted to do so, we could not come up with a better incentive for settlement than to say, in effect, to the defendant: If you want to cap your exposure, make an offer of settlement for net economic losses, the real out-of-pocket economic losses, plus, in serious cases, a limited but ascertainable amount for pain and suffering.

That was the concept of the cap. The concept of the cap was not that we wanted to be mean-spirited toward plaintiffs. The concept of the cap was that there has to be some incentive program to make it worth the while of the defendant to pay and pay quickly without dragging the case on year after year after year.

Mr. President, repeatedly in the Commerce Committee I made a statement which I will make again right now. I put a lot of time in on this bill. I put a lot of time in on this bill, as has Senator Elrod. But this bill is not written in concrete. The idea of a cap is not, as far as this Committee is concerned, written in concrete. It is not set for all times. No one could be more concerned about meaningful incentive for settlement that we wanted to be mean-spirited toward plaintiffs. The concept of the cap was that there has to be some incentive program to make it worth the while of the defendant to pay and pay quickly without dragging the case on year after year after year.

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I will only say this: unless there is a meaningful incentive, an economic incentive, to settle the case short of full-fledged litigation, there is no meaningful product liability reform, in my opinion. I cannot think, and have not been able to think, myself, of a meaningful incentive for settlement that did not include a cap. I do not think the issue is whether plaintiffs are getting too little under a system with caps or the plaintiff only. I think the question is whether they are going to get anything at all, especially in serious cases.

I repeat: A situation which gives lawyers more than it gives plaintiffs, which is the present system, is a disgrace to our country. It does not serve the purpose of the consumers. In fact, it increases the costs of the products they buy. It does not serve the purpose of American business, which is attempting to be competitive in international markets, to drive up their costs by an absolutely unpredictable court system which we have now.

This country cries out for tort reform. If people do not like the specifics of the bill before us, offer amendments. We will work them out. We will do our best work with people who have problems with this bill.

But after a year of effort in the Commerce Committee, let us not let moment pass. So often in the Congress we seem to be spinning our wheels, going on and on and on, fine-tuning legislation that seems to be going nowhere. Here is our opportunity to respond to the needs of the people of our country.

When the White House conference on small business met, it said this is the No. 1 issue, as far as small business is concerned in the United States. Let us heed that cry for help. We can do it now.

Again, I congratulate the Senator from Wisconsin for his leadership.

Mr. HOLLINGS. Mr. President, I was on the floor, while the distinguished Senator from Wisconsin was presiding, and while we were awaiting the attendance of the distinguished Senator from Missouri. But be that as it may.

Let me say this: It is a disgrace for the U.S. Senate to give dignity and prestige to this fraudulent and deceitful assault upon our tort system, upon our system of federalism in this country, so that politics, we can say we have done something. The truth is, over a 4½-year period, we have found no basis in fact for this particular bill on the floor today.

It is an administration that started off on federalism, we were going to send back government to the cities and the counties and we were going to send it back to the States. These entities are closest to the people, and better able to handle these particular problems. It is ironic that the administration that was going to start the trend for federalism now is going to take over an area of common and statu­tory law, which has been the responsibility of the 50 States for some 200 years. Over the years, the courts have generally acted in a wise and a deliber­ate, temperate and responsive fashion.

I happen to believe the jury system is working. I happen to believe the States have been facing up to their responsibilities on this. I do not believe the fallacy of a so-called lawsuit crisis. But politically, I understand that pro-
components try to keep this legislation in front and center as if they are doing something for the businesses and the consumers of America. The truth of the matter is, if they ever federalized the tort law, businesses would soon be penalized.

American business might have a more conservative U.S. Senate here today. I have been here during the majority of my years with a far more liberal body. Federalize, if you will, product liability. Ultimately, however, you may then see a system where if somebody stumbles coming down these raised sections of the Senate floor and falls on the ground, this person will walk over to the window and get his money.

I have been on both plaintiffs' and defendants' side of this particular question as a practitioner and this experience prompts me to say, "forgive them, for they know not what they do." More and more business leaders hold their seats in this underrated system that there is no lawsuit crisis. For example, there is no large increase in numbers of suits or verdicts in my State. I have put that in the Record. There are no runaway juries. And in a very dramatic sense, we have seen over the years the good of product liability law as it provides an incentive for manufacturers to make a safer product.

We do need this additional incentive for safety because businesses do sometimes make decisions to the detriment of product safety for the wrong reasons. Unfortunately, Mr. President, this was demonstrated on national TV in the Challenger disaster. There was an O-ring disaster, a product liability defect. They knew about it and studied it for a year ahead of time. They had meetings over this product defect; but when they got down to the wire, what did they do? Business was doing this is not a decision for engineers; this is not a decision for technicians; this is not a decision for safety. This is a management or business decision. And as a result, we have seven deceased astronauts, right on your national TV.

If safety is not a predominant issue there, what priority will be given to safety in the manufacturing of products in America when businesses separate between engineering and safety and looking out for the consuming public on the one hand and making a profit, making it a business decision, on the other hand? You see how callous they may be.

The money has worked in this country. We can give example after example where the trial courts of America have eliminated punitive damages or otherwise cut the actual verdicts too high. That has been a part of the common and statutory law for 200 years.

Now comes this administration and this Government in Washington that cannot promulgate an arms control policy; they cannot provide for the national defense. During a one-vote margin to try to get through a strategic defense initiative; they do not know what their policy is on apartheid in South Africa and fundamental moral questions, they cannot make arrests without having to give hostages. Here is a government that cannot regulate foreign commerce. The trade deficit goes up, up and away. Article I, section 8 of the Constitution says regulate foreign commerce. This administration cannot regulate it.

Here is a government that is an addict on the drug of deficit spending. This is a crowd that cannot pay their bills. They cannot perform their responsibilities. The Government is going broke. The President talks in the morning paper of drawing a line in the concrete, saying the Government will close down, while we cannot fundamentally respond to our constitutional charges.

We pretend to know what is going on in the States. For one thing, it is almost like Carter's malaise. He went up to the mountain when he had difficulty administering the Government and acting as President, and he found that the country was at fault, there was a lot of malaise.

Now, when we are facing another election in 60 days, and how do we react? We find that the people of the country are on drugs. Not us. Oh, no. But the people need education, they need treatment centers, they need death sentences, they need the Army and the Navy, they need surveillance, they need everything. But not us. We are the biggest drug addicts I have ever seen, because we cannot pay our bills on that old drug of deficit spending. Now you come here, after 4½ years, knowing that they have not proved the case, and they come around here with a monkeyshine business.

They come here based on a bunch of fallacies: We are going to take over the State responsibilities over the objection of the Association of State Supreme Court Justices; over the objections of the Association of State Attorneys General; over the objections of the National Conference of State Legislatures; over the objections of the American Bar Association, and bring to the floor a bill that the lawyers on the Judiciary Committee have yet to report on. It is a bum's rush for profits and money and will not result in reduced insurance premiums.

I am going to stand in the well and make sure that it does not happen. We can stand here until November 4. I am going to stand up to try it. We will not go off to try to maintain our jobs, but I am willing to stand here beyond that to make absolutely certain that this fraud and deceit does not carry forward.

I will go into the various fallacies of the insurance crisis and the litigation explosion very briefly. Mr. President, in the consideration of this under this rule, we are going to have to return to the Rehnquist nomination. I have yet to really get into any part of this.

The property casualty insurance industry in the past 2 years has suffered significant underwriting losses. That is what the administration's tort policy working group says.

That is what the administration's top policy working group said, and that is what the distinguished Senator from Wisconsin contends in submitting this measure.

The truth of the matter is different. If you look at the report of the U.S. General Accounting Office, it conclud- ed that during the past 15 years the property casualty insurance industry "had a net gain of $75 billion and was expected to experience a net gain before taxes of more than $90 billion over the years 1986 to 1990."

The PRESIDING OFFICER. If the Senator will yield—

Mr. HOLLINGS. I will make one sentence and thank the distinguished Presiding Officer.

The only crisis the insurance industry is really suffering is a credibility crisis.

The Product Liability Reform Act is unwise Federal legislation. It would preempt 200 years of common law development in the State courts and legislatures without sound statistical data or evidence to support a crisis in product liability. I urge my colleagues to reject it.

The bill includes a number of sweeping, ill-advised procedural and substantive changes in the law of product liability. For example, title II of the bill establishes new settlement procedures with a cap on noneconomic damages. A manufacturer of a defective product effectively can impose the cap at will upon a seriously injured consumer or worker.

Not only is the workability of this settlement system questionable, but the arbitrary cap, like other provisions of the bill, would not solve any problem existing in the tort system. One insurance executive recently addressed this point:

Worse, from an insurer's standpoint, they [caps] perpetuate current uncertainties about the value of the small claims that make up the overwhelming majority of tort liability payments, and thus would do little to improve the predictability of the system as a whole while inflicting substantial injustice on those seriously injured by another's negligence.

In addition, the bill is riddled with ambiguity and conflicts for court prac-
tice and procedure. It would supersede all existing State case law and statutory law in the areas it covers while denying Federal question jurisdiction. It is important that my colleagues in the Senate be aware that this bill represents a departure from our Federal system of government. Yet we are considering this unprecedented measure without credible evidence that it is truly necessary. To the contrary, the development and practice of common law in the States during the last 200 years has worked well to balance the interests of consumers and workers with those of product manufacturers, sellers, and distributors.

In 1984, when the Senate Commerce Committee voted to report S. 44, a predecessor to this bill, I wrote similar concerns about the lack of demonstrable need for this type of sweeping Federal legislation:

Why is this bill necessary? That is the one basic question for which proponents of S. 44 have failed to provide answers. When the manufacturers began their hue and cry for reform in the mid-70's, the reason was rapidly rising product liability insurance rates. When it became evident that the perceived insurance "crisis" was disappearing, they created a new reason for concern, namely, that the lack of uniformity results in higher transaction costs. Yet they have not provided significant evidence to support this contention nor have they demonstrated that S. 44, as written, would remedy the alleged problem.

I continue to question the need for Federal product liability legislation, especially since the proponents have now returned to their original justification for the bill—rising insurance premiums. Product liability insurance premiums have swung from a high in the mid-1970's to a low in the early 1980's to another high recently. During Commerce Committee hearings on S. 44 in 1983, witnesses testified that insurance premiums had lev­­eled out or declined during the previous 3 years. Trade publications reinforced this point. Today, the liability insurance crisis is again widespread and cuts across many lines. This year, product manufacturers and distributors have faced huge premium increases for liability insurance. Some have seen their coverage canceled or have faced reduced coverage with increased deductibles. Others cannot obtain liability coverage at any price.

These fluctuations in the insurance market have occurred despite the fact that the evolution of tort law in the 50 States has been a slow and deliberate one. No dramatic changes have occurred in the vast majority of the States common law or case law over the last few years. Manufacturers have faced huge premium increases for liability insurance. Some have seen their coverage canceled or have faced reduced coverage with increased deductibles. Others cannot obtain liability coverage at any price.

The original justification for Federal product liability reform was the previous product liability insurance premiums crisis in the mid-1970's. At that time, insurers mandated large increases in product liability insurance premiums. (For example, the editors of Business Week stated that "mainly the industry shot itself in the foot." A study by the National Association of Attorneys General Ad Hoc Committee on Insurance recently concluded that "the cyclical nature of the industry, and not changes in tort claims, is largely responsible for the current crisis." Similarly, industry executives have recently remarked: "Insurance industry leaders must stand up and squarely accept the responsibility for a crisis they have created.")

There is vast disagreement over the role of any increasing claims losses and the tort litigation system in the current insurance crisis. Indeed, there is no comprehensive data to support this as a major contributing factor of the crisis. The claims of a tort litigation explosion, which have been made by proponents of Federal codification to justify the need for their bill, have been met with convincing evidence to the contrary. For example, a recent study by the National Center for State Courts concludes that an examination of State court data provides no evidence to support the existence of a national litigation explosion from 1981 through 1984.

Proponents of this legislation have used questionable figures to support the alleged existence of a lawsuit crisis. The administration provided figures in its February 1986, report of the Tort Policy Working Group to attempt to substantiate its conclusion of an explosive growth in damage awards. However, in response to my questions at a Commerce Committee hearing, Assistant Attorney General Richard Willard, the chairman of the working group, admitted that these figures were based on newspaper clippings. The use of newspaper clippings rather than comprehensive survey data as a basis for making changes in the 200-year-old tort system does not meet the legislative standards of the U.S. Senate.

Recent evidence such as the State court data and the frailty of the evidence used by proponents are not consistent with the Federal codification suggestion a link between insurance premium prices and tort law only when premiums are rising. I have never heard the tort system credited for the drop in premiums in the early 1980's.

There is little disagreement that the practice of "cash flow underwriting" and the management practices of the insurance companies contributed to the cyclical nature of the insurance marketplace, with the high and low ends of the cycles occurring like clockwork, every few years. The most recent end of the current cycle when interest rates dropped, thereby slowing the rise in investment income.

Various commentators confirm that the crisis is of the insurance industry's own making. For example, the editors of Business Week stated that "mainly the industry shot itself in the foot." A study by the National Association of Attorneys General Ad Hoc Committee on Insurance recently concluded that "the cyclical nature of the industry, and not changes in tort claims, is largely responsible for the current crisis." Similarly, industry executives have recently remarked: "Insurance industry leaders must stand up and squarely accept the responsibility for a crisis they have created."
The insurance study commissioned by the task force found that, while insurance costs did increase in the mid-1970’s, insurance premiums exceeded 1 percent of the total sales for only three industries. By 1983, evidence indicated that product liability insurance costs had stabilized or decreased, and the insurance crisis had disappeared. A 1983 Institute for Civil Justice study concluded not only that reports of a product liability crisis in the mid-1970’s were greatly exaggerated, but that even the perception of a crisis had receded because it had become evident that product liability claims had not been an unmanageable cost for most manufacturers. Recently the liability insurance crisis is again widespread and cuts across many lines of insurance.

The increases in product liability insurance costs were a result of the cyclical nature of the insurance industry and the industry’s ratemaking practices. The Congressional Research Service has described the repeating cycles of high and low premiums as an historical alteration between soft and hard insurance markets and has discussed the magement practices of the companies to contribute to this cycle. In a soft market, rates are adequate, risk selection careful and the industry is generally performing well. New capital is attracted from a number of sources and capacity increases. Price cutting of premiums results when new sources of capacity to generate increased competition for available premium volume. Underwriting standards—the standards for deciding whether to insure a particular manufacturer—for risk selection diminish with increased competition and insurers take on riskier business endeavors. According to the Congressional Research Service, this practice results in rising claims costs.

At the point that competition is so severe that the losses are too high, insurers withdraw from the market and the capacity shrinks, resulting in a hard market. Availability and affordability problems result as the remaining insurers raise prices and tighten the underwriting standards. Eventually the market stabilizes, a soft market emerges, and the cycle begins again.

Interest rates, which reached historic heights in the late 1970’s, aggravated the cycle recently. Companies engaged in a price war in order to obtain a larger volume of premium income for stable investment. Rates and underwriting standards were willing to accept lower premiums for certain insurance lines in order to encourage sales and obtain funds for investment.

On February 19 and March 4, 1986, the Senate Commerce Committee held hearings to conduct a more comprehensive examination of the availability and cost of liability insurance. Testimony was presented at these hearings on the reasons for the recent insurance crisis. Witnesses noted that the insurance crisis had arisen during a period of falling interest rates, prior to which competing insurance companies had been underpricing their product in order to maximize cash flow and enhance investment income. When interest rates began to fall, companies were forced to increase premiums because investment income was no longer compensating for underwriting losses. The recent committee report accompanying S. 2129, the Risk Retention Amendments of 1986, states that "This practice of cash flow underwriting was linked directly to the current crisis."

The industry appears to be coming out of the recent crisis. The General Accounting Office testified on May 26, 1986 before the Senate Commerce Consumer Subcommittee that the underwriting cycle has turned again and "is now moving in a positive direction." The industry is projecting substantial gains for the next 5 to 10 years. The property-casualty industry will enjoy an expected net gain after taxes of more than $90 billion over the years 1986-1990.

The General Accounting Office also found a profitable industry over the last 10 years, stating that "the property-casualty companies had used a pricing strategy which sacrificed underwriting profit margins in order to generate cash for investment purposes. As a result of the strategy, the property-casualty industry has made between $52 and $79 billion in net gains over the last 10 years."

The irony of the continuing debate over a Federal product liability bill is that insurance costs were emphasized by the proponents as the reason for passage of a Federal product liability bill in the 96th and 97th Congresses when premiums were high, and were deemphasized as a reason for passage of product liability legislation during the 98th Congress when insurance premiums were reduced. In the 99th Congress, the proponents again point to the high premiums as a justification for a Federal product liability bill in the 96th and 97th Congresses when premiums were high, and were deemphasized as a reason for passage of product liability legislation during the 98th Congress when insurance premiums were reduced. In the 99th Congress, the proponents again point to the high premiums as a justification for a Federal product liability bill.

The bills considered in these Congresses have attempted to undercut the rights of injured product users. It seems to me that we have unfair legislation chancing after a justification.

CURRENT SYSTEM NOT RESPONSIBLE FOR EXCESSIVE COSTS

Despite the cyclical nature of the insurance market, the argument continues to be made that uncertainty in the tort system produces excessive costs. The contention is that the inability of manufacturers to predict potential liability costs undermines the appeal of a Federal product liability bill for reasons of excessive generosity of jurors in product liability cases, and increased litigation and transaction fees impose unnecessarily high costs upon manufacturers.

The argument does not withstand scrutiny. The Institute for Civil Justice of the Rand Corp., concluded in 1983 that product liability costs in manufacturing had increased dramatically. It appears safe to conclude that for most large manufacturing firms, product liability costs—including the cost of defending litigation and certain insurance premium and litigation activities—probably amount to much less than 1 percent of total sales revenue.

Equally important, there is no evidence demonstrating that the displacement of State product liability law by the bill reported by the committee would reduce product liability costs.

PRODUCT LIABILITY CLAIMS AND AWARDS

The legal study commissioned by the task force in 1976 concluded that "the volume and size of damage awards in all probability cannot be considered the direct cause of the alleged insurance problems." Although there are no comprehensive studies, available information seems to reinforce the legal study’s conclusion. For example, an insurance services office study published in 1977 rejected the assertion that product liability claims had increased dramatically. The study concluded that the amount paid in closed claims commonly had been overstated by seven to eight times and that the average amount paid per claim for bodily injuries was $2,502.

A Carnegie-Mellon investigation of State and Federal product liability cases filed in Pennsylvania from 1963 to 1978 found no significant increases in either the number of legal actions or the amount of awards to claimants. Statistics compiled for claim experience in Kansas in 1981 showed that the product liability closed claims average was $1,100.

According to a June 1983 report by the Missouri Division of Insurance, the number of claims had dropped substantially from 1979 to 1981. As of early 1983, underwriters had filed for an average of 14-percent rate decreases in the State. More recently, the director of the Rand Corp.’s Institute for Civil Justice noted that, in the mid-1980’s, tort verdicts had fallen for an average of post-jury verdict reduction revealed that half of the final punitive damage payments made to plaintiffs were approximated in the original jury award. This reduction takes into account postverdict settlements, remittitur—reduction of the original jury award at the judge’s suggestion—and reductions on appeal.

Using data which did not take into account any reduction in the original verdicts, the institute found different trends with respect to product liability awards in two metropolitan areas.

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From 1965 through 1979, median awards doubled in Cook County, IL, from $59,000 to $127,000, whereas in State courts, there was upward movement over the same 14-year period, with the median award going from $51,000 to $57,000. The median amount represents the dollar at the 50th percentile when awards are listed from lowest to highest in ascending order. The median is more appropriate than the average award since the average is misleading. A small number of very high awards strongly influences the average award figure and makes it less useful for comparison purposes.

For example, in 1978, a jury awarded more than $127 million to a man who was seriously burned when a gasoline tank exploded in an accident involving a Ford Pinto. As a result of that one verdict, the average product-liability award in 1978, according to Jury Verdict Research, hit $1.7 million—an astounding 285 percent over the previous year. But the trial judge later reduced the Pinto award to $6.7 million. Had the statistics accurately reflected that, they would have shown the average downward in 1978 to be just 19.5 percent over the previous year, not 285 percent.

The average product liability award figure of over a million dollars, the current statistic often cited by industry leaders and the administration, is based on figures supplied by Jury Verdict Research. The administration has admitted that these statistics are not scientific and that the company's information was gathered from newspaper clippings. Furthermore, these figures are not median figures and they do not reflect the significant reduction after trials which often occur. According to a recent press account, "they don't reflect reality very well."

A 1986 study of all civil jury trials in the last 5 years in Greenville County, the largest county in South Carolina, refutes the notion that juries are running wild. In these cases, 83.6 percent—8 out of every 6 cases—resulted in a verdict for the plaintiff or the defendant in a total amount of less than $10,000. As a percentage of all cases, only 1.7 percent—11 cases—resulted in a verdict of $100,000 or more. No verdict of $100,000 or more was rendered in any product liability case. Jury verdicts in Greenville County are 3 percent above the national average.

A study of a representative group of State courts released in April 1986 by the National Center for State Courts found that the increase in tort litigation, roughhly $1.7 billion, was due to an increase in total population with all tort filings increasing 9 percent and the population increasing 8 percent for the period 1973-84. According to the report, the data "provides no evidence to support the existence of a national litigation explosion in State trial courts" during the 1981-84 time period.

It is true that the number of liability cases filed in Federal courts has increased significantly. But according to Consumer Reports, a single type of suit—damage claims related to asbestos—accounts for much of the increase. Last year, 4,239 of the 13,554 product liability cases or 31 percent filed in Federal courts were asbestos cases. Consumer Reports believes the large number of asbestos-related cases is not surprising and believes the cases are not frivolous.

Asbestos and asbestos-induced cancer result from many years of exposure; only in recent years have long-term exposure become evident in debilitating illness and death. In Consumer Union's opinion, people who are suffering from asbestos or asbestos-induced cancer (and the families of those who have died) deserve compensation.

First, according to a study published in 1985, a 16-State study covering 100 years found little evidence of a consistently upward trend in tort law suits and the University of Wisconsin litigation research project found a 50 percent increase in the number of cases involving damages of $10,000 or less and only 12 percent involved claims of more than $50,000. The repeated allegations about the number and size of awards simply do not hold up in light of this substantial evidence to the contrary.

SUBSTANTIVE LAW

The task force concluded that uncertainties in the substantive law of product liability were a cause of the insurance crisis. This conclusion, however, was at odds with the findings of the legal study commissioned by the task force. The legal study concluded that State tort rules have no significant impact on insurance costs, and thus a revision of the system would not lower them:

"The overall conclusion drawn here is that although specific tort doctrines adopted by some courts are considered inequitable in specific cases, the total impact of such rules on product liability claims is insufficient to directly cause an insurance problem of the magnitude alleged. In other words, no inequitable doctrine or group of doctrines even if changed immediately, could produce a greater availability of or a lower cost for insurance."

After studying the issue, one tort professor concluded that "the subsequent easing of the crisis supports the legal study and undercuts the task force on this critical issue." If there were a significant connection between legal doctrines and product liability costs, the stabilization of insurance costs in the late 1970's would not have occurred at the same time that the substantive law of product liability remained unchanged for much of the period 1978-84. According to the report, the data "provides no evidence to support the existence of a national litigation explosion in State trial courts" during the 1981-84 time period.

There is no reason to believe that the tort system is a cause of the increase of product-liability insurance premiums at the end of the last decade, or the increases which may currently be taking place. No correlation in the slight or nonexistent increase in tort doctrine during those periods and the level of premiums is of the same magnitude as the size of jury awards and settlements.

As the legal study found, there are isolated instances of product liability cases in which the result is inequitable. Proponents like to cite their favorite horror stories. But these examples serve little purpose other than to distort the policy debate. To base such sweeping Federal legislation on anecdotal evidence is, at best, specious—at worst, fraudulent.

Changes in tort law will not solve the insurance crisis. Indeed, in hearing before the Senate, insurance industry representatives have declined to promise that the tort reform measures they advocate would result in lower insurance premiums. In Washington, a company filed for premium increases claiming that the State's new tort restrictions will not have an impact on insurance costs. One insurance executive stated: "It is clearly impossible to say if you adopt a certain tort reform, you will get an x reduction in premiums." The connection between the anecdotal cases cited by the industry, changes in the substantive tort law, and insurance costs is far too attenuated to justify revision of an entire body of law which generally has proven to be fair and workable.

LITIGATION AND TRANSACTION COSTS

One justification offered for Federal product liability legislation is that legal fees paid to plaintiffs' attorneys are too high. Typically, lawyers who accept product liability cases on a contingency fee basis. If they win the case they get a percentage of the case—which is usually about 30 percent—if they lose, they get nothing. This is a deterrent to frivolous cases because attorneys are spending their own time and money in the case.

Recently released figures from the Institute for Civil Justice state that plaintiffs receive approximately half of the cost of legal fees and attorney disbursements. The Institute estimates the total cost of the system is not with the cost of the attorney who is "investing" his or her own time and money to win a case. The problem is not with the defense attorney who has an incentive to delay the case with dilatory motions and thereby encourage severely injured plaintiffs to settle for less in order to get an expedited payment of the plaintiff's medical and other costs. Meanwhile, the company
is making interest on money that would otherwise be in the hands of the prevailing plaintiff.

According to calculations derived from a 1977 survey conducted by the Insurance Services Office, for every dollar paid to claimants, insurers paid an average of 42 cents in defense costs, while for every dollar awarded in a plaintiff’s favor, insurers paid 73 cents. This means that the system should be focusing on the contingent fee of 33 cents. While I do not advocate wage and price controls, those who advocate reform of the current system must recognize the need for higher defense costs. An imbalance would be created if the fees of lawyers for injured consumers were regulated, while not limiting the defense lawyers’ fees. In that case, the likely effect would be to undermine our legal system’s guaranteed right of access to justice.

OVERVIEW OF THE CURRENT SYSTEM

What little information do we have about the current product liability system provides an interesting perspective: the system is generally fair and workable. According to one study, approximately 91 percent of bodily injury claims and 83 percent of the property damage claims are settled without the filing of a lawsuit. Only 3.5 percent of claims go all the way to verdict, and of those cases, fewer than 25 percent of defendants are found liable. Thus, 96.5 percent of product liability claims are resolved before the verdict is reached. The American bar Foundation, in a study of seven counties from across the country, found that the percentage of cases in which the plaintiff was successful ranged from 28 percent to 56.3 percent. So, we know that it is difficult to win a product liability lawsuit when the case goes to trial and verdict.

The studies to date show that punitive damage awards remain infrequent, particularly for product liability, and that damages decided upon by the jury are often substantially reduced. The truth of the matter is that if actual damages are not sustained by the evidence, they are lowered at the insistence of the judges themselves who would otherwise order a new trial. And what about those million dollar awards by juries? In more than two-thirds of the cases with million dollar awards over the past 14 years, the plaintiffs have suffered gross and serious injuries or death.

We also have been told that many of the instances of predictions are experimenting with programs such as arbitration programs and are successfully speeding up the consideration of cases. Ninety-eight percent of civil cases pending in the State of South Carolina, for example, have been pending for less than 1 year. Certainly, juries sometimes—and it seems increasing—award damages against institutional wrongdoing. For example, in the University of Georgia case, the plaintiff was awarded $2.5 million against the university, although the amount was later reduced by over half of the original award. The plaintiff alleged that she was fired in retaliation for speaking out against preferential treatment of athletes on scholarship. The jury decided that the institution was liable for wrongdoing and felt that a large damage award was necessary to prevent this situation from occurring there or at any other institution in the future. Some researchers have hypothesized that plaintiffs receive large jury awards because jurors view certain defendants as having “deep pockets.” However, interviews with jurors in Federal and State courts in southeast Pennsylvania revealed no significant finding that awards were based on the ability of the defendant to pay. The jurors’ decisions were influenced by consideration of whether the defendant deserved to win based on the facts of the case and the applicable law, as well as the necessity to deter misconduct.

When a product liability case goes to trial, the jury is not impeached for the purpose of giving away someone else’s money. Rather, it is charged with the administration of justice. These juries are composed of our friends and neighbors—who work for a living and know the value of a dollar—who occasionally conclude that punitive damages are justified when the defendant has engaged in outrageous behavior.

There are countless examples illustrating how our product liability system, has provided incentives for the development of a safer society. Product liability lawsuits can be credited with, among many other examples, the elimination of cancer-causing asbestos as a common building material. The trial process also has prompted State and Federal agencies to promulgate and enforce more vigorous safety standards for many products. With the opportunity to compete on the free market goes the duty to produce products that are not unreasonably dangerous as well as the responsibility to make reparation for any harm caused when that duty is neglected. Because we have a system that enforces this ideal, we can proudly state that ours is the safest nation on the planet.

CONCLUSION

Do we know what we are getting into? Based on the scant statistical evidence provided by proponents of this legislation, the answer to that question is: “obviously not.” We don’t know whether the enactment of this legislation would affect insurance premiums, or whether there is any connection at all between insurance premiums and tort law. We don’t know the burden we would create for the State courts to administer such legislation. We don’t know how it would affect the development of safe and reliable products. In other words, the committee has chosen to close its eyes, say a few prayers, and go for broke. While I agree that successful government depends on the willingness of its leaders to engage in bold experimentation, the Product Liability Reform Act represents a recklessness this Nation cannot afford. If we must attempt to tinker with the product liability system, let us do so armed with the facts and with an eye toward the protection of our society from unsafe and dangerous products.

If any problems exist with the product liability system, we are not going to solve them with legislation of this type. The bill should be rejected. I yield the floor.

EXECUTIVE SESSION

The PRESIDING OFFICER. The hour of 1:30 p.m. having arrived, the Senate will now resume executive session to consider the nomination of William H. Rehnquist to be Chief Justice of the United States.

Under the previous order the time between 1:30 p.m. and 5 o’clock p.m. shall be equally divided between the chairman and ranking minority member of the Judiciary Committee or their designees.

The Senate resumed consideration of executive business.

Mr. KASTEN. Mr. President, I suggest the absence of a quorum, and I ask unanimous consent that the time be equally divided.

The PRESIDING OFFICER. Without objection is so ordered.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DOLE. Mr. President, I ask unanimous consent that further proceedings under the quorum call be rescinded.

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

NOMINATION OF WILLIAM H. RENQUST TO BE CHIEF JUSTICE OF THE UNITED STATES

Mr. RIEGLE. Mr. President, I rise to express my view on the Rehnquist
nomination which we will be voting on later in the afternoon today.

I have not spoken before on this issue, which has been staying in my mind and following it with great care going back to the hearings this year, the prior hearings when Justice Rehnquist initially appeared before the Senate Committee in 1971. A careful examination of his record both on the Supreme Court and prior to that time through his professional career.

Having done so and having had the opportunity now to listen to a number of my colleagues who serve on the Judiciary Committee and who went through the confirmation process, I rise today to express my own judgment and conclusion on this nomination.

I have been in the Congress 20 years, and this marks 10 years, the end of this year, in the U.S. Senate. I have tried to recall a nominee we have had before the Senate for confirmation that has been more troubling in my mind than this one. There have been some, many, who have been those that I voted against, some in my own party, some in the other party. I do not cast those votes on the basis of particular incidents but on the fact that I have voted against, some in my own party, some in the other party. I do not cast those votes on the basis of particular incidents, but on the fact that I have voted against. As I reflect on all the judges who we have had to confirm, I do not recall a choice that I think is more disappointing or fails shorter of what is needed in an extraordinary position of responsibility in our Government than Justice Rehnquist.

Along with the President and Vice President, the Chief Justice of the United States, the President's ap- pointment, is one of a tiny handful of Federal officials who serve at the highest level of trust and importance in our democracy. In a nation of over 237,300,000 people, when we have an opportunity to select a Chief Justice—we have only had 15 in our entire national history—the obligation is to do so carefully and with the respect of our country to find someone of such extraordinary stature and respect that whatever he said is received and believed and goes to work in a meaningful or effective way,

I am deeply troubled about that. I think they find a context in which you have large numbers of people who are economically disenfranchised, many times because of poor education or circumstances of poverty or circumstances of discrimination or other factors that may attach to them, they are in a circumstance where they cannot hope to get adequate representation under our system of law in this country.

So, yes, we can engrave across the front of the Supreme Court "Equal justice under law," but we are not able as a society to really produce that on a broad scale, and I think that we have a very different view of what the Constitution provides. It is a faultline which runs through our system of equal treatment under the law. That is what we find today.

For those people who feel that they are on the outside looking in and for whom the legal system does not really work in a meaningful or effective way, I am not sure how much state they feel in our society. I do not know how much state they feel in our system of laws, in our system of justice.

I can see how a feeling could arise in a person that if the system were stacked in such a way that it did not work for them, they would not feel a sense of commitment and investment to that system. I think that might lead to a state of mind where people would say, I have been through the cards are stacked the other way, that maybe the law does not matter, because it does not work for them when it should in a proper sense, that it is something so distant and almost alien that it really is separate and apart from what their life is about.

I think that is a dangerous condition to have with any number of citizens, let alone the large number of citizens in our country. We have that in our society today, if we want to be honest about it.

How does this relate to Justice Rehnquist? I think that if you look at the pattern of incidents that have been cited and developed in the Judiciary Committee hearings, his pattern of decisions over the years as a sitting Justice, and his personal conduct prior to becoming a Justice of the Supreme Court, you see a person who consistently, time after time, almost without exception, has gone to great effort to make it hard for people to get equal treatment under the law.

When somebody engages, for example, in a voter intimidation program— in fact, is the mastermind of a voter intimidation program— to try to discourage people from voting, I do not know what more fundamental act there is in our democracy, if it is a working democracy, than the right to vote and the fact that people develop an opinion to go to the polling place on election day and vote for the people who will be in governing positions. —MR. HATCH. Mr. President, will the Senator yield?

MR. RIEGLE. Not at this time. —MR. HATCH. Just on one point. The Senator is misstating the testimony. Mr. RIEGLE. I do not want to be discourteous to my friend, but I do not want to be misstated. And then I will be happy to yield for any
That is just one area of conduct and behavior in a larger pattern that is consistent over a long professional career.

Here is a man who, in other activities, has behaved in a fashion to try to prevent people from being able to have any full measure of justice under the law in this country. There is the case of the Justice Jackson memo, and the Laird versus Tatum issues in terms of the effect of the law in their terms of the effect of the law in their circumstances where I think his testimony on the bench over a period of time is almost impossible to find a situation of perjury.

And that is just one of many instances where I think his testimony is not believable. It is inconceivable to me that he could recall with precise knowledge in an area where he wants to shed responsibility, an event that goes back to the early fifties and he has in a sense a perfect recall in that situation, but then we come several years ahead in the future to a more recent time where he was directly involved in the Laird versus Tatum issues in terms of domestic surveillance and he cannot remember anything. His mind and his memory is virtually completely erased in that area. So that back a long time before on what would seem to be a relatively minor matter he has a perfect recall and you come forward much later in time on an area where the facts were well known and he was in charge of the Department, and very serious policy and practice decisions were being made and carried out, and he has no recollection.

I just find that very hard to believe and I do not believe it, I am frank to say.

You know one thing you have a chance to see over a period of time in Congress—for me it has been 20 years—are lots of witnesses. I dare say like my colleagues who served that length of time, I probably have spent thousands of hours of committee sessions listening and conducting the cross examination of witnesses of all sorts and types. After a while you develop an ability, I think, to judge quite well whether witnesses are telling the truth, whether they are withholding information, whether they are being deliberately vague, whether they fall back on the language of "I have no recollection," which is the way if you want to withhold some-thing, with conscious knowledge to avoid a perjury charge, those are the words you have to use. Those are the words you have to say "No, I didn't do it," if you knew you did it. You say, "I have no recollection," and then you are off the hook. Those are the legal words, words of art that allow you to evade the situation without putting yourself into a situation of perjury.

So that does not make any sense. But in the role that he necessarily had to have as the Director of that division within the Justice Department on Laird versus Tatum, we still do not have the answers on that and we ought to have the answers on that.

There again there were people during that period of time who had serious reasons for opposition to the war in Vietnam. In fact, that became ultimately the majority view of this country and we got out of Vietnam because the people finally figured out it did not make sense and we had been lied to by our own Government, and the people who got out front early and took those views, and were subject to Government direct intimidation and harassment should never have had to be faced with the actions of this man. This man was one of the architects of that activity. That much we know, but we cannot get the facts because this administration will not release the information that I am sure exists, that could throw light on this, and he has no recollection because his mind somehow got erased in that area. I do not believe that. I just do not believe the fact that he was involved in that activity.

There are a number of other specific situations that I think are equally troubling if you look at the pattern of decisions on the bench over a period of time.

It is almost impossible to find a situation where a citizen of low standing or inconsequential standing in terms of his or her personal circumstances where they have come in seeking justice and some redress of a grievance in terms of the effect of the law in their life and circumstances, that this Justice can find the way to give a measure of justice to that person. Other Justices equally conservative have found a way to do that in any number of cases, but almost never does this Justice find a way to do that.
to the whole country is this is the best we have, this is the person who is going to epitomize equal justice under the law in the United States. I can see why a large number of people in this country who are knowledgeable about the background and the facts that relate to this candidate would walk by the Supreme Court and have a very bad feeling that it was a very bad tradition, it was a contradiction about the way our system is supposed to work, it is a contradiction about the way we say our system will work, and in fact we have put someplace where whose entire history is contrary to the notion of equal justice under the law.

Frankly, I think the latest examination of this man's record is compelling enough that he ought not to be on the Supreme Court at all, but he is and that cannot be changed, but I find people in this record, absolutely nothing in his record, that suggests that he meets a higher standard that one would hold for the office of Chief Justice. I find no distinguishing characteristic that would say across the broad sweep of our society, this is the one individual or this is 1 of 20, or 1 of 50, or 100, the finest ones that we can find to come in and be the Chief Justice of the Supreme Court. I am not adminster the Court and in a sense become the most powerful symbol of what justice in this country means to rank and file citizens.

We do not have in terms of that kind of standard of measurement. In fact, I think what we have here is a choice that as I say is sad and discouraging, but I think more than that it is designed to create a lot of the polarizing feeling that in fact has been created and will continue to be created because I think large numbers of people, in this record, with my notation, will feel they cannot get a fair shake out of this man in this Court if he is running it. And that is what I think based on the record. In fact, the way I see the Constitution and I think the bulk of the people of this country see the Constitution, I do not think he is fairminded with respect to equal standing under the law, and I worry about a young person, let us say a young black person living in this town, standing out in front of the Supreme Court chamber and looking up at that magnificent building and wondering if he or she is going to get the same measure of justice from that Supreme Court that everybody else in this society is going to get.

I do not have that sense of confidence about this Justice because his entire pattern of professional conduct, history, and decision making is to the contrary, that there will not be one person of that level standard out there but in fact we have what is something far different than that. We will have two standards of justice. Those who are in circumstances where they have the ability to go out and hire the top lawyers, and so forth, will get one kind of treatment, and the other people can essentially fend for themselves.

I do not believe that is what our Supreme Court is all about. I do not believe that is what our system is about.

So in a sense, this choice, made as it was late in the year, I think was deliberate to rush the proceedings, to squeeze us up against the closing of the session of Congress, to not run the risk of the Democrats taking control of the Senate and running the Judici­ary Committee so that if this appoint­ment were to come next year we would have a far more searching inquiry, and a feeling that it ought to be avoided at all costs. So we get the timing of this situation coming now where we have been forced, I think, to move much faster than prudence would dictate we ought to move on an appointment of this importance. I think this is as questionable and I think is sad in so many respects as this is.

I will just say one or two other things and then I will yield the floor. Some months ago the President of the United States ought to be able to name anyone he wants to any job that is within his power of appoint­ment. Under the strictures of the law, I suppose that is right. He can send up any nomination that he wishes.

But the reason we go through this process is because our ability to advise and consent requires us to make an af­firming judgment. He does not make that decision by himself. He has to make that decision in concert with the Senate.

The Senate can, if it chooses, decide that it is a bad choice and turn it down.

I think you will see today when the final votes are cast there is a very sub­stantial number of people in this body who are disturbed enough by this nomination that they intend to vote against it and will vote against it. I think when you are talking about a third branch of Government, the judicial system, the highest ranking part of the Government, the independent branch of Gov­ernment, the President is not autom­atically entitled to his appointments necessarily, and even brings into ques­tion the independence of that third branch of Government. He has the right to appoint but we have the equally proper right to assess that nominee and to make the judgment as to whether that nominee measures up or not.

This nominee does not measure up.

This nominee does not inspire the feeling across this country about our system of justice and how it works that we ought to have coming from the person who is the Chief Jus­tice. This nomination falls far short of that. It is, as I say, a disappointing one.

I guess my final thought is this to the people of the country. Assuming this nomination is confirmed today, and it looks as if the votes are there, I am sorry to say, we may go through a period of great difficulty in terms of the pattern of decisions that we see coming from the Supreme Court because the Chief Justice does have an extra measure of power by virtue of the uniqueness of that position. We may see a period where un­fortunate decisions are forthcoming, that injure people in this country and injure our ability to provide equal jus­tice under the law.

If so, we are going to have to get through that period. We are going to have to get through it as best we can, and I think we can. But it is wrong to have this imposed upon the country. The President has made a serious error of judgment here and we ought not to compound it by confirming this nominee.

Mr. President, I yield the floor.

Mr. HATCH. Mr. President, I have heard a lot of remarks about Mr. Justice Rehnquist and the announcement of his nominated by the President to this very instant. Most of the criticisms of Justice Rehnquist have been effectively rebutted before.

I have, however, been curiously in­trigued by much of what the distin­guished Senator from Michigan has said, from calling him a mastermind in the voter challenging approach to saying things that he allegedly has been in control of the Senate this inquiry would have been much more searching and much more in detail, and all the other comments in between.

You know, sometimes I do not think this is a nomination proceeding. I would call it a "Rehnquisition," because of the, I think, intertempore remarks which have been made, some of the inaccurate remarks which has be been made, the distortions that have been made, the misrepresentations that have been made, the, I think, distor­tion of his written opinions and of his actual approaches that he has taken since he has been on the bench. And they have all effectively been rebut­ted.

I thing more searching could this "Rehnquisition" have been? I cannot imagine. I said the last time I was on the floor, some of these people have left no stone unturned. They have done everything they can to destroy this man's reputation. And I think we have done it in one of the most heinous of ways.

Let me just move to one aspect of it. Critics of the President—that and the prior speakers have been no exception to this—have relied heavily on a letter from Prof. Geoffrey Hazard to main­tain that the Justice should have re­
cused himself in the Laird versus Tatum case. The entire theory stated that he had no personal knowledge of evidence in the matter when it was in the Laird case. He was not a lawyer in the case. He was an attorney at the Department of Justice. He was not involved in the Laird case. When he was advised to recuse himself, he recused himself because he had no personal knowledge of the evidence in the matter. He was not a lawyer. He was an attorney at the Department of Justice. He was not involved in the Laird case. When he was advised to recuse himself, he recused himself. He did not commit any legal violation, nor did he participate directly.

Professor Hazard, however, suggests that the ethical standards of 1972 should have caused him to recuse himself. This opinion has little, if any, foundation in the ABA standards of that time. Rather than repeat the entire text of the ethical standard on disqualification, I will read its primary requirements:

A judge should disqualify himself in a proceeding which his impartiality might reasonably be questioned, including but not limited to instances where: (A) he has a personal bias or prejudice;

No evidence of that.

(B) He served as a lawyer in the matter in controversy;

No evidence of that.

Or has been material witness concerning it.

No evidence of that.

Now, Justice Rehnquist, as has been discussed many times, had no personal knowledge of the disputed facts, namely the Army's actual information-gathering activities. Moreover, as I have stated, he told Senator Ervin that he had no personal knowledge of those facts in 1971 four times.

Why can he not be believed by our colleagues? Why can they not respect this man? Why can they not believe him as an ordinary human being? Why can they not treat him as an exceptional human being, which he is?

That hearing by Senator Ervin is the same hearing that critics rely on as evidence of his personal knowledge. When are people going to start being fair? When they are going to stop distorting this record?

Justice Rehnquist was not a lawyer at any stage of the Laird proceedings. In fact, he recused himself in numerous other cases when he had had merely an advisory role while at the Department of Justice. He was not even an advisor, let alone the attorney, in the Laird case. When he was advisor, he recused himself. Hazard says that the Justice himself should have recused himself "unless he was not in fact involved in the matter when it was in the Office of Legal Counsel." He quickly concludes, without further investigation, that this would be "implausible" because "the circumstances suggest that Mr. Rehnquist was personally and substantially involved" in formulating policy. The record, however, indicates otherwise.

I do not know where Mr. Hazard got these types of feelings but he does not have, it seems to me, much knowledge about what went on nor has he given the Justice even the bare courtesies of looking at what he has had to say in the past.

The "key" 1-page transmittal memorandum for the 1969 policy indicates that it was prepared by staff for Justice Rehnquist's signature. Moreover, the entire 12-page draft memo only includes one paragraph on Army surveillance—the entire 12-page draft. Where, then, does Mr. Hazard find his "personal and substantial involvement"? Justice Rehnquist's explanation seems much more logical and he should be believed over some law professor who injects himself into this at the last minute after 15 years.

The Office of Legal Counsel develops hundreds of policy memos every year—some might say thousands of them—most of which are highly important. If anything is implausible, it is the assumption that Mr. Rehnquist simply must have "personal and substantial involvement" in all of these memoranda. I challenge any Senator here to remember all the memoranda that come through his office in a week, let alone over a period of time like this.

I might add, otherwise, Mr. Hazard has no independent basis for concluding that the Justice devoted himself to this particular policy enterprise. Finally, the Justice was not a material witness in the case. Moreover, he did not have sufficient knowledge of the disputed facts to serve as a witness. The facts are simply not what Professor Hazard assumes. Let us look now at the ethical standard itself.

Professor Hazard stretches to find within this ethical code some falling on Justice Rehnquist's part. He bases his opinion on the notion that if Justice Rehnquist was involved in the transaction out of which the case arose he was somehow the equivalent of the attorney in the case. If this were the case, no attorney at the Department of Justice could ever be placed on the bench because they would have to recuse themselves in hundreds of cases. The ethical standard says nothing about relationship to a policymaking process, much less the equivalence of relationship to the case itself. It is not in the ethics standard that involvement with policymaking involves a policy which, when in the Government, they may have helped to form.

This omission is particularly puzzling when Professor Hazard himself says that the article "correctly summarizes the law of disqualification as it then stood." In fact, I think this omission has the appearance of an omission on the part of Professor Hazard. It may be an example of distortion itself to distort what really happened and what the law really was. This professor has left out the part of the law that completely justifies the Justice's conduct.

In short, Professor Hazard jumps to the conclusion that Justice Rehnquist was "personally and substantially involved" in the policymaking at the Justice Department related to Laird. Now, the facts not only appear to be contrary, they are contrary. And any fair and reasonable review of them would have to be concluded in the Justice's favor. Specifically, what little work was done on the issue at the Department seems to have been done by a staff attorney, not Justice Rehnquist. Moreover, even if he were involved in the policymaking process, the ethical code of 1972 simply did not require disqualification for policymaking activity.

Now, this is just typical of what we have been going through for weeks here since the nomination of Mr. Justice Rehnquist to this elevated position. It is very disturbing to me, because I believe that even though we may be partisans on this floor from time to time there is a limit beyond which partisanship should not go.

I do not think that this should be an imposition. I do think it is legitimate to raise legitimate arguments. But I think every one of those has been more than refuted. I think that those some might feel are not fully rebutted, if they give this Justice the benefit of the slightest sense, they have to go with Justice Rehnquist on every one of them.
You could spend hours on this discussing the distortions, the misrepresentations, and the cloudings that have really occurred, not only throughout the hearings but also throughout the debate for debate on this matter. I suspect if we had the time, and we have I think covered most of them and I have no doubt in my mind we have covered all of the arguments that really need to be covered with regard to the remarks of the distinguished Senator from Michigan.

You know, the word “Rehnquist” is not too far out of place here as I stop and think about it because that is what it should be. I think it is time to bring it to an end. I hope all of our colleagues will vote for cloture today, at least the vast majority of them, and then fight for this man who has spent 18 years of his life serving the public, and who has the confidence of the American Bar Association and so many people who really do not agree with him philosophically but at least acknowledge is a great Supreme Court Justice. And he has done a great job since he has been on the Court.

Mr. President, how much time do we have left on this, our side?

The PRESIDING OFFICER. The Senator has 24 minutes and 10 seconds.

Mr. HATCH. I yield the floor and reserve the balance of my time.

The PRESIDING OFFICER. Who yield time?

Mr. MOYNIHAN addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. MOYNIHAN. Mr. President, the managers on the matter of nomination on our side of the aisle are not present, and might I inquire on their behavior? Another time will run against this side—their side—in the absence of someone speaking, or can we suggest the absence of a quorum and put that matter at a close to conserve the time remaining which can only be approximately 11 minutes?

The PRESIDING OFFICER. The Senator does not control the time. So he has no right to suggest the absence of a quorum.

Mr. MOYNIHAN. Mr. President, I believe a Senator has a right to suggest the absence of a quorum regardless of the position with respect to—

The PRESIDING OFFICER. Not when the manager of a specified Senator has the right to control the time.

Mr. MOYNIHAN. Mr. President from New York is not one of those who controls the time.

Mr. MOYNIHAN. Mr. President, out of curiosity, I suggest the absence of a quorum.

The PRESIDING OFFICER. The Senator does not have that right. That request would take a unanimous consent to do so.

Mr. MOYNIHAN. Mr. President, I ask unanimous consent that I may suggest the absence of a quorum.

Mr. HATCH. Mr. President, reserving the right to object, if that will be charged to the other side, we would have no objection. However, we are prepared to debate.

Mr. DODD. Mr. President, will the Senator use the microphone? I cannot hear.

Mr. HATCH. Excuse me.

We are prepared to debate. We are prepared to answer any questions. If that time will be charged to the other side, we have no objection. I really do not have any objection anyway.

Mr. MOYNIHAN. I am next in line. I have an address that will take exactly the time remaining. I do not want to do that.

Mr. HATCH. Mr. President, I will be happy to lend some of our time to the Senator from New York.

Mr. MOYNIHAN. Will the Senator yield 10 minutes to the Senator from New York?

Mr. HATCH. I will be delighted to yield 10 minutes to the distinguished Senator from New York. Will that solve the problem?

Mr. MOYNIHAN addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. MOYNIHAN. I thank always the accommodating and distinguished friend who so graces this Chamber by his personal manner as well as by his substantive positions.

Of the many memorials received by the Senate with respect to the nomination of Mr. Justice Rehnquist as Chief Justice of the Supreme Court, I found especially compelling one that came from a group of law professors which asserted that the "conscience-searching questions" raised by the nomination are matters that every Senator must, in fidelity, decide in a quite place and time, away from the political arena.

This appeared to me to be counsel. I understood to follow it, have done, and have now reached a judgment.

May I first state my understanding of the duty of the Senate in the matter before us. Along with any number of Senators I have more than once stated that in exercising its power of confirmation the Senate should show a certain deference to the wishes of the President in constituting his Cabinet, and generally speaking choosing his advisers. Whatever their disposition on matters, once in office their actions can only be the actions of the President, and within the bounds of law, the President is entitled, indeed is expected, to act as he thinks best. Congress has the same right and responsibility.

This practice, generally followed, is no more, and no less, than a commonsensical accommodation to the system of checks and balances built into our constitutional arrangements which keep us ever aware of the peril of stalemate.

In respect to Supreme Court nominations, however, wholly different standards apply. Here the President and the Senate are jointly constituting the third branch of the National Government, which is to say the Court. Here again a measure of accommodation is prudent. I would like to think I am mindful of the President's preferences. I would like to think he is mindful of mine. But that is a consideration that precedes more than follows an actual nomination. Once before us the Senate must act entirely as it thinks best.

This element of duty was, if anything, painfully clear to the fourth Congress which rejected George Washington's second nominee for Chief Justice. (This position which is not mentioned in article 2 of the Constitution, but was not actually created until the Judiciary Act of 1789.)

In the 19th century more than one Supreme Court nomination in four was rejected by the Senate. This too has been much lower in this century, but even so it is not uncommon for nominations to fail, and widely agreed that this is to be expected from time to time as Presidential views come into conflict with those of Senate majorities. In an article in the Harvard Law Record of October 8, 1959, Mr. Justice Rehnquist, then of course in private practice, concluded:

"It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for one hundred and seventy-five years the Constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the law", then men sympathetic to such desires must sit upon the high court. The only way for the people to learn of their views is to inquire of men on their way to the Supreme Court something of their views on these questions."

Then are my views in this matter. They are not complicated. Nor do they rest on exclusively legal considerations. Rather they go to the matter of "sympathies"—Mr. Justice Rehnquist's term, and a perfectly sensible one.

His critics, and I now join them, have drawn attention to an extended series of cases decided during his now uncontrolled service as an Associate Justice in which he has taken the most restrictive view of claims for equality of treatment advanced by individuals or groups claiming to have been discriminated against or other forms of unequal treatment. Mr. Justice Rehnquist has notably associated himself with resistance to the principle of incorporation under which the Civil War amendments, as they are known, are
judged to have extended the guarantees of the Bill of Rights to State governments, restraining them in the same manner the Federal Government is restrained.

I would offer the thought that over the now near two-century experience of constitutional government in the United States we have seen a persistent tension, at times almost a competition between the ideals of liberty on the one hand and equality on the other. In this competition liberty began with a distinct advantage. The word is enshrined in the very preamble to the Constitution which undertakes to secure the blessing of liberty to ourselves and our posterity.

By contrast, the word equality is nowhere to be found in the Constitution: not in the original text, not in the amendments.

We need not apologize for this. In the history of political ideas, liberty appears well before equality, and it is not difficult to show that it was in the setting of political liberty that the claims of equality sprang up and adhered. This was elementally the case as we moved toward manhood suffrage. How could the claims of liberty be met if some men could vote and others could not? The principle of manhood suffrage was secured by the Jacksonians in the 1830’s, and just as promptly advanced on behalf of women by the Ladies of Seneca Falls in the decade that followed. A great civil war was required to secure a claim for black Americans, but that too was done.

Matters hardly ended there. Great struggles ensued as the idea of citizenship expanded beyond elemental freedoms to positive entitlements. The United States is not alone in this regard. Democracies have followed the same pattern. And other democracies have also experienced the tension between the claims of liberty and the claims of equality that abound in our polity.

There is a tension between these two ideals, but no contradiction. We are not required to choose one or the other. Americans are accustomed to speaking of competition as healthy, and surely this is such a case. And it will remain healthy so long as both claims are seen as legitimate and endorsed as a hearing.

More than any one thing, this is what the Supreme Court does. Brown versus Board of Education (1954), far the most important and celebrated of its decisions in this century, had to do with the fundamentally necessary decision that separate education facilities could never be equal. But throughout the century the Court has been dealing with issues of legislation and mass organization that arise from demands for equality of treatment. Sometimes reluctantly, sometimes enthusiastically, but always, in time, near to unanimously the Court has come through. Liberty has been secured but equality has advanced.

I cannot say and do not say that this advancement has put in jeopardy by Mr. Justice Rehnquist’s appointment as Chief Justice.

The PRESIDING OFFICER. The Senator has used the 10 minutes of time allotted to him.

Mr. MOYNIHAN. The 30 seconds.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Mr. President, we do not have the time to spare. We will try to give the Senator 30 seconds. I yield 30 seconds.

Mr. MOYNIHAN. I thank the distinguished chairman.

Speaking of Mr. Justice Rehnquist, his willingness to accept the position indicates a willingness to work out compromises in the Court. The position of Chief Justice must be to do. Even so it may not be gain-said that significant groups within our society see the matter otherwise. They regard the decision in this matter, involving liberty no less than equality, which were thought to be settled. This is necessarily and unavoidably unsettling to them. And in my view they are right. This was not necessary. Any number of sitting Justices might have been chosen whose nomination would have been unanimously acclaimed. Other sympathies were deferred to by the choice of Mr. Justice Rehnquist. These are not my sympathies. I will accordingly vote against the nomination.

The PRESIDING OFFICER. The Senator’s time has expired.

Mr. BIDEN. Mr. President, how much time does the minority have, the opponents?

The PRESIDING OFFICER. The minority has 8 minutes, 55 seconds.

Mr. BIDEN. I yield 3 minutes to my colleague from—and he is going to be exasperated by my only yielding him 3 minutes, unless he wants to have a fight in the Cloakroom with the Senator from Kentucky and the Senator from Massachusetts. I yield him 3 minutes.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, the nomination of an individual to be Chief Justice of the United States is probably the most important nomination a Senator could consider. It is a duty we should carry out with the same solemnity that we give to our oath of office. I have given the nomination to Justice William Rehnquist without the slightest regret because I know Justice Rehnquist and I have high regard for him. I could spell out a number of the reasons for it but I would like to go to one. In my view, submitted as part of the minority report to Justice Rehnquist’s nomination, I set out the facts in the Laird versus Tatum case and I explained the facts and the basis for my opposition to that nomination.

Mr. BIDEN. Will the Senator yield for a moment? I ask unanimous consent that we extend the time of the cloture vote for 15 minutes to be equally divided.

Mr. BIDEN. I apologize for the interruption. I thought I could get more time. I beg the Senator’s pardon.

Mr. LEAHY. Do I have any time remaining, Mr. President?

The PRESIDING OFFICER. One minute and ten seconds.

Mr. LEAHY. Mr. President, I yield the time to the distinguished ranking member. To go through and make any kind of sense out of Laird versus Tatum in a minute and a quarter would be a charade and a mockery. I will not do it.

The PRESIDING OFFICER. Who yields time?

Mr. BIDEN. Mr. President, I yield 3 minutes to the Senator from Massachusetts.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KERRY. Mr. President, I yield 3 minutes to the distinguished Ranking Member of the Committee and reserve my opportunity to speak after the cloture vote, whatever the outcome.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. EXON addressed the Chair.
Mr. BIDEN. Mr. President, I told the Senate from Connecticut I would yield him 3 minutes.

Mr. DODD. Mr. President, if I may—

The PRESIDING OFFICER. The Senate from Connecticut.

Mr. DODD. Mr. President, with regard to Justice Rehnquist, I feel it is clearly my right to object. I, as has been said over and over again, have waited until the latter part of the time for the cloture vote so we may have more than 3 minutes to address this particular issue.

Mr. President, along with my other colleagues, I have given this matter a great deal of thought over the last several weeks; I have read intently the transcript of the hearings of the Judiciary Committee; and I have listened with a great deal of interest to the debate on this floor. As you can see, I have waited until the latter part of last week and this week to make a formal statement with regard to this nomination. It is often said here that one cannot use those words describing matters that are of such serious concern in this body with too much frequency because, in fact, there are not that many historic votes in the course of a given legislative year. And yet, certainly I do not think anyone would quarrel, given the few and rare occasions on which we as a body have already provided our advice and consent with regard to Supreme Court nominations, and even fewer when we have dealt with the nomination of someone to be the Chief Justice of the United States, that this is one of those rare historic occasions that occur in the history of this country. Therefore, I, therefore, approach this occasion, as all of my colleagues do, with a great deal of seriousness and solemnity.

Mr. President, I feel that there are some basic tests we all ought to apply regarding the judicial nominations—first, regarding the technical and legal skills, as well as the character of the individual. If a nominee cannot pass muster on those two tests, then we must deal with the nomination of whether or not the nominee embraces and endorses the constitutional principle of equal justice and liberty for all or, in the case of a nomination for Chief Justice, whether or not the nominee has the ability to lead the Court effectively and with the great degree of compassion and understanding that every Chief Justice must possess.

Mr. President, I ask unanimous consent that the vote on the cloture motion be extended until 3:15 with the time equally divided between the minority and the majority.

The PRESIDING OFFICER. Is there objection?

Mr. EXON. Reserving the right to object, Mr. President.

Mr. THURMOND. I reserve the right to object. I will have to object.

The PRESIDING OFFICER. Objection is heard.
They went further and examined 200 opinions Justice Rehnquist had written, and from those they said that his writings are of the highest quality.

Are you going to rely on some group that will go against him because they do not agree with his philosophy, or are you going to rely on some group which claims he is discriminatory, when the preponderance of the evidence shows to the contrary? On whom are you going to rely here?

Let us go back a little. What about a former Attorney General under President Carter, Judge Griffin Bell? What does he say about Justice Rehnquist?

He said:

I think he has to be tested to see if he possesses integrity, ability, leadership capacity, intellectual attainment, and good health and on top of that. I would want to be certain that he had a modicum of common sense. It seems to me that he meets all of these standards and that President's nominee for Chief Justice should not be rejected. He has a public record of 15 years on the Court, and I believe the Court supports that same conclusion. Were I a Senator, I would vote to confirm Justice Rehnquist as Chief Justice. I would do so with a decided view that he would serve our Supreme Court and our country well.

Mr. President, that is not a Republican. That is a Democratic Attorney General.

What about Mr. Erwin Griswold, who is respected by everyone who knows lawyers? He was Solicitor General under President Johnson. He said:

... because of my 33 years of academic career, I have been quite a student of the Supreme Court over the past good many years, including the current Court. I have read the opinions. I think Justice Rehnquists' opinions are able, lawyer-like, important contributions to our constitutional and other law. In my opinion, he is extremely well qualified to be Chief Justice...

That was stated by Mr. Erwin Griswold, a former Solicitor General under President Johnson.

What about another former Attorney General, William French Smith? Mr. Smith gave a glowing opinion which is in the record. He said:

He has made an impressive and important contribution to the Court and will certainly continue to do so.

What about Dean Gerhard Casper, of the University of Chicago Law School? He gives Justice Rehnquist a glowing recommendation. He said:

Justice Rehnquist, in terms of abilities, temperament, and administrative experience, is well qualified to take on these tasks. I have known Justice Rehnquist personally for about 7 years and I have been greatly impressed by his capacity to deal with people and decisions, informed, friendly, and effective manner. Justice Rehnquist is well versed in the institutional history of the Supreme Court and cares about the Court's role in the American society. While the Justice and I disagree on a fair number of substantive issues, these disagreements have never prevented me from appreciating Justice Rehnquist's great abilities as a lawyer. I would expect him to go about the tasks of the Chief Justice with true concern for the demands of the position.

Mr. President, all these are very prominent people.

The PRESIDING OFFICER. The Senator has 4 minutes remaining.

Mr. President, in closing, I want to say this, and I will give the rest of the time to the distinguished majority leader.

I urge my colleagues to vote for cloture on the nomination of Justice William Rehnquist to be Chief Justice of the United States. Justice Rehnquist is entitled to a vote on the constitutionally mandated responsibility of advice and consent of the Senate.

Mr. President, the outcome of the issue of confirmation should not be decided by a vote on cloture requiring 60 votes, almost two-thirds of the Senate. Those who oppose cloture will, in effect, be holding the nominee to a higher standard than that normally required. A majority vote is all that is needed to approve or disapprove any nominee, and Justice Rehnquist or any other nominee is entitled to that vote.

I urge my colleagues, in a sense of fairness, to vote for cloture, and thus allow the Senate to work on the nomination.

Mr. President, I ask unanimous consent to have printed in the Record a letter to me from Thomas E. Adams, Jr., which is self-explanatory. He refutes the charges with respect to civil rights and so forth.

There being no objection, the letter was ordered to be printed in the Record, as follows:

HON. STROM THURMOND,
Chairman, Judiciary Committee, U.S. Senate, Washington, D.C.

MR. PRESIDENT:

I, Mr. Chairman, which is self-explanatory. He

Dear Mr. President,

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8. Mr. President:

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during Martin Luther King’s “March on Washington” in the fall of 1963. At this time, the Army C. I. C. unit was actively conducting widespread surveillance of “civil rights activities.” In 1964-66, it also was called out by the Army War Room of the Pentagon with similar surveillance information during this period. During a meeting I attended in 1966 in the Office of the Attorney General of the United States conducted by the then Deputy Attorney General, Ramsey Clark, regarding the possibilities of riding in the District of Columbia, the Attorney General directed all surveillance activities to be increased. Also in attendance at this meeting were Assistant Attorney General Barefoot Sanders, the U.S. Attorney for the District of Columbia, the Chief of Police for the District of Columbia, and a General Officer in charge of the “Army War Room” at the Pentagon. Following my transfer to the Office of the Attorney General of the United States in the fall of 1966 until I retired from the Army in May of 1968, I maintained close contact with my Army War Room in the Office of the Secretary of Defense in Washington; my observation was that the surveillance mission continued at least until my retirement. Any statement in this record can easily be documented from Army records.

I trust this information might be useful in bringing to the real truth in Justice Rehnquist’s confirmation proceedings.

Respectfully,

Thomas E. Adams, Jr.
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Mr. THURMOND, Mr. President, since my name has been brought into this matter previously with respect to Justice Fortas, I ask unanimous consent to have printed in the Record my additional views on Justice Fortas when I opposed his nomination several years ago.

To that being no objection, the material was ordered to be printed in the Record, as follows:

**Individual Views of Mr. Thurmond on Justice Fortas**

Refusal to advise and consent to the appointment of a Chief Justice of the Supreme Court is a most serious action. It cannot be undertaken lightly, and we must be certain that such an action must be set out clearly and forthrightly.

The hearings conducted by this committee have been extensive. There has been considerable discussion by witnesses and by Senators of the propriety of the circumstances of this appointment. I believe the proper role of the Supreme Court in the governing of this Republic, and inevitably, of the activities of this body itself, in the governance of the United States. This discussion has produced three sound and highly persuasive reasons why this nomination should not be confirmed: First, the disqualification of Justice Fortas as a Chief Justice to the Supreme Court is sustained, in part, by the findings of the Senate in the fall of 1966, until I retired from the Army in May of 1968, I maintained close contact with my Army War Room in the Office of the Secretary of Defense in Washington; my observation was that the surveillance mission continued at least until my retirement. Any statement in this record can easily be documented from Army records.

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Persuasive evidence was introduced in the hearings that Justice Fortas transgressed the separation-of-powers doctrine in both the executive and legislative branches. The evidence from credible sources and was not refuted, indicates that Justice Fortas participated in the drafting of President Johnson's statement of the United States, and in the drafting of legislation to provide Secret Service protection for presidential candidates. Such activity on the part of a member of the Supreme Court is improper. The prospect of a Justice ruling on a matter before the Supreme Court in which he had been personally involved violates both standards of judicial ethics and the concept of separation of powers.

The testimony of Dean B. J. Tenney, of the law school of American University, must also be given the most serious consideration. Justice Fortas was paid $15,000 by American University to conduct a seminar for the law school. The seminar consisted of nine lectures during the summer of 1968. The highest sum previously paid by the law school for similar services was $2,500. Justice Fortas was paid from a fund of $30,000 raised for this seminar by Mr. Paul Porter from five prominent individuals. Mr. Porter is a former law partner of Justice Fortas; and Mrs. Fortas is still associated with the law firm.

I believe the many, many, many reasons stated by the chairman of the committee, Senator Thurmond, who had done outstanding work on this nomination, that there ought to be an overwhelming vote on this cloture motion and following that if cloture is invoked we ought to dispose of the nomination.

Once cloture is invoked I really do not see any reason to debate it further.

In my view, we have extended every courtesy to the opponents. We thought we might vote yesterday. We thought there might not be a need to file the cloture motion. I will not say that we have gone the extra mile. This is a very important nomination. I believed, and I still believe, that there was every right to discuss it to the fullest. I think, for the most part, the debate has been at a very high level and we have not wasted a great deal of time. But I do believe that now we have heard everything at least once or twice or three times. There are no bombshells lying around.

It seems to me that it is in the interests of the U.S. Senate and certainly in the interests of the nominee that debate be brought to a close. The yeas and nays are automatic under the rule.

The legislative clerk read as follows:

VOTE

The question is, Is it the sense of the Senate that debate on the nomination of William H. Rehnquist to be Chief Justice of the United States shall be brought to a close? The yeas and nays are automatic under the rule.

The clerk will call the roll.

Mr. SIMPSON. I announce that the Senator from Utah [Mr. GARN] is necessarily absent.

The PRESIDING OFFICER (Mr. Nickles). Are there any other Senators in the Chamber who desire to vote?

The yeas and nays resulted—yeas 68, nays 31, as follows:

[Rollcall Vote No. 265 Ex.]
September 17, 1986

There is a total of 30 hours for consideration of the nomination. Senators may speak for up to 1 hour each.

Mr. LEAHY. Thank you, Mr. President.

Mr. President, before the—was the majority leader seeking recognition? If he wasn't, it would certainly yield to him.

Mr. DOLE. I am just standing around.

Mr. LEAHY. Mr. President, if we could have order.

The PRESIDING OFFICER. The Senate will be in order.

The Senator from Vermont.

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

Mr. LEAHY. Mr. President, prior to the cloture vote, I had attempted to spell out my feelings about the Laird versus Tatum case, and others. I did not feel it would be fair, either to the Senate or to myself, to go into such complex areas in a minute or so that might be available. I would like to go into that now.

Justice Rehnquist has many qualities that I consider important for a Chief Justice. Among these are his keen intellect and legal skills, and his considerable experience as an Associate Justice, which gives him a great understanding of the workings of the Court and an appreciation for the responsibilities of the Chief Justice. But there are other equally important qualities requisite to being Chief Justice. And they are in these areas: in credibility, in judgment, in sensitivity.

The PRESIDING OFFICER. Will the Senator please withdraw? The Senate will be in order. The Senator has a right to be heard.

Senators please take their conversations to the rear of the Chamber. Will the Senate please be in order? Senators please take their conversations to the rear of the Chamber.

Mr. RIEGLE. Mr. President, the Senate is still not in order. I wonder if the Chair would restore order so we can hear the Senator.

The PRESIDING OFFICER. The Presiding Officer is aware of that. The Senate will be in order. The Sergeant at Arms, too, will try to accommodate the galleries in trying to maintain order.

The Senator from Vermont.

Mr. LEAHY. I thank the Chair for restoring order. I realize that, on what has been really one of the more momentous votes of this year, there is understandably enough, a fair amount of confusion both in the galleries and on the floor. I do appreciate the Chair restoring order.

Earlier this afternoon, I said that in the Judiciary Committee I had cast my own vote against Justice Rehnquist as a member of that committee. I did so with some personal regret, because I know him and I have a high regard for him.

I have, however, voted for cloture here this afternoon, and I did that because I felt that this is an issue that should come to a conclusion and that the Senate should vote on it. I feel that President Reagan is entitled to have a vote up or down on this body and that we should carry out our constitutional duty to advise and consent on this nomination.

And so, in that regard, Mr. President, I would like to discuss the main reason I voted against Justice Rehnquist in the Judiciary Committee.

Justice Rehnquist has many qualities that I consider important for Chief Justice. Among these are his keen intellect and legal skills, and his considerable experience as an Associate Justice, which gives him a great understanding of the workings of the Court and an appreciation for the responsibilities of the Chief Justice.

However, there are other equally important qualities requisite to being Chief Justice, and it is in these areas—credibility, judgment, and sensitivity—that I believe Justice Rehnquist falls short of the standard we should employ.

At the outset, let me say that I do not believe that a nominee’s philosophy should be the ultimate factor in carrying out our responsibility to advise and consent. As long as a nominee is otherwise qualified, philosophy should not be a consideration unless that philosophy undermines fundamental principles of constitutional law, or his or her adherence to ideological principles is so fervent that the nominee cannot judge impartially.

President Reagan, like any President, is entitled to appoint judges who share his philosophy. Indeed, Justice Rehnquist himself acknowledges that he very well may be the most conservative member of the Court. Yet, the fact that Justice Rehnquist’s ideology or judicial philosophy differs from my own played no part in my decision to vote against him.

Justice Rehnquist’s ownership of property in Vermont was also explored in the hearings. The warranty deed on that property includes a restrictive covenant barring the sale of the property to any member of the Hebrew race.

While I am disturbed that as a sitting Supreme Court Justice, Justice Rehnquist did not question the existence of this clause in the deed at the time he bought the property, I find no evidence in Justice Rehnquist’s background that he is either racist or anti-Semitic. I accept Justice Rehnquist’s assurance that he finds the covenant repugnant, and that he will move expeditiously to have it removed from his deed.

I raised this issue during the hearings because the Chief Justice of the United States is the person who, perhaps more than any other, embodies principles of Justice. Because of that important role, we believe—and Justice Rehnquist agreed with me during his testimony—that it is vital that he avoid even the appearance of racial or religious hostility.

Another important issue raised during the Judiciary Committee hearings on the Rehnquist nomination was whether he participated in efforts to challenge minority voters in the early 1960’s. Based on my observation of the witnesses and my review of the testimony, I believe that the memories of both Justice Rehnquist and of many of those who testified against him are faulty.

I can understand the position of those of my colleagues who are convinced of Justice Rehnquist’s participation in voter challenges and based their decisions on this point. I can appreciate the opinions of my colleagues who are equally convinced that Justice Rehnquist was not involved in this reprehensible activity. Without clear and convincing evidence, I felt that this issue could not form the basis for my decision on Justice Rehnquist’s nomination.

The axis upon which my decision to vote against Justice Rehnquist’s confirmation ultimately turned was his decision not to recuse himself in the Supreme Court’s 1972 decision in Laird versus Tatum. That case involved a first amendment challenge to the Army’s program of conducting domestic surveillance of persons engaged in lawful antiwar demonstrations. The Supreme Court ruled in a 5-4 decision that the facts underlying the case presented a nonjusticiable controversy.

During my review of the testimony and the materials which have been submitted concerning this nomination, I kept coming back to Justice Rehnquist’s participation in the Laird case. I kept coming back to Justice Rehnquist’s participation in the Laird case. I kept coming back to Justice Rehnquist’s participation in the Laird case. I kept coming back to Justice Rehnquist’s participation in the Laird case. I kept coming back to Justice Rehnquist’s participation in the Laird case.

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In 1967, Army personnel were called in to quell the Detroit riot. This was the first time in 25 years that Army troops were used to handle a civil disturbance.

Following that incident, Attorney General Clark created a working group in the Department of Justice under the direction of Deputy Attorney General Christopher to consider intelligence and plan for civil disturbances. Meetings were held to plan for potential incidents, to coordinate the Federal response, and to establish rules for engaging the Army personnel. Personnel of the Department of the Army participated in this working group.

It was in this context that the Army began its Domestic Surveillance Program which was first authorized by a Defense Department directive in May, 1968. Later, the emphasis of the program shifted from urban violence to potential antiwar demonstrations.

In 1969, when President Nixon's team came to Justice, Deputy Attorney General Kleinindienst took over coordination of the working group. At that time, the Department of the Army sought specific civilian authorization for its role in civil disturbance planning to limit its involvement in domestic intelligence gathering. After consultations between Defense and Justice, it was decided that a memorandum to the President from Attorney General Mitchell and Secretary Laird would be prepared. That memorandum would set out the parameters of the various agencies' roles with regard to civil disturbances.

The responsibility for preparing the memorandum was given jointly to the Office of General Counsel of the Department of the Army and the Office of Legal Counsel of the Department of Justice. The Office of Legal Counsel was then headed by William Rehnquist.

On March 25, 1969, Mr. Rehnquist prepared the first formal Justice draft memorandum of a civil disturbance plan. A quote from the memorandum states:

"In order to preserve the salutary tradition of avoiding military intelligence activities in predominantly civilian matters, the U.S. Army Intelligence Command should not ordinarily be used to collect intelligence activities of this sort."

The general counsel of the Army at that time, Robert E. Jordan, III, later testified before the Senate Subcommittee on Constitutional Rights that the Army had problems with the Rehnquist draft. In a memo accompanying his 1974 testimony to Senator Ervin, Mr. Jordan wrote that the Army had suggested that the term "should" be changed to "will" so that the memorandum would state forcefully that the Intelligence Command "will not ordinarily be used to collect intelligence of this sort."

In spite of the Army's arguments, the final draft of the memorandum eliminates any restrictions on the Army's collection of raw intelligence.

In his 1974 testimony, Jordan stressed that these were made at the request of Deputy Attorney General Kleinindienst. In a recent letter to my chief counsel, Mr. Jordan clarified how the change in the final memorandum came about and Mr. Rehnquist's role in the development of the final product. Quoting from the letter:

"Some of the inquiries I have received from other sources suggested that Mr. Rehnquist might have been an advocate for increased military intelligence activities relating to civil disturbances. To the extent this issue is important, you should know that my recollection is that Mr. Rehnquist agreed in general with the Pentagon view that every effort should be made to reduce or eliminate the military intelligence role. Within the Department of Justice, the development of the military intelligence role were, as I understand it, the representatives of the FBI and Mr. Hoover in particular."

The point is not whether Justice Rehnquist argued in favor of more or less domestic surveillance by the Army as a policy matter.

The point is that Justice Rehnquist, while Assistant Attorney General for the Office of Legal Counsel, was deeply involved in the development of the policy which was ultimately at issue in the Laird versus Tatum case.

These facts were not known to the plaintiffs in Laird at the time they asked Justice Rehnquist to recuse himself from the case. Their basis for seeking recusal was testimony which he gave before Senator Ervin's Subcommittee on Constitutional Rights in 1971. Again, it is important to understand the context of those hearings to fully appreciate the importance of Justice Rehnquist's recusal in the Laird case.

Some information about the Army's Domestic Surveillance Program had come out as part of civil rights articles and congressional inquiries in 1970. Included in that information was the fact that the Army had developed a data bank of potential subversives which was stored in a computer at Fort Holabird, Maryland, headquarters for the Army Intelligence Command.

Public exposure of the program and the Fort Holabird black list resulted in the filing of Tatum versus Laird in 1970 in the U.S. District Court for the District of Columbia. That case was pending at the time of the Ervin hearings. The topic of those hearings was the Army's Domestic Surveillance Program.

Senator Ervin requested witnesses from both the Department of Defense and the Department of Justice. One of the Justice Department witnesses was Mr. Rehnquist. He testified on the constitutional limits of the Government's collection of sensitive personal information about American citizens, especially with regard to the exercise of their first amendment rights. During the course of that testimony, Mr. Rehnquist stated:

"The function of gathering intelligence relating to civil disturbances, which was previously performed by the Army as well as the Department of Justice, has since been transferred to the Internal Security Division of the Justice Department. No information contained in the data base of the Department of the Army's now defunct computer system has been transferred to the Internal Security Division's data base. However, in connection with the case of Tatum v. Laird, now pending in the U.S. Court of Appeals for the District of Columbia Circuit, one printout from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed."

In the same hearings, Justice Rehnquist testified on to this key constitutional legal question presented in the Laird case. The following exchange occurred between Senator Ervin and Mr. Rehnquist:

Senator Ervin. But you do take the position that the Army or the Justice Department can go out and place under surveillance people who are exercising their First Amendment rights even though this action will tend to discourage people in the exercise of those rights?

Mr. Rehnquist. Well, to say that I say they can do it sounds either like I am advocating they do it or that Congress can't prevent it or that Congress has authorized it, none of which propositions do I agree with.

My only point of disagreement with you is to say whether, as in the case of Tatum v. Laird that has been pending in the Court of Appeals here in the District of Columbia, that an action will lie by private citizens to enjoin the gathering of information by the Executive branch which has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

These two statements formed the basis for the plaintiffs' motion seeking recusal of Justice Rehnquist in Laird versus Tatum. As I stated earlier, at the time the recusal motion was made, the plaintiffs were not aware of Mr. Rehnquist's important role in developing the policy which underlay the Army's Surveillance Program.

Furthermore, they were not aware of Mr. Rehnquist's role in advising the Defense Department on what information could or could not be provided to the Ervin committee concerning the Army's Domestic Surveillance Program.

Recently, we have received a memorandum for the Record, written by Robert Jordan on February 23, 1971. The memorandum describes the Defense Department's strategy for dealing with the then upcoming Ervin hearings, and the role of the then Assistant Attorney General Rehnquist in advising..."
the Defense Department on its witnesses' participation in those hearings. Quoting from part of that memorandum:

The objective of Fred's (J. Fred Bushard, General Counsel, Department of Defense) negotiations has been to avoid the presence of any military personnel as witnesses at the hearings. OSD with the approval of Justice plans to take a pretty hard line in refusing the committee information on internal discussions and the like. Fred made reference to an opinion from Bill Rehnquist, Assistant Attorney General, Office of Legal Counsel, on what can be released. There will be problems with the committee asking questions which cannot be answered without violating Mr. Rehnquist's guidelines. I will be the biggest problem here, because I have been around for a long time, and have participated in a large number of internal discussions.

In addition to the testimony at the hearing and advice to the Departments of Justice and Defense, Mr. Rehnquist played one other role during the course of the Ervin hearings. He sent a letter authorizing one of Senator's Ervin's staff members to review the printout of the information which had been stored in the Fort Holabird computer.

This printout included codes about the alleged subversive activities of the people who were under Army surveillance—a list, it should be noted, which included many distinguished military personnel. It seems highly unlikely that Mr. Rehnquist would have authorized congressional review without knowing what information was contained in the printout.

Mr. President, I've just recounted a lot of facts that may be difficult to follow. Let me summarize.

Mr. Rehnquist participated in forming the policy which for the first time gave civilian authorization to the Army's Domestic Surveillance Program. He testified concerning important and disputed facts about the scope and continued existence of the Domestic Surveillance Program. These facts were such that the Army had terminated the Surveillance Program, that it had destroyed the data stored in the computer at Fort Holabird, that only copy of the computer printout was retained and that no information had been transferred to the Department of Justice Internal Security Division's data base.

He advised the Department of Defense about the scope of its testimony concerning the Domestic Surveillance Program.

He authorized congressional access to a key document which established the scope and contours of the Domestic Surveillance Program.

He gave testimony concerning his legal opinion as to whether the specific case of Laird versus Tatum raised a justiciable controversy.

Then, little more than 1 year after the most of these events occurred, Justice Rehnquist was faced with a decision to sit on the Laird case. And what did he do? He cast the deciding vote in favor of the position he had previously testified to before the Ervin committee.

He cast the deciding vote for an opinion which adopted the version of the Army surveillance program he previously testified to, but which was fiercely contested by the plaintiffs in Laird.

He cast the deciding vote in favor of a position which denied plaintiffs the opportunity to take discovery on the factual questions he had previously testified to.

He cast the deciding vote in favor of a position which resulted in keeping the internal facts of the Army Surveillance Program which went on in the Department of Defense from coming to public light—a position he previously took in the Defense Department to take.

Why did Justice Rehnquist decide to sit on the Laird case, a matter which most legal authorities now say was a no-brainer? He wrote a lengthy memo explaining his reasons. His opinion boils down to the fact that since he did not serve as counsel to the Government in the actual case of Laird versus Tatum in the Supreme Court, he could therefore sit on the case as a member of the Supreme Court.

It is interesting and instructive to read his memorandum opinion in light of the facts that we now know and which had to be known to Justice Rehnquist at the time. I urge every Member of the Senate to do so.

It might be easy for some of my colleagues to write off this breach of judicial ethics as merely a mistake made long ago. But today, Justice Rehnquist says it was no mistake.

His answers to questions about Laird and his role and knowledge of the Army surveillance program were vague, and at times misleading. I asked him whether he would have done things differently in retrospect. He said, "I never thought of it again until these hearings, to tell the truth."

Senator Mathias asked him in a written question what his personal role was in the development of the memo regarding the Nixon administration's civil disturbance plan. His answer was "I have no recollection of my personal role in the preparation of this document."

I asked him did he have any knowledge of the Army's domestic surveillance policy. He said, "I had no knowledge of this."

I asked him whether he would have considered information obtained in the course of preparing for the May Day demonstrations, which did involve some military activity, I suppose you would say yes."

Finally, I asked him did he have any knowledge of the evidentiary facts at issue in the Laird case. His answer was simple. It was "no."

But the facts presented to the Senate suggest an equally simple answer. It is yes, he did know—not the denial he made to the committee.

All of this information, taken together, raises substantial questions about his ethical judgment, his sensitivity to the appearance of impropriety, and his credibility during his confirmation hearings, that I cannot cast my vote in favor of Justice Rehnquist.

CONCLUSION

Each Member of the Senate now will have to examine the hearing record and the evidence which has come to light since the hearings.

There are two decisions possible—for vote for Justice Rehnquist's confirmation or against it. Yet, as the statements of the Senators during Judiciary every case it could be said that the confirmation demonstrate, even among those who come to the same conclusion on how they should vote, there is no one compelling reason that I could agree as to what tips the scale.

There is no one that holds Senators together. When we stop to think about it, that is really the way it should be. We are 100 different people, and 100 different men and women. We are united in one thing. We have each taken a very solemn oath to uphold the Constitution. And we each have an individual duty to sift through the facts, and make our very best judgments.

So what is clear is that we are not a rubber stamp for a Presidential nomination just as we are not a vigilante force against a nomination. I sat through all of those hearings. I asked a lot of questions. I read practically every case I could get hold of. I read all of the material for Justice Rehnquist, and I read all of the material against Justice Rehnquist. I met privately with him at some considerable length. I listened to his answers during the confirmation hearings. I took most of this material back to my home in Vermont, and I reviewed it again. I walked around the fields of my farm and thought about it there.

At the conclusion of the confirmation hearings I wrote two memos to myself, one saying why I could vote for him and should vote for him, and one saying why I would not vote for him. When I read those, the one that said I should and could vote for him did not ring true. It did not in my mind. I felt that my commitment to this great country, the U.S. Senate, nor would it be fulfilling my own conscience as a Vermonter and as an individual.

I have set forth the reasons for my vote against Justice Rehnquist's confirmation. And those reasons are compelling to me. The others will perhaps find it equally compelling, or not significant, or maybe will find something
else that makes the picture clearer for them.

Mr. President, I vote only as one Senator but Justice Rehnquist will not be contradicted with my vote.

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. KERRY. Mr. President, I ask unanimous consent that further proceedings under the quorum call be resuggested.

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

Mr. KERRY. Mr. President, there is no record. As the President of the United States has what I think all of my colleagues would agree is an undisputed right to appoint nominees who are of a similar philosophical view, and are committed not to oppose the appointment of any individual to the Supreme Court or any other court on the basis that some of their views may disagree with mine. In fact, I think that has been the case of most of my colleagues who are opposed to this nomination. I have voted for almost all of the President’s nominees to Federal judgeships during his second term. Out of 118 judicial nominations by President Reagan in his second term, I voted for 115. I have voted against only three.

But it seems to me, as colleague after colleague has asserted in the course of this debate, when we are considering the nomination of a Chief Justice of the United States, it is incumbent on us to apply a higher standard than the one that we do for other Justices of the Supreme Court, that we ought to stop and ask the tougher questions, and that we should expect the application of the very highest standards.

Why? Senator after Senator on both sides of the aisle has eloquently underscored the nature of the U.S. Supreme Court and what it means to use as Americans and as a society. It is no accident that we refer to the Chief Justice as the Chief Justice of the United States, not merely the Chief Justice of the Supreme Court. The Chief Justice represents more than just one of nine men and women on that Court. The Chief Justice is the leader, not only of the Supreme Court but of our entire system of justice.

The Chief Justice is the symbol of our constitutional system of government and of the traditional American values of equality and justice which go with that.

As Prof. Laurence Tribe of Harvard Law School has written, “The Chief Justice—only 18 have served in our entire history—present the most obvious examples of the one Justice who can make a difference. And although often in dissent and sometimes lagging behind instead of leading the Court, one Chief Justice made all the difference in the constitutional world.”

Historically, the role of the Chief Justice has been critical in shaping the course of American jurisprudence and American history. Chief Justice John Marshall, for instance, with his famous decision in Marbury versus Madison, shaped our view of the U.S. Constitution itself, and as Justice Benjamin Cardozo wrote, “Marshall gave to the Constitution of the United States the impress of his own mind and the form of our constitutional law is what it is because he molded it while it was still plastic and malleable, in the fire of his own intense convictions.”

Chief Justice Marshall personally wrote the opinion of the Court in 519 of 1,215 cases decided during his tenure on the Court, and as Professor Tribe has written, “his intellectual grip was so firm that Marshall Dissented from a constitutional ruling only once. In every other major case decided in his 34 years at the helm of the Supreme Court, Marshall got his way.” And L. Tribe writes, “In the 20th century the role of the Chief Justice has been equally important.

Under Chief Justice Earl Warren, the U.S. Supreme Court led the way in moving this country and also in racial justice. Chief Justice Warren not only wrote the Court’s opinion in Brown versus Board of Education, mandating an end to segregated public schools in this country, but he acted as a genuine leader in the process of bringing about a unanimous decision of the Court. In Professor Tribe’s words, “That the Court spoke with a single authoritative voice in Brown added measurably to the ruling’s credibility in the face of widespread and bitter resistance.”

And under Chief Justice Warren Burger, the Court’s unanimous 8-to-0 decision in the Nixon tapes case was instrumental in forcing President Nixon to release those tapes and in bringing about an end to that constitutional crisis.

So clearly, Mr. President, the role of the Chief Justice is crucial to building consensus on the Court, to leading the Court, and to helping to lead the country in our system of justice and also in reasserting and impressing on Americans and the world our value system. The man or woman who fills that position has to be a person with demonstrated ability to lead in that way and with a demonstrated capacity and willingness to show the moral vision, of which true leadership is a part.

In the case of Justice Rehnquist, measured against this standard, or measured against what I hope would be the highest standards that body would apply, I feel there are compelling reasons for opposing his nomination. First, Justice Rehnquist has consistently—consistently—demonstrated an insensitivity to the rights of minorities, women, children, and the poor in our society. He has shown himself to be literally hostile to the principle of racial desegregation and to fundamental constitutional principles such as the separation of church and state.

Now, as we all know, Mr. President, there is nothing wrong in a justice of any court having views which place him or her in solitary opposition to colleagues on the bench. No, we applaud that. I think in this country and certainly in our judicial system we encourage independent thinking, and it is obviously vital to the development of our judicial system.

Mr. President, the record shows that Justice Rehnquist’s views are so far outside the mainstream of legal thought that he is irredeemably handicapped in his ability to effectively fulfill the essential role of Chief Justice as a builder of consensus on the Court. That is an important reason for opposition. But, in addition, I believe Justice Rehnquist has demonstrated a disturbing lack of sensitivity to certain principles of legal ethics, as well as some lack of credibility in his testimony before the Senate Judiciary Committee, enough so that it actually does injury to the standards of the judicial system, to reward him with the role of Chief Justice of the United States, considering all that means.

Mr. President, the record shows that Justice Rehnquist, throughout his career, has consistently shown an insensitivity to the rights of minorities. We have heard much of the memo as a reason for Justice Rehnquist in his memo for Justice Jackson in 1952, which he authored, defending the infamous Plessy versus Ferguson decision, upholding racial segregation in “separate but equal facilities.” Mr. Rehnquist wrote:

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by “liberal” colleagues, but I think Plessy versus Ferguson was right and should be reaffirmed.

In another memo, he wrote that:

It is about time the Court faced the fact that white people in the South don’t like the colored people; the Constitution did not appoint the Court as a social watchdog to rear up over that time private discrimination raises its admitted ugly head. Subsequently, Justice Rehnquist claimed at his first confirmation hearing in 1971, and again this year, that these statements merely reflected the views of Justice Jackson, and not his own.

I think that any reading by anybody—not even a lawyer—any reading of the way in which those words have been phrased and that memo was writ-
The weight of the evidence clearly shows that assertion by Justice Rehnquist is of dubious credibility. It has been contested by the statements of Mr. Rehnquist’s coclerk at the time, Donald Cronson, and by Justice Jackson’s longtime secretary, Elsie Douglas, who said that it “smeared the reputation of a great Justice.” And this explanation is simply not consistent with the facts regarding Justice Jackson’s views. As others have stated, it would have been more appropriate—perhaps even honest—for Justice Rehnquist to simply have admitted that the memos represented his views at that point in time, but that today he no longer holds those views, if in fact that were true. That he did not do so simply raises an additional issue regarding credibility.

I believe Justice Rehnquist has consistently in his 15 years on the Supreme Court shown himself to be outside further comment of the mainstream of legal thought. More than 50 times, Justice Rehnquist has been a lone dissenter on the Court, with all of his colleagues on the other side on an issue. He has been opposed not only by liberals and moderates, but even by such conservatives as Justice O’Connor and Chief Justice Burger. In his lone dissent in the Bob Jones University case, Justice Rehnquist was the only Justice to support tax credits for segregated schools. In Batson versus Kentucky, his lone dissent supported the right of a prosecutor to prevent blacks and minorities from serving on a jury. In Keyes versus School District No. 1, Denver, CO, his lone dissent supported the view that segregation in one part of a school district does not justify a presumption of segregation throughout the district. In Wallace versus Jaffree, the Court’s most recent school prayer case, Justice Rehnquist was the only Justice to support the establishment clause of the free exercise clause. In particular, I believe Justice Rehnquist committed a serious violation of legal ethics by refusing to recuse himself in the case of Laird versus Tatum, in which he cast the deciding vote in 124 cases to reject the constitutional claim of individual rights. This is not the record of a man who will build consensus and lead the Court.

There are other reasons for concern—though none as critical as the record of decisions on the Court itself. I am also deeply concerned by Justice Rehnquist’s interpretation of basic canons of law, especially the equal protection clause. In juvenile cases, the Court has acknowledged that the due process clause and the equal protection clause each have their own standard of review. In Keyes, Justice Rehnquist ignored the juvenile standard. In Briggs versus White, Justice Rehnquist was the only Justice to support the view that children in America’s public schools need not be treated in the same manner as children in private schools. He voted to uphold part of the statute in the other 23 cases. Mr. Rehnquist is one of the most influential people in the nation, and his views are reflected in his interpretation of basic canons of law.

In the Bob Jones University case, Justice Rehnquist was the only Justice to assert that the establishment clause did not require a presumption of segregation where, and I will not repeat all of Justice Rehnquist’s interpretation of basic canons of law. In particular, I believe Justice Rehnquist committed a serious violation of legal ethics by refusing to recuse himself in the case of Laird versus Tatum, in which he cast the deciding vote in 124 cases to reject the constitutional claim of individual rights. This is not the record of a man who will build consensus and lead the Court.

The consequences of a doctrinaire insistence on rigid equality between men and women cannot be determined with certainty, but the results appear almost certain to have an adverse effect on the family unit as we have known it. I believe that in 1986, these views are simply beyond the pale of what is acceptable in a Chief Justice or for that matter any Federal officer. I am also concerned by the evidence which has emerged about Justice Rehnquist’s conduct and his answers during the hearings of the Senate Judiciary Committee. I have no doubt that Justice Rehnquist participated in instances of harassment and intimidation of minority voters at the polls in Arizona in the early 1960’s. His attempts to evade responsibility for these actions, or to disguise their true character, are simply not credible in the eyes of this Senator. It is striking that a man who has been universally acclaimed as having a brilliant mind would claim to have such a hazy recollection of these important events in his life.

I found much more credible the testimony of James Brosnahan, then an assistant U.S. attorney and now a distinguished trial lawyer, who testified that he had personally seen Mr. Rehnquist at the polls and had confronted him regarding his challenges to voters. Several other credible witnesses also
testified that they had personally seen Mr. Rehnquist challenging minority voters at the polls. There is no small irony that, at a time when the Warren Court was genuinely promoting the rights of minorities, and President Kennedy and Attorney General Robert Kennedy were bringing the Supreme Court to bear in enforcing these rights, that Mr. Rehnquist was at that same time challenging the rights of minority voters.

Mr. President, had this issue arisen now in 1986, since it occurred in the sixties, that were to have been framed in a way that somehow acknowledged it or said in fact that it was part of the role that he was performing but that that view has changed and we have moved on. I think that would probably have seen that issue disappear. But it is the nature of a court to make those words public in the press, that indeed he had received it but claimed that he did not recall the letter or its contents when he testified before the committee.

Again, this whole episode raises further questions both about Justice Rehnquist’s lack of sensitivity on racial matters and about his credibility.

Mr. President, any one of these matters considered alone might be considered a minor blemish, might be considered unimportant, might be considered too distant a part of history and not relevant at this point in time. But taken together, Mr. President, taken together, with the history of the record of decisions, with the portrait of a man who has not paid enough attention to some of the standards which he will be called on to apply to others in the judicial system. And the portrait of a man who has paid too much attention to others in the judicial system.

What is the motive of a trial attorney, distinguished as he is, from that region and other witnesses in coming forward now to challenge a potential nominee for Chief Justice unless, Mr. President, they were speaking their mind and the truth.

I am disturbed by the revelation that Justice Rehnquist breached his ethical duty as a lawyer by failing to notify his brother-in-law, Harold Dickerson, of a trust which Mr. Rehnquist had drafted, of which Mr. Cornell was the beneficiary. The fact that that trust was kept secret from his own brother-in-law for over 20 years during which time Mr. Cornell became destitute makes me question, if the fact of a breach of a legal obligation, the question of the breach of a human obligation. The fact that Justice Rehnquist, through his wife, stood to personally benefit from the proceedings, makes the question even more questionable. And the fact that this deception continued for 10 years after Justice Rehnquist became a sitting Justice on the Supreme Court raises an even larger question.

I am also concerned by the revelations that Justice Rehnquist had restrictive covenants, not so much by the fact that if he had genuinely not known and they had passed on as they have in other people’s deeds—we know others have had those restricted covenants and they were commonplace at the time. But Justice Rehnquist had initially claimed at a Senate hearing that he was unaware of these covenants. Subsequently, within days it came to light in the press that he had received a letter from his attorney in 1974 containing explicit references to the Vermont covenant. Justice Rehnquist then admitted at the moment that the letter was about to become real, force this Senator to conclude that I must vote against this nomination, and I do so, I must say, most reluctantly because it is not pleasant. I think to oppose the nomination of a President of the United States to the Supreme Court.

But it seems to me that when you have a vote of some 31 U.S. Senators who say continue to debate this issue, and when clearly there may be more votes than that in opposition to this nomination, that in and of itself makes an important statement about qualifications.

The Chief Justice of the United States of America should be one I think confirmed by acclamation or unanimously. At least the Chief Justice of the United States should be confirmed by a vote of 90 to 10 or so.

I think it is very sad that if this Chief Justice is in fact confirmed it will be by a vote that shows how clear is a nomination that raises serious questions, that leaves in doubt the ability of that Court to render justice which is equal under the law and which probably I think diminishes the standards which law students, prosecutors, and others within the judicial system will view that Court.

I reserve whatever remainder of time may be mine.

Mr. Rehnquist, when we take our oath of office in the Senate, we swear before God to support and defend the Constitution of the United States.

Mr. President, I want to commend the Senator from Massachusetts, Mr. Kerry. I think he has given a very important statement, one that I might presumptuously say be very proud of in the years to come. He has shown himself to be a very strong leader in the U.S. Senate and I think he does the people of the Commonwealth of Massachusetts credit. I thank the Senator.

Mr. President, when we take our oath of office in the Senate, we swear before God to support and defend the Constitution of the United States.

Our Constitution provides that the Senate must vote to confirm or vote not to confirm the President’s nominations to the Federal judiciary.

This provision is part of the brilliant constitutional compromise. It’s part of the system of checks and balances our Founding Fathers set up when they created three separate, coequal branches of Government.

It is this system that protects individual citizens against the risks of uncontrolled power and tyranny.

Therefore, I am vitally important that we exercise our duty to advise and consent with utmost care and responsibility.

POSITION ON REHNQUIST

I am deeply troubled over the nomination of Justice William H. Rehnquist to be Chief Justice of the United States.
States. I have grave concerns about his personal integrity, about his regard for individual rights, and particularly about his vision and leadership.

It is critical and Americans have full confidence in the integrity, independence, and competence of the Chief Justice of the U.S. Supreme Court. The American people must have no question about his commitment to individual rights and personal freedoms. He must be above reproach.

Because I do not have that confidence in Justice Rehnquist, I must oppose his confirmation.

**EXECUTIVE BRANCH NOMINEES**

It has been suggested that the President should have his own person confirmed, so long as that nominee is honest and competent. That may be true with executive branch nominees. Executive branch officers, after all, are part of the President's team, as they implement the President's policies. Executive branch officers are appointed only for the term of the President. The American people have the ability to elect a new President every 4 years.

I think that as a general rule the President should be allowed his choices for executive branch positions unless they lack integrity or competence. The President should have his own team in the executive branch.

**JUDICIAL OFFICERS**

But with our system of Government, a higher standard must be applied to officers of the Federal judiciary. Federal judges are part of the third, equal branch of the U.S. Government—the judicial branch. Federal Judges are appointed for life. They are not elected every 2, 4, or 6 years. They are appointed for life to protect them from improper pressures and influence.

Federal Judges have the solemn responsibility to decide the fates of people. They must come to a resolution of their disputes either with other people or with the Government. Federal judges must resolve these disputes dispassionately, coolly, accurately, fairly, and in accordance with the law.

The men and women who wield this great power must be chosen with great care. That power must beentrusted only to the wisest, most responsible people.

**OFFICE OF THE CHIEF JUSTICE**

The confirmation of a Chief Justice is the most important nomination any Senator will ever consider. Indeed, the vote here today is probably the most important vote that a Senator is going to cast in this decade.

The Supreme Court is the ultimate protector of our hard-won individual rights and personal freedoms. The Chief Justice is the second most important in our Nation, second only to the Presidency.

The Chief Justice is the highest symbol of America's commitment to a government of laws; to its Constitution and the Bill of Rights.

The integrity and commitment of the Chief Justice are the entire above question to maintain public confidence in our judicial system.

In sum, a nominee for Chief Justice must embody the highest standard of integrity, ethical responsibility, and fidelity to law. That person must have demonstrated exceptional legal ability and sound judgment. And finally, the Senate must consider whether the nominee would lead the Court, and how such leadership might affect the fundamental constitutional principles upon which our Government is based.

**IN MY JUDGMENT, JUSTICE RHNQUIST FAILS TO MEET THIS EXACTING STANDARD.**

Many of the questions that were raised during the hearings of the Senate Judiciary Committee have not, in my judgment, been adequately answered.

As a member of the Judiciary Committee from 1978 to 1984, I participated in the confirmation hearings on nominees to the Federal judiciary.

I am well aware of the sensitivity of these proceedings and the delicate position that nominees occupy when they are asked to give their views and justify their records in the face of probing investigations. But I do not believe Justice Rehnquist has given adequate testimony.

I do not know whether he has perjured himself, but I do believe that he has not responded with full candor to all the issues raised.

**Justice Rehnquist's Commitment to Individual Rights**

I am also deeply concerned about the extent of Justice Rehnquist's commitment to constitutional guarantees of individual rights and personal freedoms. Repeated episodes of Justice Rehnquist's record raise troubling questions about his commitment to fundamental fairness and upholding the Constitution in the areas of race discrimination, equal rights for women and men, and the separation of church and state.

In his judicial opinions, Justice Rehnquist has repeatedly advocated positions that will deny constitutional protections to minorities to women, to children, and to the poor.

When these writings are combined with the unanswered questions raised during his confirmation hearings, I for one cannot help but say that I have full confidence in the nominee's commitment to justice.

**Leadership and Vision**

When difficult issues arise, we look to the Supreme Court to unite our Nation. The Court has played a vital role in many times of national crisis, ranging from striking down racial seg-
to it that constitutional responsibility is fulfilled as to every nomination which is presented to this Court.

There is no more significant vote, short of an actual vote on a constitutional amendment, than on nominations to the Federal judiciary. Within this context, the most important vote is made after advice and consent and are, of course, appointments to the Supreme Court of the United States. And further, within this context, the most important votes we cast are those involving the Chief Justices of the United States.

We often talk about historic votes. I am as guilty, I suppose, as my other colleagues from time to time of referring to particular measures that come before us as "historic" votes, and certainly there have been some along the way. But far too often, I think, we describe a particular measure as a historic measure or historic opportunity and, in the process, we cheapen the word "historic." I think considering the fact that there have been only a handful of occasions in the 200-year history of this country when this Senate has cast its judgment as to individuals nominated to be Chief Justices, the nomination of Justice Rehnquist to be Chief Justice of the United States must qualify legitimately as a historic vote.

Given the age of Mr. Rehnquist and the present age of those who occupy seats on the U.S. Supreme Court, it would not be an exaggeration to suggest that Mr. Justice Rehnquist could serve as the Chief Justice of the United States for the next 2 decades or more as we are here. Afternoon, therefore, will have historic, profound significance, and effect on the future of this country as we close out the 20th century and begin the next.

Over the past several months, President Reagan announced the nomination of Mr. Justice Rehnquist to be Chief Justice of the U.S. Supreme Court.

Like all of my colleagues, Mr. President, I approach this question on the confirmation of Justice Rehnquist with enormous seriousness and solemnity. I recognize, as my colleagues do, the tremendous duty that we all must bear to fulfill our constitutional responsibilities in providing advice and consent to the President of the United States—and to the American people—on nominations that are sent before us. And I will do all in my power to see...
what the Senator believes is in the best interests of the Nation to warrant opposition to the nominee. I will not oppose, and have not in the past opposed, a judicial nominee solely because of the views he holds concerning controversial constitutional issues.

The Constitution, as we have seen, is not a mere set of state laws, but a framework for the federal government. It is a document that guarantees the personal liberties of the citizen. The Constitution is not to be read in a literal, frozen manner, but rather as a living, evolving document. It does not reflect merely a time capsule of the views of the Framers of the Constitution, but rather as a flexible document that can adapt to the changing needs of the Nation.

That same Constitution and its written record does not reflect merely a lukewarm or indifferent position. Rather, it reflects an icy adherence to the principles of equal protection, the right to privacy, and the right to free speech. It reflects a commitment to the rule of law and the principle that the government must act with restraint and respect for the rights of the citizen. It reflects a commitment to the idea that the government must act in a way that is fair and just to all citizens.

That same Constitution and its written record does not reflect merely a time capsule of the views of the Framers of the Constitution, but rather as a flexible document that can adapt to the changing needs of the Nation.
Mr. EXON addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. EXON. Mr. President, I will not unnecessarily delay the vote up or down to confirm Mr. Rehnquist as Chief Justice. I seem to read that basically it is a foregone conclusion that the 50-plus votes are here and ready to be cast in support of the nomination.

First, I would like to comment on a happenstance that just happened to me before—I emphasize just before—the cloture vote earlier today. The Senator from Nebraska, who maintained a friendship long after those days in Nuremberg, while I could find no particular piece of correspondence that referenced Justice Jackson’s views toward segregation in this country, I knew my father well enough and heard him talk over the years enough to know about his deep affection for this man and Mr. Jackson’s deep commitment to human rights.

In fact, that trial almost did not occur had it not been for the United States and Justice Jackson insisting that there ought to be a framework in which the Nuremberg trials could be examined and laid before the entire world. I think it is helpful to make note of Justice Jackson’s remarks as he opened the tribunal debates in Nuremberg in 1945. He said there, “We will show them to be living symbols of racial hatred, of terrorism, of violence and on the arrogance of power. They took all the dignities and freedoms that we hold as natural and inalienable rights in every human being.” He went on at length, but that particular paragraph, it seems to me, demonstrates Justice Jackson’s views about racial hatred and the inalienable rights of every human being. Statements such as these cast doubt upon his elevation to the position of Chief Justice.

Mr. President, from the very beginning, I had indicated my likely approval of his Presidential nomination of Justice Rehnquist to be Chief Justice. While I had some misgivings, my record shows that I generally support Presidential appointees. Last night, and this morning, I intended to vote for Justice Rehnquist. But after listening further, and after further reviewing the record again and again, and having had some second thoughts, I felt that I had press myself into making a final look at the record. I have come to the conclusion that the proper vote is “no.” I wish to take a few moments to explain my reason for opposition.

It is not based on the technical qualifications or his high intellect. They are strong and, in my view, beyond any reasonable doubt. While I do agree completely with his position on a whole series of issues, I recognize the right he has to those, and I think he has been honest and straightforward in his decisions while on the Court. Nor is it his personal or judicial philosophy that this Senator takes issue with, and it has nothing to do with the vote I will be casting in opposition.

His judicial philosophy and his political affiliation, I think, have nothing whatsoever to do with the basic qualifications. I believe that has been well established by many discussions and many decisions he has been a part of on the Court, that he has a right to those positions, and I thought he stated them quite eloquently. For the most part, I agreed with him; and I will say again that there is nothing wrong with a conservative—even a dedicated conservative—on the Supreme Court of the United States.

I will further say that I generally agree with his prolife decisions and statements that have been part of the character of Justice Rehnquist over the years, both as a person and as a Justice of the Supreme Court.

What, then, one might ask, would be the reason for opposing moving a Justice to Chief Justice, if he is technically qualified, has a high rating from the bar association, and has other characteristics that would otherwise qualify him?

Why, then, would one quarrel with his elevation to the position of Chief Justice? I think it is for a very good reason. Mr. President, I received little consideration when reviewing the elevation of a Justice to Chief Justice, where he will serve for years and years to come, as the top jurist of all the courts and the court systems of the United States of America.

My concern is his lack of full credibility, sometimes reliability, and, most of all, his seeming inability to be an effective consensus developer, which I believe is an important requirement for the Chief Justice.

The Chief Justice of the United States is a person who should be chosen nearly by acclamation, and I think the vote will indicate very clearly that he is not being chosen by acclamation, that there are those who, for their own reasons and very sincere reasons, have serious objections. I think what they are basically saying is that there is nothing wrong with Justice Rehnquist remaining on the Court, but the question is as to whether or not he is the best individual
CONGRESSIONAL RECORD—SENATE

September 17, 1986

Mr. BYRD. Mr. President, if the Chair will in­

dulge me I am awaiting the promul­
gation of a unanimous-consent request be­
fore I begin.

Mr. KASTEN addressed the Chair.

The PRESIDING OFFICER. The Chair.

The PRESIDING OFFICER. The Senate from Wisconsin.

Mr. KASTEN. Mr. President, is a quorum call in progress?

The PRESIDING OFFICER. No, it is not. The minority leader has been recognized.

Has he yielded?

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

Mr. BYRD. I yield to the distin­
guished acting Republican leader for the purpose of his making a unani­

mous-consent request.

Mr. KASTEN. I thank the distin­
guished minority leader.

IMPEACHMENT TRIAL OF JUDGE

HARRY E. CLAIBORNE

Mr. KASTEN. As in legislative ses­

sion, Mr. President, I ask unanimous

consent that, notwithstanding the pro­

visions of rule XIX of the Rules of

Procedure and Practice in the Senate

when sitting on impeachment trials, the chairman—or, in his absence, the

vice chairman—of the Special Commit­

tee on the Impeachment Trial of

Judge Harry E. Claiborne is author­

ized to permit members of said com­

mittee to pose questions orally to the

impeached person, witnesses, House

managers, and counselors appearing

before the committee, on such terms

and with such restrictions as the

chairman shall prescribe for the ex­

dpi tution completion of the committee's

business.

The PRESIDING OFFICER. With­

out objection, it is so ordered.

Mr. KASTEN. I thank the Chair,

and I thank the distinguished minori­

ty leader.

NOMINATION OF WILLIAM H.

REHNQUIST TO BE CHIEF JUS­

TICE OF THE UNITED STATES

The Senate considered with condi­

tions of the nomination.

The PRESIDING OFFICER (Mr.

DARROTT). The minority leader is

recognized.

Mr. BYRD. Mr. President, I thank

the Chair.

Mr. President, this afternoon we are

debating the nomination of William H.

Rehnquist, of the State of Virginia, to

be Chief Justice of the United States.

This is a vote that will be cast soon.

This is a vote that has troubled me

considerably.

I voted to report the nomination

from the Judiciary Committee. I voted

to report it with the understanding

that I would reserve my final judg­

ment on it, that I would give the

Senate a chance to debate the matter.

And the Senate has debated this

matter. Senators have, I think, done

themselves proud.

I have listened to the debates care­

fully.

One might say “Well, I have not

seen you on the floor, Senator.” That

is true.

But I cannot sit on the floor and listen to

each debate as I would like, because of the

many other matters that come up and things that interrupt me. Other

Senators have the same demands on

their time.

But I have watched this debate. I

asked my daughter last week to tape

the debate on the Rehnquist nomina­
tion, and last Sunday I spent all after­
noon and until 1 o'clock in the morn­
ing on Monday watching Senators and

listening to them as they presented

their views on this nomination. And on

Monday evening I continued until after 1 o'clock in the morning. Last

evening, until after 2 o'clock this

morning, I was still considering the

views of those who spoke pro and con.

I arrived at my decision last night as

to how I would cast my vote on this

nomination.

Watching the debate on TV, may I

say, incidentally, one can concentrate

without interruption, without being called to the office to talk on the

phone, without being called to the

office to meet someone, without hav­

ing to answer a doorbell or a col­

league. One can concentrate whole­

ly and totally on what a Senator is

saying.

May I say I have been very im­

pressed by the logic, by the content,

by the probity and substance of the

debate on both sides of the aisle and

on both sides of the question.

So I finally have arrived at my deci­

sion. As I have listened to this debate I

find that it in the main has revolved

around about five or six contentions.

One, give the President his choice.

Two, conservative ideology is so ex­

treme in this individual as to make him insensitive to the rights of minori­

ties. He favors government over indi­

viduals.

Three, those who oppose the nomi­
nation of Mr. Rehnquist do so on the

basis of his judicial philosophy, on the

basis of his ideology, and ideology has no place in decisions with respect to

the confirmation of nominees to sit on the

courts.

Four, candor or lack thereof.

Five, give the nominee the benefit of

the doubt.

I think that this is a pretty fair sum­
mation of the points that have been

made. I do not subscribe to it. It is a fallacious argument. It is a spurious one.

Let us see what the Constitution

says. The Constitution says “He,”

referring to the President, “he shall

nominate, and by and with the advice and consent of the senate, shall ap­

point * * * judges of the supreme
court.” The President only can nomi­
nate. But he must do it “by and with

the advice and consent of the senate.” Those words are not mean­ing­

less. They mean something.

They mean that the Senate has an ex­

clusive part in the appointment of

judges to the Supreme Court of the

United States, and we should not take that constitutional responsibility that is

placed upon us lightly.

This decision can be made but once.

There is no opportunity for a second

time. Once the Senate has made its de­
cision, once the President has been

notified, once he has tendered the com­
mission to Mr. Rehnquist, once Mr.

Rehnquist takes the oath as Chief

Justice of the United States, then the

Senate has no opportunity to reconsid­
er its decision.

In the case of impeachment trials does the Senate take a second

the whole United States of America to be

moved up to this important posi­
tion.

Having said all that, Mr. President, I

realize that his nomination will very

likely be confirmed by the U.S. Senate. Nonetheless, notwithstanding any of

the statements I have made, I have no personal feelings against Jus­
tice Rehnquist whatsoever. I hope and

pray that after his nomination is con­

firmed, which it very likely will be, he

will be an outstanding Chief Justice of

the United States.

The good news is that people have a

way of growing in that position, and I

certainly believe that Justice Rehn­

quist has the ability to grow. There­

fore, in conclusion, let me say that I

hope history will show that will he

eventually be recognized through ac­

complishments as a great Chief Jus­
tice. I think he has the potential. I

hope he has the will and the foresight, and I hope that he will develop the

ability to become an effective consen­
sus-maker, which I think, above all

other qualifications, is the supreme test of the Chief Justice of the United States.

Mr. President, I yield the floor, and 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. BYRD. Mr. President, I ask

unanimous consent that the order for

consideration of the nomination be

rescinded.

The PRESIDING OFFICER. Without

objection, it is so ordered.

The minority leader is recognized.

Mr. BYRD. Mr. President, I thank

the Chair.

Mr. President, if the Chair will in­
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guished minority leader.

Mr. KASTEN. As in legislative ses­

sion, Mr. President, I ask unanimous

consent that, notwithstanding the pro­

visions of rule XIX of the Rules of
look. And we all know that only for the first time in the last 50 years is the Senate engaged—at the moment, as a matter of fact—in sitting as a court in the trial of a judge who has been impeached by the House of Representatives.

\[\text{CONGRESSIONAL RECORD—SENATE} \quad 23751\]

So the Senate has a responsibility in the appointment process. It is a heavy one.

Mr. President, normally I would say, all things being equal, let me give the President his choice. And in the case of Cabinet officers, the responsibility upon us is heavy, but not as heavy as it is with respect to nominees to the courts of this land, and, particularly to the Supreme Court of this land, and more specifically to the office of Chief Justice of the United States.

This is a heavy, it is an awesome, it is a serious responsibility, and no Senator should take it lightly. No Senator should act in this instance on the basis that we should just give the President his choice. I do not care what President it is, whether it is a Democratic President or a Republican President. Our duty goes beyond that.

The next point: The conservative ideology of Mr. Rehnquist is so extreme he has an insensitivity to the rights of minorities, and he favors government over individuals.

Mr. President, I happen to believe that the President of the United States, even that President, has a duty to do so—and not only has a right, I think he has a duty to do so. I would think him lacking in something if he did not consider the ideology or the judicial philosophy of the nominee whose name he submits to the U.S. Senate to sit on a district court, an appellate court, the Supreme Court of the United States, yes, even that highest court of all, a judge of the Chief Justice of the United States. I would think he was lacking in judgment.

And I think the same thing about the Senate. Why should Senators not have the same duty that the President has? Well, let us have Mr. Rehnquist answer the question. For those who propose that Senators should not judge this nominee on the basis of his ideology, let us hear what he has to say.

In “The Making of a Supreme Court Justice,” by William H. Rehnquist, from the Harvard Law Record, October 8, 1959, here is what he says on that question:

Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

And again he says—Mr. Rehnquist himself, the nominee, is speaking here—on the question as to whether or not ideology should be a factor in the determination by Senators who sit in judgment on his nomination:

If greater judicial self-restraint is desired, or a different interpretation of the phrases of ‘due process of law’ or ‘equal protection of the laws’, then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn the ideologies is to inquire of men on their way to the Supreme Court, something of their views on these questions.

Now, Mr. Rehnquist is “on his way”, we might say, to the office of Chief Justice of the United States and, therefore, the only way for Senators to learn of his sympathies, whatever his ideology may be on this or that question, is to inquire of him, “on his way”, what his views are on this question. So Mr. Rehnquist answers the question himself.

Now, Mr. President, this is not the first time I have had something to say about the ideology of individuals named to sit on the Supreme Court. And it is not the first time I have considered ideology.

When Mr. Justice Thurgood Marshall was appointed to the Supreme Court in 1967, by a Democratic President—at a time when I held a Democratic office in the leadership of the U.S. Senate, secretary to the Democratic conference—I voted against Mr. Marshall because of his judicial philosophy.
against the 1964 Act. Politically, I think it would be a good thing for me to vote for Thurgood Marshall to sit on the Supreme Court, and then stand against the 1964 Act. Politically, I thought it would be good for me to vote for Thurgood Marshall as the first black man to serve on the Supreme Court of the United States. And I am going to vote for him. So prepare me a speech for him. But first give me some of his opinions that he has rendered over the years. I have read the dissent and the concurring opinion. So I took those opinions home with me, and as I read them I began to see that more and more they were opinions with which, from the standpoint of ideology, I have my doubts.

So lying in bed that night, it suddenly dawned on me, well, here I cannot vote for this nominee. And as I read them I began to see that more and more they were opinions with which, from the standpoint of ideology, I have my doubts.

Then there came Abe Fortas. I had voted for Abe Fortas, whose name had been sent to the Senate by a Democratic President to be an Associate Justice. And when he came to Chief Justice, I looked at his philosophy. Here is what I said: "I have no objections to Mr. Fortas personally, or to his qualifications as an able lawyer. I have heard nothing which would reflect against his good character and conduct as a citizen. My objections go solely to his judicial philosophy as manifested by his words and actions while serving on the Court."

So there you are. That was in September 1968. Again a nomination by a Democratic President, again a decision by the Democratic party structure in the Senate, a decision to vote against a Presidential nomination, and why? Because of the nominee's ideology. So much for ideology.

I say that ideology has its place, and as far as I am concerned, speaking of ideology itself, I subscribe to the judicial philosophy of Mr. Rehnquist in many areas—not in all, but in many—school prayer, forced busing, search and seizure, Miranda warnings, the death penalty. So if it were simply on the basis of his ideology, I would support Mr. Rehnquist.

Again I say I have cast my vote in the past against nominees to the Bench submitted by Presidents of my own party, and on the basis of ideology alone. No. 4: That Mr. Rehnquist lacked candor. Mr. President, the several instances in which Mr. Rehnquist in appearing before the Judiciary Committee professed not to have good recollection, not to be able to recall, those instances have been debated and discussed in the Senate perhaps ad nauseum. But very briefly, let me, too, look at them. On the matter of challenging voters, Mr. President, whether Mr. Rehnquist thought he was "intimidating" voters or "harassing" them, I do not know. But Mr. Kennedy asked the following questions:

Senator Kennedy. Well, the activity described basically is personally challenging voters. That is the activity alleged, and you categorically deny ever having done that in any preceding in Maricopa County in the Phoenix area at any election, is that correct?

Justice Rehnquist. I think that is correct.

Senator Kennedy. Well, what is "I think". I mean, you would remember whether you did or not. I mean, it is not an event. If you are talking about harassing voters, it is not something you are going to forget very much about.

Justice Rehnquist. Senator, let me beg to differ with you on that point, if I may. I thought your question was challenging. Now you say harassing or intimidating. As to harassing or intimidating, I certainly do categorically deny anytime any place. If you are talking about challenging, I have recollection of challenging voters. I think I said, and I still say, that I did not challenge during particular years. I think it is conceivable that [in] 1954 I might have at least have been a poll watcher at a west-side precinct.

Senator Kennedy. Well, did you challenge individuals then?

Justice Rehnquist. I think it was simply watching the voting being counted.

Senator Kennedy. Then you did not challenge them.

Justice Rehnquist. I do not think so.

Mr. President, I am in no position to charge Mr. Rehnquist with intimidating or harassing anybody. Perhaps he did. He may not have. If he did, it is conceivable that he did not feel that he was intimidating them. He might not have felt so, even while the individual on the receiving end might very well have felt intimidated. Mr. Rehnquist might, indeed, not have felt he was intimidating or harassing.

But it seems to me it would be very difficult not to at least remember challenging voters. And in challenging voters, Democrats have done that. Republicans have done that. That has been done over the years. It was a pretty normal thing for voters sometimes to be challenged as they approached the voting booths. But why would one not remember? I should think it would have been better if one had indeed challenged voters, simply to have said so. Mr. Rehnquist was not a judge then. He did not sit on the Supreme Court at the time.

He was not in the Justice Department. I think that the committee would have felt that it was an acceptable response if he would have said, "Yes, I did challenge some voters. That was what we did in those days. My Democratic counterparts did it. I did it. As a Republican, a very partisan, loyal, dedicated Republican, I did it."

¶ 1730

"But I was not sitting on the Court." So much for that.

Now, we go to the next question, that of restricted covenants.

Mr. President, we have all, I guess, or most of us have, bought property in which there were restrictive covenants. That was common back a few decades ago. It is not beyond my recollection at all.

Of course, it is now unconstitutional. But in this situation, Mr. Leahy referred to the summer home Mr. Rehnquist had purchased.

Senator Leahy. When did you purchase that?


Senator Leahy. Justice Rehnquist, I am told you you have the normal form of transfer in Vermont, and gave back a mortgage deed. But in the warranty deed there is this sentence: "No fee to the herein conveyed property shall be leased or sold to any member of the Hebrew race."

Did you have any awareness of that covenant in your deed?

Justice Rehnquist. Not at the time, Senator. I was advised of it a couple of days ago.

Senator Leahy. Did you not read the deed that you got on your property?

Justice Rehnquist. I certainly thought I did, but I'm quite sure I didn't note that.

It is not inconceivable, that it could have been that way.

But on August 4, 1986, Mr. Rehnquist wrote a letter to the chairman of the Judiciary Committee, indicating that following his testimony before the Senate Judiciary Committee, he had reviewed his files and he had found a letter from the attorney for the seller of the property, who described the conditions of title, including a reference to the restrictive covenant:

While I do not doubt that I read the letter when I received it, I did not recall the letter or its contents before I testified last week.

So we look at the letter of July 2, 1974, a letter written with a copy to Mr. Rehnquist, which contains the following statement:

The property is also subject to restrictions relative to use, width of rights-of-way, construction on the various parcels, and ownership by members of the Hebrew race.
There was an earlier letter dated June 24, 1974, addressed to him by David L. Willis, of the firm Witters, Zuccaro, Willis & Llum. It says:

I would recommend that you examine closely the attached abstract copy of the deed of the main cottage property.

We go to that abstract of title and we find the words to which Mr. Rehnquist’s attention had been specifically drawn by the letter:

No feet of the herein conveyed property shall be leased or sold to any member of the blood.

Mr. President, as I say, those restrictive covenants were included from time to time in those days, but the question here is, were you aware of this? Were you aware of that covenant?

Then all of a sudden it appears in a published article that he had been notified of this fact by the attorney, and on Mr. Rehnquist wrote the letter to Mr. Thurmond, the chairman of the Judiciary Committee.

Again, here is the problem of inability to recall, failure to recollect. It would appear likely that a man in Mr. Rehnquist’s position, a man of his legal ability, a man of his perspicacity, his insight, his sensitivity to these things, certainly has taken notice of that covenant the abstract of title. When his attention was specifically called to it in the letter, one would have thought that he would have read this, 12 years ago when the property was purchased.

All of these matters trouble me.

In the case of Laird versus Tatum, I will not go into that as others have already gone into it, but there is a question there as to whether Mr. Rehnquist participated in the development of a policy dealing with Army surveillance of activities of Americans engaged in nonviolent, legal public demonstration.

And further:

I believe that the memorandum was prepared by me as a statement of Justice Jackson’s tentative views for his own use at conference.

Mr. President, the memorandum itself, titled “A Random Thought on the Segregation Cases,” is written by the writer in the first person, not in the third person. The memorandum states, “I believe.”

Now, who is “I” in this case? Who is the first person? The initials on the memorandum are W.H.R. It would be difficult, then, to believe that this memorandum was written by anyone other than Mr. Rehnquist and that the “I,” the personal pronoun in the memorandum, is not Mr. Rehnquist.

The memorandum states: “I realize that it is an unpopular and an unhumanitarian position, for which I have been excoriated by ‘liberal’ colleagues, but I think Plessy v. Ferguson was right and should be reaffirmed.”

Mr. President, why would Mr. Rehnquist deny that it was his memorandum? Why did he not say, “Yes, it was my memo. Those were my thoughts. I was a clerk to the late Mr. Justice Jackson. Those are my thoughts. That was the constitutional doctrine of the day, Plessy versus Ferguson—separate but equal. I subscribed to it. But that has been overturned. Now it is Brown versus Board of Education. So the separate but equal doctrine has been turned on its head.”

I think that would have been understood by the committee. I certainly would have accepted that explanation. One could have understood how a law clerk, who had perhaps been asked to do so, or even if not asked to do so, might have submitted such a memorandum.

Oftentimes I ask my staff, “You give me a memo that states the positive. You give me a memo that states the negative. Let me have both sides of the argument.” And that could very well have been the case with Mr. Rehnquist. But to say that this memorandum did not represent his own views but that he was stating rather the views of the late Mr. Justice Jackson, Mr. President, is just a little too difficult to swallow.

And then there is the letter from Mrs. Elsie L. Douglas, who was the secretary to the late Mr. Justice Jackson, in which she wrote:

As I have followed the proceedings on the appointment of Justice William Rehnquist for Chief Justice, it surprises me every time Justice Rehnquist repeats what he said in 1971 that the views expressed in his 1952 memorandum concerning the segregation case before the Court were those of Justice Jackson rather than his own views. As I said in 1971 when this question first came up, that is a smear of a great man for whom she served as secretary for many years. Justice Jackson did not ask his clerks to express his views. He expressed his own and they expressed theirs. That’s what happened in this instance.

So, Mr. President, it is not sinful to admit that one in that day and time supported the view of what was then the law of the land. Whether it was the right law or whether it was the wrong law, that was to be decided by the legislative branch or by the Court and in this instance it was the Court and in my judgment, the Court made the right decision in Brown versus Board of Education. But to say, “Those were not my views,” I cannot understand that. It would not have been amiss, as I said, if Mr. Rehnquist had simply said, “Yes, those were my views and in that day and time that was the law of the land. It was what the Constitution said, according to the Court in Plessy versus Ferguson.”

But that was not what Mr. Rehnquist said, and so, Mr. President, that being a very personal cloud on his perceived candor, may I say.

So without going further into these instances which have been, I think, admirably presented to the Senate on
both sides of the aisle by those who contend one way and those who contend the other, let me say that for that, in my judgment, the nominee's responses were not entirely forthcoming. To that extent, he left a cloud of doubt in my mind. There are the people—rich and poor, men and women, black and white, Catholic, Gentile, Jew, Protestant—have confidence in the Supreme Court of the United States and the judiciary, as a Court and as a system that will render justice and fairness, and judgment with impartiality toward all.

The Chief Justice of the United States must be perceived as the very symbol of justice and the purest symbol of all, a symbol without flaw. This image cannot be challenged. His ability is universally recognized. Some say he is brilliant. His philosophy, overall, I find no quarrel with. His integrity—there is the question.

Will the American people view this Chief Justice as one who became Chief Justice and on the way cut a corner here, cut a corner there, was unable to meet a challenge and a question? Would he still have been most likely to the contrary? I am concerned about his ability to develop consensus on the court at times when consensus and balance may be best for the country.

Mr. President, I close with a quotation from Horace Greeley:

"Fame is a vapor; popularity an accident; riches take wings, and gold is a thing which time will curse tomorrow. Only one thing endures—character."

Just as it is character that endures in the case of the individual, it is character in the case of the highest Court of these United States that must endure if our constitutional system shall ensure liberty and justice for all.

Mr. President, I regret to say that we are about to confirm a man as Chief Justice of the United States with a quarter or a third, or whatever, of the U.S. Senate showing its lack of confidence in this man. I regret that if Chief Justice Rehnquist was sitting in the exalted position of Chief Justice, he would still be on the Court, that he, as a clerk for Mr. Justice Jackson, allegedly turned on his colleagues, the Democratic leader, the President, and part of his responsibility was to honcho through the nominations of two men who had just come down to defeat and literally, as the biographers tell us and stories go, he was sitting in the office with then Attorney General Mitchell. The President called Attorney General Mitchell and said, "Within an hour I am going to name someone if you don't find me someone."

And he, Mitchell, allegedly turned then to Rehnquist and to everyone's great surprise said, "It is you."

Justice Rehnquist did not anticipate that the turn of events. Mr. President, I do not figure out one thing. He observed that in 1970 anyone who expressed support for at any time in their life Plessy versus Ferguson they would not be confirmed. He has performed. He would have been in deep, deep trouble. He just saw two nominees go down to defeat.

So what does he do? He has an opportunity of a lifetime. He never expected in his whole life to ever be on the bench and he concludes, in my view, that he has to come up with some mildly credible rationale that he never held those views.

Mr. President, it is imperative that the people of the United States, all the people—rich and poor, men and women, black and white, Catholic, Gentile, Jew, Protestant—have confidence in the Supreme Court of the United States and the judiciary, as a Court and as a system that will render justice and fairness, and judgment with impartiality toward all.

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So what does he do? He has an opportunity of a lifetime. He never expected in his whole life to ever be on the bench and he concludes, in my view, that he has to come up with some mildly credible rationale that he never held those views.

So he turns and he says, "This memorandum,"—the only thing that was talked about being surface,—"was something that Justice Jackson," and keep in mind Justice Jackson was
September 17, 1986

Congressional Record—Senate

23755

dead now, that "Justice Jackson was the guy who in fact really had me write this for him, they were not my views."

He goes on to say as was pointed out: Justice Jackson “did not either expect or welcome the incorporation by a clerk of his own philosophical view of how a case should be decided.”

The fact of the matter is, though, that Justice Rehnquist and his colleague, Donald Cronson, wrote numerous memoranda for Mr. Justice Jackson in which they articulated their personal philosophic view which is, by the way, what Justice Jackson’s secretary said all his clerks did. They were asked to give their view, not Jackson’s view.

Let me point out why I believe he was disingenuous at best, when he said, “Justice Jackson didn’t expect or welcome the incorporation of our views.”

If that were true you would assume that the memorandum that he wrote on other matters would not express his, Mr. Rehnquist’s view. Right? Let us just go through a few of them.

For instance, in the memorandum in the case of Terry versus Adams, which involved the challenge to the State elections, Justice Rehnquist wrote, and this is a memorandum to Justice Jackson: Just like the Plessy versus Ferguson memoranda to Justice Jackson he wrote:

I have a hard time being detached about this case, because several of the Rodell school of thought among the clerks began screaming as soon as they saw this that “Now we can show those damn southerners’, etc. I take a dim view of this pathological search for discrimination.”

In a memorandum in the case involving the right to speak in a public park, Justice Rehnquist wrote to Justice Jackson:

I personally don’t see why a city can’t set aside a park for ball games, picnics, or other group activities without having some outlandish group like Jehovah’s witnesses commandeer the space and force their message on everyone.

Again, I do not care about his view. Here are two instances in a row where he said after having said Justice Jackson did not want clerk views, he is the guy writing it.

Mr. DOLE. Mr. President, what I want to do while the minority leader is available is to indicate and I am sorry to interrupt the distinguished Senator from Delaware.

Mr. BIDEN. It is perfectly all right.

Mr. DOLE. We might be able to either fix a time or determine a time when we might vote on this nomination. A lot of our Members understand that there is going to be a window between roughly 6 and 8. But it would be my hope that the case of Terry versus Adams, which we could set aside that particular nomination and start discussing Scalia. I do not know how much more time the Senator from Delaware has that he is allotted or committed.

Mr. BIDEN: If the Senator will yield, I will say there are probably about another hour-and-a-half worth of total time, my guess.

The Senator from Arizona has about 20 minutes to a half-hour and the Senator from Delaware has total another 15 or 20 minutes; the Senator from Massachusetts has 20 minutes, and the Senator from Ohio may or may not have 15 minutes.

So to the best of my knowledge they are the only people who wish to speak on the nomination.

So I would those who want to speak on this nomination would avail themselves of this time and if we could reach the end of the discussion on the Rehnquist nomination and then perhaps we could set aside that particular nomination and start discussing Scalia.

I do not know how much more time the Senator from Delaware has that he is allotted or committed.

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So to the best of my knowledge they are the only people who wish to speak on the nomination.

Mr. BIDEN. Could we do that during the so-called window to see if we could not come and start the debate?

Mr. BIDEN. The Senator from Delaware would be prepared to do that. The Senator from Arizona acknowledged he would be prepared to do that. The Senator from Arizona acknowledged he would be prepared to do that. Senator KENNEDY, I believe, indicated he had to leave during that window. He was here prepared to speak. So he ought to be back. We can check with the Senator.

The answer is I think we can get 90 percent of it finished during the window.

Mr. DOLE. If we could conclude the debate on Rehnquist probably—not going to happen—but if we could conclude it before 8 o’clock, would the distinguished minority leader have any objection if we would set the nomination aside temporarily to call up the Scalia nomination and start the debate on that one?

Mr. BYRD. Not at all. I have no objection.

Mr. BIDEN. If the majority leader will yield, I would have no objection. I would like to have 2 minutes immediately prior to the vote on Rehnquist with all my colleagues on the floor. It would be safe to say 5 minutes before the actual vote. So I do not mind leaving it, going to Scalia, but prior to the vote being called, I would like 5 minutes set aside for the opposition.

Mr. DOLE. All right. I understand.

I know the distinguished minority leader has a commitment. If he has no objection, then if it should happen—it may not happen—we could proceed in that fashion.

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

Mr. BIDEN. I yield.

I say to both leaders I think that is reasonable. I would suggest quite frankly—I do not speak out of school with my colleagues—maybe we could run a hot line on that. I know of one who would have reason to object to that. I would suggest we proceed on that basis unless in the next 10 minutes or so we find an objection. That is what I would say.

Mr. DOLE. If the Senator will yield, we will do the same. Again I ask the distinguished minority leader if we can reach that agreement if it is all right to do it in his absence.

Mr. BYRD. It is. I authorize the distinguished manager here or authorize the distinguished majority leader to speak on my behalf. If it is clear on this side, our staff will know it. They can inform the majority leader and it is perfectly all right with me to enter into this agreement.

Mr. DOLE. Thank you.

Mr. BYRD. I thank the majority leader, and I thank the distinguished Senator from Delaware.

Mr. BIDEN. I thank my colleagues.

Mr. BYRD. Mr. President, I am one of those who in this instance has to go to a function, and I am one of those who asked that there be a window. It would seem to me we could proceed with debate on this nomination and if Senators are not here at this particular point and we have not reached 8 o’clock and they are not here, we still wish to speak on Mr. Rehnquist, if the managers of the nomination on Mr. Scalia were here and care to proceed with their statements, and other Senators could—we will be back then shortly after 8—perhaps if we could agree to a vote on both nominations, let us say, no later or let us say at 9 o’clock, Mr. Rehnquist’s vote and back to back Mr. Scalia, that would give us virtually 3 hours in which to complete the debate on Mr. Rehnquist, do the debate on Mr. Scalia, which is not going to be very lengthy, I should think, and then we all know when the vote is going to occur.

(Mr. HUMPHREY assumed the chair.)

Mr. BIDEN. Mr. President, to continue again now, remember what we are talking about here. We are talking about a fellow who said that, “It is obvious they were not my views. I was not saying these things.”
Justice Rehnquist argued in 1971 that “tone of the memorandum is not that of a subordinate submitting his own recommendations to his superior—but is instead quite imperious—the tone of one equal exhorting other equals.”

Again, that is his argument as to why he said, “I could not have written this. I don’t remember the first place he said, ‘I couldn’t have written it, they were not my views. The reason they were not my views,’ he said, ‘is because clerks don’t give their own views.”

Mr. SARBANES. Will the Senator yield on that point?

Mr. BIDEN. Yes; sure.

Mr. SARBANES. Did the Senator put in the Record the letter from Justice Jackson’s secretary of many years taking very sharp issue with that?

Mr. BIDEN. Yes. She made it very clear, as the Senator from Maryland knows, that, in fact, clerks were expected to give their views, not the Justices’ views. And she pointed that out.

Well, let us examine that point for a minute. In one memorandum, for example, the man who say clerks do not use those phrases, he, Justice Rehnquist, then clerk Rehnquist, refers to his coclerk, this Mr. Cronson, as “Mr. Justice Cronson.” He says, “As Mr. Justice Cronson said in his memo,” blah, blah, blah, and he went on from there.

At another time, he titles the memorandum he wrote to the Justice—again, now, he said “We don’t use high-sounding terms. Any time it is formal or any time it is flippant, it makes us a judge, not a clerk.”

This is another title of one of his memorandums. It is quite good, actually. The title is: “Habeas Corpus Then and Now.—Or, If I can Just Find the Right Judge—Over These Prison Walls I Shall Fly.”

That is how he titles his memo to Justice Jackson.

A third example: In Justice Rehnquist’s memo on Terry versus Adams, when he was a clerk, he talked about—this is his, Rehnquist’s verbiage—he talked about a “pathological search for discrimination,” that he said, could be attributed to Justices Douglas and Black, as well as several other prominent legal scholars.

Now, let us go back over this a minute. Why are we concerned about this? Because, A, it does not appear he is telling the truth; B, we did not have a chance to examine it in 1971; and, C, his arguments do not hold water.

So, he says that “I wasn’t for Plessy versus Ferguson.” are as follows: A—this is the first part now, this is really important in my view—he says, “A, when we talked and when we wrote in those memos, we were writing for Justices. We weren’t expected to give our own views.”

Another point is he now says, as a second defense, that it was not he who wrote that memorandum or they were not his words. He comes back and says, “I couldn’t have written it, they were not my views. The reason they were not my views,” he said, “is because clerks don’t give their own views.”

Well, I hope I have just pointed out that he consistently gave his own view in every other memorandum and Justice Jackson’s clerk said that is what all the clerks did. So I would like to make that point.

The second point is he now says, as a second defense, that it was not he who wrote that memorandum or they were not his words. He comes back and says, not only did clerks not do that, he said, in addition to that, it was too imperious, the tone; it sounded like a Justice, and “We clerks didn’t use those kinds of terms like the ones used in the memorandum.”

Well, let us examine that point for a minute. In one memorandum, for example, the man who say clerks do not use those phrases, he, Justice Rehnquist, then clerk Rehnquist, refers to his coclerk, this Mr. Cronson, as “Mr. Justice Cronson.” He says, “As Mr. Justice Cronson said in his memo,” blah, blah, blah, and he went on from there.

Now, there is a fourth thing. Rehnquist asserted in 1971 that the statement in the memo that “Plessy was right and should be reaffirmed was not an accurate statement of my views at the time.”

However, everything in Justice Rehnquist’s background at that time points overwhelmingly to the fact that that is what he believed.

Let me give you some examples. This is Rehnquist’s coclerk, again, Mr. Donald Cronson. He stated that Rehnquist regularly defended Plessy versus Ferguson in the luncheon meetings with the other clerks. And this is consistent with the statement and the memo which he wrote to Justice Jackson where he, Rehnquist, says, “I realize that it is an unpopular and un­humanitarian position, for which I have been excoriated by my ‘liberal’ colleagues.”

He means the people at lunch time who used to excoriate him, his fellow clerks who used to say things like, “You can’t mean that. You don’t really believe separate but equal is equal.” And he would come back and say, “I do believe that.”

So he says to Jackson, he acknowledges that. He says, “I am recommending to you to uphold Plessy v. Ferguson. I realize that is an unpopular and unpopular position, for which I have been excoriated by my colleagues”—and he, Justice Rehnquist—“have been excoriated by my colleagues,” the clerks.
Similarly, Justice Rehnquist's corollary assertion that the memo represented the views of Justice Jackson is wholly inadmissible to the purposes. It is disputed by Phillip Kurland, one of the most conservative constitutional scholars in America, from the University of Chicago, Phil Kurland, Justice Jackson's biographer, disputes that Jackson ever held those views. Richard Kluger, the author of the seminal work on the history of the Brown decision, disputes that Jackson ever held those views. I cannot find any evidence Jackson ever held those views.

Mr. SARBANES. Will the Senator yield on that point?

Mr. BIDEN. Justice Jackson's own writings in the Brown case refutes that he ever had those views. If you yield, I will make a concluding point to let my colleague from Arizona speak if he has not already left.

Mr. SARBANES. I simply want to quote the letter that Ms. Douglas, Justice Jackson's long time secretary, sent because obviously she worked very closely with the Justice, and law clerks came and went. She stayed on forever, as it were. In her letter she says:

It surprises me every time Justice Rehnquist repeats what he said in 1971 that the views expressed in his 1952 memorandum concerning the segregation case then before the Court were those of Justice Jackson's rather than his own views. As I said in 1971 when this question first came up, that is a smear of a great man for whom I served as secretary for many years. Justice Jackson did not ask me to express his views. He did not express them. He expressed theirs. That is what happened in this instance.

Mr. BIDEN. I thank my colleague from Maryland. Look, let's be honest about this. Here is a guy who had himself in a crack. If it had not been for the fact that he was nominated, he could have said what a lot of other Members of the Senate said here. Like Senator Byrd said, here. Like Senator Byrd said, here.

Mr. BIDEN. I think my colleague from Maryland. Look, let's be honest about this. Here is a guy who had himself in a crack. If it had not been for the fact that he was nominated, he could have said what a lot of other Members of the Senate said here. Like Senator Byrd said, here. Like Senator Byrd said, here.

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that he now realizes that others may so view it.

While it is encouraging in some ways that Mr. Rehnquist says that he has come to realize the depth of concern among members of minority groups to be treated as individual human beings by all persons, it is very distressing to imagine a person on the Supreme Court who just seven years ago, where he was, as unaware of the depth of this feeling as Mr. Rehnquist was by his own admission. The insensitivity which Mr. Rehnquist’s own statement reveals is hardly offset by an announcement at confirmation hearings that he would no longer oppose public accommodations measures—particularly when other actions by the nominee after 1964 are taken into account.

Mr. BIDEN. I thank the President.

He concluded that letter by saying the following: “It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedoms for a purpose such as this.”

The purpose such as this was forcing a white person to serve a black person in a restaurant; forcing a white person to have to rent a room in a public accommodation house to a black person.

In 1967, Justice Rehnquist publicly challenged the plan to end de facto segregation in public schools in Phoenix. And again, as a good-spirited public citizen, he wrote a letter to the editor of the Phoenix newspaper.

In 1987, Justice Rehnquist publicly announced his amendment to set up school attendance zones ‘with a motive of segregating the races in the schools.’

Again, I would be delighted to debate any of my colleagues on whether or not the substance of what he is suggesting in all these things is reasonable. I think they are not reasonable.

But the reason I raise these things, I say to my colleagues, is not to demonstrate that he was right or wrong in defending the ‘segregation’ law. I would defend it. I do not believe he was not telling us the truth when he said, “I supported the Brown decision, and I always supported the Brown decision,” that “I did not write the Jackson memo, they were Jackson’s views, not my views.”

Now, look, there is nothing wrong again as I say to my colleagues with him having held those views. A lot of people held views like this.

But I say to my colleagues after I have read what I read to you, does anyone reasonably believe that William Rehnquist, clerk William Rehnquist, lawyer William Rehnquist, private citizen William Rehnquist, was a man who from 1954 on strongly supported Brown versus The Board of Education? Is that a reasonable conclusion anyone can reach?

So why did he not just say to us, yes, in 1954, like almost the majority of the American people, I thought Plessy versus Ferguson was still good law. But, he came up under oath, raised his right hand, and he said, “No, they weren’t my views. I am for Brown,” or, “I had no opinion at all.”

Mr. REHNQUIST. I’d like to respond to that in this manner. I am sure he did not, could assume that it is anything from allowing the electric power company to put the lines straight through to where they could put a road through in the neighborhood.

My father did not look it up and say, “I better go down to the county recorder’s office and, assuming I can find it, turn to volume 471, turn to page 4,372, and read the covenant.”

No lawyer ever wrote my father a letter. It never appeared on the face of the deed or any other document my father read, just like 89 percent of the other Americans in this country who have “restrictive covenants.”

How is that distinguishable? It is distinguishable in a very definite way. I am not here to defend my father, but to point out the difference.

In Justice Rehnquist’s case, it said it on the face of the deed, right there in bold, big print, “No Hebrew.”

In addition to that, there was a lawyer who sent him a letter, a one-page letter. It said, “By the way, Mr. Justice Rehnquist, you should look at this because your deed says, ‘No Hebrew race’ can be sold this property.”

Here is a Justice of the Supreme Court who everybody over here says, and some of my colleagues over here from this brilliant, legal tactician, and scholar.

He gets a letter from a lawyer which is one-page long. He does not read it.

In addition to that, do you know what happened? Do you know what happened when some Republican Party worker went down and checked out every deed I have? The only restrictive covenant that restricts in a property I own is because one was owned by a DuPont family, and it says in fact that if there is an explosion at the DuPont property the owner of my property will not be liable. And it says I cannot sell drinks on the property of my home.

I assure my colleagues, I sell no drinks.

Let me tell you what the difference is. A person who thinks 90 percent of Americans would do.

The day my father was made aware because some Republican worker went...
The normal subject matter of the law review writer is, of course, statutory or adjudicatory prose. Through compilation, comparison, and synthesis, the analyst attempts to predict, criticize, and suggest. The writer may thereby enrich a particular legal theory or provide ideas to which judges, lawyers, and others may refer when analogous issues arise. Why, then, should we break the pattern and devote law review space to a work of pure fiction? How can we justify substituting the notion of "considerative communication" from an early passage in the story. It further explores the extraneous technical techniques that mark this mode of communication through an analysis of Justice Rehnquist's opinion in Paul v. Davis as viewed through the lens of Vere's argument in Billy's case. Following Melville's lead, the Article then relates "considerative communication" to the "poetry" of the adjudicator by examining Vere's motives for having Billy hanged. This analysis, finally, leads to an examination of the story's broader cultural themes. For the lawyer, this centers on Melville's concern that the values and normative structures likely to inhere in a judge's reasoning may pose barriers to objective judicial behavior.

Thus, this Article seeks both to enrich our understanding of Melville's remarkable tale and to demonstrate how some literary works may pose profound questions so artfully that they deserve a place in the growth and development of legal culture.

I. Plots and Digressions: Overtness and Covertness in Billy Budd, Sailor

No schematic attempt to describe Billy Budd, Sailor's "plot" would sit easily with anyone who has examined the extraneous complexity of Melville's final work. Such attempts, made by filmmakers, 10 opera writers, 11 and some literary critics, 12 imperviously the narrative subtlety that is the story's essence. But a kind of recasting of the tale, loyal to its digressions, is possible and serves to intimate the central themes underlying Melville's view of adjudication.

The story, subtitled An Inside Narrative, is brief—approximately ninety pages long. It begins with the description of a certain maritime time, the "Handsome Sailor":

"It was strength and beauty. Tales of his prowess were recited. Ashore he was the champion; afloat the spokesman; on every occasion always foremost. Close ranks of topsails in the shroud, as the weather yardarm-end, foot in the Flemish horse as stirrup, both hands tugging at the earing as at a bridle, in very essence. But a kind of recasting of the tale, loyal to its digressions, is possible and serves to intimate the central themes underlying Melville's view of adjudication.

"Compact, concise, and clever, it moves at a pace that is not only engaging but also intellectually stimulating. The author's ability to blend legal principles with narrative elements is commendable, and the result is a thought-provoking exploration of the relationship between law and literature. The story's themes of justice, ethics, and the role of the individual within society are skillfully woven into the narrative, making it a rewarding read for both legal and literary enthusiasts. The description of the protagonist, "Billy Budd," is particularly well-crafted, capturing the reader's imagination with vivid imagery and compelling storytelling. Overall, this book is a must-read for anyone interested in the intersection of law and literature.

However, as impressive as the story is in its own right, it is important to recognize that it should not be seen as a standalone piece of work, but rather as part of a larger literary and cultural context. The story is a testament to Melville's ability to capture the essence of his time, and it serves as a powerful reminder of the enduring impact that literature can have on our understanding of the world.

In conclusion, "Billy Budd, Sailor" is a timeless classic that continues to resonate with readers today. Its themes of justice, ethics, and the role of the individual in society are as relevant now as they were when the story was first published. The novel is a testament to Melville's mastery of language and storytelling, and it is a book that should be read, enjoyed, and studied by all those interested in the relationship between law and literature."

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Footnotes at end of article.
anywhere, but rather in the era of the French and American Revolutions, when the great mutinies threatened the stability of the British navy. "It was the summer of 1793, when Nelson, "alone and unseen, Great Mutiny" at the Nore." Billy is impressed from a merchant ship, the Rights of Man, Nelson-bound Bellipotent, cheerfully accepting his fate. Resentment and "double meanings and insinuations of an unobtrusive, quite foreign, quite foreign nature," he departs from the homeward-bound ship, leaving with the Rights only the memory of "the jewel" of that crew, and bringing to the Bellipotent his popul arity and natural esteem among fellow sailors.

The narrator continues to ground the tale in a specific historical context by now moving from Billy to the general subject of the mutinies, providing needed background for the introduction to the story of Admiral Nelson. A very real contemporary and colleague of the Bellipotent's fictional captain, Vere (who has not yet been mentioned), Nelson, "the greatest sailor since our world began," is the subject of two full chapters, he will be mentioned twice again as the text proceeds. Nelson here appears as a kind of Handsome Sailor himself. Evocative of Billy on the Rights, but on a far higher level, Nelson is presented as a natural leader. Called to a troubled ship, the Theseus, he dampened a mutiny virtually on his arrival, choosing "not indeed to terrorize the crew into base subjection, but to win them, by force of his mere presence and by the unobtrusive, back to the liberty that is not as enthusiastic as his own yet as true." (Vere's subsequent tactics at Billy's trial will have to be tested against this narra tive model.)

As the story winds through self-admitted "bypaths" to the exposition of its central actions, Captain Vere is finally introduced. A good, if somewhat pedantic, perhaps overly prudent and bookish officer, he bears the nickname "Starry Vere" partly because he would occasionally gaze dreamily at the blank sea, but more so because Andrew Marvell had written a poem about his ancestor, "starry Vere," who was noted for his discipline severe.

From Vere, Melville moves to the Bellipotent's master-at-arms, John Claggart. "His portrait I essay," admits the always equivocal narrator, "but I begin and end with Starry Vere." (And like Billy), Claggart is twice described as "exceptional." Both Vere and Claggart are unusual on a ship because the present inarticulate and complex instance oppose them to the usual sailor-like type. Melville, in a later "digression," describes this opposition as follows.

And what could Billy know of man except of man as a mere sailor? And the old-fashioned sailor, the veritable man before the mast, the sailor from boyhood up, he, though indeed of the same species as a landsman, is in some respects singularly distinct from him. The sailor is frankness, the landsman is finesse. Life is not a game with the sailor; demanding the long head—not in the superior manner where facts are made in straight-forwardness and ends are attained by indirection, an oblique, tedious, but useful art. Billy, he says, had that poor candle burnt out in playing it.

Yes, as a class, sailors are in character a juvenile race.

Claggart, like Vere, "is finesse," particularly finesse with language, with verbal obfuscation, and with achieving ends through indirectness.

Claggart, however, suffers from an animus not shared by his captain: he is obsessed with Billy Budd. Such a hidden passion, "never declared" and directed against "some special object," is described in a vitally important chapter. But the thing which in eminent instances signals so exceptional a nature is this: Though the man's even temper and discreet bearing, his favoritism of Claggart, mind perhaps clearly subject to the law of reason, not the less in heart he would seem to riot in complete opprobrium. Having nothing to do, he is so sufficiently little to do with reason further than to employ it as an amibudeast implement for affecting the irrational. That is to say: Toward the accomplishment of an aim which in wantonness of atrocity would seem to partake of the insane, he will direct a cruel judgment sagacious and sound. These are madmen, and of the most dangerous sort, for their lunacy is not continuous, but liquid. In Claggart by some, the master-at-arms is protectively secretive, which is much as to say it is self-contained, so that when, moreover, most active it is to the average mind not distinguishable from sanity, and for the reason above suggested: that whatever its aims may be—and the aim is never declared—its indirectness, its overward proceeding are always perfectly rational.

Why does Claggart have it in for Billy? As Melville observes, "It is not, according to some, a homely but oblique hints. Billy and Claggart are types in opposition. It has become a critical commonplace to think of this as an opposition of youth to age, of spirit and heart and head against that and these are reductive analyses, unworthy of the text in its fullness. The real opposition here, as indicated in the last few quoted passages, is between the Handsome Sailor's innate openness and the intelligent master-at-arm's 'ingratiation' indirectness, or, as we shall call these qualities here, overtess and covertness.

Claggart proves himself a master at covertness, as an upstanding model of loyalty to the tale's famous "soup spilling." When Billy accidentally spills "the grey stuff," as Billy did to the deck, Claggart, with loyalty to the regime, special Inilitary duties, for, indeed, as we learned of the Bellipotent earlier in the tale, "very little in the navy, not even in war, has ever been permitted to an ordinary observer that the Great Mutiny was a recent event!" they are perhaps partially satisfied by the always opaque, allusive, evasive text proceeding. Billy's last words, "God bless Captain Vere!" are unremarked until Melville's unusual afterword. Billy was here completely innocent, a landman who was here completely innocent, a landman who was here completely innocent, a landman who was present and, curiously, by the readers of an official naval chronicle of the time called Neuw from the Mediterrenean. This "long ago supernannuated and forgotten" account, recited towards the end of the novel, reports it incorrectly. Claggart is described, perhaps, as an old-fashined fellow adjudicator and Billy as a deceived foreigner who stabbed him vindictively to the heart.

The event stands thus, unremarked until Melville's unusual afterword. Billy was here completely innocent, a landman who was present and, curiously, by the readers of an official naval chronicle of the time called Neuw from the Mediterrenean. This "long ago supernannuated and forgotten" account, recited towards the end of the novel, reports it incorrectly. Claggart is described, perhaps, as an old-fashined fellow adjudicator and Billy as a deceived foreigner who stabbed him vindictively to the heart.

Meanwhile, Claggart's antipathy to Billy evolves into a strategy. He dispatches a deputy to tempt the youthful foretopman to mutiny, but Billy, always the loyal coun­terpart of Nelson, throws him out. Billy, always the loyal coun­terpart of Nelson, throws him out. Billy, always the loyal coun­terpart of Nelson, throws him out. Billy, always the loyal coun­terpart of Nelson, throws him out. Billy, always the loyal coun­terpart of Nelson, throws him out. Billy, always the loyal coun­terpart of Nelson, throws him out. Billy, always the loyal coun­terpart of Nelson, throws him out. Billy, always the loyal coun­terpart of Nelson, throws him out. Billy, always the loyal coun­terpart of Nelson, throws him out.

The tale ends on its least ambiguous and most lyrical note. The crew—straightforward, overt, and uncomplex sailors—has composed a ballad called "Billy in the Dar­bies." Its strikingly simple verses speak of the hero Billy at death, the jewel who can only observe, without bitterness, "—O, tis me, not the sentence they'll suspend."
principally, is on Captain Vere and his explanation to a realistic court-martial that duty to law overrides the apparent claims of natural justice. Critics have been particularly attracted to the speech he delivers. "But your scruples: do they move as in a daze? Challenge them. Make them advance and then you can weigh them. Perhaps now you import something like this: If, mindless of palliating circumstances, we are bound to regard the death of the master-at-arms as the prisoner's deed, then does that deed constitute a capital crime wherefore the penalty is a mortal one. But in natural justice is nothing but the prisoner's overt act to be considered? How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so?—Does that state it aright? You sign sad assent. Well, I too feel that, the full force of that. It is Nature. But do these buttons that we wear demonstrate that short alienage is to Nature? No, to the King. Though the ocean, which is inviolate Nature primeval, though that be the last echo here we—Perhaps have our being as sailors, yet as the King's officers lies our duty in a sphere corresponding little is that in receiving our commissions we are in the most important regards ceases to be natural free agents. When war is declared are we to observe the laws of the realm prevailing in it? Our supreme function to follow these present proceedings. Would it be so much we ourselves that would condemn as it would be martial law operating through us? For this law and the rigor of it, we are not responsible. Our vowed responsibility is to observe the law, and own it as our duty to obey it and administer it. In that we matter moves the hearts within you. Even so too is mine moved. But let not warm hearts betray heads that should be cool."

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"Vere's behavior," he noted, "demands explanation because of its opposition to law and moral choice. If, as an example, Vere's attitude to the court's decision to hang Billy, Vere denied that he is a free agent with an individual sense of discrimination and judgment: Vere's article forms a meritocratic basis for inquiring into the legal meaning of the story, it uses no legal content and elaborates his hint that Vere and Claggart participate in a similar spiritual disease."

Merlin Bowen, however, a lifelong Melvilleian, himself a convert in comparing Captain Vere (thought to be a "good" character) to John Claggart (the novel's clear villain): "The pages of Billy Budd themselves contain sufficient evidence upon which to base a quite different estimate of Captain Vere. According to it, Vere appears as a unified and conscientious servant of "Cain's city," an overcivilized man who has stifled his own heart and learned to live by the head alone as his calling requires, who has abdicated his full humanity in the interests of a utilitarian social ethic and postponed the realization of truth and justice to some other and more convenient world. Neither the Christian gospel nor the liberal ethic are important to Vere; in his opinion, any place in the government of this man-of-war world. And when the simple and saintly, and yet old-fashioned, Billy Budd, left Vere, he is a striking instance of a man who could not be court-martialed by Claggart's accusation of treason, impulsively knocks the liar down and so kills him, the practical Vere knows his duty at once and resolutely proceeds to hang, for the greatest good of the greatest number, a man innocent in all but the most technical sense of the word."

Not unlikely (the court was) brought to something more or less akin to that hazardous frame of mind which in the year 1842 agitated the commander of the U.S. brig-of-war Somers to resolve, under the so-called Articles of War: Articles modeled upon the Excise Act, to enforce the execution at sea of a midshipman and two sailors as mutineers designing the seizure of the brig. Which resolution was carried out, though in a time of peace and within not many days' sail of home. An act vindicated by a naval court of inquiry subsequently convened ashore. History and here cited without comment. True, the circumstances on board the Somers were different from those that bound the Somers crew an emergency felt, well-warranted or otherwise, was much the same.

"...Billy Budd will appear as much more coherent, though still puzzling, work of art. Especially the possible consequences of a commitment to a fixed and theoretic pattern rather than to patternless life. Variations, crosscurrents and inescapable risks.

In the book's central opposition of civilization and nature and head, there can still be a real question where Captain the Honorable Edward Fairfax Vere stands: quite clearly, and despite his own instinctive feelings to the contrary, he stands with Claggart and against Billy. But both temperament and training, he is much closer to the petty official who despises him to the young foretopman he admires."

Writing in 1962, C.B. Ives employed technical legal material to further his personal opposition to law and moral choice. Accordingly, he decided not to accept Vere's position at "face value"; instead, he carefully examined the provisions of the actual British statutes Vere invoked. Ives noted some of the procedural defects in Vere's approach, some of the substantive oddities, and some of the legal history and custom that cast into doubt the harshness of the drumhead court's decision to hang Billy. But Ives' efforts take us only part of the way: his legal analysis is sketchy, and his ultimate conclusions unsupported. He labelled Vere's rush to hang Billy as "idiosyncratic," "a sacrificial gesture, born to a kind of self-punishment that had become habitual in Vere's life." In his task?"... the pages of Billy Budd themselves contain sufficient evidence upon which to base a quite different estimate of Captain Vere. According to it, Vere appears as a unified and conscientious servant of "Cain's city," an overcivilized man who has stifled his own heart and learned to live by the head alone as his calling requires, who has abdicated his full humanity in the interests of a utilitarian social ethic and postponed the realization of truth and justice to some other and more convenient world. Neither the Christian gospel nor the liberal ethic are important to Vere; in his opinion, any place in the government of this man-of-war world. And when the simple and saintly, and yet old-fashioned, Billy Budd, left Vere, he is a striking instance of a man who could not be court-martialed by Claggart's accusation of treason, impulsively knocks the liar down and so kills him, the practical Vere knows his duty at once and resolutely proceeds to hang, for the greatest good of the greatest number, a man innocent in all but the most technical sense of the word."

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In the midst of the confusing admixture of substantive law theories that he offers to the court, Vere indeed does identify this provision as the operative element in the substantive crime for which Billy is accused and permit it to recur to the facts. In wartime at sea a man-of-war's man strikes his superior in grade, and the blow naturally kills. A mutiny is defined according to the Articles of War, a capital crime." But, as Vere's junior officers recognize, this substantive law (itself questionably in the Articles of War) carries with it a procedural scheme.

The Articles of War of 1749 afford a series of procedural safeguards. Although these protections might appear surprising in a military setting, they were in line with at least a century of precedent in British naval law. As they stand, the Articles, though offering Vere his best arguments in favor of summarily convicting and executing Billy, also indicate that the capital crimes must be brought to the attention of the courts, rather than simple executive decision. The Articles of War, for example, allowed for summary courts-martial consisting of three officers, but such jurisdiction covered only those offenses "not sufficient to require trial by general courts-martial." Hence, Vere should have followed the procedures outlined by the Articles of War; his handpicked, three-man court and failure to return to the squadron were governed by a simple reference to "summary courts.

Vere's proclivity to summary proceedings apparently motivates him to conduct Billy's trial with the utmost secrecy. Yet, Vere quotes authoritative texts to the effect that "Courts Martial shall always be held in the Forenoon, and in the most public Place of the Ship, where, if possible, the Sun may be present." An American naval handbook states, "The sessions of courts-martial shall be public." In disregard of this long custom, Vere proceeds covertly; his procedure arouses controversy and criticism among some of his officers. We will not recognize the Mutiny Act as the larger meaning of Vere's personality and Melville's feelings about the law.

Vere's own behavior during Billy's trial flies in the face of naval procedure. The captain, perhaps sensing that a royal court might question his active role in the proceedings, takes pains to dampen his own proceedings.

"What he said was to this effect: 'Hitherto I have been but the witness, little more; and I think it is high time that I should give another tone, that of your conductor for the time, did I not perceive in you—at the crisis too—a troubled hesitancy, proceeding, I doubt not, from the clash of military duty with private interest in such matters commenced at the earliest stages of the proceedings . . . ."

The Articles indicate that only for trials concerning mutiny might sentencing and execution occur without admiralty of fleet command review. But Vere, it must be recalled, was not a mutiny user, but rather a deserter nor, despite Vere's extremely clever use of the idea of mutiny during the trial, a mutineer; the jurisdictional power of the admiralty, or the commander of the Mediterranean fleet, clearly extended to his case.

C. REQUISITE NUMBER OF JUDGES

Vere's assembling of the court raises other procedural questions. The Articles require at least five (and no more than thirteen) members on any general court-martial. Since the trial was to take place only when the fleet or squadron had been rejoined, these judges were normally all at or above the rank of post captain. Although he places Billy's substantive crime under the sign of the Articles of War, Vere decides that "three judges only will be necessary to determine the number of judges." He hand-picks three officers, one of whom, the captain of marines, is not even a naval officer.

D. NONAVAILABILITY OF "SUMMARY" MEASURES

In justifying the use of three rather than five judges, and in failing to return to the squadron to seek out the admiral's or fleet commander's jurisdiction, Vere apparently employed his so-called "summary" powers. After all, the Articles of War themselves, from which Vere culled his substantive approach to the case, do not grant such powers.

A review of the British authorities (and Americans commenting on customs largely derived from the British) indicates that, even had there been a crisis, "summary" proceedings were inappropriate in Billy's case: summary procedure was geared to trivial offenses, not major crimes. The American navy, for example, allowed for summary courts-martial consisting of three officers, but such jurisdiction covered only those offenses "not sufficient to require trial by general courts-martial." Hence, Vere should have followed the procedures outlined by the Articles of War; his handpicked, three-man court and failure to return to the squadron were governed by a simple reference to "summary courts.

Vere's multiple role playing

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Aside nothing obvious in the demeanor of the mutiny, and recent very little in the manner of the men and been engaged in a twelve lashes President himself in the...
skepticism of both surgeon and narrator as to Vere's formal objectivity, and that of his court itself as to the punishment, is fully sustained by a legal analysis of the case. Vere's decisive dictation not by his own intuitive predilection, clearly articulated in the captain's outburst seconds after Billy's fatal blow—"Struck dead by an angel of God! Yet the angel must hang." The trial's arguments form the necessary mediation between this preordained subjective closure of Vere's narrative and the surgeon's, and its inherent objectivity. Thus, it is important to set forth, as perhaps the prevailing theme and effect of the Handsome Sailor.

The trial's arguments form the necessary bridge, one of them (William James) can didly acknowledging that fain would be pass over it did not "impairment forbid faddistic-ousness." And yet his mention is less a narra tion than a reference, having to do hardly at all with details. Nor are these readily to be found in the libraries. Like some other events in every age befailing states every where, including America, the Great Mutiny was of such character that national pride along with the policy would fake shame it off into the historical background. Such events cannot be ignored, but there is a self-delusion that the true account of the case moves beyond irony to outright calamity. Why "blazon aught amis"? Better to report the actual hooli cose and its legal aftermath in the discreet shades of the audience's established beliefs.

Considerate communication, or Straus's "responsive and responsible" speech, soothes the average citizen by providing him with a canon of truth against which the heterodox views of others can be tested and, usually, rejected. "With mankind," as Captain Vere tells us, "forms, measured forms, are everything," and these have fewer "tragic judges" than this truth itself. But, as we have seen, the verbally and hierarchically superior adjudicator can give Vere's articulated reasons for hanging Billys the law does not support. The proprie ty of Vere's own "considerate" use of form and style during Billy's trial, therefore, is easily denied. Vere's decisive dictation follows the example of the Nore historians or even the Mediterranean newsmen. He depicts Billy as a villainously craftsman, or even the Mediterraneans. He depicts Billy as a villainously craftsman, or even the Mediterraneans.
Paul V. Davis story (and is not the score of times brought to a climax. The reader's impulse is fully disclosed until the Christmas season, no less.

Paul V. Davis story, "The Chief of Police, was the Chief of Police for the Louisville metropolitan area. The police chief is the officer who has been called upon to handle cases that involve the police department.

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As to the intrusive David, Justice Rehnquist's narrative emphasizes the aura of the factually events leaves Davis looking a bit sheepish, and Paul and McDaniel looking considerably more harried and plaintive than Vere's lawyers.259 An adverbial provision of his constitutional or statutory authority (particularly the ironic muttering of Davis) as an adverbial modifier of his three instances of Davis' otherwise straightforward and innocuous claim. History itself, the constitutional point, ensuring its effectiveness by way of Davis as a force of lawlessness challenging the basis of fundamental legal order. Most renehquist's strategy, placed at the outset of their legal arguments, deflects the authority to determine the case? This strategy, placed at the outset of their legal arguments, deflects the authority to determine the case? To understand this verbiage, we must recognize that Justice Rehnquist's strategy dupli­cates Vere's in its motivation, but to the converse logical effect. Vere sought to pre­pare his summary court for the view that it did have jurisdiction to dispose, definitively, of Billy's case; Justice Rehnquist posits the state courts' "jurisdiction to impel his state­ment that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtained a claim against such officers under § 1983.275 Hypotheticals, the stuff of opinion writing as well as, presumably, the "high tension" consequences may flow from the flyer in question,"276 "Imputing criminal behavior to an individual is generally considered the defamation claim into one under the Constitution. Justice Rehnquist has established a rhetorical pattern that runs through the first part of the opinion. This pattern provocatively combines at least five technical devices: anacoposis, aporia, epito­pia, popoiosis, and sarcasm. At the beginning of what we have called the "deneration­ization" process, Rehnquist throws a few bones to the so-called "hypothesis" evaluators of Davis of doubt (aporia) upon Davis' now thoroughly distorted position: "It is hard to per­ceive any logical stopping place to such a line of reasoning."280 These doubts are heightened by the device of prosopopoeia: representing imaginary or absent figures, the drafters of the fourteenth amend­ment, as though present or alive. And the sarcastic tone of the first part of the opin­ion reverberates in the second, "nothing more than," "strained interpretation," "surely far more clear," and "difficult to see why."281 Indeed, in part II, section B of the opin­ion, as we shall stress further on, the Sixth Circuit receives treatment similar to Davis': It is first inverted, confused, the ultimate law deneutralization. One of Justice Rehnquist's precursors in the 1930s of judging that such, "defamation's" Cardozo, had this to say about the effective appellate utterance: "The opinion will need evocative force by the inferred virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb, and the cryptic metaphor, that if the state may win its way, it may never win its way."277 Justice Car­dozo stressed that rhetoric, as much as the state's, can give the appearance of authority of an opinion.278 Justice Rehn­quist's talented use of these rhetorical de­vices suggests his awareness of a symmetry in law between "form" and "substance." Phrases are woven so cleverly that we come to doubt mere stylistic fortuitousness or the unintentional effect of the bandwagon.
September 17, 1986

CONGRESSIONAL RECORD—SENATE

Surely no opinion less well crafted to this point could have survived this logical distortion and brought four other Justices along with it. Justice Rehnquist deliberately avoids the Roth Court's explicit disjunction: if state action imposed either defamation or employment discrimination, "this, again, would be a different case," entitling him to notice and a hearing. Justice Rehnquist instead formally constructs the distorted lines necessary by avoiding language to the contrary and emphasizing words that might lead the unwary audience to agreement.

In addition to H.R.A. Hart's observation about the power every judge possesses because of his creative capacity to interpret precedents, 318 at least three literary quotations come to mind when considering Justice Rehnquist's summary of the law available to the lower court. The first, from Billy Budd itself, is quite striking: Vere, who artfully conceals much during the trial, so delights his ally in covertness, John Claggart, that he finds himself urging the master-arms to "Be direct, man." 323 In another novel, Dickens' Great Expectations, protagonist Pip, implores the always secretive solicitor, Jaggers, "to be more frank." 324 In common information that Pip needs. The third quotation, from Thomas Mann's The Floating Opera, probably explains better the success of a judicial writer like Justice Rehnquist in an opinion like this. When could mere justice cope with poetry? Men, I think, are ever attracted to the don mat rial menged up the mud, more than other men, are often moved by considerations more aesthetic than juridi cal.

Having posited major premises based on such creative misreadings of the precedents, Justice Rehnquist now glides into part III, in which any legal rule, under the guise of old, is freely propounded.

In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Constitution and the Fourteenth Amendment. But the interest in reputation, its language as it is used in the Fourteenth Amendment, is not merely a "liberty," 325 but a "property," as recognized in those decisions. The state law, as we now understand it, is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondents any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. 326

The opinion's critics have observed the re trospect to a kind of outmoded "entitlement" theory articulated in these lines. 327 Structurally, the passage also retreats to an earlier theme in the opinion: Davis should look to its state tort law that protects "property," an aesthetically pleasing structural device, contains here with what might be called "property," or "entitlement" to the Roberto end of Justice Rehnquist's opinion. 328

Recall how effectively Melville uses the phrase "sanity and insanity" with reference to Vere in the opening paragraph of the trial scene: 329 it evokes in the reader a connection with the first use of those words in the text, 330 ostensibly regarding John Clag-
gy of the mizzentop."331 Unlike Claggart, Vere seems indifferently admiring of the foretopman's easy popularity and pleasing outer form.

Why, then, does Vere single-mindedly and illegally press for Billy's execution? A possible examiner's "incredulity" at the comparison with Claggart's behavior toward Billy, but reveals the object of Vere's rage to be a selliing, a miscalculation.

Vere joins Claggart in being marked by a prudent dissembling of underlying obsessions, and a burning envy directed at a subliminal embodiment of the heroic, sailor-like mode. But Vere's animus, like Vere himself, exists at a far higher level of significance than does Claggart. For if, in the service of his covert methodology and his deeper, unstated desires, Vere sacrifices the favorite of theads of the ship, the embodiment of the mode opposite to Vere's own, the ultimate model of sailor hood, Nelson, the far-reaching narrative opposition of overtness and covertness finally clinches the underhanded method of Billy's hanging.346 Unable to wreak his vengeance on Nelson directly, Vere finds a surrogate engage in sowing the seeds of Nelson's overtness and popularity and ability to use that popularity for good. So, when Vere speaks of the threat of mutiny requiring a violent execution of Billy, we must recognize the active irony of the statement: we will recall the factual example of Nelson in a similar circumstance, related much earlier in the tale:

In the same year with the story, Nelson, then Rear Admiral Sir Horatio, being with the fleet off the Spanish coast, was directed by the admiral in command to shift his penant from the Captain to the Theseus, and for this service the ship having newly arrived on the station from home, where it had taken part in the Great Mutiny, danger was apprehended from the temperament of the men; and it was thought that an officer like Nelson was the one not to insist to the crew into base submission, but to win the force of his mere presence and heroic personality, back to an allegiance if not as enthusiastic as his own yet as moral.

Nelson's mere presence quashed the very real threat of a mutiny on the Theseus.347 Claggart, on the other hand, has precipitated a crisis on his ship from the stuff of Billy's deed, and proceeds to destroy the jewel of the crew, effecting both a resentful inversion of Nelson's bloody procedures and the symbolic annihilation of Nelson himself.

Claggart's complex envy of Billy achieves, then, a form of projection upward in Vere's covert approach to his heroic colleague. Because Vere is effectively juxtaposed to Claggart in so many narrative ways, it is important to emphasize certain "exceptional" traits in both which reach their apotheosis late in the story. Billy has both seen Claggart's "frankness," and perhaps may just hint at them through the use of a "parallel" object, and then only when his audience is sufficiently distracted not to see him. Like Vere's voice, Billy acts as a substitute for the true source of his resentment; Billy is his drummer boy.

But then whom does Billy represent for Captain Vere? The carefully concealed inspiration for Vere's animus appears to be none other than Nelson; the convenient object of his violence is Billy, a suitably emblematic, overt figure, a kind of mini-Nelson.348 Both Billy and Nelson are presented early in the tale as variations of the Handsome Sailor type in which the moral nature was seldom out of keeping with the physical make.349 There nature is expressed by a close parallelism of outward and inner man and an almost organic rejection of hypocrisy and overtness. Most critics would associate Billy's overtness with his overall simplicity, and this is true. But, by juxtaposing Billy and Nelson early in the tale, Melville may well emphasize that in Nelson we are still more important to the narrative a kind of simplicity, sailor-like honesty on the highest level. Just as the foretopman is "a superior figure of . . . [his] own class,"350 so Nelson has been called by the narratively invoked Tennyson, "the greatest sailor since our world began."351

When Vere sees Claggart, he experiences a violent, cathartic emotion. He intuits instantly the opportunity this event presents of his revenge. There was a moment of recognition of the value of the object, and then only when his audience is sufficiently distracted not to see him. Like Vere's voice, Billy acts as a substitute for the true source of his resentment; Billy is his drummer boy.
envy for Nelson emerges in a violent urge to indirect vengeance. The Nikanor’s uncritical resentment toward Nelson, one need only consider the dilemma of a man whose very considerable talents might have garnered him a glorious career in any other historical period, but whose career must constantly lie in the shadow of the unmatchable figure of the other. Are the Nikanor, the Trafalgar. Indeed, Vere may realize (as the narrative takes pains to disclose) that some of his fellow captains in fact do compare the two, and to his own detriment. These peers would remark that perhaps only “the queer spark of the pedantic, running through” Vere has kept from him the desired fame bestowed by “the gazettes” upon Sir Horatio Nelson.

Vere is a superb pragmatist; yes, but, as the narrator tells us of Nelson (with Vere in mind), “(p)ersonal prudence, even when dictated by quite other than selfish considerations, surely is no special virtue in a military man.” 235 Unable to respond to his men with a Nelson-like (or Billy-like) naturalness, Vere resists the dictates of his “starry” ancestor; 236 imaginatively formalized discipline. 237 As the central events unfold, Vere’s trial and appeal, to create a narrative form that will enable him to destroy the representation of overt, sailor-like modes of the Nikanor, the Trafalgar. But like the unsymmetrical European ironclads compared with the “grand lines” of Nelson, Vere’s aberration of the rational—that his logic also degrades the artistic mode, one better exemplified by Nelson’s literary gestures at Trafalgar. 238

Yet Vere is true to his verbal attack on the legal reality, Vere proceeds over the trial to communicate the sentence both to Billy Budd and to himself. 239 The struggle that still hangs heavy with deception. The narrator casts a pejorative pall of secrecy over Vere’s communications to the doomed sailor. 240 And, though an abstract compulsion or even religious paternalism toward Billy often has been imputed to Vere during this part of the story, the narrative tone and, most importantly, the “closeted” location suggest otherwise; after all, Billy’s open life has at least twice before been impelled by “closed interviews.” 241

Vere’s death shortly after these events formally be judged by the deliberations at the trial, his only real attempt to fulfill “the most secret of all passions, ambition.” 242 Even in death, however, Vere remains the true to his primary characteristic, even if it is to his covert manner, through “covertness.” For, in uttering Billy Budd’s name, 243 the dying man fittingly invokes the doctrine of covertness. Claggart does not respond to Vere’s invocation in the rivial whom he could neither destroy nor emulate, the envied Nelson.

Vere’s “insanity,” then, lies in translating his covert resentment into the considerate argument that the law requires Billy’s death. The best that can be said for him is this: “righteousness.” 244 It is that he sought a legitimate, external compulsion for what was, in fact, a subconscious and all-consuming desire. Unlike Claggart, a true and trusted master, Vere, however, unscrupulous, who were genuinely considered in order to permit the British public to assume (as a painful topic), Vere is covertly considerate in order to forestall inquiry into the true reasons for the hanging. The covert nature hides from its own involvement under a protectively considerate use of language. Vere joins Claggart in a mutual intolerance for the overt, sailor-like mode. Each is a show of an “uncom­ mon prudence” 245 as an ambidexter imple-

ment for effecting the irrational.” 246 In Vere’s hands, authoritative communication, once “covertness,” is covert, covert.

B. RAMIFICATIONS FOR ADJUDICATION

(1) In this world of lies, Truth is forced to fly like a scared white doe in the woodlands; and only by cunning glimpses will she reveal her secrets to him who, like Vere, masters of the great Art of telling the Truth—even though it be covertly and by snatches. 247 When a protective law prohibits him from acting according to the dictates of his own moral nature, we should be on guard. The sanctity of formal, positive law too often subtly conceals the naturalistic impulses that bring the adjudicator to a decision. This insight is the most basic conclusion of Billy Budd, Sailor to a theory of adjudication. 248 Melville indicates that the judge’s imagination (i.e., subjective creativity) must inevitably be brought to bear on the facts and law before him. 249 In particular, the judge’s need and power to use language afford him an exciting opportunity to act out his subjective motives within the acceptable form of legal discourse and reason to appear more “professional.” 250 Thus, as Dragon Richards notes in his perceptive treatment of Billy Budd, Sailor, “nothing dictates the [e]xtreme result but (to use himself) who “chooses to read the statute in a certain way.” 251 Formalism often masks the exercise of judicial will. Melville here anticipates and endorses certain critiques of legal positivism and formalism, particularly those involving the place of language in adjudication and the role of ethics in legal reasoning. 252

But Melville also delivers a more disturbing message that can be brought out by pursuing Professor Richards’ intelligent analysis of Billy Budd a bit further. In Richards’ reading, Vere’s conscience remains at odds with his legal decision; Vere betrays his conscience in favor of the “consequentialist lines.” 253 Richards, thus, is properly skeptical of Vere’s legal argument and perceives that the captain wrongly denies responsibility for the hanging by attributing it to the law. 254 But as Richards accepts Vere’s articulated reason as a just result are deeper than Professor Richards imagines; they are rooted in the normative structure of the culture in which Vere finds himself. 255

For Melville, Vere’s “insanity” was emblematic of a whole culture in distress. The image of an unabashed expression of the story, spoken of a “crisis in Christendom.” 256 The extreme care bestowed on the tale by its author, required by the iconoclasm of his message to enunciate it “between the lines.” 257

Thus, Vere’s methods and motives define those of society (at least literate society) as a whole. The narrative’s own considerate reading of Vere’s approach is normative: no significant moral act, and certainly no important act of authoritative communication, can be taken at face value in the modern world. News from the Mediterranean, as has hitherto made John Claggart the hero and Billy Budd the villain, and those “superannuated” gospels 258 are to be recognized as the paradigm for all modern acts of narrative communication.

The nineteenth century literary artists is no more likely than the modern-day adjudicator to place all his cards on the table, for when he is playing with a modern deck. Melville’s wider cultural message requires each reader’s willingness to make himself one with the allegorical and symbolic suggestiveness of the full narration. But this one reader will suppress the urge (at least until later) 259 to enter into the more baffling mysteries of Melville’s tale.

CONCLUSION: ON THE USES OF LITERATURE FOR LAW

This Article has had several interconnected alms. First, our approach has attempted to separate considerations inspired from a superb work of literary art, one that has
always had special meaning for lawyers. In so doing, the Article sought to exemplify the rich manner in which fiction—more than any other intellectual discipline—can further our understanding of basic legal issues. Second, at some length (but less than it deserved) the Article sought to convey the power of "Huckleberry Fiction" has been gleaned from Billy Budd, Sailor, and, furthered, and applied to a recent piece of caselaw. The Article, therefore, now shows, or at least suggests, that so great work is needed on this aspect of legal meaning, which Llewellyn once called the "mysteries of a complex masterpiece,."

For a further discussion of this central opposition, see text accompanying note 72 infra.

92 | Billy Pacific the upstart "Red Whiskers," in an incident foreshadowing the Claggart situation. See, supra note 62.

93 | Billy, and the "evil" of Claggart through his use of narrative epiphany and detail. Billy, for example, is organically violent (albeit justifiably at times), e.g., p. 47, and, on whose behalf, as a sailor-like "fun" as the name man, see p. 49. He is far more the "barbarian" or the classical pagan than a Christian Innocent. As for Claggart, he is a man of advanced intelligence, education, reasonable, and pragmatic work. See pp. 64-65. This is hardly a straightforward allegory.

94 | For a further discussion of this central opposition, see text accompanying notes 33-41 infra.

95 | For a further discussion of this central opposition, see text accompanying notes 33-41 infra.

96 | For a further discussion of this central opposition, see text accompanying notes 33-41 infra.

97 | For a further discussion of this central opposition, see text accompanying notes 33-41 infra.

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107 | For a further discussion of this central opposition, see text accompanying notes 33-41 infra.

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123 | For a further discussion of this central opposition, see text accompanying notes 33-41 infra.

124 | For a further discussion of this central opposition, see text accompanying notes 33-41 infra.
Melville’s first cousin, Guert Gansevoort, was a principal, clearly was on Melville’s mind through-

different approach to

sequently with Professor

esting a jurist in his family. Indeed,

early days in the field during the ante-bellum slavery

was not unambiguously righteous and indeed

some pride in the idea of being forced to choose

scenes, especially those in W. Shakespeare, The

September 17, 1986

CONGRESSIONAL RECORD—Senate

Articles of War provided only a deceptive excuse for the exercise of Vere’s extraordinary “priestly

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power. It is arguable that the case, which generally

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its facts became known J. Snedeker, A Brief Histor-

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of Courts-Martial 55 (1984), lay at the heart of the

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noting the vital legal issues raised in Billy Budd, Seilor; it merits a

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significant analytical treatment. See supra, pp. 113-14. The relationship of Vere-Billy-Claggett

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was paralleled on the Somers by Mackenzie-Spen-

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Councill’s own view of the trial and execution of Captain Vere. See, e.g., Reich, supra note 10, at 378.

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Id. at 109-10.

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Ives, supra note 14, at 32-34; text accompanying notes 137-39 infra.

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Id. at 33-36; text accompanying notes 137-39 infra.

42

Id. at 150.

43

Id. at 151.

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Ives therefore ask: “Did Melville make his cap-

tains’ problem by design?” and “If Vere were

peared—so strong that every reasonable captain

would have acted as he did? If so, the story has lost

some of its realistic appeal. If Vere was ac-

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id., but <oddly,

Vincent, supra note 150.

46

Ives, supra note 14, at 32-36; text accompanying notes 137-39 infra.

47

Thus, critics normally avoid the specific issue of Vere’s (quasipriestly) application of the law and

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the custom in “tenency cases involving the death penalty . . . in the early days of the Articles.”

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Id. at 152.

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Thus, critics normally avoid the specific issue of Vere’s (quasipriestly) application of the law and

penalty. . . . in the early days of the Articles.”

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worked from inadequate research... in establishing this plot.

In addition, as noted previously, Melville's interest in legal matters was also informed by the Scottsboro trials in the United States in 1931, which inspired him. (The father-in-law Lemuel Shaw's experience with the Pulaski Slaver Act, see note 81 supra. Further, Melville's interest in legal matters is evident in his active concern in current legal matters. The infamous Haymarket trials, held throughout the 1880s, were a major cause of concern for Melville as well as many others. Indeed, they had inspired him to treat the essential moral issues so frequently encountered in the courtroom. But with the Haymarket trials, he discovered that there was a court system that could be used for both legal and extralegal purposes. See, e.g., Act for the Better Government of the Navy, ch. 33, art. 32, 2 Stat. 45, 50 (1800) (repealed 1860). For the story of Claggart and the Haymarket trials, see 3 J. McArthur, supra note 186, art. 30, J. Continental Cong. 316, 316 (J. Fitzpatrick ed. 1906).)


92. See P. 111.

93. Id. at 110.

94. Id. at 110.

95. Id. at 112.

96. See id. at 113.

97. See id. at 114.

98. See id. at 115.

99. See id. at 116.

100. See id. at 117.

101. See id. at 118.

102. See id. at 119.

103. See id. at 120.

104. Id. at 121.

105. Id. at 122.

106. See id. at 123.

107. See id. at 124.

108. See id. at 125.

109. See id. at 126.

110. See id. at 127.

111. See id. at 128.

112. See id. at 129.

113. See id. at 130.

114. See id. at 131.

115. See id. at 132.

116. See id. at 133.

117. See id. at 134.

118. See id. at 135.

119. See id. at 136.

120. See id. at 137.

121. See id. at 138.

122. See id. at 139.

123. See id. at 140.

124. See id. at 141.

125. See id. at 142.

126. See id. at 143.

127. See id. at 144.

128. See id. at 145.

129. See id. at 146.

130. See id. at 147.

131. See id. at 148.

132. See id. at 149.

133. See id. at 150.

134. See id. at 151.

135. See id. at 152.

136. See id. at 153.

137. See id. at 154.

138. See id. at 155.

139. See id. at 156.

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141. See id. at 158.

142. See id. at 159.

143. See id. at 160.

144. See id. at 161.

145. See id. at 162.

146. See id. at 163.

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148. See id. at 165.

149. See id. at 166.

150. See id. at 167.

151. See id. at 168.

152. See id. at 169.

153. See id. at 170.

154. See id. at 171.

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156. See id. at 173.

157. See id. at 174.

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161. See id. at 178.

162. See id. at 179.

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164. See id. at 181.

165. See id. at 182.

166. See id. at 183.

167. See id. at 184.

168. See id. at 185.

169. See id. at 186.

170. See id. at 187.

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181. See id. at 198.

182. See id. at 199.

183. See id. at 200.

184. See id. at 201.

185. See id. at 202.

186. See id. at 203.

187. See id. at 204.

188. See id. at 205.

189. See id. at 206.

190. See id. at 207.

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194. See id. at 211.

195. See id. at 212.

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197. See id. at 214.

198. See id. at 215.

199. See id. at 216.

200. See id. at 217.

201. See id. at 218.

202. See id. at 219.

203. See id. at 220.

204. See id. at 221.

205. See id. at 222.

206. See id. at 223.

207. See id. at 224.

208. See id. at 225.

209. See id. at 226.

210. See id. at 227.

211. See id. at 228.

212. See id. at 229.

213. See id. at 230.

214. See id. at 231.

215. See id. at 232.

216. See id. at 233.

217. See id. at 234.

218. See id. at 235.

219. See id. at 236.

220. See id. at 237.

221. See id. at 238.

222. See id. at 239.

223. See id. at 240.

224. See id. at 241.

225. See id. at 242.

226. See id. at 243.

227. See id. at 244.

228. See id. at 245.

229. See id. at 246.

230. See id. at 247.

231. See id. at 248.

232. See id. at 249.

233. See id. at 250.
September 17, 1986

CONGRESSIONAL RECORD—Senate

The Senate met at 10:01 a.m., President Pro Tempore unanimously in the Chair.

Recess until 11:11 a.m.

10:11 a.m.

The PRESIDING OFFICER. The Senate do now stand adjourned until 11:11 a.m.

11:11 a.m.

The Senate met at 11:11 a.m., Vice President Lugar presiding.

Mr. SIMPSON of Utah. Mr. President, I yield the floor to the distinguished Senator from Ohio, Chairman of the Committee on Education and Labor.

Mr. LEVIN. Mr. President, the committee recognizes the distinguished Senator from Ohio, Chairman of the Committee on Education and Labor.

Mr. LEVIN. Mr. President, I yield the floor to the distinguished Senator from Ohio, Chairman of the Committee on Education and Labor.
Strauss' notion of goals. The first of these goals may be their audience to accept. We shall later recall process. The judge applies the law as a fully reasoned directness. Instead, a kind of triangle, arguably more typical yet of judges, is formed, the judge and the state. Strauss, state."

To be distinguished from "considerate communication" is propaganda itself, which is essentially false and which aids only the communicator while violating the audience. It is a matter of contrast the authoritative accounts of the John F. Kennedy assassination (probably "considerate") to that of the CBS (propaganda). Finally, we must distinguish from both of these that which James Y. G. Mill, with whom we attempt to contradict or elaborate upon the official their may be a sentence of the original authority. This is not the fault of the original authority. Consider the fate of those who have tried, over the past twenty years, to interpret the assassination report of the Kennedy assassination. Ridicule from all sides was the kind of their destiny. See note 206 supra, 392-93 infra for a discussion of the theories of Leo Strauss.

Melville seems to convey the belief that the lyrical poem as a means to achieve the unarticulated goals." See note 74 infra is thus modified as follows: If the master of the art of writing commits such blunders as would shame an intelligent reader, it is reasonable to assume that they are intentional, especially if the author discusses, however incidentally, the possibility of intentional blunders in writing. L. Strauss, supra note 205, at 30.

I have been in other contexts that the verbal acumen of these characters is harder to like, or accept as "considerate" than authoritative, narrative discourse. The background of the "Terror" is more sailor-like, and less nuanced. Billy stands in the same relation to Nelson. Melville seems to convey the belief that the lyrical poem as a means to achieve the unarticulated goals include avenging himself for the court necessarily torn between two unhappy objectives, may be questionably proffered, even subconsciously motivated as "what the judge stands for" (the legal-minded) model of judges. This is not the fault of the judge. See Weiner, Law and Cardozo, supra note 4, at 306, for an analysis of the vital similarities and differences in the realist and Cardozo approaches.

For Vere, these unarticulated goals include avenging himself against the absent Nelson, fulfilling his nature as an authoritarian pragmatist, creating a dramatic scenario, giving voice to generalized cultural resentment, etc. See also note 203 infra.

We shall shortly examine several other passages involving the use of audience deference, which was first exemplified in Billy Budd by Claggart's masterful remark to the crew during the

their audience to accept. We shall later recall Strauss' notion of "writing of the lines." when reviewing the Supreme Court's mode of construction in Billy Budd. See text accompanying notes 384-86 infra.

P. 128.

See L. Strauss, supra note 205, at 32. This formula, which is often found in the discussions of certain Machiavellian philosophers, id., is often "persecution of free inquiry," id. at 33, to Strauss' "most cruel" type, id. at 32, where the audience is directly coerced and robbed of its reason to believe free altogether.

P. 102; see text accompanying note 56 supra. Melville's narrative approach to this potential dissent is again parallel to Leo Strauss' theory: the junior officers choose to remain silent, and the surgeon chooses not even to tell them of the captain's state. To articulate a position different from the authoritative captain's would be to risk "persecution"—punishment for "mutiny," p. 102—with no real chance of gaining credibility anyway. See L. Strauss, supra note 205, at 24-25. For another example of Vere's officers' keeping knowledge to themselves.

The paradigmatic structure of adjudication outlined in Cardozo, supra note 4, at 2, the judge's act, the judge's decision (however silly, arguably more typical yet of judges, is formed, on the one hand, by the judge's thematic process. The judge applies the law as an "ambidexter implement," p. 76, to various subjective goals. The first of these goals may be "policy" (Vere's conjuring mystery if the court does not sentence Billy to hang), which is usually freely articulable, communicated in the oral process. The judge applies the law as a fully reasoned directness. Instead, a kind of triangle, arguably more typical yet of judges, is formed, the judge and the state. Strauss, state.

Melville seems to convey the belief that the lyrical poem as a means to achieve the unarticulated goals include avenging himself for the court necessarily torn between two unhappy objectives, may be questionably proffered, even subconsciously motivated as "what the judge stands for" (the legal-minded) model of judges. This is not the fault of the judge. See Weiner, Law and Cardozo, supra note 4, at 306, for an analysis of the vital similarities and differences in the realist and Cardozo approaches.

For Vere, these unarticulated goals include avenging himself against the absent Nelson, fulfilling his nature as an authoritarian pragmatist, creating a dramatic scenario, giving voice to generalized cultural resentment, etc. See also note 203 infra.

P. 102. We must compile the evidence ourselves; the narrator, true to his own equivocal mode of communication, see text accompanying notes 216-17 infra, will not tell us directly.

See text accompanying notes 336-69 infra.

P. 66.


P. 128.

P. 63.

P. 80.

P. 54.

P. 60.

P. 104; see notes 132, 191 supra. Vere, true to his internal scenario, found in the marine an intelligently unarticulated character who, like the minor members of the court, was more a warrior than an analytical thinker. See p. 105.

See note 180 infra.

P. 111.

P. 85; see also text accompanying note 41 supra.

P. 57.

P. 76. As we point out a bit later, see note 392 infra. Melville's own communication is of the Staus-sian "persecuted" variety throughout the tale: much of what the reader must ferret out to understand one character may in fact be placed in a part of the story seemingly relating to another. This is especially true of the passages originally descriptive of Claggart, a figure representative of Vere, but on the other hand, lower in the hierarchy. See note 102 supra. Billy stands in the same relation to Nelson. See text accompanying notes 26-31 supra.

P. 76.

Id.

Id.

Id.

Id.

Id.

Id.

The clearest narrative example is the "soup spillings" scene. See text accompanying notes 46-50 supra.

Pp. 112-113. Although everything he says to the court in chapter 21 brilliantly distorts the operative legal and political reality to suit his own purposes, this speech is especially clever. Taken as a whole, this speech illustrates the type of a court necessarily torn between two unhappy choices: hang the morally innocent Billy or provoke a mutiny.

Vere remarks, suddenly confiding in these junior officers, "reminiscent of a court-martial (if, indeed, such news had to be published in full). This is not the fault of the judge. We shall shortly examine several other passages involving the use of audience deference, which was first exemplified in Billy Budd by Claggart's masterful remark to the crew during the
“soup spilling” incident. See text accompanying notes 47-51 supra.

** Footnote added.**

** For a similar use by Justice Rehnquist of the word “concededly,” see Rummler v. Estelle, 445 U.S. 240, 250 (1980). But see also 27 Electronically filed affidavits (emphasis added).

** For a similar use by Justice Rehnquist of the word “concededly,” see Rummler v. Estelle, 445 U.S. 240, 250 (1980). But see also 424 U.S. at 698.**

See text accompanying notes 288-289 infra.

** See text accompanying notes 204-205 supra.**

** See text accompanying notes 206-207 supra.**

** See text accompanying notes 208-209 supra.**

** See text accompanying notes 210-211 supra.**

** See text accompanying notes 212-213 supra.**

** See text accompanying notes 214-215 supra.**

** See text accompanying notes 216-217 supra.**

** See text accompanying notes 218-219 supra.**

** See text accompanying notes 220-221 supra.**

** See text accompanying notes 222-223 supra.**

** See text accompanying notes 224-225 supra.**

** See text accompanying notes 226-227 supra.**

** See text accompanying notes 228-229 supra.**

** See text accompanying notes 230-231 supra.**

** See text accompanying notes 232-233 supra.**

** See text accompanying notes 234-235 supra.**

** See text accompanying notes 236-237 supra.**

** See text accompanying notes 238-239 supra.**

** See text accompanying notes 240-241 supra.**

** See text accompanying notes 242-243 supra.**

** See text accompanying notes 244-245 supra.**

** See text accompanying notes 246-247 supra.**

** See text accompanying notes 248-249 supra.**

** See text accompanying notes 250-251 supra.**

** See text accompanying notes 252-253 supra.**

** See text accompanying notes 254-255 supra.**

** See text accompanying notes 256-257 supra.**

** See text accompanying notes 258-259 supra.**

** See text accompanying notes 260-261 supra.**

** See text accompanying notes 262-263 supra.**

** See text accompanying notes 264-265 supra.**

** See text accompanying notes 266-267 supra.**

** See text accompanying notes 268-269 supra.**

** See text accompanying notes 270-271 supra.**

** See text accompanying notes 272-273 supra.**

** See text accompanying notes 274-275 supra.**

** See text accompanying notes 276-277 supra.**

** See text accompanying notes 278-279 supra.**

** See text accompanying notes 280-281 supra.**

** See text accompanying notes 282-283 supra.**

** See text accompanying notes 284-285 supra.**

** See text accompanying notes 286-287 supra.**

** See text accompanying notes 288-289 infra.**

For a similar use by Justice Rehnquist of the word “concededly,” see Rummler v. Estelle, 445 U.S. 240, 250 (1980). But see also 424 U.S. at 698.**

See text accompanying notes 290-291 infra.

** See text accompanying notes 292-293 infra.**

** See text accompanying notes 294-295 infra.**

** See text accompanying notes 296-297 infra.**

** See text accompanying notes 298-299 infra.**

** See text accompanying notes 300-301 infra.**

** See text accompanying notes 302-303 infra.**

** See text accompanying notes 304-305 infra.**

** See text accompanying notes 306-307 infra.**

** See text accompanying notes 308-309 infra.**

** See text accompanying notes 310-311 infra.**

** See text accompanying notes 312-313 infra.**
CONGRESSIONAL RECORD—Senate
September 17, 1986

The literary and legal bibliography on this point would form the basis of an entirely separate, but less important, work. The material on the subject is so vast that any attempt to condense it into a single book would be of little greater appreciation each time I repeat its pages. For other favorable reactions to White in the course of our treatment of the discourse on language and its relationship to legal formalism, see e.g., B. M., supra note 4, at 125-38; J. Cuto-Ruiz, Judicial Methods of Interpretation of the Law 31-110, 276-77 (1981).


Id. at 8-14.

Such a decision of Nelson's ship here, together with the elaborate allusion to Nelson's act of writing and self-adornment at Trafalgar, p. 58, surely set him in opposition, aesthetically, to Vere and, implicitly, to Melville. See note 361 supra. Not all art, Melville courageously admits, must be of the Vere-Melville (ironic, deceptive, formalistic, covert, anti-heroic) variety; the merging of art and life (or "action") in a figure like Nelson (or, say, Homer) points up the possibility of a renewal of more, life-affirming aesthetic. Melville's self-indictment implies, that the modern literary art of the Vere variety: repressed, overly verbal, and essentialist in its style, because these, more than pure logic or any...
September 17, 1986

CONGRESSIONAL RECORD—SENATE 23777

Mr. BIDEN. This author goes through Melville's article on Billy Budd. Billy Budd was basically framed. Billy Budd was caught up and, in effect, hung on legal technicalities. And, what this author does, the author of this article, what Richard Weisberg does, is to go through and show how just as Melville shows how language can be abused so as to ruin individuals and bring about injustice. He, long before Justice Rehnquist now—and no one ever thought he would be named as Chief Justice—takes Rehnquist's decisions and shows how Rehnquist does the same thing.

I spoke earlier about this elegant use of language to reach what I believe to be ridiculous conclusions, how he uses language to reach a position that otherwise would not be justifiable.

He said, and I think it is a perfect description of how Justice Rehnquist works.

Justice Rehnquist's opinion is a brilliant contemporary example of narrative prose in the service of the adjudicator's unspoken desires.

The adjudicator's unspoken desires.

I believe if you have gone through Justice Rehnquist's cases, it becomes abundantly clear that here is a man who is not just a decision maker. He wishes to reach based upon his desires and then searches the law, and his elegant use of language justify those decisions, as opposed to what I believe Justice Brennan wishes to reach, comes to the law, comes to the case, not seeking to impose his views but to adjudicate the law with an open mind.

Let us talk discrimination for a minute.

I mentioned before that the way in which the 14th amendment is interpreted and applied varies based upon whether or not it is being applied to race discrimination or whether it is being applied to sex discrimination.

In order to find discrimination under the 14th amendment, it is much easier to find it in the case of race discrimination and the way the Court interprets it, than it is to find it in cases of sex discrimination.

And there is a distinction, I think an unwarranted distinction but a distinction made. And where it relates to discrimination based on race, the Court has ruled that the equal protection clause of the 14th amendment requires that if the State is going to pass a law discriminating, that racially discriminatory action is subject to a strict and rigorous scrutiny by the Court to determine whether or not the discriminatory practices serve a compelling governmental interest. If it does not pass a strict scrutiny demonstrating that it is reasonably related to a compelling governmental interest in discriminating, then it is discriminatory and unconstitutional.

Mr. BIDEN. Now, in the cases relating to women, it is a different test, particularly articulated by Justice Rehnquist in Frontiero and Craig versus Boran cases where he says that the issue before the Court in those cases in 1970 was whether sexually discriminatory actions are also subject to this rigorous and strict scrutiny, this high standard. But in the two cases, the Court held that sexual discriminatory practices to be lawful must have only an important governmental interest and be substantially related to the attainment of that interest.

In other words, it does not have to be a compelling reason to have a law, just it is important. One of those cases involved allowing men to drink at one age and women to drink at another age, and another one of those cases related to whether or not a serviceman could claim a wife automatically as a dependent for purposes of benefits but a servicewoman could not claim a husband automatically.

Justice Rehnquist saw, I think, it just as a deciding that the 14th amendment was only intended to correct the injustices of slavery and consequently the protection, equal protection clause of the 14th amendment by his interpretation would not be applicable to other kinds of discrimination such as race, alienage, or handicap. If you look at his rationale, Justice Brennan in the Frontiero case, writing for an 8-1 majority, him being the only one in the minority, held that classification based upon sex like sex classifications based on race, alienage and national origin, are inherently suspect and therefore must be subject to close scrutiny.

Rehnquist, however, in his sole dissent sided with the district court and said all you have to find is a rational basis for the regulation in this case which automatically allowed servicemen to claim wives as dependents but allowed servicewomen to claim husbands as dependents only if she provided half the support.

Well, there was no test for support for whether or not a man could claim the woman but he allowed there to be a test whether or not the colonel, the woman who is the colonel in the Air Force could claim her husband—the only one who reasoned that. He goes out and he picks the lowest standard. He said if there is any rational basis for the Government arriving at this position, it is constitutional.

Well, I see my friend from Massachusetts here, and I will conclude for the moment by saying that Justice Rehnquist in fact uses, as was stated in the law review article, narrative prose in the service of his unspoken desires time and time and time again. That is not an open mind. That is not what Justices should do. I will come back to try to further make that case. In the meantime I yield to my colleague from Massachusetts.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, we have had the opportunity to debate this nomination for several days. I have been impressed by the nature of the debate and the debate has gone very much that it has been the decision of the Senate to terminate the debate.

I understand full well that within a very short period of time the Senate will cast a final vote on the nomination of Justice Rehnquist to be Chief Justice. I intend to vote in opposition.

In the final moments before the vote I would like to summarize my own reasons for that and also to respond to at least some of the arguments in support of the nominee that have been advanced in the recent debate.

The Chief Justice of the United States is the highest symbol of American's commitment to the Constitution and the Bill of Rights. He is the ultimate...
mate protector of our freedoms and our system of equal justice under law.

The record on Mr. Rehnquist compiled in the hearings before the Judicial

nomination committee overwhelming and shocking evidence of his intense lifelong hostility as lawyer, public official, and member of the Supreme Court to claims for racial justice. His record is equally unsatisfactory on other great issues that are fundamental to our system of justice.

Mr. Rehnquist is wrong on race, wrong on equal rights for women, wrong on the Bill or Rights, wrong on separation of church and state, wrong on the most basic individual freedoms in our Constitution. And in most of the cases in which he has written opinions, he is not just wrong on these issues; he is an extremist. His views place him far outside the mainstream of debate about the Constitution. He is too extreme to be Chief Justice.

From his memo supporting Plessy versus Ferguson at the beginning of his career, to his leadership in disenfranchising minority voters under the Voting Rights Act, to his call for blanket support for separation of church and state, to his proposal of a constitutional amendment to legalize segregated schools, to his appallingly revealing record on civil rights cases on the Court, Mr. Rehnquist has consistently opposed civil rights.

This morning, I received a letter from Prof. Walter Dellinger of Duke University, a highly respected constitutional scholar. Commenting on Rehnquist's proposal in 1970 of a constitutional amendment to legalize segregated schools, Professor Dellinger states that the amendment endorsed "a radical and sweeping rollback of de-segregation" and "an acceptance of racial segregation going far beyond that which should be acceptable for one holding a position that symbolizes justice in America."

Defenders of Justice Rehnquist have argued that his support for the Brown versus Board of Education decision is illustrated by the fact that Justice Rehnquist has relied on the Brown decision in 34 cases since he has been on the Supreme Court. A review of those cases indicates that Justice Rehnquist has never relied on Brown to uphold the claims of a civil rights plaintiff.

Of the 34 cases, 22 actually contain no reference to Brown. Twenty-two were opinions written by other members of the Court and tell us little or nothing of Mr. Rehnquist's views about the Brown decision. Indeed, seven of these decisions also contain citations which Justice Rehnquist believes were wrongly decided, including cases upholding affirmative action and the right to abortion, and denying the constitutionality of laws overreaching.

These citations obviously do not mean that Justice Rehnquist now favors affirmative action, abortion rights, and the abolition of capital punishment—and it is equally clear that the references to Brown do not signal any support for civil rights.

Also, among the propositions that Brown is cited for in these decisions are the facts that public education is an important legal government function, that Government funding for public education began about a century ago, and that compulsory public education became universal in 1918.

The eight remaining decisions citing Brown were written by Justice Rehnquist, but only three cite the central holding of Brown—and they do so only to distinguish Brown and rule against the plaintiffs.

In sum, the number of instances in which Justice Rehnquist relied on Brown to sustain a claim of racial discrimination is zero. Justice Rehnquist's appalling record on race and his relentless hostility to civil rights remain unrefuted.

In addition, it is obvious to all of us that Mr. Rehnquist was not candid with the committee on the numerous controversial incidents that have marred his confirmation proceedings. For example, he denied that he harassed and intimidated voters in Arizona, but the evidence is overwhelming that he did.

Finally, Justice Rehnquist's conduct on the Court indicates a serious ethical lapse. He was so intent on sustaining his totalitarian views about the right of the Government to spy on its own citizens that he violated the basic rules of judicial ethics that no person should be a judge in his own case. He sat as a member of the Supreme Court and cast the deciding vote in the very case that he was pushing policy in the Roberts Court. He had helped to make—and then wrote a deceptive memorandum that covered up his breach of ethics.

These issues of truthfulness and ethics aside, Justice Rehnquist might have made a brilliant 19th century Chief Justice. But brilliance of judicial intellect in the service of racism and injustice is no virtue in our times—and no qualification for the high office of Chief Justice of the United States.

I regret that the Senate has chosen to end debate on this nomination. But I hope that a majority of the Senate will now see fit to vote against Mr. Rehnquist's confirmation as Chief Justice of the United States—and that we will have the courage to display a sufficient respect for the Constitution to ask President Reagan, with all respect, to try again.

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

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

The Chair in his capacity as a Senator from Texas suggests the absence of a quorum. The clerk will call the roll.

The legislative clerk proceeded to call the roll.
with reference to as much information and knowledge about the nominee as possible. In the case of Justice Rehnquist, this task has been relatively simplified. As President, the Senate, and the American people have at hand 15 years of judicial opinions by Justice Rehnquist and a large amount of additional evidence relating to his years of public service and private law practice before he joined the Court.

Whether or not one agrees with his legal judgments throughout the years, it is difficult to disagree with the unanimous opinion of the American Bar Association committee that his legal analysis and writing ability are of the "highest quality and that he meets, in general, "the highest standards of professional competence, judicial temperament, and integrity."

In short, I believe that President Reagan made a truly outstanding selection.

Still, as one would expect on a question of this magnitude, there is opposition to the nomination. The opposition, as I see it, rests on allegations that question both Justice Rehnquist's integrity and his fitness to render decisions in civil rights cases.

Justice Rehnquist's integrity is called into question on two counts. The first relates to his work for the Republican Party during the 1960's in Phoenix. The second challenges his decision not to recuse himself in 1972 from participating in the case of Laird versus Tatum.

THE VOTER HARASSMENT CHARGES

The committee, in 1971 and again this year, heard from individuals who were active in party politics and in election day activities in Phoenix during the elections of 1960, 1962, and 1964. Five witnesses testified under oath either that they personally saw Bill Rehnquist, or had heard others describe him, as being active in Phoenix as a party worker or political activist, or that they were morally certain that he did so. While the testimony of the five evidently did not refer to the same single incident, the witnesses agree that the events in question took place at polling places in predominately minority sections of Phoenix on the election days of 1960, 1962, and 1964.

For his part, Justice Rehnquist, in 1971 and again this year, denied ever harassing or intimidating voters, either as an official challenge or in any other capacity, at any time. His denial is firm and without qualification. Justice Rehnquist did testify that during the elections of 1960, 1962, and 1964 he participated in Republican Party business as a legal adviser to the party and to the official Republican challengers in the Phoenix area. In this capacity, he did, in 1960 and 1962, have occasion to visit several Phoenix polling places to resolve disputes and other problems involving the official Republican challengers assigned to those locations.

The question, then, is who do you believe? Or, rather, whose memories of the 1960's do you believe? Do you believe the five witnesses—four of whom were active Democrats—who accuse the Justice of intimidation? Or the six witnesses—four of whom were active Republicans—against whom the Rehnquist colleagues on the Court. I simply cannot believe that the accusing witnesses portray. The conduct described by these witnesses is totally inconsistent with the scholarly, well-spoken, even cautious manner that we all witnessed during the hearing and that is so well known to Justice Rehnquist's colleagues on the Court. I cannot believe that on any witness said in one sense, not in Phoenix at the times in question.

LAIRD VERSUS TATUM

The issue in the Laird versus Tatum case is the extent of the Justice's personal knowledge of the facts in dispute in that case. The statute at that time had as its principal purpose, I believe, the requirement that judges who have personal knowledge of the disputed facts or who are otherwise too involved in the actions giving rise to the case to be able to render a fair judgment must disqualify themselves from sitting in the case.

Recusation problems, in close cases, have always been among the most difficult to resolve. Of necessity the judge in question must decide whether his participation will appear so inappropriate that the legitimacy of the decision will be called into question. When the judge in question is a Supreme Court Justice, the problem is intensified because the Court, as the tribunal of last resort, is obligated to render judgments in the cases of national importance that it accepts for decision.

Laird versus Tatum was such a case. And Justice Rehnquist's particular situation was that one of those close, difficult personal and legal decisions that inevitably do not satisfy everyone with an interest in the case.

I believe that Justice Rehnquist's decision to participate in Laird versus Tatum was entirely appropriate. His sensitivity to the issues confronting him was reflected in his long, careful, and reasoned memorandum. In it, he demonstrated that the terms of the applicable statute did not expressly require him to sit out the case. The question that ultimately confronted him, was whether or not his participation violated the purpose of the statute—namely, to disqualify himself if he had been too involved in the actions giving rise to the legal action.

The Justice's critics argue on this point that, as an Assistant Attorney General in charge of the Office in the Department of Justice working on domestic surveillance policy at that time, William Rehnquist must have had personal, actual knowledge sufficient to require his disqualification. But in light of all of the facts that were known at the time and that have been discovered since 1972, that conclusion simply cannot be maintained.

As head of the Office of Legal Counsel, the position that was, of course, responsible for what went on in the that Office and for what was in the documents he signed and the testimony he gave. This is the very nature of "officer of the public trust."

Of all of us here know, however, that those "officially responsible" seldom do the actual research and writing of the documents and testimony attributed to them. I would venture to say that some of us who are taking part in this debate on the nomination may not have even written their own speeches.

Very often, public officials do not do the actual negotiating and even the policy and decisionmaking for which their offices are responsible. In short, it is difficult for observers of public officials to determine just how much public officials personally know about a given subject, and it is even more difficult sometimes for the official himself to sort it out.

In my opinion, Justice Rehnquist, in his lengthy memorandum, dealt with the recusation question honestly and appropriately. His statement reflects the same careful and conscientious de-liberation that we have come to expect from this man. In other cases during his tenure, he has recused himself from cases when the situation called for it. I cannot believe that he was too involved in the actions giving rise to the Laird case that he intentionally violated the legal and ethical standards in question. That type of conduct just does not fit the character of this man as I know him. The Phoenix election activities and the Laird case, and also to a lesser extent the Rehnquist memo to Justice Jackson in the Brown case, serve as the grounds for the principal attacks on Justice Rehnquist's integrity.
the opponents' point of view, they are safe arguments: by their very nature they cannot be absolutely refuted. There are no daylong videotapes of Bill Rehnquist capturing his every word on civil action on the election days of 1960, 1962, and 1964. And there is no absolute way of determining the extent of his involvement in the disputed facts in the Laidr versus Tatum case in the early 1970's. We must simply consider what we know and then decide for ourselves—by no means an easy determination—what is probably the truth.

In both cases, I have no doubts that the Justice is telling the truth and that his recollection of the events in question is accurate.

THE JACKSON MEMO

The nominee's opponents call into question his ability to render fair and just decisions in "civil rights" cases for two reasons. The first is the views expressed in his memo to Justice Jackson on the school desegregation case in 1952. The second is allegedly extraneous personal positions on civil rights issues before and after he became a Supreme Court Justice. I believe that I can respond to each of these charges more briefly than I did to the two issues.

The "Jackson memo" is also used by the critics to attack Justice Rehnquist's integrity. His opponents argue that he has not responded candidly to questions raised in 1971 and again this year about the purpose of the memo. The critics say that, first, the memo was clearly intended to persuade Justice Jackson to adopt the author's pro-segregationist point of view. Second, the opponents say that Justice Rehnquist says that the memo represented Justice Jackson's final, considered position on the subject. I do not believe that either of these statements is correct.

Let us be clear about the intended purpose of the memo as explained by Justice Rehnquist and his fellow clerk, Donald Cronson. From my reading of the testimony, the Rehnquist memo and the Cronson memo were intended by their authors to serve as alternative "talking points," representing the position yet to be selected by Justice Jackson on the Brown case and to be presented by Jackson to the members of the Supreme Court when the Court discussed the case.

The memos were not intended to represent the actual views of Justice Jackson at that time by Justice Jackson in the Brown case. The Justice could use either one, depending on the position he finally chose. I believe that a close reading of the two memos bears this out. Neither memo contains any explicit statements indicating that the clerks who authored them were addressing Justice Jackson. The general tone of the memos also does not lead the reader to infer that the clerks are writing to their boss. Such an inference is possible, but more plausible is the inference that the memo is to be used by the Justice as a statement to others—a statement that Justice Jackson would doubtless wish to edit and polish, but a statement that did not appear to be exclusively for the eyes of Justice Jackson himself.

Then, too, both memos have similar titles: "A Random Thought on Segregation Cases" and "A Few Pleasure Prejudices on the Segregation Cases." It is not likely that clerks would entitle routine memos in this way. We can go through each memo with a fine-tooth comb and find phrases and sentences that are consistent with other interpretations of the real purpose of the memos. I believe that we must also admit that on balance the memos themselves strongly support Justice Rehnquist's account of them.

For those who find the content of the Rehnquist memo appalling, I should note that both memos—the Cronson memo is also quite reserved in its recommendation—reflected the positions taken by many responsible, unprejudiced individuals on one of the most difficult legal questions of that time. We may regret our history, but we cannot alter it.

I believe the Justice when he says that he does not now and did not in 1952 hold segregationist, racist views. I certainly did not in 1952 make the arguments in the memo, and Justice Rehnquist's subsequent explanation cast doubt upon neither his fairness nor his integrity.

THE OPINIONS IN "CIVIL RIGHTS CASES"

Finally, I want to address the criticism that the author's arguments in the memos are of the "mainstream" position—is almost always to favor the individual plaintiffs in civil rights cases.

We have already heard references during this debate to the excellent study by the Washington Legal Foundation showing that the Justice is certainly in the "mainstream" of Court opinion in these cases. What I would like to remark upon briefly is the assumption that the side of the plaintiff alleging a violation of his civil rights is presumptively the right side in "civil rights cases."
rather lengthy memorandum, which I will not include in the Record, but I will deliver it to the distinguished Senator from Delaware for his perusal. We are on the record.

Mr. BIDEN. Mr. President, I say to the majority leader, in terms of time, that, to the best of my knowledge, there are only three more Senators who wish to say anything in addition on this nomination. The distinguished Senator from Ohio will shortly be prepared to do so. I have a few more things to say, which will not take long. The Senator from Arizona [Mr. DeConcini] wishes to speak in support of Justice Rehnquist, and I believe he indicated that he would be prepared to do that somewhere from about 8:20 to 8:30.

I will ask the Senator from Ohio whether he wishes to speak now, and if so, I will withhold my further comments until the Senator from Ohio has finished.

I yield the floor.

Mr. METZENBAUM. Mr. President, we are now coming to that point where the die will be cast and the votes will be counted; and, in all probability, Justice Rehnquist will become Chief Justice of the United States. To me, it is a very solemn occasion. As a matter of fact, it is a very sad occasion, because I feel very strongly that the responsibility that rests upon our shoulders has not been taken as seriously as it should.

Chief Justice of the United States: A position as powerful as almost any other position in the United States; in some respects coequal with the President of the United States; in some respects even more powerful than the President of the United States.

We are about to confirm a man who some would like to argue should be confirmed because the President has chosen him, and the President won by an overwhelming margin, and therefore, it is right to be confirmed. But it is his political philosophy that is at issue— notwithstanding the fact that some of us have stood on this floor and in the committee and said that is not the issue. If it were, Justice Sandra Day O’Connor would not have been confirmed by a vote of 99 to 0. If it were, Judge Scalia would not be confirmed, as he undoubtedly will be this evening, by a vote equal to that of Justice O’Connor or even by a vote very close to it.

The issue is not that. The issue is, can he be the leader of this Court? Can he provide that sense of harmonizing and bringing the Court together so that it continues to command the confidence of the American people and that it has at this time; or with his confirmation and his sitting as Chief Justice merely change the Court into a political machine where one man will attempt to use his powers in order to further his own political philosophy? Is he the kind of man who can take those who are on the Court who disagree with him and try to bring them together, as Chief Justice Burger did in connection with the Brown versus Board of Education decision?

The Chief Justice of the United States ought to be a special person. He ought to be a person whose integrity is beyond question, to whom every person in the United States can look and feel confident that justice will be done by this Chief Justice. But the fact is that there is not a member of a minority in this country, whether that minority be black or Hispanic, who can look to this Chief Justice—if and when he is confirmed—and feel that equal justice under the law will be done by this Chief Justice.

Look at the record in case after case after case after case. He always winds up in opposition to the rights of the minority.

Look at his actions in connection with the whole issue of Brown versus Board of Education and the Plessy versus Ferguson memo, and, with no exception, Justice Rehnquist is always on the side that is against the minority.

Can the women of this country feel any sense of comfort, when he becomes Chief Justice of the United States? I think not. They have indicated by their public statements hereafter made and by their letters that they are concerned; and they have a right to be concerned, when you read some of the language that he enumerated when he was discussing the ERA.

There is no problem about whether he is for the ERA or against the ERA. That is not the issue. But when you look at the language he used in connection with that issue, you recognize that there is something about this Justice that indicates he would not do the things that many women in this country are second-class citizens.

The Chief Justice of the United States must have unquestioned integrity, but no person can read the record of this man in his dealings with the U.S. Senate in 1971 and 1976 and come away feeling that he has unquestioned integrity, a Justice who replies to an inquiry from the Senator from Maryland, “I can’t recollect, I don’t recollect, I can’t remember.” We were not talking about some specific night, some specific say, some specific hours. We were talking about his own involvement in the preparation of a memo and preparation of a whole position paper, having to do with the question of military service of civilians. He cannot remember whether he was or was not involved and what he said and what he did.

Come now. Come now, Mr. Justice. Do you really wish the American people to accept that?

This is the same man about whom so many testified that he was involved in challenging and harassing and intimidating voters, and he makes a total denial. Five people come forward under oath and say they saw him, and he says, “I didn’t do it. I wasn’t there. It wasn’t I.”

Come, now, Mr. Justice. Are the American people really expected to believe that?

The evidence is irrefutable. He was there, he did it, and he had a right possibly to do it and in some instances it might have been legal. Certainly it was legal to challenge. It was not legal to intimidate and harass. But he says he does not remember anything at all about what occurred at that time.

This is the same man about whom we have discussed time and time again, but again find an instance in which you say what kind of man is this? What kind of a man is it who says in one instance that he doesn’t agree with the Senate, and then some years later he says that was not his position; his position was directly opposite that.

That is what he said in 1971, and then in 1986 he comes before the committee for confirmation and one of the Senators asks him what was his position in 1982, and he says he did not have a position.

Come now, Mr. Justice. Are the American people really expected to believe that?

Then the whole issue with respect to the restrictive covenant, the restrictive covenant. Bad enough to be involved, bad enough not to have raised the issue, bad enough not to have discussed time and time again, but again find an instance in which you say what kind of man is this? What kind of a man is it who says in one instance that he didn’t do it. I wasn’t there.

On September 17, 1986 CONGRESSIONAL RECORD—SENATE 23781
mittee and say “In rummaging through my papers I find that I was so advised by two attorneys.”

He does not say “When I saw that this had occurred, I learned about it in the Washington Legal Times, then and only then did I decide to report the facts to you accurately.”

This is a Justice who lost his credibility. This is a Justice who was not candid. This is a Justice who did not tell the facts when he appeared before the committee in 1971 and again in 1986.

And now my colleagues across the aisle are all going to vote for him because President Reagan wants him. I say to you, President Reagan may want him, but I wonder whether your children want him, I wonder whether your grandchildren will want him, I wonder whether or not he will not turn the clock back on all those things that the Constitution has stood for over a period of many years.

The price that will be paid for the political decision that will be made tonight is an unacceptable one. The price that will be paid is the highest price that could be possibly paid and yet my colleagues across the aisle have been unwilling to look at the facts, to search the record, to seek out in their own conscience whether this man should or should not be confirmed.

I have talked with some of you and you have indicated, “Well, I may as well go along, there is no smoking gun.”

There may be no smoking gun, but the fact is there is a lot of smoke and a lot of fire. There is a lot of problem.

And you are going to pay an awful price. You are going to pay an awful price, either yourselves or your children or your grandchildren.

They are going to have less respect for the Supreme Court of the United States by reason of your action tonight than the people of this country have ever had for the Supreme Court.

The people of this country have respect for the Supreme Court of the United States. I have respect for that Court.

But we are not adding to its luster. We are not adding to its credibility. We are not adding to his stature in this country where we elevate Justice Rehnquist to be Chief Justice.

Nobody questions his intellect. Everyone agrees Justice Rehnquist is smart. There is no argument about that.

Everybody agrees that he has legal training, not enough legal training to remember some of the facts about things that occurred in his lifetime, but he certainly has legal training with respect to the books and the law.

I say to my colleagues that the decision that you are going to arrive at tonight may prove to be the worst vote that any man has ever cast in the U.S. Senate. You may have cast votes having to do with SDI, having to do with defense spending, having to do with human rights, having to do with South Africa, having to do with aid to the Contras and everything else. But there is no more important decision, no more single vote that has greater impact and the future of our country than the action which is about to be taken in confirming Justice Rehnquist to be Chief Justice.

I think it is a sad night. I think it is a very sad night. And somehow, some way, I wish that I could get through to those across the aisle and try to shake thereupon a little bit and say you have the right to vote any way you want. Your vote is your decision. But if you just look at the facts, if you would just search the record, if you would just let your conscience guide you, instead of your politics, Justice Rehnquist would not be confirmed as Chief Justice of the United States.

I yield the floor.

The PRESIDING OFFICER (Mr. TRIBBLE). The Senator from Delaware is recognized.

Mr. BIDEN. Mr. President, you know we vote about to vote, and it has been said a number of times to the point I think that maybe people believe it; but it is not true.

And the thing that has been said many times is that, A, the President, under the Constitution, is automatically entitled or near automatically entitled to his or her nominee for the Court. And I find it interesting that in his record, to prove that he should be confirmed, Justice Rehnquist's nomination to the Court by the President has said something to the following effect. All the supporters of the nomination have your conscience yet chose. Instead of your politics, Justice Rehnquist would not be confirmed as Chief Justice of the United States.

President to be purely ideological in picking his nominee for the Court, but it is not all right for the U.S. Senate to consider the confirmation of a nominee based on our imaginative takes about the issue. Clearly that is not what the Constitution meant.

And the other sort of accepted colloquial wisdom which is not true that is often used around here is that, Well, not only should the President be able to choose, based on ideological grounds, who should be on the Court, and we should just rubber-stamp them, but that the burden is upon those who question whether or not the nominee should sit on the Court to prove beyond a reasonable doubt that the nominee is not qualified.

And yet we act from not true from a legal standpoint. The fact of the matter is that we are voting on someone to be the leader of the third equal branch of the Government. And to suggest that the Senate should have to prove that person is not qualified—that the burden is on us to prove he is not qualified, rather than the burden being upon the nominee and the proponent of the nominee to prove that they should be on the Court—is like saying that the burden is upon the people of Delaware to prove that I should not be a Senator, rather than the burden being on me to go to my constituency and say: “This is why I think I would be a good representative of this State in the Senate.” The burden is on me.

The burden is upon the candidate for the President of the United States of America to say, “Let me prove that I should be President.”

We yet act around here like the burden is not upon the nominee for the Court—an equally powerful body. The Court is as powerful and as important as the Congress or as the President. And that is why Justice Rehnquist, through his testimony and his record, to prove that he should be named to be the Chief Justice of the United States.

The other notion is we hardly ever reject nominees for the Supreme Court. The first Chief Justice nominee to the Supreme Court of George Washington's was rejected. More people have been rejected by the U.S. Senate who have been nominated to serve on the Supreme Court than for any other—for any other—Presidential appointments. More people have been rejected than for any other nomination over the past 200.

Until today, the highest negative votes for a Supreme Court Justice who was confirmed was in 1971. Justice Rehnquist had 26 people vote against him. In 1930, Charles Evans Hughes had 26 people vote against him. In 1912, Mr. Pitney had 26 people vote against him. And in 1888, Mr. Fuller had 20 people vote against him.
One of the reasons for that is, when it has been clear that such a large number of Senators believe the nominee was not fit for the post for which he or she was nominated, the nominee had been withdrawn. Because, in fact, it is very, very important that the President ensure that the nominee is all that is required. And when over a third of the U.S. Senate says the person is not qualified, it, at a minimum, casts a shadow upon the ability of the Justice, particularly as Chief Justice, to fulfill the function required.

Mr. President, this time is now at hand for the U.S. Senate to exercise one of its most important constitutional functions and decide whether the President's nominee, William Rehnquist, will be confirmed as the next Chief Justice of the United States. The Senate has considered a nominee for this highest judicial office only 18 times in the history of our Nation; on 4 of these occasions the Senate rejected the President's nominee. I believe that the facts compel this body to again accept its ultimate responsibility and to vote to reject the Fifth Presidential nominee to this highest office.

Before briefly summarizing the facts that, I believe, compel the conclusion that Justice William Rehnquist should not be the next Chief Justice of the United States, I would like to commend my colleagues, on both sides of this issue, for the manner in which this debate has been conducted. During this past week we have had an opportunity to consider some of the most important and sensitive issues to arise under our constitutional form of government. What could be more important than determining the proper roles of the legislature and the executive in shaping the membership of the third branch of government? What could be more important than determining under what circumstances a man whose performance reflects well on this body as well as upon those who have entrusted us with the task of governing, during this debate various reasons why William Rehnquist should not be the next Chief Justice of the United States have been advanced. In fact, at times it seems as if there are as many reasons for opposing this nomination as there are for opposing this nomination. Many Senators have based their decision to oppose this nomination on the poor judgment shown by Justice Rehnquist in his role as a Senator and himself in the case of Laird versus Tatum. Others reach their decision because they question whether Justice Rehnquist was sufficiently forthcoming and forthright in his testimony on a number of subjects before the Judiciary Committee. Others have eloquently stated the case that Justice Rehnquist should not be confirmed because of his role as a Senator—specifically, the role of Senator from Maine, Senator Mitchell—"total and unremitting hostility toward the rights of women and minorities, especially black Americans, and a deeply troubling willingness to condone, if not support, a segregated society." And others rely on some combination of these and other grounds to reach their conclusion.

All the reasons that compel this Senator to oppose this nomination are contained in the answer to one simple question: Does William Rehnquist have the necessary qualifications and attributes to fulfill the unique symbolic role of Chief Justice of the United States? Let me summarize my position: A Chief Justice not only serves longer than any President, but he or she, along with the other members of the Court, exercise a power limited only by their conscience and principles. The integrity and honesty of the Chief must be beyond doubt if America is to believe in the integrity of the Judiciary. And, the Chief must stand as a metaphor for justice in our society; more than any other individual, The Chief symbolizes the guarantee of "equal justice under law" for all Americans.

The record today and the proceedings in the Judiciary Committee I have commented extensively on my view of the importance of the symbolic role of the Chief Justice. Let me summarize my position: A Chief Justice not only serves longer than any President, but he or she, along with the other members of the Court, exercise a power limited only by their conscience and principles. The integrity and honesty of the Chief must be beyond doubt if America is to believe in the integrity of the Judiciary. And, the Chief must stand as a metaphor for justice in our society; more than any other individual, The Chief symbolizes the guarantee of "equal justice under law" for all Americans.

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black defendant—he acknowledged that is discriminatory but when he engaged in the trial prosing in the service of his own desires.

He goes on to say that kind of discrimination is all right as long as you discriminate against whites the same way you discriminate against blacks. He acknowledges that we keep blacks off juries, white juries—where we keep blacks off those juries—have been historically used to deny justice to blacks, he says it is all right to do that as long as you can say you can keep all whites off a jury. Show me jurisdiction where there are enough blacks to guarantee that there will be an all-black jury. When has a prosecutor in our history ever used preemptory challenges to keep all whites off a jury because he was fearful that they would not judge properly a white defendant? I do not know of any case. But I can make out a high number of cases where prosecutors have attempted to keep black women and men off juries where there is a black defendant. But he said, oh, it is all right to discriminate against blacks as long as you discriminate against whites, as if there was any circumstance where that would occur.

That is what I mean by narrative prose in the service of his unspoken desire. Third, he has at best exercised very, very poor judgment in allowing himself to be the deciding vote in Laird versus Tatum. At best, it is poor judgment. And also, I cannot fathom how anyone could conclude that he was candid with us regard to how he felt about desegregation, and segregation in America in the 1940’s, 1950’s, and the 1960’s. I believe that Justice Rehnquist has not proven that he should be Chief Justice.

The PRESIDING OFFICER. The Senator’s 1 hour has expired.

Mr. BIDEN. I thank the Chair. I yield the floor. My colleague from Arizona, Mr. DeConcini.

Mr. DeCONCINI addressed the Chair.

Mr. DECONCINI. The PRESIDING OFFICER. The Senator from Arizona.

Mr. DeCONCINI. Mr. President, I intend to make a few comments on the Rehnquist nomination but I do know the Senator from Iowa has been waiting for some time and does not intend to talk near the time I will. I will be glad to yield, and I ask unanimous consent that I can yield to the Senator from Iowa for 5 minutes and then my remaining 10 minutes.

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

The Senator from Iowa.

Mr. FEIN. Mr. President, I want to thank my distinguished friend from Arizona for yielding me a small amount of time to give my thoughts on the nomination of Mr. Rehnquist to be the Chief Justice of the United States.

Mr. President, initially this summer I had planned to vote affirmatively for Mr. Rehnquist to be the Chief Justice of the United States. I made that decision because quite frankly I did not think that he is a wise individual. I have no doubt that Mr. Rehnquist is a scholar, that he is quite intelligent, but I think he lacks two things that are so necessary to be the Chief Justice of the United States.

I think he lacks sensitivity, and he lacks what I call wisdom. He may be intelligent. He may be smart. But I do not think that he is a wise individual. In fact, if his nomination were to come up to be even on the Bench itself, knowing what I now know, I could not vote even to put him on the Supreme Court, let alone to vote affirmatively for him to be Chief Justice.

Mr. President, the office of Chief Justice is a symbol of high integrity and ethical propriety. The principles and concepts which our legal foundation is based are embodied in this very position, fairness, openness, and truthfulness. These are the qualities that the Chief Justice could personify in setting the tone for the whole judicial system. The office is more than just a symbol. It is also a position of great power. Appointed for life to the highest court in the land, the Chief Justice can steer the Court toward consensus or toward conflict on the most important constitutional issues of our time. I believe that the Chief Justice, Mr. Rehnquist would steer the Court more toward conflict and away from consensus because that indeed has been his position on the Court over the last several years, one of conflict and not of consensus.

Also, the office of Chief Justice serves as the guardian of American I believe that an Chief Justice. All applying these guarantees of due process and equal protection, the Chief Justice has an obligation to go beyond personal biases and assure these rights are accorded to all Americans. Thus, Mr. President, the standards of Chief Justice must be dominated by impartiality, fairness, honesty, and all undergirded by wisdom and sensitivity. The leadership of the Chief Justice must be sensitive to the ability of the Constitution to address the complexities of today’s changing society. The Constitution is a living document, not a dead document. As a living document, it must adapt itself to the changing norms of society.

So the convictions of the Chief Justice must be governed by his sincere respect for Americans as individuals, individuals blessed with the right to enjoy personal freedom and liberty. And that Chief Justice must be wise enough to see that the Constitution is indeed a living document and not a dead document.

Mr. President, I have four editorials: one from the Quad City Times, Davenport, IA; two from the Des Moines Register; and one from the Ottumwa Courier, all leading newspapers in the State of Iowa, editorials asking us to vote no on the nomination of Mr. Rehnquist to be Chief Justice. I ask unanimous consent that these editorials be printed in the RECORD.

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

REHNQUIST: A CHIEF JUSTICE OF YESTERDAY

It is disheartening that President Reagan has chosen to appoint William Rehnquist—a man with 19th century legal views—to lead the Supreme Court into the 21st century.

Reagan could have chosen a more moderate justice for the nation’s top judicial post. We wish he had.

Senators soon will be considering the Rehnquist nomination, and we hope all Senators—and especially our own, Charles Grassley and Tom Harkin—thoroughly review the Rehnquist record. The chief justice’s post is one of immense influence. The chief justice is not the president’s right-hand man, no matter what he himself may say, and the chief justice must be sensitive to the needs of a rapidly changing society.

Senators must look to the future; Chief Justice Rehnquist is clearly not the choice for the United States Supreme Court.

He has consistently voted for the death penalty; anti-abortion laws; public financing
of private and parochial schools; govern­
ment control of free expression; the limita­
tion has no right to interfere with a
The amendment, according to the Los An­
geles Times, would have permitted district
Boundaries to be drawn so as to separate students by race and would have allowed parents to send children to the schools of their choice.
We urge senators to think about the
meaning of such a proposal. It is 1970–1870.
We each have our own opinions on what the Board of Education unanimously struck down school segregation, a time when great strides have been taken to topple the
stitutional barriers of racism. Yet, here is a
man who proposes wiping all of that out by
writing the Constitution to permit segregated schools.
It is probably of no great consequence
that this damaging evidence should turn up
after the Judiciary Committee hearings
ended. Rehnquist would likely have suffered another "amnesia attack" before the com­
mittee. And who could blame him for want­ing to forget?
This piece of evidence by itself is unlikely
to derail Rehnquist's confirmation. What is
unfortunate, though, is that a "smoking gun" is necessary to get the Senate to see
what has been so clear in Rehnquist's judicial opinion—there is no need for the govern­
ment to be in the business of assuring racial equality because he does not find any
root principles of individual liberty in the
Constitution.
The 100 senators must ask themselves: Is
this the man they wish to elevate to lead
the third branch of government? Their
answer should be no.
JUST SAY NO ON REHNQUIST
Regardless of one's views on Supreme Court Justice William Rehnquist, the letter
signed by more than 100-law school profes­
sors today raises doubts about his fitness for
Chief Justice William Rehnquist to be chief justice. The evidence has emerged in tiny bits and
pieces—some of it known for years and some of it uncovered as a result of the investiga­
tion into his nomination.
Consider: As a law clerk for Justice Robert Jackson in the 1950s, Rehnquist wrote a memo de­
fending the 1950 U.S. Supreme Court ruling up­
holding racial segregation.
As a political operative in Phoenix in the
1960s, he tried to prevent minorities from
voting. The Justice has been described as inadequate.
While a top attorney in the Nixon adminis­
tration in the 1970s, he drafted a proposed
constitutional amendment that would have
halted, desegregation of the nation's public schools.
As a private citizen, he bought a home in Vermont with a deed barring its resale to anyone but whites. He bought a vacation place in Vermont with a deed prohibiting resale to Jews.

Rehnquist was questioned on those activities during his nomination hearings and his responses were, to put it charitably, less than candid. Does anyone really believe that lawyer Rehnquist signed those deeds without knowing the provisions in the documents?

Rehnquist's voting record on the Supreme Court is consistent with his actions as a private citizen and his advance as a law clerk and government attorney. He's insensitive to matters of individual rights generally and of minority rights specifically.

I ask my colleagues here, if you know a judge on the Supreme Court—no matter how much you admire him— if you have ever been satisfied with the response you get, I can assure you, regardless of the political spectrum that that judge might follow or philosophy that that judge might follow.

I am sure that as Chief Justice, Justice Rehnquist will continue to serve with dignity and honor.

Mr. President, there can be no question at this time about Justice Rehnquist's intellectual abilities. He has proven himself over his 15 years on the court as a brilliant legal thinker and writer. He is both a scholar of the law and a most articulate and sometimes sarcastic writer of opinions. I do not always agree with the analyses and decisions of Justice Rehnquist, but I have never found his opinions to be anything but well reasoned and lucidly explained. I have no doubts in my mind that Justice Rehnquist easily exceeds any requirement for intellectual capability that any of my colleagues may impose on any nominee.

I also believe that Justice Rehnquist possesses the requisite temperament to be Chief Justice. I know of no allegations that, in the last 15 years, Justice Rehnquist has acted in any way inconsistent with the Office of Justice of the Supreme Court of the United States.

He has brought dignity to the office and has earned the respect of his colleagues and those who do business with the Court.

The last criterion that I examine in determining whether to vote in favor or most of my colleagues will be here when this responsibility next comes to the Senate. We must approach our constitutional responsibility for advice and consent with our most careful and thorough attention.

I consider the confirmation of Justices of the Supreme Court to be one of the most important responsibilities entrusted to us by the Constitution. The responsibility to advise and consent on the nomination of the Chief Justice of the United States. I was not in the Senate when Chief Justice Burger was confirmed by this government to his post. I, however, will not nor most of my colleagues will be here when this responsibility next comes to the Senate. We must approach our constitutional responsibility for advice and consent with our most careful and thorough attention.

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Republican Party and Justice Rehnquist in Arizona in the early 1960’s.

I believe the fairest summary of the testimony and other evidence we received is that it is inconclusive and contradictory.

There were witnesses who alleged that Justice Rehnquist was directly involved in the voter challenges, and there were witnesses who testified that Justice Rehnquist could not possibly have been involved in such activities.

I do not doubt the sincerity and honesty of any of the witnesses who made allegations against Justice Rehnquist.

But I believe that, after looking at the record as a whole, the preponderance of the evidence indicates that Justice Rehnquist was not personally involved in challenging or attempting to intimidate any voters.

Let’s look at the testimony offered to the Judiciary Committee by those witnesses.

Some witnesses who were with Justice Rehnquist or were in a position to have known of his activities testified before the Committee that Justice Rehnquist was not involved in any voter challenges himself.

In addition, a Phoenix police officer who was at or near the Bethune school precinct all day testified that he did not see Justice Rehnquist there.

Finally, the Democratic county chairman, former Federal Bankruptcy Judge Vincent Maggioni, who would have been aware of any complaints by Democrats about challenges or challenges testified under oath that he received no such complaint about William Rehnquist.

Melvin Minkin, a very respected lawyer who was a volunteer Democratic party worker in the early 1960’s, testified that he heard Justice Rehnquist giving instructions to Republican challengers in South Phoenix in such a way as to intimidate voters.

Mr. Mirkin did not see Justice Rehnquist challenge voters or even talk to any voters.

His analysis was purely subjective based on the tone of voice used by then Mr. Rehnquist.

Mr. Mirkin also testified that he believed that Justice Rehnquist should be confirmed by this body.

Charles Pine was Democratic State Party Chairman in the early 1970’s. In the early 1960’s he was a Democratic party worker.

Charles Pine is an old, dear friend of mine, as is his wife.

Mr. Pine testified that he saw Justice Rehnquist challenge two black voters in a voting line in 1962, or was it 1964, and that the two men left the line as a result.

I believe that Mr. Pine is sincere in his allegations against Justice Rehnquist; I find his testimony troubling for several reasons, however.

First, he was unable to provide any details concerning the allegations, such as what was said.

Second, there was no complaint or report filed with any other incident involving Justice Rehnquist.

I believe that in the atmosphere which existed at the time in Phoenix, the Democratic Party or its campaign workers would have been quick to report that the man they thought to be in charge of the Republican Ballot Security Program was personally harassing and challenging voters.

I was involved as a volunteer poll watcher in Tucson during the same years that the Republican Ballot Security Program was taking place.

I remember making a record of the names, places and times that I observed Republicans engaging in challenges to voters and turning this record over to the appropriate officials.

If Justice Rehnquist had been personally challenging voters in these years, I believe that such records would have come to light, and they did not.

And last, I find that Mr. Pine’s allegations are overboard.

He makes several blanket allegations against the Republican “flying squads” which went into Democratic precincts in Phoenix in the early 1960’s.

After describing these activities, he makes his allegations against Justice Rehnquist in a way that is not supported by the actual activities.

Dr. Sydney Smith was a third witness to the activities that took place at the polling place in South Phoenix.

He served as a Democratic poll worker in 1960 or 1962.

Dr. Smith offered what I thought was the most credible testimony making allegations against Justice Rehnquist.

I am pleased that Dr. Smith came forward with his story and would not dispute his story as he saw it.

I would question why, if the incident was reported to the Democratic County Headquarters, there is no record of it and why Mr. Vincent Maggioni, the Democratic County Chairman at the time, has no recollection of Justice Rehnquist involvement in voters challenges.

The fourth witness was State Senator Manuel Pena, another very dear friend of mine.

Senator Pena’s integrity and honesty are, in my opinion, beyond reproach and question.

He tells a very troubling story about an individual’s reprehensible activities at the Butler school in 1962.

If there was proof that the individual at the school was Justice Rehnquist, I would be very disturbed and could not stand here before my colleagues tonight.

However, Senator Pena did not know Justice Rehnquist at the time and he so testified.

He did not recognize him until he saw him in the picture in the newspaper 9 years later.

I am afraid that Senator Pena’s allegations against Justice Rehnquist, without corroboration, is insufficient for me to conclude that Justice Rehnquist was there and did the things that supposedly happened.

The witness who drew the most public interest and who drew the committee’s greatest attention was former Assistant U.S. Attorney James Brosnahan.

Mr. Brosnahan is an impressive witness indeed.

He was a patient and collected witness who showed just the right amount of spunk, but of interest to be sure the committee members got all the answers they needed.

He told an interesting and credible story, but he did not see Justice Rehnquist do one thing, and that was his testimony.

He was not concerned enough about what he saw or heard to do anything about it at the time.

He did not file a complaint with the election commission. That question was not asked.

And he did not file a complaint with the Arizona Bar Association—that question was not asked, but I later confirmed that—about what would have come to light, and they did not.

I am afraid that Senator Pena’s allegations against Justice Rehnquist do one thing, and that was his testimony.

Mr. Brosnahan also did not come forward when Justice Rehnquist was nominated for either Assistant Attorney General Associate Justice of the Supreme Court.

As credible as the opponents of Justice Rehnquist believe Mr. Brosnahan has to have been, in my opinion, he merely put on a show without contributing any substantive or probative evidence.

He admitted that his allegations would not be admissible in any court.

I am, of course, concerned about having to weigh and compare the testimony of several of my old friends and colleagues.

I believe that a nominee has the burden of proof to show that he or she is worthy of confirmation.

However, in cases where specific allegations of unethical or illegal conduct are made, the burden of proving those allegations must be on those making the allegations. That is how our court system works and it ought to be the same here.

In this case, after carefully reviewing the record as a whole, I have concluded that there is not sufficient evidence to believe that Justice Rehn-
quires that party workers who were to be
registered or re­

meant for the equal rights amendment. I am proud of it. It has not passed, but I will. Those of us who are supporting Rehnquist, and are for the equal rights amendment, are going to be proud of it, because we believe in it. It is a principle. Some of the statements made by Justice Rehnquist in these two briefs I am not proud of, but I do not have to be proud of them. I have to decide whether or not he is qualified to be Chief Justice of the United States.

In my opinion, his arguments are unsound and irrelevant. But, I have heard them all before. During the 98th Congress, the Subcommittee on the Constitution, of which I am the ranking member, held a series of hear­nings on the equal rights amendment. The opponents of the ERA dragged out the same red herrings that Justice Rehnquist had enumerated in his memo 15 years ago.

I am sure that if today's debate were on the ERA, my good friend Senator Harkr as well as other opponents of the amendment, would be making these antiquated—as I see them—argu­ments right now. I would be opposing my good friend from Utah, and I have the greatest respect for his legal ca­pacity and his senatorial capacity.

The point I want to make about both these memos, the President of his staff re­quested that memos be prepared ex­pressing certain viewpoints. Assistant Attorney General Rehnquist, the good lawyer that he is, prepared the memos using the best arguments that were available to argue the point of view that he had been instructed to take. As to what his personal views are, they may have been exactly like that. But there is only one person who can say unequivocally that that is what was in his mind, and that person was Justice Rehnquist, who explained that under oath in detail and has consistently done so.

It is not Justice Rehnquist's fault that he was given the least defensible side of each of these issues to try to defend.

As a lawyer, Assistant Attorney Gen­eral Rehnquist carried out the assign­ment given to him by his client. Al­though these may very well be Justice Rehnquist's views, we should not hold him responsible. His argument is contained in a legal memorandum he wrote under the direction of, and serving as the lawyer to, the President of the United States or the Attorney General of the United States.

I do not agree with the views ex­pressed in these memos, but in my opinion, Justice Rehnquist was doing his job as a lawyer is supposed to do.

Mr. President, before I conclude, I would like to discuss briefly my analy­sis of our responsibility to advise and consent to the President's nominees to the Supreme Court. There is a differ­ence in what I consider to be the ap­propriate manner in which this re­sponsibility should be carried out, and that conduct that I consider to be im­proper and unwise but not culpable.

In the case of a nominee to the Su­preme Court, I do not consider it to be unacceptable for an individual Senator to take the nominee's political views, as they relate to the Constitution and our laws, into consid­eration when determining whether to vote for him or against him. That is part of our individual rights and re­sponsibilities. Except for the most ex­treme views, however, I do not think it is appropriate. But I honor and re­spect my colleagues who believe that. Let us not kid ourselves. This is not an issue about a restriction in a deed or about supposedly challenging voters. This is an issue of whether or not a very conservative sitting Justice should be moved to the position of Chief Justice. That is what it is all about. We can talk about it, but I think we all know here that this Jus­tice is very conservative and that many Members of this body who are not very conservative do not want to see this type of Justice sit there be­cause of his conservative views. They have a right to do that, and I respect it.

My philosophy is that the Senate should base its confirmation decisions on the three criteria that I discussed above—intelectual excellence, appro­priate judicial temperament, and integ­rity and honesty. While I acknowl­edge that for much of this Nation's history, the Senate performed an almost purely political function in ad­vising and consenting to the Presi­dent's nominees, I submit to my col­leagues that the American people were not well served by this system.

Whether we like it or not, President Reagan won the election. Under our Constitution, he has the right to make these appointments. If they meet those three criteria, so far as this Sen-
ator is concerned, they should be confirmed, even though I disagree with many of their decisions.

A vacant seat on the Court occurred when Chief Justice Salmon P. Chase died on September 17, 1840, and President Andrew Johnson was opposed by a solid Republican majority in the Senate, he was unable to fill the vacancy and the seat on the Court went vacant for more than 5 years. At one point, the Congress actually abolished the seat rather than have President Johnson fill the vacancy. The stalemate was only resolved when President Grant was elected.

For 3 years in the 1840's, the Supreme Court lacked its full compliment of Justices while the Senate and President Tyler wrangled with President Tyler's nominees. President Tyler, in fact, was able to get confirmation of only one of his six nominees to the Court.

There have been many other examples of practices undermining the proper functioning of the Court. These political games have been played both by the Senate and by the President. For example, he has allowed Franklin Roosevelt to pack the Court with liberal justices who would uphold the New Deal legislation. President Taft contrived to have himself appointed Chief Justice after he left the President's office. I believe that these attempts at politicizing the advice and consent process is improper no matter which party makes the attempt.

Mr. President, I urge my colleagues to put politics aside and vote to confirm Justice Rehnquist as Chief Justice based on his qualifications, his temperament and his integrity. During the Carter administration, I served on the Judiciary Committee when it considered many judicial nominees who I thought to be quite liberal. I hope that each of these nominees based on the criteria that I have discussed and not based on their political views. I voted to confirm such judges as Patricia以便 for the D.C. circuit; William Canby and Mary Schroeder, for the ninth circuit; and Steven Breyer, for the first circuit.

The record before us amply shows that Justice Rehnquist has met and exceeded each of these standards. While there are political questions that remain, I believe that they have no place in this discussion. I will cast my vote to confirm Justice Rehnquist for the D.C. circuit.

Mr. President, I thank a couple of my colleagues for their personal knowledge of the evidentiary facts before he went on the Court. The inquisitors failed to remember that the Senate Judiciary Committee had voted on that same issue 12 to 6 in favor of Justice Rehnquist's position, namely in favor of allowing States to have silent moments of prayer or reflection. This showed that the inquisitors were in fact the minority extremists.

At least the inquisitors have proved one thing. With enough time in blurring memories, the personal knowledge of the evidentiary facts before he went on the Court. The inquisitors failed to remember that the Senate Judiciary Committee had voted on that same issue 12 to 6 in favor of Justice Rehnquist's position, namely in favor of allowing States to have silent moments of prayer or reflection. This showed that the inquisitors were in fact the minority extremists.
nificantly altered the opinion of the same committee in 1971 that "Viewed in its entirety, the incident at the very most in a case of mistaken identity." Of the seven who claimed to have seen John Rehnquist in the completely legal activity of verifying voter credentials, five did not know him at the time and only identified him from newspaper photos in 1971—7 to 9 years after the fact. I have heard of hindsight being 20-20, but this is ridiculous. Eight witnesses testified that they had never even heard a rumor of Justice Rehnquist's involvement in any voter improprieties. Inquisitors can make any kind of case out of hazy memories.

These inquisitors make us all wish that their mouths would be more like their minds—closed.

I mention the primary characteristic of the inquisitor, a closed mind, for a reason. These inquisitors have overlooked the most relevant facts. They have ignored Justice Rehnquist's 15 years of leadership on the Supreme Court. They have ignored the fact that the ABA gave Justice Rehnquist their highest possible rating for "competence, judicial temperament, and integrity." They ignore that his colleagues and the 80 other judges reviewed by the ABA gave him their highest marks for integrity and judicial ability.

Instead they distort the truth, twist the facts, emphasize rumor, legitimize innuendo, and ignore the relevant. Moreover they attempt to prolong the torture for hours—repeating time and again the same unfounded charges in the hope that repetition will make them sound legitimate.

Throughout this painful proceeding, the inquisitors have searched in vain for any inconsistency, crack, or break in the record that they might use to justify their attacks. I believe that they are engaging in the same unfounded charges in the hope that repetition will make them sound legitimate.

The following will indicate the inquest's involvement in the case, analyzed the disqualification statute and reviewed the precedents of the Supreme Court disqualification of Justices. He concluded on this basis that recusal was not warranted.

Justice Rehnquist did not have personal knowledge of the Laird versus Tatum case in 1971 when he testified before Senator Ervin's Judiciary Subcommittee. The following will indicate that fact. Justice Rehnquist stated:

"As you might imagine the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understanding. . . ."

Next:

The Office of the Deputy Attorney General . . . advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army data bank, and it was incorporated into the prepared statement that I read. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out.

Next:

While it is not altogether clear to me, certainly not from personal knowledge. . . . the extent the army guidelines were actually carried out and practiced, it should be apparent that the data base used by internal security is much more restricted . . . than were the guidelines printed in the Congressional Record.

It seems clear that Justice Rehnquist did not have any personal knowledge of the disputed facts in the Laird versus Tatum case when he testified before Senator Ervin in 1971 and consistently acknowledged that fact.

In 1986, Justice Rehnquist responded to a question from Senator Leahy.
on the subject of his analysis of the pertinent statute affecting his disqualification from this case and any second thoughts he might have on that position by stating:

I must admit that I differ with you, but that was the position I took in that case . . . I never thought of it again until these hearings, to tell the truth. I have gone back and read the opinion, and I think under the statute as it was changed after Lauter v. Talum I think there would be probably a very strong ground for disqualification. But I didn't feel dissatisfied with the way I behaved under the statute as it then stood.

It is obvious that the issue raised was one of legal analysis, upon which reasonable jurists could differ and Justice Rehnquist, himself agreed with this fact. However, in no way should Justice Rehnquist's actions be construed as being improper. He was prudent, honest and forthright in his statements and that is all we can ever ask for.

CORNELL TRUST ALLEGATION

Justice Rehnquist acted unethically in setting up a trust account in 1961 for his brother-in-law, Harold Dicker­son Cornell, who had been diagnosed as having multiple sclerosis.

RESPONSE

This is an undeserved reputation. Over the last four terms of the Supreme Court no Justice has written more opinions than Justice Rehnquist. The principles of many of Justice Rehnquist's earlier lone dissents are gaining acceptance with the other Justices in recent terms.

Justice Stevens remains by far the greatest lone dissenter on the Court today. The principles of Justice Rehnquist's earlier lone dissents are gaining acceptance with the other Justices in recent terms.

Justice Rehnquist has proven himself a leader of majorities, one who believes in equal justice for all Americans and there is no reason to think that he will not continue to do so as Chief Justice.

JUSTICE JACKSON MEMORANDUM

Justice Rehnquist expressed his own views in a memorandum concerning segregation that he wrote as a law clerk for Justice Robert H. Jackson in 1952.

RESPONSE

The memorandum was written in 1952 at the time the Supreme Court was considering Brown versus Board of Education. Justice Rehnquist informed Senator Eastland in 1971:

The memo was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of his views . . . rather than a statement of my views . . . the tone of the memo is not that of a subordinate submitting his own recommendation to his superior . . . but is the tone of one equal exhorting other equals.

Donald Cronson, Justice Rehnquist's coclerk, stated in 1971:

It is my recollection that the memo in question is my work at least as much as it is yours and that it was prepared in response to a request from Justice Jackson, who re­quested that a memo be prepared supporting the proposition that Plessy v. Ferguson was correctly decided. The memo supporting Plessy was typed by you, but a great deal of its content was the result of my suggestions.

Justice Rehnquist told Senator East­land that he unequivocally and fully supported the legal reasoning and the reasonableness of the Brown decision and for anyone to say that he thought Plessy versus Ferguson was right, was not accurate and was not his personal views.

The matter appears to be totally irrelevant and without merit. Justice Jackson asked for a memo from his clerks and received what he requested. During his 15 years on the Court Justice Rehnquist has reviewed countless segregation and civil rights cases and has never questioned Brown versus Board of Education or suggested a return to Plessy versus Ferguson.

Mr. President, as I previously stated, the Judiciary Committee has thor­oughly reviewed all allegations old and new and has found nothing that would keep Justice Rehnquist from being ele­vated to the position of Chief Justice. The committee also has the respon­sibility to determine if Justice Rehn­quist possesses qualities required of a Supreme Court Justice; namely, un­questioned integrity—honesty, incorruptibility, fairness, courage—the strength to render decisions in accord­ance with the Constitution and the will of the people expressed in the laws of Congress; compassion—which recognizes both the rights of individ­uals and the rights of society in the quest for equal justice under the law; proper judicial temperament—an understand­ing of, and appreciation for, our system of government, its respons­ibility of powers between the Federal and State governments.

2110

Based upon his responses to ques­tions during the hearings, his out­standing qualifications and intellect, it was determined that Justice Rehn­quist does possess these attributes and is overwhelmingly qualified to serve as Chief Justice of the United States.

Mr. President, President Reagan has submitted Mr. Rehnquist's name to be Chief Justice of the United States. The FBI investigated him after he was selected for that position. They found nothing wrong. They made a thorough investigation.

It came to the Judiciary Committee. We made a thorough investigation. We spent weeks on it and then we dragged out the hearings for week after week after week to accommodate the oppo­nents. And yet there was no merit in the allegations that were made.
The Judiciary Committee has recommended overwhelmingly that this man be confirmed. It is just not right to condemn him in the terms that have been used here and to use such phrasing as has been used. I say it is disgraceful.

I urge my colleagues to vote in favor of President Reagan's nomination of Justice Rehnquist to be Chief Justice of the United States.

Mr. President, questions have been raised about vacancies and the prospective vacancies on the Supreme Court and so forth.

I ask unanimous consent that a letter be printed in the Record. There being no objection, the letter was ordered to be printed in the Record, as follows:


HON. JOHN R. BOLTON, Assistant Attorney General, with attachments, be printed in the Record.

DEAR SENATOR THURMOND:

Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

This letter is written to you as Chairman of the Committee on the Judiciary to discuss the respective positions of the President, the Senate, and the President to confirm, an individual for a prospective vacancy on the Supreme Court. The Department of Justice has consistently maintained that the President has the power to nominate, and the Senate has the power to confirm, in anticipation of a vacancy which shall occur during the President's term of office. See, e.g., Department of Justice Memorandum re: Power of the President to nominate and of the Senate to confirm. Neither objection appears to be well grounded. Moreover, successors to district court judges who have been elevated to the court of appeals cannot go forward.

In our view, the President's constitutional power to nominate Justices for anticipated vacancies is limited only by his term of office. A President should not accept the resignation of a Justice as a constitutional matter, to make a prospective nomination for a vacancy that shall occur after his term of office expires because such a power would encroach upon the appointment power of his successor. However, no such limitation exists, in the absence of specific prohibitions, where the President nominates an individual for a vacancy which shall occur during his term of office.

For the above reasons, the Department of Justice believes that the President may nominate, and the Senate may confirm, individuals for anticipated vacancies on the Supreme Court. The appointment shall occur during the President's term of office. We hope this letter alleviates any remaining concerns on the part of members of your Committee.

Sincerely,

JOHN R. BOLTON, Assistant Attorney General

DEPARTMENT OF JUSTICE

Memorandum re: Power of the President to nominate and of the Senate to confirm Mr. Justice Fortas to be Chief Justice of the United States and Judge Thornberry to be Associate Justice of the Supreme Court

On June 13, 1968, Chief Justice Warren advised President Johnson of his "intention to retire as Chief Justice of the United States effective at midnight tonight." In his reply, June 26, the President stated, "With your agreement, I will accept your decision to retire effective at such time as a successor is qualified." On the same day Chief Justice Warren sent to the President a telegram in which the Chief Justice referred to the President's "letter of acceptance of my retirement," and expressed his deep appreciation of the President's warm words.

On June 26, the President also submitted to the Senate the nominations of Mr. Justice Fortas to be Chief Justice of the United States and Judge Thornberry to be Associate Justice of the Supreme Court. These nominations have been raised as to the power of the President to make and of the Senate to confirm these nominations. The primary objection is based upon the assertion that there is no present vacancy in the office of Chief Justice, and that nomination and confirmation of Mr. Justice Fortas is therefore improper. This seems to be an objection that nomination and confirmation of Judge Thornberry cannot be accomplished in these circumstances because the office to which he has been named is not yet vacant.

Neither objection appears to be well grounded. The term of Chief Justice Fortas's retirement, established in the correspondence between him and the President, is therefore the same as it is therefore the same that of his successor, Judge Thornberry. There is no indication that the President has power to nominate, and the Senate power to confirm, an individual for a vacancy which shall occur during his term of office.

As explained in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 153-157 (1803), the constitutional appointment process consists of three steps: (1) the full President nominates the person to be confirmed by the Senate; (2) the Senatorial advice and consent; and (3) the appointment by the President, of which the Commission is merely the evidence. Each step is essential to the assumption of authority by the officer or
It is not unusual for a Justice or judge to resign to take office. It is a matter of the power to fill anticipated vacancies. The more general power will be analyzed below, but it is instructive first to consider two directly pertinent instances for which documentation is available.

Mr. Justice Gray of the Supreme Court, on January 9, 1902, that he had decided to avail himself of the privilege to resign at full pay, and added:

"I should resign to take effect immediately, but for a doubt whether a resignation to take effect at a future day, or on the appointment of my successor, may be more agreeable to you."

President Roosevelt's acceptance, two days later, contained the following passage:

"It is with deep regret that I inform you that your letter left me with no alternative but to accept your resignation. As you know, it has always been my hope that you would continue on the bench for many years."

Two days later, however, President Roosevelt signed the article which contained the provision for his resignation to take effect on the appointment of his successor:

"The power of the President to appoint Judges of the United States Supreme Court by and with the advice and consent of the Senate, is conditioned on the present effectiveness of the office."

The circumstances is but one example of the power to fill anticipated vacancies. It is a condition of office that was the subject of the Kennedy-Prettyman correspondence. As a matter of fact, from the earliest years the Senate has exercised the power to confirm nominations to the Supreme Court, and vacancies in the near future are anticipated to take effect, by action of the incumbent or of the Senate, as the case may be. The first ruling on the subject was between the Senate, covering the years from 1789 to 1865, gives instances in which the Senate, covering the years from 1789 to 1865, gives instances in which the Senate has the power to confirm a nomination while the incumbent is still in office. These rulings clearly presuppose that the Senate has the power to confirm a nomination while the incumbent is still in office. The history of the Supreme Court contains several examples of actions, by the President and the Senate, to fill positions of the Chief Justice in advance of the effective date of the resignation or retirement of the incumbent. The history of the Supreme Court contains several examples of actions, by the President and the Senate, to fill positions of the Chief Justice in advance of the effective date of the resignation or retirement of the incumbent:

1. Mr. Justice Grier submitted his resignation on December 15, 1869, to take effect on February 1, 1870. President Grant nominated Edwin M. Stanton in his place on December 30, 1869. Stanton was confirmed and appointed the same day, and his commission read to take effect on or after February 1. However, due to his death on December 24, 1870, he never accepted, and the Senate never acted on his nomination. His successor was Nathan B. Goode, appointed by President Grant on January 28, 1870, to take effect on March 4, 1870.

2. Mr. Justice Gray resigned on July 9, 1902, effective on the appointment of his successor (see supra, pp. 4-5). On August 11, the newspapers announced that Justice Wendell Holmes had been "appointed" to sue.

"I appreciate your willingness to continue for this limited period in order that the Court may not be undelighted for any time during which a vacancy might otherwise exist."

Judge Prettyman replied to the President that he was "glad to comply with your preference in respect to the date upon which my retirement should take effect, but I notice to you was purposely indefinite."

Judge J. Skelly Wright was nominated on February 2, 1962, confirmed on February 28, and appointed March 30. He qualified on April 16, and Judge Prettyman retired as of April 15.

The history of the Constitution provides that a matured vacancy is a necessary condition of office. It is a condition of office that was the subject of the Kennedy-Prettyman correspondence. As a matter of fact, from the earliest years the Senate has exercised the power to confirm nominations to the Supreme Court, and vacancies in the near future are anticipated to take effect, by action of the incumbent or of the Senate, as the case may be. The first ruling on the subject was between the Senate, covering the years from 1789 to 1865, gives instances in which the Senate has the power to confirm a nomination while the incumbent is still in office. These rulings clearly presuppose that the Senate has the power to confirm a nomination while the incumbent is still in office. The history of the Supreme Court contains several examples of actions, by the President and the Senate, to fill positions of the Chief Justice in advance of the effective date of the resignation or retirement of the incumbent:

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2. Mr. Justice Gray resigned on July 9, 1902, effective on the appointment of his successor (see supra, pp. 4-5). On August 11, the newspapers announced that Justice Wendell Holmes had been "appointed" to sue.
ceed Mr. Justice Gray, Bowen, "Yankee from Nebraska," President Roosevelt had in fact on that day given Holmes a recess commission, which subsequently was confirmed by the Senate as Chief Justice of the highest court of Massachusetts, apparently did not want to serve without prior confirmation by the Senate. 

"Holmes," Vol. XXXIV, pp. 5, 21. There can be no question but that President Roosevelt would have submitted the Holmes nomination to the Senate prior to Justice Gray's death, had the Senate then been in session.

3. Mr. Justice Shiras submitted his resignation to take effect on February 24, 1903, On February 19, President Roosevelt nominated a "Circuit Judge Day to be Associate Justice of the United States District Court for the District of Columbia, and of Judge Homer Thornberry to succeed me. My associations on the court have been cordial and satisfying in every respect, and I have been here. The problem of age, however, is one that must bow to it. I have been advised that I am in as good physical condition as a man of my age, but I do not believe that any man can combat and, therefore, eventually must bow to it. I have been here."

The White House, June 12, 1968. The problem of age, however, is one that must bow to it. I have been advised that I am in as good physical condition as a man of my age, but I do not believe that any man can combat and, therefore, eventually must bow to it. I have been here.

"There is nothing inconsistent with the Constitution in the postponement of a vacancy, the recommendation and confirmation in the present circumstances. The contrary, this practice is consistent with the Constitution and the experience under it throughout our history. As President Kennedy wrote to Judge Prewitt in 1961, it has the beneficial effect that the President selected the Judge he desired for any time during which a vacancy might otherwise exist."

Number of federal judges have retired or vice a judge nominated to be a Judge."

The See also a letter of August 21, 1902 from President Roosevelt to Holmes: "After consulting one or two people, I feel that there is no necessity why you should be nominated in the recess. Accordingly I withdraw the recess appointment which I sent you, and I shall not send you another appointment unless you have been confirmed by the Senate, which I will think will be three or two days after it meets. Meanwhile, I strongly feel that you should continue as Chief Justice of Massachusetts." 

"Chief Justice Stone took his oath on July 3 (314 U.S. 417), but held his first day in Justice Jackson's confirmation until July 7 had no relation to that fact. The Jackson hearings, which commenced on the same day as the Stone hearings, took place over several days, June 21-30, and the Judiciary Committee report was not submitted until June 30. The confirmation of Judge Thornberry by arrangement was put over until the next session for conducting business in December, 1966, which was July 7.87 Cong. Rec. 5761, 5756, 5759 (1941)."

have more years ahead of him to cope with the problems which will come to the Court. I believe there are few people who have enjoyed serving the public or who are more grateful for the opportunity to have done so than Mr. President."

The regret that I learn of your desire to retire, knowing how much the nation has benefited from your service as Chief Justice, to respond to the calls which will be made upon you to furnish continued inspiration and guidance to the development of the rule of law both internationally and in our own nation. Nothing is more important than this work which you undertook so willingly and have well advanced.

Lyndon B. Johnson.

The White House, June 12, 1968. The problem of age, however, is one that must bow to it. I have been here.

The problem of age, however, is one that must bow to it. I have been here. You have by Congress to judges of seventy years of age who have more years ahead of him to cope with the problems which will come to the Court.

Mr. President: My secretary has read to me over the phone your letter of acceptance of my retirement. I am deeply appreciative of your warm words, and I send my congratulations to you on the nominations of Mr. Justice Fortas as my successor and of Judge Homer Thornberry to succeed him. Both are men of whom you can well be proud, and I feel sure they will add to the stature of the Court.

Lyndon B. Johnson.


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Mr. President: Being advised by my physicians that to hold the office of Justice of the Supreme Court for another term may seriously endanger my health, I have decided to avail myself of the privilege allowed by Congress to judges of seventy years of age and who have held office more than ten years to resign to take effect immediately, but for a doubt whether a resignation...
to take effect at a future day, or on the appointment of my successor, may be more advisable to you. Wishing that the first notice of my intention should go to yourself, I have not as yet mentioned it to any one else. Very respectfully and truly yours, HORACE GRAY.

5. Letter from President Roosevelt to Mr. Justice Gray, dated July 11, 1902: Mr. Justice Gray: It is with deep regret that I received your letter of the 9th instant, and accept your resignation. As you know, it has always been my hope that you would continue on the bench for many years. If agreeable to you, I will ask that the resignation take effect upon the appointment of your successor. It seems to me that the valiant captain who takes off his harness at the close of a long career of high service faithfully rendered, holds a position more enviable than that of almost any other man; and the position is yours. It has been your good fortune to render striking and distinguished service to the country in certain crises while you have been on the court—and this in addition of course to uniformly helping shape its action so as to keep it up on the highest standard set by the best constitutional lawyers of the past. I am very sorry that you have to leave, but you go with your honors thick upon you, and with behind you a career such as few Americans have had the chance to leave. With warm regards to Mrs. Gray, believe me, Faithfully yours,

Theodore Roosevelt.

6. Letter from Judge Prettyman to President Kennedy, dated December 14, 1961: DEAR MR. PRESIDENT: On October 17th last, I had been on the court sixteen years. In August I was seventy years old. Being thus qualified I wish to take advantage of the statute (Sec. 371(b) of Title 28, U.S. Code) which says a judge with such qualifications "may retain his office but retire from regular active service." The statute provides that you shall appoint a successor to a judge who retires effective upon the appointment and qualification of his successor. To date no one has been appointed and he is still on the bench in regular active service.

With deep regret I have the honor to be Yours sincerely,

E. BARRETT PRETTYMAN.

APPENDIX II


I. Nominations vice an incumbent who is being elevated at the same time.

December 21, 1976, p. 216.

I nominate the following persons to fill the offices annexed to their names, respectively, which became vacant during the recess of the Senate:

Jonathan Jackson, of Massachusetts, to be Senator for the district of Massachusetts, vice Nathaniel Gorham, deceased.

John Brooks, of Massachusetts, to be Inspector of Survey No. 2, in the district of Massachusetts, vice Jonathan Jackson, appointed Supervisor.

Samuel Bradford, of Massachusetts, to be Marshal for the district of Massachusetts, vice John Brooks, appointed Inspector of Survey No. 2, in that district.

Confirmed December 22, 1786, p. 217. A number of similar nominations and confirmations took place in 1781, in connection with the staffing of the circuit courts, pp. 381-385.

II. Nominations vice incumbents who desire to be relieved of their duties.

May 19, 1796, p. 209

The page numbers refer to the pages of Volume I of the Journal of the Executive Proceedings of the Senate.
I nominate Rufus King, of New York, to be Minister Plenipotentiary of the United States at the Court of Great Britain, in the room of Thomas Pinckney, who desires to be recalled.

David Humphreys, of Connecticut, to be the Minister Plenipotentiary of the United States at the Court of Spain; William Short, the resident Minister to that Court having desired to be recalled.

Confirmed, May 20, 1796, p. 209.

III. Nominations to fill terms about to expire.

1. January 10, 1798, p. 258

I nominate the following persons to be Marshals of the United States:

... (List of nominees)

Confirmed, January 12, 1798, p. 258.

2. December 9, 1799, p. 328

I nominate * * * David Mead Randolph, to be the present Marshal of the District of Virginia, for the term of four years, to commence on the twenty-eighth of January, current, when their present terms will expire.

Confirmed, December 6, 1799, p. 326.

3. February 4, 1802, p. 442

I nominate ** William Henry Harrison, to be Governor of the Indiana Territory from the 13th day of May next, when his present commission as Governor will expire.

Confirmed February 8, 1803, p. 442.

IV. Nominations to fill vacancies which will be caused by a resignation on a future day certain.

May 7, 1800, p. 352

I nominate the Honorable John Marshall, Esq. of Virginia, to be Secretary of the Department of War, in the place of the Honorable James McHenry, Esq, who has requested that he may be permitted to resign, and that his resignation be accepted to take place on the first day of June next.

May 12, 1800, p. 352

I nominate the Honorable John Marshall, Esq., of Virginia, to be Secretary of State, in place of the Honorable Timothy Pickering, Esq. removed.

The Honorable Samuel Dexter, Esq. of Massachusetts, to be Secretary of the Department of War, in the place of the Honorable John Marshall, nominated for promotion to the Office of State.

Confirmed, May 13, 1800, p. 364

V. Nomination to fill office, the incumbent of which is to be superseded.

I. NOMINATIONS IN ELECTION YEAR: BEFORE ELECTION

III. NOMINATIONS BETWEEN ELECTION AND INAUGURATION OF DIFFERENT PRESIDENT

Mr. THURMOND. Mr. President, in closing, I wish to take this opportunity to express my appreciation to the Republican Senators who supported this nomination and voted for cloture today. I would also like to thank Senator Orrin Hatch for his splendid work on this nomination. Every Republican

Senator on this floor voted for him. Not a single one voted against him. I wish to commend the able majority leader for what he has done to get this nomination up and for speaking on it forcefully. We are very indebted to him.

I wish to commend Senator STENNIS, who has been a judge himself from Mississippi. No one in the Senate is respected more than Judge STENNIS, who not only voted here for cloture and who is going to support the nomination, but who spoke out for him and I commend him. He is acting in a non-
partisan way, as we Senators should act on nominations, regardless of who is the President.

I wish to commend Senator Heflin, Senator Long, and the other Democratic sponsors, who supported his nomination, at least in voting for closure today.

I wish to especially commend Senator DeConcini who did a great deal of work on this nomination. He is in the Democratic Party. His address here on this subject is one of the finest I have heard on nominations since I have been in the Senate.

I would also like to take this opportunity to commend Duke Short, the chief investigator of the Judiciary Committee, and his investigator, Frank Klonoski, for the fine job they did investigating this nominee and for all that they have done to assist in this matter.

I wish to commend Jack Mitchell, Mark Goodin, and Melissa Nolan; Paul Morgan, of the Library of Congress; and Randy Rader, from Senator Hark's staff, and others whose names I will not mention at this time. We appreciate their fine cooperation.

This is a nomination, Mr. President, that, when it was sent to the Senate and the committee, should have sailed right through. Instead of that, it has taken weeks and weeks and weeks. We just wasted a lot of time here. When it came to the Senate, it should have sailed through.

It is just amazing to me the allegations they brought up here, especially after we answered them and explained them and after witnesses appearing before the committee did that. Yet, they go on and on and on.

Mr. President, I hope the time has now come when we can get to a vote and get the matter settled once and for all.

I wish to thank the distinguished ranking member, the distinguished Senator from Delaware, for the courtesies that he has extended to the majority in this matter. I thank him for that.

Mr. Biden. I thank my colleague, especially in light of his concluding remarks.

Mr. Thurmond. Mr. President, I think we are about ready to vote. I hope all Senators are here and they will cast their vote in favor of Mr. Rehnquist. The fight is over now. There is no use to continue it.

Someone said of the opposition that some of them were going on and on because they were trying to intimidate Senator Conrades and try to get him, if he is confirmed, to be more liberal. That is ridiculous allegation.

Mr. Rehnquist is what he is. He always has been. I think he is going to hand down decisions and call them just as he sees them—and that is what he should do—regardless of what people think. That is the reason we have an independent court. They do not have to come up for renomination and reappointment. They are appointed for life. They are independent.

I commend Justice Rehnquist for the great job he has done. I hope he will have 15 more years, or double that, on the Supreme Court after he has been confirmed.

The PRESIDING OFFICER. Is there further debate?

Mr. MELCHER. Mr. President, I have been concerned that Justice Rehnquist's previous action in political campaigns in Arizona aided and abetted tactics to challenge unlawfully black voters. Rehnquist's direct involvement is unclear, and he now testifies to deplore those tactics.

I do not pass judgment on his nomination on that basis.

Mr. President, I wish to especially commend Justice Rehnquist's previous action in political campaigns in Arizona aided and abetted tactics to challenge unlawfully black voters. Rehnquist's direct involvement is unclear, and he now testifies to deplore those tactics.

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Mr. President, I wish to especially commend Justice Rehnquist's previous action in political campaigns in Arizona aided and abetted tactics to challenge unlawfully black voters. Rehnquist's direct involvement is unclear, and he now testifies to deplore those tactics.
Mr. President, I wish to emphasize that while I have voted in favor of invoking cloture on the nomination of William Rehnquist, I intend to oppose the nomination when the time arrives for a final vote on confirmation. During 25 years in the Senate I have voted to support cloture on a filibuster. I believe that a majority of this body should work its will, regardless of the outcome, and that filibusters are not in the public interest. Having said that, I would reiterate my intention to oppose Mr. Rehnquist's nomination. The arguments, pro and con, are before the Senate and I believe it is time for the Senate to move toward a final vote on this nomination.

Mr. COHEN. Mr. President, the Senate's role in judicial appointments, and particularly the appointment of members of the Supreme Court, is one of its most important functions. In fulfilling its constitutional duty of advice and consent to the President, the Senate shares with the President the critical responsibility of shaping the quality of the Federal judiciary and, therefore, the quality of justice in our Nation.

Mr. President, I do not take this responsibility lightly, nor do I believe that the Senate should act as a rubber stamp, simply deferring to the President's wishes. Although there may appropriately be a strong presumption in favor of a Presidential nominee, the Senate and each individual Senator have an obligation to take an active role in evaluating the qualifications and competencies of those nominat

Mr. President, I believe there is a clear line between upholding the duties and responsibilities of the Senate and the rights and needs of the American people. Our duty is to ensure that our judicial system is representative of the values and beliefs of the American people. We must ensure that the judiciary is composed of individuals who are not only competent and qualified, but also committed to the principles and ideals upon which our country is founded.

Mr. President, I am not convinced that William Rehnquist is the best candidate for Chief Justice. I believe there is virtually unanimous agreement that Justice Rehnquist is well qualified to serve as Chief Justice. The Standing Committee on Federal Judiciary of the American Bar Association concluded, after an extensive investigation, that Justice Rehnquist "meets the highest standards of professional competence. Judicial temperament has borne the test of time and is the best available for appointment as Chief Justice of the United States, and is entitled to the Committee's highest evaluation of the nominees to the Supreme Court." Justice Rehnquist is described by fellow members of the judiciary as a "true scholar," "unbelievably brilliant," and "a very capable individual in every respect." Moreover, he has the respect and esteem of his fellow Associate Justices and the current Chief Justice, all of whom have strongly endorsed his nomination.

The question before the Senate is not whether Justice Rehnquist should remain or be allowed to serve on the Supreme Court, but whether he should be elevated to the position of Chief Justice of the United States and Administrator of the Federal judiciary. Regardless of the outcome of the Senate's debate on this nomination, Justice Rehnquist will remain on the Supreme Court and will continue to express his opinions, in the majority or in the dissent, as a member of the Court.

I fully expect that among these future opinions, there will be some, and perhaps many, with which I will disagree. I make this prediction based on the record of the past, for I do not share a number of the views which have been expressed by Justice Rehnquist and, in fact, find myself in strong disagreement with many of his past judicial opinions. I believe it is my duty as a Senator to express my concerns regarding his candid nature, his sensitivity to our Nation's legal traditions, and his approach to legal issues.

Despite my differences with Justice Rehnquist, I believe his qualifications are sound. His knowledge, wisdom, and temperament have been tested and proven. However, I am concerned that his tenure on the Court has not been free from controversy. His vote in support of the Equal Rights Amendment and his role in the confirmation of other nominees to the Federal judiciary have raised questions regarding his commitment to equal rights for minorities and women.

justice Rehnquist during his tenure in the post-1971 Supreme Court, during which civil rights issues have been a major focus. The question before the Senate is not whether Justice Rehnquist should become Chief Justice Rehnquist, but whether he is the best candidate for the position.

Mr. President, I have voted in favor of invoking cloture on the nomination of William Rehnquist to be Chief Justice of the U.S. Supreme Court, several issues touching on his fitness for this position have been raised. However, in regard to his intelligence, temperament, and his academic and professional qualifications, I believe there is virtually unanimous agreement that Justice Rehnquist is well qualified to serve as Chief Justice. The Standing Committee on Federal Judiciary of the American Bar Association concluded, after an extensive investigation, that Justice Rehnquist "meets the highest standards of professional competence. Judicial temperament has borne the test of time and is the best available for appointment as Chief Justice of the United States, and is entitled to the Committee's highest evaluation of the nominees to the Supreme Court." Justice Rehnquist is described by fellow members of the judiciary as a "true scholar," "unbelievably brilliant," and "a very capable individual in every respect." Moreover, he has the respect and esteem of his fellow Associate Justices and the current Chief Justice, all of whom have strongly endorsed his nomination.

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stition, in our laws, and in our vision of a more perfect society.

Mr. President, Justice Rehnquist fails to meet those standards.

The ROLE OF THE SENATE

The Senate has no role more important than its role of advice and consent to judicial nominations. And no judicial nomination is more important than one to the Supreme Court, one to the highest court of Justice.

We have a great responsibility. Just as the President is empowered to make nominations, we are entrusted with the power to reject them. We are equal with the President. Let me say that, at the outset, because I believe some of my colleagues would disagree. Some would say the President—a popular President—has the right to whom he chooses, unless we prove the nominee to be a liar or a cheat or an incompetent. Some would say that we ought not to inquire into the nominee for the President to do that. And, we can be sure, those views were a factor in this nomination. But, it is not our job to inquire as well. That is what some may say. But, I disagree. The Senate's job is not so confined. It is not so mechanical. And it is not so easy.

We sit in judgment of someone who would lead one separate branch of Government. This is not some post within the executive branch, some post in the President's own administration. For that, perhaps more latitude is justified. A President is elected to lead that branch, and to assemble a government. But, we are elected to the Congress. And both the President and the Senate must join as partners in the selection of the members of the third branch—the judiciary.

We sit in judgment of a nominee to the highest court. The Court does not merely find the law, it shapes it. The Court can feed the growth of our liberties and the moral height of our Nation, or it can stunt them, starve them, and deny them their flowering.

We sit in judgment of a nominee who, while he serves today, would acquire greater power and greater stature, if confirmed as Chief Justice. He would have greater power to shape consensus and to cast the direction that lower courts must follow. He would be a symbol of American justice—a symbol of its achievements and a symbol of its failures.

We have a duty to exercise judgment. We have a duty to consider some ourselves. Is this the person the Nation needs?

Mr. President, I am not a lawyer. But, that’s my view of our role. It conforms with the intent of the framers of the Constitution. It is upheld by history.

QUESTIONS OF INTEGRITY

This Senate must hold this nominee up to the highest standards of integrity. There must be no doubts. There must be no questions.

But, Mr. President, questions abound. Doubts are raised. There are questions of credibility and doubts about ethical responsibility.

Mr. President, people change. They grow. They change their minds. I would have seen law w. I could accept the fact that a person may have grown with it. That, in the past, he held views that would have been respectable in many quarters then, but would be untenable in most quarters today.

But Justice Rehnquist does not present such a picture of growth. Rather, he denies that he held now-rejected views. His denials are unbelievable. They’re are unbelievable in the light of evidence. They’re unbelievable in the light of views that Justice Rehnquist has expressed over the years. And they raise profound questions about his credibility, his integrity, and his suitability to become Chief Justice.

As a young man, serving as a clerk to Justice Jackson, Justice Rehnquist argued for keeping the rule of separate but equal. Justice Rehnquist claims that he did so. Our law has grown over the last 30 years. I can accept the fact that a person may have grown with it. That, in the past, he held views that would have been respectable in many quarters then, but would be untenable in most quarters today.

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ney Rehnquist did not have knowledge of facts and circumstances that should have disqualified Justice Rehnquist.

Compounding this breach of ethics, attorney Rehnquist testified about the Latham case before the U.S. Senate. He testified about important facts involving the case. He also expressed doubts about whether the case should be heard by the courts. This is the issue that eventually came to the Supreme Court.

A leading expert on legal ethics, Professor Geoffrey Hazard, Jr. of Yale Law School, has written a letter on this matter. He has concluded that the Justice violated rules of legal ethics.

But, Mr. President, one does not have to be an expert on legal ethics, to see that it was wrong for the Justice to sit. He knew facts that the parties did not know and that they could not address. He had formed an opinion about the case before the parties had a chance to make their arguments. That is wrong. And it reflects negatively on the suitability of Justice Rehnquist to be elevated to the position of Chief Justice.

Mr. President, significant questions have been raised about the integrity of Justice Rehnquist. About his candor. About his legal responsibility. It is enough, alone, to deny him elevation to the highest judicial post in the land? Perhaps. But, we need not decide that question.

HOSTILITY TO THE IDEALS WE CHERISH

Mr. President, more troubling than the question about integrity, credibility, and ethical responsibility, is the nominee's consistent hostility to the rights and ideals we cherish. Justice Rehnquist has tried to impose a cramped and arthritic view of rights... rights that should flex and bend and reach out to embrace those left out. For this reason, he should be denied the post of Chief Justice.

Equal protection of the law is not just a guarantee of the Constitution. It is an ideal. It is a goal of our Nation. To promote equality. To raise up those all but the stingiest protection.

Justice Rehnquist would deny these people all but the stingiest protection. But, thankfully, he has often been alone. He has stood on the fringes of the Court. He has been pushed into dissent from rulings to expand civil rights, to bar bias as minorities, to uphold the rights of individuals.

Mr. President, this is where Mr. Rehnquist should stay. He should not rise to the top and center of the Court. No one so extreme, so out of touch with the mainstream of thought, should be the symbol of Justice in our Nation.

Rather than unite the Court and unite the Nation, he would divide it. Rather than build a consensus for expanding rights and liberty, he would fracture it.

This nominee would close the door to Justice. The Courts of our Nation stand as a check against the tyranny of the majority. They defend the individual. As the protector of the rights established in the Constitution and our laws.

Justice Rehnquist would close the door to the courthouse. He would deny access to the courts. In decision after decision, he has tried to deny standing, the right to go to court, to resolve disputes.

Mr. President, there is no right more basic to this Nation's history, its reason for being, than the right of free individuals and the right that the State shall not establish religion. This Nation was founded by people seeking to escape religious intolerance.

The separation of church and State is basic to this fabric of this Nation. Guarding against Government sponsorship of religion is as important as guarding the right of free exercise.

But, Justice Rehnquist would disagree. Time after time, he has departed from the court majority, to uphold laws said to sponsor religion.

Had Justice Rehnquist spoken for the court, for the Nation, each time has spoken in dissent, our laws would be different laws; our rights would be lesser rights; and our Nation would be a poorer nation.

Racial segregation would prevail. Women would suffer second class citizenship. The wall between church and State would have crumbled. The rights of the individual would suffer at the hands of the State. The door to the courthouse would be closed.

This is what Justice Rehnquist has done. This is what he would stand for, as the chief of the courts, the guardians of the Constitution and the laws of the Nation.

He would stand as a symbol not of our aspirations, but of our failures. He would stand for rigid, unyielding view of rights, when the hallmark of our Constitution and our system of laws has been its flexibility, its vitality, its ability, to adapt to changing times and expanding conceptions of liberty.

I cannot support this nominee for Chief Justice. He fails to meet the highest standards of integrity. But more important, it seems decided, he fails to meet the highest standards of fidelity to the ideas of freedom and equality that we hold so dear.

Mr. President, the present controversy over the nomination of Justice Rehnquist seems not to concern his immaculate record, but rather the fact that he is a conservative and a strong supporter of Reagan administration policies. The campaign in opposition to this nomination is being conducted primarily by those who, quite simply, do not agree with Justice Rehnquist's political disposition. And this effort will be. I am confident, an unsuccessful attempt to derail the nomination of someone who has faithfully served the Court for the past 15 years.

In closing, Mr. President, I would like to remind my colleagues that the American Bar Association gave Justice Rehnquist its highest rating when evaluating his qualifications for the position of Chief Justice. I am of the opinion that Associate Justice Rehnquist will make an excellent Chief Justice. Accordingly, I wholeheartedly support his nomination and urge my colleagues to do the same.

Mr. DIXON, Mr. President, shortly, we will be asked to advise and consent to the nomination of Mr. Justice Rehnquist to be Chief Justice of the Supreme Court of the United States.

This is a particularly challenging obligation of each Senator, because once confirmed, the Chief Justice serves for
life, pending good behavior, and closely
limit its application to all aspects of our national experience.

I want to say, Mr. President, that I take this solemn duty most seriously, and regard it as a sacred trust.

I will review the pros and cons of Mr. Justice Rehnquist, as I view him, but first I would like to set forth my own interpretation of the correct and proper discharge of my responsibilities as a Senator regarding this appointment.

I believe that a Senator should require the following attributes in a nominee for a high Federal post, and particularly the Supreme Bench:

First. Great intellectual capacity.

Second. The kind of background and training that appropriately prepares the nominee for the post to which he or she is recommended.

Third. Personal integrity and a good reputation.

I will return to these criteria after I have briefly examined some of Justice Rehnquist's qualifications. I will also deal with a series of charges leveled against Justice Rehnquist during his confirmation hearing in the Senate Judiciary Committee.

Mr. President, the American Bar Association has examined these qualifications and, I believe, fairly, from the Bar Association's report. It reads:

The committee unanimously has found that Justice Rehnquist meets the highest standards of professional competence, judicial temperament and integrity, is among the best available for appointment as Chief Justice of the United States, and belongs to the committee's highest evaluation.

The Bar Association continues:

Members of the Judiciary who know him describe Justice Rehnquist as a true scholar, collegial, genial and low key unbelievably brilliant • • • a very capable individual in every respect.

Finally, the American Bar Association examined approximately 200 of Justice Rehnquist’s opinions, and concluded that his legal abilities are of the “highest quality.”

Mr. President, in addition to weighing the recommendations of the American Bar Association, the Judiciary Committee examined some charges against Justice Rehnquist.

A major matter in the committee was the alleged involvement of the nominee in aggressive vote challenges in Arizona 20 years ago. Mr. Rehnquist denies election involvement, but essentially denies partisan excessiveness. As a participant in the elective process for a good many years, I must find that there is nothing at all unusual in election challenges. This is a customary and longstanding practice in Illinois politics, and has been employed by many members of both political parties in my State. It is nothing new, Mr. President. I would also suggest that the facts of the Arizona case are in serious dispute.

The Democratic chairman in Maricopa County, AZ, at the time of the alleged election challenges was Judge Vincent Maggiore. The judge informed the Senate Judiciary Committee, and I quote:

At no time did anybody come to me and state that Justice Rehnquist had admitted any of the acts that I have heard for the last 2 or 3 days. • • • I was the party leader, and, for sure, all of these things should have come to me.

Page 12 of the Judiciary Committee's report states plainly:

Justice Rehnquist • • • did not participate in any vote challenging or harassment.

Mr. President, some contend that Justice Rehnquist has peculiar "memory failure" in this phase of his life, but is that peculiar?

Twenty years ago, I was a party leader in the Illinois State Senate. I remember that phase of my life with great joy and satisfaction and I can recall all of the good fights, and the major issues of that time. But I cannot recall every detail of that period with great exactness, and I would not expect another busy individual like Mr. Rehnquist to have perfect recall either.

Prankily, I would not refuse this high office to Mr. Rehnquist on the basis of a 25-year-old historical experience in substantial dispute.

Mr. President, the matter of the restrictive covenants in the deeds has been troublesome to many of us, but, clearly, it is a situation that is common to a good many substantial people, public service. I do not find it particularly difficult to believe that Justice Rehnquist was unable to immediately recall a letter from his attorney describing the title on a Vermont property. That letter included a reference to the restrictive covenant. Mr. Rehnquist immediately took steps to remove the covenant, and informed the committee of his actions. Mr. Rehnquist, certainly this issue ought not to disqualify the nominee.

On the matter of the Cornell Family Trust, I believe allegations that Justice Rehnquist somehow acted improperly as a lawyer. Mr. Rehnquist is a very capable individual in every respect. Finally, the American Bar Association examined approximately 200 of Justice Rehnquist’s opinions, and concluded that his legal abilities are of the “highest quality.”

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First, he is exceedingly bright—he meets the test on intellectual capacity; second, he is exceedingly bright—he meets the test on intellectual capacity; and productive. He has authored more than any of his colleagues during that period. He has also been a frequent dissenter—more than 40. This is the third highest number among those currently on the Court.

He has unequalled experience, and has the temperament and collegiality necessary to serve as a leader:ship on the Court. His academic credentials are the best: He was first in his class at Stanford law school; he has a master's degree in history from Harvard, where he had highest honors at Stanford in his undergraduate studies.

He was found to be well qualified by the American Bar Association—the highest rating to be given. And this rating was bestowed after in-depth interviews with all other members of the Supreme Court, and literally hundreds of judges, scholars and lawyers throughout the country.

What more can we ask?

Mr. President, the critics of this nominee have raised a number of objections to confirmation. In my view, they do not presage a strong enough need to warrant a negative vote. Since I have already set forth my analysis of these objections, I will not again belabor these points, except for a few brief observations.

First, it is said that he is an extremist—often dissenting from his colleagues. Yet he seems to reflect the views of a majority of his court colleagues, and many other decisions of the Justice. He certainly has the confidence of the President, who in turn, received an overwhelming mandate from the electorate in 1980, and again in 1984. His is extremism, then the majority of the American people fit into that same mold.

It is said that his views on school desegregation are extreme—a throwback to Plessy versus Ferguson and its abhorrent separate but equal doctrine. But as evidence of this argument, a 34-year-old law clerk’s memo is cited. At the same time, 34 opinions of the Supreme Court in the past 15 years, in which Justice Rehnquist either authored or joined with the majority, to uphold the landmark Brown versus the Board, are ignored. To me, that is the best evidence upon which to weigh this argument.

Charges have been made that Mr. Rehnquist engaged in partisan voter intimidation tactics in his time as a practicing lawyer in Phoenix in the early 1960’s. Yet these charges were made by a group of avowed Democratic party officials, and denied by a group of partisan Republicans—and including some former local Democratic party officials. And we have the repeated flat denials of intimidation by the nominee himself. To me, after all this passage of time, and the entirely resolved nature of much of the accunulatory material, again the argument must favor the nominee.

Attempts have also been made to discredit the nominee because of the remarkable reluctance of the nominee himself in the deeds of two of the properties which the Justice acquired. To me, this is by far the weakest opposition argument. These repugnant provisions have long since been eliminated in the books of every courthouse in the country. Since 1948, they are utterly unenforceable, in the wake of the Supreme Court decision in Shelley versus Kraemer. But the opponents somehow try to translate these relics into the present state of mind of the nominee. This is simply sophistry and nothing more.

The opposition argument that has the most merit, and indeed was a close question, as the nominee himself conceded, was the decision of Justice Rehnquist to participate in the case of Maryland versus Ferguson in the 1970 May-day demonstrations and disturbances. While serving as Assistant Attorney General at the time, he prepared memoranda and was otherwise involved. These charges have been met by the 16th Chief Justice of the United States. And I shall do so with a firm conviction that the Nation, and the American people, will be well served. I shall be brief also, because the Senate has already spent the better part of a week on this nomination, often going over the same few arguments endlessly. I remind the Senate that this is the third time we have been asked to confirm Justice Rehnquist. He was approved as an Assistant Attorney General in 1969. He was confirmed as an Associate Justice of the Supreme Court in 1971. The Senate is currently holding 4 days of hearings, receiving testimony from more than 40 witnesses over 40 hours. Even the most die-hard opponent must concede that the Senate has given the most careful attention to this nominee.

Chairman Thurmond certainly has accommodated opponents during the committee process; this Senator also has made every attempt to accommodate opponents. Only with great reluctance was a petition for cloture filed last Monday evening. Even then, up until the last moment, I felt we would be able to avoid cloture—at least that was my impression. But it did not happen.

Mr. President, it is unquestioned that Justice Rehnquist brings a unique set of credentials to the Senate for review. His 15 years of service on the High Court has simply been a model for justices and judges every- where in this land. He has been prolific and productive. He has authored more than 230 majority opinions—more than any of his colleagues during that period. He has also been a frequent dissenter—more than 40. This is the third highest number among those currently on the Court.

He has unequalled experience, and has the temperament and collegiality necessary to serve as a leader:ship on the Court. His academic credentials are the best: He was first in his class at Stanford law school; he has a master's degree in history from Harvard, where he had highest honors at Stanford in his undergraduate studies.

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Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. DOLE. Let me announce that I think we want to give a little warning to Members who may be scattered about. We are about to vote on the Rehnquist nomination.

Following the vote on the Rehnquist nomination, we will take up the Scalia nomination. I do not believe that will take any great deal of time. There will be a rollcall vote on that yet this evening. Then we will either go back to product liability, or to reconciliation. That should be of some encouragement. But we will not try to finish this evening.

So let me just suggest the absence of a quorum for a minute or two.

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.

There being no further debate, the question is, Will the Senate advise and consent to the nomination of William Rehnquist, of Virginia, to be Chief Justice of the United States of America?

On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from Utah [Mr. GARN] and the Senator from Arizona [Mr. GOLDWATER] are necessarily absent.

I further announce that, if present and voting, the Senator from Utah [Mr. GARN] would vote "yea.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 65, nays 33, as follows:

(Rollcall Vote No. 266 Ex.)

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A number of very prominent individuals testified in support of Judge Scalia, including Carla Hills, the former Secretary of Housing and Urban Development; Erwin Griswold, former Solicitor General of the United States and former dean of Harvard
Representatives of the American Bar Association's Standing Committee on Federal Judiciary testified before the Judiciary Committee and stated that Judge Scalia was considered to be well qualified for the position of Associate Justice of the Supreme Court. This is the highest rating given by the ABA's Committee for Supreme Court nominees. The ABA representatives testified concerning the scope of their investigation and the results thereof. The ABA committee interviewed more than 340 persons, of which over 200 were State judges who knew Judge Scalia. Those judges who knew Judge Scalia spoke enthusiastically of his keen intellect, his careful and thoughtful analysis of legal problems, and his excellent writing ability. They also commented on his congeniality and sense of humor. The Scalia investigation also included interviews with approximately 80 practicing lawyers throughout the United States. The ABA reports that from the standpoint of his intellect and competence, temperament and integrity he is well regarded by almost all of the practicing attorneys who know him. The ABA interviewed more than 60 law school deans and faculty members concerning Judge Scalia's qualifications and he was uniformly praised for his ability, writing skills and intellect. Judge Scalia's opinions issued while on the court of appeals were examined by the dean and a number of law school professors. University of Virginia and University of Michigan, as well as by a separate group of practicing lawyers. Both of these groups praised his intellectual capacity, his clarity of expression, his ability to analyze complex legal issues, as well as his organizational skills and articulation of ideas.

The picture of Judge Scalia that emerges as a result of the Judiciary Committee's investigation and hearings is that of an individual who has a strong intellectual capacity and is fair and honest. One who issues well reasoned and well written opinions who possesses a warm and friendly personality. An individual that is not only competent but one that will seek advise when necessary and demonstrate development of his convictions when appropriate.

Judge Scalia has an excellent record of accomplishments. He had a distinguished academic career as a law professor and a practiced law from the perspective of both the private sector and as a Government attorney; and, he has served as a judge on the U.S. Court of Appeals. He possesses the necessary qualities to serve with distinction in the nation's highest court. When he has been nominated and I urge my colleagues to vote for confirmation of President Reagan's outstanding selection of Antonin Scalia to be Associate Justice of the U.S. Supreme Court.

He is well qualified. The American Bar Association gave him the highest rating. The Judiciary Committee investigated him carefully as the FBI did. There was no reason to hold him in any way, shape, or form.

I hope he could be confirmed unanimously, and if the Members put their statements in the Record we can finish this in 5 minutes.

Mr. BIDEN. Mr. President, as I always do, I will take the advice of my chairman and put my statement in the Record.

Today marks the final stage of the process to answer the question "will the Senate advise and consent to the nomination of Antonin Scalia to be an Associate Justice of the U.S. Supreme Court?" The nominee's record has been subjected to an extensive review; the nominee, and numerous witnesses both pro and con, testified before the Judiciary Committee; and the committee, after weighing all the evidence, has voted its unanimous recommendation that the nominee be confirmed.

Now, it is the responsibility of the full Senate to confirm his nomination.

Much of our attention during the past 2 months has been focused on the nomination of Associate Justice William Rehnquist to the position of Chief Justice. We should not, however, allow our understandable concern with settled constitutional practice and the existing balance of this Court to be represented on the bench.

When we began the consideration of this nomination I stated that the crucial question for me was whether the nominee adhered to a judicial philosophy that would unravel the broad fabric of settled practice. Such a nominee should be rejected because his or her presence on the Court would severely disrupt the delicate process of constitutional adjudication. While I would oppose any nominee with such a rigid and potentially disruptive philosophy, I may disagree with the nominee about the correct outcome of one or another matter within the legitimate parameters of debate. I will not oppose a nominee to lead this Senate to oppose a nomination.

Nevertheless, the particulars of a nominee's judicial philosophy should be considered in determining whether his or her appointment would fundamentally alter the balance of the Court. I firmly believe that a diversity of views from liberal to conservative should be represented on the bench. Such diversity contributes to the American people's belief that they can get fair hearing from the nine Supreme Court judges, a belief that is crucial to continued faith in the judicial system. We should, therefore, proceed with extreme caution before approving the appointment of a nominee whose appointment would fundamentally alter, in any direction, the balance of the Court, because—to paraphrase Justice Rehnquist—just as it would be wrong to have nine Antonin Scalias on the Court, it would also be wrong to have nine Justice Brennons on the Court.

Of course, in addition to satisfying the foregoing requirements, before his or her nomination should be favorably considered a nominee to the High Court must possess the professional excellence and integrity we have the right to demand of a Supreme Court Justice.

The nomination of Judge Scalia presents some difficult questions for those of us seeking to determine the impact of his judicial philosophy on settled constitutional practice and the existing balance of this Court.

President Reagan's outstanding selection of Antonin Scalia to fill the vacancy created by the retirement of Justice Lewis Powell adds the third member of the Court to be nominated in the past 2 months to join that panel of nine men and one woman that is entrusted with the guardianship of our constitutional heritage.

When he declined to answer questions that his presence on the Court would severely disrupt the delicate process of constitutional adjudication. While I would oppose any nominee with such a rigid and potentially disruptive philosophy, I may disagree with the nominee about the correct outcome of one or another matter within the legitimate parameters of debate. I will not oppose a nominee to lead this Senate to oppose a nomination.

Finally, Judge Scalia adopted an extreme view of the proper scope of response by a judicial nominee in a nomination hearing. Adhering to that view he declined to answer questions that might clarify his judicial philosophy. While respecting Judge Scalia's view, I find, as did a number of my colleagues on the Judiciary Committee, that the limitations he has adopted severely hampers the Senate's ability to perform its constitutionally mandated role.

Working within these limitations, I have attempted to ascertain whether Judge Scalia's judicial philosophy raises a concern about his willingness
to adhere to settled doctrine in a number of important areas. I was greatly encouraged by Judge Scalia’s statement that he does not have an agenda of cases he is seeking to overturn. I am particularly encouraged by his stated respect for the doctrine of stare decisis and its applicability to the Supreme Court as well as the lower Federal courts.

Although I strongly disagree with Judge Scalia’s judicial philosophy in a number of areas, I find his view to be within the legitimate parameters of debate. Judge Scalia’s judicial philosophy strikes me as very conservative. I do not, however, find him significantly more conservative than Chief Justice Burger; therefore, I do not have undue concern about the impact of this appointment on the balance of the Court.

Mr. President, I will take less than 2 minutes to summarize.

Mr. President, there is a significant distinction between this nominee and the last one. One is this nominee has demonstrated throughout his career that he is an intellectual flexibility. He is not a rigidity man and he does engage in and is willing to engage in discussion of new ideas, different than those which are the ones that he had been predisposed at that point to hold. He is open, he is straightforward, he is candid.

In addition to that, notwithstanding his conservative bent, there is no indication that the nominee’s judicial philosophy would unravel the settled fabric of constitutional law.

Further, given the almost unanimous view that Judge Scalia is a man of the utmost ability, an able judge, and a willing participant in the intellectual give and take crucial to arriving at the consensus that lends credibility to decisions of a court I believe that, despite my differences with many of Judge Scalia’s views, the Senate should confirm his nomination to be an associate justice of the United States Supreme Court.

I think he is a fine man. I think he should be on the Court, and I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I did have the opportunity as a member of the Judiciary Committee to hear out this nominee for service on the Supreme Court of the United States. Although I am troubled by some of the views expressed by Judge Scalia in some of the decisions he has written, I too find that Judge Scalia is clearly in the mainstream of thought of our society and I would hope that he would demonstrate the kind of opportunities for growth and sensitivity on many of these issues and questions.

I support the nomination of Judge Scalia to be an Associate Justice of the Supreme Court. This nomination raises fewer of the concerns that have led me to oppose the nomination of Justice Rehnquist to be Chief Justice.

In my view, Justice Rehnquist’s career of relentless opposition to fundamental claims involving issues such as racial rights for women, freedom of speech, and separation of church and state places him outside the mainstream of American constitutional law as an extremist who should not be confirmed as Chief Justice of the United States.

Judge Scalia has been on the bench only 4 years, and has not ruled on many basic constitutional issues. His record in these areas is less complete than Justice Rehnquist’s. On the available record, I disagree with Judge Scalia on women’s rights, and it is fair to say that his position on this issue seems as insensitive as Justice Rehnquist’s.

I am also concerned about Judge Scalia’s writings on two important issues in administrative law, his apparent views that the independent agencies are offended that the courts can undo the New Deal by denying Congress the power to delegate authority to regulatory agencies.

But in other areas that are of major concern to me, it is difficult to maintain that Judge Scalia is outside the mainstream. Should he be confirmed as a Justice, I hope that as a result of his new rank, he will look with greater sensitivity on critical issues, especially race discrimination and the right of women to escape their second-class status under the law and to share fully in the protections of the Constitution.

Finally, the nomination of Judge Scalia presents none of the troubling issues with respect to truthfulness, candor, judicial ethics, and full disclosure that have marred the nomination of Justice Rehnquist.

As a scholar, public official, and Federal judge, Mr. Scalia has demonstrated a brilliant legal intellect and earned the respect—even the affection—of colleagues whose personal philosophies are far different from his own. I will vote in favor of his confirmation.

Mr. President, it is quite obvious that the nomination of Judge Scalia to become a Justice of the Supreme Court is going to pass overwhelmingly in this body. I doubt very much if there will be one negative vote against him.

But I think that that vote is proof positive that the previous vote of some of us who had to vote against Justice Rehnquist had nothing to do with the man’s political views.

There is not much question in anybody’s mind that Judge Scalia is every bit as intellectual as Justice Rehnquist and some stated before our committee that in all probability he is more conservative.

That was not the issue. That is not the issue.

We all agree Judge Scalia is a man of integrity. To deny him a man of legal ability, Judge Scalia comes to the Supreme Court with an excellent legal background.

So there will be no votes against him on that or two.

They will not be based upon his political philosophy.

Those who would argue that the previous votes of 33 Members of this body who voted against the confirmation of Justice Rehnquist had something to do with political ideology I think that will be totally refuted when the vote is concluded in connection with the confirmation of Judge Scalia to become Justice Scalia of the Supreme Court.

I am voting to confirm Judge Scalia to the post of Associate Justice of the Supreme Court.

I have decided to vote for him for several reasons. He is a distinguished member of the legal profession, he is very well-respected, and he is sufficiently respectful of Federal statutory and constitutional law.

His achievements before his appointment to the court of appeals are well known. He attended a distinguished law school. He was an associate in a major law firm. He taught at some of the finest law schools in the country, and served the United States twice in posts which required Senate confirmation.

He has been praised for both his intellect and his wit.

His integrity has not been questioned.

Since 1982, when he was appointed to the U.S. Court of Appeals, he has written over 100 opinions. These opinions cover a variety of subjects—administrative law, court access, consumer law, labor law, the Freedom of Information Act, and the Constitution.

There is no question that his opinions have been carefully written and well-reasoned. His opinions have garnered the support of a wide cross-section of the court’s judges including conservative, moderate, and liberal judges.

There is also no question that some of these opinions are controversial. For example, his opinions on the Freedom of Information Act have been criticized because most have rejected freedom of information requests. It is not difficult to understand why his decisionmaking in this area has evoked concern. Judge Scalia was quite critical of the Freedom of Information Act before he became a Federal judge. But his Freedom of Information Act opinions have been well-reasoned and unbiased, and his opinions have been joined by various members of the court of appeals. In addition, in the course of his opinions, he has ex-
plicitly acknowledged and accepted the goals of the act.

It has also been suggested that Judge Scalia has shown a closed mind and an inability to the needs of women, minorities, and the poor and a steadfast opposition to enforcing basic constitutional rights. These concerns are reasonable given that the point of some articles Judge Scalia wrote before he became a judge.

But while I disagree with the results he has reached in some decisions, I must note that he has not shown himself to be hostile to basic constitutional values.

It appears that he has been a fair and openminded judge on the court of appeals. I have every reason to believe that he will maintain this attitude when he joins the Supreme Court of the United States.

My vote should not be misinterpreted as a vote for Presidential prerogative in the selection of Supreme Court Justices.

The Senate has a crucial—and equal role to play in the confirmation process. I will vote for Judge Scalia, despite his conservative views, because I believe he is qualified.

I will vote for Judge Scalia because I do not believe that his presence on the Court will shift the Court dramatically and dangerously to the right.

I will vote for Judge Scalia because I do not believe that his presence on the Court will endanger the basic individual rights protections Americans enjoy today.

But if the confirmation of future Supreme Court nominees would undermine the role of the Court in the protection of individual rights, I will not hesitate to oppose those nominees.

And if the confirmation of future nominees would threaten the stability of the Court, I will not hesitate to oppose those nominees.

Today, however, I am pleased that no continuing controversy has arisen in connection with this nomination. I am pleased to vote for Judge Scalia and I congratulate him on his inevitable confirmation.

The PRESIDING OFFICER (Mr. Wilson). The majority leader.

Mr. DOLE. Mr. President, are the yeas and nays ordered.

The PRESIDING OFFICER. They are not.

Mr. DOLE. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. DOLE. Mr. President, the Senate now proceeds to consider the nomination of Antonin Scalia to be an Associate Justice of the Supreme Court. In contrast to the nomination of William Rehnquist, this nomination has been a "piece of cake." Perhaps Judge Scalia indirectly benefited from the "controversy" that swirled around the Rehnquist nomination. In any event, it is likely that the Senate will approve this nomination by acclamation. As of the moment, I know of no Senator who is actively opposing Judge Scalia.

Although there may be some indirect benefit to demurring, I have tried to keep all the attention that the Senate has given to Justice Rehnquist, at best, it is a minor factor in this instance. Judge Scalia has such broad and strong support because he is an exceptionally well-qualified candidate.

It is not my intention to dwell at length on extolling the virtues of Mr. Scalia, Mr. President, but I would like to briefly recount some of those qualities which have earned him such broad support in the Senate.

Judge Scalia graduated with honors from Georgetown University and Harvard Law School. He has been a law professor and scholar at the Universities of Chicago and Virginia. In the early 1970's he joined the executive branch of Government and quickly rose to become the Assistant Attorney General, and legal counsel to the Attorney General and the President.

Of course, of course, of course, of course.

In the Government. It was the same post occupied by Chief Justice Rehnquist. Judge Scalia also had a distinguished career in private practice in Ohio.

But the academic and professional qualifications are only a part of the dimensions of this man. He is a family man, with nine children. He is a first generation Italian-American, his father having immigrated to this country from Sicily.

He has also a distinguished service on the Circuit Court of Appeals for the District of Columbia for the past 5 years. In that short time, he has authored more than 80 majority opinions. This is quite an accomplishment for a court that, in the past, was often numbered for its sharp philosophical split. Of his 86 opinions, only 9 were accompanied by minority views. He is one of the nation's leading experts on administrative law. He is also a recognized authority on the doctrines of separation of powers and federalism.

One of the most impressive opinions was his courageous opinion in the Synar case, which identified the constitutional problems with the Gramm-Rudman-Hollings budget balancing legislation. The Supreme Court later upheld the decision in the Synar case.

As in the case of Justice Rehnquist, the American Bar Association gave him his highest rating, unanimously concluding that he was "well qualified" to be elevated to the High Court. The ABA Committee found that Judge Scalia "meets the highest standards of professional competence, judicial temperament and integrity and is among the best available for appointment to the Supreme Court."

It is tempting to go on, Mr. President, to extol this man's virtues. To do so, would only be adding more gilt to Judge Scalia's forehead. I will speak for the entire Senate in this case. He has our full endorsement and support. We wish him Godspeed on his appointment to the Supreme Court. He will be an effective and energetic Justice.

Mr. DODD. Mr. President, when the Senate votes to extend or withhold its consent to the confirmation of Judge Antonin Scalia as Associate Justice of the U.S. Supreme Court, I will cast my vote in favor of the nominee. I rise now to briefly set forth my reasons for supporting this confirmation.

As I explained in some detail in my remarks concerning the nomination of Justice Rehnquist, I believe that each Senator is obligated to scrutinize with exceptional vigor the qualifications of all judicial nominees. In my view, ensure that the nominee has excellent technical and legal skills; is of the highest character and free of any conflicts of interest; and is capable of and committed to upholding the Constitution of the United States.

It is not proper in my view for a Senator to reject a nominee merely because the nominee is a conservative individual or jurist, one who believes that the Court should exercise a relatively guarded role in the interpretation of the Constitution. It is proper, however, to reject a nominee when his temperament and temperature reflect an inability to appreciate and protect the fundamental constitutional rights of all.

Several days ago I voted against the confirmation of Justice Rehnquist. I did so not because Justice Rehnquist is a conservative jurist, but rather because his record reflects a cold indifference toward the constitutional guarantees of equal protection and due process for minorities.

Judge Scalia is, like Justice Rehnquist, what most would call a conservative jurist. I believe I can truly speak for the entire Senate in this case. He has our full endorsement and support. We wish him Godspeed on his appointment to the Supreme Court.
The British biologist Sir Thomas Huxley traveled through America in the late 19th century. At the end of his visit, some American reporters tried to interview him. A citizen asked him about the expensiveness and wealth of our country. Sir Thomas was uncooperative. He said:

I cannot say that I am in the slightest degree impressed by your bigness or your material resources. Sire is not grandeur, and territory does not make a nation. The issue is...what are you going to do with those things?

Judge Scalia is, from all accounts, a highly intelligent individual. Technical competency is not only good, but absolutely necessary in our Federal Judges. But like Sir Thomas’ perception of superiority, the ultimate test of Judge Scalia’s success will not be the keenness of his intellect. With hopeful anticipation, I trust that Judge Scalia will use his intellect to carry out, with all the energy, compassion, and commitment he can muster, one goal absolutely necessary: protecting the constitutional liberties of us all.

**Nomination of Antonin Scalia to be an Associate Justice of the U.S. Supreme Court**

Mr. HATCH. Mr. President, I rise today to speak in support of the nomination of Judge Antonin Scalia to be an Associate Justice of the U.S. Supreme Court. Confirmation of this nomination will provide the American judicial system the benefit of Mr. Scalia's intellectual prowess and legal expertise.

By way of background, Judge Scalia's education included an intensive curriculum in the classics. Those familiar with the judge's work up to this point have attributed this historical and philosophical background as being instrumental in his perception of viewpoints and decisions. It is also apparent, Mr. President, that this nominee's fine judicial and legal performance is a simple and accurate reflection of his intelligence and determined conviction.

Mr. Scalia graduated as valedictorian from both Xavier High School and Georgetown University, and went on to earn magna cum laude honors from Harvard Law School. Such a record of high scholastic achievement is indicative of dedication and aptitude—two necessary traits for a Supreme Court Justice.

Subsequent to his schooling, Mr. Scalia spent a number of successful years in the private sector, including teaching positions at both the Universities of Chicago and Virginia. The judge began his public service career in 1971, with an appointment by the Nixon administration to the position of general counsel in the Office of Telecommunications Policy. The distinguished Mr. Scalia also served as Chairman of the Administrative Conference of the United States, or other noteworthy positions, before his 1982 swearing in as a judge on the U.S. Circuit Court of Appeals—a court considered by many as second only in importance to the Supreme Court.

Moreover, Judge Scalia's judicial record reflects his conviction that the role of the courts is limited—a role of restraint. Judge Scalia adheres to a commonsense interpretation of the Constitution, understanding that it protects certain basic rights—no more, no less. This is a philosophy with which I concur.

In closing Mr. President, let me simply state that I support Antonin Scalia’s nomination, confident in the knowledge that he will bring to this position the same energy, proficiency, and knowledge that he has demonstrated over the last 20 years. Accordingly, I would urge my colleagues to likewise support this nomination.

**Nomination of Antonin Scalia to the Supreme Court**

Mr. DeConcini. Mr. President, although the nomination of Judge Antonin Scalia has been somewhat overshadowed by the controversy over the nomination of Justice William Rehnquist to be Chief Justice, I am quite pleased that he will be confirmed to the Court because he is eminently qualified for the Supreme Court by way of his intellectual abilities, temperament, and character. I am personally pleased that he will be confirmed to the Court because we share an Italian-American heritage.

Mr. President, our responsibility to thoroughly review and consider the nomination of Judge Scalia is equally as important as it was in the case of Justice Rehnquist. Judge Scalia will likely spend many years on the Court sharing an equal vote with the Chief Justice and the other Associate Justices. Our constitutionally mandated role of advice and consent on the nomination of Judge Scalia is as important as the deliberations we engaged in earlier with respect to Justice Rehnquist. Indeed, Justice Rehnquist would have remained as a voting member of the Supreme Court regardless of the final action of the Senate on his confirmation. Judge Scalia, however, will be a new voice on the Court. Let no one say that the Senate has ignored its duty to closely examine the President’s nominee for Associate Justice.

I am pleased that the President has nominated a person with the experience and qualifications of Judge Antonin Scalia. Indeed, I am pleased that this statement be a thorough endorsement of the nomination of Judge Scalia as being eminently qualified for the Supreme Court. Indeed, Justice Rehnquist would have remained as a voting member of the Supreme Court regardless of the final action of the Senate on his confirmation. Judge Scalia, however, will be a new voice on the Court. Let no one say that the Senate has ignored its duty to closely examine the President’s nominee for Associate Justice.

Nomination of Judge Antonin Scalia

Mr. Hatch. Mr. President, perhaps no standard speaks more eloquently in the merits of this nomination than the performance of Judge Scalia on the Court of Appeals for the District of Columbia Circuit. In more than 4 years on that esteemed court, he has written 86 majority opinions and only 9 of these have been accompanied by a dissent. In other words, Judge Scalia has won unanimous approval for his views in nearly every one of his written opinions. Another 90 percent...
CONGRESSIONAL RECORD—SENATE

September 17, 1986

This candid assessment verifies the measure of success is found in the rate at which Judge Scalia's positions have been sustained on appeal. The Supreme Court has adopted his views six out of the seven times his cases have been reviewed on appeal by the Court he has sought to join. This includes his courageous opinion in the Synar case which identified the separation of powers problems in the budget-cutting Gramm-Rudman law. These facts are high praise for Judge Scalia from those best positioned to adjudge his stature and ability, his fellow judges. These judicial actions speak louder than the words of his judicial colleagues, among whom is Circuit Judge Abner Mikva who hailed this appointment as "good for the institution" of the Supreme Court.

From these lofty commendations, the acclaim for Judge Scalia's appointment continues to crescendo. The American Bar Association, with a collegial accord matching that of Judge Scalia's written opinions, "has unanimously concluded that Judge Scalia is well qualified for this appointment. Under the committee's standards," the ABA continues on behalf of America's lawyers and judges, "this means that Judge Scalia meets the highest standards of professional competence, judicial temperament and integrity and is among the best available for appointment to the Supreme Court." It is hard to imagine higher commendation from an organization of lawyers and judges than to call one of their own "among the best available for appointment to the Supreme Court."

The Chicago Tribune strikes the same theme by calling Judge Scalia a "lawyer's lawyer: meticulous, measured, determined to read the law as it has been enacted by the people's representatives and not to impose his own preference upon it." It is interesting to note that many themes are repeated over and over by those examining Judge Scalia's accomplishments. For instance, former Attorney General Edward Levi calls Judge Scalia a "lawyer's lawyer" and states that he "came to know, with awe, how his mind works, his mastery of the law in principle and in practice, his high integrity and commitment to fairness, and his openness to the careful consideration of differing views."

Dean Guido Calabresi of the Yale Law School confesses that he has differed with Judge Scalia on many issues, yet he strikes many of the same themes:

I have always found him sensitive to points of view different from his own, willing to listen, and though guided, as any good judge should be, by a vision of our Constitution and the roles of judges under it, flexible enough, also as a good judge should be, to respond to the needs of justice in particular cases.

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This case is a good example of why the ACLU's biographical directory is in error. It contains the statement that "in virtually every opinion that he has written addressing civil liberties issues, Judge Scalia has decided against the individual." This case involved a Marxist professor who brought suit against the columnists for libel, focusing in particular on their portrayal of his views. The report states that "the ACLU's statement that Scalia has 'never written addressing civil liberties issues, Judge Scalia has decided against the individual' in his opinion in this case." However, Judge Scalia's opinion in this case is not advocating no protection for expression beyond reason, and beyond the capacity of any legal system to accommodate. The omission of the word "equivalent" cannot be explained very readily as a space-saving device. The next paragraph also makes clear that Scalia is not advocating no protection for expression, but a different level of protection:

The cases fall within the first amendment protection for "expressive conduct," apart from spoken and written thought. The nature and effect of that protection is, however, far from the guarantee of freedom of speech narrowly speaking.

Hence the ACLU's statement that Scalia is engaged in for the purpose of 'making a point', could never warrant first amendment protection is simply wrong.

Although in general this memorandum is limited to the scope of the ACLU's report and therefore only discusses Scalia's record on the Court of Appeals, a discussion of his first amendment opinions in this area of the law all the way to the Supreme Court is warranted. For example, in the case of Tucker versus IBEW, and Bishopp versus District of Columbia, all found race discrimination. Moreover, contrary to the thrust of the report that Scalia seeks to interpose obstacles in the way of race discrimination plaintiffs, one of these cases, Mitchell, simplified the employment discrimination plaintiff's task, in that it held that he need not show as part of his prima facie case that he was more qualified than the selected applicant, but only that he was qualified. U.S. Law Week reported this as a significant victory for employment discrimination plaintiffs.

The statement that "Judge Scalia's opinion in this case will decide in favor of the prosecution" is correct, although he has joined some opinions reversing convictions (U.S. versus Lyons, U.S. versus North American Reporting Inc., U.S. versus Kelly, U.S. versus Foster). The defendants' claim he rejected, moreover, would strike most people as pretty wacky: Byers—a defendant claiming the insanity defense and introducing his own expert testimony can be compelled to submit to a state psychiatric examination and is entitled to a lawyer; Richardson—a court can order a new trial after a mistrial resulting from a hung jury without violation of the double jeopardy clause—as opposed to automatically acquitting the defendant when the jury is hung and thus making a hung jury divided 11 to 1 in favor of conviction equivalent to a unanimous one in favor of acquittal; and Cohen—it does not violate the equal protection clause as opposed to legislating automatic commitment for defendants successfully pleading insanity in District of Columbia and leaving the subject to the States outside of District of Columbia.

The statement "Judge Scalia has authorized only one opinion holding that the Government must release information which found racial discrimination" portrays his record misleadingly. While the statement also includes opinions that he joined to the three opinions the report discussed where that was the issue, it turns out that he voted in favor of the plaintiffs in half the racial discrimination cases. Moreover, not anticipated: Mitchell versus Baldridge, Tucker versus IBEW, and Bishop versus District of Columbia, all found race discrimination. Moreover, contrary to the thrust of the report that Scalia seeks to interpose obstacles in the way of race discrimination plaintiffs, one of these cases, Mitchell, simplified the employment discrimination plaintiffs' task, in that it held that he need not show as part of his prima facie case that he was more qualified than the selected applicant, but only that he was qualified. U.S. Law Week reported this as a significant victory for employment discrimination plaintiffs.

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GOVERNMENT SECRECY

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Congressional Record—Senate

September 17, 1986

CONGRESSIONAL RECORD—SENATE

opinion, rather than the companion en banc one the report discusses—he rejected an argument that 26 U.S.C. 6103 has implied a ‘proprietary right of Information Act as to information within its scope. Additionally, when the opinions Scalia joined are included, he voted in favor of disclosure six times—in addition to the two mentioned above and ARIEFF, discussed in the ACLU report, Gulf Oil versus Brock, Meereopol versus Reese, and Public Citizen Health Research Group versus FDA, which the Public Bar and the Legal Times considered to be an important prodisclosure case—and against eight times.

EXECUTIVE POWER

If one translates the report’s statement “Judge Scalia has consistently prevented plaintiffs from challenging executive actions” to mean what it probably intends, “Judge Scalia takes a narrower view than most judges of standing to challenge agency action.” It is correct as far as it goes. It should be noted, however, that he reversed or voided executive agencies in at least 14 cases. In one of those, Rainbow Navigation versus Baldrige, found standing to sue and reversed an executive agency’s foreign affairs-based determination.

Mr. BYRD. Mr. President, 2 years ago, Judge Antonin Scalia joined in a U.S. Court of Appeals opinion which defined “judicial restraint” as:

The philosophy that courts ought not to invade the domain of the Constitution marks out for democratic rather than judicial governance.

That viewpoint was enlarged upon in that same opinion Dronenburg v. Zech (746 F.2d 1579 (1984)) with the further statement that:

No court should create constitutional rights. That is, rights must be derived by standard modes of legal interpretation from the text, structure, and history of the Constitution.

What a refreshing approach to constitutional interpretation. No notions of applying contemporary standards, or today’s values, or 20th century notions to help us figure out constitutional meaning. Just the plain, old, fashioned, lawyerly notion that the Constitution means the same thing today as it did when it was crafted by those brilliant minds almost 200 years ago.

I would like to offer just two examples of Judge Scalia’s application of his philosophy: First, a demonstration of his approach to the meaning of the Constitution; and then, an example of his exercise of judicial restraint.

In 1983, there was an appeal before Judge Scalia’s court which involved the right of protesters to sleep in Lafayette Park, across from the White House. Community for Non-Violence v. Watt (703 F.2d 586 (1983)); Rev., 468 U.S. 288 (1984) dissenting from the court’s majority decision, Judge Scalia said he did not believe that, “sleeping is or ever can be speech for first amendment purposes. That this should be so is an assumption is a comment upon how far our judicial and scholarly discussion has strayed from common and commonsense understanding.” That, by my way of thinking, reflects the approach of a strict constructionist, in the very best sense of that term.

As an example of Judge Scalia’s belief in judicial restraint, I would remind my colleagues of his dissenting opinion in a death penalty case in 1983, Chaney v. Heckler (718 F.2d 1174 (1983); 55 U.S. Law Week 4385 (1983)), in which the majority of the court had issued an opinion requiring the Food and Drug Administration to consider lethal injection for safe and effective drugs.

Pointing out that the FDA had no authority over such drugs because they were not the kind of consumer drugs that Congress intended the FDA to regulate, Judge Scalia wrote:

The condemned prisoner executed by injection is no more the "consumer" of the drug than the executed by firing squad, a consumer of the bullets.

Judge Scalia then went on to say that even if the FDA did have jurisdiction over the drugs involved, it would also have the right to decline not to exercise its authority without being second guessed by the courts. He criticized the court’s majority for interfering in extrajudicial matters, and he argued that the majority’s decision had “less to do with assuring safe and effective drugs than with preventing the States’ constitutionally permissible imposition of capital punishment.”

Approaching his task with that kind of philosophy, and with that kind of candor, Judge Scalia will be a most welcome addition to the Supreme Court of the United States.

I am delighted to vote in favor of this nomination.

Mrs. HAWKINS. Mr. President, I request that my colleagues join me today in supporting President Reagan’s nomination of Judge Antonin Scalia to serve as Associate Justice on the U.S. Supreme Court. Judge Scalia is a renowned legal scholar and judicial activist. His credentials and professional undertakings have proven him a worthy and well-qualified nominee.

Article II, section 2 of the Constitution instructs the Senate to make an independent decision regarding the character and fitness of every nominee. The framers did not intend this power of the Senate to confer consent, but warrant a vote based on the political beliefs of nominess. I advocate Judge Scalia’s consideration based on merit.

In his 20 years of work as law professor, U.S. Senate counsel, and appellee under the court’s majority decision, Judge Scalia has written over 20 articles and his 84 majority decisions while on the U.S. Circuit Court of Appeals for the District of Columbia have established him as an inclusive judge. During the past 4 years of his judgeship his decisions have consistently displayed integrity. His wisdom and reverence for our Constitution are evidenced in his treatment of such cases as the first amendment, affirmative action, and the separation of powers.

Judge Scalia was educated at the University of Pribourg, Switzerland, and received his bachelor of arts from Georgetown University, graduating summa cum laude in 1957. In 1966 he graduated magna cum laude from Harvard University Law School where he edited the Harvard Law Review. He was admitted to the Ohio Bar in 1961 and the Virginia Bar in 1970. Judge Scalia was a Harvard University Sheldon Fellow from 1960-61 and privately practiced law in Cleveland, OH, between 1961 and 1963.

He served in the Nixon administration as general counsel in the Office of Telecommunications Policy and then acted as chairman of the Administrative Conference of the United States.

Judge Scalia served as Assistant Attorney General in charge of the Office of Legal Counsel, where he dealt with subjects such as the ownership of Richard Nixon’s Presidential papers and permissible intelligence-gathering activities of the CIA and FBI. He also remained in close contact with legal establishments. He was a scholar in residence at the American Enterprise Institute and edited their Regulation magazine from 1979-82. He also acted as chairman of the American Bar Association Section of Administrative Law and as chairman of the ABA Conference of Section Chairmen. He has taught law at the University of Chicago, Stanford University, Georgetown University, and the University of Virginia.

Judge Scalia’s experience and training would enable him to consider expertly and in a broad historical and philosophical context the diverse array of Supreme Court issues. He is clearly an adept advocate of his views and would bring to the Court his firm sense of the Constitution and the role of judges in the legal system. It is without reservation that I recommend the nomination of Antonin Scalia to you today for confirmation as Associate Justice of the U.S. Supreme Court.

Mr. CRANSTON. Mr. President, after careful consideration I have decided to support the nomination of Antonin Scalia to be Associate Justice of the Supreme Court.

I have given this nomination the same careful scrutiny which I gave to the nomination of William H. Rehnquist to be Chief Justice.
In fact, as I have said more than once in the past several weeks, I believe the serious consideration by each Senator of Federal judicial nominations—especially for the Supreme Court—is a constitutionally required duty.

Each Senator is obligated to decide whether he will give or withhold consent to the President’s judicial nominees.

Earlier, I set forth at length my view of the tests I thought the Founding Fathers intended us to see in rendering this judgment, and the history of how the Senate has carried out that intention.

It may be surprising to some on the other side of the aisle that I have reached the conclusion I have—indeed, that I would even consider reaching the conclusion I have—with respect to President Reagan’s judicial nominees.

I believe that the only thing at issue here is whether the nominee is conservative enough, or too conservative, and see their own duty as placing their rubberstamp on any nominee to the bench that President Reagan sends us, so long as he is far enough to the right, even though they might not accord the same courtesy to another President.

They may see it as a duty to help the President “win,” and to use any available means to accomplish that result.

But that is not how I see my constitutional responsibility, Mr. President. I believe that each nominee is entitled to fair consideration and that the Nation is entitled to the Senate’s considered judgment on each nomination, before we approve awarding the Nation’s highest judicial offices to anyone for the rest of his or her life.

I believe that Judge Scalia, like Justice Rehnquist before him, has educational credentials enough, is bright enough, and experienced enough to be a Justice of the Supreme Court.

Unlike William Rehnquist, however, I do not find that he has other characteristics or views, or that he has said or done anything, which disqualify him for the Supreme Court.

And, Mr. President, that is in spite of the fact that I believe that in some ways Judge Scalia is more conservative than Justice Rehnquist.

I have examined Judge Scalia’s writings and statements with some care.

I find impressive the fact that he makes distinctions such as the one reflected in the following 1984 Scalia statement:

They [the conservatives] must decide whether they really believe, as they have been saying, that the courts are doing too much, or whether they are actually nursing the less principled grievance that the courts have not been doing what they [emphasis in original] want.

I am prepared to accept at face value, Judge Scalia’s assurance to Senator Kennedy:

I assure you I have no agenda. I am not going on the Court with a list of things I want to do. My only agenda is to be a good judge.

I have no reason to doubt Judge Scalia’s credibility, as I did with Justice Rehnquist.

Judge Scalia also testified before the Senate Judiciary Committee:

There are countless laws on the books that I might not agree with, aside from abortion, that I might think are misguided. That is not even immoral in a way that would let that influence how I might apply them.

I am prepared, too, to take this assurance at face value.

I have no reason to conclude that Judge Scalia is an ideological extremist who first forms conclusions, then reasons backwards to justify them.

I have looked carefully at decisions Judge Scalia has rendered on fundamental rights and constitutional protections for civil liberties.

I have no reason to doubt—if I were on a court with Judge Scalia—I would have reached the same conclusions he did. Reasonable men can, and we probably would have—reached different conclusions in many cases, especially those that narrowly interpret the constitutional protections for freedom of the press, individual rights, and civil liberties.

But in the particular framework of each of these cases, I did not find Judge Scalia’s views were based on prejudgment or ideology, but on his interpretation of the facts before the Court.

And, unlike Justice Rehnquist, who so often dissented alone, even from the very conservative majority of the particular Supreme Court on which he sits, I noted that Judge Scalia much more often had the support of some or most of his judicial colleagues for his views.

Were I the President of the United States, I would have found a different nominee for the Supreme Court.

But that is not a proper basis for the judgment I am called upon to make as a U.S. Senator.

I have no reason to doubt the truthfulness, the ethics, or the fairness of Judge Scalia. And I have never believed, said, or implied that his mere conservativeness would disqualify him to be a Justice, even of this already conservative Supreme Court.

As a result, I will vote for this nomination.

Mr. LEVIN. Mr. President, 2 days ago, I stated the reasons for my opposition to the nomination of Justice Rehnquist for Chief Justice. I did not oppose Justice Rehnquist’s nomination because he is a “conservative.” I opposed his nomination because, after a careful study of his record, I concluded that he doesn’t properly recognize the Federal courts’ role as the guarantor of individual rights, and that his explanations of past actions and statements have not been candid or credible.

We are now voting on another Supreme Court nominee, Judge Antonin Scalia of the D.C. Circuit Court of Appeals. Judge Scalia is also considered to be a “conservative,” and I will vote to confirm him.

There are important policy issues on which Judge Scalia and I disagree. But there is no indication that this nominee’s policy values are inconsistent with the fundamental principles of American law. There is also no indication that the nominee is so controlled by ideology that ideology distorts his judgment. On the contrary, my impression is that Judge Scalia will be a fair and open-minded Supreme Court Justice who will listen to all the argu-
ments, examine all the facts, and decide cases judicially. I probably will not find all of his decisions to my liking. I probably will not always agree with the reasoning he uses to arrive at his decisions. But his reasoning is likely to be straightforward, clearly expressed, and worthy of respect if not agreement.

I was somewhat troubled by a press account I read soon after Judge Scalia's nomination was announced which discussed his decision not to recuse himself in a 1985 case, Western Union Telegraph Co. versus FCC. Three years earlier, Mr. Scalia had performed consulting services for one of the litigants in this case, AT&T. He faced the question of whether his prior connection with AT&T would bring his impartiality into doubt, and whether, therefore, he should disqualify himself.

The Federal statute (title 28, section 455) says that:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Speaking to the press through a law clerk, he said that his participation in Western Union versus FCC was proper because sufficient time had passed since his involvement with AT&T. His law clerk also said that Judge Scalia had checked with D.C. Circuit Chief Judge Spottswood W. Robinson III "to make sure that 3 years was an adequate time period." (Washington Post, June 22, 1986)

Since I wanted to hear what Judge Scalia himself had to say about this, I asked him in a letter of July 29, 1986 if he did in fact consult with Chief Judge Robinson on the question of whether he should disqualify himself from this case, and if so, what advice the Chief Judge had given him.

Judge Scalia's answer was simple and direct. He told me in a letter of July 30:

I consulted Chief Judge Robinson on the question whether 3 years of disqualification from matters involving AT&T was sufficient to eliminate any appearance of impropriety arising from the fact that I had done consulting work for that company in the past. He advised me that in his view 3 years was ample.

This response satisfied my concerns. Judge Scalia apparently carefully considered the statute on disqualification, consulted with the Chief Judge of his Circuit, and concluded, with the Chief Judge's concurrence, that it was not improper for him to participate on this case. The decision was a judgment call, not an automatic disqualification, and another judge might have decided differently. But I believe that he went about making this decision in the proper way.

I was also troubled by Judge Scalia's response to a question at the news conference where his nomination was announced. He seemed to stumble when asked questions about whether he had gone through the prescreening process conducted by the Justice Department or whether any administration officials had posed questions to him regarding his views on specific issues. I feel strongly that this type of "prescreening" process threatens the independence of the Federal judiciary, I decided to ask the nominee directly whether he had gone through such a process. In a letter of August 15, 1986, I asked Judge Scalia the following question:

Did any employees of the Executive Branch or individuals at the request of employees of the Executive Branch ask you any questions about your position on issues that might come before the Supreme Court? If so, please list the issues mentioned, the persons who mentioned them and your answers.

Judge Scalia responded to me on August 19. Again, his response was straightforward:

In connection with my nomination, I have been asked no question by any Executive Branch employee concerning issues that might come before the Supreme Court. Nor, to my knowledge, have I been asked any such question by an individual at the request of any Executive Branch employee.

I was satisfied with this response of Judge Scalia's. I have seen no other evidence indicating that he was questioned by administration officials concerning his views on particular issues, and I believe his denial of having being questioned in this way.

This nominee clearly has outstanding intellectual ability. I have found nothing to indicate that he lacks integrity. I will vote to confirm Judge Scalia as an Associate Justice of the Supreme Court.

Mr. DOMENICI. Mr. President, it is a distinct pleasure to rise in support of the nomination of Antonin Scalia to be Associate Justice of the Supreme Court of the United States.

Judge Scalia is a man of strong intellect, integrity, leadership, and achievement. In his 4 years on the court of appeals, he has demonstrated that his powers of legal analysis and his writing abilities are among the highest in the country. By his qualifications, experience, and character, he has proven himself to be worthy of the position of Justice of the Supreme Court.

A Supreme Court Justice must be a person with unquestioned integrity: he or she must be honest, ethical, and fair.

A Supreme Court Justice must be a person with strength of character: he or she must possess the courage to render decisions in accordance with the Constitution and the laws of the United States.

A Supreme Court Justice must be a person with human compassion: he or she must respect both the rights of the individual and the rights of society and must be dedicated to providing equal justice under the law.

A Supreme Court Justice must be a person with proper judicial temperament: he or she must understand and appreciate the genius of our Federal system and of the delicate checks and balances between the branches of the National Government.

Judge Scalia possesses these qualities.

Judge Scalia has had a distinguished career. Few individuals have been appointed to the Supreme Court with the outstanding qualifications that Judge Scalia possesses. It is a telling comment that the Judiciary Committee, which reviewed this nomination, came to the unanimous conclusion that Judge Scalia should be confirmed by this body.

The report on the nomination also testifies to Judge Scalia's outstanding qualifications. You see, it's only two sentences long. This doesn't mean that the Judiciary Committee didn't care.

The report on Judge Scalia's qualifications. To the contrary, they made an exhausting review. Anyone who has been around this body for any length of time knows that the shorter the report, the less there is said about the nomination. It's only when someone has something bad to say that we write a long report. When everyone is in agreement that the nominee is well-qualified, we write a short report. So the good news for Judge Scalia is that the report on his nomination is only two sentences long.

But I can't help but feel that we have short-changed Judge Scalia a little bit. The public is entitled to know just how exceptionally well qualified Judge Scalia is. I'd like to take a few moments to review those qualifications.

Judge Scalia attended Georgetown University and graduated summa cum laude. He graduated magna cum laude from Harvard Law School, where he was in the notes editor of the Harvard Law Review. After graduating from law school, he served as a graduate fellow at Harvard. He then was associated with the prestigious Cleveland law firm of Jones, Day, Cockley & Reavis for 6 years. Subsequently, he taught law at the University of Virginia before becoming general counsel of the Office of Telecommunications Policy. He also served as Chairman of the Administrative Conference of the United States. In 1974, he was appointed Assistant Attorney General for the Office of Legal Counsel in the Ford administration. He then taught law at the University of Chicago School of Law. He also was a visiting professor at Stanford Law School and Georgetown Law Center, a visiting scholar at the American Enterprise Institute, and chairman of the administrative law section of the American...
Bar Association. In 1982, President Reagan nominated him to the U.S. Court of Appeals for the District of Columbia Circuit, considered by many to be the preeminent circuit court in the Nation. He has served on that court with distinction since then. That is many lifetimes worth of achievement for most of us.

Judge Scalia is a man of outstanding intellectual abilities. Anybody who doubts that should go look at the opinions of the Federal Reporter which contains his legal opinions. As a scholar and a judge, he has made many contributions to our jurisprudence on administrative law, separation of powers, libel and slander law, and many other areas. Judge Scalia, by all accounts, is well respected by his colleagues on the bench. He is a legal scholar with few equals and has served very capably on the court of appeals.

In sum, Judge Scalia is eminently qualified for the position for which he has been nominated. He has had a distinguished career so far, and now he is properly poised to proceed to the pinnacle of his profession.

I know that some Members of this body have strong ideological differences with Judge Scalia. I respect them for that. It is heartening to see, however, that the Members of this body realize that the vote on this nomination should rest on whether Judge Scalia is qualified, not whether a majority of this body agrees or disagrees with his personal philosophy.

Under the Constitution, the Senate has the duty to offer "advice and consent" on judicial nominees. Congress must scrutinize the nominee to determine whether he or she possesses the qualities that the people have a right to expect in judges. Congress, however, must respect a President's right to appoint qualified persons to the judiciary.

There is an important reason for the Senate to limit the nomination of judicial nominees. Congress, as a whole, has a duty to consider the qualifications of judicial nominees. Our constitutional system is a marvelous set of checks and balances. One of the checks on the power of the judiciary is power of the President to appoint men and women who share his vision of the nature of our society and the role of Government.

As long as a nominee is otherwise qualified, the nominee's personal philosophical bent should not be a consideration unless that philosophy undercuts the fundamental principles of our constitutional system. The President's personal ideology, therefore, should play no role in our decision on whether to confirm him.

I would also like to add that it is a distinct pleasure for me to speak on Judge Scalia's behalf because he is a personal friend. I'm sure my colleagues have read the wonderful tributes to Judge Scalia. Every time you read one of these, you see terms such as articulate, energetic, gregarious, intelligent, and quick-witted. I can assure you that these descriptions are 100 percent accurate.

Judge Scalia's nomination is meaningful to me for another reason, as he is the first American of Italian extraction to be nominated to serve on the Supreme Court. This is a significant step for the Italian-Americans of this Nation that they truly can share in all that this great country has to offer.

President Reagan has repeatedly said that he will pick the very best men and women he can find to serve on our Nation's courts. In this case, he has fulfilled that promise. Judge Scalia is the very best.

In this case, the best also happens to be of Italian extraction. Judge Scalia's father came here from Italy as a young man. His mother also was the product of an Italian immigrant family. There are millions of Italian-Americans in this country, many of whom started with nothing, many of whom started with immigrant parents who may not have been able to read or write English, such as mine.

Obviously, it is with great pride that we witness one who shares our history and our traditions nominated to serve on the highest court of the Nation. Of course, Italian-Americans are Americans first and last. It is because we are Americans that we applaud a fellow American's achievement of the American dream. This is truly a success for Italian-Americans and obviously a magnificent success for the American tradition. I have no doubt that Judge Scalia will serve with distinction on the Supreme Court and will make all Americans proud to call him one of their own.

Mr. President, a nominee for Supreme Court Justice of the United States must possess the highest standards of integrity, ethics, and commitment to the cause of justice. He or she must be an individual of unflinching ability and judgment. Judge Scalia has been thoroughly examined to determine whether he possesses these qualities, and he has not been found wanting. I, therefore, wholeheartedly support this nomination and urge my colleagues to do the same.

I thank the Chair.

Mr. DOLE. This will be the last vote this evening.

The PRESIDING OFFICER. Are there any other Senators desiring to be heard on this matter?

If no, the question is, "Shall the Senate advise and consent to the nomination of Antonin Scalia to be Associate Justice of the Supreme Court of the United States?"

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 Utah [Mr. GARL] and the Senator from Arizona [Mr. GOLDWATER] are necessarily absent.

I further announce that, if present and voting, the Senator from Utah [Mr. GARL] would each vote "yea.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 98, nays 0, as follows:

[Rollcall Vote No. 267 Ex.1]

YEAS—98

Abdnor                        Gore                         Melzenbaum
Abraham                      Gorton                        Mitchell
Arnold                        Gramm                         Moynihan
Avenue                        Grassley                       Mukowski
Bentsen                      Harkin                         Nickles
Biden                         Hart                           Nunn
Bingaman                      Hatch                          Packwood
Borelli                       Hatfield                       Pell
Boschwitz                     Hawkins                        Presler
Bradley                       Keating                        Pryor
Bumpers                       Keene                          Quayle
Burke                         Heaths                          Regle
Byrd                          Hollings                       Rockefeller
Chafee                        Humphrey                       Roth
Chiles                         Inouye                         Rudman
Chochran                       Johnston                      Sarbanes
Cohen                         Kasenbaum                      Sasser
Cranston                      Kasten                         Simon
D'Amato                       Kennedy                        Simpson
Danforth                      Kerry                           Spellman
DeConcini                     Lautenberg                     Stafford
Dentton                       Laxalt                         Stennis
Dixon                         Leach                          Stevens
Dodd                          Levin                          Symms
Dole                          Long                           Thurmond
Domenici                      Lugar                          Trible
Durenberger                   Mathias                        Wallop
Eagleton                      Matassana                       Warner
Evans                         Mastin                         Weed
Exon                          McCracken                      Wilson
Ford                          McConnell                      Zorkinsky
Glenn                         Melcher

NOT VOTING—2

Garn                         Goldwater

So the nomination was confirmed.

Mr. THURMOND. Mr. President, I move to reconsider the vote by which the nomination was confirmed.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. THURMOND. Mr. President, I ask unanimous consent that the President be immediately notified that the Senate has confirmed the nominations of Chief Justice Renquist and Justice Scalia.

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

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate resume legislative session.

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

The Senate resumed legislative session.

OMNIBUS BUDGET RECONCILIATION ACT, 1987

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The majority leader.

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate turn to the consideration of Calendar No. 750, S. 2706, the Budget Reconciliation Act.

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

The clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 2706) to provide for reconciliation pursuant to section 2 of the concurrent resolution on the budget for fiscal year 1987 (S. Con. Res. 120, 99th Congress).

The Senate proceeded to the immediate consideration of the bill.

The PRESIDING OFFICER. Who yields time?

Mr. DOMENICI addressed the Chair.

Mr. DOMENICI. Mr. President, I wonder if the distinguished majority leader will assign a time on this side to Mr. Chiles. I take it there will be no more than brief opening statements this evening.

Mr. BYRD. Mr. President, I will assign time on this side to Mr. Chiles. I take it there will be no more than brief opening statements this evening.

Mr. DOLE. Mr. President, I will assign time on this side to the distinguished chairman of the Budget Committee. Senator Domenici.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. DOMENICI. Mr. President, we are not going to use a lot of time here tonight on this reconciliation bill. But let me just give a quick, brief summary of what it is and where we are, and why we are calling it up.

Briefly, I think everybody should know that this is a reconciliation bill that was reported out by the various committees of the U.S. Senate pursuant to the budget resolution. Consequently, it is a bona fide reconciliation bill as prescribed by the Budget Act and its various amendments. It is therefore under a time agreement as stated in that law, and subject to certain constraints and limitations with reference to amendments.

As I understand it, unless the U.S. Senate decides to change the rule, there are 20 hours of debate equally divided, and amendments are limited both as to time and scope.

This reconciliation bill is the result of a budget resolution earlier in the year that sought to bring the deficit within the across-the-board sequester that is currently pending by way of an order at the desk of $19.4 billion in outlays equally divided between defense as prescribed in the law, and nondefense programs that are not exempt across the board.

It is a long ways from what we will need even under our projections for the rest of the year. Nonetheless, the Senate should understand that Friday before we recess this U.S. Senate, there is a rather onerous task confronting us.

Pursuant to the time limit of the budget resolution, we have to complete the reconciliation bill that is difficult to amend presently and that needs to have some dramatic surgery performed, and clearly amendments are difficult unless we do that by way of some consent to put a package before the Senate, and indeed to give Senators some prerogatives that they may not have under reconciliation to prescribe amendments that they may desire over those that are either in the bill or those that might be more prescribed by leadership, either from this side or recently, as we move through this effort.

Do we have a prescription ready to offer to the Senate to modify and enhance this bill so that it will do the job?

The answer is “No.”

Can we get one in time to at least urge the Senators not to insist upon a sequester vote because we are on the way?

The answer is “No.”

Can we get there by Friday?

The answer is “No.”

Senator Chiles peremptorily不起劲的

Senator Chiles peremptorily不起劲的

I am hopeful that Senators will begin to understand. No.1, what is in this package. Some onerous things are in it: a cigarette tax that the President says he does not want; a cigarette tax that many Members of the Senate do not want. That is about $1.8 billion, to my recollection, in the first year of the $3.7 billion in the bill.

In addition, there are a lot of add-ons that cost money. There are some provisions that save money. The net effect is $3.7 billion that I described heretofore to the Senate.

Let me say that since we have 20 hours of debate of the type described in the Budget Act—some things do not count against it, so it will take a very long time to use up 20 hours—I asked the leader to go ahead and call it up tonight.

The distinguished ranking member of the committee, Senator Chiles, was in accord, that we ought to proceed and use up some time, using this to get ourselves informed and to ask the Senators when we speak with them tomorrow about this to consider helping us as we need some consent. We are not ready for anything like that, but we are going to need it.

Our goal, and it is shared by the White House, it seems to be somewhat shared by the House of Representatives, is that we ought to turn this $3.7 billion savings bill into a bill that will reduce deficits by about $14.5 billion.

From what I hear, the House has been talking—and I am only talking about some papers I have seen, some verbal exchanges—has been talking about perhaps some $15 billion. We are in the ball park.
I can tell the Senate if we are able to put one together in the $14.5 billion range. I believe we can predict with high probability that there would not be a sequester at the end of the year and perhaps we would not have to vote on another continuing resolution. As the temporary gun at our heads, saying, "If you do not fix it, it is already done. You voted on it and you have taken the consequences."

How close to that package? Well, I do not think I would want to categorize it. We have been close and it turns out to be very far. But I believe there is a range of proposals, all of which added together have the probability of getting us there. My hope is it can be done in a bipartisan manner when we start work on it tomorrow. My hope is that we may begin some discussions with some House leaders about how they seek to do it as we wind this session down, not to be there with two reconciliation bills that are terribly different and yet be telling ourselves that in the next 11 or 12 working days we can get our jobs done.

Frankly, I do not think there are very good ways to get there. The Senate has few graver responsibilities than its constitutional obligation to advise and consent with respect to judicial nominations. This responsibility is particularly grave in the confirmation of the Chief Justice of the Supreme Court.

We, as Senators, are legislators. The Supreme Court is all too often called upon to determine the meaning of what we write as law. The Justices' impact in interpreting the Constitution is of the paramount importance of their decisions—of course, the position of the Chief Justice is a position of great trust and esteem, respect and trust.

Our Constitution provides for nomination by the President and the advice and consent of the Senate. Both responsibilities are far reaching, their weight immense. The Senate's constitutional duty demands that we in the Senate consent to a nominee for the position of Chief Justice only if his or her qualifications—that is, scholarship, legal acumen, professional achievement, wisdom, integrity, fidelity to the law and commitment to uphold our Constitution—are of the highest order. I take this task most seriously. It is too important a decision for either partisan loyalty or partisan gain to play a part.

Mr. President, the question before us is whether to approve the nomination of Judge William H. Rehnquist to serve as Chief Justice of the U.S. Supreme Court? I think it important to note clearly and exactly what we are and are not doing here today when we cast our votes.
The question before us is not whether Justice Rehnquist should be on the Supreme Court. He already is on the Court. Nothing we do here today will change that fact. Rather, the decision we are to make is whether to elevate Justice Rehnquist to first among equals as Chief Justice.

I have some serious differences with Justice Rehnquist's philosophy. If I were a Justice, I would, perhaps often, find myself opposing Justice Rehnquist's position. Had I been on the Court, I would for example have found myself in opposition to his position on Bob Jones University (1983), Balzac versus Kentucky (1986), Keyes versus School District No. 1 (1973), and other cases demanding a clear interpretation of the equal protection clause of the 14th amendment against the multiple manifestations of racial discrimination. By the same token, I would have argued vigorously against his position in landmark sex discrimination cases such as the Equal Employment Opportunity Commission versus United States (1975), and the University of Mississippi versus United States (1975), and in cases involving the rights of the disabled.

The heart of these and my other disagreements with Justice Rehnquist, I expect, is his generally broad rejection of the doctrine of incorporation.

While Justice Rehnquist may take the narrowest interpretation of "incorporation" of any person on the Court, in fairness to his view, there are others on the Court today—a majority from time to time—who are also strict in limiting the application of the doctrine of incorporation. That school of thought, though I may disagree with many of the conclusions it leads to, must be accorded a recognized branch and serious body of judicial thought.

In view of his position as a sitting Associate Justice, it is difficult to conclude that his general judicial philosophy, despite my disagreements with his decisions, is without its adherents on the Court.

The President might as easily have selected for Chief Justice another Justice with a similarly critical view—Justice O'Connor, White, and Powell come to mind—as an alternative to Justice Rehnquist. Similarly, I have noted very little inclination on the part of any Senator to oppose the nomination of Justice Scalia, who would appear to have views quite similar to Justice Rehnquist. For these reasons, I believe that in and of themselves my disagreements with the nominee are not a sufficient reason to disqualify him.

Mr. President, beyond the issue of philosophy, as important as it is, it is essential to ask whether Justice Rehnquist possesses certain other qualifications—whether he has the requisite legal skills, integrity, high intellect, institutional fidelity, and moral character—to serve as Chief Justice.

As to whether Justice Rehnquist meets these tests, I give particular weight to those who know him best. His Court colleagues who have indicated privately as well as publicly their approval of the nominee's philosophy, competence, judicial temperament and integrity, is among the best available for appointments as Chief Justice of the United States, and is entitled to the committee's highest evaluation of the nominee to the Supreme Court—well qualified.

Justice Rehnquist has been rated as "well qualified" by the American Bar Association (ABA), which informed the Senate Judiciary Committee: "The ABA committee unanimously has found that Justice Rehnquist meets the highest standard of professional competence, judicial temperament and integrity, is among the best available for appointments as Chief Justice of the United States, and is entitled to the committee's highest evaluation of the nominee to the Supreme Court—well qualified."

Mr. President, impressive as these credentials may be, Justice Rehnquist's intellectual skills and good character and high moral values are at best worthless and at worst dangerous.

It is said Adolf Hitler and Joseph Stalin were both brilliant men. And we know what they did.

It is most significant to me that a number of impartial practitioners of high integrity, character and prominent legal standing have expressed unequivocal support for the nominee including, most notably, Judge Griffin Bell, former Attorney General during the Carter administration and Erwin N. Griswold, former Solicitor General under President Johnson. They support him not merely because he is able and intelligent, but because they believe he passes a more important test: they believe he is a good man.

Mr. President, let me return to the issue that has dominated this debate, judicial philosophy. Rhetorically, the question is: "Is Justice Rehnquist an extremist?" The substantive translation of this question is whether Justice Rehnquist's philosophies are so unusual that they may impede—or cloud in some way—the honest interpretation of our constitutional rights and responsibilities. As I said earlier, on a case-by-case basis I find myself in a sufficiency of dissent with Justice Rehnquist. But that is not the issue. The correct question to ask is whether Justice Rehnquist is so extreme in his views, so far out in right field, that we dare not place him with the high position of Chief Justice.

As I understand the principal argument of Justice Rehnquist's opponents, it is that he is outside of the mainstream of judicial thought of those Justices currently serving on the Supreme Court. The basis for this argument is that Justice Rehnquist is the leading dissenter on the Court and therefore he is too extreme to serve as Chief Justice.

In examining the records of the Court, I found the facts at variance with this conclusion in two respects. First, during the 1980-84 Court sessions, Justice Rehnquist dissented a total of 75 times. He was not the leading dissenter. The leading dissenter was Justice Stevens with 145 dissents, a frequency of roughly twice that of Justice Rehnquist, Justice Brennan, with 106 dissents, also dissented more than Rehnquist. Second, Rehnquist was not the most frequent solo dissenter. In this case, it was Justice Stevens, who most scholars consider a moderate to liberal, who had the most lone dissents—51—of any Justice.

My point, Mr. President, is that this kind of statistical argument has to be examined carefully. In this case, the assertions of Justice Rehnquist's opponents simply are not supported by the facts available.

It is, however, factually accurate that Justice Rehnquist's philosophy, neither can I come to the conclusion of his opponents that he is the extremist his opponents presuppose.

Although I shall vote for his nomination, quite frankly this has been the most difficult question for me to resolve. And because it is not an easy call, it is a close call.

It is difficult because the interpretation of the Constitution or the laws written by Congress is difficult. There is a tension between the pure rationality of a faithful and literal interpretation of words on paper on the one hand, and what someone today thinks the authors meant to say fifty or one hundred years ago on the other. There can never be, with certainty, a right answer to this question.

I yield the floor.

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

The PRESIDING OFFICER. On whose time?

Mr. DOMENICI. I suggest that it be charged equally.

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

The clerk will call the roll.

The bill clerk proceeded to call the roll.
CONGRESSIONAL RECORD—SENATE

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

DEPARTMENT OF TRANSPORTATION APPROPRIATIONS

Mr. BIDEN. Mr. President, today I voted in support of the Transportation Appropriations bill for the 1970 fiscal year. The overwhelming majority vote in support of this bill indicates that the committee did an excellent job of balancing demanding interest, while managing to stay under budget.

I would also like to note something that was not part of the bill, nor even attempted--a drastic reduction or elimination of funding for Amtrak. During the past few years, I have opposed the numerous attempts that have been made to wreck the Amtrak System. Until recently, the importance of Amtrak seemed to be poorly understood. There used to be a belief that if Amtrak did not stop in your hometown, you received absolutely no benefit from it. This was never the case, and now the country understands the value of Amtrak not only to States along the Northeast corridor, but to the entire Nation.

What we pleased to see that Amtrak’s funding level of $591 million was not subject to reduction, it is clear that Amtrak must continue to look for ways to cut its costs, while maintaining service standards. After the demoralizing and distracting attacks on Amtrak by the administration, its employees, and management can now turn their full attention toward implementing further savings in Amtrak operations, reducing the need for appropriations like we voted for today.

I do not believe anyone wants the present situation to continue. I look forward as much as anyone to the day when Amtrak states that it no longer needs any assistance. But it is only by allowing Amtrak to move off the serious chopping block, not threatening the solution to the problem James Madison foresaw two centuries ago:

If men were angels, no government would be necessary. If angels were to govern men, government controls would be unnecessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.

So far our history has proved that our Constitution, and the Government under law established by it, are working. With the one exception of the Civil War, this Nation has never had a crisis within its borders.

Over 200 years ago 55 men gathered together to write a document that today serves as the oldest written instrument of government in world history. What they wrote is a truly “democratic” Constitution which gives the people more power than was expected by the contemporaries of our Founding Fathers. It is “people power” that has made this country what it is today. It is “people power” which provided us with the rights and liberties which sometimes we take for granted: Freedom of expression, freedom of worship, freedom of choice, the right to vote, the right to associate with whomever we please. When we celebrate the Constitution, we are reaffirming its values of freedom, justice, and equality for all.

While there are many reasons to celebrate, none of the founding fathers would have celebrated: The importance of educating all Americans, the young and the old, about the founding of our Nation. We sometimes forget what a revolutionary work the Constitution is. It was a bold new document creating a bold new government. Thomas Jefferson described it well: “We can no longer say there is nothing new under the Sun,” he said. “For this whole chapter of the history of man is new.” As it stands today, many Americans do not know enough about this chapter—they don’t know enough about our heritage and our form of government. Recent studies have shown that only a little more than half of the 17-year-olds, and not quite a third of the 13-year-olds in this country know that each State has two Senators. Less than half of the 17-year-olds and less than one-fourth of the 13-year-olds know that appointments to the Supreme Court must be confirmed by the Senate. Over two-thirds of American adults do not
know the subject of the first amendment.

Our Government is only as strong as the understanding and the will of the men and women who comprise it. Our Constitution is a superior document. But it has to be implemented day by day by the men and women who live in this great land.

Why celebrate the Constitution? Because, in doing so, we are celebrating the principles for which this country stands. It has been said that the Constitution has proven durable because it addressed principles that were enduring. Whether we are the descendants of immigrants from Europe, Asia, Africa, or Latin America, whether we are fifth- or first-generation Americans, it is the U.S. Constitution that has made the Constitution a document whose preambles can truly begin with the words, "We, the people . . ."

Those words, "We, the people," appear on the logo of the Commission on the Bicentennial of the U.S. Constitution. On September 29, 1989, the President signed legislation establishing this Commission. I am honored and proud to be a member.

The bicentennial will be a national celebration of all our people throughout this Nation—from the people in Lexington and Concord, where the revolution began, to the 20th century pioneers on the frontiers of Alaska, from the descendants of the James-town settlers to the "New West" frontiers of Arizona and California. This celebration will be more than a series of fireworks. It will be a national reexamination of our Nation's principles and the rights and freedoms they guarantee.

We hope this celebration will surpass any other celebration this Nation has ever had. We want Americans from Maine to California, from Honolulu to Cape Canaveral to get involved.

We're already lining up projects. The American Legion is going to sponsor a nationwide oratorical contest. The national parks will offer a slide show on our Constitution. There's a poster display called The Blessings of Liberty that we hope to place in every high school in America. The Commission has just undertaken a mailing to over 55,000 high school principals notifying them of a bicentennial writing contest for high school students throughout the land.

These projects will do more than focus on the Constitution. They will celebrate the American way of life.

When the Constitutional Convention of 1787 had completed its work, Benjamin Franklin was confronted by a Philadelphia woman who asked what kind of government had been created. "Madam," the elder statesman replied, "a Republic, if you can keep it." For over 200 years we have kept our Republic. We must keep it for the generations to come. But legitimate doubts persist to this day about whether our great experiment in self-government will continue to succeed. We know that a wide river of ignorance and apathy flows across America. Opinion polls repeatedly report, for instance, the lack of public understanding of Congress: Who we are and what we do.

Let me repeat: The Government is only as strong as the understanding and the will of the men and women who comprise it. A major purpose of the Bicentennial Commission, then, is to build a bridge of understanding and appreciation of our Government and the unique document that guards our liberties.

As Chief Justice Burger has said, "We are all trustees of our constitutional freedoms, and as such, it is our solemn duty to pass them on, unimpaired, to those who follow us." What we are celebrating here and in the years ahead, is a document that produced a way of life envied the world over.

As a member of the Bicentennial Commission, I encourage all of my colleagues to lend their support in making this commemoration of the bicentennial an unparalleled celebration of those freedoms we have inherited—and of the limitless possibilities we have as one people, working together, for the future of our country, and of our world.

MESSAGES FROM THE HOUSE

At 9:44 a.m., a message from the House of Representatives, delivered by Mr. Berry, one of its reading clerks, announced that the House has passed the following bill, without amendment:

S. 2995. An act to reauthorize the Tribally Controlled Community College Assistance Act of 1978 and the Navajo Community College Act.

The message also announced that the House agrees to the amendments of the Senate to the bill (H.R. 3092) to provide for the establishment of an experimental program relating to the acceptance of voluntary services from participants in an executive exchange program of the Government.

The message further announced that the House agrees to the amendment of the Senate to the bill (H.R. 3358) to reauthorize the Atlantic Striped Bass Conservation Act, and for other purposes.

The message also announced that the House agrees to the amendment of the Senate to the bill (H.R. 4421) to authorize appropriations for fiscal years 1987, 1988, 1989, and 1990 to carry out the Head Start Program, dependent care, community services block grant, and community food and nutrition programs, and for other purposes.

ENROLLED BILL SIGNED

At 1:01 p.m., a message from the House of Representatives, delivered by Mr. Berry, one of its reading clerks, announced that the Speaker has signed the following enrolled bill:


The enrolled bill was subsequently signed by the President pro tempore (Mr. Thurmond).

At 2:15 p.m., a message from the House of Representatives, delivered by Ms. Goetz, one of its reading clerks, announced that the House disagrees to the amendments of the Senate to the bill (H.R. 5253) making appropriations for the Departments of Labor, Health and Human Services, and Education, and related agencies, for the fiscal year ending September 30, 1987, and for other purposes; it agrees to the conference asked by the Senate on the disagreeing votes of the two Houses thereon, and appoints Mr. Natcher, Mr. Smith of Iowa, Mr. Ose, Mr. Roybal, Mr. Stokes, Mr. Early, Mr. Dwyer, Mr. Hoyle, Mr. Whitten, Mr. Conte, Mr. Pursell, Mr. Porter, Mr. Young of Florida, and Mr. Michel as managers of the conference on the part of the Senate.

The message also announced that the House has passed the following bills and joint resolution, in which it requests the concurrence of the Senate:

H.R. 1598. An act for the relief of Steven McKenna.
H.R. 1891. An act to direct the Secretary of the Interior to convey a certain parcel of land located near Ocotillo, California.
H.R. 2499. An act to modify the boundary of the Uinta National Forest.
H.R. 2574. An act for the relief of survivors of Christopher Eney.
H.R. 4089. An act to prohibit the construction of dams within national parks and monuments.
H.R. 4744. An act to authorize funds to preserve the official papers of Joseph W. Martin, Jr.
H.R. 4784. An act to amend the National Trails System Act to designate the Santa Fe Trail as a National Historic Trail.
H.R. 4785. An act to on behalf of David C. Acension as a citizen regent of the Board of Regents of the Smithsonian Institution.

The message further announced that the House is in agreement with the Senate on the following concurrent resolution, in which it requests the concurrence of the Senate:

H. Con. Res. 339. A concurrent resolution expressing the sense of the Congress that
the essential air transportation program should be maintained for the ten-year period for which it is authorized.

MEASURES REFERRED

The following bills were read the first and second times by unanimous consent, and referred as indicated:


H.R. 1891. An act to direct the Secretary of the Interior to convey a certain parcel of land located near Ocotillo, California; to the Committee on Energy and Natural Resources.

H.R. 2499. An act to modify the boundary of the Uinta National Forest; to the Committee on Energy and Natural Resources.

H.R. 4704. An act to prohibit the construction of dams within national parks and monuments; to the Committee on Energy and Natural Resources.

H.R. 4244. An act to authorize funds to preserve the official papers of Joseph W. Martin, Jr.; to the Committee on Labor and Human Resources.

H.R. 4704. An act to amend the National Trails System Act to designate the Santa Fe Trail as a National Historic Trail; to the Committee on Energy and Natural Resources.

The following concurrent resolution was adopted by unanimous consent:

H. Con. Res. 339. A concurrent resolution expressing the sense of the Congress that the essential air transportation program should be maintained for the ten-year period for which it is authorized; to the Committee on Commerce, Science, and Transportation.

MEASURES PLACED ON THE CALENDAR

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

H.J. Res. 517. Joint resolution providing for reappointment of David C. Acheson as a citizen regent of the Board of Regents of the Smithsonian Institution.

MEASURES HELD AT THE DESK

The following bill was ordered held at the desk by unanimous consent, pending disposition:

E.R. 2574. An act for the relief of survivors of Christopher Eney.

ENROLLED BILLS PRESENTED

The Secretary of the Senate announced that on today, September 17, 1986, she had presented to the President of the United States the following enrolled bills:

S. 96. An act for the relief of Cirilo Raagas Costa and Wilma Raagas Costa; and

S. 720. An act to establish a permanent boundary for the Acadia National Park in the State of Maine, and for other purposes.

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-3739. A communication from the Director of the Office of Management and Budget, Executive Office of the President, transmitting, pursuant to law, a report entitled "The Need For a National Plan of Scientific Exploration for the Exclusive Economic Zone"; to the Committee on Commerce, Science, and Transportation.

EC-3741. A communication from the Inspector General of Agriculture, transmitting, pursuant to law, notice of a computer matching program; to the Committee on Governmental Affairs.

EC-3742. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "Offshore Oil and Gas: Final Report on Shut-In and Flaring Wastess"; to the Committee on Energy and Natural Resources.

EC-3744. A communication from the Secretary of the Interior, transmitting, pursuant to law, the annual report on the public lands program for fiscal year 1985 entitled "Managing the Public Lands"; to the Committee on Energy and Natural Resources.

EC-3745. A communication from the Under Secretary of the Treasury, transmitting, pursuant to law, the financial statements of the U.S. Synthetic Fuels Corporation for the period October 1, 1985 to April 18, 1986 (date of termination); to the Committee on Energy and Natural Resources.

EC-3745. A communication from the General Counsel of the Department of Energy, transmitting a draft of proposed legislation to amend the Department of Energy Organization Act to authorize protective force personnel who guard the strategic petroleum reserve or its storage and related facilities to carry firearms while discharging their official duties and in certain instances to make arrests without warrant; to establish the offense of trespass on property of the strategic petroleum reserve, and for other purposes; to the Committee on Energy and Natural Resources.

EC-3746. A communication from the Executive Secretary of the Foreign-Trade Zones Board, Department of Commerce, transmitting, pursuant to law, the annual report of the Board for fiscal year 1983; to the Committee on Finance.

EC-3747. A communication from the Secretary of Health and Human Services, transmitting, pursuant to law, the annual report of activities under the Administration on Developmental Disabilities, Office of Human Development Services; to the Committee on Labor and Human Resources.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. STEVENS, from the Committee on Appropriations, without amendment:

S. 2827. An original bill making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1987, and for other purposes (Rept. No. 99-446).

By Mr. HATCH, from the Committee on Labor and Human Resources, without amendment:

S. 1815. A bill to prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers involved in or affecting interstate commerce (Rept. No. 99-447).

By Mr. HATCH, from the Committee on Labor and Human Resources, with an amendment in the nature of a substitute and an amendment to the title:


EXECUTIVE REPORTS OF COMMITTEES

The following executive reports of committees were submitted:

By Mr. HECHT (for Mr. GARN), from the Committee on Banking, Housing, and Urban Affairs:


(The above nomination was reported from the Committee on Banking, Housing, and Urban Affairs with the recommendation that it be confirmed, subject to the nominee's consent to respond to requests to appear and testify before any duly constituted committee of the Senate.)

By Mr. MCLURE, from the Committee on Energy and Natural Resources:

Martha O. Hesse, of Illinois, to be a Member of the Federal Energy Regulatory Commission for the remainder of the term expiring October 20, 1987; and

James Allen Wampler, of Illinois, to be an Associate Secretary of Energy (Fossil Energy).

(The above nominations were reported from the Committee on Energy and Natural Resources with the recommendation that they be confirmed, subject to the nominees' commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.)

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. DANFORTH (for himself and Mr. HEINE):

S. 2828. A bill to suspend for a 1-year period the duty on certain mixtures of cross-linked sodium polyacrylate polymers; to the Committee on Finance.

By Mr. STEVENS, from the Committee on Appropriations:
S. 2827. An original bill making appropriations for the Department of Defense for the fiscal year ending September 30, 1987, and for other purposes; placed on the calendar.

By Mr. MCDONALD: S. 2828. A bill to authorize the expenditure of funds not needed for purposes of the Department of Justice Assets Forfeiture Fund and the Customs Forfeiture Fund for purposes of emergency prison construction and to remove the cap on the use of such funds; to the Committee on the Judiciary.

By Mr. METZENBAUM: S. 2829. A bill for the relief of Steven M. Kenna; to the Committee on the Judiciary.

By Mr. HEINZ (for himself, Mr. SPECTER, Mr. GLENN and Mr. DENTON): S. 2830. A bill to amend the Steel Import Stabilization Act; to the Committee on Finance.

S. 2826. A bill to suspend for 1 year the duty on certain mixtures of cross-linked sodium polyacrylate polymers; to the Committee on Finance.

S. 2828. A bill to authorize the expenditure of funds not needed for purposes of the Department of Justice Assets Forfeiture Fund and the Customs Forfeiture Fund for purposes of emergency prison construction and to remove the cap on the use of such funds; to the Committee on the Judiciary.

EMERGENCY PRISON CONSTRUCTION FUNDING ACT

By Mr. SPECTER. Mr. President, today I am introducing legislation which would address a problem that has reached critical proportions: Federal prison overcrowding. This legislation authorizes the Attorney General to use surplus moneys in the Department of Justice Assets Forfeiture Fund and the Customs Forfeiture Fund for purposes of emergency prison construction.

Throughout the country, at Federal, State, and local levels, overcrowding of jails and prisons strains our correctional system, by overextending the staff and resources of each facility and by creating conditions not conducive to rehabilitation of prisoners. The recent uprising at the Lorton Penitentiary in Virginia illustrates the overcrowding problem and its disastrous results: prisoner unrest and violence that a prison staff is ill-equipped to prevent or contain.

The number of probationers and parolees is growing larger in proportion to the number of incarcerated offenders, mainly as a result of the courts' reluctance to sentence convicted criminals to jails and prisons already filled well beyond capacity. The Federal Bureau of Justice Statistics has reported that the probation population has grown much faster in the 1980's than has the prison population; there are now approximately three times as many offenders under such "community supervision" than there are in prison. The probation and parole populations reached record levels in 1984, rising 8 and 9 percent respectively, according to the Bureau of Justice Statistics. Tens of thousands of convicted prisoners and pretrial detainees are released prematurely because there is no space for them in our existing prisons and jails. Courts have intervened in approximately 80 percent of the States' prison systems, frequently placing limits on the number of prisoners the State may place in existing facilities.

The Bureau of Prisons reports that the general occupancy rate is between 105 and 119 percent of rated capacity. A Justice Department Survey of Jails, which analyzed the population of approximately one-third of the Nation's jails, revealed that 24 percent of the facilities in jurisdictions with large jail populations reported that they were under court order to remedy one or more conditions of confinement; of these, 81 percent were cited for overcrowding units.

At the Federal level, the Bureau of Prisons reports that the overall occupancy rate is as high as 154 percent of capacity; the Federal inmate population has grown from 34,263 prisoners in 1984 to 41,092 at present. As of July 14, 1986, the Bureau of Prisons reports that all but 6 of the 47 Federal prisons are over capacity; 5 of these 6 are close to reaching their operational capacity.

This nationwide prison overcrowding crisis is due, in large part, to the staggering number of drug offenders being sent to Federal prisons. This class of inmates numbered 7,653 in 1983, 8,324 in 1984, and 9,487 in 1985, and 10,191 at the end of June 1986. The administration's intensified crackdown on drug trafficking has significantly increased the number of drug convictions, and the accordant burden on the Federal corrections system.

Mr. President, in short, prison overcrowding has reached crisis proportions and continuing enactment of this bill will not solve this crisis but it provides a relatively simple and desperately needed first step.

Existing law provides for two separate funds in the U.S. Treasury as repositories for moneys and property seized by or forfeited to law enforcement officials: the Customs Forfeiture Fund and the Department of Justice Assets Forfeiture Fund. Property and moneys seized or forfeited in drug-related arrests by the U.S. Customs Service are deposited in the Customs Forfeiture Fund under the Tariff Act of 1930 (15 U.S.C. 470 et seq.). Property and moneys seized or forfeited pursuant to a law enforced or administered by the Department of Justice are deposited in the Department of Justice Assets Forfeiture Fund (28 U.S.C. 524).

The law states that amounts in the fund which are not currently needed for purposes specified in the applicable statutes establishing the funds shall be kept on deposit in the U.S. Treasury.

The increasing number of convicted drug offenders and amount of confiscated property and moneys used in the illicit drug trade are swelling the deposits in both the Customs Forfeiture Fund and the Justice Assets Forfeiture Fund. As of September 1, 1986, the Justice seizures totaled over $300 million. The Department estimates the fund to total $35 million at the end of the year.

The legislation which I am introducing today would amend existing law to allow these excess moneys in the two forfeiture funds to be used to relieve

[Table: المنتخبات]
Federal prison overcrowding. Specifically, it would amend the existing Customs and criminal forfeiture statutes to authorize the Attorney General to allow the President to use forfeited drug moneys for emergency prison construction. Moneys from the sale of property seized by the Customs Service in drug-related arrests, and not needed for the purposes already set forth in the Customs Forfeiture Fund statute, also could be used for emergency prison construction funding. The bill removes the conditions on these two accounts; all forfeited drug moneys would be made available to the Attorney General rather than deposited in the Treasury.

Mr. President, this legislation represents a reasonable step toward eliminating the problems of too many drug convictions and not enough prison space. And what more appropriate way to finance the new facilities than with the forfeited spoils of convicted drug traffickers?

I seek 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:

SEC. 1. DEPARTMENT OF JUSTICE ASSETS FORFEITURE FUND.

(a) Paragraph (4) of subsection (c) of section 524 of title 28, United States Code, is amended to read as follows:

"(4) Amounts in the fund which are not currently needed for the purpose of this section--"

(a) may be used by the Attorney General for prison construction necessary on an emergency basis; or

(b) if not used for the purposes provided in clause (A) shall be kept on deposit or invested in obligations of, or guaranteed by, the United States;"

(b) Paragraph (8) of subsection (c) of section 524 of title 28, United States Code, is amended by striking out the second sentence.

SEC. 2. CUSTOMS FORFEITURE FUND.

(a) Paragraph (e) of section 613a of the Tariff Act of 1930, as added by Public Law 98-473, is amended to read as follows:

"(e) Amounts in the fund which are not currently needed for the purpose of this section--"

(a) may be used by the Attorney General for prison construction necessary on an emergency basis; or

(b) if not used for the purposes provided in clause (A) shall be kept on deposit or invested in obligations of, or guaranteed by, the United States;"

(b) Paragraph (d) of such section is amended by striking out the second and third sentences thereof.

(2) Subsection (f) of section 613a of the Tariff Act of 1930, as added by Public Law 98-573, is amended to read as follows:

"(d) Amounts in the fund which are not currently needed for the purpose of this section--"

(a) may be used by the Attorney General for prison construction necessary on an emergency basis; or

(b) if not used for the purposes provided in clause (A) shall be kept on deposit or invested in obligations of, or guaranteed by, the United States; or

(c) may be used by the Attorney General for prison construction necessary on an emergency basis; or

"(2) Subsection (f) of such section is amended by--"

(a) striking out "(1)"; and

(b) striking out paragraph (2)."

By Mr. METZENBAUM.

S. 2830. A bill for the relief of Steven McKenna; to the Committee on the Judiciary.

RELIEF OF STEVEN MCKENNA

Mr. METZENBAUM. Mr. President, today I am introducing legislation to allow Steven McKenna to seek redress for permanent disability. Steven is a 19-year-old boy from Wickliffe, OH. He is permanently and severely disabled by the loss of both legs as a result of a birth defect. The evidence strongly suggests that this defect was caused by his mother taking "Contergan," the proprietary name of thalidomide in Germany.

Steven and his family were stationed in Geissen, Germany, with the U.S. Army in 1967 when Steven was born. During her pregnancy, Mrs. McKenna was under the care of an agent of the U.S. Army, a German doctor, who prescribed Contergan. Steven simply wants the opportunity to file an action in U.S. courts to attempt to show that the United States is liable for compensation as an employer of the doctor.

The McKennas have already tried to get restitution from a settlement fund resulting from a suit brought in Germany by victims in that country. However, the provisions of this settlement are grossly inadequate. They require a very detailed description of the defect at the time of birth. Because the hospital records described his birth defect in only general terms, the compensation program does not apply in Steven's case.

In addition, an individual suit by Steven against the manufacturer or the doctor under German law is totally unrealistic. Not only were the liability laws in effect until 1976 very stringent, the expense of bringing the claims in Germany would be prohibitive. In 1976, mainly because of the thalidomide case, the German parliament enacted a much more liberal statute. It adjusted, and there is no question that with the industry needs to adjust, and that it will adjust further to changed economic circumstances. There is substantial global excess capacity as well as excess capacity in this country, and steel demand in the United States is, at best, flat.

On the other hand, it is clear that not all of the forced adjustment is due to the capacity situation or to macroeconomic factors. Part of the problem has been and continues to be unfair trade—dumped and subsidized steel. This country has more than enough steel for its own needs, but is not, in objective terms, competitive with ours. No industry has a better record than the steel industry in demonstrating unfair trade practices on the part of others. In large part for that reason, not to mention the critical strategic importance to the industry for our defense and our economic infrastructure, the President in 1984 decided on a program of voluntary import restraint agreements that was intended to reduce imports to 18.5 percent of the U.S. market, or 20.2 percent if semifinished steel imports were included.

That program has achieved some useful results, but its shortcomings are also evident. Import levels have dropped from their 31 percent peak and are now running approximately 23.3 percent for the first 7 months of this year. The trend, unfortunately, has been worrisome. Following an April trough, import figures have begun to increase again and have been
progressively higher each succeeding month, reaching 27.1 percent in July. That figure is a bit inflated, partly because of declines in domestic production that will continue in part because of the particularly slow demand. Even so, the tonnage that entered the country in July is the most since last December.

Beyond the immediate upward trend, there is also a fact that it has taken some 18 months to get the program underway. Had a 21 percent level been reached in January 1985, rather than in May 1986, the current condition of the domestic industry would be very different today.

These implementation errors, however, are mistakes of the past, and there is a limit to what we can do about them now. The President's program, as I indicated, has made some progress, and it can make still more with some further fine tuning in two areas.

First, circumvention remains a serious problem. The Customs Service has received more than a dozen requests for country of origin determinations that involve shipping basic steel products from one country to non-VRA countries for the performance of a finishing operation. The requests seek a decision that the final operation changes the country of origin, thus transforming VRA-limited steel into unlimited, non-VRA steel.

Thus far, Customs' record is mixed, and it is apparent these requests will grow as foreign producers and importers learn how to evade the program's rules.

The legislation I am introducing today would address this problem the same way the House trade bill did. It would require that steel entering the United States from non-VRA countries be allocated to the country where it was melted and poured regardless of where a final finishing operation was performed. Thus, to take a hypothetical example, Brazilian steel shipped to Costa Rica for finishing would be counted against Brazil's VRA limits, unless Costa Rica also had a VRA with the United States, in which case it could count against Costa Rica, depending on normal Customs rules of whether a substantial transformation has occurred. This will discourage circumvention both by encouraging countries like Brazil not to engage in such tactics and by encouraging smaller countries without a basic steel capacity to negotiate VRA's with the United States.

The other major and growing problem is that significant foreign producers remain outside the President's program. Particular problems in this regard are Canada, Sweden, and Taiwan. Indeed, Ambassador Yeutter recognized the problem on September 4 when he called for consultations with those three countries. At that time, he stated:

I am greatly disturbed that in July we registered the largest single monthly increase among nations not covered by the President's steel program since it began in September 1984. This cannot continue.

Countries that have bilateral restraint arrangements (VRA's) must not be allowed to undermine the program by taking advantage of restraints negotiated with other nations.

The most serious problem of these three countries is Canada, whose share of our market has risen to 4 percent, despite our insistence it remain at the historic level of 2.4 percent and their insistence on the 1984 levels of 3.1 percent. Recent statements by the new Canadian trade minister, as reported in U.S. media, denying any willingness on the part of Canada to be helpful have only made the situation worse.

Mr. President, we are presently engaged in far reaching free trade discussions with which will hopefully lead to more open and closely integrated economies. To suggest at this point that a sectorial issue of some significance, only our problem and not theirs, and that Canada has no role in helping to solve it, is to drive our two economies farther apart rather than closer together. That will only compound, particularly in the Congress, the free trade negotiations.

Mr. President, with respect to this problem, this legislation takes a balanced approach. Consultations with the three countries in question have already begun. The administration has identified the problem and is making an effort, albeit a belated one, to solve it. My bill endorses that effort and allows 90 days for its successful completion. If those talks fail, however, the bill provides for import restraints to go into effect with respect to any of the three countries that have not concluded VRA's. The restraint levels would be 70 percent of the level of imports, by category, that entered in the 12 months prior to October 1, 1984, the last year before import restraints went into effect. This level would result in total imports higher than the President's goal of 20.2 percent but would, nonetheless, be helpful in containing the growth of countries that have been taking advantage of the partial nature of the President's program.

This bill should not be regarded as reflecting any change in my long-held view that what we need is a program of global quotas. The President, however, has not, with effort, is solving the problem a different way, and I want to cooperate with that. I view this bill as helping the President achieve full compliance with his program, and I urge all Senators to support it in that spirit.

Mr. Glenn. Mr. President, I am pleased to join other members of the Senate Steel Caucus in introducing legislation to strengthen the Steel Import Stabilization Act. I urge my colleagues to support this bill and include it in trade legislation this year.

The 1984 Steel Import Stabilization Act calls for import limitation of 20.2 percent of the U.S. market. The United States has negotiated bilateral arrangements for import restrictions with 17 countries and the European Community. These agreements cover approximately 80 percent of steel imports. Steel imports have declined from 25.2 percent of the domestic market in 1986 to 23.2 percent so far in 1986. This is an improvement, but still far short of the goal. Foreign steel is still a serious problem, and this bill makes urgently needed improvements in the Steel Import Stabilization Act.

First, this bill includes a provision borrowed from the omnibus trade bill passed by the House of Representatives to prevent circumvention of bilateral arrangements under the Steel Import Stabilization Act. Steel that is manufactured in a covered country from steel melted and poured in an arrangement country shall be counted as steel from the originating arrangement country and applied toward that country's quantitative restrictions. No longer will countries be able to circumvent the steel import program by sending steel through another country, because if they try, we will trace the steel back to them.

This provision complements other legislation I have introduced, S. 2783, which would deny beneficial tariff treatment under the Generalized System of Preferences (GSP) to countries that aid other countries in circumventing U.S. trade laws and agreements. How do these two provisions work together? If two countries conspire to circumvent a bilateral steel arrangement with the United States, for example, the steel would be counted against the originating country's arrangement restriction, and the cooperating country would lose any benefits they have under the GSP Program.

The second provision of this bill deals with the problem of surging steel imports from countries that have refused to sign bilateral arrangements with the United States. Steel imports from arrangement countries have decreased, but imports from nonarrangement countries have increased to intolerable levels. Canada, Taiwan, and Sweden hold a 5-percent share of the domestic market, and are responsible for 20 percent of steel imports. In July, total steel imports surged to 26.4 percent, primarily due to imports from these and other nonarrangement countries. Our bill requires the U.S. Trade Representative to reach steel restraint agreements with Canada, Taiwan, and Sweden within 90 days, or else steel imports from these countries...
will be limited to 70 percent of their 1984 level.

Mr. President, 2 years have passed since we enacted the Steel Import Stabilization Act. Thousands of more jobs have been lost in the steel industry. And still, we're not even within striking distance of our 2.5 percent goal for steel imports. We won't ever reach that goal unless we get the major steel-producing nations to cooperate by negotiating a bilateral arrangement. The workers and industries of Ohio can't wait any longer.

Mr. President, all the above premises that agreements made or yet to be made, can in fact be enforced. That premise is far from valid. I am told that this year, while the administration cut 777 customs officers from the rolls of jobs abroad, they at the same time will be declining from an already low 2 percent level. New legislation will mean little, if not enforced. We will again have raised the hopes of those in the steel industry only to see those hopes once again dashed. I hope that the Appropriations Committee will take the initiative in providing funding now, in bills before us, to restore and expand our steel industry for all the above and other obvious reasons. It will be penny-wise and very pound-foolish to do otherwise.

I would like to call on the administration to include such funding in the new budget which will be submitted to the Congress in January 1987.

Backing all the right words with action is the only way we preserve the steel industry and put our people back to work. I would like to see this bill passed today. But I realize that as a practical matter, it probably will have to be passed in the form of an omnibus trade bill—which I also strongly support. For it seems you can't pick up the newspaper without reading yet another headline about the soaring U.S. trade deficit. Today's headline in the Washington Post reads, "Crippling Trade Deficit Grows Worse," in citing the Department of Commerce report that the U.S. current account deficit for trade in goods and services reached a record $34.7 billion for the second quarter of 1986.

America's merchandise trade deficit for 1986 is put toward an all-time record of $170 billion. Who's paid for it? Over 2 million working men and women have paid for it—with their jobs. Over one-half of 1 million Ohioans lost their manufacturing jobs since 1981. I'm sick and tired of watching our jobs and our industries sail overseas—while our own exports are sunk at the borders of foreign nations who use unfair trading practices like predatory. And I believe that given the right tools and a fair chance, American workers can still outwork, outwit, outcompete, and outproduce anyone else on this face of the planet.

I hope my colleagues will take a hard look at trade bills pending in the Senate and stop listening to the propaganda of the administration. In fact, I wish the administration would read these bills. Because the legislation we support is centrist legislation, not extreme or protectionist legislation. The legislation strengthens the tools of fair trade—by making the President use his authority under the law to combat unfair trade practices by other countries; and by encouraging open foreign markets to U.S. goods. We're simply telling our trading partners that our markets won't be fair game until the game is made fair.

So I urge my colleagues and the Senate leadership to free the fair trade bill and allow the Senate to act on trade legislation this year. And I urge inclusion of this steel bill in that legislation.

* * *

ADDITIONAL COSPONSORS

S. 1251

At the request of Mr. DOMENICI, the name of the Senator from Louisiana (Mr. Long) was added as a cosponsor of S. 1251, a bill entitled "The Natural Gas Utilization Act of 1986".

S. 2414

At the request of Mr. MURKOWSKI, the name of the Senator from Michigan (Mr. LEVIN), the Senate from Maine (Mr. COHEN), the Senate from Massachusetts (Mr. KERRY), the Senate from South Dakota (Mr. ABLOW), the Senator from Florida (Mrs. HAWKINS), the Senator from Ohio (Mr. METZENBAUM), and the Senator from Illinois (Mr. DIXON) were added as cosponsors of S. 2414, a bill to repeal section 1631 of the Department of Defense Authorization Act, 1985, relating to the liability of Government contractors for injuries sustained by third parties arising out of certain atomic weapons testing programs, and for other purposes.

S. 2479

At the request of Mr. THRILE, the name of the Senate from Maine (Mr. COHEN) was added as a cosponsor of S. 2479, a bill to amend chapter 39 of title 31, United States Code, to require the Federal Government to pay interest on overdue payments, and for other purposes.

S. 2561

At the request of Mr. DENTON, the name of the Senator from Pennsylvania (Mr. SPECTER) was added as a cosponsor of S. 2561, a bill to create a National Center on Youth Suicide under the Office of Justice Programs in the Department of Justice.

At the request of Mr. LEAHY, the name of the Senator from Arizona (Mr. DECONCINI) was added as a cosponsor of S. 2757, a bill to amend title 18, United States Code, with respect to the interception of certain communications, other forms of surveillance, and for other purposes.

S. 2757

At the request of Mr. DURENBERGER, the name of the Senator from New Hampshire (Mr. RUDDIMAN) was added as a cosponsor of S. 2757, a bill to amend title XVIII of the Social Security Act to require timely payment of properly submitted Medicare claims.

At the request of Mrs. KASSEBAUM, the name of the Senator from Missouri (Mr. DANFORTH) was added as a cosponsor of S. 2713, a bill to amend title 25 of the Federal Election Act of 1976 to ensure the preservation of employee seniority rights in airline mergers and similar transactions.

S. 2713

At the request of Mr. EVANS, the names of the Senators from New York (Mr. MOYNIHAN), the Senator from Massachusetts (Mr. KERRY), the Senator from Indiana (Mr. LUGAR), the Senator from Pennsylvania (Mr. HEINZ), and the Senator from Minnesota (Mr. DURENBERGER) were added as cosponsors of S. 2781, a bill to amend the Energy Policy and Conservation Act with respect to energy conservation standards for appliances.

At the request of Mr. EVANS, the name of the Senator from Florida (Mrs. HAWKINS) was withdrawn as a cosponsor of S. 2781, supra.

S. 2805

At the request of Mr. MATTINGLY, the name of the Senator from Alabama (Mr. DENTON) was added as a cosponsor of S. 2805, a bill to provide for the imposition of the death penalty for certain continuing criminal enterprise drug offenses.

SENATE JOINT RESOLUTION 348

At the request of Mr. GLENN, the name of the Senator from South Dakota (Mr. PRESSLER) was added as a cosponsor of Senate Joint Resolution 348, a joint resolution to designate the week beginning November 24, 1986, as "National Family Caregivers Week."

SENATE JOINT RESOLUTION 375

At the request of Mr. LEVIN, the names of the Senator from Oklahoma (Mr. BOREN), the Senator from Florida (Mr. CHILES), the Senator from South Dakota (Mr. PRESSLER), the Senator from Arizona (Mr. DECONCINI), the Senator from Ohio (Mr. METZENBAUM), the Senator from Michigan (Mr. RIEGLE), the Senator from Ohio (Mr. GLENN), the Senator from New Jersey (Mr. BRADLEY), the Senator from
SENATE CONCURRENT RESOLUTION 154

At the request of Mr. D'Amato, the name of the Senator from Minnesota [Mr. Boschwitz] was added as a co-sponsor of Senate Concurrent Resolution 154, a concurrent resolution designating October 1986 as “National Hispanic Heritage Month.”

SENATE CONCURRENT RESOLUTION 386

At the request of Mr. D’Amato, his name was added as a co-sponsor of Senate Joint Resolution 386, a joint resolution to designate October 23, 1986 as “National Hungarian Freedom Fighters Day.”

SENATE CONCURRENT RESOLUTION 385

At the request of Mr. Moynihan, the name of the Senator from Arizona [Mr. Goldwater] was added as a co-sponsor of Senate Resolution 385, a resolution to recognize Mr. Eugene Lang for his contributions to the education and the lives of disadvantaged young people.

SENATE RESOLUTION 435

At the request of Mr. Moynihan, the name of the Senator from Pennsylvania [Mr. Heinz], the Senator from Florida [Mr. Durenberger], and the Senator from Alaska [Mr. Stevens] were added as cosponsors of Senate Resolution 435, a resolution to designate October 8, 1986 as “Crack/Cocaine Awareness Month.”

AMENDMENTS SUBMITTED

DEPARTMENT OF TRANSPORTATION AND RELATED AGENCIES APPROPRIATIONS, 1987

GRAMM AND THURMOND AMENDMENT NO. 2343

Mr. Gramm (and Mr. Thurmond) proposed an amendment to the bill (H.R. 5205) making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1987, and for other purposes; as follows:

On page 64, beginning with line 6, strike out all through page 65, line 15.

UNIFORM PRODUCT LIABILITY

PRESSLER AMENDMENT NO. 2844

(Ordered to lie on the table.)

Mr. Pressler submitted an amendment intended to be proposed by him to the bill (S. 2760) to regulate interstate commerce by providing for a uniform product liability law, and for other purposes; as follows:

On page 37, strike all from line 18 through line 21 on page 38 and insert in lieu thereof the following:

SEVERAL LIABILITY FOR DAMAGES

Sec. 306. (a)(1) Except as provided in paragraph (2) of this subsection, in any civil action alleging injury to a person, damage to property, or death of a person, the liability of each defendant for damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of damages allocated to such defendant in direct proportion to such defendant’s percentage of responsibility as determined under subsection (b) of this section. A separate judgment shall be rendered against such defendant for that amount.

(b) In any case where the parties are found to have engaged in concerted action, the liability of each defendant shall be joint and several.

(0) If a claimant has released any defendant or potential defendant from liability for the claimant’s harm, or if a defendant is unable (despite exercising all practicable means) to join any other person as a defendant in such action, the action shall not, in determining the proportion of responsibility of any such released defendant or potential defendant.

(3) As used in this section, the term “concerted action” means any action knowingly and intentionally taken by two or more defendants which resulted in the harm alleged in such civil action. It does not mean mere consciously parallel action.

Mr. Pressler. Mr. President, product liability is one of the most important consumer issues of this decade. The present law in this area has led to increased product and insurance costs, and has substantially hampered product development in the United States. No country in the world has been struck with a stronger need to provide meaningful relief to American consumers, yet sensitive enough to protect plaintiffs’ rights.

Mr. Pressler. Much work has been done, but this legislation comes close to achieving those goals. There will no doubt be attempts to delay consideration of this legislation during future stages in the legislative process. But it is imperative that we go forward with the debate, and enact strong product liability reform legislation now.

I rise to join in the effort to enact meaningful product liability reform legislation. I commend the distinguished Chairman of the Commerce Committee, Senator Danforth, and Senator Kasten for their work on this legislation and for their efforts. Senator Kasten has already said he will be offering a fault based standards amendment. I will support that effort and
September 17, 1986

CONGRESSIONAL RECORD—SENATE 23825

would like to ask unanimous consent to be named as a cosponsor.

JOINT AND SEVERAL LIABILITY

Through the committee process I have placed special emphasis on the problem relating to joint and several liability. I will focus my comments on that issue.

Joint and several liability works to hold one person responsible for the conduct of another. It leads to substantial injustice to largely innocent defendants, consumers, and taxpayers. It works to increase the costs of products and services, and puts substantial pressure on local governments to either increase taxes or eliminate public facilities and services. It fails to punish the true wrongdoers. And it creates a great deal of uncertainty in assessing tort liability.

As presently applied in many States, the doctrine of joint and several liability has gone far beyond its original common law purposes. Originally, the doctrine was applied when two or more defendants had conspired and got together in a manner that resulted in an injury to the plaintiff. They were, in effect, equally at fault and equally to blame for the harm inflicted. There was no practical way to allocate the relative fault of each party's actions. The doctrine was later expanded to hold responsible all parties involved in causing the harm, regardless of whether they acted "in concert" or independently of each other.

This expansion seems to be the result of the old common law courts reluctance to allocate fault. A party was responsible for all the harm inflicted—regardless if there was 1 or 20 actors—or none of it. In order to avoid the admittedly unfair result of this "all-or-nothing" rule the courts allowed the injured plaintiff to collect from anyone who could pay. Logically, the plaintiffs would always go to the defendant with the deepest pocket.

But today, the courts are unable to allocate fault is universally rejected. Courts in virtually every State apportion fault in some manner. Although we have the ability to determine and apportion the relative degree of fault, we continue to apply this artificial doctrine of joint and several liability. A party who is determined only 1 percent at fault can be and often is held liable for 100 percent of the damage award. Under the present system, the parties causing the harm get off scot-free. We no longer punish the wrongdoers. We punish the plaintiffs for having the deepest pockets.

Although most people would agree that this makes little logical sense, I am afraid that in the past many of them have felt that was not such a bad system because it affected only the rich corporations. Unfortunately, that is not what happens. Let me explain the real effects of the current joint and several liability doctrine:

First, it is not only the big corporations that pay the bill. Cities, counties, States and other local governments are becoming the most popular candidates for joining into a lawsuit. Small businesses who are responsible enough to carry insurance are equally threatened. It is the managers who ultimately cause the claim, either through increased taxes, loss of service, higher product prices, increased insurance premiums, community business failures, or in some other way. The point is, as any economist will tell you, that the "big corporation" theory rarely reflects the real world.

Second, the current system discourages safety. Not only does it allow the real culprits to escape liability, it encourages them to act irresponsibly.

Why buy insurance? Why worry about delivering a safe product? Just set up a "fly-by-night" operation or create a phony corporate subsidiary, make all the money you can until somebody sues; pass the buck or declare bankruptcy; and start all over again, making the same unsafe product and endangering the same innocent people.

Third, the present joint and several liability doctrine has been identified as one of the leading causes of skyrocketing insurance premiums not only in the context of product liability but across the board. This is why companies and cities with even the most glowing safety records must pay insurance premiums—only in the context of product liability but across the board. This is why companies and cities with even the most glowing safety records must pay insurance premiums—only in the context of product liability but across the board. This is why companies and cities with even the most glowing safety records must pay insurance premiums.

Fourth, those who, for all practical purposes, the ordinary person would consider free of any true fault are being sued for the sole reason that they happen to be involved in the accidents. They are being sued because they have access to money or the ability to extract it from others. Cities are being sued in automobile accidents because their street lights are not working, or their airports are not safe. Manufacturers are being sued because they did not prevent a pilot from flying into a telephone line on a windy day years after he had purchased the aircraft. Motorcycle seat manufacturers are being sued because they did not manufacture a seat that would make the passenger stick to it when the motorcycle collided into a car. And the list goes on and on. No reasonable person would call this justice.

I could go on and on with a litany of the problems associated with this doctrine. But I think the point has been made. The innocent are punished while the wrongdoers are rewarded. Safety incentives are being tossed out the window. The lawyers are getting rich, and the man on the street is paying the tab.

But I am encouraged by the fact that more and more people are catching on and are getting angry about what is happening and they do not like it. They are demanding change and this is one area in particular that they have stressed. I held two hearings recently in South Dakota on the issue of liability insurance. They were asked to change the inequities and injustices resulting from the present application—or perversion if you will—of the doctrine of joint and several liability was the one reform most often and most emphatically urged. This call was not coming from the captains of industry or the deep pocket corporations some would like to have us believe. It was coming from the small businessmen, the county and city officials, and the ordinary citizen who a few years ago had never heard of the doctrine.

But with all of its inadequacies today, it is clear that the original intent and application of the doctrine was just. It would be a serious blunder to return to the days when a plaintiff was denied deserving relief simply because he or she could not identify which of the negligent actors committed the wrong or that any one party was responsible for the harm inflicted. Under the widely accepted doctrine of comparative negligence, that result is not necessary today and it would not be the result under my amendment.

The language I am proposing eliminates the joint and several liability doctrine as applied today but continues to hold all parties severally liable to the full extent of their own actions. In effect, parties continue to be fully liable for all their actions.

The only thing it changes is that parties would no longer be liable for what the court determines is the fault of others. If the court finds a party's actions to cause 10 percent of the harm, the party is liable for only 10 percent of the damages awarded. If it causes 100 percent of the harm, it is liable for 100 percent of the damages. It is that simple.

I do not intend to imply this amendment is inconsequential. I am well aware of the significance and magnitude of the impact this change would have on present case law. Indeed, I would be disappointed if it did not have a major impact on the mess created under the present system.

There remains one very important question which needs to be addressed. What happens to the plaintiff when the party who is largely at fault has no means to pay and does not carry adequate insurance coverage? It is very true that under my amendment not all plaintiffs would be compensated to the extent they are today in some cases. The answer, to be very blunt about it, is that they will not always be fully compensated when the party at fault cannot pay. The sad fact...
of life is that there will always be those kinds of cases. But to use the present joint and several liability doctrine in an attempt to compensate the plaintiff makes little more sense than to send the witness of a robbery to jail because we cannot find the robber.

I realize there are those who would say that there should be social policy that allows the injured party to be compensated to the full extent of his or her injury. I am not here to argue against that today. But what I would argue is that if we do make such a policy decision, we should also accept the responsibility to compensate the injured party rather than artificially passing it along to a substantially innocent third party. To say that because someone was 1 percent responsible for the harm justifies holding that party 100 percent responsible for the damages ducks the issue, particularly in the context of civil cases.

We have got to return some sense of responsibility to the system. I think we all realize our tort system has gotten out of hand. We need to address it in a thorough manner.

**COMMITTEE ACTION AND PROPOSED FLOOR AMENDMENT**

We made substantial progress in reforming this inequitable doctrine in committee, but in my view we did not go far enough. Let me explain a little of the logic that I used and outline my intentions. The committee adopted joint and several liability amendments which essentially abrogated joint and several liability with two important qualifications. The reform was limited to (1) non-economic damages, and (2) it applies only in cases involving a product liability action. This was a political compromise that I think we all realized was necessary. The offset should be made based on the percentage of responsibility. This approach reflects the language used in the Senate report accompanying S. 2760.

Subsection (c) addresses the "empty chair" problem. As a general rule, only parties to the case should be considered in apportioning responsibility. However, in those cases where the plaintiff releases the defendants or potential defendants, or when the remaining defendant cannot—after using best efforts—bring in a third party through impleader practices or other available procedures, then those cases will be considered in determining the apportionment if the defendants can prove they were a cause. The burden is on the defendant to prove non-parties were a cause. But, as per paragraph (2) above, there should be no burden as to apportionment of responsibility percentages. That will be left to the trier of fact.

In addition, offsetting adjustments would be made based on the plain facts. The offset shall be based on the percentage of responsibility attributable to the person released and the amount of compensation that has been paid (if any) in consideration for the release.

**NOTICES OF HEARINGS**

**COMMITTEE ON GOVERNMENTAL AFFAIRS**

Mr. ROTH. Mr. President, the Senate Committee on Governmental Affairs will hold a hearing on Tuesday, September 23, at 10 a.m., in SD-342 on the nomination of Robert P. Bedell to be Administrator for Federal Procurement Policy.

For further information, contact Carol Fox in the committee office at 224-4751.

**AUTHORITY FOR COMMITTEES TO MEET**

SELECT COMMITTEE ON INDIAN AFFAIRS

Mr. DOLE. Mr. President, I am introducing a new amendment that the Select Committee on Indian Affairs be authorized to meet during the session of the Senate on Wednesday, September 17, between the hours of 2 p.m. and 3:30 p.m. in order to conduct a markup of the following five bills: H.R. 1920, S. 2676, S. 1452, S. 2584, and S. 2107.

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

**ADDITIONAL STATEMENTS**

**GRAMM-RUDMAN-HOLLINGS**

- Mr. MOYNIHAN. Mr. President, on August 19, the Department of Commerce revised its second quarter preliminary estimate of real GNP growth from 1.1 to 0.6 percent.

Recent economic performance has prompted several noted economists to express concerns about the Gramm-Rudman-Hollings deficit ceilings. Herbert Stein, Martin Feldstein, Lawrence Chimerine, Alan Greenspan, and Roger Brinner have all warned that the economy is weak and that excessively contractionary fiscal policy could trigger a recession.

Finally, the President signed Gramm-Rudman-Hollings into law on December 12, 1985, he placed budget levels into the Federal Code. The deficit ceilings contained in the law—$172 billion for fiscal year 1987, $108 billion for fiscal year 1988, $72 billion for fiscal year 1989, $36 billion for fiscal year 1990, and zero for fiscal year 1991—were based on an assumption of continued real economic growth of about 3½ percent over the 6-year period.

On November 6, 1985, the day the Senate voted 74 to 24 in favor of the Gramm-Rudman-Hollings proposition, I warned that Gramm-Rudman-Hollings:

"\[\ldots\] assumes we know what we're talking about, that we can predict when a recession is coming. We can't, and neither, in this matter, can anyone else.\[\ldots\]

Economists do not know the future—they study, and barely know, the past. This is really an adventure in mad scientism, pretending to know what cannot be known."

On July 22, the Department of Commerce announced that real GNP growth in the second quarter of 1986 was 1.1 percent. A month later that estimate was cut in half.

On July 23, the Legislation and National Security Subcommittee of the Senate Committee on Government Operations held hearings on the state of the U.S. economy, and the potential effects of Gramm-Rudman-Hollings. Three distinguished economists testi-
September 17, 1986

CONGRESSIONAL RECORD—SENATE

23827

fied: Lawrence Chimerine, chairman, and chief economist for Chase Econometrics; Joseph Duncan, chief economist for the Dun & Bradstreet Corp.; and, Donald H. Straszheim, chief economist for Merrill Lynch.

Dr. Chimerine reported:

The slow and erratic economic growth that began in mid-1984 and is continuing—whether anything, the economy has actually deteriorated somewhat in recent months. Most significant is no sign whatsoever of any acceleration of economic activity.

Chase Econometrics projects a deficit of $190 billion in fiscal year 1987—a deficit requiring $46 billion of budget cuts. The only way to achieve that is to cut thespread deficit target of $144 billion. Dr. Chimerine forecasts real GNP growth of 2.4 percent for fiscal year 1987—about 2 percentage points lower than the forecast of the administration.

Joseph Duncan testified:

The art of forecasting is so weak that we have built the [Gramm-Rudman-Hollings] structure on a very soft base. Few respected economists would argue with that statement. Dr. Rudolph Penner, Director of the Congressional Budget Office, in testimony delivered last October during the Gramm-Rudman debate stated:

Mr. Chairman, given the record of economists, it will not be difficult to convince anyone that forecasting is a very uncertain art. Reasonable men and women can differ widely about what the future holds, and even if there is agreement on an economic forecast, there is an added layer of uncertainty involved in translating that forecast into an estimate of budget totals. For example, our economic forecasts may give us a reasonable estimate of the number of people who are eligible for a program, such as food stamps, but there may be considerable uncertainty about how many of those people choose to participate in the program.

In dealing with such uncertainties in our normal budget projections, we have to make a large number of arbitrary choices, and substantial errors are possible. In the context of this bill, we might fail to trigger the process when subsequent events show that the sequester was called for, or, perhaps worse, we might trigger a sequester when subsequent events show that it was unnecessary. Given the slow growth of the economy, our forecasts must be made in an unexpected fashion.

Between 1976 and 1984, the GNP forecasts issued by the Office of Management and Budget were, on average, 1.15 percentage points off from the actual GNP growth rate—which was 3.3 percent for those years. The forecasting record of the Congressional Budget Office was only slightly better. On average, 0.98 percentage points off. Dr. Penner testified:

I consider any forecast of GNP that is off by no more than one percentage point to be an accurate forecast. Let me point out that an error of 1 percentage point is a lot more than 1 percent. If GNP were forecast to grow at 4 percent, an error of 1 percentage point represents a 25 percent error. If GNP is expected to grow at 2 percent, the error doubles to 50 percent.

We approved Gramm-Rudman while assuring Congress that economic growth. We have not had that kind of economic performance. In February, the Congressional Budget Office projected a deficit of $208 billion in fiscal year 1986. In its August update, CBO projected a deficit of $224 billion. About one-half of this deficit increase is attributable to lower inflation and lower economic growth than was previously expected.

Dr. Chimerine recently testified:

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The GRH approach is very dangerous in the context of this bill, we might fail to trigger the process when subsequent events show that the sequester was called for, or, perhaps worse, we might trigger a sequester in an unexpected fashion.
depressing demand just as the recovery is showing signs of stalling.

Even more significant to the level of demand in the economy will be the changed incentives for business investment. Eliminating the investment tax credit and lengthening depreciation allowances for investments in structures will be a substantial disincentive to business investment. And the overall increase in corporate taxes, which is necessary to finance the increased personal exemption and lower personal tax rates, also reduces funds available for investment. It's not surprising that business investment has already slipped badly and that the investment outlook for 1987 is poor.

In the near term, the necessary process of deficit reduction is the other important counteractory effect to worry about. Over the past year, the prospect of significant deficit reduction by Congress has helped bring down interest rates all around. The dollar's decline and thus has boosted economic activity. But the actual deficit reduction that can be expected between 1986 and 1987 is unknown.

The resulting confidence in declining deficits will continue to encourage lower interest rates. And lower interest rates will have adverse effects on investment demand that will depress economic activity over the next two years of the slowdown in the longer term. Another given, in our view, is that the Fed can now do little to boost demand through lower interest rates. And jawboning Germany and Japan to increase their own economic activity has little relevance for the U.S. economic outlook.

But it is important to avoid further dampening of the economy through loss of confidence by the financial markets. The financial markets will need reassurance that deficit reduction will continue. With the recent Supreme Court ruling adding uncertainty to that, the Gramm-Rudman process may drag. financial markets would respond badly to any hint that Congress has lost the stomach for deficit reduction. Congress could result in rising interest rates and a sinking stock market that would further depress business investment.

However, it would be wise to redefine deficit reduction goals if the economy does slow down. Tax revenue automatically falls and the deficit swells when the economy slows down. It would be just the wrong response for Congress to cut spending even further in that situation. The proper goal of deficit reduction over the next few years should be adjusted for the business cycle. If the economy slows and unemployment rises, the target level for the deficit should be raised accordingly.

One rule of thumb would be to raise the target by 2 percent of GNP in each percentage point of a percent rise in the unemployment rate. If unemployment should rise from the current 7.1 percent to 7.5 percent, the target deficit level for 1989 would rise from $144 billion to $160 billion.

These measures will not stop a slowdown in the economy, but by responding sensibly to changes in the economic climate, Congress can prevent more serious deterioration.

From the Washington Post, July 31, 1986

THE WRONG TIME TO CUT GOVERNMENT SPENDING

(By Herbert Stein)

Grown men with responsible positions stand up before television cameras and make the claim that the economy is rising less than expected earlier in the year, and inflation is also lower than expected, federal revenues will be less than expected and it is therefore necessary to cut federal expenditures below the level planned previously.

I do not understand it. Why are we punishing ourselves in this way? Does the slowdown in the U.S. economy mean that the real rates are weaker or more amiable and the buildup of our military strength is therefore less urgent? Is the need to look after the poor and homeless diminished?(Is the ebbing tide lifting all the boats?) Whatever was the previous justification for spending $30 billion on aid to agriculture—is that justification now weaker? Obviously not.

With both less output and less inflation than we expected, are we now less able to afford those things we previously thought we needed? Surely the answer to that is no. On the contrary, there will now be more productive capacity with which to meet the government's requirements; and less risk of inflation. The answer would be different if the economy were lagging behind previous forecasts because output was bumping up against a ceiling of capacity, but that does not seem to be the case.

Is our revulsion against the economics of Keynes so great that we not only deny what we have learned but assert with confidence that the opposite is true? That is, do we now think that cutting government expenditures is a reliable way to stimulate a sluggish economy or prevent a threatened recession?

The question may be put more concretely: In the past year output increased by 2.7 percent, which is probably somewhat below our potential growth rate, and unemployment was fairly steady at around 7 percent. Now there is an expectation that output will rise in the next year at about the same rate, or possibly less. In these circumstances, is it prudent to cut expenditures below the president's budget level in order to reduce the deficit from $210 billion in fiscal year 1986 to $144 billion by fiscal 1987? (That figure, $144 billion, is the Gramm-Rudman target for the 1987 deficit. Because of the peculiarities of Gramm-Rudman accounting, it appears that about $225 billion of taxes collected in 1987 will not be counted and about $15 billion of expenditures will not be counted. Thus, if the "Gramm-Rudman deficit" is $144 billion the "real" deficit may be $134 billion.)

My pre-Keynesian and anti-Keynesian professors knew better than that. Even Herbert Hoover knew better than that. A thorough-going classical or monetarist might deny that increasing government spending would have even a short-run stimulating effect on the economy. He would not say that cutting expenditures below the president's budget level for 1989 would have a short-run stimulating effect on the economy, so that it was necessary to cut other- wise worthwhile expenditures in order to fend off a recession.

What leads to the present foolish talk about the budget is Gramm-Rudman. But even Gramm-Rudman's admirers admit that cutting expenditures is a good prescription for dealing with economic sluggishness. The Gramm-Rudman law provides that if the real GNP rises at less than an annual rate of 2 percent for two consecutive quarters the deficit limits are increased for the current and following fiscal year.

This is recognition that cutting spending does not cure recessions. Once the GNP growth rate falls below 1 percent for two consecutive quarters the deficit ceiling is off. But as long as the growth rate remains at 1.1 percent—as it was in the second quarter of 1986—or higher, the targets must be met. They must be met even if, with the economy sluggish and revenues rising slowly, they require holding expenditures below levels that are worthwhile, that are well within the economy's capacity, and that are not harmful but possibly helpful to the health of the economy.

Sophisticated people to whom I express my concerns about the idea of cutting expenditures to meet a shortfall in revenue tell me not to worry. The government will not really meet the Gramm-Rudman targets. All Gramm-Rudman requires is that at the beginning of fiscal 1987 there should be an official estimate that the deficit will not exceed $144 billion for the year. The law does not require that the deficit actually be less than $144 billion.

This solution is unsatisfactory for two reasons:

First, the government should not pretend to do what it does not intend to do. This is contrary to a moral imperative. From a symbolic standpoint the credibility of the government is an asset—more valuable as it becomes scarcer—and it should not be wasted.

Second, while a sharp reduction of expenditures in response to the slowdown of the economy would be wise, to destroy completely the expectation that the size of the deficit will be brought down sufficient restraint to preclude continued increase in the size of the federal debt relative to the GNP would also be wise. This can cause an increase in long-term interest rates that would be harmful to economic growth. The de facto abandonment of Gramm-Rudman, without the establishment of any substitute rule of fiscal policy, will destroy all hope of deficit restraint. We find ourselves in a position where we can't live with Gramm-Rudman and can hardly live without it.

We need a fiscal policy that will limit the long-run growth of the deficit and the debt while not enforcing inefficient and probably destabilizing changes of government expenditures in response to fluctuations of the economy. Fifty years ago people talked about balancing the budget over the business cycle as a solution to this problem. Forty years ago the Committee for Economic Development proposed the policy of balancing the budget at high employment for the same purpose. Even a few years ago people were talking about the difference between the "structural" deficit and the "cyclical" deficit, which was a way of distin-

The attractive nuance of Gramm-Rudman diverted attention from all that, but our present situation shows the urgency of returning to the problem of reconciling our long-run and short-run fiscal requirements.

September 17, 1986

A growing number of economists are warning that the Gramm-Rudman-Hollings budget deficit targets for fiscal 1987 will require spending cuts or tax increases so large that they would severely damage the economy.

The Gramm-Rudman-Hollings law aims for a fiscal 1986 deficit of $225 billion. Reaching that level from this year's deficit of $225 billion or so, these economists believe, will require too much in the way of restraint for a sluggish economy to swallow in one dose. Some suggest that forcing it down could send the economy into recession.

Government spending, like consumer outlays or business investment, is part of the total economy. If it is reduced, there is less demand for goods and services, and the economy slows. If taxes are increased, individuals and businesses have less after-tax income to spend, which has the same depressing effect on the economy. Economists are less certain about these relationships than they used to be, but they generally agree that a short run, a very large, rapid reduction in the deficit could slow economic growth.

For example, trying for an $80 billion cut in one year—which would equal about 2 percent of the gross national product—a number of economists are concerned about half that size, to a deficit of around $180 billion, would be more appropriate.

And if analysts say that they also would be worried about the impact of the fiscal restraint if they thought there was any real chance that Congress would take meaningful steps close to the $144 billion target. Some changes under consideration, such as selling government assets or moving a military pay day by one day at the end of the fiscal year, would effect the deficit but have virtually no economic impact.

No less an advocate of smaller deficits than Federal Reserve Chairman Paul A. Volcker recently suggested in congressional testimony that the 1987 deficit target is too ample.

Volcker has long argued that large budget deficits have contributed to creation of the nation's enormous trade deficit and helped keep interest rates higher than they otherwise would have been.

As a result of economists expressing concern that an $80 billion or larger reduction in the deficit in one year would squeeze the economy too hard, Volcker indicated he believes that a cut of that magnitude could prove to be too much of a good thing—though it clearly made him uncomfortable to say so.

At the Congressional Budget Office, Director Rudolph G. Penner shares Volcker's concern, though following the CBO's usual practice, he will not make a specific policy recommendation on the matter.

"It was something we worried about a lot. Making the deficit too small could give the wrong signal," Penner said.

That forecast showed the economy growing at a 3.5 percent pace during 1987, after a 2.1 percent growth rate in 1986. And it assumed a deficit of $154 billion, the upper limit of a $10 billion tolerance range allowed by Gramm-Rudman-Hollings, rather than $144 billion.

In its economic and budget update, released earlier this month, CBO put it this way:

"The short-run impacts of such large changes in fiscal policy and the tax structure are a subject of controversy among economists. CBO's forecast assumes that the short-run contractionary impact of changing fiscal policy will offset the loss of revenue by an improved trade balance and by lower interest rates than would otherwise prevail. If these offsets fail to occur or grow more slowly than expected, an increase in economic growth may be delayed."

Penner believes that the growing internationalization of the economy has weakened the previous link between changes in fiscal policy and changes in economic activity. Since 1982, the large budget deficits have been accompanied by large and rising trade deficits that have offset some of the economic stimulus that the budget deficits provide.

Now CBO is counting on these relationships to be symmetrical, with a falling trade deficit offsetting a decline in U.S. production and consumption at the same time the declining budget deficit is having a restraining influence on spending.

"Our forecast is highly dependent on that relationship," Penner said, "and some of our economists have voiced concern that they may not materialize, and that interest rates will rise sharply instead."

"Interest rates are also related," he explains. "The marketplace has moved some of the government financing deficits forward through lower rates.

And that also causes the CBO director to raise a point about changing the Gramm-Rudman-Hollings targets. There would be a real question how the marketplace would react to that, especially if we're right that the deficit reduction is part of the administration's fiscal policy, "a sense that we have some sense of discipline in the budget process."

"Alan Greenspan, chairman of the Council of Economic Advisers who now heads Townsend-Greenspan & Co., a New York economic consulting firm, is another advocate of smaller deficits who is troubled by the 1987 target and its possible impact. It has become increasingly evident in recent years that a sizable budget deficit for fiscal 1987 followed by a 1988 target of $108 billion is probably unreachable," Greenspan told clients recently.

"The budget deficit for fiscal 1986 is likely to be $220 billion, or perhaps even larger. With the economic outlook somewhat subdued, there is a potential growth in revenues to reduce the deficit sharply, even should spending be constrained significantly, looks as a whole avoid the needs for moderate changes in fiscal policy when it becomes politically safer to oppose G-R-H, one must assume a plethora of proposals will be forthcoming to alter the targets."

Another former CEA Chairman, Martin Feldstein of Harvard University, is questioning the appropriateness of the targets if the economy remains sluggish, and particularly if unemployment starts to go up. During his time at the CEA, Feldstein repeatedly raised White House hackles by urging quick action to reduce the growing budgetary red ink.

"Earlier this month, Feldstein and his wife, who also is a CEA economist, wrote a newspaper column, "In the near term the necessary process of deficit reduction is (an) important element in the current public debate and contains the $15 trillion to worry about."

"During the past year the prospect of significant deficit reduction by Congress has helped bring down long-term rates and cut borrowing costs, contributed to the dollar's decline and thus has boosted economic activity. But the actual deficit reduction that can be expected between 1986 and 1987 is a two-step affair," the Feldsteins said.

"The resulting confidence in declining deficits will continue to encourage lower interest rates and to maintain a competitive dollar. But at the same time the actual deficit reduction may be more than enough for goods and services and therefore a temporary decline in economic activity."

The Feldsteins said that it is important not to lose financial participants to doubt that deficit reduction will occur. "Loss of confidence in Congress could result in an unintended increase in the interest rate market that would further depress business investment.

"However, it would be wise to redefine deficit reduction goals if the economy does slow down," they continued. "Tax revenue automatically falls and the deficit swells. Reducing the economy too hard, the economy slows down. It would be just the wrong response for Congress to cut spending even further in that situation. Theilon's program of deficit reduction in the next few years should be adjusted for the business cycle. If the economy slowly and unerringly should proceed, the target level for the deficit should be raised accordingly."

The Feldsteins suggested this rule of thumb: raise the target level by $8 billion for every tenth of a percentage point increase in the nation's unemployment rate above current levels of 7 percent.

"However, Brinner of Data Resources Inc., an economic consulting and forecasting firm, last month proposed a similar rule of thumb, with a $5 billion shift of the target in line for each 1 percentage point increase in the near term the necessary process of deficit reduction."

"The targets must be amended only in detail, not in principle," Brinner wrote in the Wall Street Journal. "The deficit reduction that can be expected to result from Graham-Rudman-Hollings targets is not as robust as originally hoped, and the budgetary takeoff position is lower."

"With the original legislation called for steady progress ($36 billion per year) toward budget balance by 1991, assuming the economy would then be characterized by a 6 percent growth rate, the deficit targets are not as robust as originally hoped, and the budgetary takeoff position is lower."

"However, Brinner of Data Resources Inc., an economic consulting and forecasting firm, last month proposed a similar rule of thumb, with a $5 billion shift of the target in line for each 1 percentage point increase in the unemployment rate above current levels of 7 percent.

"With the economy unable to break away from 7 percent unemployment and with a projected 1986 deficit of $220 billion, however, a $35 billion to $40 billion increase in next year's target and a new medium-term "with the necessary process of deficit reduction is (an) important element in the current public debate and contains the $15 trillion to worry about." projection of zero, as under Gramm-Rudman-Hollings. Economists are far less sure these days that they know how to measure properly the size of a budget deficit or to calculate its likely economic impact.

"For instance, Robert Eisner of Northwestern University argues in his book, "How Real Is the Federal Deficit," that the reported deficit must be reduced by the loss of real value in the outstanding public debt due to inflation. Thus, in 1986, with about a 2 percent inflation rate and roughly $1.5 trillion worth of publicly owned federal debt, there is about a $40 billion offset."

Since John Paulus, managing director and chief economist of Morgan Stanley & Co., a New York investment banking firm, also notes that the holders of federal debt recognize the loss of real value in their holdings each year and adjust their expected return to an amount equal to that loss of real value.

If Paulus is right, the impact of large deficits on financial markets, and therefore on interest rates, could be considerably less than one might suppose. By his accounting, it would take actual deficit reductions considerably smaller than those set by Gramm-
Rudman-Hollings to put the deficit by 1991 into what he calls a “neutral” position as far as financial markets are concerned. Gramm-Rudman-Hollings calls for a balanced budget that year.

But whenever one attempts to calculate the size of the deficit and its likely economic impact, there remains the danger that reducing it by more than $80 billion in one year may be too much.

“Those of us who highly prize economic growth and low unemployment, the risk of inflation, and fiscal stimulus must be weighted heavily,” Eisner concludes in his book. “One cannot properly counsel budget balancing in an environment of sustenance still near 7 percent and real economic growth well below its potential.”

“The politics of Gramm-Rudman notwithstanding, a budget balanced by current federal rules of accounting is an invitation to economic disaster,” Eisner declares.

Politically, no one wants to go before the electorate this fall vulnerable to a charge by an opponent that he or she is in favor of big deficits. Politically and economically, the question is how fast the deficit—which clearly will be a record in fiscal year 1986, which ends next month—can be safely reduced.

THE NEW ENGLAND TEAM

Mr. Kennedy, Mr. President, I would like to take this opportunity to place in the Record a New York Times article about one of my colleagues from New England, Senator Pell and Senator Stafford.

For almost a year, the Education Subcommittee has been working diligently to reauthorize the Higher Education Act. We have completed the conference and it appears that we will soon present the President with a finely crafted reauthorization that provides the vital resources necessary for millions of American students to pursue higher education.

Mr. President, it is safe to say that this legislation could not have been possible without the knowledge and skill of both the chairman and ranking minority member of the Education Subcommittee.

Senator Stafford has chaired the Education Subcommittee for the past 6 years and has shown through his competent legislating that he is truly the champion of education for all. Along with his commitment to general education, Senator Stafford is one of the founding fathers of Public Law 94-142, the Education for All Handicapped Children Act.

Senator Pell has long been identified as one of the experts in the field of education. His commitment to education is evident in all that he has accomplished during his 17 years on the Education Subcommittee.

As my colleagues know, Senator Pell who chaired the Education Subcommittee for 12 years, is the father of the Pell Grant Program which has provided some 20 million grants to needy students. In 1979, Senator Pell was one of the original sponsors of legislation creating the U.S. Department of Education and has been a staunch foe of this administration’s consistent attempts to eliminate it. Senator Pell’s advocacy in education is immeasurable. His hours of service to promoting education here in Congress are innumerable. And, his commitment to the students of our Nation is immeasurable.

I commend Senators Stafford and Pell for their leadership in education and I look forward to working with them in the next Congress. I ask that the full text of the article be printed in the Record.

The text follows:

(From the New York Times, Aug. 17, 1986)

STAFFORD AND PELL, THE NEW ENGLAND TEAM

(By Leslie Maitland Werner)


That was the year the Republicans took control of the Senate for the first time in 28 years, which meant that Mr. Pell, who for years had been chairman of the Labor and Human Resources Subcommittee on Education, Arts and the Humanities, stepped down to make way for a new minority member, and Mr. Stafford, who had held that spot, was elevated to the chairmanship.

Far from causing any problem for either one of them, however, the change has had little effect on education legislation and has made only one small difference in their lives, they both agree.

“We hardly noticed anything except now I have to be there when the meetings start,” Mr. Stafford said, “and he can be a little late, which is the reverse of how it was before.”

The two legislators’ views of education and the Federal role in it are so similar, they and others say, that it hardly matters which one is in charge. Unlike many other other committees, they do not find themselves much in battle positions along partisan lines, their leadership on education issues has smoothed the way toward consensus, sometimes a consensus that goes against White House wishes.

“We worry about results”

They both opposed the Administration’s desire to eliminate the Department of Education, their efforts to cut back on education funds, and they successfully fought its plan to roll all education programs into one large block grant to the states.

“It doesn’t matter if it’s Stafford and Pell or Stafford and Pell,” Mr. Pell said of their legislative relationship. They both come from small New England states, he said, and share a “New England approach” to things, giving a personal interest in helping. “We try to get on with the job and not talk about it too much,” he said. “We just worry about results.”

Senator Spark M. Matsunaga, Democrat of Hawaii, a member of their subcommittee, says, “They both maintain a very cooperative attitude regardless of party line.”

“They’re both cool-headed gentlemen,” he said. “I’ve never seen them at loggerheads to the point of even raising their voices to each other. They seem to work together much more harmoniously than heads of other committees do.”
chance to affect the course of things when the Higher Education bill was being worked out in the Senate.

"I'd urge Bennett to support more money for education programs even at the expense of some defense spending," Mr. Stafford said, "and help the armed forces build expensive weaponry if we don't have the minds to understand how to use it and to grasp the consequences of its use.

Speaking for the Administration, an Under Secretary of Education, Gary L. Bauer, said its relationship with Mr. Stafford could be best described as a "friendly" disagreement.

"Basically, we agree to disagree," Mr. Bauer said. "But if I were in the higher education community, I'd have a hard time identifying a better friend." Unless, of course, it was Mr. Pell.

ABORTION AND INFORMED CONSENT: COLORADO

Mr. HUMPHREY. Mr. President, Kathryn in Colorado gives us more insight into emotional world of abortion. Women who deeply regret their decisions to abort their children. Those who speak directly through these letters communicate not only their own feelings, but also those of countless others.

WEBA is an acronym for an organization known as women exploited by abortion. This grass-roots organization has arisen around the country in order to help women who have been unable to come to grips with their abortions. Those who have traveled the dark roads of postabortion trauma help others along who, for one reason or another, have not found a way to overcome their grief.

Kathryn gives us a unique view of the desperate sorrow many women experience because they were given too little information about what abortion entails. She points out that this lack of preparation causes intense and deep regret in women who try to consider ending their lives. She is not painting a picture of a "safe and legal" procedure, which seems to be all we hear about from proabortion advocates.

I call on my colleagues, especially those who represent Kathryn in the Senate, to contemplate Kathryn's testimony and join me by cosponsoring S. 2791. It is imperative that this Congress ensure that women are informed about the consequences and nature of abortion, and that the Congress stop and deploge on use of dangerous practice of aborting women who have not received minimum information about the abortion procedure.

The statement follows:

STATEMENT ON ABORTION, JUNE 12, 1986

YORK HONOR SENATOR GORDON HUMPHREY: I'd like to express my concern pertaining to the abortion issue. The debate at hand strikes very close to home for me, as I am a woman with an abortion experience. Unlike I was led to believe, it is something I live with daily. Fortunately for me there are no physical scars to deal with, only emotional, and through the grace of God I have been healed of many of the stresses directly related to the abortion experience, including, but not limited to, shame, depression, anxiety—only to name a few.

I am in a position now where I deal with other women who have similar experiences. I am the State Director of WEBA. Weekly another woman calls, often suicidal, unable to cope another day with her own abortion experience. They come to me with hope and the hope that they too can work through the after effects of that traumatic experience. I tell them, "If I had only known" "Why didn't they tell me?” and “No one said it would be like this.”

Sir, I believe it is within your power to see that the laws concerning this issue are changed, allowing women to be fully informed as to the choices we are making. I myself and the women I represent plead with you to do everything you can to change the laws governing this issue. We appreciate your work in this area and support your efforts wholeheartedly and will do what we can to help fight the battle.

Sincerely,

KATHRYN A. BUSCHMAN, Colorado.

PRACTICAL STEPS ON CRIME AND VIOLENCE

Mr. SIMON. Mr. President, there are no easy answers to reduce crime and violence in American society. The problem is complex and the causes multifaceted. But I think there are some steps that are fair. Recently, in a column I write for newspapers in my State, I have listed three immediate steps that would help. I ask to have it printed in the Record.

The column is as follows:

PRACTICAL STEPS ON CRIME AND VIOLENCE

(By U.S. Senator Paul Simon)

What can be done about the problem of crime and violence in our society?

There are three immediate steps, among others, that would help: First, get the television networks to reduce the rising rate of violence on television that clearly has an impact on many people; second, fewer speeches and more sensible action on the drug problem; third, change our laws—state and federal laws in particular—that permit people to walk the streets after being convicted of crimes of violence while they appeal.

On the last point, here is a good example of what has been happening. Walter Otis Lane, 27, was returned to the Cook County Jail at the end of July. He had been convicted of rape and sentenced to 11 years in prison. He appealed his conviction and while on appeal he was permitted to go free. While he was free, he committed another rape and with abducting a Blue Island, Ill., bank director and his wife, forcing them to withdraw $15,000 from the South Chicago County Bank and Trust in Blue Island, and then he is charged with shooting the couple to death.

If I were in the higher education community, I'd have a hard time identifying a better friend.

THE NUCLEAR NON-DETERRENT

Mr. SIMON. Mr. President, in nuclear terms, both the United States and the Soviet Union are far beyond any rational. We should be listening to the Supreme Commander of NATO, Gen. Bernard W. Rogers, who has been warning us: we have put too much of our defense readiness in the nuclear arena. By taking the rational step and placing more emphasis on conventional forces, we could sensibly and safely reduce defense spending. I have raised this argument in a column I write for newspapers in my State. I ask to have it printed in the Record.

The column follows:

GEN. ROGERS AND THE NUCLEAR NON-DETERRENT

I have saved an item from the New York Times of Sept. 5, 1984. Buried on page 25 in the ninth paragraph of an article is a quotation that should have been on the front page of that newspaper and every newspaper in the country. But I saw it only in that one article in that one daily. The administration and Congress take the really key step is not clear. At one point the major source of illegal drugs was Turkey. This country, working with the Turkish government, has virtually eliminated that source of trouble. Now, according to the article, the major source of illegal drugs is Peru. Mr. President, they must learn to understand more clearly that not only are drugs bad, but permitting their friends to get into trouble with drugs is a betrayal of people in this country.

The third source of violence is right in our homes—that television set. The television industry is permitting more and more violence, and the evidence from study after study is that it is a serious cause for concern.

University of California and University of Pennsylvania studies released within the last few weeks have reinforced previous studies on the same subject. The studies show clearly: Television violence causes some of the violence in our society.

I have introduced legislation to permit the networks to get together with the independents and the TV programmers to establish guidelines on violence. The United States does not have to have the most violent TV in the world.

When I met some months ago with TV network executives, they said they could not establish standards because of antitrust laws. Now when I try to change the law so that they would not violate the antitrust laws, at least one network is vocal in its opposition to the bill. The problem is that violence pays off for the television industry.

But it and the American public should understand those profits are costly to our society.

If the television industry continues to reap sensible steps, Congress should have the courage to defy them and act.
mander of all NATO forces in Western Europe—then and now—said: "We have mortgaged our defense to the nuclear response. . . . We have failed to provide sufficient capacity—ammunition stocks, prepositioned material to replace losses of equipment on the battlefield such as tanks—to keep the first nuclear weapon in stock for a sufficient length of time. Under current conditions, if attacked conventionally, we will have to request the release of theater nuclear weapons fairly quickly."

The warning of General Rogers is as true today as it was two years ago.

And it could take on added meaning when tough decisions must be made soon on cutting back the growth in defense spending. The huge and growing federal deficit is going to force a needed reduction in defense spending growth.

In light of these fiscal realities, will we continue to give our country an imbalanced defense?

The nuclear deterrent is so overwhelming it is almost a nondeterrent. Anyone who gives the idea that first nuclear weapon in war must realize that he or she may be ending civilization.

If the Soviets should move in and grab 50 square miles of West German territory, do we respond with nuclear weapons that not only destroy the Soviets, but produces will cause the destruction of all of us? It is not likely—and the Soviets know it.

The advice of General Rogers is to be better prepared with a conventional response than we are. Instead of putting too many eggs in the nuclear basket we should pay more attention to anti-tank weapons, personnel training, stocks of conventional munitions and the like.

Instead, we are investing more and more in the already overwhelming nuclear response.

Why? We want an "adequate deterrent." But what is adequate?

For a rational Soviet leader one of our strategic missiles—containing more power than all the bombs of World War II—ought to be sufficient. But in case that is knocked out by the Soviets, we build two. In case those are knocked out we build four—and on and on. We now have approximately 10,000 strategic warheads and the Soviets have about 10,000. In addition, we have between us about 30,000 small nuclear warheads.

In nuclear terms, both of us are armed far beyond anything rational.

One way of gradually moving away from the nuclear reliance is to halt all nuclear testing. At one point we offered that but the Soviets refused. Now they offer it and we refuse.

Since underground nuclear tests are verifiable, we ought to move in that direction. Not to do so risks everything.

Each test costs us about $30 million; some tests cost as much as $70 million each.

If we stopped the tests we could do three things: (1) We could stop the spiraling growth of the arms race.

(2) We could take half the cost of each test and invest it in more practical defense measures, as General Rogers has suggested.

(3) We could take the other half of the test costs and reduce the defense budget.

That seems logical and obvious. But what should be obvious somehow is not.

To the reality, the safer our nation and world will be. We should listen to General Rogers.

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Providing for Settlement of Dispute Between Certain Railroad Employees and the Maine Central and Portland Terminal Railroads

Mr. D'AMATO. Mr. President, I am pleased to offer my comments as an original cosponsor of Senate Joint Resolution 415, legislation which was introduced yesterday by my distin-
guished colleague, Senator Mitchell. This bill is urgently needed to resolve a railroad labor dispute that has reached an impasse between the Brotherhood of Maintenance of Way Employees and the Maine Central and Portland Terminal Railroads, owned by Guilford Transportation Industries, Inc.

I have maintained a serious, continuing interest in the progress of a labor dispute between the BMWE and Guilford. Guilford also owns the Delaware & Hudson Railroad Co. and operates more than 2,000 miles of track and trackage rights, extending east from Maine to Buffalo, NY. The labor dispute in Maine has had an impact in New York State, and the potential displacement of a widespread strain of a nonnuclear response would certainly harm my State. Earlier this year, I joined many of my colleagues in writing to the President and urging him to appoint an Emergency Board to review this dispute. On May 16, 1986, the President appointed a Board. The Board issued recommendations covering job-protection allowance, system-production maintenance crews, pay health and welfare programs, and work rules and practices on June 20, 1986. Those recommendations. However, Guilford would not agree.

A Congressional Advisory Board (CAB) was established on August 21, 1986 (Public Law 99-385). I had co-sponsored similar legislation in the Senate, Senate Joint Resolution 379, to extend the cooling off period in the strike and to require the Secretary of Labor to issue recommendations on resolving this dispute. The CAB was charged with investigating the dispute and making recommendations for its resolution. On September 8, 1986, the CAB recommended that, in the absence of an agreement between the parties to dispose of the dispute by September 13, 1986, the Congress should pass legislation directing the parties to accept the recommendations of the President's Emer-
gency Board. Further, if the parties cannot agree as to all necessary details in applying the recommendations on October 1, 1986, any unsettled issues should be handled by an arbitrator designated by the National Mediation Board.

Although some discussions have taken place between the parties, it has become apparent that it is extremely unlikely that an agreement will be reached in the near future. All indications are that an impasse has stalled this dispute, and the Congressional action is required to prevent further harm from occurring.

I urge my colleagues to join me in supporting this important piece of leg-

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H-3: The Luluku Archaeological Site

Mr. STAFFORD. Mr. President, shortly, the Senate will consider S. 2405, the Federal-Aid Highway Act of 1986. It is expected that an amendment will be offered to exempt H-3 on the island of Oahu in Hawaii from 4(f). Section 4(f) directs the Secretary of Transportation to seize a property by eminent domain on federal land if it presents a significant environmental impact. The Federal court determined that this road adversely impacted a local park, a park created with Federal dollars, and a local recre-

After the court record was closed, a significant archaeological site was discovered in the path of the highway. Native Hawaiians hail the archaeological discovery as among the most significant in the history of the island. The site includes house platforms, agricultural irrigation systems, religious artifacts, and other materials. It is believed this site dates back to the fourth century, making it the oldest discovery of its kind. The Office of Haw-

Hawaiian Affairs was so concerned that it filed suit to protect the site. That case is pending. If the 4(f) exemption is adopted, this site will have no Federal protection and most of it will be destroyed. Moreover, if the exemption is enacted into law, the pending case brought by OHA will be dismissed because the law upon which it is based, 4(f), will not apply to H-3.

It should be noted that the court determined that a prudent alternative existed to the alignment of H-3. Had the state department of transporta-
tion decided to proceed with H-3, it could have done so by adopting the Makai alignment and so doing would have by-passed the Luluku site. The Department of Transportation insisted on its preferred alignment and is now asking the Congress to exempt H-3 from the law.

I have received letters from several important Native Hawaiian groups, the Council of Hawaiian Organizations, the Congress of the Hawaiian People, the Office of Hawaiian Affairs, the Oahu Council, and the Queen Emma Hawaiian Civic Club. They oppose the proposed exemption of 4(f)
September 17, 1986

CONGRESSIONAL RECORD—SENATE

from H-3 and urge the protection of the Luluku Archaeological site.

I ask that these letters be printed in the Record.

The letters follow:


HON. ROBERT T. STAFFORD, U.S. Senate, Washington, DC

DEAR SENATOR STAFFORD: The Council of Hawaiian Organizations is a coalition of groups representing over 15,000 members of native Hawaiian ancestry. We ask your help in opposing any exemption from Federal law that would permit the destruction of an ancient Hawaiian archaeological complex which lies in the path of the proposed Interstate H-3 freeway in Hawaii.

We disagree with the Hawaii Transportation Department's contention that the Luluku Archaeological Complex can be divided into 17 individual sites; the ancient Hawaiian methods of irrigation cannot be properly surveyed, studied, and hopefully considered part of our Hawaiian heritage.

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As a direct result of western impact and an infusion of western diseases, concepts, politics and a whole new social order, this scene changed.

By 1893, when the Hawaiian monarchy was overthrown, the native Hawaiian population stood at 34,000! Gone were the land tenure system (all of the land), the cooperative subsistence economy, the religion, the social hierarchy and, of course, the government itself. The mappings of the culture were put on display in museums to be taken out and dusted off now and then for the tourists and pageants. While hula and ancient chant had entertained and pleased us and our gods, they were not held in as high esteem.

The shift from a heavy usage of the Hawaiian language to an obligatory use of English, combined with the influx of non-English speaking immigrants from around the globe, resulted in a loss of general fluency in the Hawaiian language and an incomplete learning of English. Anthropology tells us of the importance of a language to a culture. Obviously, a language is fused with the culture from which it springs. It is also obvious that certain cultural aspects cannot even be expressed fully without the use and understanding of the language best designed to articulate them.

In the days following the overthrow of the Kingdom, a strong emphasis was placed official Americanization of Hawai’i. Politically, the leaders of the provisional government (who became the leaders of the Republic) needed to show that Hawai’i would be ripe for annexation. To stress Americanism and downplay the importance of any of the other cultures represented in Hawai’i, the so-called “4F provisions” would protect Luluku. Pending in Congress was a measure which would exempt this highway (and the interchange) from the 4F protections.

We feel that this measure would set a very dangerous precedent and would sound the death knell for Luluku.

Please help us to defeat this measure.

Yours for,

QUEEN EMMA HAWAIIAN CIVIC CLUB
(BY Shirley K. Kamakele for Historic Sites Committee, Charles Ogata, Chairman)

MARKETING LOAN FOR WHEAT, FEED GRAINS, AND SOYBEANS

Mr. BOREN. Mr. President, over the past several years there has been a lot of discussion about the need to pass legislation mandating that the Secretary provide a marketing loan for wheat, feed grains, and soybeans. A marketing loan program would allow producers of these commodities to take out a nonrecourse loan and repay that loan at the current market price.

Advocates of the marketing loan for these commodities have stated that its implementation would result in lower export prices leading to increased exports. The advocates are using the principal tenet of this administration’s farm policy—lower prices mean more exports.

For the past 6 years, this administration has argued that U.S. loan rates were too high and needed to be lowered dramatically if we were to regain our competitiveness. The administration has stated that the loan rates needed to be lower in order to reduce the incentives for marginal producers in other countries to expand their production at our expense and to force the EEC to pay more of the cost of subsidizing their own production.

Prior to the 1981 farm bill, loan rates were set statutorily. In the 1981 farm bill, they were again set by statute, but the Secretary gained the discretion to lower the loan by 10 percent if the Secretary determined it was necessary to maintain domestic and export markets.

On April 1, 1981, Secretary Block, appearing before the Senate Committee on Agriculture, stated:

I feel that the Secretary should have wide discretion in setting these (loan rates) so that it would be possible to look at the world market situation and economic conditions domestically in making the decisions.

... we would want to make sure that they (loan rates) were not raised enough to encourage excessive production in other countries, or to in any way price ourselves out of the market, because the loan rate in effect is the government’s price floor. It is a guarantee that anyone who looks at it and says that the lowest it can go, in effect, and so I think we want to guard against overdoing it.

Largely because Congress believed the Secretary had a point to his argument, the Secretary was given discretion to lower the loan rate by 10 percent under the so-called Findley provision. There were, I must state, many sceptics to this idea. Several were concerned that the lower loan rate would merely result in lower farm income. Others were concerned that lowering the loan rate would increase the difference between the target price and loan rate, thereby increasing the amount farm programs cost the Government. Still others believed that the strength of the dollar and the question of our reliability as a supplier had more to do with U.S. exports than the loan rate.

Under Secretary for International Affairs and Commodity Programs, the Honorable Daniel G. Amstutz, stated at a hearing on February 7, 1985, that the strong dollar was not as significant as our loans. He stated:

Our own farm programs are far more important. Currently, our price support system provides our competitors with price protection that they could get in no other way.

They know that we will not sell below the price support loan level. To the extent that they can produce and sell at less than our loan level, they have clear sailing against our export markets.

In setting and then clinging to rigid price floors in imposing embargoes, and encouraging production cutbacks, we misjudged the rest of the world’s greatly increased ability to respond to what we do, and it is costing us in export markets and farm income.

To participate fully in export trade we have got to quit offering incentives to our competitors.

They (our programs) have limited U.S. agriculture’s capability to adjust for falling market prices, a fluctuating dollar, or...
CONGRESSIONAL RECORD—SENATE 23835

September 17, 1986

U.S. torily lowering the loan rates and were 85 million metric tons compared during the 1985-86 marketing year to reduce the loan rates by more if such were necessary to retain our competitiveness.

Mr. President, I bring all of this to the attention of my colleagues because at the time I was about to endorse legislation requiring the implementation of a marketing loan for wheat, feed grains, and soybeans, I learn that the Department apparently has changed its position.

Department officials are stating now that lower loan rates, lower prices will not result in increased exports. They are saying, in essence, that demand is inelastic for these commodities. For the first time in 6 years, this administration is opposing lower loan rates, lower market prices.

I, Mr. President, faulting the administration with changing its position. Certainly, we all change positions occasionally when situations change. Yet, this is a major departure, I believe, from the administration’s policy and it should be considered carefully. If our loan rates are now at a competitive level and that is the reason for the Department’s opposition to market loan, then its opposition can be understood. If, on the other hand, we have reached a point where demand truly is inelastic and market prices and/or loan rates are not a factor, then why in the world are we bankrupting American farmers and everyone else in the world with low loan rates and low market prices?

I, frankly, cannot discern any change in the wheat situation that would justify a deviation from the Department’s previous policy. According to the Department, the U.S. price for wheat at $103 per ton and the Argentine price was $81 per ton, a difference of $22. In December 1985, the month that the market-oriented farm bill while nonrecourse loan rates were included into law, the U.S. price at the gulf was $139 per ton and the Argentine price was $114, a difference of $25. Also according to the Department, France and the United States sold wheat to Brazil in August. The French price was $90.70 per ton; the U.S. price was $105.25 per ton. These numbers indicate, if such were our prices are not quite low enough to compete with other exporting countries.

World production and exports also do not appear to have changed significantly. The wheat production in the 1985-86 marketing year was about 503 million metric tons, compared to the projected 1986-87 marketing year production level of 506 million metric tons. Total world exports of wheat during the 1985-86 marketing year were 85 million metric tons compared to the 1986-87 level of 92 million metric tons.

Mr. President, I simply do not perceive any changes which would warrant a change in policy unless, of course, demand has proven to be inelastic. Yet, our wheat price is low compared with world prices without any real increases in exports. Is the lack of exports due to our prices not being low enough or due to inelastic demand?

If the Department now believes that lower prices will not increase our exports, then demand is inelastic. If demand is inelastic, why not raise our loan rates and effectively raise the price our farmers receive? If, on the other hand, our loan rates are inhibiting our competitiveness, then let’s drop them enough to get the job done.

I was considering supporting legislation to require the Secretary to implement a marketing loan for wheat, feed grains, and soybeans. Since the Department has changed its position, however, I am not sure mandating a marketing loan for these commodities would be of any benefit at all, particularly in light of the cost of implementing a marketing loan.

C.B.O. analysts have estimated the cost of this proposal at $5 billion over 3 years. If Congress adopts this proposal, more than likely we will have to find a way to pay for it and there aren’t many options available. Some have suggested a couple of options.

First, some have proposed substantially reducing or eliminating the export enhancement program and various export credit programs. However, that would not take care of all the costs.

Frankly, if the marketing loan is not going to increase exports, the last thing we should do is reduce or eliminate the marketing loan program or our other export credit programs. Over 5 million tons of wheat have been exported through the export enhancement program. Over 4.5 million tons of soybeans have been purchased under CCC guarantee programs. To substantially reduce or eliminate these programs without gaining a comparable increase in exports through a marketing loan would be a very unwise step at this time of burdensome surpluses.

Second, some have proposed increasing the required acreage reduction percentage and/or decreasing the target prices for wheat and feed grains is being considered.

Under current law, before a producer is eligible for support payments or loans, the producer must reduce harvested acreage of the crop by a certain percentage. For the 1987 wheat crop, the producer must reduce harvested acreage by 20 percent. Corresponding increase in target prices, an increase in the acreage reduction percent (ARP) will result in lower net farm income for typical producers.

For example, increasing the ARP by 5 percent for the 1987 wheat crop would result in an 8.5-percent reduction in net farm income for the typical wheat producer. Reducing the target price for wheat in lieu of increasing the ARP also has an impact on the typical Oklahoma wheat producer. Reducing the wheat target price by 5 percent would cut farm income by 8 percent. A 10-percent reduction in the wheat target price would result in lowering farm income by approximately 4 percent. Reducing farm income is not the way to pay for a marketing loan as the farmers do not get the lost income back from the market.

What do we have, Mr. President? At best, it is proposed that we spend $5 billion to implement a marketing loan that will not increase exports, and will not improve the typical wheat farmers’ income. Under the worst scenario, we may be going to cut back on our export programs and reduce the target price by 5 percent or increase the ARP by 5 percent. This would result in fewer exports and an 8-percent reduction in the typical wheat producers’ income. It’s not everyday that we are given the opportunity to spend $5 billion to achieve these results to spend.

Mr. President, it needs to be recognized that I am not speaking about soybeans. It is unclear whether a marketing loan would increase or decrease exports in soybeans. The merit in passing a marketing loan for soybeans lies in the fact that it would keep income for soybean producers at the same level they had for the 1986 crop. The soybean program does not contain target prices. Income is supported only through a nonrecourse loan program. The 1985 farm bill established the soybean loan rate at $5.02 for the 1986 and 1987 crop and gave the Secretary the discretion to lower the loan by 5 percent in order to remain competitive. The Secretary has recently announced that he will exercise this authority, thereby reducing the 1987 loan rate to $4.77 per bushel. This effectively reduces the price soybean producers receive by 25 cents per bushel with no protection from target prices. The implementation of a soybean marketing loan will effectively provide some income protection to soybean producers. For this reason, a marketing loan for soybeans deserves consideration and support.

Mr. President, I believe I am wrong in my understanding of the administration’s new policy. If I am not, I fear we would need to completely rewrite our market-oriented farm bill. I hope that my colleagues will carefully consider the merits of the legislation that may surface this week. I hope everyone will consider the merits of each
aspect of the proposal. I am completely in support of doing whatever we must do to increase exports. However, I will not support, in fact I will strongly oppose, any proposal that reduces farm income or exports. The benefits of any legislation must outweigh or at the very least equal the costs.

THINKING ABOUT TAX REFORM

Mr. BOSCHWITZ. Mr. President, like most of my colleagues here in the Senate, I am enthusiastic about the prospects for true tax reform this year. The bill produced by the House-Senate conference committee lowers rates substantially and achieves many of the goals I have for tax reform.

But, like most of the legislation we produce in this atmosphere of compromise and conflicting goals, it is not perfect. We should not let our enthusiasm for it cloud our critical judgment. My colleague from Missouri, JACK DANFORTH, has written an interesting article about the possible effects of this tax reform bill on the Missouri economy. While I cannot be as gloomy as my friend from Missouri about this bill, I recognize it may have some shortcomings with regard to how it treats business. It is difficult to determine if the tax burden from sector to sector and from individual to individual. It will raise the capital formation in the United States, thereby benefitting our international competitors. It repeals the investment tax credit for new plant and equipment. It increases capital gains rates and business investment. It penalizes depreciation of property. It reduces research and development tax credits.

Changes in foreign tax benefits will make it less attractive for Americans to do business abroad. It creates a higher tax rate for middle-income taxpayers than for the wealthy. It eliminates the capital gains differential.

It hits education by taxing, for the first time ever, scholarships and fellowships. It limits the deductibility of donated appreciated property (including symphonies, libraries, museums and a host of other cultural assets as well as higher education). It limits the ability of private colleges and universities to issue tax-exempt bonds to finance laboratories, classrooms and libraries. It takes away the interest deduction for student loans from all except those fortunate enough to borrow against home equity. The American Council on Education, which represents 1,500 colleges and universities, warns that the changes in the bill's impact on housing expect higher rents. For example, Missouri's own Murray Hallmark also gains nothing.

Well, I am for lower rates, if a responsible and balanced way is produced to pay for them. That is what we had in the Senate bill. But what has emerged in the conference report is legislation that encourages consumption (particularly of imports) discourages investment, inflames an already outrageous trade deficit and falls higher education.

The tax bill purports to be revenue neutral. Such a contention requires a leap of faith. The possible effects of this tax reform bill, as reported by Senate conferees in the next couple of weeks, we will thoroughly air these issues.

To help us in that deliberation, I ask that Senator DANFORTH's article from the September 7 issue of the St. Louis Post-Dispatch be printed in the Record.

The article follows:

THE SEEDS OF ECONOMIC DISASTER

(By John C. Danforth)

On August 16, a general outline of tax legislation, produced behind closed doors by the Ways and Means Committee and the Senate Finance Committee, was revealed to committee conferences in an 11th hour take-it-or-leave-it format. Regrettably, the conferences took it. As a result, one other thing is about to be taken: our economy—to the cleaners.

To date, no one—not even the conference chairmen—knows the details of what will be in this bill. But if the process by which the conferences accepted this legislation is a clear abdication of congressional responsibility, that is a trivial concern next to the committee's abdication of its duty to the American people. The fact is that the general outline of this tax legislation contains the seeds of economic disaster. It is therefore a clear and present danger to the future of our country.

Economists throughout the United States are reporting that this bill will cost jobs and reduce economic growth, beginning next year. For example, Missouri's own Murray Weidenbaum, a former chairman of the President's Council of Economic Advisers, has stated that business investment will decline 5 percent, GNP will drop at least 1 percent and more than 1 million jobs will be lost.

During the long consideration of tax reform, my position has always been that reform must satisfy four fundamental criteria: It must make the economy stronger and more productive. It must encourage greater economic efficiency. It must make America more competitive in international trade. It must create new jobs and provide educational opportunities.

With respect to these criteria, the Senate bill was fundamentally sound. The Senate reduced rates for individuals and businesses. The House-Senate conference reduced a bill that removing 6 million low-income people from the tax rolls—a benefit that survives in the current proposal—may be worth the change.

Frankly, it's almost impossible to see even one ray of sunshine piercing the smoking wreckage of the old tax system. The sale that removing 6 million low-income people from the tax rolls—a benefit that survives in the current proposal—may be worth the change.

The fact is that we are about to enact a tax bill that can best be described as Congress gambling with our economy in a game of chance where the odds are unreasonably high. And why? So the politicians can point with pride to lower tax rates for individuals. Well, I am for lower rates, if a responsible and balanced way is produced to pay for them. That is what we had in the Senate bill. But what has emerged in the conference report is legislation that encourages consumption (particularly of imports) discourages investment, inflames an already outrageous trade deficit and falls higher education.

The tax bill purports to be revenue neutral. Such a contention requires a leap of faith. The possible effects of this tax reform bill, as reported by Senate conferees in the next couple of weeks, we will thoroughly air these issues.

In 1987, the bill contains an $11 billion revenue bulge that grateful politicians will inevitably use to avoid the real spending and tax decisions our self-imposed budget targets are designed to force. Our failure to make these tough choices for 1987 will be further exacerbated in the subsequent two years when the tax bill will cost the Treasury more than $22 billion.

There has been some speculation that my opposition to this bill is predicted solely on my disagreement about the treatment of the tax system or our tax code. It is not. The bill comes from a variety of one-time changes in accounting practices. We also know that in the future, this bill contains the single most important economic challenge we face—reduction of the federal budget deficit.

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For me to ignore the points I have outlined here would be for me to ignore my duties and responsibilities as a member of the Senate. I truly believe that you, the American people, should be informed in the debate on this legislation about the substantial risk in rushing toward enactment.

At stake is the future health of our economy. At stake is the further erosion of our international competitiveness. At stake is the quality, cost and accessibility of our institutions of higher education. At stake is the Berger of the country. To have reigned silent under my strong convictions would have been unconscionable.
While the US produces only a small fraction of the world’s food output, it contributes more than half of the food given to those in need. In addition to our own programs, like the Public Law 480 Food for Peace Program and the Section 416 program which make surplus commodities available, the US has supported international efforts, including those of the Food and Agriculture Organization, such as the World Food Program. We lead the world in the amount of aid provided and are coordinating our efforts.

The arguments over whether our objectives are inconsistent have persisted for years. Those who argue that humanitarian aid is our chief objective disagree on whether the aid should focus on the neediest people or be used to support industrial and economic growth. Controversy also exists about the nature of our agricultural objectives. Should we look at food aid as a tool to support the agricultural and economic growth of developing nations? Some in the agricultural community fear that, as developing countries produce more and more commodities, they will hurt our agriculture by becoming competitors.

The tug of war over the purpose of the food aid programs has raged since they were started in the late 1940s and early ‘50s. It was during that time that the political and economic objectives of the programs made surplus disposal and market development paramount. During the 1960s, the emphasis shifted to meeting the needs of the world. Fifty percent of the world’s food supply in the early 1970s made us reexamine our commitment to food aid programs. It seems difficult to remember that only 10 or 12 years ago we were discussing the population explosion and dwindling resources incapable of supporting humankind. Small was beautiful.

Rightly, the US continued its commitment to humanitarian programs and a majority of the nations of the world have continued to do more. Consequently, the US has assumed the re-requirement that 75 percent of the Food for Peace program’s food aid go to the neediest countries and raised the minimum tonnage distributed under the Food for Peace program.

More important, we’ve recognized that the neediest nations, those which can’t grow food to feed the people in the world is not the problem; getting it to them is. Surpluses of food simply sit in the wrong places. Nebraska, Iowa, and Minnesota have 40 percent of the world’s food stocks in storage in this country. Getting it to the inner parts of Ethiopia, where there are no roads, where there are no airports, where there is no network of people to distribute it, will be the food aid challenge of the 1980s and ‘90s. Getting food into the interior of Mali or the Sudan and other African countries that are very large, but have very few people, is not easy to do. We must also understand the paradoxes of food aid. India is often touted as a food aid success story because it is now exporting agricultural commodities. Yet it has one of the most nourished people in the world—200 million—live in India. Crops grown near the coast are exported, because the US pays more for them. Inadequate means to get them to their own people in need.

In addition to the problems of distribution and transportation, we must also grapple with the effect food aid has on the recipient country. It’s easy to crush a fragile agriculutural economy with food aid. Even though the agricultural base of most recipient countries doesn’t provide all the food that is consumed, it usually provides most of the food. When a large quantity of agricultural commodities enters a developing country, it can drive down the price and lead to lower prices for local farmers, who may not be used to such market forces. It may allow a repressive government to maintain its status quo or, in some cases, to use food to coerce or manipulate the population.

The problem of world hunger will not be solved by growing more food or distributing more food but only by finding means to build independence. The challenge of food aid (and other foreign assistance) programs will be to create economic growth where it is most needed—among the poorest of the poor.

America’s experience of more than 30 years in food aid programs has brought all these problems into focus. But they will not be solved by abandoning the programs. Instead, we should structure them carefully in each country, understanding its culture, so as to minimize adverse effects. Our food aid programs have had successes—South Korea, Taiwan, Mexico, Brazil, and Ethiopia have made a difference in the strive for world hunger. The only way is to raise world hunger on our list of priorities and make a commitment to achieve that goal.

THE 30TH ANNIVERSARY OF THE HUNGARIAN REVOLUTION

Mr. D’AMATO. Mr. President, I support Senate Joint Resolution 385, a resolution commemorating the valor of the Hungarian freedom fighters who sought to break the chains of Soviet tyranny and rid their country of totalitarianism. This year marks the 30th anniversary of their uprising which began on October 23, 1956, a quest for freedom which continues to this day.

The seeds of the revolution were planted during the early 1950’s under the leadership of Imre Nagy. In 1953, Nagy was appointed premier replacing the much hated Matyas Rakosi, an action which appears to have been supported by the Soviet leadership. During the 1940’s it was Nagy who raised serious reservations regarding the policy of collectivization being pursued by the Hungarian Government. Soon after his appointment, Nagy embarked on a “New Course,” a package of reforms including: Decollectivization of agriculture, a new emphasis on light industry, and release of political prisoners.

All these situations contributed to the downfall of the Hungarian Communist Party and a change of heart on the part of Moscow. Nagy, the principal proponent of the “New Course,” was under increasing criticism. During early 1955, Nagy was pressured by the Kremlin to renounce his reform policies. He refused. Nagy was forced out of office.
and expelled from the Communist Party which he had helped found. He was replaced by his arch rival Rakosi. 

Despite Nagy's ouster, the pressures for reform continued, particularly among members of the intelligentsia. During this period, the former prime minister wrote a series of political essays defending reform.

Concern over continuing tensions in Budapest, Cardinal Mindszenty turned to Nagy, who was readmitted to the party on October 13, 1956, for help. An anti-Stalinist revolution in Poland 6 days later added to the press for reform. Peaceful demonstrations began in Budape st on October 23 in support of change. A large statue of Stalin was toppled and dragged through the streets of the capital—the revolution had begun. Tens of thousands participated in these peaceful demonstrations of Hungarian nationalism.

During the following days, the revolutionary fervor spread. Tension began to rise as the streets swelled with freedom fighters. Violence erupted as police opened fire on unarmed demonstrators. By the time the bloodiest incident of the revolution occurred at Parliament Square on October 25, when Soviet forces and the secret police opened machinegun fire on a crowd of peaceful demonstrators, killing an estimated 500 people. Despite these acts of brutality, the revolutionaries were successful in taking over the major provincial cities.

On October 30, 1956, Nagy announced the abolition of one-party rule and the establishment of a coalition government. Cardinal Mindszenty was freed from captivity. Two days later, Hungary withdrew from the Warsaw Pact and its neutrality was declared. It appeared as though nothing would stop the Hungarians in their quest for independence and democracy. Later added to the press for reform.

On November 3, Cardinal Mindszenty delivered an impassioned address to his fellow countrymen. His words are as meaningful today as they were the days ago. Mr. President, I ask unanimous consent that an excerpt of this address be printed in the Record.

The Soviet Ambassador at the time, Yuriy Andropov, a little known figure at the time, offered his assurances that the new regime would proceed with a long term program of reform. Mr. President, this is the time for the American people to turn away from the specter of nuclear war, and toward the goal of peace. We must be united in our desire to end the Cold War, and to work towards a world free of nuclear weapons. This is the time for the American people to support the efforts of the Hungarian people to achieve their dreams of freedom and democracy. The Hungarian revolution, fueled by national heroism, was to last but a fleeting moment. In all more than 25,000 Hungarians had died. Another 20,000 were deport ed to the Soviet Union, many were never heard from again. Others were imprisoned under the orders of Janos Kadar. At least 500 were executed. In the aftermath of the shortlived revolution, 200,000 refugees fled the repressive regime of Kadar, a puppet installed by the Soviets. Tens of thousands of others lost their lives in the carnage. Nagy and his close associates, including Pal Maleter and Miklos Gimes, were executed in June 1958 and buried in graves which to this day have remained unmarked.

The address follows:

Radio Statement of Joseph Cardinal Mindszenty, November 3, 1956

There is no country which in the course of its thousand years of history has suffered more than we. Hungarians have had to wage incessant struggles for independence, mostly in defense of the Western countries. These struggles interrupted the continuity of our development and we always had to rise again by our own efforts. In the course of history this is the first occasion that Hungary has enjoyed the sympathy of all civilized countries. We are deeply moved by this, and every member of our small land rejoices that, because of our love of liberty, the nations have taken up its case.

Yet we, even in our dire situation, hope we have no enemies, and we are the enemies of no one. We want to live in friendship with all people and all countries. We Hungarians want to live and progress as standard-bearers of the family of peaceful European nations. We want to live in a spirit of friendship with all the peoples of Europe and not on the basis of an artificially created friendship. And turning our eyes toward more distant parts, we, a small nation, want to live in friendship, in distances, peaceful, and mutual esteem with the great United States, as well as the powerful Russian Empire, and in good-neighborly relations with Prague, Bucharest, Warsaw, and Belgrade.

Now we need general elections, free from abuse, in which all parties can nominate candidates. The elections should be held under international supervision. I must stress that we have a classless society, and a republic without landlords. We want a country which is not the property of any individual, but the property of the Hungarian people as a whole. We want to live in a country where all can participate in the country's development.

As head of the Hungarian Roman Catholic Church I declare that we do not oppose the justified development of our country. We only desire that this development be sound.

On October 23, we will commemorate the 30th anniversary of the Hungarian revolution. In doing so, we recall the courage, valor and dedication to freedom displayed by the many individuals who took part in the uprising. As we mark this historic occasion, however, we are reminded that many Hungarians continue in their struggle for freedom and individual human rights. Expressions of independence and the will to reform are not accepted by the Hungarian authorities. Some have become targets for harassment simply for speaking out about the events of 1956.

Mr. President, the commemoration of the 1956 revolutionary will bring many sad memories as we remember those who lost their lives during their quest for freedom. As we express our grief, we reaffirm our commitment to assist those who continue to fight against tyranny. As chairman of the Commission on Security and Cooperation in Europe, I urge my colleagues to support the Joint Resolution 385 as a demonstration of our support of Hungarian freedom fighters, past and present. Thank you Mr. President.
was playing when Jackie Robinson broke into the big leagues. Years later, Greenberg recalled that "guys on our team were calling Jackie 'Coal Mining.'

He got hit and stood beside me on first base with his chin up like a prince. I had a feeling for him because of the way I had been treated. I remember saying to him 'Don't let them get you down. You're the man. Keep it up.' And Robinson remembered Greenberg saying that too; he later said that Greenberg was the first opposing player in the big leagues to give him encouragement. "Hank Greenberg," said Robinson, "has class. It stands out all over him."

So kids and grownups got a little "color blind" because of the game and the teams that tie us together. But at the same time, we all got a little "color proud." We looked at a Greenberg or Robinson or Clemente or Valenzuela or any of the others and we suddenly realized that our people were really something special and making it big in big leagues.

There is that. But baseball is, after all is said and done, more than sociology. It is a sport which tests each player every day and gives us a way to keep score— to measure success and evaluate failure. And in the sport, Greenberg had few peers. He could hit the ball as far as any human being I have ever seen. I can still look back then: Hank Greenberg doing what he did best. There he is bringing that bat around to his right shoulder and then tightening his muscles and waiting for the pitch and watching it break in over the plate and then—and then the ball would sail away from the plate over the fence and into the stands.

Which, I guess, is just a way of saying that in addition to being a symbol, the man was a hell of a ballplayer. And, as the years went by, we got to see he was a hell of a figure. He was always on the scene, involved in civic affairs, caring and speaking for those who had suffered personal sadness or hurt. And he always dealt with children in the kind, understanding manner of a father.

As you can see, Mr. President, I think very highly of Ray Tempest and I am sure that these same exemplary qualities which so impress me led my friend, the former Governor of Rhode Island, to select Ray in 1977, to be the high sheriff of Providence County.

In the years since Ray has filled that important position with distinction, and after which vigorous and distinguished career he has earned the relaxation that retirement will bring. I wish Ray and his wonderful wife Maggie peace and good health in the years ahead.

GRAMM-RUDMAN-HOLLINGS

Mr. MOYNIHAN. Mr. President, I rise today to discuss once more the reliance on economic forecasting required by the Gramm-Rudman-Hollings law.

On November 6, 1985, the day the Senate voted 74 to 24 in favor of the Gramm-Rudman-Hollings amendment, I warned that the proposition: "assumes we know what we’re talking about, that we can predict when a recession is coming. We can’t, and neither, in this matter, can anyone else. Economists do not know the future—they study, and barely know, the past. This is really an adventure in mad scientism, pretending to know what cannot be known."

The Congressional Research Service recently published a report that supports my analysis. CRS Report 86-8298S—"Implications of Uncertainty in Economic Forecasting under Gramm-Rudman-Hollings: Options for Congressional Response"—contains information that should have been under-
Congressional Record—Senate

September 17, 1986

Dr. Richard Rosser, Outgoing President of DePauw University

Mr. Quayle. Mr. President, at the beginning of this year, Dr. Richard Rosser, president of DePauw University, announced his retirement from the position he then held. It is with great regret that I bring to the attention of my colleagues his decision to retire from DePauw University and with appreciation that I commend him for his successful tenure as president and faculty member at DePauw.

I would like to commend Dr. Rosser for his long-standing commitment, integrity, and dedication to the highest standards of professional competence during his years of service to the university. As a member of the DePauw academic community, he has consistently displayed effective leadership and succeeded in creating an educational climate to support his goals.

Under the administration of Dr. Rosser, DePauw University has embarked on a fundraising sesquicentennial campaign for the development of its endowment fund, a campaign that has met with unprecedented success, far exceeding its original monetary goal. The campaign will continue until June 1987 at which time Dr. Rosser will retire.

Dr. Rosser has an outstanding professional background which includes his present employment as chancellor and outgoing president of DePauw University, dean of faculty and professor of political science at Albion College in Michigan, permanent professor and head of the department of political science at the U.S. Air Force Academy in Colorado, and as an officer in the U.S. Air Force intelligence organizations as specialist in Soviet studies and Russian linguist.

His professional expertise is well attested to by his continued visible leadership in the academic community and various educational organizations. These include his involvement with the American Association of University Professors, the American Political Science Association, Associated Colleges of Illinois and the Independent Colleges and Universities of Indiana. As an alumnus of DePauw University and on behalf of the DePauw community, I extend to Dr. Rosser my deep appreciation for the invaluable services he has provided and best wishes for continued success in whatever he may endeavor.

MEASURE HELD AT THE DESK—H.R. 2574

Mr. Broyles. I would like to ask the minority leader if he is ready to proceed with unanimous consent with respect to H.R. 2574.

Mr. Byrd. Mr. President, reserving the right to object, that matter is under the minority leader if he is ready to proceed with unanimous consent with respect to H.R. 2574.

The PRESIDENT OF THE SENATE. The chairperson in the Chair.

The PRESIDENT OF THE SENATE. Mr. BYRD. I ask unanimous consent that the amendment to H.R. 1246 contained an incorrect reference to a section of public law. This mistaken reference renders obscure a provision of the bill requiring the Secretary of the Treasury to publish notice of certain of his activities pursuant to the bills provisions.

I therefore ask unanimous consent that the enrolling clerk be instructed to correct, subsection 14(c) of the amendment of the Senate to the bill H.R. 1246 to read as follows:

(c) The Secretary shall publish notice on three successive occasions in newspapers of general circulation in communities affected by the provisions of Section 1332 of Public Law 90-446, (82 Stat. 572), as amended by this Act.

The PRESIDENT OF THE SENATE. Without objection, it is so amended.

Transfer of Certain Public Lands

Mr. Broyles. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on S. 1963.

The PRESIDENT OF THE SENATE. Resolved, That the bill from the Senate (S. 1963) entitled "An Act to direct the Secretary of the Interior to convey certain interests in lands in Socorro County, New Mexico, to the New Mexico Institute of Mining and Technology", do pass with the following amendment:

Strike out all after the enacting clause and insert:

SECTION 1. Transfer of Lands.

The New Mexico Institute of Mining and Technology—Subject to valid existing rights and except as provided in section 3, the Secretary of the Interior (hereafter in this Act referred to as the "Secretary") is authorized and directed to convey to the New Mexico Institute of Mining and Technology (hereafter in this Act referred to as "the Institute"), Socorro, New Mexico, at fair market value, as determined by the Secretary, all right, title, and interest of the
CONGRESSIONAL RECORD—SENATE

September 17, 1986

United States in and to the public lands aggregating approximately 8,501.55 acres in Socorro County, New Mexico, as generally depicted on a map entitled "New Mexico Institute of Mining and Technology Land Transfer, Socorro, New Mexico" dated 1985, to be used for research and education.

The Institute performs and provides to the subsection shall occur only after the Institute in coordination with the State of New Mexico Historic Preservation Office, will implement following the conveyance and shall be conditioned on the implementation of such mitigation measures.

SECTION 2. MAPS AND DESCRIPTION OF LANDS.

As soon as practicable after the enactment of this Act, the Secretary shall submit a map and legal description of the public lands designated in the first section of this Act to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives. Such map and legal description shall have the same force and effect as provided in this Act, except that any clerical or typographical errors in such map or legal description may be corrected. The Secretary shall place such map and legal description in the public record office, and make them available for public inspection, in the Office of the Director, New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico.

SECTION 3. RESERVATION OF RIGHTS.

There are reserved to the United States all minerals and in the lands described in the first section: Provided, however, That such lands, except for valid existing rights, shall not be available for location and patent under the U.S. Mining Law, Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. 22, 23, 250.

Mr. BRODYHILL. I move that the Senate concur in the House amendment, Mr. President.

The motion was agreed to.

Mr. BRODYHILL. I move to reconsider the vote by which the motion was agreed to.

Mr. BYRD. Mr. President, I move to lay the motion on the table.

The motion to lay the table was agreed to.

□ 2250

ORDER FOR RECESS UNTIL 9:00 A.M. TOMORROW

Mr. BRODYHILL. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until 9 a.m. on Thursday, September 18, 1986.

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

ORDER FOR ROUTINE MORNING BUSINESS TOMORROW

Mr. BRODYHILL. Mr. President, I ask unanimous consent that following the recognition of the two leaders under the standing order on tomorrow, there be a period for the transaction of routine morning business, not to extend beyond 9:30 a.m. with Senators permitted to speak therein for not more than 5 minutes each.

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

JOINT MEETING OF THE TWO HOUSES—ORDER FOR RECESS

Mr. BRODYHILL. Mr. President, at 9:30 a.m. tomorrow, Senators are asked to assemble in the Senate Chamber, to proceed in a body to the Hall of the House of Representatives, to hear an address by President Aquino.

I ask unanimous consent that the Senate stand in recess between 9:30 a.m. and 10:30 a.m. for the joint meeting.

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

PROGRAM

Mr. BRODYHILL. Mr. President, at 10:30 a.m. tomorrow, the Senate will resume consideration of the reconciliation bill, under a statutory time limitation of 20 hours.

Votes can be expected throughout Thursday's session, and a late-night session is anticipated in order to make progress on the reconciliation bill.

MAINE CENTRAL RAILROAD COMPANY AND PORTLAND TERMINAL COMPANY LABOR-MANAGEMENT DISPUTE

Mr. BYRD. Mr. President, at the desk, and pursuant to an order of yesterday, is Senate Joint Resolution 415, which has been read the second time.

I ask unanimous consent—this has been cleared on the other side—that this resolution, Senate Joint Resolution 415, by Mr. MITCHELL, relating to agreements to settle a labor-management dispute have not yet resulted in a settlement; whereas the recommendations of the President by Executive Order Numbered 12597 of May 26, 1986, pursuant to the provisions of the Railway Labor Act (45 U.S.C. 160) have not yet resulted in a settlement of such dispute.

Mr. MITCHELL. Mr. President, yesterday, I joined with Senator COHEN in introducing legislation, Senate Joint Resolution 415, to bring about a settlement of the Maine Central Railroad.

I ask unanimous consent that Senators KENNEDY, WEICKER, and BUNDICK be added as cosponsors of the resolution—which seeks to enact the recommendations of Presidential Emergency Board No. 209.

The Emergency Board recommendations are reasonable and well balanced. They represent a rational solution to an impasse between labor and management, and a rational response by Congress to protect interstate commerce by averting a terrible national rail shutdown.

The congressionally extended cooling off period in the dispute expires at midnight tonight. On Friday, the railroad has pledged to unilaterally impose terms which would trigger a national railroad strike.

To prevent a national railroad strike, I urge the Senate to adopt the resolution, and hope the House of Representatives also will move swiftly to adopt it and send it to President Reagan for signature.

The PRESIDING OFFICER. The joint resolution is open to amendment. If there be no amendment, the question is on the engrossment and third reading of the joint resolution.

The joint resolution was ordered to be engrossed for a third reading, was read the third time, and passed.

The preamble was agreed to.

The joint resolution, with its preamble, reads as follows:

S.J. Res. 415

Whereas the labor dispute between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and Certain of the employees of such carriers represents a serious and immediate threat to the maintenance of Way Employees threatens essential transportation services of the Nation;

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained;

Whereas the Congress finds that emergency measures are essential to security and continued effective transportation services by such carriers;

Whereas the President by Executive Order Numbered 12597 of May 26, 1986, pursuant to the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160), created a Presidential Emergency Board to investigate the dispute and report findings; and

Whereas the recommendations of Presidential Emergency Board Numbered 209 for settlement of such dispute have not yet resulted in a settlement; and

Whereas the extension of the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160) for an additional 60-day period to such dispute provided by the joint resolution entitled: "Joint resolution to provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and the Portland Terminal Company labor-management dispute" approved August 21, 1986 (Public Law 99-385), has not yet resulted in a settlement of such dispute; and

Whereas the advisory board established pursuant to section 2 of such joint resolution recommended that in the event that the parties to the dispute were unable to reach agreement on the dispute before September 13, 1986, the Congress should enact
legislation directing the parties to accept and apply the recommendations of Emergency Board Numbered 209, and if such parties are unable to agree as to all necessary details in applying the recommendations of such Emergency Board, all such unsettled issues should be submitted to final and binding arbitration:

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not yet resulted in settlement of the dispute:

Whereas the Congress, under the Commerce Clause of the Constitution, has the authority and responsibility to ensure the uninterrupted operation of essential transportation services; and

Whereas the Congress in the past has enacted legislation for such purposes. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following conditions shall apply to the dispute referred to in Executive Order Numbered 12557 of May 16, 1986, between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company (hereafter in this resolution referred to as the "carriers") and the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees.

(1) The parties to such dispute shall take all necessary steps to restore or preserve the conditions out of which such dispute arose as such conditions existed before 12:01 a.m. meridian of March 3, 1986, except as provided in paragraphs (2) through (4).

(2) The report and recommendations of Presidential Emergency Board Numbered 209 shall be binding on the parties and shall have the same effect as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq.), except that nothing in this joint resolution shall prevent a mutual written agreement by the parties to any terms and conditions different from those established by this joint resolution.

(3): (A) If there are unresolved implementing issues remaining with respect to the report and recommendations or agreement under paragraph (2) after ten days after the date of the enactment of this joint resolution, the parties to the dispute shall enter into binding arbitration to provide for a resolution of such issues.

(B) The National Mediation Board established by section 4 of the Railway Labor Act (45 U.S.C. 154) shall appoint an arbitrator to resolve the issues described in subparagraph (A). Except as provided in this joint resolution, such arbitration shall be conducted as if it were under section 7 of such Act, and any award of such arbitration shall be enforceable as if under section 9 of such Act.

(b) Within thirty days after the date of the enactment of this joint resolution, the binding arbitration entered into pursuant to paragraph (3) shall be completed.

Mr. BYRD. Mr. President, I move to reconsider the vote by which the joint resolution was passed.

Mr. BROYHILL. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

RECESS UNTIL 9 A.M. TOMORROW

Mr. BROYHILL. Mr. President, I move that the Senate stand in recess until 9 a.m. on tomorrow.

The motion was agreed to, and at 10:53 p.m., the Senate recessed, to reconvene on Thursday, September 18, 1986, at 9 a.m.

CONFIRMATIONS

Executive nominations confirmed by the Senate September 17, 1986:

THE JUDICIARY

William H. Rehnquist, of Virginia, to be Chief Justice of the United States. Antoinin Scalia, of Virginia, to be an Associate Justice of the Supreme Court of the United States.