SENATE—*Wednesday, September 17, 1986*

(Legislative day of Monday, September 15, 1986)

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 * * * Psalm 42:1-2.

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

The bill 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 Presiding 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, PROXMIRE, MURKOWSKI, SASSER, BROYHILL, CHAFEE, and LEVIN—not to exceed 5 minutes each. I ask unanimous consent that the order for Senator TRIBLE 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, or 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 investment 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 relative 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 Government still has 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 to 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

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course, but we ought to help in every way we can—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, and I look forward to seeing her and hearing her message tomorrow.

CONSTITUTIONAL BIRTHDAY

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, participated in those observations. It was on September 14, 1787, that word went out from Annapolis that there would be a meeting the next May in Philadelphia to draft a constitution "adequate to meet the exigencies of the Union."

The Constitution has proven more than adequate. Although we've amended it—26 times—that is not very often considering its longevity and the changes that have taken place in the world over the past 200 years. And the amendments we have added only enhance the underlying document.

The principles that guided this Nation into being and have propelled it into the role of the world's greatest democracy are all contained in the Constitution. From the separation of powers, the authority to levy taxes, declare war, to freedom of speech and religion, the right to a speedy and public trial, granting women and all citizens the right to vote, regardless of color, creed, or religion—these are the keystones not only of our Government, but also our way of life.

Because the Constitution is so integral to what we are as a nation, it is only fitting that States, cities, towns, and most of all the Federal Government, dedicate this time to reflect upon the importance of the Constitution and to celebrate its very existence.

And those of us in Congress, who have the responsibility for creating the laws of this land—laws that abide by the Constitution—have a special reason to commemorate and honor it. For if we ever lose sight of the Constitution's meaning, its import, then we will lose our direction as a nation. This birthday celebration will go forward to make sure that does not happen.

□ 0904

RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. Under the previous order, the Democratic leader is recognized.

THE VISIT OF PRESIDENT AQUINO

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, as 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 jobs as 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 5½ 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.

As 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.

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 here are already running at an annual rate of $69 billion. That's a 64-percent increase since the beginning of 1981.

By running up such large foreign debts, our country has 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. 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 debts for too long. We are paying a steep and growing price for the administration's neglect. The disturbing evidence has been thrust in our faces 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 and money markets is now dependent as 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 we are 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 $105 billion to that debt, if there is a continuation of the trend shown by today's Commerce Department data for the first half of 1986.

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. At that time, foreigners held $501 billion worth of American assets. They now own $1.1 trillion.

U.S. payments of interest, dividends, and profits to foreigners for their investments here have climbed 64 percent since 1980 to an annual rate of $69 billion (based on the data announced this morning).

Foreigners have been attracted more by high U.S. interest rates than by confidence in the continued growth of the U.S. economy. Foreigners have expanded their nongovernmental holdings of interest-paying assets much faster than they have bought American stocks and businesses. Between the end of 1980 and the end of 1985, they increased their holdings of—

U.S. Treasury securities from $16 billion to $84 billion,

Corporate bonds from $10 billion to $82 billion, and

U.S. bank accounts from $120 billion to $354 billion.

These types of investments alone account for the great majority of foreigners' purchases of U.S. assets.

Until we gain control of the trade deficit, the U.S. will be forced to continue pawning off its assets. This has two painful costs to Americans. First, we are making a permanent sacrifice of tens of billions of dollars in the standard of living of Americans. Second, as Paul Volcker suggested in the quote above, our ability to reduce interest rates to spur the domestic economy is being limited by the need to please our foreign lenders.

Mr. BYRD. Mr. President, I ask unanimous consent that I may reserve the remainder of my time if I have any.

The ACTING PRESIDENT pro tempore. Without 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 horrors 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 $468.9 million in 1986. ADAMHA is slated for a further increase again, to $490 million in 1987.

I should add that in addition to educating, ADAMHA money goes to fund public and private drug rehabilitation centers. For my colleagues who have a lot to say about the war on drugs but never visited a rehabilitation center, I must tell you that there is no more meaningful way to drive home the horrors of drug abuse than to visit and talk with children in a drug rehabilitation program.

But at the same time, I cannot imagine a place that is more filled with hope. There is no greater reward than to talk with people who realize they have been given the opportunity to free themselves from the strangling clutches of drug abuse.

That is what ADAMHA money buys—education and rehabilitation; it offers foresight and hope.

Now, let us examine the supply side. For years we have heard that we should "call out the troops" to help. There are those who propose this as if it were a new idea, when the plain truth is that we have been talking about this and have had it at our disposal for years.

As we all know, the 97th Congress amended the posse comitatus statutes. While military personnel are prohibited from engaging directly in civilian law enforcement, they can use their resources to help civilian police agencies.

Under the national security directive signed by President Reagan on April 8 the military is now supposed to be committed to a greater role than ever before in helping to stem the flow of illicit drugs.

By rights, then, we should expect to be seeing results. Are we? Let us look at the record.

□ 0950

Navy and Air Force radar aircraft are flying missions to detect drug traffickers offshore in support of the Coast Guard and Custom Service.

Navy ships operating in coastal waters are constantly vigilant for suspect vessels and some carry Coast Guard tactical law-enforcment teams which board suspect vessels.

The Marines operate aircraft for night detection of drug smugglers.

Air Force aircraft are flying frequent training missions in support of the drug enforcement community.

According to a recent White House strategy report, the Air Force provided the Customs Service access to all information obtained from a joint sur-

veillance 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.

Those who say "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 posse comitatus just 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 should provide 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 this dream of a defense against enemy intercontinental ballistic missiles. Former Defense Secretaries have told the Congress the cost could be more than $1 trillion to build this system. They estimate the annual cost each year of maintaining and modernizing it could exceed $100 billion. It could exceed the cost of the U.S. Navy, Army, or Air Force.

Most outside experts say it will not work. They tell us it is an immense waste of money and something more, one of the Nation's most vital resources—its scientific genius. Tens of thousands of this Nation's finest physical scientists will be drawn away from developing crucial conventional arms that would surely strengthen America's national security. They will also be taken from work in developing improvements in the Nation's transportation system, from agriculture, from such development of advances in health as cancer and heart research, and from many other areas to improve the conditions of human life.

Mr. President, this is a reminder that those of us in the Congress are not the only ones who will decide what resources we pour into this massive star wars effort. This is a free country. Sure, the salaries and the equipment available to those scientists who accept star wars work will be immensely tempting. But a surprising number have seen this—for what it is—a struggle for the soul of America. Should they dedicate their life 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 teaching, to building a healthier and stronger country?

The way our most competent scientists have come down on this will surprise many. Think of it: 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 told Broad—"it had nice people." So he stayed.

In 1979, Hagelstein found his colleagues stymied in trying to develop an x-ray laser weapon. They faced a technical problem. Hagelstein solved the problem. In doing so, the Hagelstein solution helped materially to pave the way for SDI or star wars. It did more. It hooked Hagelstein—at 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 worried about his role in advancing weapons instead of human health. So he has just recently quit. He will go back to MIT as an associate professor. A friend of Hagelstein said Hagelstein wants to do work that will "benefit all of mankind."

What changed Hagelstein's mind? The Newsweek report declares that it has become clear lately that Hagelstein's breakthrough with his laser 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, Boyce Rensberger reports that a Livermore physicist said Hagelstein's leaving would be "a very big loss because when we need a computation for a new 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 on fronts that may be more important than any decision made by the Government itself, the Congress or the President.

Mr. President, I ask unanimous consent that 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 and offers funding the likes of 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 top weapons center, sold his house, called the lab to say he had the flu and slipped into hiding. Next month he joins the Massachusetts Institute of Technology, his alma mater, as an untenured associate professor of electrical engineering.

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 1975, "they convinced him this 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 would take holographic images of living cells and molecules in the body, gathering clues to cancer and other mysteries. Then one day in 1979, he 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 the nation's arsenal. "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 John Pike of the Federation of American Scientists. "That makes the high moral purpose of the thing more difficult to see."

Hagelstein's departure could slow SDI's X-ray program, whose funding is due to double to $530 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 15 Nobel laureates and 57 percent of the faculties at the nation's top 20 physics departments, have signed a petition pledging to refuse SDI funding.

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 shape and temperature gradients of 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 personally believe that our job [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, 32, who 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," is to join 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 a form of X-ray laser that is powered by a hydrogen bomb explosion and showed promise as a space weapon that could destroy Soviet nuclear missiles 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 SDI, or "Star Wars."

Livermore sources said Hagelstein, whom they described as shy and idealistic, had expressed misgivings about working on weapons.

Hagelstein came to Livermore in 1975 as a promising mathematics and physics student at MIT. Unusually well-rounded for the kind of intense scientist Livermore usually attracts, he ran marathons in college, was a composer and performed as a violinist with the MIT Symphony Orchestra.

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.

The recruiter, Teller's protege Lowell Wood and a former Hertz fellow, did not tell Hagelstein about the lab's central function. Only after arriving at the lab did Hagelstein realize that Livermore was a "bomb shop," he told Broad.

"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 similar X-ray laser research intended for a weapon.

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 worked, 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 need 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 community by giving expression to 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 remedied, such abuses or flaws do not affect the intrinsic right of the State to exact justice through capital punishment. They urge that due process in capital cases be made swifter and more just 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 has general scriptural warrant in the explicit duty of the State to protect its citizens. They cite the sanctity of life as demanding justice in the social order, including imposition of the death penalty.

Finally, many advocates of capital punishment point out 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 far superior in substance and merit. Again, I draw upon the work and words 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 merely 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 correctional institutions and 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, they declare, 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 ripping apart families while drug abuse is threatening to destroy our traditional picture of a strong and healthy American family.

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 awareness of this problem higher, and I think that the public is ready to do whatever is necessary to combat this growing cancer. The September 8 issue of U.S. News & World Report presents findings of the poll it conducted. The poll revealed 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 similar 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 residents of 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 work 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 to assure that those illegal acts are noted and that something is done to put the drug pushers behind bars.

While local and State law enforcement officials and other groups are trying to rid our communities, our schools and our neighborhoods of drugs, the Federal Government must keep doing its part 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 if we are going to succeed in winning the battle against drugs.

RECOGNITION OF SENATOR CHAFEE

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The PRESIDING OFFICER. Under the previous order, the Senator from Rhode Island [Mr. CHAFEE] is recognized for not to exceed 5 minutes.

Mr. CHAFEE. Thank you, Mr. President.

GENERAL ACCOUNTING OFFICE REPORT ON TEENAGE PREGNANCY

Mr. CHAFEE. 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 us today. 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 teens 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 she is to have completed 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 at a low birth weight 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 the death of a baby. Many such heartbreaking 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 26. 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 devastating. The visible products are lives spent on the

margin of society with dependence on our welfare system.

It has been estimated that the Federal cost for teenage parenthood is approximately $10 billion a year in health and welfare benefits. Yet the GAO report points out there is only one Federal program which is targeted to preventing teenage pregnancy and providing services to pregnant and parenting teeneagers 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 worthwile projects to confront this national tragedy. These projects attempt either to prevent unintended teenage pregnancies, or to provide services to help pregnant teenagers and teenage mothers to avoid negative outcomes for both mother and child.

In my own State, 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 pregnancy, maternal 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. Certainly we must begin to reduce the incidence of teenage pregnancy by encouraging abstinence from sexual activity and by providing adequate birth control information for those who are sexually active. To be effective, prevention efforts such as family life education and family planning must be directed at all teenagers. We must also 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 antipoverty 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 confront 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 the 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

U.S. GENERAL ACCOUNTING OFFICE,
Washington, DC, July 21, 1986.

B-223573.

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 future legislation maximally 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 planning review in which we used four procedures. We analyzed the main features of two congressional bills, reviewed available statistics 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 decades. Despite the overall decline, the birthrate for unmarried teenagers actually increased. Thus, of the 500,000 births to women younger than 20 years old in 1983, 270,000 were 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 to 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 at a specific group (poor teenagers younger than 18), it is flexible with respect to the comprehensive services that could be provided to pregnant teenagers, and its administrative structure is relatively straightforward. Senator Moynihan's proposal is targeted more broadly (including teenagers eligible for AFDC and selected young women with children younger than 6), 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. However, only one, the Adolescent Family Life Program (AFL), 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 few available data on how much money these federal programs spend on pregnant and parenting teenagers.

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 across the studies there were no consistent or large effects on fertility or contraception. For the postpregnancy projects, the evidence shows some positive 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 research designs. Even for those whose designs were credible, the ability to generalize

from them to typical service settings is uncertain and the long-term benefits of these services is unknown, because only one 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 an administratively simple program structure.

Second, our review points to a role for the federal government that, as an alternative to installing a program that expands 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 from research on questions about, for example, the sexual decision-making among unmarried teenagers. Identifying and testing these ideas, with the thought of disseminating the promising practices to state and local agencies, could be a cost-effective way for the federal government to help address public concern about teenage pregnancy.

Officials of 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 AFL interim findings, agency officials offered us access to the original source material. We were unable to review the material in time to inlcude 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 CHELIMSKY,
Director.

BRIEFING REPORT

BACKGROUND

Senator John Chafee asked us to assess the wide range of current programs and legislative proposals to address the public concern about teenage pregnancy among the poor. We selected for examination two legislative proposals on the grounds of their special interest, as well as to maximize the diversity of approaches to be considered in our review. Senator Chafee's proposal, S. 938, and Senator Moynihan's proposal, S. 1194 (section 6), both describe programs of comprehensive services that would be provided exclusively to pregnant and parenting young women. The bills differ on the scope of services that would be provided, the types of clients who would be served, and the administrative and financing arrangements that would be required. Senator Moynihan's bill also differs from Senator Chafee's in that it proposes a pregnancy-prevention program.

We organized our examination of these proposals around four questions:

1. What is known about the extent of teenage pregnancy?
2. What solutions have been tried?
3. What is known about the effectiveness of these solutions?
4. What implications does this knowledge have for the structuring of new legislation?

Focusing on the main features of the two bills, we examined information on the extent of the teenage pregnancy problem that is relevant to the target populations specified in the two bills; reviewed the characteristics of existing federal programs providing relevant services; and examined published studies on the effectiveness of programs for preventing teenage pregnancy and for providing related services.

At least four sources of information could be drawn upon in assessing whether a proposed program might have the results intended: common sense, logic, plausible theory based on research, and evaluations of the effectiveness of prior interventions. We focused our review on the source we thought would provide the most directly relevant information: program evaluations.

The 70 documents we reviewed supplied information about a wide range of program services and administrative and financing arrangements. The studies also described the difficulties of implementing programs. However, less than half of the evaluations included comparison data, and few used research designs adequate for evaluating the effectiveness of a project.

[Figures 1 thru 7 not reproducible for the Record.]

In appendix I, we describe our methodology—the evaluation planning review—in detail. Appendix II is a bibliography of general references, including the evaluation studies we reviewed. (A bibliography of all the documents we reviewed and brief descriptions of the specific studies we employed in our analyses are available on request.)

What is known about the extent of teenage pregnancy?

In 1983, there were 500,000 live births and more than 1 million pregnancies in the United States to women younger than 20. While teenage pregnancy rates increased during the past decade, teenage birthrates, overall, declined. Although reliable information is not available on the extent of teenage pregnancy and births among the poor, it is known that birthrates are increasing for unmarried teenagers and have barely declined for very young teenagers—two groups at particular risk of negative health, educational, and social outcomes. Additionally, the number of births to unmarried teenagers varies dramatically by state of residence.

Teenage pregnancy rates have increased while birthrates have declined overall

Combining data from surveys of health care providers with federal natality statistics to include births, abortions, and miscarriages, the Alan Guttmacher Institute has estimated that teenage pregnancy rates have increased.

In 1972 (the first year for which data are available), about 95 in every 1,000 women 15 to 19 years old became pregnant; in 1981 (the year of the most recent data), the rate was estimated at about 111 in 1,000.

Teenage birthrates, however, have declined, mirroring the decline in birthrates for all women.

In 1952, the overall birthrate was 86 in 1,000 among women 15 to 19 years old; in 1972, the rate was 62 in 1,000; and in 1982, the rate was 53 in 1,000. (In 1983, the year of the most recent data, the rate was 52 in 1,000.) Increased abortion rates for teenagers are believed to account for most of the differences in the pregnancy and birth trends.

Limited information is available on the extent of teenage pregnancy among the poor

Compared to women who delay their childbearing, women who bear children before the age of 18 generally experience more birth complications and show deficits in educational attainment and income. Their children have been found to have a higher risk of congenital defects, childhood disease, and developmental lags than children of mothers in their twenties. Teenage childbearing in the context of poverty is believed to increase the probability of these negative consequences and to require additional health and social services to avert these consequences.

To estimate the extent of teenage pregnancy among the poor—and, thus, the need for additional services—we investigated nine government and private data bases on fertility, income, and teenagers. We found that no reliable estimates of poor pregnant and parenting teenagers are readily available, for a variety of reasons: Mothers' income information is not included in birth records; household income information is not accurately reported in surveys of teenagers; Government fertility surveys have excluded teenagers younger than 18 from their samples; and the standard national survey of household income reports the number of families with income below the poverty level but excludes from its count families headed by teenagers (or others) that reside in larger households.

Therefore, to identify the populations most in need of services, we examined the available data on other characteristics of teenage births that research has identified as being associated with negative outcomes for teenage pregnancy: Age, marital status, and education.

Increasing proportions of pregnant and parenting teenagers are at risk of negative outcomes

Although birthrates have declined for teenagers as a whole, they have not declined for some who are at particularly high risk of the negative consequences of childbearing.

The rate for older teenagers (18 to 19) decreased dramatically after 1970, but the rate

for younger teenagers (15 to 17) did not decrease 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 in 1,000.

The rate for unmarried teenagers (15 to 19) rose from 23 in 1,000 in 1972 to 29 in 1,000 in 1982, 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 completed 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 tables end 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, Illinois, New York, Ohio, Pennsylvania, and Texas.

Eleven states had fewer than 1,000 such births: Arkansas, Delaware, Idaho, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming.

About 80,000 babies were born to unmarried teenagers in the 13 states and the District of Columbia, in which the last decennial census showed that nearly 15 percent or more of the population earned incomes below the poverty level: Alabama, Arkansas, the District of Columbia, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, 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 teenage pregnancy or to provide services to assist pregnant teenagers and teenage mothers in preventing some of the negative consequences for mother and child. The federal role appears limited at present to a single demonstration program aimed solely at these activities and nine other grant programs that provide services relevant to teenage 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 program literature, which include surveys of state and local government 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 grant programs are relevant to teenage pregnancy programs, information on the number of pregnant and parenting teenagers who are served and on the amount of federal funds spent on this subpopulation is available at the federal level for only one of these programs.

Only one program serves teenage mothers exclusively—the AFL program. Its fiscal year 1986 appropriation was $15 million, and it funded prevention and service 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 teenagers); Employment Training Services for the Disadvantaged, under the Job Training Partnership Act (JTPA); and the Special Supplemental Food Program for Women, Infants, and Children (WIC). National information on funds allocated to teenagers through these programs is not maintained.

Six programs provide services relevant to poor pregnant and parenting teenagers: the maternal and child health block grants and the social services block grants, the program for community health centers, employment services and job training grants (demonstrations under the JTPA), child welfare grants, and community services block grants. National information on funds allocated by these programs to pregnant and parenting teenagers is not maintained.

Although the expenditures of these programs on teenage pregnancy are not known, the federal role appears to be secondary to 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 teenagers. Of the 127 responding cities, 90 reported that special programs were provided and that most of these received public funds from one or more sources: 67 percent received local funds, 59 percent received state funds, and 47 percent received federal funds. Neither the amount received nor the share of total funds was reported.

State and local funds came predominantly from education departments; federal funds came primarily from the block grants for material and child health and for social services. Across these government levels, 70 percent of these cities reported that education funds were a source of support for special programs for pregnant teenagers, 33 percent reported health funds, and 12 percent 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 service programs exclusively for pregnant and parenting young women. They differ in flexibility and scope of services, types of clients, and complexity of administrative arrangements.

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 relatively 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 explicitly 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 and 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 not completed high school and by requiring participation in a program leading to a diploma.

Senator Moynihan's bill also proposes a pregnancy-prevention program that is operationally more flexibile than his service program 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 and the economic dependence of teenage mothers. However, specific services would not be required in this program, and two strategies for preventing teenage pregnancy are acknowledged: the postponement of sexual activity and the use of contraception.

These two bills also differ in their administrative and financial arrangements. Senator Chafee's bill proposes new grants to public and private nonprofit agencies and contains the following key features.

It is flexibile, proposing to provide any of the following services: comprehensive prenatal and postpartum care, well-child care for infants, comprehensive family-planning services, educational and vocational counseling, family-life and parenting education, counseling services, and other services designed to improve the availability of comprehensive assistance services.

It is targeted to pregnant teenagers and mothers who are younger than 18 at the time of birth.

The proposed funding level for fiscal year 1986 was $30 million.

It is, administratively, relatively straightforward.

Senator Moynihan's bill proposes new grants to state agencies administering AFDC and has the following key features.

It is prescriptive, requiring that all the following services be provided: educational and vocational services; the coordination of services, otherwise available, directed at the health needs of mother and child; other services designed to improve the availability of comprehensive assistance services, including child care, transportation, and individual needs assessment and written plans to assist in case management.

It is broadly targeted. Program A would serve all teenagers eligible for AFDC, and Program B would serve women younger than 25, whether pregnant or parents, who are eligible for AFDC.

Its proposed funding level for fiscal year 1986 is 2 percent of a state's AFDC payment.

It is, administratively, relatively complex, requiring federal, state, and local coordination 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

[1] In 1983, the year of the most recent data, the birthrate was 78 in 1,000 women 18–19 years old, 32 in 1,000 women 15–17 years old, and 1.1 in 1,000 younger than 15.

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 WIN).

THE EFFECTIVENESS OF PRIOR 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 hundreds of 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 information 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 conception and fertility. Only 11 of the 24 studies provided comparison data, and only 2 of the 5 interim evaluations of the AFL demonstration 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 in which we 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 intensive interpersonal-skills program reported positive short-term results in the use of more reliable, medical methods of contraception. It also appears that increases in teenage enrollment in family planning clinics are associated with reductions, although small, in teenage birthrates.

While there is no strong evidence that the sex education typically available in schools reduces teenage pregnancy, there is also no evidence that it encourages sexual activity, which some have feared.

School-based teenage health clinics that include family planning services are frequently associated with reduced teenage birthrates but have not provided conclusive evidence that the programs were responsible for these declines.

The evidence is insufficient for concluding that some types of services are more effective than others. Two comprehensive health clinics, one school-based and the other hospital-based, appeared equally successful in maintaining the use of reliable contraception. Since we do not know what other services the family planning clinics may have provided to teenagers (such as counseling), we cannot determine which services were responsible for the apparent success.

The information on the effectiveness of comprehensive service programs is limited

Both of the legislative proposals we reviewed intend to increase the availability of comprehensive assistance services to pregnant and parenting teenagers. Because they would authorize numerous services in addition to the traditional perinatal health care and parenting education programs, we focused on comprehensive service projects. We found that these projects provided only limited information on the effectiveness of the explicit objectives of the two target proposals: preventing unintended repeat pregnancies, ensuring the health of mothers and their children, and enabling the mothers to complete high school, acquire job skills, and achieve economic self-sufficiency.

Only 9 of the 37 studies we reviewed provided comparison data with which to evaluate their results. Additionally, 5 of the 9 AFL projects had interim evaluations that included comparison groups in their designs. (The results reported by these 14 studies are shown in table III.3; those we have most confidence in are highlighted.) Our analysis indicated the following.

The teenage mothers who were enrolled in service programs providing a range of assistance that included prevention services had lower fertility rates than teenagers in similar communities without such programs. Additionally, the programs reported increased use of birth control in the first year after delivery.

Positive results were reported in other areas as well, including child health status and mother's school attendance and attainment. Teenagers receiving a broad array of services had no fewer complications and no healthier infants at delivery than teenagers receiving at least prenatal health care, but their children were more likely to receive regular health checkups. Teenage mothers enrolled in multiservice programs were more likely to return to school and, thus, to complete more years of school after delivery than nonparticipants, but there was no strong evidence of improved graduation rates.

However, because of limits in study designs, several cautions are needed in interpreting these findings. First, few studies had controls adequate to exclude plausible explanations (other than comprehensive services) of their results. For example, few "comparison" groups were truly comparable. Therefore, our conclusions regarding fertility and school enrollment are based on only three studies each, our conclusions on mother and infant health on six.

Second, these are short-term results, genrally limited to 1 year. No differences in fertility of school enrollment were found between participants and nonparticipants after 2 years. Partly because of the short-term nature of these studies, they provide no evidence on whether the participants were more likely to be economically self-sufficient, a relatively long-term objective for teenage mothers.

Finally, many of these programs were special demonstrations, so that it is difficult to generalize from their results to what might be expected in typical, ongoing service programs.

In summary, numerous programs provide 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 specific sets of services. Most within-study comparisons did not specify the services received by the comparison groups. Although one AFL project did test the value of peer counselors' services in addition to the full range of services, it did not find positive results consistently across the measured outcomes.

There were too few adequate studies and too much diversity in the sets of service they represented to permit an independent evaluation of the effectiveness of specific service components.

IMPLICATIONS FOR FUTURE LEGISLATION

Our review of the extent of the problem of teenage pregnancy and the effectiveness of efforts to address it can be summarized in terms of what is and is not known. This summary serves, in turn, as the basis for our obervations about the feasibility and promise of the two proposals for new programs and the implications for future legislation.

What is known?

The literature provides some information on three topics that help in assessing the two legislative proposals: the size of the eligible populations, potential benefits, and implementation difficulties observed for current programs.

1. *Large eligible populations.* Recent statistics show that the eligible population is potentially large. About 44 percent of births to unmarried teenagers occur in seven states reporting a high incidence of such births. The data are not sufficient to estimate precisely how many individuals might be eligible under the two bills, but rough estimates can be derived from the data through 1984. We estimate that about 1 million teenagers would be eligible for services under S. 938, or up to 2 million if the fathers are included. For S. 1194, our estimates are as high as 2 million for the prevention program and 600,000 for the services program (see table 5 on the next page). The latter figures are overestimates because the income data were available only in relation to the federally defined poverty level, which is generally higher than the states' income standards of eligibility for AFDC.

2. *Probable benefits but uncertain causes.* The results of several projects appear promising, if not conclusive. Family planning and comprehensive health clinics, as well as intensive interpersonal-skills training, have reportedly affected either the short-term use of contraceptives or fertility. The comprehensive and the more limited programs for pregnant teenagers and teenage mothers reported, in a variety of settings, results that seem encouraging for infant health, short-term fertility, and return to school.

3. *Feasibility concerns.* Some of the problems commonly identified in the literature and mentioned by program administrators in a recent 50-state survey include the following:

Lack of public understanding about the size and scope of the problem;

Community ambivalence toward the issue, making the programs unpopular;

Lack of support services to improve programs' accessibility for clients;

Agency rivalries and incompatible procedures;

The immaturity and limited resources of the teenagers, compared to adult clients;

Unstable funding sources;

Lack of coordination among existing services; and

Insufficient or nonexistent services to coordinate (see U.S. House of Representatives, 1986, item A22 in the bibliography in appendix II).

Programs could increase their chances of success by attending to these factors during the program development stage. Media campaigns educating the public about the

extent of teenage pregnancy and its serious consequences could help gain program support. Research and evaluation suggest promising strategies for overcoming some of the other barriers. The case-management approach required in Senator Moynihan's proposal has been associated 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. Evidence suggests that the clients who receive more rather than less service or continued service show greater success. These individuals may be more motivated than others who terminate their participation early, but participation may nevertheless be hindered by barriers that are frequently beyond their control—lack of transportation and child care and conflicts with work or school, for example. Thoughtful program development could address these factors.

What is not known?

The evaluations of efforts addressing teenage pregnancy leave several critical questions unanswered. In particular, we do not know the factors responsible for what works and what does not work; availability of resources in the field; and additional costs for service delivery. These gaps in knowledge influence the confidence we can place in projections about the likely effects of the proposed legislation.

1. *What factors are responsible?* In most instances, the evaluations that we reviewed tested whether the provision of a composite set of services resulted in benefits to the clients. Looking across the projects, we found various combinations of services, different settings, different treatment modalities, and different types of clients. The results for the participants were typically compared to the results for individuals who received "customary" services that were in some way distinct from treatment under a project. Given these test conditions, it is not possible to determine whether all services worked, whether some were more essential than others, or whether some had no value at all.

Further, when "customary" services (private prenatal care, peer and parental counseling, locally available professional counseling, and so on) are used as the basis for assessing program effectiveness, it is quite possible that both customary and comprehensive services may be effective (relative to providing no services at all). Thus, the prior assessments leave important questions unanswered: Does the program work or not? Does it work, or not work, as a whole or as a result of a single component? Which components are responsible for the positive and which for the negative outcomes? Answers to these questions would require research and evaluation practices that are more sophisticated than appear in the literature.

2. *What are the resources in the field?* Many federal, state, and local programs can, or could, provide relevant services, but there is little information on who is being served, on what programs are available, and on whether all relevant services are available for coordination. According to a 1986 report by the House Select Committee on Children, Youth, and Families, only some of the 50 states in a 1985 survey could report on how much of their federal block grants and other federal funds were spent on adolescents or how many adolescents were served by programs using these funds (see item A22 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. However, the state officials who did respond indicated 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 90 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 education (84), and sex education (81). Day care was the most frequently mentioned unmost need of pregnant teenagers and teenage parents (39) cities), and this was followed by job and vocational assistance (31), funds (23), continuing education (22), and parenting education (20).[2]

3. *What are the costs of providing services?* The available evaluation reports do not provide information sufficient for determining the likely cost of providing comprehensive or coordinated services. Very few project reports described their program costs, and those that did used 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 service 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 and $5,500 to $9,592 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 care.

The varying definitions of cost and their resulting values reflect one of the crucial difficulties in estimating the costs of the programs proposed in the two bills. 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 1985, the federal share of AFDC expenditures (including administrative expenses) was $8.96 billion for all states; 2 percent of this would represent $179 million for the national program. This is substantially more than the $30 million proposed in S. 938 for service projects—and more than the $15 million currently being spent for the AFL demonstration projects.

However, the states' shares of 2 percent of the federal AFDC payment vary dramatically, according to the 1985 figures. Nevada would receive $116,890, or the smallest amount, but it had 781 births to unmarried teenagers in 1983, resulting in $150 per potential client. In contrast, California would receive the largest amount, $33,075,170, but it has 28,841 such births in 1983, resulting in $1,174 per potential client. These figures are very rough but point to the difficulty of 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 at least two distinct avenues could be pursued in future legislation: (1) expanding services where they are most needed and (2) supporting well-evaluated demonstrations of innovative, flexible, and clearly targeted programs.

OPTION I: THE EXPANSION OF SERVICES

If the expansion of service programs is essential, then adequate targeting, flexibility, 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 as mothers, these women are most likely to be 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 what services may 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 experience with the programs that require extensive coordination across agencies and funding sources and by the concerns that have been reported about programs on teenage pregnancy. Of course, targeting to selected high-risk teenagers will automatically reduce the administrative complexity of a program. For example, targeting 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 AFL 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 rearing a teenagers' infant; some programs in other

[2] In the originial survey, 92 cities were reported as supplying counseling services. We could not reconcile this number with the total number of respondents, which was 90.

states encourage greater and more productive communication and understanding between teenagers and their parents regarding sexuality. There is little available evidence on the results of these approaches—they are either too new or not 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. They 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 comprehensively the results of the large body of research on the prevention of teenage pregnancy and the consequences of teenage childbearing. A panel of the National Academy of Sciences is about to complete a study that may help identify promising practices for future innovations.

Sound evaluation is essential. 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 having detailed 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 other factors are responsible for intended changes in important outcomes, evaluation designs must include a basis for comparison. This should be obtained from analyses of data on comparable individuals who do not receive the innovative services or analyses of time-series data. This does not mean that individuals in comparison groups must be denied services. They could be provided "customary" services that do not include all the features of the innovative program.

A description of the innovative program and its components, clients' characteristics, and type and amount of services should be detailed enough to allow its implementation in other service settings, if, of course, it is thought effective. The services provided to individuals in the comparison group should also be described in detail.

Outcome measures should be relevant to the specific objectives of the innovative project; comparable data collected across projects should facilitate between-project comparisons.

The measurement of intermediate and long-range outcomes should be scheduled to ensure that sufficient time elapses for program outcomes to be demonstrated, if the program is successful and has durable benefits.

Results should be reported in detail sufficient to allow readers to assess the validity and integrity of the conclusions.

At present, only a few projects have approximated this level of evaluative effort. In the past, credible evidence on other programs has been obtained by providing technical assistance to state and local projects, expanding the resources devoted to evaluation, creating a centralized evaluation mechanism, and combining two or more of these tactics.

Once models have been tested and have demonstrated their promise, federal support for dissemination seems justifiable. That is, support could be provided for the dissemination of research and evaluation findings, the development of material to facilitate the transfer of a project's operational service plan and format to other areas, and on-site consultation by project developers.

In summary, our review suggests the following two options for congressional consideration:

1. If the expansion of service program is considered essential for dealing with the unmet needs associated with teenage pregnancy, then selected targeting of program resources, flexible program service-delivery packages, and simple program adminsitration are warranted. However, the lack of evidence from past programs means, unfortunately, that decisions about new programs and the expansion of old programs have to be based on common sense, logic, and plausible theory rather than on empirical data and knowledge.

2. The evidence is also consistent with an approach that encourages innovation, evaluation, and the dissemination of tested program models. That is, rather than investing 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 could be considered in future legislation?

Our preliminary work uncovered a range of current efforts to address teenage pregnancy that was too broad to allow us to comprehensively assess the implications for all possible legislative efforts that might be pursued. It was mutually agreed that we would pursue these questions with regard to two legislative proposals of particular interest to the Senator: his own bill, S. 938, and one proposed by Senator Patrick Moynihan, S. 1194.

Our objectives for this review were to identify, evaluate, and synthesize information relevent to the feasibility of two new program proposals and their likely success in achieving their stated objectives. We refer to our general methodology as an evaluation planning review, a prospective analysis anchored in evaluative concepts of program proposals. To be timely, the method is selective; no attempt is made to be comprehensive by reviewing all possible studies, projects, or research. Using evidence from prior evaluations, statistical information systems, and knowledge of social programs, 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 examined 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 operations of each program package, 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 work 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 determine (a) 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 compared these findings to the features of the two pieces of proposed legislation. Our application of this methodology is summarized below.

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 postpregnancy service projects as the dual focus of our review. (We did not attempt to review all projects providing services to pregnant teenagers, because Senator Chafee's interest was in comprehensive service programs.) These criteria also delimited our estimates of the size of the target populations. The policy objectives mentioned in each bill and the general strategies for achieving them are depicted in figures 2–4. The models in these figures define the outcomes of interest to which we restricted our review of the success of prior efforts.

IDENTIFY RESEARCH

We began our search for the most important research 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, Dissertation Abstracts, ERIC, Health Planning and Administration, Psych Info,* and *Sociological Abstracts* (which cover reports from the academic community). Our search terms were intentionally broad, because we wanted to find as many relevant documents as possible. Our search of each file was generally restricted to documents published after 1980.

The computerized searches yielded more than 1,100 references, many with abstracts. Two staff members screened these references and selected the items that appeared to be the most relevant to our various topics, 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 bibiographies of the research studies and reviews to identify other studies that might have been missed in the computerized searches. The staff members also informally contacted several experts on demography and relevant programs to identify work in progress and elicit nominations of the "most important" research. The experts included Martha Burt, Urban Institute; Josefina Card, Sociometrics Data Archive on Adolescent Pregnancy and Pregnancy Prevention; Cheryl Hayes, National Academy of Sciences; Martha Hill, Panel Study of Income Dynamics; Douglas Kirby, Center for Population Options; William Marsiglio, National Longitudinal Survey; Martin O'Connell, Bureau of the Census; Paul Placek and William Pratt, National Center for Health Statistics; Janet Quint, Manpower Demonstration Research Corporation; and Melvin Zelnick, Johns Hopkins University. We mailed out bibliography to other knowledgeable researchers and policy analysts for their review, including Gordon Berlin, The Ford Foundation; Thomas Brock, Manpower Demonstration Research Corporation; Janet Hardy, John Hopkins University; Lorraine Klerman, Yale University; Karen Pittman, Children's Defense Fund; Freya Sonenstein, Urban Institute; Sharon Stephan, Congressional Research Service; and Gail Zellman, Rand Corporation. Our search yielded a total of 70 documents; our full bibliography is available upon request. In addition, a single publication (see item A23 in the bibliography) provides summary descriptions of 66 demonstration projects funded by the AFL program. Only some of those projects reported interim evaluation data.

Information on the prevalence of teenage pregnancy and childbearing is required in order to ascertain the seriousness of the phenomenon and to estimate the need for services. To ascertain the scope of the problem, we reviewed the published literature and analyzed birth statistics reported by the National Center for Health Statistics and others. To estimate the extent of teenage childbearing among the poor, we investigated the availability of income and fertility information in a number of public and private data bases.

However, no reliable estimates of the number of poor pregnant or parenting teenagers are readily available. Therefore, to ascertain estimates of the populations most in need of services, we examined the available data on the characteristics that previous research has identified as being associated with outcomes for teenage childbearing: age, marital status, and educational attainment.

EVALUATE STUDIES

From those documents describing a prevention or service project, we set aside those that reported no data on any of the outcomes specified in the bills. Then, for each remaining study of a prevention or service project, we rated separately the quality of the information provided on each outcome measure. Separate ratings by outcome measure were required, because some outcomes were measured with different designs within the same study. We adapted six dimensions from those identified in our paper entitled *The Evaluation Synthesis:*

1. The similarity of the comparison group to the project's clients;

2. The adequacy of the sample size and the extent of attrition (in studies using longitudinal designs);

3. Standardizations of data collection procedures;

4. The appropriateness of the measures that were used to represent the outcome variables;

5. The adequacy of the statistical or other methods used for control of threat to validity (that is, possible influences on observed differences other than program participation); and

6. The presence and appropriateness of the methods used to analyze the statistical significance of observed differences.

All ratings were made from a 3-point scale from "unacceptable," indicating no information on a study method or a method so flawed that the data were probably wrong, to "acceptable," indicating an appropriate method with attempts to minimize endemic problems. All ratings were based on published materials that often did not fully disclose the evaluation procedures.[1]

These dimensional ratings were then combined to judge the overall acceptability of data on each outcome variable for inclusion in our synthesis of results. Outcome data from studies with their own comparison data were judged acceptable overall if they had "acceptable" ratings on the comparability of the comparison data, the extent of sample attrition (if any), and the adequacy of controls for explanations of the observed results other than program participation. Outcome data meeting these criteria are highlighted in the tables and forced the basis for our synthesis of results.

SYNTHESIZE RESULTS

To compare information on prior efforts with the proposals in the two bills, we characterized projects by the types of service and means of service delivery (see tables III.4 through III.8). For categories, we used the characteristics proposed in the most specific legislation, S. 1194. We identified three types of service projects on the basis of the provision of academic and vocational services, as required by Senator Moynihan's proposal, and by the primary setting for service delivery (health facility or school). Prevention projects were characterized by the service components identified in our general review of prevention programs as well as some of the service-delivery characteristics proposed for the comprehensive service program. Prevention projects were too few and too diverse to permit convenient grouping.

To analyze the data available on effectiveness of these programs, we excluded the studies that had no comparison data and grouped the results by more specific types of program. For convenience, we include in these tables the outcome data that we judged acceptable and unacceptable; however, we based our synthesis of results on the data that we judged acceptable.

[1] At the time that we received agency comments, we were offered access to the annual reports of the AFL projects, but, because of time constraints, we were unable to review them for inclusion in this report.

[Appendix II]

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C. COMPREHENSIVE SERVICES

C1. N. Aries and L. V. Klerman. "Evaluating Service Delivery Models for Pregnant Adolescents." *Women and Health,* 6:1-2 (Spring-Summer 1981), 91-107.

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C4. Martha R. Burt et al. *Helping Pregnant Adolescents: Outcomes and Costs of Service Delivery.* Washington, D.C.: The Urban Institute, February 1984.

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C9. C.J. Miller. "Helping the Pregnant Adolescent Remain in School: The Continuing Education Program." *ANA Publication,* March 1984, pp. 27-29.

C10. M.F. Mitchell. "Reducing the Risks of Teenage Pregnancy." *Mobius,* 4:3 (July 1984), 20-25.

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C13. Denise Polit, Janet Kahn, and David Stevens. *Final Impacts From Project Redirection: A Program for Pregnant and Parenting Teens.* New York: Manpower Demonstration Research Corporation, April 1985.

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[Tables in Appendix III not reproducible for the Record.]

TABLE 1.—1983 HIGH SCHOOL STATUS OF WOMEN AGES 20-26 WHO WERE TEENAGE MOTHERS

[In percent]

Age at first birth	Dropout	Received diploma	Received general equivalency diploma
Younger than 15	70	23	6
15	55	24	21
16	51	28	21
17	47	38	15
18	38	52	10
19	23	68	9
At least 20	10	86	4

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

Source: F. L. Mott and W. Marsiglio, "Early Childbearing and Completion of High School," Family Planning Perspectives, 17:5 (1985), 236, table 3.

TABLE 2.—NUMBER OF BIRTHS TO UNMARRIED TEENAGERS IN 1983 BY AGE AND PERCENTAGE OF PERSONS IN POVERTY BY STATE

State	19 or younger	17 or younger	younger than 15	Poverty rate[1]
Alabama	6,100	3,036	243	17.9
Alaska	610	270	11	10.1
Arizona	4,391	2,014	95	12.4
Arkansas	3,475	1,768	163	18.7
California	28,841	12,699	750	11.3
Colorado	3,012	1,376	76	10.2
Connecticut	2,738	1,192	90	8.7
Delaware	995	470	47	11.9

TABLE 2.—NUMBER OF BIRTHS TO UNMARRIED TEENAGERS IN 1983 BY AGE AND PERCENTAGE OF PERSONS IN POVERTY BY STATE—Continued

State	19 or younger	17 or younger	younger than 15	Poverty rate[1]
District of Columbia	1,562	707	48	18.9
Florida	13,372	6,443	592	13.0
Georgia	8,887	4,481	428	16.4
Hawaii	1,197	452	14	10.0
Idaho	732	336	18	12.7
Illinois	16,103	7,565	509	11.5
Indiana	6,077	2,896	179	9.8
Iowa	2,096	947	27	9.4
Kansas	2,125	968	45	10.2
Kentucky	3,724	1,770	128	18.4
Louisiana	8,462	4,111	333	18.9
Maine	4,427	1,860	83	9.8
Maryland	6,292	2,741	196	9.9
Massachusetts	1,032	446	15	12.9
Michigan	8,849	4,252	296	11.1
Minnesota	3,074	1,245	50	9.3
Mississippi	6.002	3,089	321	24.5
Missouri	5,886	2,711	158	12.4
Montana	770	316	11	12.4
Nebraska	1,324	566	27	10.4
Nevada	781	393	32	8.5
New Hampshire	601	245	13	8.7
New Jersey	7,985	3,693	258	9.7
New Mexico	2,394	1,073	71	17.4
New York	19,349	8,518	497	13.7
North Carolina	7,460	3,674	284	14.6
North Dakota	539	222	7	12.8
Ohio	12,088	5,537	362	10.5
Oklahoma	3,593	1,727	127	13.3
Oregon	2,246	994	47	11.3
Pennsylvania	11,774	5,302	341	10.5
Rhode Island	856	381	18	10.3
South Carolina	5,529	2,698	250	15.9
South Dakota	736	295	10	16.1
Tennessee	5,735	2,854	250	17.0
Texas	18,061	9,040	804	14.8
Utah	1,152	532	22	10.7
Vermont	463	187	8	11.4
Virginia	6,032	2,688	216	11.5
Washington	3,806	1,679	87	10.2
West Virginia	1,760	860	51	14.5
Wisconsin	4,559	1,944	96	8.5
Wyoming	422	178	12	8.0
Total	270,076	125,441	8,816	12.5

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

TABLE 3.—SERVICES PROVIDED IN FIVE REPORTED TYPES OF PREGNANCY PREVENTION PROGRAMS

Program type	Typically included	Possibly included
Sexuality education	Class instruction in puberty and reproduction.	Discussion of family life, sex roles, interpersonal relationships, or family planning.
Interpersonal values discussion.	Outreach workshops and seminars on peer pressure, interpersonal relationships, and family communication.	Assertiveness training, education for self-esteem, or ongoing peer support groups.
Parents as educators programs.	Outreach workshops and seminars on adolescent development, peer pressure, and family communication.	Sexuality education materials provided to teenagers.
Family planning clinics	Physical exams, contraceptive information and supplies, and pregnancy testing and counseling.	Community education and outreach or special education and counseling for teenagers or their parents.
Comprehensive teenage health clinics.	Routine health care, physical exams, health education, and counseling.	Substance abuse programs, contraceptive services, or prenatal health care.

TABLE 4.—SERVICES PROVIDED IN FIVE REPORTED TYPES OF POSTPREGNANCY PROGRAMS

Program type	Typically included	Possibly included
Perinatal health care and parenting education.	Medial exams and care; information on pregnancy, childbirth, and infant health care; and nutritional advice and supplements.	Family planning services, information on child growth and development, intensive training in mother-child interaction, or social service referrals.

TABLE 4.—SERVICES PROVIDED IN FIVE REPORTED TYPES OF POSTPREGNANCY PROGRAMS—Continued

Program type	Typically included	Possibly included
Residental care	Residential care for pregnant teenagers, prenatal care and childbirth education, and individual and group counseling.	Arrangements to continue education, parenting education, family planning services, or residential services for teenage mothers and their children.
Alternative school programs.	Academic instruction (at home or in a separate building) and referrals for perinatal health care and parenting education.	Family planning services, group counseling, or special childbirth and parenting classes for students remaining in regular classes.
Social services with referrals.	Outreach, individual or group counseling, and referrals for health and education services.	Life-skills training, preparation for general equivalency diploma, or vocational assistance.
Comprehensive services	Perinatal health care and parenting education, arrangements to continue education, group counseling, referral and followup using a case-management system.	Vocational assistance, family planning services, child care, or single assignments of staff.

TABLE 5.—ESTIMATED POPULATIONS OF PROGRAMS PROPOSED IN S. 938 AND S. 1194[1]

Proposal	Eligibility	Approximate number
S. 938	Pregnant teenagers younger than 18; mothers younger than 18 at the birth of children now younger than 6; the fathers or guardians.	1,046,859 women who gave birth in the previous 5 years before age 18; 2,093,718 including another adult guardian.
S. 1194 Program B, services.	Women younger than 25 eligible for AFDC and pregnant or mothers of children younger than 6, without high school diplomas.	Up to 630,582 unmarried women without high school diplomas who gave birth in the previous 5 years and are younger than 25.
Program A, prevention.	Male and female teenagers eligible for AFDC.	Up to 2,092,500 children 12–17 in households headed by women with incomes below the poverty level.

[1] Estimated for 1984 from birth statistics since 1978 and the 1984 National Survey of Family Growth.

Mr. CHAFEE. 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 is babies having babies. That is the situation.

The old adage is an ounce of prevention is 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 their pregnancy to provide proper prenatal care, information on what type of diet and assistance in obtaining that 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 a great deal more on this in the future.

Thank you.

RECOGNITION OF SENATOR MURKOWSKI

The PRESIDING OFFICER (Mr. CHAFEE). Under the previous order, the Senator from Alaska [Mr. MURKOWSKI] is recognized for not to exceed 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 Asian 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 has now lasted over 6 years. 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 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 Mideast, the Iranians basically overcome 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.

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

CHINA NOW LARGEST SUPPLIER OF ARMS TO IRAN, U.S. SAYS

(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.

Other Chinese military shipments to Iran—including heavy tanks, a version of the MiG21 aircraft and rocket launchers—may be on the way, these officials said, 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's 3-to-1 advantage in manpower has been checked by Iraq's heavy advantage in sophisticated weapons, including warplanes, tanks and missiles.

The introduction to Iran of new arms is a setback to U.S. efforts over several years to create an international arms embargo 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, Winston 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, antiship missiles and other arms.

Perhaps the greatest U.S. concern has arisen from persistent reports that China has agreed to supply Iran with J6 jet fighters, a Chinese version of the Soviet MiG21 and similar in some respects to the U.S.-made F5E. 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 jets.

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." Iraq, on the other hand, is reported by the institute to have about 500 combat planes in service and has access to nearly unlimited replacement from the Soviet Union and France.

The institute reported last fall that China and Iran signed a $1.6 billion agreement in March 1985 covering the supply to Tehran of J6 fighters, T59 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 agreements [between China and Iran] in 1985" of uncertain proportions.

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

China in the past also has been an important supplier of Iraq, providing $1.5 billion worth 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 flow of arms supplies to Iran from Eastern European allies of the Soviet Union. Polyakov made no commitments, according to U.S. 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 main 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 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.

□ 1010

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 privately officials have suggested some Chinese export corporations might be doing so unbeknownst to official ministries.

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 gound-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. We seek the earliest possible negotiated end to the Iran-Iraq war.

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 Chin'a 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 237.6 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 to a large extent. When computers pick 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 whirlpool with sellers following sellers to market. The Securities and Exchange Commission, in June, estimated the average block-trading share of the market to be between 10 and 25 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 analysts stress that the Federal deficit continues to increase upward pressure on the interest rates for Government bonds.

The potential recurrence of inflation came from several sources: 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 money supply, fueled by several quarters of ever-lower interest rates, some economists speculate, lays the groundwork for inflation.

Mr. President, we cannot say with certainty what triggered last week's market plunge. In all likelihood, we saw several factors combining to push the market dramatically down. However, several troubling questions are 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, some answers to these questions may soon be forthcoming. Throughout the next 2 weeks, several key economic indicators will be released. These figures should provide 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 quarterback of the trading is the computer.

□ 1020

ROUTINE MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will now be a period for the transaction of routine morning business not to extend beyond the hour of 10:30 a.m., with statements therein limited to 5 minutes each.

Mr. SASSER. 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.

□ 1030

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.

ORDER OF BUSINESS

Mr. DOLE. Mr. President, I ask unanimous consent that notwithstanding the provisions of rule XXII of the Standing Rules of the Senate, at 1:30 p.m. today the Senate resume executive session to consider the nomination of Justice Rehnquist, that the time between 1:30 p.m. and 3 p.m. today be equally divided between the chairman of the Judiciary Committee and the ranking minority member or their designees.

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

Mr. DOLE. I also ask unanimous consent that at 3 p.m. today the cloture vote occur on the Rehnquist nomination and the mandatory quorum under rule XXII be waived.

The PRESIDING OFFICER. Is there objection? Hearing none, it is so ordered.

Mr. DOLE. Mr. President, I thank the distinguished minority leader for his assistance, and I think we both believe we can, depending on the cloture vote of course, if cloture is invoked, dispose of both the Rehnquist and Scalia nominations before 6 p.m.

That is our hope. Also, as I have advised my colleagues, there will be a window between roughly 6 and 8 o'clock this evening, and I am advised by the distinguished chairman of the Budget Committee that perhaps they could make opening statements and do some debate on reconciliation during that time, unless we have not completed the DOT appropriations bill, and perhaps we could take up additional amendments on that appropriations bill, but any votes would occur after 8 p.m. this evening.

UNDERSTANDING THE TERRORIST THREAT

Mr. THURMOND. Mr. President, the threat of terrorist attacks against our citizens on our own soil has been considered only a remote possibility by most Americans until recently. Although terrorist activity reached an all-time high in 1985 with 480 incidents, only 7 of these were committed within our borders. However, since the American raid on Libya in April, Colonel Qadhafi and his cohorts have promised to make the United States pay for the damages inflicted upon Libya.

Mr. President, there is an urgent need to make the American people aware of the reality and seriousness of this threat. There is a further need to examine the roles of State and local governments in assisting the Federal Government to combat this type of criminal activity. In response to these needs, the Strom Thurmond Institute of Government and Public Affairs at Clemson University, under the direction of Dr. Horace W. Fleming, recently held a 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 DENTON, 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 conferees 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:

UNDERSTANDING THE TERRORIST THREAT

(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 American raid on Libya in April, and this seemed to change. We were suddenly standing toe-to-toe with the leading culprit of state-sponsored terrorism, Col. Moammar Khaddafy, and we felt vulnerable.

In fact, we have always been vulnerable to terrorists operating within our national boundaries. The few terrorist acts committed on American soil seemed only incidental to the larger drama played out in the international political stage by struggling Middle East powers. In 1985, there were only seven terrorist acts committed on American soil, and most of those were directed against foreign nationals.

One month after the Libyan strike, the Strom Thurmond Institute held a conference in South Carolina on "State and Local Government Responses to Domestic Terrorism." We sought to familiarize state and local law enforcement from across the nation with the threat posed by terrorism within the United States; to familiarize them with counter-terrorist studies, programs and related activities conducted by the federal government; and to discuss ways in which federal, state and local governments can cooperate in devising and implementing counter-terrorist programs and policies. We wanted to provide conference participants an opportunity to discuss specific interests and problems with leading experts in the field of counter-terrorism.

Leading the program were recognized authorities with expertise in the precise area of domestic terrorism: Sen. Jeremiah Denton, Chairman of the U.S. Senate Judiciary Subcommittee on National Security and Terrorism; Edgar Best, Director of Security for the 1984 Olympic Games in Los Angeles; Adm. James Holloway, USN (Ret.), Chairman of the President's Task Force on Combatting Terrorism; Air Force Lt. Col. William Farrell, senior faculty member of the U.S. Naval War College; Lt. Col. James Fraser, formerly Chief of the Terrorism Counteraction Office, U.S. Army; Lt. Kevin Hallinan, Co-Commander of the Joint FBI-New York City Terrorist Task Force; and Ike Pappas, Senior CBS News Correspondent. They were joined in the program by 150 law enforcement and related agency personnel and by representatives from the Federal Aviation Administration, Department of Energy, FBI, Secret Service, U.S. Marshal's Service, Coast Guard, and Maritime Administration.

There is a serious problem in making the American people aware of the nature of this threat. International terrorism reached an all-time high in 1985: 480 incidents, 854 fatalities. Only seven incidents occurred that year in the United States. From the standpoint of the man-in-the-street, terrorism happens to others. Clearly, Americans must recognize that this trend could be reversed. Col. Khaddafy, Abu Nidal, and their surrogates have vowed to make the United States pay for the damages inflicted on Libya. For no other reason than "face-saving," we can expect them to make good on their pledge—on American soil. That was the conclusion of our experts.

Conference participants pointed to two types of terrorists: issue-oriented indigenous groups (such as those we confronted during the 1960s and 1970s, fired by opposition to the Vietnam War) and extremist elements acting on behalf of foreign powers. Our greatest fear is of those groups operating with the financial assistance and encouragement of other states.

We must disabuse ourselves of the image of terrorist organizations as fomented only by leftist movements, said the experts. There is an abundance of such groups in various stages of involvement and organization posing equally serious threats from the extreme political right.

The United States presents an inviting target for foreign-sponsored terrorism. The democracy which fosters our freedom and protects our civil liberties also is weakened by these same conditions. Terrorists are more difficult to detect, more difficult to intercept, more difficult to apprehend and detain with the protections enjoyed by suspects and the accused under the American Constitution and laws.

Civilian targets, said the panelists, are more inviting than military targets and more likely the object of attack in the immediate future. Terrorists prefer softer targets to the strict security and protections normally in force around U.S. military bases and similar installations. Our penalties listed a number of likely domestic targets: nuclear power generating facilities, federal office buildings and government officials, electric power plants and grids, water treatment plants, water supplies, and transportation.

Various measures were suggested to remedy deficiencies in our security to counter terrorist activities. In the main, there were some basic proposals for the approach to dealing with domestic terrorism more generally.

First, domestic terrorism must be recognized and dealt with as a criminal act. To react to terrorism by purely repressive measurs—such as suspending individual civil liberties—"play into the hands of the terrorists."

Second, the United States does have the necessary tools under the law to deal with the threat of domestic terrorism. The Foreign Officials Act and the Comprehensive Crime Control Act of 1984 allow the FBI to deal effectively with such incidents as the bombings of the American embassy in Lebanon and the killing of U.S. Marines in El Salvador. As the lead U.S. agency in the field of terrorism, the FBI helped thwart 23 planned acts of terrorism in this country in 1985.

Third, federal, state and local law enforcement agencies need to undertake memoranda of understanding as to jurisdiction over domestic acts of terrorism. This will encourage greater exchange of information and interaction between the levels of government involved and, in the event of major incidents or prospects for coordinated terrorist activities, a quick and effective series of responses by these agencies.

Fourth, training programs for state and local law enforcement agencies should include terrorism and its domestic threat.

Finally, state and local law enforcement agencies should anticipate terrorist targets. Knowledge that a target has been included in a local plan of protection can be an important deterrent.

How likely is it that the United States faces a serious threat within its borders? Distance from the safe havens of international terrorists make it difficult to mount and sustain a campaign of terrorism in America. We are vulnerable, but knowledge and understanding should drive our initiatives in combating domestic terrorism, not fear.

1985 ROLLCALL OF HEROES

Mr. HEINZ. Mr. President, I rise today for a most solemn and sober purpose. On behalf of the Fraternal Order of Police, I would like 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 half 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 varied from officer to officer, the quality of the conscientious service they rendered did not. For these dedicated men and women, and for the officers who gave their lives in years past, we express our deepest thanks for their great courage and willingness to go to such lengths to protect our citizens and communities.

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.

Since 1969, FOP National Chaplain Virgil D. Penn, Jr., has conscientiously gathered a list of slain officers from around the country who perished during the previous year. Known as the Rollcall of Heroes, it is an acknowledgment of their sacrifice and a small way for us to give support to their families and loved ones who must carry on with their own lives, notwithstanding their and our tragic loss.

Mr. President, I ask that the remarks of Chaplain Penn be placed in the RECORD, along with the list of slain officers, the Rollcall of Heroes.

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

GREATER LOVE HATH NO MAN

Year after year it is with great sorrow that we report the sacrifices put forth by our "Soldiers of Peace", the Law Enforcement Officers of America and its far flung territories. The Grim Reaper respects no rank or age as the supreme sacrifice has been made from the youngest Police Officer to the oldest. From Patrolman to the highest officer in every Police Agency, no matter

how small or large. From all ethnic groups, male and female, on duty and off duty. Every one of these officers gave their all to protect the lives and properties of the citizens of America. Over 75 of these brave men and women have given their lives in the battle against crime in this great land, during 1985.

Many of our Servicemen 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 "ROLLCALL 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 occurred. How many 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 California, who for many years made aware to Congress the sacrifices made by Law Enforcement Officers throughout America, and to Senator John Heinz of Pennsylvania, who has continued to honor our fallen heroes. We sincerely appreciate the respect given our men by the entire legislative body of this great Nation who have recognized the great sacrifices of our deceased Brothers and Sisters. Thank you and may The Good Lord Bless every one of you.

Respectfully yours,

VIRGIL D. PENN, Jr.,
National Chaplain,
Fraternal Order of Police.

LAW ENFORCEMENT OFFICERS KILLED DUE TO CRIMINAL ACTION—1985

(Date of death,[1] 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 70166, San Juan, Puerto Rico 00936.

January 24, 1985—Sergeant Craig A. Nollmeyer, Tacoma Police Department, 930 Tacoma Avenue, South, Tacoma, Washington 98402.

January 26, 1985—Patrolwoman Deanna S. Rose, Overland Park Police Department, 8500 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 36130.

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 10, 1985—Lieutenant Timothy J. Sullivan, Anaconda Police Department, Anaconda, Montana 59711.

February 14, 1985—Officer John T. Scanlon, Robbinsdale Police Department, 4145 Hubbard Avenue, North, Robbinsdale, Minnesota 55422.

February 18, 1985—Patrolman Robert A. Way, North Charleston Police Department, Post Office Box 10100, North Charleston, South Carolina 29411.

February 24, 1985—Patrolman Gary Stymiloski, Westchester County Parkway Police, Saw Mill River Parkway, Hawthorne, New York 10532.

February 26, 1985—Deputy Barry L. Pendrey, Roanoke City Sheriff's Office, 317 Church Avenue, Roanoke, Virginia 24016.

March 2, 1985—Trooper James A. Froemsdorf, Missouri State Highway Patrol, Post Office Box 568, Jefferson City, Missouri 65102.

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

March 4, 1985—Sergeant Isidro Rodriguez Monclova, Police of Puerto Rico, G.P.O. Box 70166, San Juan, Puerto Rico 00936.

March 7, 1985—Criminal Investigator Enrique Salazar Camarena, Drug Enforcement Administration, 1405 Eye Street, Northwest, Washington, D.C. 20537.

March 10, 1985—Patrolman Kevin J. Williams, Huntsville Police Department, 1220 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 Abigail Powlett, Plainfield Police Department, 200 East Fourth Street, Plainfield, New Jersey 07060.

March 19, 1985—Patrolman Leonard R. Lesnieski, Patrolman Rosario J. Collura, Milwaukee Police Department, 749 West State Street, Milwaukee, Wisconsin 53233.

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

March 27, 1985—Officer Thomas E. Strunk, Billerica Police Department, Concord Road, Billerica, Massachusetts 01821.

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

March 31, 1985—Officer Thomas E. Riggs, 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 of Puerto Rico, G.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 92415.

April 9, 1985—Trooper Giles A. Harmon, North Carolina State Highway Patrol, 512 North Salisbury Street, Raleigh, North Carolina 27611.

April 11, 1985—Sheriff George E. Goare, Webster County Sheriff's Department, Post Office Box 55, Preston, Georgia 31824.

April 12, 1985—Trooper Leo Whitt, Virginia State Police, Post Office Box 27472, Richmond, Virginia 23261.

April 15, 1985—Trooper Jimmie E. Linegar, Missouri State Highway Patrol, Post Office Box 568, Jefferson City, Missouri 65102.

April 20, 1985—Patrolman John R. Tucker, Fort Gay Police Department, Post Office Box 336, Fort 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. Mathis, 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. Stewart, Oklahoma Bureau of Narcotics and Dangerous Drugs, Post Office Box 53344, State Capitol Station, Oklahoma City, Oklahoma 73152.

May 10, 1985—Officer Ignatius J. Charlie, Alakanuk Police Department, Alakanuk, Alaska 99554.

May 14, 1985—Trooper Raymond E. Worley, North Carolina State Highway Patrol, 512 North Salisbury Street, Raleigh, North Carolina 27611.

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

May 21, 1985—Officer John W. Mann, Trafford Police Department, Post Office Box 97, Trafford, Alabama 35172.

May 28, 1985—Officer Thomas J. Trench, Philadelphia Police Department, Eighth and Race Streets, Philadelphia, Pennsylvania 19106.

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, 1121 South State 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 28202.

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

August 9, 1985—Officer Myron J. Massey, Fairfield Police Department, Post Office Box 177, Fairfield, Alabama 35064.

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[1] This date may not coincide with the date of the assault causing the death.

August 16, 1985—Officer Elabio Aponte Rivera, Police of Puerto Rico, G.P.O. Box 70166, San Juan, Puerto Rico 00936.

August 25, 1985—Patrolman Jose Cisneros, Solano County Sheriff's Office, 500 Texas Street, Fairfield, California 94533.

August 28, 1985—Detective Albert J. Mallen, Sr., New Jersey State Police, Post Office Box 7068, Trenton, New Jersey 08625.

August 29, 1985—Officer Ramon Luis Reyes Rosa, Police of Puerto Rico, G.P.O. Box 70166, San Juan, Puerto Rico 00936.

August 29, 1985—Detective Charles D. Heinrich, El Paso Police Department, 500 East San Antonio Street, El Paso, Texas 79901.

August 30, 1985—Trooper Paul L. Hutchins, Michigan State Police, 714 South Harrison Road, East Lansing, Michigan 48823.

September 13, 1985—Special Agent in Charge John T. King III, Georgia Bureau of Investigation, Post Office Box 1109, Milledgeville, Georgia 31061.

September 13, 1985—Patrolman Daniel M. McPherren, Newton Police Department, 115 North Second Avenue, Newton, Iowa 50208.

September 14, 1985—Trooper Robert L. Coggins, North Carolina State Highway Patrol, 512 North Salisbury Street, Raleigh, North Carolina 27611.

September 21, 1985—Patrol Officer David W. Roberts, Paris Police Department, 811 Bonham Street, Paris, Texas 75460.

September 23, 1985—Officer Osvaldo Santiago Oliver, Police of Puerto Rico, G.P.O. Box 70166, San Juan, Puerto Rico 00936.

September 27, 1985—Trooper Bruce K. Smalls, South Carolina Highway Patrol, Post Office Box 191, Columbia, South Carolina 29202.

September 30, 1985—Deputy John R. Klem III, Forrest County Sheriff's Department, 316 Forrest Street, Hattiesburg, Mississippi 39401.

October 17, 1985—Investigator Michael W. Ridges, Cook County Sheriff's Department, 1401 South Maybrook Drive, Maywood, Illinois 60153.

October 31, 1985—Detective Thomas C. Williams, Los Angeles Police Department, 150 North Los Angeles Street, Los Angeles, California 90012.

November 1, 1985—Deputy Richard A. Kent III, Tangipahoa Parish Sheriff's Office, Post Office Box 727, Amite, Louisiana 70422.

November 5, 1985—Patrolman Kenneth R. Dawson, Wheeling Police Department, 255 West Dundee Road, Wheeling, Illinois 60090.

November 11, 1985—Sergeant James D. Mitchell, Amarillo Police Department, 609 Pierce Street, Amarillo, Texas 79101.

November 12, 1985 and November 15, 1985—Patrolman Michael J. Schiavina and Patrolman Alain Y.J. Beauregard, Springfield Police Department, 130 Pearl Street, Springfield, Massachusetts 01103.

November 18, 1985—Officer Vincent J. Adolfo, Baltimore Police Department, 601 East Fayette Street, Baltimore, Maryland 21202.

November 26, 1985 and December 18, 1985—Sergeant Nathaniel H. Taylor and Officer Robert E. Walls, Essex County Sheriff's Office, New Courts Building, Newark, New Jersey 07102.

November 28, 1985—State Constable Valdon O. Keith, Greenville County Sheriff's Office, 4 McGee Street, Greenville, South Carolina 29601.

December 13, 1985—Lieutenant John P. Frisco, Windcrest Police Department, 8601 Midcrown Street, Windcrest, Texas 78239.

December 28, 1985—Officer Alma B. Walters, Meridian Police Department, 2415 Sixth Street, Meridian, Mississippi 39301.

LAW ENFORCEMENT OFFICERS ACCIDENTALLY KILLED—1985

January 2, 1985—Officer Manuel Salcido, Jr., U.S. Border Patrol, Carrizo Springs, Texas 78834.

January 11, 1985—Criminal Investigator Larry N. Carwell, Drug Enforcement Administration, 1405 Eye Street, Northwest, Washington, D.C. 20537.

January 19, 1985—Corporal Robert E. Armstrong, Dothan Police Department, 111 North Saint Andrews Street, Dothan, Alabama 36303.

January 22, 1985—Deputy Raymond H. Topolewski, Will County Sheriff's Department, 14 West Jefferson Street, Joliet, Illinois 60431.

February 1, 1985—Patrolman Manuel Olivas, New Mexico State Police, Post Office Box 1628, Santa Fe, New Mexico 87504.

February 2, 1985—Patrolman Jeffrey G. Casner, Berlin Police Department, 240 Kensington Road, Kensington, Connecticut 06037.

February 3, 1985—Trooper Gary W. Fisher, Pennsylvania State Police, Region V Strike Force, Armbrust, Pennsylvania 15616.

February 5, 1985—Sheriff Joseph R. Steenbergen, Collin County Sheriff's Department, McKinney, Texas 75069.

February 9, 1985—Officer David H. Massel, Woodlawn Police Department, 10143 Woodlawn Boulevard, Cincinnati, Ohio 45215.

February 14, 1985—Trooper John J. Brown, Pennsylvania State Police, 1800 Elmerton Avenue, Harrisburg, Pennsylvania 17110.

March 1, 1985—Officer David W. Parker, Honolulu Police Department, 1455 South Beretania Street, Honolulu, Hawaii 96814.

March 9, 1985—Deputy Richard D. Glass, Mason County Sheriff's Office, Post Office Box 1037, Shelton, Washington 98584.

March 11, 1985—Sheriff Matthew V. Schofield, Haakon County Sheriff's Department, Post Office Box 249, Philip, South Dakota 57567.

March 23, 1985—Trooper Lindell J. Gibbons, Florida Highway Patrol, Troop F, Naples, Florida 33940.

March 30, 1985—Investigator Michael O. Lewis, District Attorney's Office, San Bernardino County, 316 North Mountain View Avenue, San Bernardino, Califoria 92415.

April 6, 1985—Officer David W. Copleman, California Highway Patrol, 4656 Valentine Road, Ventura, California 93006.

April 19, 1985—Trooper William P. Kohlleppel III, Texas Department of Public Safety, Post Office Box 4143, Austin, Texas 78765.

April 28, 1985—Chief Deputy Lewis W. Wahl, Crockett County Sheriff's Department, Post Office Box 1931, Ozona, Texas 76943.

April 29, 1985—Officer James A. Bradley, Oilton Police Department, Post Office Box 175, Oilton, Oklahoma 74052.

May 9, 1985—Officer Dean A. Whitehead, Lansing Police Department, 120 West Michigan Avenue, Lansing, Michigan 48933.

May 13, 1985—Corporal Darrell D. McCloud, Maricopa County Sheriff's Office, 120 South First Avenue, Phoenix, Arizona 85003.

May 19, 1985—Deputy Walter N. Coleman, Camden County Sheriff's Department, Post Office Box 699, Woodbine, Georgia 31569.

May 20, 1985—Constable David E. Nelson, Constable's Department, Precinct 3, Travis County, 3010 South Lamar Street, Austin, Texas 78704.

May 23, 1985—Patrolman Donald W. Parker, Jr., Bureau of Police, 626 State Street, Erie, Pennsylvania 16501.

May 24, 1985—Trooper Glenda D. Thomas, Washington State Patrol, District 2, 2803 156th Avenue, Southeast, Bellevue, Washington 98007.

May 25, 1985—Corporal Larry D. Cawyer, Alabama Department of Public Safety, Post Office Box 1511, Montgomery, Alabama 36192.

May 27, 1985—Criminal Investigator Lowry D. Durington, Healdton Police Department, 310 Franklin Street, Healdton, Oklahoma 73438.

June 9, 1985—Deputy James E. Simono, Elmore County Sheriff's Department, Post Office Box 665, Mountain Home, Idaho 83647.

June 14, 1985—Agent Lester L. Haynie, U.S. Border Patrol, 350 First Street, Yuma, Arizona 85364.

June 16, 1985—Trooper Charles G. Whitney, Iowa State Patrol, Post 9, 1510 West First Street, Cedar Falls, Iowa 50613.

July 5, 1985—Trooper Jody S. Dye, Ohio State Highway Patrol, 660 East Main Street, Columbus, Ohio 43266.

July 5, 1985—Patrolman William R. Burns, Radcliff Police Department, 411 West Lincoln Trail Boulevard, Radcliff, Kentucky 40160.

July 11, 1985—Trooper Jonathan D. Harris, West Virginia Department of Public Safety, 725 Jefferson Road, South Charleston, West Virginia 25309.

July 20, 1985—Corporal Thomas L. Harris, Dallas Police Department, 2014 Main Street, Dallas, Texas 75201.

July 23, 1985—Sergeant Gerald G. Chirrick, Corporal Virgle D. Knight, Jr., Deputy Ronald A. Terwilliger, Douglas County Sheriff's Office, Post Office Box 1757, Roseburg, Oregon 97470.

July 28, 1985—Patrolman Roy L. Graham, Sumpter Police Department, 23483 Sumpter Road, Belleville, Michigan 48111.

August 1, 1985—Deputy Robert A. Van Alyne, Jr., Laramie County Sheriff's Department, Post Office Box 787, Cheyenne, Wyoming 82003.

August 5, 1985—Deputy Monty L. Conley, Deputy Joe R. Landin, Tulare County Sheriff's Department, County Civic Center, Visalia, California 93291.

August 6, 1985—Deputy Robert D. Wright, Williamson County Sheriff's Office, Georgetown, Texas 78626.

August 10, 1985—Corporal Phillip G. Ostermann, Arkansas State Police, Post Office Box 5901, Little Rock, Arkansas 72215.

August 14, 1985—Officer Raymond E. Miller, California Highway Patrol, 4040 Pierce Road, Bakersfield, California 93308.

August 16, 1985—Patrolman Thomas J. Dietzman, Jr., Aurora Police Department, 15001 East Aiameda Drive, Aurora, Colorado 80012.

August 21, 1985—Officer Dean J. Esquibel, California Highway Patrol, Post Office Box 898, Sacramento, California 95804.

August 23, 1985—Patrolman Roy H. Mardis, Division of Police, 134 East Main Street, Lexington, Kentucky 40507.

August 31, 1985—Patrolman Issac D. Hamby, Hanceville Police Department, 103 Magnolia, Avenue, Hanceville, Alabama 35077.

September 3, 1985—Deputy Reginald F. Norwood, Harris County Sheriff's Depart-

ment, 1301 Franklin Street, Houston, Texas 77002.

September 5, 1985—Patrolman Oronzo L. Cellamare, Utica Police Department, 413 Orinskany Street, West Utica, New York 13502.

September 6, 1985—Officer William H. Fordham, Bergen County Police Department, Hackensack, New Jersey 07602.

September 8, 1985—Patrolman Johnny W. Wagner, Ranlo Police Department, 1624 Spencer Mountain Road, Gastonia, North Carolina 28054.

September 16, 1985—Officer Leslie P. Hollers, Rapid City Police Department, 300 Kansas City Street, Rapid City, South Dakota 57701.

September 27, 1985—Deputy Louie E. Cosby, Shelby County Sheriff's Department, Post Office Box 1095, Columbiana, Alabama 35051.

October 2, 1985—Sergeant John C. Baxter, Jr., Florida Highway Patrol, Neil Kirkman Building, Tallahassee, Florida 32307.

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

October 7, 1985—Officer Pedro A. Burgos LaCourt, Officer Pilar H. Lopez, Officer Martinez H. Ortiz, Sergeant Malendiz F. Diaz, Police of Puerto Rico, G.P.O. Box 70166, San Juan, Puerto Rico 00936.

October 8, 1985—Officer Richard J. Lear, Baltimore Police Department, 601 East Fayette Street, Baltimore, Maryland 21202.

October 9, 1985—Lieutenant G. D. Honea, Anderson County Sheriff's Department, 704 Avenue A, Palestine, Texas 75801.

October 12, 1985—Deputy Walter L. Terry, Smith County Sheriff's Department, Post Office Box 90, Tyler, Texas 75710.

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

November 13, 1985—Officer Charles O'Hanlon, Philadelphia Police Department, Eighth and Race Streets, Philadelphia, Pennsylvania 19106.

November 23, 1985—Deputy Joseph W. Jarreau, Sr., West Baton Rouge Sheriff's Office, Port Allen, Louisiana 70767.

November 26, 1985—Trooper Thomas F. Hudson, New York State Police, Division Headquarters, Building 22, State Campus, Albany, New York 12207.

December 6, 1985—Officer Jackie C. Gray, Sr., Metropolitan Police Department, 300 Indiana Avenue, Northwest, Washington, D.C. 20001.

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

December 12, 1985—Officer Manuel A. Aquino, Guam Police Department, 287 West O'Brien Drive, Agana, Guam 96910.

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

1985 National Police Prayer

Eternal God, Our Heavenly Father, we pray that You will accept 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 labors on Earth are o'er. 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 on this Earth. We pray Almighty God that our deceased comrades will rest in Thy loving care and we will all be *reunited* 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. Biden, 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: A Smokescreen 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 Club today on a matter fundamental to America's future. My subject is 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" described by Henry Luce is drawing to a close; and as a new century approaches, the people of the United States confront questions that will shape our 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 to grant or deny 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 nation—we face perhaps the gravest question of all, posed by an Administration that is moving to eliminate the entire framework governing superpower arsenals now capable of annihilating all civilization.

In the months ahead, each of these issues will warrant the full attention of the American people. Today, I shall focus on the most fundamental issue—survival in the nuclear age.

THE U.S.-SOVIET CONTEXT

Let me begin by seeking to clarify the relationship between arms control and a second Reagan-Gorbachev summit, especially in light of the recent Soviet seizure of American journalist Nicholas Daniloff.

Public discussion has been greatly confused, I believe, by a mistaken belief that summits can be used to negotiate arms control. Postwar history demonstrates quite the contrary. Arms control depends not on any cordiality that develops between two superpower leaders during a fireside chat, but rather on serious, purposeful negotiation conducted over a period of many months and years.

Summits can, however, serve two important purposes: to improve an already promising atmosphere and to finalize and commemorate agreements on which the preponderence of work has already been done. Currently neither of those conditions exists. The Kremlin's decision to hold an innocent American journalist hostage is a calculated, public affront to American principles. And the two sides are still far apart on the fundamental issues of arms control, not least because for six years the Administration has failed to bargain seriously.

Summitry and the seizing of Mr. Daniloff both fall into the same category: They reflect the degree of amicability and behavioral decency in the relationship; and it is appropriate if necessary for the United States to link the two. In a completely different category is 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.

Secretary Gorbachev has spoken frequently in recent weeks to express his desire for arms control, and his insistence that a second summit not be simply cosmetic. But if the seizure of Daniloff represents an effort by the Soviet leadership to criticize the Administration's arms control posture, it has chosen an utterly stupid and self-defeating way to do so. Whereas heretofore the Administration has used summitry as a substitute for arms control, a summit breakdown would provide an excuse for the absence of arms control. In sum, the Kremlin's outrageous treatment of Daniloff can only give satisfaction to those whose purpose is to derail arms control through one means or another.

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 of the Reagan Administration's policy on nuclear arms control, to which I shall now turn.

THE NUCLEAR FRAMEWORK IN JEOPARDY

Four decades ago on the New Mexico desert, the world was changed, and changed utterly, by a destructive miracle of science. As that first atomic blast mushroomed into the heavens, the scientist who had led the American effort that produced this apocalyptic vision, J. Robert Oppenheimer, sought to express the immensity of what makind had done—and what could never be undone. He found it expressed in the words

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 that offers little reason for complacency. Knowledge of the atom has proliferated among men and nations. And the technology for hurling its destructive power to distant targets—by what experts now clinically call "strategic nuclear delivery vehicles"—advances steadily by the day, propelled by a bitter competition between the world's two superpowers. But worse still, we see today a sustained assault on the structure carefully erected, over two decades, to contain this destructive power—a protective barrier of negotiated superpower agreements now imperiled by an Administration whose policy represents an amalgam of ideology, ignorance, and, I believe, historic irresponsibility.

Administration policy on arms control is shaped by one premise not in dispute—that the Soviet Union cannot be trusted. But it is driven also by certain deep-seated ideological beliefs which have proven both dubious and dangerous:

First among these is a visceral rejection of the Soviet Union as an equal, whether as a nuclear adversary or as a partner in agreements that enhance nuclear stability.

Equally strong is an assumption that arms control agreements are a dangerous placebo for Western public opinion, weakening the national will necessary for an adequate defense.

And third is an implicit conviction that nuclear weapons represent an arena of superpower competition that is actually advantageous to the United States, and that a combination of will power and technology can somehow return us to the halcyon days of American nuclear superiority.

Together, I submit, these attitudes reflect an unwillingness to accept international reality, a lack of faith in the American people, and a distorted faith in technology. They give life to an ideology that has halted all progress in nuclear arms control, while motivating a deliberate effort to dismantle the entire arms control framework previously erected.

In the control of offensive systems, the Administration has repudiated a SALT regime that constitutes the only existing constraint on U.S. and Soviet bombers and missiles—an ill-considered act holding enormous potential costs to American security and no apparent gains.

On issues of compliance, the Administration has repeatedly exaggerated the extent and significance of Soviet violations, while launching an outright attack on the only established forum for resolving compliance issues.

On the question of nuclear testing, the Administration has refused to ratify the Threshold Test Ban Treaty and has reversed the position of our last six Presidents by refusing even to consider negotiations on a Comprehensive Test Ban.

Finally, but most fundamentally, Administration policy has undermined the essential equation of all arms control, which is that in order to limit and then reduce offensive arms, defensive arms must also be constrained. That equation's logic is this: that either superpower—if confronted by antimissile defenses even of uncertain reliability, and such uncertainty is inherent—will be compelled in its own interest to multiply its offensive systems to the point of absolute assurance that, even if victimized by a massive first strike, it could still inflict a devastating retaliatory blow.

The President's dangerously ingenuous notion of erecting a "strategic space shield" contravenes that equation. And by radically reinterpreting the ABM Treaty—a reinterpretation that contradicts the treaty language, the negotiating record, the ratification record, and thirteen years of established practice—the Administration has moved toward eradicating not only defensive limitations but all constraint on offensive systems as well. Accordingly, we now confront the specter of a nuclear arms race without limits—brought on, tragically, by ideologues who believe such a competition serves the American interest.

A SMOKESCREEN OF MYTHOLOGY

Bridging the gap between this policy and the American public's overwhelming support for nuclear arms control has required of Administration officials no small measure of political dexterity. But they have supplied it, primarily by propagating a mythology which has provided the smokescreen for a no-arms-control policy.

Soviet "superiority": an excuse for delay

Their first myth is the claim that, when they came to office, the United States had fallen perilously behind the Soviet Union in strategic forces. If there was to be arms control, we were told, it would depend first upon a massive Reagan build-up. But in fact the assertion of Soviet superiority was plainly false when first uttered and has gained standing only through sheer repetition by the President and his Secretary of Defense.

Proof of its falsehood lies in a survey of our strategic arsenal today, which comprises essentially the same triad—of ICBMs, SLBMs, and long-range bombers—already in place or on-line when President Reagan was elected. Indeed, the Administration's one addition to this arsenal—its dubious decision to revive the B-1 bomber—pales against the strategic loss from its shift of the MX missile from deceptive basing to emplacement in existing silos. That decision, reflecting an unwillingness to proceed against localized opposition to a survivable basing mode, means that a weapon conceived solely to close a theoretical "window of vulnerability" will, for want of political courage, be deployed in a way that concentrates warheads in vulnerable silos and thereby opens the window still further.

Overall, what we have seen is less a build-up than a spend-up, in which the act of awarding defense contracts has been portrayed as a measure of strategic strength. The strategic balance between the superpowers remains essentially unchanged, and the Kremlin today has no more reason to bargain—and no less—than before any Reagan program went into effect.

"Bringing Moscow to the table": a false claim for the "build-up"

Unfazed nonetheless, Administration officials have propagated a second myth—a claim that the alleged strategic build-up, including Star Wars, has "brought the Kremlin back to the bargaining table." This assertion, however, lacks both evidence and logic. True, in 1983, after 2 years of stalemate in Geneva and on the eve of NATO missile deployments in Europe, the Soviets interrupted negotiations, obviously hoping to capitalize on West European concerns about President Reagan. But, by the large, the Kremlin has remained at the bargaining table since the two superpowers began discussions on limiting strategic systems in 1966. The result of that extended bargaining is the current arms control structure, which was under attack by the President and his advisors long before they reached office.

Nor has Star Wars been vindicated by the Soviet insistence on discussing it. This demand expresses no more than the basic logic of arms control—that limits on offensive and defensive systems are crucially related. In the early years of arms control, the U.S. side argued determinedly in favor of this principle: and Moscow's eventual acceptance led to the ABM Treaty, by which the two superpowers forswore any effort to erect full-scale defenses. The Soviet call for talks on strategic defenses, rather than a sign that Star Wars is "working," represents the only logical response to the Administration's threat to abandon unilaterally a principle that previous Administrations had successfully induced the Kremlin to accept.

The Soviet Union needs arms control not because of the so-called Reagan build-up, or the implausible threat of a perfect strategic defense, but rather for reasons long-established and quite similar to our own. Whatever the differences between the two superpowers—and they are vast—leaders in Moscow have the same economic and strategic interest we have in gaining a measure of predictability of the adversary's force structure. And they share our profound interest in mutual constraints that enhance nuclear stability by reducing the risk of nuclear war.

Today, for example, the Kremlin can foresee that by the early 1990's the entire Soviet arsenal of land-based ICBMs will be subject to preemptive strike by our new and highly accurate Trident II—a submarine-launched missile that was developed, one should note, by the much-maligned Carter Administration. To prevent this "window of vulnerability"—a Soviet "window" that would be far more real than ours ever was—the Kremlin has begun deployment of mobile ICBMs, while undertaking to negotiate further strategic limits in Geneva. The Soviets have ample incentive for further arms control, and would have such incentive regardless of this Administration's reckless bravado, and its self-defeating policy of attacking the structure of controls now in place.

"Serious proposals": a false defense for a lack of progress

If the so-called Reagan build-up has brought anyone to the bargaining table, it is the Administration itself, which has used the talks to justify expenditure on such supposed bargaining chips as the MX. From that perspective, the talks have indeed already succeeded—by relieving public pressure for arms control, while running interference for increased military spending. By pretending to follow the traditional logic of arming in order to negotiate, the administration has used negotiations in order to arm.

To assuage public opinion has, of course, required the Administration to adopt negotiating positions that have at least superficial plausibility. This has brought forth a third myth, which is that the Administration has offered "serious proposals," the corollary of which is that any lack of progress may be attributed to the Soviet Union. Under analysis, however, the Administration's proposals—both in the INF talks on intermediate-range nuclear forces and the START talks on long-range systems—have been less than serious.

In the INF talks, the Administration's famous "zero option" was clearly non-negotiable. By calling upon the Soviet Union to dismantle not only all of its new SS-20s but also all of the old intermediate-range mis-

siles (SS-4s and 5s) they were created to replace, the Administration could hardly have expected to create the basis for agreement; Soviet forces would have been weaker than before the SS-20 was created. Similarly, in the START talks the Administration fashioned a position that had the surface virtue of calling for common limits on missile warheads, but the limits and sublimits chosen were such as to require a major overhaul of the entire Soviet force posture, while requiring much less change in our own. Moreover, by focusing on missile warheads, the Administration has disingenuously ignored a strategic factor of which the Soviets are keenly aware: the overwhelming U.S. superiority in bombers. Proposing to ban mobile missiles was equally disingenuous, in that the Soviets have undertaken a major mobile-missile program as a precaution against the imminent U.S. capability to destroy all Soviet silos in a first strike.

A considerable irony of the various U.S. proposals is that they have also contained elements directly contrary to basic American interests and doctrine. The "zero option" proposal, for example, would have deprived NATO of the theater-nuclear modernization that is integral to maintenance of the "flexible response" doctrine and thereby to the strategic "coupling" of the Atlantic Alliance. Similarly, certain START proposals, if implemented, would have involved an actual intensification of MIRVing, rather than inducing the de-MIRVing needed for the enhancement of nuclear stability. Even more illogical was the proposal to ban mobile missiles, which would have undercut our own effort to escape ICBM vulnerability through the new Midgetman.

This latter curiosity apparently resulted from an unholy alliance that has plagued arms control throughout this Administration—between strategic targeters 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 myth of bargaining seriously has been useful in explaining six years of failure to progress in arms controls, a fourth myth has been needed for an attack on the arms control framework already in place: the allegation of blatant and massive Soviet violations. There are indeed legitimate issues concerning Soviet compliance with existing agreements. But such issues are complex, controversial, and—it cannot be emphasized too strongly—still marginal in military significance. What the myth of "massive" Soviet violations seeks to obscure is that the essential constraints—the numerical SALT sublimits that cap the deployment of MIRVed missiles and bombers carrying cruise missiles—have been fully adhered to by both sides, and subject to no credible charge of Soviet violation.

Over the history of SALT, these limits have required the Soviets to dismantle ten missile launchers for every one retired by the United States; and that ratio will continue in the period immediately ahead—unless the limits are abandoned. It is for that reason that the Senate has repeatedly and overwhelmingly urged the President to continue U.S. compliance with the SALT limits. Unfortunately, the White House announcement of May 27th—that the Administration intends to exceed the SALT limits later this year—makes clear that this message has been ignored.

Consequently, I have introduced legislation with Republican Senator Bill Cohen that would not simply urge—but require—continued U.S. adherence to the major SALT II sublimits for so long as the Soviets remain in compliance. (These common limits are 820 for MIRVed ICBMs; 1200 for MIRVed ICBMs and SLBMs; and 1320 for MIRVed missiles plus bombers carrying cruise missiles.) A companion measure sponsored by Congressman Dicks has already passed the House but is unlikely to be accepted by Senate conferees on the Defense authorization bill. The issue will therefore revert to the Senate.

I regret the need for binding legislation in an area where Presidential latitude is obviously preferable. But we now face a historic collapse of responsibility in the conduct of American strategic policy. With no conceivable loss in strength, the United States can comply with the key SALT limits for the next two years simply by retiring two aging Poseidon submarines. Yet failure to take such action would represent unilateral American withdrawal from the only remaining constraint now capping both superpower arsenals.

Once that constraint is lifted, offensive systems on both sides will almost certainly multiply. At present, each superpower possesses approximately 10,000 strategic warheads, each more deadly than the bombs which struck Hiroshima and Nagasaki in 1945. According to a detailed projection by the House Armed Services Committee, if SALT limits are abandoned, each side—eight years from now—could have 28,000 warheads, a near tripling of the nuclear arsenal by 1994.

Clearly, members of the President's party will hope to finesse the question of binding legislation if possible; and with a second Reagan-Gorbachev summit now in the offing, we can expect to be told once again to leave the President a free hand. I intend, however, to make every effort to force a Senate vote on this crucial issue before Congress adjourns. The Administration's unilateral abandonment of existing constraints is an issue on which the Senate should be recorded, and that record should be before the American people in November.

As this moment of truth on SALT approaches, news reports have surfaced in the past week that, in its internal negotiations regarding a new offensive arms agreement, the Administration has now dropped the goal of deep cuts. This is not surprising since the idea of 50% reductions, while good propaganda, was never plausible as a near-term objective. The new position, reportedly, aims for cuts of perhaps 20-30% in missile warheads, while allowing substantial growth in bomber forces—in a pattern which simply mirrors current U.S. force trends. In short, the Administration has now adopted a policy that the President always purported to oppose: arms control as a codification of forces that would exist anyway.

To compare this new negotiating position with where the superpowers could now be, had SALT II been ratified six years ago, reveals the bankruptcy of Administration policy. When SALT II was signed by Presidents Carter and Brezhnev, there was every reason to expect that the two governments could promptly agree on a SALT III treaty which would initiate percentage-annual-reductions of 3-7% from the SALT II ceilings. Had that occurred, we could be at the point today of having reduced the Soviet and American arsenals by 25% or even more. Instead the Administration rejected that opportunity, wasted six years while claiming to be satisfied only with "deep cuts," has now adopted a negotiating position that—even if realized—would represent little more than a variation on the status quo, and meanwhile is carrying us to the threshold of abandoning arms control altogether.

This is a sad policy indeed for a President who vigorously attacked his predecessor for failing to achieve deep cuts but whose only contribution to arms control thus far has been to rename the negotiation. Had SALT II been ratified, we could by now have had substantial cuts; instead, we have had none.

"Star wars": a fantasy and a false alternative to arms control

This brings us to the Administration's fifth myth—and surely the most remarkable. Unable or unwilling to build on the nuclear arms control progress of his predecessors, and under mounting public pressure as a result, the President in 1983 performed an astounding political act. Like a Baryshnikov of nuclear politics, he simply pirouetted and leaped over the entire issue, announcing a presidential "vision" that the American people could escape nuclear danger not by arms control but by erecting an anti-nuclear astrodome over the United States. This immaculately conceived notion has obviously demonstrated a certain mystical appeal. Unfortunately, it has no possibility of practical implementation, as attested by an overwhelming body of scientific opinion, and by common sense.

Analysis of Star Wars should begin, however, with the vision itself. The President presented Star Wars as an escape from what he called the "immoral" doctrine of Mutual Assured Destruction—and also an escape from nuclear dependence, since defenses would supposedly be non-nuclear. He also implied that this nonexistent technology would free us from the need to bargain with the Soviets, while paradoxically proposing that we provide the Kremlin full access, so that our erstwhile adversaries could share in this forthcoming miracle. But this very vision is inherently and fundamentally fraudulent:

First, strategic defenses would not eliminate reliance on retaliatory forces. The President speaks beguilingly of a new era of "mutual assured survival." But certainly such a realist as he is not planning for a utopia in which we disarm entirely, living quietly under a technological astrodome. One associates that vision with Woodstock perhaps, but not with Ronald Reagan. The truth is that—in any foreseeable future and whether or not we seek to deploy strategic defenses—our principal deterrent will continue to be our ability to retaliate against an attacker. And that, despite the President's verbal legerdemain, is nothing more or less than the doctrine of Mutual Assured Destruction.

Nor would Star Wars move us away from nuclear dependence. Even defensive technologies will involve nuclear explosive devices—most notably the X-ray laser, which the Administration is so bent on testing that it refuses to consider a nuclear test ban of even limited duration.

Nor would Star Wars free us, as implied, from arms control. Even in theory, there is no way a defensive system could work without some cap on the enemy's offensive sys-

tems, which could be increased to overwhelm our defenses. Such limits on offensive systems can only be imposed through negotiated agreement—meaning arms control.

Nor could we "share the system," as the President has proposed, again apparently under the belated influence of Woodstock. Sheerly on the basis of logic, sharing a 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 summoned Secretary Weinberger to instruct him 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 effectiveness of layered defenses, a large number of the Soviet missiles that exist now would penetrate any system we could conceivably deploy 20 years from now. Given the inevitable development of Soviet countermeasures, any hope for a leak-proof missile defense will remain an ever-receding aspiration. 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 more elemental means.

CONSEQUENCES OF MYTHOLOGY

To say that Star Wars will not work, however, is far from labelling it meaningless, for 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 increased and misallocated our defense budget, at a time requiring austerity and carefully established priorities emphasizing the improvement of conventional forces.

It has diverted valuable R&D resources, at a time when the best American talent is now urgently needed in the civilian sector to strengthen our competitiveness in the global marketplace.

It has weakened 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 answer aggression with the limited nuclear response that is fundamental to the credibility of NATO doctrine.

It has pushed Soviet behavior 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 nonnegotiable, Star Wars constitutes a major impediment to arms control.

This multiplicity of negative consequences combines into a single conclusion: The Star Wars initiative represents a fundamental assault on the concepts, alliances, and arms control agreements that have buttressed American security for several decades; and the President's continued adherence to it 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 progress in nuclear arms control. But while the Reaganites have enjoyed some success in propagating their smokescreen 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 forseeable 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, cannot be altered even by the dreams of Presidents;

third, that actual reductions in nuclear weaponry will not occur except 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 act 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 be reaffirmed in its restrictive form—and not with the current caveat that we will adhere only until our defensive systems are ready for deployment. (Such action has been urged by former Defense Secretaries Brown, Schlesinger, Laird, and McNamara, and numerous other distinguished officials in past Administrations.) This means that the United States must clearly limit SDI to a genuine research program intended to hedge against and deter any Soviet "break out" from the ABM Treaty—and to examine the possibilities of stabilizing point-defenses—but not aimed at erecting 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 START 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 throw-weight.

Meanwhile, INF may be dealt with in one of two ways. An agreement could place equal ceilings on U.S. and Soviet European-based missiles, with Soviet Asian-based missiles balanced (implicitly) by British and French nuclear forces. Or agreed definitions could allow INF to be included in and capped under the strategic aggregates negotiated in START.

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 a renewed commitment to reach resolution. Issues surrounding "new" types of missiles and allowable encoding of test data must essentially be addressed from scratch, since they arise from previous agreements worded too vaguely. (The nearly inevitable confusion on these issues is well described in the current issue of Foreign Policy by Ambassador Ralph Earle, U.S. negotiator of SALT II.) Questions surrounding the radar at Krasnoyarsk—an apparent Soviet violation of the ABM Treaty—will require U.S. insistence on a satisfactory Soviet response.

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

But while a treaty on testing could play a constructive role in an overall pattern of agreement, no illusion should be encouraged 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 remain on achieving agreement to constrain the deployment of strategic defenses and offensive delivery systems.

Clearly, even success with such an agenda would not change the nature of the Soviet Union; that we cannot expect to accomplish. Nor, despite this Administration's early pretensions, can we even require changes in Soviet force levels which the Kremlin does not wish to make. But we can manage the superpower competition, by channeling our competing energies into regimes of cooperation that enhance the security of both sides.

I refer in closing to Winston Churchill, whose name the Reaganites often invoke. As well as any leader in the 20th century, that great British prime minister understood the dangers posed by totalitarian regimes. But Churchill was a statesman, not an ideologue—a man who perceived international affairs in many dimensions, and who brought wisdom and gallant rhetoric to the pursuit of rational public purpose. Churchill warned in futility against appeasement in the 1930's; but years later, witnessing the dawn of the nuclear age, he issued a warning graver still: Without man's wisest efforts to constrain this peril, "the Stone Age may return on the gleaming wings of Science." Will that warning also have been in vain?

In response to the continuing and still-depending nuclear danger I would, with other

Americans, welcome a surprise from President Reagan in the days now ahead: a seizing of control over his own divided Administration and the conduct of serious, purposeful negotiations toward an expansion, rather than erosion, of the existing structure of nuclear arms control. But such progress will require an immediate and dramatic departure from the pattern of infighting, obfuscation, and presidential indifference to detail that has characterized the Administration thus far.

In summary, progress on nuclear arms control can occur only with presidential leadership. If he provides it, President Reagan will be hailed by all. If not, the issue of nuclear arms control will figure heavily in the election of 1988; and I trust that the American people will use the tools of democracy to act in their own defense.

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. 5205, the Department of Transportation appropriations bill.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

A 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.

There being no objection, the Senate proceeded to consider the bill which had been reported from the Committee on Appropriations, with amendments, as follows:

(The parts of the bill intended to be stricken are shown in boldface brackets, and the parts of the bill intended to be inserted are shown in italic.)

H.R. 5205

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, $7,465,000 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, $2,475,000 for the Office of the Assistant Secretary for Governmental Affairs, $20,030,000 for the Office of the Assistant Secretary for Administration, $1,400,000 for the Office of the Assistant Secretary for Public Affairs, $746,000 for the Executive Secretariat, $390,000 for the Contract Appeals Board, $1,260,000 for the Office of 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 as authorized by 49 U.S.C. 332: *Provided,* That, notwithstanding any other provision of law, funds 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, **[**$3,349,000**]** *$4,649,000, of which $1,300,000 shall be derived from unobligated 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 **[**$64,500,000**]** *$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, **[**$21,000,000**]** *$30,000,000,* to remain available until expended.

COAST GUARD

OPERATING EXPENSES

For necessary expenses for the operation and maintenance of the Coast Guard, not otherwise provided for; purchase of not to exceed eight passenger motor vehicles for replacement only; and recreation and welfare, **[**$1,849,800,000**]** *$1,830,000,000,* of which $15,000,000 shall be expended from the Boat Safety Account: *Provided,* That, of the funds available under this head, not less than $372,983,000 shall be available for drug enforcement activities: *Provided further,* That the number of aircraft on hand at any one time shall not exceed two hundred and ten, exclusive of planes and parts stored to meet future attrition: *Provided further,* That none of the funds appropriated in this or any other Act shall be available for pay or administrative expenses in connection with shipping commissioners in the United States: *Provided further,* That none of the funds provided in this Act shall be available for expenses incurred for yacht documentation under 46 U.S.C. 12109 except to the extent fees are collected from yacht owners and credited to this appropriation.

ACQUISITION, CONSTRUCTION, AND IMPROVEMENTS

(INCLUDING RESCISSION)

For necessary expenses of acquisition, construction, rebuilding, and improvement of aids to navigation, shore facilities, vessels, and aircraft, including equipment related thereto; to remain available until September 30, 1991, **[**$101,850,000**]** *$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 warranty 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 warranty 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 the House of Representatives are notified in writing of the Secretary's intention to waive and reasons for waiving such requirements: *Provided further,* That the requirements for such written warranties shall not cover combat damage: *Provided further, That of the funds available under this head, $32,500,000 is hereby rescinded.*

RETIRED PAY

For retired pay, including the payment of obligations therefor otherwise chargeable to lapsed appropriations for this purpose, and payments under the Retired Serviceman's Family Protection and Survivor Benefits Plans, and for payments for medical care of retired personnel and their dependents under the Dependents Medical Care Act (10 U.S.C., ch. 55), $364,000,000.

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, **[**$63,857,000, of which $3,000,000 shall be derived from unobligated balances of "Alteration of bridges" and $2,000,000 shall be derived from unobligated balances of "Pollution fund"**]** *$65,000,000.*

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, **[**$20,100,000**]** *$20,000,000,* to remain available until expended: *Provided,* That there may be credited to this appropriation funds received from State and local governments, other public authorities, private sources and foreign countries, for expenses incurred for research, development, testing, and evaluation.

OFFSHORE OIL POLLUTION COMPENSATION FUND

For necessary expenses to carry out the provisions of title III of the Outer Continental Shelf Lands Act Amendments of 1978 (Public Law 95-372), $1,000,000, to be derived from the Offshore Oil Pollution Compensation 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 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, and the Secretary of the Treasury is authorized to purchase, 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 under Public Law 92-75, as amended, [$15,000,000] *$30,000,000*, 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] *$30,000,000* 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 at the headquarters location 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, 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 provisions of law authorizing obligation of funds for similar programs of airport and airway development or improvement, purchase of four passenger motor vehicles for replacement only, [$2,797,447,000] *$2,769,300,000*, 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 States, counties, municipalities, 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 controller 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 maintenance]: *Provided further, That section 5532(f)(2) of title V, United States Code, is amended by striking "December 31, 1986" and inserting "December 31, 1987" in lieu thereof: Provided further, That section 8344(h) of title V, United States Code, is amended by striking "April 1, 1985" in paragraph (2) and inserting "April 1, 1986" in lieu thereof: Provided further, That in the event that the Federal Aviation Administrator employs annuitants subject to section 8344(h) of title V, United States Code, not to exceed $10,000,000, to be derived from the unobligated balance of any appropriation available for obligation by the Federal Aviation Administration as of the effective date of this Act, shall be available through December 31, 1987, for the purpose of funding such employment: Provided further, That any such funding shall be reported to the Committees 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 navigation and experimental facilities, including initial acquisition of necessary sites by lease or grant; engineering and service testing including construction of test facilities and acquisition of necessary sites by lease or grant; and construction and furnishing of quarters and related accommodations of officers and employees of the Federal Aviation Administration stationed at remote localities where such accommodations are not available; to be derived from the Airport and Airway Trust Fund and to remain available until September 30, 1991, [$823,000,000] *$772,684,000* together with $1,914,000 to be derived from unobligated balances of "Research, engineering and development (Airport and Airway Trust Fund), Center for Research and Training in Information-based Aviation and Transportation Management": *Provided*, That there may be credited to this appropriation funds received from States, counties, municipalities, other public authorities, and private sources, for expenses incurred in the establishment and modernization of air navigation facilities: *Provided further*, That of the funds available under this head, [$5,000,000] *$10,000,000* shall be available for the Secretary of Transportation to enter into grant agreements with universities or colleges *having an airway science curriculum recognized by the Federal Aviation Administration*, to conduct demonstration projects in the development, advancement, or expansion of airway science curriculum programs, and such funds, which shall remain available until expended, shall be made available under such terms and conditions as the Secretary of Transportation may prescribe, to such universities or colleges for the purchase or lease of buildings and associated facilities, instructional materials, or equipment to be used in conjunction with airway science curriculum programs[: and $3,914,000 shall be available to construct an experimental computer-based airway and aviation management facility at the Center for Research and Training in Information-based Aviation and Transportation Management at Barry University].

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. 1301-1542), including construction of experimental facilities and acquisition of necessary sites by lease or grant, [$141,700,000] *$142,000,000*, 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.

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 14 of Public Law 91-258, as amended, and under other law authorizing such obligations, and obligations for noise compatibility planning and programs, [$800,000,000] *$860,000,000*, 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 [$1,017,200,000] *$1,000,000,000* in fiscal year 1987 for grants-in-aid for airport planning and development, and noise compatibility planning and programs, notwithstanding section 506(e)(4) of the Airport and Airway Improvement Act of 1982[: *Provided further*, That, $50,000,000 of unobligated contract authority 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 incident to the care, operation, maintenance, improvement, and protection 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; purchase, cleaning, and repair of uniforms; and arms and ammunition, $35,000,000: *Provided*, That there may be credited to this appropriation funds received from air carriers, concessionaires, and non-Federal tenants sufficient to cover utility and fuel costs that are in excess of $6,682,000: *Provided further*, That there may be credited to this appropriation funds received from States, counties, municipalities, other public 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, [$50,000,000, to be derived from the Airport and Airway Trust Fund and] *$7,000,000*, to remain available until September 30, 1989: *Provided*, That the Federal Aviation Administration shall submit to Congress by March 31, 1987, fully coordinated five-year master plans for capital development at Washing-

ton 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. 1324 note). None of the funds in this Act shall be available for the implementation or execution of programs under this head, the obligations for which are in excess of $75,000,000 during fiscal year 1987. Such obligations shall be redeemed by the Secretary from appropriations authorized by this section. The Secretary of the Treasury shall purchase any such obligations, and for such purpose he may use as a public debt transaction 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 subsection. The Secretary of the Treasury may sell any such obligations at such times and price and upon such terms and conditions 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, $13,516,000, to remain available until expended, together with such sums as may be necessary for the payment of interest due under the terms and conditions of 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] *$204,660,000*, shall be paid, in accordance with law, from appropriations made available by this Act to the Federal Highway Administration together with advances and reimbursements received by the Federal Highway Administration: *Provided*, That not to exceed [$39,288,000] *$41,288,000* of the amount provided herein shall remain available until expended: *Provided further*, That, notwithstanding any other provision of law, there may be credited to this account funds received from States, counties, municipalities, other public authorities and private sources, for training expenses incurred for non-Federal employees.

HIGHWAY SAFETY RESEARCH AND DEVELOPMENT (HIGHWAY TRUST FUND)

For necessary expenses in carrying out provisions of sections 307(a) and 403 of title 23, United States Code, to be derived from the Highway Trust Fund and to remain available until expended, $7,000,000.

HIGHWAY-RELATED SAFETY GRANTS (LIQUIDATION OF CONTRACT AUTHORIZATION) (HIGHWAY TRUST FUND)

For payment of obligations incurred in carrying out the provisions of title 23, United States Code, section 402, administered by the Federal Highway Administration, to remain available until expended, $12,000,000, to be derived from the Highway Trust Fund: *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".

[RAILROAD-HIGHWAY CROSSINGS DEMONSTRATION PROJECTS

[For necessary expenses of certain railroad-highway crossings demonstration projects as authorized by section 163 of the Federal-Aid Highway Act of 1973, as amended, to remain available until expended, $23,500,000, of which $15,333,333 shall be derived from the Highway Trust Fund.]

FEDERAL-AID HIGHWAYS (LIMITATION ON OBLIGATIONS) (HIGHWAY TRUST FUND)

None of the funds in the Act shall be available for the implementation or execution of programs the obligations for which are in excess of [$13,125,000,000] *$13,000,000,000* for Federal-aid highways and highway safety construction programs for fiscal year 1987.

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

For carrying out the provisions of title 23, United States Code, that are attributable to Federal-aid highways, including the National Scenic and Recreational Highway as authorized by 23 U.S.C. 148, not otherwise provided, including reimbursements for sums expended pursuant to the provisions of 23 U.S.C. 308, [$13,036,000,000] *$13,130,000,000* or so much thereof as may be available in and derived from the Highway Trust Fund, to remain available until expended.

RIGHT-OF-WAY REVOLVING FUND (LIMITATION ON DIRECT LOANS) (HIGHWAY TRUST FUND)

During fiscal year 1987 and with the resources and authority available, gross obligations for the principal amount of direct loans shall not exceed $47,850,000.

MOTOR CARRIER SAFETY HIGHWAY TRUST FUND

For necessary expenses to carry out the motor carrier safety functions of the Secretary as authorized by the Department of Transportation Act (80 Stat. 939-940), [$20,447,000] *$19,515,000, to be derived from the highway trust fund*, of which [$1,300,000] *$1,900,000* shall remain available until expended[, and not to exceed $1,532,000 shall be available for "Limitation on general operating expenses"].

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 September 30, 1990: *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 $50,000,000 in fiscal year 1987 for "Motor carrier safety grants".]

For necessary expenses to carry out provisions of section 402 of Public Law 97-424, $20,000,000 to be derived from the Highway Trust Fund and to remain available until September 30, 1989.

ACCESS HIGHWAYS TO PUBLIC RECREATION AREAS ON CERTAIN LAKES

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, to carry out the provisions of the Federal-Aid Highway Act of 1970, for the Baltimore-Washington Parkway, to remain available until expended, $9,000,000, to be derived from the Highway Trust Fund and to be withdrawn therefrom at such times and in such amounts as may be necessary.]

WASTE ISOLATION PILOT PROJECT ROADS

For necessary expenses in connection with the upgrading of certain highways for the transportation of nuclear waste generated during defense-related activities, not otherwise provided for, $10,000,000, to remain available until expended.

[AIRPORT-HIGHWAY DEMONSTRATION PROJECT

[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 113 in north-central California that demonstrates methods of reducing motor vehicle congestion and increasing employment, $13,900,000, 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.

[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.

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

[For necessary expenses to carry out construction projects in the State of Mississippi on Route 302 to connect I-55 and U.S. Highway 72, on State Route 6 from Pontotoc 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 benefits of widening and improving highways, there is authorized to be 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

remain available until expended, for the projects identified under this head on Route 302 and on U.S. Highway 82: *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.

[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 highways on the Federal-aid 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 Mineola, 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 all funds appropriated under this head 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-Santa Fe, New Mexico, corridor that demonstrates methods of improving the safety of transporting nuclear waste by constructing an alternate route with specific safety features, $4,000,000, to 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.

[THEODORE ROOSEVELT BRIDGE CAPACITY IMPROVEMENTS (HIGHWAY TRUST FUND)

[For necessary expenses to improve the safety, capacity, and operation of the Theodore Roosevelt Bridge on I-66, connecting the Commonwealth of Virginia and the District of Columbia, $1,500,000, to 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.

[AIRPORT ACCESS HIGHWAY DEMONSTRATION PROJECT (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.]

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

OPERATIONS AND RESEARCH

(INCLUDING TRANSFER OF FUNDS)

For expenses necessary to discharge the functions of the Secretary with respect to traffic and highway safety and functions under the Motor Vehicle Information and Cost Savings Act (Public Law 92-513, as amended), [$93,600,000] *$81,448,000*, together with [$2,000,000] *$5,000,000*, to be derived from unobligated balances of ["Payments to air carriers"] *"Section 408, Alcohol Safety Incentive Grants", and such amounts of liquidating cash as may be necessary to be derived from "Highway Traffic Safety Grants"*, of which [$37,742,000] *$28,822,000* shall be derived from the Highway Trust Fund: *Provided*, That not to exceed [$44,268,000] *$34,598,000* shall remain available until expended, of which [$21,637,000] *$12,717,000* shall be derived from the Highway Trust Fund[:-*Provided further*, That, of the funds available under this head, $10,000,000 shall be available to implement the recommendations of the 1985 National Academy of Sciences report on trauma research].

HIGHWAY TRAFFIC SAFETY GRANTS

(LIQUIDATION OF CONTRACT AUTHORIZATION)
(HIGHWAY TRUST FUND)

[(INCLUDING RESCISSION)]

For payment of obligations incurred carrying out the provisions of 23 U.S.C. 402, 406, and 408, and section 209 of Public Law 95-599, as amended, to remain available until expended, [$122,000,000] *$127,000,000*, to be derived from the Highway Trust Fund: *Provided*, That none of the funds in this Act shall be available for the planning or execution of programs the total obligations for which are in excess of $121,060,000 in fiscal year 1987 for "State and community highway safety" authorized under 23 U.S.C. 402: *Provided further*, That none of these funds shall be used for construction, rehabilitation or remodeling costs, or for office furnishings and fixtures for State, local, or private buildings or structures: *Provided further*, That none of the funds in this Act shall be available for the planning or execution of programs the total obligations for which are in excess of [$14,400,000] *$17,900,000* for "Alcohol safety incentive grants" authorized under 23 U.S.C. 408: *Provided further*, That none of the funds in this Act shall be available for the planning or execution of programs authorized under section 209 of Public Law 95-599, as amended, the total obligations for which are in excess of $4,750,000 in fiscal years 1983, 1984, 1985, 1986, and 1987: *Provided further*, That not to exceed [$4,860,000] *$4,900,000* shall be available for administering the provisions of 23 U.S.C. 402[: *Provided further*, That of the funds available for obligation for "Alcohol safety incentive grants" under section 23 U.S.C. 408, $5,000,000 is hereby rescinded].

FEDERAL RAILROAD ADMINISTRATION

OFFICE OF THE ADMINISTRATOR

(INCLUDING [TRANSFER] *TRANSFERS* OF FUNDS)

For necessary expenses of the Federal Railroad Administration, not otherwise provided for, including authorized expenses associated with Washington Union Station, [$26,750,000] *$27,000,000*, of which $4,600,000 shall remain available until expended, [and] $3,500,000 shall be derived from unobligated balances of "Rail service assistance", *and $4,565,000 shall be derived from unobligated balances of "Conrail workforce reduction"*: *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 Emergency Rail Services Act of 1970, as amended, and that no new commitments to guarantee loans under section 211(a) or 211(h) of the Regional Rail 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 transference 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, of 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 made available under section 5(h) shall be made available for use directly under sections 5(h)(3)(B)(ii) 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 no State may apply for fiscal year 1987 funds available under section 5(h)(2) until such State has obligated all funds granted to it under section 5(h)(2) 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

For necessary expenses in connection with railroad safety, not otherwise provided for, [$25,700,000] *$28,424,000 of which $2,700,000 shall remain available until expended.*

RAILROAD RESEARCH AND DEVELOPMENT

For necessary expenses for railroad research and development, [$9,800,000] *$9,581,000*, to remain available until expended: *Provided, That $200,000, together with funds appropriated for fiscal year 1986 and intended for such purposes, shall be available to support, by contract or financial assistance agreement, the development of rail-*

road-community-police grade crossing safety education programs.

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, as amended (45 U.S.C. 851 et seq.), [$16,962,000] *$11,962,000*, to remain available until expended: *Provided*, That, notwithstanding any other provision of law, the provisions of Public Law 85-804 shall apply to the Northeast Corridor Improvement Program: *Provided further*, That the Secretary may waive the provisions of 23 U.S.C. 322 (c) and (d) if such action would serve a public purpose: *Provided further*, That all public at grade-level crossings remaining along the Northeast Corridor upon completion of the project shall be equipped with protective devices including gates and lights.

CONRAIL LABOR PROTECTION

Any unobligated balances of funds provided for "Conrail workforce reduction program" in excess of $4,565,000 that are not required for reimbursement of termination allowances for terminations effected not later than September 30, 1986, are transferred to "Grants to the National Railroad Passenger Corporation": Provided, That such sums as may be necessary shall be made available from unobligated balances of funds previously provided for "Conrail labor protection" to pay necessary expenses of the Railroad Retirement Board ("Board") for administration of section 701.

Notwithstanding any other provision of law, upon exhaustion of appropriated funds available for payment of benefits under section 701 of the Act and thereafter, (1) the Consolidated Rail Corporation ("Conrail"), as agent for the Board, shall pay section 701 benefits, without reimbursement, in such amounts and to such eligible employees as the Board shall designate, subject to the limitations stated in the Benefit Schedules prescribed by the Secretary of Labor; (2) Conrail shall pay the Board for its necessary expenses of administration; and (3) the United States shall have no further liability under title VII of the Act: Provided, That the Board shall continue to administer the determination of benefits under section 701 and shall designate benefits for payment by Conrail as agent for the Board; and the Board shall make requests of Conrail to pay, in advance, necessary expenses of administration, which requests Conrail shall promptly honor as due and payable liquidated debts, subject to adjustment after audit by the Inspector General of the Board; and the Board may receive and apply the administrative costs paid by Conrail as if such funds were appropriated expenses of administration under this Act: Provided further, That Conrail shall be deemed subrogated to the right of the Board to recover any benefit paid by Conrail that was improvidently paid, and the Board shall cooperate fully with Conrail in its effort to recover any such payment; but Conrail shall have no claim against the Board for such payment, and the Board shall not be made a party to any lawsuit or to any proceeding with respect to recovery of such payments: Provided further, That upon exhaustion of funds appropriated under section 713 of the Act, the benefits provided by Conrail, as agent for the Board, shall, for purposes of said title VII, nevertheless be deemed to have been made available under section 713 of the Act; and, except as set forth herein, title VII of the Act shall remain in full force and effect in accordance with its terms: Provided further, That (1) any dispute or controversy concerning eligibility for benefits under section 701 of the Act and the Benefit Schedules issued thereunder shall be determined under such procedures as the Board may by regulation prescribe; (2) subject to administrative reconsideration by the Board under its own procedures, findings of fact and conclusions of law of the Board in determination of any claim for such benefits shall, in the absence of fraud or an action exceeding the Board's jurisdiction, be binding and conclusive for all purposes and shall not be subject to review in any manner; and (3) for purposes of the administration of section 701, the administrative powers and penalties set forth in sections 9 and 12 of the Railroad Unemployment Insurance Act shall be available to the Board.

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 operating losses incurred by the Corporation, capital improvements, and labor protection costs authorized by 45 U.S.C. 565, to remain available until expended, [$613,000,000, of which $11,000,000 shall be derived from unexpended balances of "Conrail workforce reduction"] *$591,000,000, together with such sums that are available from "Conrail workforce reduction" as of September 30, 1986 in excess of $4,565,000*: *Provided*, That none of the funds herein appropriated shall be used for lease or purchase of passenger motor vehicles or for the hire of vehicle operators for any officer or employee, other than the president of the Corporation, excluding the lease of passenger motor vehicles for those officers or employees while in official travel status: *Provided further*, That the Secretary shall make no commitments to guarantee new loans or loans for new purposes under 45 U.S.C. 602 in fiscal year 1987: *Provided further*, That the incurring of any obligation or commitment by the Corporation for the purchase of capital improvements prohibited by this Act or not expressly provided for in an appropriation Act shall be deemed a violation of 31 U.S.C. 1341: *Provided further*, That no funds are required to be expended or reserved for expenditure pursuant to 45 U.S.C. 601(e): *Provided further*, That none of the funds in this or any other Act shall be made available to finance the rehabilitation and other improvements (including upgrading track and the signal system, ensuring safety at public and private highway and pedestrian crossings by improving signals or eliminating such crossings, and the improvement of operational portions of stations related to intercity rail passenger service) on the main line track between Atlantic City, New Jersey, and the main line of the Northeast Corridor, unless the Secretary of Transportation certifies that not less than 40 per centum of the costs of such improvements shall be derived from non-Federal sources: *Provided further*, That, notwithstanding any other provision of law, the National Railroad Passenger Corporation shall not operate rail passenger service between Atlantic City, New Jersey, and the Northeast Corridor main line unless the Corporation's Board of Directors determines that revenues from such service have covered or exceeded 80 per centum of the short term avoidable costs of operating such service in the first year of operation and 100 per centum of the short term avoidable operating costs for each year thereafter: *Provided further*, That none of the funds provided in this or any other Act shall be made available to finance the acquisition and rehabilitation of a line, and construction necessary to facilitate improved rail passenger service, between Spuyten Duyvil, New York, and the main line of the Northeast Corridor unless the Secretary of Transportation certifies that not less than 40 per centum of the costs of such improvements shall be derived from non-Amtrak sources.

RAILROAD REHABILITATION AND IMPROVEMENT FINANCING FUNDS

The Secretary of Transportation is authorized to issue to the Secretary of the Treasury notes or other obligations pursuant to section 512 of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210), as amended, in such amounts and at such times as may be necessary to pay any amounts required pursuant to the guarantee of the principal amount of obligations under sections 511 through 513 of such Act, such authority to exist as long as any such guaranteed obligation is outstanding: *Provided*, That no new loan guarantee commitments shall be made during fiscal year 1987.

REDEEMABLE PREFERENCE SHARES

Notwithstanding any other provision of law, the Secretary of Transportation shall, until September 30, 1988, issue and sell, and the Secretary of the Treasury until such date shall purchase fund anticipation notes, and the Secretary of Transportation is hereby authorized to expend for uses authorized for the Railroad Rehabilitation and Improvement Fund proceeds from the sale of such fund anticipation notes and any other moneys deposited in the fund after September 30, 1985, pursuant to sections 502, 505-507, and 509 of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210), as amended, and section 803 of Public Law 95-620, in additional amounts not to exceed [$9,000,000] *$4,000,000*.

[CONRAIL COMMUTER TRANSITION ASSISTANCE

[For necessary capital 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 1964, 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. 3109, $31,000,000[, of which not to exceed $560,000 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 1964, as amended (49 U.S.C. 1601 et seq.), to remain available until expended, [$17,600,000] *$17,400,000*: *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.

FORMULA GRANTS

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, $16,900,000 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 funds provided under this Act for formula grants, no more than $825,325,017 may be used for operating assistance under section 9(k)(2) 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 [$1,015,000,000] *$990,000,000* 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.).

(LIQUIDATION OF CONTRACT AUTHORIZATION)

(HIGHWAY TRUST FUND)

For payment of obligations incurred in carrying out section 21(a)(2) 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] *$1,100,000,000*, 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 23 U.S.C. 103(e)(4) related to transit projects, $200,000,000, to remain available until expended.

WASHINGTON METRO

For necessary expenses to carry out the provisions of section 14 of Public Law 96-184, [$217,239,000] *$185,000,000*, to remain available until expended.

SAINT 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 except as hereinafter provided.

LIMITATION ON ADMINISTRATIVE EXPENSES

Not to exceed [$1,925,000] *$1,990,000* shall be available for administrative expenses, which shall be computed on an accrual 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 or allowances therefor for operation and maintenance personnel, as authorized by law (5 U.S.C. 5901-5902), and $15,000 shall be available for services as authorized by 5 U.S.C. 3109.

[EISENHOWER LOCK REPAIR

[For necessary expenses to repair and rehabilitate Eisenhower Lock located near Massena, New York, $2,000,000, to remain available until expended.]

RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION

RESEARCH AND SPECIAL PROGRAMS

For expenses necessary 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, [$20,800,000] *$19,950,000*, of which [$5,000,000] *$4,500,000* shall be available only for natural gas and hazardous liquid pipeline safety grants-in-aid, and of which [$7,265,000] *$6,550,000* 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 natural gas and hazardous liquid pipeline safety grants-in-aid, the sum provided over and above the amount made available for this purpose in fiscal year 1986 shall be used only to support 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, [$27,770,000] *$27,000,000*.

TITLE II—RELATED AGENCIES

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

SALARIES AND EXPENSES

For expenses necessary for the Architectural and Transportation Barriers Compliance Board, as authorized by section 502 of the Rehabilitation Act of 1973, as amended, [$1,975,000] *$1,890,000*.

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 $1,500 for official reception and representation expenses, [$47,900,000] *$46,802,000*, together with the unobligated balances of "Payments for directed rail service": *Provided,* That joint board members and cooperating State commissioners may use Government transportation requests when traveling in connection with their official duties as such.

PAYMENTS FOR DIRECTED RAIL SERVICE

(LIMITATION ON OBLIGATIONS)

None of the funds provided in this Act shall be available for the execution of programs the obligations for which can reasonably be expected to exceed $1,000,000 for directed rail service authorized under 49 U.S.C. 11125 or any other legislation.

PANAMA CANAL COMMISSION

OPERATING EXPENSES

For operating expenses necessary for the Panama Canal Commission, including hire of passenger motor vehicles and aircraft; uniforms or allowances therefor, as authorized by law (5 U.S.C. 5901-5902); not to exceed $9,000 for official reception and representation expenses of the Board; operation of guide services; residence for the Administrator; disbursements by the Administrator for employee and community projects; not to exceed $3,000 for official reception and representation expenses of the Secretary; not to exceed $24,000 for official reception and representation expenses of the Administrator; and to employ services as authorized by law (5 U.S.C. 3109); [$409,770,000] *$410,000,000*, to be derived from the Panama Canal Commission Fund: *Provided,* That there may be credited to this appropriation funds received from the Panama Canal Commission's capital outlay account for expenses incurred for supplies and services provided for capital projects.

CAPITAL OUTLAY

For acquisition, construction, replacement, and improvement of facilities, structures, and equipment required by the Panama Canal Commission, including the purchase of not to exceed forty-one passenger motor vehicles for replacement only (including large heavy-duty vehicles used to transport Commission personnel across the Isthmus of Panama, the purchase price of which shall not exceed $14,000 per vehicle); to employ services authorized by law (5 U.S.C. 3109); $24,403,000, to be derived from the Panama Canal Commission Fund and to remain available until expended.

DEPARTMENT OF THE TREASURY

OFFICE OF THE SECRETARY

INVESTMENT IN FUND ANTICIPATION NOTES

For the acquisition, in accordance with section 509 of the Railroad Revitalization and Regulatory Reform Act of 1976, as amended, and section 803 of Public Law 95-620, of fund anticipation notes, [$9,000,000] *$4,000,000*.

UNITED STATES RAILWAY ASSOCIATION

ADMINISTRATIVE EXPENSES

For necessary administrative expenses to enable the United States Railway Association to carry out its functions under the Regional Rail Reorganization Act of 1973, as amended, to remain available until expended, [$2,297,000] *$2,200,000*, of which not to exceed $500 may be available for official reception and representation expenses.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

INTEREST PAYMENTS

For necessary expenses for interest payments, to remain available until expended,

$51,663,569: *Provided,* That these funds shall be disbursed pursuant to terms and conditions established by Public Law 96-184 and the Initial Bond Repayment Participation Agreement.

TITLE III—GENERAL PROVISIONS

SEC. 301. During the current fiscal year applicable appropriations to the Department of Transportation shall be available for maintenance and operation of aircraft; hire of passenger motor vehicles and 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 Federal Aviation Administration shall be available (1) except as otherwise authorized by the Act of September 30, 1950 (20 U.S.C. 236-244), for expenses of primary and secondary schooling for dependents of Federal Aviation Administration personnel stationed outside the continental United States at costs for any given area not in excess of those of the Department of Defense for the same area, when it is determined by the Secretary that the schools, if any, available in the locality are unable to provide adequately for the education of such dependents, and (2) 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. 304. Appropriations contained in this Act for the Department of Transportation shall be available for 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.

SEC. 305. None of the funds appropriated in this Act for the Panama Canal Commission may be expended 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) of 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 1976, as amended, at the—

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

(2) Broadway Extension crossing in Stonington, Connecticut.

SEC. 307. None of the funds in this Act shall be used for the planning or execution of any program to pay the expenses of, or otherwise compensate, non-Federal parties intervening in regulatory or adjudicatory proceedings funded in this Act.

SEC. 308. None of the funds in this Act shall be used to assist, directly or indirectly, any State in imposing mandatory State inspection 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 current 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 or any previous or subsequent Act shall be available for the planning or implementation of any change in the current Federal status of the Transportation Systems Center; and none of the funds in this Act shall be available for the implementation of any change in the current Federal status of the Turner-Fairbank Highway Research Center.]

SEC. [312] *311.* The expenditure of any appropriation under this Act for any consulting service through procurement contract, pursuant to section 3109 of title 5, United States Code, shall be limited to those contracts where such expenditures are a matter of public record and available for public inspection, except where otherwise provided under existing law, or under existing Executive order issued pursuant to existing law.

SEC. [313] *312.* (a) For fiscal year 1987 the Secretary of Transportation shall distribute the obligation limitation for Federal-aid highways by allocation in the ratio which sums authorized to be appropriated for Federal-aid highways and highway safety construction which are apportioned or allocated to each State for such fiscal year bear to the total of the sums authorized to be appropriated for 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 35 per centum of the amount distributed to such State under subsection (a), and the total of all State obligations during such period shall not exceed 25 per centum 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 giving priority to those States having 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 1982 and the Federal-Aid Highway Act of 1981, have experienced substantial proportional reductions in their apportionments and allocations; and

(3) not distribute amounts authorized for administrative expenses, and the Federal lands highway program.

(d) The limitation on obligations for Federal-aid highways and highway safety construction programs for fiscal year 1987 shall not apply to obligations for emergency relief 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 97-424, section 118 of the National Visitors Center Facilities Act of 1968, or section 320 of title 23, United States Code.

[(e) This section shall be in effect until enactment of H.R. 3129 or similar legislation modifying subsections (a) through (d).]

SEC. [314] *313.* None of the funds in this Act shall be available for salaries and expenses of more than one hundred thirty-eight political and Presidential appointees in the Department of Transportation.

SEC. [315] *314.* Not to exceed [$725,000] *$750,000* of the funds provided in this Act for the Department of Transportation shall be available for the necessary expenses of advisory committees.

SEC. [316] *315.* None of the funds in this or any other Act shall be made available for the proposed Woodward light rail line in the Detroit, Michigan, area until a source of operating funds has been approved in accordance with Michigan law: *Provided,* That this limitation shall not apply to alternatives analysis studies under section 21(a)(2)(B) of the Urban Mass Transportation Act of 1964, as amended.

SEC. [317] *316.* The limitation on obligations for the Discretionary Grants program of the Urban Mass Transportation Administration shall not apply to any authority under section 21(a)(2)(B) of the Urban Mass Transportation Act of 1964, as amended, previously made available for obligation.

SEC. [318] *317.* Notwithstanding any other provision of law, none of the funds in this Act shall be available for the construction of, or any other costs related to, the Central Automated Transit System (Downtown People Mover) in Detroit, Michigan: *Provided,* That the immediately preceding provision shall not apply to $5,000,000 apportioned to the Detroit Department of Transportation.

[SEC. 319. The City of Linden, New Jersey, and its successors and assigns are 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] *318.* None of the funds in this Act shall be used to implement section 404 of title 23, United States Code.

SEC. [321] *319.* (a) SAFETY ENFORCEMENT PROGRAM PERFORMANCE.—The Secretary of Transportation shall on or before February 1, 1987, transmit to the Congress a comprehensive report on the fiscal year 1986 activities of the Federal Aviation Administration's operation and maintenance inspection and certification programs. 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-

lidity of the staffing standards on which the goals are based;

(2) schedules showing the experience, in years, of the various inspector workforces 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 appropriate Federal regulations and safe operating practices;

(4) a comparison of actual inspections performed during the fiscal year to 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 update inspector guidance documents 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 operational measures of effectiveness—"best proxies" standing between the ultimate goal of accident prevention and ongoing 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 fiscal year by program, including the 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 STRATEGIC PLANNING STUDY.—The Department of Transportation shall undertake a long-range, multi-modal national transportation strategic planning study. This study shall forecast long-term needs and costs for developing and maintaining facilities and services to achieve a desired national transportation program for moving people and goods 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 strategic transportation planning study shall address such issues as:

(1) the need to continue a national transportation policy and program to further social, environmental, and mobility goals and objectives of the Nation;

(2) public and private fiscal support, growth patterns, 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 demands—and future community developments and configurations that may affect transportation needs;

(5) the degree to which 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 program 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 and remote communities of the discontinuation of essential air service subsidies. The study shall, first, identify those communities which are likely to realize a transportation dislocation without some level of air service support. Having identified such communities, the Secretary shall identify various methods of continued air transportation support. In presenting these methods, the Secretary shall identify various financial support options for each. The study shall be conducted with appropriate consultation with affected communities. The Secretary shall transmit the study to the Congress by February 1, 1987.

SEC. [322] *320.* Within seven calendar days of the obligation date, the Urban Mass Transportation Administration shall publish in the Federal Register an announcement of each grant obligated 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. 323. 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 Commuter Connection (UMTA Project No. PA-03-0013).

[SEC. 324. (a) Section 411(f) of the Surface Transportation Assistance Act of 1982 is amended by inserting "(1)" before "For the purposes" and by adding at the end of such section the following:

["(2) MAXI-CUBE VEHICLE DEFINED.—For purposes of this section, 'maxi-cube vehicle' means a truck tractor combined with a semi-trailer and a separable cargo-carrying unit which is designed to be loaded and unloaded through the semi-trailer, except that the entire combination shall not exceed 65 feet in length and the separable cargo-carrying unit shall not exceed 34 feet in length.".

[(b) Section 411(c) of such Act is amended by inserting after "prohibit" the following: "maxi-cube vehicles or".

[SEC. 325. None of the funds in this Act shall be used for any study project involving access by a causeway or bridge across wetlands of the San Francisco Bay to U.S. Highway 880 in Alameda County, California.]

SEC. [326] *321.* None of the funds appropriated in this Act may be used to prescribe, implement, or enforce a national policy specifying that only a single type of visual glideslope indicator can be funded under the facilities and equipment account or through the airport improvement program: *Provided, however,* That this prohibition shall not apply in the case of airports that are certified under Part 139 of the Federal Aviation Regulations.

SEC. [327] *322.* None of the funds in this Act shall be used to enforce any rules, policies, or guidelines [that seek to delay transit grants or condition their award on the methods or means by which providers of mass transit services or functions are selected, or on the extent or amount of services or functions to be carried out by various private mass transportation service providers] *which in any way condition, establish preference for, or otherwise base the granting 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 3(e), 8(e), and 9(f) 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 (c), by striking "a determination" and inserting in lieu thereof "the certification"; and

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

["(d) REMOVAL OF 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—

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

["(2) 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 "Construction" and inserting in lieu thereof "(1) Except as provided in paragraph (2), construction" and by adding at the end thereof the following new paragraph:

["(2) LIMITATIONS CONCERNING SOUTH AFRICA ON AWARDS OF CONTRACTS.—A State or local governmental body that is a recipient of Federal funds under this title may prohibit or otherwise limit the award of contracts by providing for terms and conditions related to the contractor's business in South Africa in accordance with a State or local law if the State or local governmental body first enters into an agreement with the Secretary that any costs incurred as a result of such prohibition or limitation which are in excess of the costs that would otherwise have been incurred with respect to such project under this title will not, for purposes of this title, be considered to be a cost of such project.".

[(b) Section 12(b) of the Urban Mass Transportation Act of 1964 is amended by adding at the end thereof the following new paragraph:

["(3) LIMITATIONS CONCERNING SOUTH AFRICA ON AWARDS OF CONTRACTS.—A recipient of a grant under this Act may prohibit or otherwise limit the award of contracts with respect to a project under this Act by

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 Secretary that any costs incurred as a result of such prohibition or limitation which are in excess of the costs that would otherwise have been incurred with respect to such project under this Act will not, for purposes of this Act, be considered to be a cost of such project.".

[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) REGULATORY AUTHORITY.—The Secretary of Transportation shall issue such regulations, licenses, and orders as are necessary to carry out this section.

[(d) PENALTIES.—

[(1) FOR PERSONS OTHER THAN INDIVIDUALS.—Any person, other than an individual, that knowingly violates the provisions of this section or any regulation, license, or order issued to carry out this section shall be fined not more than $500,000.

[(2) FOR INDIVIDUALS.—Any individual who knowingly violates the provisions of this section or any regulation, license, or order issued to carry out this section shall be fined not more than $250,000, or imprisoned not more than 5 years, or both.

[(3) ADDITIONAL PENALTIES FOR CERTAIN INDIVIDUALS.—

[(A) IN GENERAL.—Whenever a person commits a violation under paragraph (1) or (2)—

[(i) any officer, director, or employee of such person, or any natural person in control of such person, who willfully ordered, authorized, acquiesced in, or carried out the act or practice constituting the violation, and

[(ii) any agent of such person who willfully carried out such act or practice, shall be fined not more than $250,000, or imprisoned not more than 5 years, or both.

[(B) RESTRICTION ON PAYMENT OF FINES.—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.

[(4) 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 or 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.

[(e) DEFINITIONS.—

[(1) AIRCRAFT AND FOREIGN AIR CARRIER.—The terms "aircraft" and "foreign air carrier" have the meanings given those terms in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. App. 1301).

[(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.

[(f) APPLICABILITY 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 or activity with the intent to evade this section or such regulations.]

SEC. [331] *323.* SUITABILITY OF AIR TRAFFIC CONTROLLERS WHO PARTICIPATED IN THE 1981 STRIKE.—

(a) AUTHORITY TO APPOINT OR REINSTATE CERTAIN FORMER 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 not, as a class, be 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 731 of title 5 of the Code of Federal Regulations (as in effect on June 1, 1986).

(b)(1) An individual 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.

(2)(A) Except as provided in subparagraph (B), no claim may lie against the Government of the United States, or any officer, employee, or agency thereof, based on a failure to appoint or reinstate a particular individual under this subsection.

(B) Nothing in this paragraph shall preclude a claim based on discrimination on the basis of race, color, religion, sex, or national origin.

(3) Nothing in section 3307(b) of title 5, United States Code, or in any rule or regulation prescribed thereunder, shall apply with respect to appointments under this subsection.

(c) REGULATIONS.—The Secretary of Transportation may prescribe regulations to carry out this section (excluding the second sentence of subsection (a)).

(d) DEFINITION.—For the purpose of this section, the term "air traffic controller" has the meaning given such term by section 2109 of title 5, United States Code.

SEC. 324. Notwithstanding any other provision of law, funds appropriated under any heading in this Act or in Appropriations Acts for prior years and intended for studies, reports, or research, and related costs thereof including necessary capital expenses, are available for such purposes to be conducted through contracts or financial assistance agreements with the educational institutions which are specified in such Acts or in any report accompanying such Acts.

SEC. 325. (a) Notwithstanding any other provision of law, the Secretary of Transportation may use not to exceed one-half of 1 percent of—

(1) the funds made available for fiscal year 1987 by section 21(a)(2)(B) of the Urban Mass Transportation Act of 1964, as amended, to carry out section 3 of such Act to contract with any person to oversee the construction of any major project under such section;

(2) the funds appropriated for fiscal year 1987 pursuant to section 21(a)(1) of the Urban Mass Transportation Act of 1964, as amended, to carry out section 9 of such Act to contract with any person to oversee the construction of any major project under such section;

(3) the funds appropriated for fiscal year 1987 pursuant to section 21(a)(1) of the Urban Mass Transportation Act of 1964, as amended, to carry out section 18 of such Act to contract with any person to oversee the construction of any major project under such section;

(4) the funds appropriated for fiscal year 1987 pursuant to section 4(g) of the Urban Mass Transportation Act of 1964, as amended, to contract with any person to oversee the construction of any major public transportation project substituted for an Interstate segment withdrawn under section 103(e)(4) of title 23, United States Code; and

(5) the funds appropriated for fiscal year 1987 pursuant to the National Capital Transportation Act of 1969 to contract with any person to oversee the construction of any major project under such Act.

(b) Any contract entered into under subsection (a) shall provide for the payment by the Secretary of Transportation of 100 percent of the cost of carrying out the contract.

(c) This section shall take effect on October 1, 1986, and shall cease to be in effect at the close of September 30, 1987.

SEC. 326. The Secretary of Transportation shall permit the obligation of not to exceed $4,000,000, apportioned under title 23, United States Code, section 104(b)(5)(B) for the State of Florida for operating expenses of the Tri-County Commuter Rail Project in the area of Dade, Broward, and Palm Beach Counties, Florida during the period Interstate 95 is under reconstruction in such area.

This Act may be cited as the "Department of Transportation and Related Agencies Appropriations Act, 1987".

Mr. DOLE. I am advised that the managers of the appropriations bill are on their way to the floor. 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.

□ 1040

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.

Mr. ANDREWS. Mr. President, what is the pending business?

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 colleague 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 funded programs of $15,279,960,000. Combined, these two levels 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.

□ 1050

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 enhance 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 airplanes 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 $525 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. The allocations allowed transportation under the budget resolution also necessitated cuts in the transit trust fund and the amount allowed for transit operating assistance.

Mr. President, let me 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 propound shortly, no Senator's right to offer an amendment, including an amendment to strike this section, is foreclosed.

Let me, Mr. President, at this time yield to my colleague and 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.

The PRESIDING OFFICER. The Senator from Florida.

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 several transportation modes. It also is attentive to the interests of 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, I am pleased 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's Construction 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's proposal to cut the aviation field maintenance and flight service station personnel.

For the highway programs, we have recommended an obligation ceiling of $13.1 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 interstate 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 add greatly to the several 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-Gramm-Rudman level and it is $32 million below the House level. We have, however, rejected the proposal of the administration to essentially eliminate the formula grant program and our bill is $2.4 billion over the amounts requested by the administration for transit programs. I know many of the Members and interest groups 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 Senator ANDREWS on the excellent job he has done, not only in the holding of a series of thorough and informative hearings, but also in structuring this bill before us now, which, I believe, deserves the support of the Members.

Mr. President, I also want to compliment the most able staff of Senator ANDREWS and to thank the staff that worked on our side for the minority

for the very hard work that they have done also in putting this bill together.

□ 1100

Mr. ANDREWS. Mr. President, I thank my colleague for his generous remarks. I, too, want to commend the staff on both the Republican and Democratic sides for the outstanding job they have done in making sure that nothing was 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. Is there objection? Hearing none, it is so ordered.

AMENDMENT NO. 2843

(Purpose: To delete section 323)

Mr. GRAMM. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

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 policy for 5 years has 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 would be 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 aptitude and 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 place of work.

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 pretty 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 strike 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 controller 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 1987.

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, imposed by the President, on 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 should have taken place long ago, when it became clear that the rebuilding 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 are 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 faith in our aviation safety system. When that faith is breached, the public will look not only at the FAA, but at we in the Congress who fund 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.

On May 16, two planes carrying 224 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.

Mr. President, 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 217 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, Cleveland, and 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."

The experience drain in the FAA is more than just a problem for the agency. It is a problem for all those who are concerned about flying. It is a problem for all those who have sat on the ground at airports around the country for hours at a time, in good weather and bad.

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 those numbers very carefully; 1,484 of the 14,484 air traffic controllers claimed by the FAA are not air traffic controllers at all. They are clerical personnel. They are not controllers and they are not in training to become controllers. Telling the American public that here are 1,484 real live controllers is a cynical attempt to fool the people all of the time.

What the FAA is not telling the American people is that its air traffic controller goal for fiscal year 1986 was not and is not 14,480. It is 12,876 compared to the 16,250 controllers it had in 1981, 82 percent of whom were full performance level controllers.

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 GAO has criticized the FAA 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, because they in fact do make such determinations.

Finally, Mr. President, it is said that rehiring former controllers will ruin morale. Nothing ruins morale more quickly that 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 problems that they might 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 committee 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 GAO is right, we might spend next year listening to the FAA explain why they had to curtail air traffic.

I do not want to see that happen. I want to stop the next disaster before it happens, and I assume everybody in this body and this country feels the same way.

It is time we provided some relief to our aviation safety system. The controllers who struck in 1981 have been punished. They lost their jobs, their pensions and, in some cases, their families. Vengence is not a worthy motivation for our Nation.

The ones we punish are the traveling 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 serving in that capacity.

It is also time to provide relief to the traveling 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 mandate. It does not direct. It simply says here is a resource that maybe we ought to discuss.

□ 1120

"We are short of soldiers in our army. Here are recruits we can bring on board who can fight the battle and do it quickly."

It is the authority that the administration should have and the authority that it should use.

Mr. SIMON addressed the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

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 colleague 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 will be 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 counterpart 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.

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

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 intended to rewrite past 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 busier 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 Presdient'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 any controller back to work 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 bad apples, just as OPM does now for sensitive employment.

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. When 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 vote.

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 withstood peer group pressure 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 doing all this 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.

(Putting 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.

DODGE CITY RAILROAD PROJECT

Mr. DOLE. Before we close debate on the fiscal year 1987 Transportation appropriations bill, there is a matter of some importance to Dodge City, KS, that I would like to clarify with the chairman of the Subcommittee on Transportation Appropriations. Based on discussion with the distinguished Senator from North Dakota, it is my understanding that it will be possible to incorporate some report language in conference that would enable the Dodge City-Ford-Bucklin Railroad to obtain up to $1.9 million in unspent fiscal year 1986 funds.

Mr. ANDREWS. This Senator is willing to do everything he can to provide assistance to the Dodge City Railroad when we meet with the House in conference.

Mr. DOLE. There is the possibility that some funds would be available under the section 505 Redeemable Preference Shares Program of the Railroad Revitalization and Regulatory Reform Act of 1976. These would result from unspent fiscal year 1986 funds remaining from projects whose cost turned out to be less than the amount appropriated.

Mr. ANDREWS. The majority leader is correct. Based on conversations with the Federal Railroad Adminstration, it is my understanding that there may be funds available. We could therefore add some language in conference that would allow unspent, but prevously earmarked, funds to be reprogrammed to rehabilitate the Dodge City-Ford-Bucklin Railroad. I know this is a project of importance to the majority leader, and I promise to bring this matter to the attention of the conferees.

Mr. DOLE. It would seem to me that a project of this nature would set a good cost-sharing example. The local economic development organization has accumulated equipment and other assets worth almost $2 millon and has managed to cut down costs by having labor and equipment donated. I need not emphasize the importance of promoting economic development in communities in rural areas.

Dodge City grew out of the old frontier town in western Kansas, and it is of great historic interest to this country in general. This old west-style tourist rail line would provide access to Dodge City's boot hill area. The existing tracks would retrace that portion of the Rock Island Line that stretched through Bucklin, Ford, and Dodge City in the days of Bat Masterson and Wyatt Earp.

In addition, the commercial capabilities of the railroad line are also significant. This line would be used to haul grain and other freight, linking into a major grain freight line in Bucklin. The line links the Santa Fe and Cotton Belt rail lines, and officials from both railroads have manifested an interest in the possibility of hauling freight on the line upon its completion.

Dodge City has 15 passenger and freight cars and three locomotives on hand, and the railroad has most 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 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 498 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 near mid-air collisions, surface operational errors, and other safety-related incidents, the American public has become increasingly concerned about aviation safety.

There is reason for concern. The 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 airlines, 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, and other services necessary to manage the increasing volumes of air traffic which will be using the Nation's airspace. The FAA, for example, expects the number of aircraft operations at FAA towered 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 continue efforts to restore 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 discussion 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 is 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 not yet acted. I should report that 32 States have approved this vehicle. The Senate Appropriations Committee struck this House language.

Because this vehicle is so important, I bring this to the Senator's attention for his consideration in the bill reported 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 road connecting the 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 the Environment and 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 represent the loss of 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 a 15-mile section of the river. 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 5 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, given this pattern of spills, I feel that the Coast Guard should study the recent oilspills in the Delaware River, along with other similar incidents. This study should examine the causes of these spills, and investigate means of preventing further 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, locale familiarization requirements, 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 view of its importance to 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 language in the statement of the manager's report directing the Coast Guard to conduct such a report during fiscal year 1987.

Mr. LAUTENBERG. Mr. President, I thank the distinguished Senator from North Dakota for his cooperation in this important matter. I would also like to ask 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 my distinguished colleagues for their 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 oilspills 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 $20 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 17,800 vehicles. Maryland found that over 5,000 of these vehicles had unsafe brakes. Over 2,300 had inadequate lighting. Others had defective steering, coupling devices, and tires. Almost 13,000 of these vehicles, or over 72 percent 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 and buses will have nowhere 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 weighing 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 truckstop in the country. Substance 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, in 20 States after taking a regular motorist 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 use them to 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 use 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 truckstop in the country, things have gone too far. This is not a "victimless" 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. Unfortunately, my subcommittee is operating under strict budgetary restraints and I believe that Senator DANFORTH's proposed amendment could well exceed these constraints.

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 Senator DOLE's legislative package for combating 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 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 my amendment at this time.

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

million 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]

	Fiscal year 1987	
	Budget authority	Outlays
Outlays from prior-year budget authority and other actions completed		17.7
H.R. 5205, as reported in the Senate	10.2	9.3
Adjustment to conform mandatory programs to Budget Resolution assumptions	−(1)	−0.1
Subcommittee total	10.2	26.9
Senate subcommittee 302(b) allocation	10.6	26.9
President's request	7.0	25.5
House-passed level	10.3	27.0
Subcommittee total compared to:		
Subcommittee 302(b) allocation	−0.4	−(1)
President's request	+3.2	+1.4
House-passed level	−0.1	−0.1

(1) Less than $50 million

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

TRANSPORTATION SUBCOMMITTEE CREDIT TOTALS—SENATE-REPORTED BILL

[In billions of dollars]

	Fiscal year 1987	
	Direct loans	Loan guarantees
H.R. 5205, as reported in the Senate	0.1	
Subcommittee total	0.1	
Senate subcommittee 302(b) allocation	0.1	
House-passed level	0.1	
President's request	0.1	
Subcommittee total compared to:		
Senate subcommittee 302(b) allocation	−(1)	
House-passed level		
President's request	+(1)	

(1) Less than $50 million

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

STATUS OF APPROPRIATION BILLS IN THE SENATE

[In billions of dollars]

Subcommittee	Appropriations Committee's 302(b) allocation		Adjusted bill totals [2]		Bill compared to allocation		Bill status
	Budget authority	Outlays	Budget authority	Outlays	Budget authority	OOutlays	
Agriculture	31.3	24.1	31.3	24.1	−(1)	+(1)	Reported.
Commerce-Justice	12.1	12.3	11.7	12.3	−0.4	−(1)	Reported.
Defense	277.1	264.5					
Deficiencies and Supplementals	0.8	0.1					
District of Columbia	0.6	0.6	0.6	0.6	−(1)	−(0)	Reported.
Energy-Water	14.5	14.9					
Foreign Operations	13.0	10.8					
HUD-Independent	54.3	56.4					
Interior	7.8	8.8	7.7	8.8	−0.1	−(1)	Reported.
Labor-HHS	114.0	118.0	113.4	118.0	−0.6	+(1)	Passed.
Legislative Branch	1.7	1.7	1.6	1.6	−0.1	−0.1	Conference.
Military Construction	8.2	7.9	8.2	7.9	+(1)	+(1)	Passed.
Transportation	10.6	26.9	10.2	26.9	−0.4	−(1)	Reported.
Treasury-Postal Service	13.3	13.4	13.3	13.4	−(1)	+(1)	Reported.
Total, Appropriations Committee	559.3	560.4	198.1	213.6	−1.5	−0.1	

(1) Less than $50 million.
(2) In addition to the bill, includes outlays from budget authority enacted in prior years, possible later requirements, adjustments to conform mandatory items to budget resolution level, and other adjustments.
Note.—Details may not add to totals due to rounding.
Source: Prepared by Senate Budget Committee staff.

● 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 truck loading zones, 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. Metro staff predicts that substantial operations and maintenance savings will eventually offset the capital costs of the tunnel. Metro also states that the costs of maintaining the tunnel 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 and Related Agencies Appropriations bill for fiscal year 1987 contained $11 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 Franklin 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 question is on the engrossment of the amendments and third reading of the bill.

The amendments were ordered to be engrossed and the bill to be read a third time.

The bill was read a third time.

Mr. ANDREWS. 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. 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. 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.

The bill 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. GARN], is necessarily absent.

Mr. CRANSTON. I announce that the Senator from Hawaii [Mr. MATSUNAGA], 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.]

YEAS—87

Abdnor	Exon	McConnell
Andrews	Ford	Melcher
Baucus	Glenn	Metzenbaum
Bentsen	Goldwater	Mitchell
Biden	Gore	Moynihan
Bingaman	Gorton	Murkowski
Boren	Grassley	Nickles
Boschwitz	Harkin	Nunn
Bradley	Hart	Packwood
Broyhill	Hatch	Pell
Bumpers	Hatfield	Pressler
Burdick	Hawkins	Pryor
Byrd	Hecht	Quayle
Chafee	Heinz	Riegle
Chiles	Hollings	Rockefeller
Cochran	Inouye	Rudman
Cohen	Johnston	Sarbanes
Cranston	Kassebaum	Sasser
D'Amato	Kasten	Simon
Danforth	Kennedy	Simpson
DeConcini	Kerry	Specter
Denton	Lautenberg	Stafford
Dixon	Laxalt	Stennis
Dodd	Leahy	Stevens
Dole	Levin	Thurmond
Domenici	Long	Trible
Durenberger	Lugar	Warner
Eagleton	Mathias	Weicker
Evans	Mattingly	Wilson

NAYS—11

Armstrong	Humphrey	Symms
Gramm	McClure	Wallop
Heflin	Proxmire	Zorinsky
Helms	Roth	

NOT VOTING—2

Garn	Matsunaga

So the bill (H.R. 5205) as amended, was passed.

□ 1130

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

Mr. DOLE. 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 conferees on the part of the Senate.

The motion was agreed to, and the Presiding Officer (Mr. KASTEN) ap-

pointed Mr. ANDREWS, Mr. COCHRAN, Mr. ABDNOR, Mr. KASTEN, Mr. D'AMATO, Mr. HATFIELD, Mr. CHILES, Mr. STENNIS, Mr. BYRD, and Mr. LAUTENBERG conferees on the part of the Senate.

Mr. DOLE. Mr. President, I thank my distinguished subcommittee chairman, Senator ANDREWS, and also Senator CHILES for their expeditious 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 ask 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 advise 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, as 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.

That is 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 smarter, some may be wiser, some may be more liberal or conservative, some may have had better opportunities, some less, some may be more outspoken, some may be more introspect. 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 more importantly, 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 have been troublesome 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 temperment.

□ 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 reputation, they could 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.

I 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 were examples of courage and commitment.

In trying to resolve charges and allegations with the answers of Justice Rehnquist and his witnesses, it is inescapable that time is an important element. 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 1969. 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. We 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. But 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, there are those with widely divergent views. There are those who 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 lived 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.

Today, we 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 powers, a vibrating heart, and courageous conscience.

But an individual can only shoulder so much responsibility without help from those he seeks to lead—one of my colleagues suggested that it would be better if Justice Rehnquist remained one of nine instead of "first among equals." I would respectfully offer different advice. I look at proverbs, and as I remember—and I am paraphrasing—there is this verse which says: "He who would become chief must first learn to serve."

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 consists of 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:

> No man can be fully free while his neighbor is not. To go forward at all is to go forward together.
>
> This means black and white together, as one nation, not two. The laws have caught up with our conscience. What remains is to give life to what is in the law: to insure, at last, that as all are born equal in dignity before God, all are born equal in dignity before man * * *.
>
> Our destiny offers not the cup of despair, but the chalice of opportunity. So let us seize it, not in fear, but in gladness * * * let us go forward, firm in our faith, steadfast in our purpose, cautious of the dangers; but sustained by our confidence in the will of God and the promise of man.

Justice Rehnquist, let me make a few suggestions. You have had little control, if any, over your future during this confirmation process. But if confirmed only you can control your destiny. The position of Chief Justice is one of strength but it is also one of humility. In effect, you are a servant to many masters—the Supreme Court, the Federal courts, the State courts, and the American public. Serve them all well, all equally, all fairly. And your legacy will not only be compelling but complete.

NOMINATION OF JUSTICE WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

Mr. GRASSLEY. Mr. President, the consideration of a nominee to be Chief Justice of the United States is one of the most important and solemn responsibilities that we as U.S. Senators take on. As the "first among equals," the Chief Justice symbolizes the Supreme Court itself, and its duty to preserve and protect our cherished Constitution. By preserving and protecting the Constitution, the Supreme Court is the ultimate guardian of the people and the Republic.

In light of the fact that today, September 17, we are observing the 199th anniversary of the signing of our Constitution, it is extraordinarily appropriate, indeed, to be considering the nomination of the Chief Justice who must lead in preserving and protecting the framework that binds our Nation together, and sets us apart in the annals of history.

Therefore, in considering and confirming a Chief Justice-designate, the lifeblood, and continuing existence of our Nation is at stake. So, we have an obligation to conduct an extremely thorough examination into the capabilities and qualifications of the nominee.

The Judiciary Committee, of which I am a member, has met this obligation by conducting an exhaustive examination of Justice Rehnquist, involving more than 40 witnesses over a 4-day period.

During my examination of this nominee, I considered whether Justice Rehnquist had the qualities required of the most important jurist in the Nation. For instance, is Justice Rehnquist a person of integrity? Is he a person of great intellectual capacity and knowledge of our Constitution? Will he render his opinions based on the Constitution and the relevant statutes—without regard to personal views when those views conflict with the law? Does he possess an even judicial temperment that resists judicial legislating and is not swayed by the mere breeze of public opinion? And finally, will he be a true leader and consensus builder on the Court instead of one who will attempt to force his agenda on the Court and the Nation?

After participating in the hearings, there is no doubt in my mind that the answer to all of these questions is an affirmative one, and that Justice Rehnquist fulfills all of the requirements to be an outstanding Chief Justice of the United States.

There are some who have made allegations and innuendoes about Mr. Rehnquist and his ability to lead the Court. However, it is important to emphasize that none of these charges has been proven, and they appear to represent a very calculated, desperate attempt to undermine Mr. Rehnquist because of his conservative judicial philosophy.

The nominee certainly has the initial burden of proving that he is capable of serving the office, but when attacks are made on the nominee, the burden of proof switches, and those who have made such attacks must prove they are true. Anyone who looks beyond the mere charges will know that this burden has not been met by Justice Rehnquist's detractors.

In specifically reviewing the allegations that Justice Rehnquist is a racist and is insensitive to women's rights, I was particularly persuaded by the testimony before the Judiciary Committee of Dr. James Freedman, who is the president of the University of Iowa at Iowa City, and former dean of the University of Pennsylvania Law School. Dr. Freedman, who is a former law clerk for Justice Thurgood Marshall, has also had the opportunity to work closely with Justice Rehnquist at a 4-week seminar in Europe whose students were men and women of different nationalities from around the world. Dr. Freedman was able to observe Justice Rehnquist's personal interactions with others on a daily basis. If Justice Rehnquist harbored any prejudice toward women or different races, it would have surely been detectable as he closely intermingled with others in this situation.

However, in his testimony in support of Justice Rehnquist, Dr. Freedman emphasized that Justice Rehnquist treated people of all nationalities and gender as equals, and that he "was a

humane and decent presence" wherever he was observed.

In addition, Dr. Freedman was highly impressed 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 distinction 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 the Judiciary Committee to report favorably to the Senate the nomination of William Rehnquist to be Chief Justice of the United States. Today, with the benefit of a more complete record than 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 held 16 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 that 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.

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

(See exhibit 1.)

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 civilians.

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 when 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 over just 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 bore on the issue of recusal." Since the opinion is silent on this question, I can only assume that Justice Rehnquist concluded that his involvement in fashioning military surveillance policy, whether intimate or consequential, was irrelevant 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, 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. One of the most significant responsibilities entrusted to his small office was 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 publicly known grounds of recusal, but omitting reference to the confidential ones, would have been proper only if he had forgotten that this office in the Justice Department had handled the surveillance policy negotiations and that he himself was involved to a substantial extent. If when writing his opinion in Laird versus Tatum, Justice Rehnquist had not forgotten his involvement in the surveillance policy ngotiations, 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.

EXHIBIT 1

JUSTICE REHNQUIST'S ANSWERS TO QUESTIONS SUBMITTED BY SENATOR MATHIAS

Question:

1. Document I(1) 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 contained in the document that (i) the FBI will be charged with the task of collecting raw intelligence data bearing upon the probability of a serious civil disturbance; (ii) at the request of the Attorney General, the Department of the Army, through the U.S. Army Intelligence Command, may assist in this effort; and (iii) the U.S. Army Intelligence Command should

not ordinarily be used to collect intelligence of this sort?

D. In 1974, Mr. Robert Jordan, General Counsel of the Army during early 1969, testified before the Senate Judiciary Committee that the Department of Defense wanted to "disengage military intelligence organizations from the collection of information dealing with civil disturbance matters," and that the language (referred to above) 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 I(1), 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 some other reason?

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

Answer:

A. I have no recollection of my personal role in the preparation of this document. 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 the 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 memorandum opinion describes my reasoning at that time regarding all considerations that in my judgment bore on the issue of recusal.

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 firsthand knowledge as to the use of the military to conduct such 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.

Senator CHARLES MATHIAS,
U.S. Senate, Senate Russell Office Building, Washington, DC

DEAR SENATOR MATHIAS: You have asked my opinion about 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 and surveillance 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 lawsuit was maintainable. The effect of the Court of Appeals' decision was that the plaintiffs could have proceeded to the discovery stage and perhaps then on to the merits. The Supreme Court 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, in that he had expressed opinions on issues in the case and that he had presented the Justice Department's position before a Senate Committee hearing. Responding to the motion, Justice Rehnquist rejected these contentions as insufficient to require his disqualification. In doing so he relied extensively on the analysis in Frank, *Disqualification of Judges: In Support of the Bayh Bill,* 35 Law & Contemp. Prob. 43 (1970), which in my opinion correctly summarized the law of disqualification as it then stood.

In recent testimony before the Senate concerning his participation in the transaction out of which *Laird v. Tatum* arose, Justice Rehnquist stated, "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." From other evidence, chiefly the testimony of Mr. Robert Jordan, General Counsel of the Army at the time that the surveillance policy was formulated, it appears that Mr. Rehnquist, as he then was, had a relationship to the surveillance program beyond that disclosed in his opinion in *Laird v. Tatum* or revealed in his testimony before the Senate last month. According to this evidence, the surveillance policy was formulated in the early months of 1969. At that time Mr. Rehnquist was Assistant Attorney General in charge of the Office of Legal Counsel. On behalf of the Justice Department that Office negotiated with the Army in formulating the surveillance policy. The negotiations were extensive. The circumstances strongly suggest that Mr. Rehnquist was personally and substantially involved in them. These circumstances are that the subject was highly important, the Office is small in size, and Mr. Rehnquist himself sent a key transmittal memorandum. The negotiations resulted in a policy statement that was then adopted by President Nixon, and which in turn was the basis of the Government action complained of the litigation in *Laird v. Tatum.*

First, in my opinion Justice Rehnquist's position as head of the Office of Legal Counsel constituted grounds of disqualification from participating in *Laird v. Tatum.* unless the significance of that relationship were overcome by additional evidence showing that he in fact was not involved in the matter while it was in the office. In a matter of such substance and complexity as the surveillance policy, it is implausible that the head of the government law office responsible for development of its legal aspects would not be personally involved in considerable detail concerning the facts and issues going into the policy and its formulation. On that basis, Mr. Rehnquist was the responsible counsel in the matter in question, and as well a potential witness concerning any factual issues regarding the policy. Each of these two relationships is independently a ground for disqualification.

A lawyer directly involved in a transaction cannot properly later sit as a judge in a case in which that transaction is in dispute. As stated in the article by Mr. Frank which Justice Rehnquist cited: "Justices disqualify in government cases when they have been directly involved in some fashion in the particular matter, and not otherwise."

Mr. Rehnquist's relationship to the transaction was essentially the same as if he had been involved as legal counsel for the Internal Revenue Service in working up a tax investigating program and then sat as judge in a case challenging the program, or while in the Justice Department passed upon corporate merger or electoral districting policy and then sat in a case involving the policy

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 of *Laird* v. *Tatum.*" But that statement is irrelevant if he was counsel in the transaction out of which the case arose, a basis of disqualification that was well recognized then as now.

Justice Rehnquist appears also disqualified because he was a potential witness, at least at the discovery stage in *Laird* v. *Tatum.* In his testimony before the Senate, he denied having knowledge of "evidentiary facts." The standard relevant to the question is not "evidentiary facts" but facts relating to the "subject matter" of the litigation.

Second, when the case of *Laird* v. *Tatum* was before the Supreme Court it was Justice Rehnquist's responsibility on his own initiative to address and resolve all issues concerning his disqualification. It was not the parties' 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. *Tatus*, Justice Rehnquist referred, first, to the fact that he had not been counsel in the "case," i.e., the litigation that ensured after his involvement in the transaction, and, second, to his statements in public and as spokesman for the Justice Department before the Senate. Thus, Justice Rehnquist addressed only his publicly known involvements and omitted any reference to an involvement, as counsel in the transaction, that was at least as significant but which was not publicly known. It was his duty to resolve both the publicly known possible bases of disqualification and those arising from an involvement that was confidential. Inded, it is even more vital to fairnes in adjudication that a judge resolve grounds of recusal which arise from confidential facts, for the parties ordinarily are helpless to raise such grounds.

Justice Rehnquist's addressing the publicly known grounds of recusal, but omitting reference to the confidential ones, would have been proper only if he had forgotten that his office in the Justice Department had handled the surveillance policy negotiations and that he himself was involved to a substantial extent. If when writing his opinion in *Laird* v. *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.

Finally, Justice Rehnquist had a duty of candor to the Senate in answering questions

concerning *Laird* v. *Tatum*. The Senate hearing was an evidentiary inquiry into his qualifications for the office of Chief Justice. In making statements before such a tribunal, whether sworn or not, a lawyer or judge has an obligation to be fully truthful. Justice Rehnquist complied with duty only if his statement is accepted that he had "no recollection of any participation in the formulation of policy on the use of the military to conduct surveillance." Whether that statement should be accepted is a matter of judgment. It was made by a lawyer of the highest intelligence concerning sensitive state policy over which his office had direct responsibility early in his service in government, and about which he had been asked to search his recollection on three official occasions.

Sincerely,

GEOFFREY C. HAZARD, Jr.

□ 1250

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.

□ 1300

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

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

PRODUCT LIABILITY REFORM ACT

Mr. KASTEN. Mr. President, I move to proceed to S. 2760, the Product Liability Reform Act.

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

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. KASTEN. Mr. President, I am recognized for the purpose of debate?

The PRESIDING OFFICER. The Senator from Wisconsin is recognized.

Mr. KASTEN. I thank the Chair.

Mr. President, since our Consumer Subcommittee began hearings on this issue 5½ years ago, the product liability crisis has intensified, and the consensus for Federal action on this issue is now overwhelming.

Just a few weeks ago, the delegates to the White House Conference on Small Business ranked the liability crisis as the No. 1 problem for small business today. The delegates, in an unprecedented action, passed a resolution calling on Congress to pass the specific legislation under consideration here today.

Only 2 weeks ago, the National Governors' Association overturned a long-standing policy against Federal preemption of product liability laws and voted to support a Federal resolution to the product liability crisis.

Mr. President, our product liability system has been in need of reform for many, many years.

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 had become.

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 lawnmowers, but they cannot afford to market it. If they did, their product liability insurance will go 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 lawnmowers.

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 business was either unable 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, there 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 stepladder 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 businesses, destroying jobs, crippling American manufacturers' ability to compete with foreigners, discouraging product innovation and improvement, and driving a wide variety of good 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 manufacturers 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 16-to-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 statute of limitations, 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 situs 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.

□ 1310

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 thus make the system useless for discouraging manufacturers from making defective products.

Senator LUGAR and I will offer a short and simple amendment to provide two fault-based defenses to protect the truly innocent. Our amendment simply provides that a manufacturer should not be liable for harm caused by defects which the manufacturer could not have known about due to the scientific, technical, and medical knowledge available at the time.

Further, our amendment provides that a manufacturer should not be liable for harm resulting from the unreasonable alteration or misuse of the manufacturer's product.

Mr. President, I strongly urge the passage of S. 2760 along with this fault-defense amendment as well as Senator PRESSLER's amendment to eliminate joint and several liability. Narrow special interests have delayed a solution to this crisis for too long. Congress must act on this urgent priority.

Mr. DANFORTH addressed the Chair.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER (Mr. DENTON). The Senator from Missouri sought recognition first.

Mr. DANFORTH. Mr. President, I know the Senator from South Carolina wishes to speak and I will not take long at all.

Mr. President, I want to congratulate the Senator from Wisconsin for his intrepid pursuit of the question of product liability reform. He has led the charge on this issue for a number of years. This part year the question of product liability reform has been the, as far as the chairman is concerned, the first priority of the Senate Commerce Committee. I do not know of anything we could do to help both consumers and businesses that matches product liability reform.

In the Commerce Committee we have spent days in hearings, days in markups, days in negotiations among members, trying to fashion a meaningful product liabilty reform bill. We have reported out of the Commerce Committee a bill which is certainly controversial, but I believe which is an excellent piece of legislation.

Mr. President, the present system in the United States for resolving product liability disputes and compensating those injured by defective products is costly, slow, inequitable, and unpredictable. It is a system that hurts businesses and consumers as well as our competitive position in world markets. Moreover, the unpredictability and inefficiency of the system 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 an increased burden 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, Senator GORTON, Senator DODD, and others. It is a bill that has been shaped by the Commerce Committee during 6 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 law to impose uniform 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 had been reported by the committee during the 98th Congress, but which was not considered by the full Senate prior to adjournment.

At an executive session on May 16, 1985, S. 100 was defeated by an 8–8 vote. Prior to that markup, Senators DODD and GORTON had introduced amendments in the nature of a substitute to S. 100, each of which would have established alternative expendited 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. I 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. 1999 in December.

S. 1999 would have combined an alternative compensation system with uniform Federal standards, providing faster compensation for injured victims and greater predictability for manufacturers. However, S. 1999 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. 1999 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. 1999. Instead, it creates incentives for manufacturers to assume limited liability in product liability cases, and thus to resolve such cases quickly. The idea is to reduce 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 of defective products 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 settle product 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 in product liability cases. 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 by Senator PRESSLER. It is consistent with the approach adopted recently by the voters of California in a State referendum.

The basic policy underlying this section is to address inequitable applica-

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—where a person's economic loss might otherwise be uncompensated. 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 conduct manifesting a conscious, 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 suffers 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 destruction or 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. Frivolous 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 much 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 and that is the expedited settlement system's $250,000 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 10–7 vote to report the bill.

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 other sources, plus $100,000 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 cases 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, this $50,000 cap 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 swifter, more certain recovery 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 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-

jured parties may recover nothing at all because of the uncertainties of litigation. They face a legal system that has been compared to a lottery in which similar cases can produce vastly different results. And they also face years of delay and the costs of protracted litigation. As a consequence, victims with the worst injuies, facing the greatest economic hardships often settle for far less than their full losses to meet pressing financial needs.

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 mean-spirited idea to deprive the injured of just recompense but a tradeoff of predictablility 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 seek greater certainty as to the scope of their liability. Manufacturers, product sellers, and consumers seek to reduce the excessive transaction costs of product liability disputes. The settlement system in the bill, with its limitations 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 or 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 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 tort system 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.

The evidence is that in this country we are now paying more to lawyers and for court costs than is going to plaintiffs in product liability cases. The system today is terrible. 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 plaintiff often is financially 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 set 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, as has Senator KASTEN. But this bill is not written in concrete. The idea of a cap is not, as far as this Senator is concerned, written in concrete. It is not set for all times. No one could be more flexible than I am about the final design of this bill.

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 on pain and suffering. 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 and courts 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 to work with people who have problems with this bill.

But after a year of effort in the Commerce Committee, let us not let the 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.

□ 1320

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 politically, 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.

Here 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-

ponents 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 have come around to understanding 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. That is before the Commerce Committee. 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 defect, 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 business say? Business said, 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 tort system 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 verdict or required a new trial where original verdicts were 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; they have 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 we are about to come here, after 4½ years, knowing that they have not proved the case, and they come around here with a monkeyshine bill.

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 take it we will take a day 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 that I understand that under the 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.

□ 1330

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 concluded 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 major 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 continually failed to provide concrete 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 codification—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 off or plunged 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 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. I find it curious that proponents of Federal codification suggest 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 have 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 crisis occurred 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 that is wholly their fault."

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 question 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 serve to convince me all the more that any tort reform should occur at the State level. During the 1986 State legislative sessions, some 40 legislatures have passed provisions requiring either selected changes to the tort system, increased insurer information and regulation, or new mechanisms for securing insurance from sources other than commercial carriers. Seven other States have not taken other legislative actions but have instituted comprehensive studies of the issue.

Senator HOWELL HEFLIN, himself a former State supreme court chief justice, described the traditional important role of the States in the area of the developing tort law:

> Tort Law has been left to the States because, as in other areas of law dealing with the rights and duties of the individual such as contract, domestic, and property law, States are best able to develop and enforce tort liability rules that serve the needs of its businesses and consumers. Individual States can decide how best to prevent injuries or allocate the risks and cost of injuries. These decisions necessarily vary to some degree among States depending upon their history, economy, and demographic composition. Without a demonstration that the current system is responsible for serious economic problems, there is no reason to alter that system.

In an era when our Federal Government is working to restore power to State and local jurisdictions, the mad rush to impose the Federal will on State courts in the area of product liability tort law is indeed ironic.

Not only is there no demonstrated need for this legislation, but it contains unfair and unworkable provisions which would curtail the ability of injured consumers and workers to be awarded adequate compensation from a manufacturer responsible for designing an unreasonably dangerous product. Senators INOUYE, GORE, and GORTON have presented compelling arguments on these points.

This legislation, like the predecessor bills before it, does not provide a workable solution for any problems facing the tort system, nor would it result in reduced product liability insurance premiums. It preempts a system that has been providing redress for those injured by defective products for many, many years. It should be defeated.

ABSENCE OF DEMONSTRABLE NEED

DISAPPEARANCE AND REAPPEARANCE OF THE CRISIS

The original justification for Federal product liability reform was the previus product liability insurance premium crisis in the mid-1970's. At that time, insurers mandated large increases in product liability insurance premiums, and numerous businesses stated that Federal action was essential to resolving the crisis.

The primary allegations concerning the existence and magnitude of this crisis proved vastly exaggerated. In 1976, the Federal Government created a Federal Interagency Task Force on Product Liability—hereinafter the task force—to examine the problem.

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 unreasonable cost to 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 mangement practices of the companies which 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 losses.

At the point that competition is severe and that losses are too high, insures 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 investment. Basically, companies 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 net gains over the next 5 years. The property-casualty industry will enjoy "an expected net gain before 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 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 chasing 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, expanded tort doctrines, the 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 most cases were not excessive:

> It appears safe to conclude that for most large manufacturing firms, product liability costs—including the cost of defending litigations and certain product liability prevention 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 since then reinforces 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 $3,592.

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 averaged only $5,110.

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 jurisdictions studied, the number of tort lawsuits filed per capita since 1959 has remained constant and the median jury verdict has remained the same after adjustments for inflation.

The only study on the issue of post-jury verdict reduction revealed that half of the final punitive damage payments made to plaintiffs were approximately 45 percent of 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.

From 1965 through 1979, median awards doubled in Cook County, IL, from $59,000 to $120,000, whereas in San Francisco, CA, there was little 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 amount 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—up an astounding 285 percent over the previous year's average. 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 award 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 trial which often occurs. According to a recent press account, "they don't reflect reality very well."

A 1986 study of all civil jury trials over 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—5 out of every 6 cases—resulted in a verdict either 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 roughly approximated the increase in total population with all tort filings increasing 9 percent and the population increasing 8 percent for 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.

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 asbestosis cases. Consumer Reports believes the large number of asbestos-related cases is not surprising and believes the cases are not frivolous:

> Asbestosis and asbestos-induced cancer result from many years of exposure; only in recent years have the consequences of long-term exposure become evident in debilitating illness and death. In Consumer Union's opinion, people who are suffering from asbestosis or asbestos-induced cancer (and the families of those who have died) deserve compensation.

Finally, according to a study published in 1985, a 16-State study covering 100 years found little evidence of a consistently upward trend in tort lawsuits and the University of Wisconsin civil litigation research project found 50 percent of the cases involved disputes 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:

> [T]he overall conclusion drawn here is that although specific tort doctrines adopted by some courts can be 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.

More recently, the same professor again reached the same conclusion regarding the relationship of tort doctrines and the current insurance crisis:

> There is no reason to believe that the tort system contributed at all to the decrease 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 slightest exists between expansions or contractions of tort doctrine during those periods and the level of premiums. The same may be said with respect to 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 hearings before State legislatures, insurance industry representatives have declined to promise that the tort reform measures they advocate would result in lower insurance premiums. In Washington, a number of companies 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 liabilty legislation is that legal fees paid to plaintiffs' attorneys are too high. Typically, lawyers who accept product liability cases work 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 system allows injured plaintiffs who are not wealthy to obtain a lawyer. At the same time, the system acts as 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 costs of litigation. Any problem with the 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 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 to a plaintiff, the plaintiff pays an average contingent fee of 33 cents. While I do not advocate wage and price controls, those who advocate reform of the system should be focusing on the higher defense costs. An imbalance would be created if the fees of lawyers for injured consumers were controlled, while not limiting the defense lawyers' costs. In that case, the only effect would be to undermine our legal system's guaranteed right of access to justice.

OVERVIEW OF THE CURRENT SYSTEM

What little information we do have about the current product liability system provides an interesting perspective: the system is generally fair and workable. According to one study, approximately 73 percent of the 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 a court verdict, and in those cases, fewer than 25 percent of defendants are found liable. Thus, 96.5 percent of product liability claims are resolved before the verdict and more than 75 percent of plaintiffs lose in cases in which a 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 individual jurisdictions 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 my own 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 rested primarily on their consideration of whether the plaintiff 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 impaneled 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 conclude, some of the time, that the defective products involved and the injuries sustained require compensation. And it is 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 which enforces this ideal, we can proudly state that ours is the safest nation on the planet.

CONCLUSION

The U.S. Senate should not pass legislation to codify product liability tort law without any comprehensive data to demonstrate, first, that such legislation is necessary, and second, that such legislation will work.

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, then 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 tort 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 3 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.

□ 1340

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. REHNQUIST 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, but I have been studying it and following it with great care going back to the hearings this year, the prior hearings when Justice Rehnquist initially went on the Court, and with 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 hearing 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 others that have been troubling 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 party as I think that recitation itself indicates. But 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 falls 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, which is a lifetime appointment, 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 240 million 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 look across the length and breadth of our country to find someone of such extraordinary stature and respect and all the other qualities that you would want to see in a top government official that when that person is named and confirmed and goes to serve in that capacity there is an outpouring of support and good feeling and good will across the country. It should never be less than that, in my view, for a position as important as this one.

But I do not see that kind of feeling in the country, and I understand why. I am not able to feel it within myself because, as I say, I find this to be a sad and disappointing choice. It is a flawed choice, flawed in several ways, and one that I think will damage our country in a number of ways over a period of many years in the future.

Probably the cornerstones of our democracy when all is said and done is the idea that as citizens we make the laws. We are a self-government, a citizen government, and once we have made the laws which govern us, we will have equal justice when anything arises that applies those laws to us; that if a matter arises which takes us into court or in some way involves us with the law, our standing under the the law will be complete in terms of what the Constitution provides and it will be equal to that of any other person in our society. So that on the one hand, we have the ability as participating citizens to build the law and, on the other hand, we have the certain guarantee that we will be measured equally by those laws.

One of the defects in the way our system actually works is that very often under our legal process you get the justice you can pay for. By that I mean if you are well situated financially so that you can hire the best lawyers and have them go to work for you and they are competent and they go in and they work for you, you can get a measure of justice that is not available in the same degree to someone else who may not have the knowledge of the law or would not have the money to be able to hire the top legal talent in the country to defend them in a legal proceeding.

So the effect of the working of the law in this country is very uneven and unequal because of the nature of how the system works, in how you get and pay for legal counsel. That is why at the Federal level we have set up the Office of Legal Services to try to make sure that people who do not have the money receive some measure of representation so they get equal access to the law and get a fair judgment. That does not work very well. It works very imperfectly, and many people do not get competent and adequate representation in a legal sense.

□ 1350

I am deeply troubled about that. I think that in a society where 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 across the country.

For example, with people of very modest financial circumstances and maybe limited education, who do not understand the law and cannot afford to hire expensive legal talent, when a legal issue arises in their lives, I wonder how they feel about the degree to which they are actually able to have equal justice under law. I think they feel that it is not available to them, because, as a practical matter, most often it is not. So I think they have a different view of how they fit into our society. Unless we make a concerted effort to bring them in, in a full way, to put them on an equal standing with everyone else, there 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 stake they feel in our society. I do not know how much stake 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 it might lead to a state of mind where people would figure that 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 want to make my statement, and then I will be happy to yield for any

number of points the Senator wishes to make at the end.

The PRESIDING OFFICER. The Senator from Michigan has the floor.

Mr. THURMOND addressed the Chair.

Mr. RIEGLE. Mr. President, I do not want to be disrespectful, but I do not want to yield the floor.

Mr. THURMOND. I just want Senator HATCH to take my place.

The PRESIDING OFFICER (Mr. DURENBERGER). The Senator from Michigan.

Mr. RIEGLE. To engage in a voter intimidation program, to try to interject yourself between a person who is going to vote and their ability to vote, to operate in that fashion is about the most undemocratic act I can imagine—especially when it is carried out against people who are most often found in minority circumstances in our society, whether they be Hispanic people, black people, or other people who might otherwise have some large measure of difficulty with the voting process, or particularly with language problems or may be feeling uncomfortable about being able to go in and be understood and get their ballot and vote.

For anybody to inject themselves in the middle and try to discourage somebody from voting, to try to frighten somebody away from the voting place—what an act of arrogance that is. What an act of personal arrogance that is. Not only to mastermind a plan like that, but then to go out to the voting places, as a number of eyewitnesses have reported, and to personally inject yourself in that process, with the purpose in mind of frightening somebody away from the voting place, so that they are unable to vote and to cast the judgment they have reached—what level of arrogance does that require, for someone to feel that their notion of what the outcome of the election to be is so certain and so pure that they feel empowered to come to the voting place and try to discourage and stop the voting participation of another citizen? I have a very hard time even understanding how that kind of mind works.

Justice Rehnquist was involved actively in that kind of voter intimidation. He helped design the plan. He went to the voting place. He gives evasive and unclear answers as to his direct personal involvement in confronting voters, but we have a number of witnesses of stature who have come before us to testify that in fact he not only served as a mastermind, which he acknowledges, in terms of putting together a voter intimidation program, but also was directly involved, himself, in confronting voters in an effort to frighten them away from the voting place.

That is not an isolated incident. 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 it has been cited several times. I will not read it again into the RECORD. The language of that memo, prepared for Justice Jackson, which Justice Jackson's long-time personal secretary says did not reflect the views of Justice Jackson, which Justice Rehnquist said was the case, but was in fact Rehnquist's own views—that memo says in effect that it is all right to stay with school segregation; it is all right to basically separate our educational facilities on the basis of race.

I am deeply troubled that, first of all, he could have that view, could generate that view. I am troubled about his explanation about it after the fact. I do not find his explanation believable.

And that is just one of many instances where I think his testimony just is not believable. It just 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 recollection and you come forward much later in time on an area where he was in charge of the effort and 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 Watergate language of "I have no recollection," which is the way if you want to withhold something, with conscious knowledge to avoid a perjury charge, those are the words you have to use. Those are the words you use. You do not 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 the chance 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.

I am deeply troubled about the fact that he was involved in that activity.

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 those circumstances. 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 that. I just do not believe that is the case.

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 here 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.

So, one is left, I think, by looking at this record over the long period of time of saying that you cannot convince yourself—I am not able to convince myself—that he believes in one standard of justice equally applied for all citizens in this country. And if he becomes the Chief Justice and takes on that enormously elevated position of power, influence, responsibility, and symbolism, and the symbolic message

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 about it, that it was a contradiction, 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 someone there 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 nothing in his 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 1 of 100, the finest ones that we can find to come in and be the Chief Justice of the Supreme Court and administer the Court and in a sense become the most powerful symbol of what justice in this country means to rank and file citizens.

He is not even close 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 country, with justification, 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 th 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 decisionmaking is to the contrary, that there will not be one nice even level standard out there but in fact we will have 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 in that. 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 and a record that I think 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 make the point that 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 United States 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 position, 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 kind of 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 that 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 from the beginning of his announced nomination 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 that had the Democrats 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, intemperate remarks which have been made, some of the inaccurate remarks that have 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.

How much 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 unthrown. They have done everything they can to destroy this man's reputation. And I think they have done it in some of the most heinous of ways.

Let me just move to one aspect of it. Critics of Justice Rehnquist—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 in Professor Hazard's letter has no basis in the law or the ethics standards as they existed in 1972.

In earlier remarks, I have examined 28 H.S.C. 455 which would have required Justice Rehnquist to recuse himself if he had been "of counsel * * * a material witness * * * or had a substantial interest." He had no financial interest, was not involved even in an advisory role in the preparation of the Laird case while at the Department of Justice, and, of course, was not a material witness in the case. He did not commit any legal violation, nor did he participate directly.

Professor Hazard, however, sugests 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.

Or a personal knowledge of disputed evidentiary facts . . .

No evidence of that here.

(B) He served as a lawyer in the matter in controversy . . .

No evidence of that here.

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 treat him as an ordinary human being? Why can they not treat 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 adviser, he recused himself. Hazard says that the Justice 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" and declares that "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 comes 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 evidentiary 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 failing 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 as being the equivalent of relationship to the case itself. It is not in the ethics standard that involvement with policymaking or, to use the overly broad and vague terms of Professor Hazard, with "the transaction" requires disqualification. The ethics code speaks of the "proceeding," meaning in this context the judicial proceeding or the case, it does not speak of a broader notion of "transactions."

In fact, Mr. Hazard's statement of the law in his letter is clearly incomplete in this exact question. The professor quotes the following passage from a law review article written in 1970:

Justices disqualify in Government cases which they have been directly involved in some fashion in the particular matter, and not otherwise.

Professor Hazard omits, however, a later sentence from the same paragraph of that article. Let me read that,

More important, Justices who have come from the Government do not disqualify merely because the particular matter involves a policy which, when in the Government, they may have helped to form.

This omission is particularly puzzling when Professor Hazard himself states that this article "correctly summarizes the law of disqualification as it then stood." In fact, I think this omission has the appearance of an ethical violation on the part of Professor Hazard. It may be an ethical violation 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 those that some might feel are not fully rebutted, if they give this Justice the benefit of the doubt in the slightest sense, will 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 floor 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 "Rehnquisition" 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 15 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 admit he 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 behalf whether 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 time is under control of specified Senators. And the Senator 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 upon alone in a quite place and time, away from the political arena.

This appeared to me to be counsel. I understook 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 in policy 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 commensensical accommodation to the system of checks and balances built into our constitutional arrangements which keep us ever aware of the peril of stalemate.

With 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 elemental duty was, if anything, painfully clear to the fourth Congress which rejected George Washington's second nominee for Chief Justice. (This position which is mentioned in article 1, section 3 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 ratio 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 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 Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

What 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 extended 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 for equality gained attention and adherence. 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. Other democracies have followed much 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 ensured 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 advance would be 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. Mr. President, I ask for 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 seek out consensus in the manner a Chief Justice must do. Even so it may not be gainsaid that significant groups within our society see the matter otherwise. They see principles put in jeopardy, matters 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 my closest scrutiny and my most careful consideration. I have cast my vote in the Judiciary Committee against him. I did so with some personal 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 views, 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——

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.

The PRESIDING OFFICER. Is there objection to the request?

Mr. THURMOND. Mr. President, I reserve the right to object. I would not give an answer until the majority leader has come to the floor and approved it.

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 back 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 Seantor from Massachusetts.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KERRY. Mr. President, I ask unanimous consent that I be permitted to make an inquiry which will not come out of our time.

The PRESIDING OFFICER. Is there objection to the request?

Mr. THURMOND. Mr. President, each side has so many minutes; they can use theirs, we can use ours.

Mr. KERRY. Mr. President, I would like to make an inquiry about time.

Mr. THURMOND. The Senator can make it on their time, if he wishes.

The PRESIDING OFFICER. An objection is heard. The Senator from Massachusetts is recognized.

Mr. KERRY. Mr. President, it is my understanding we are still having the cloture vote at 3 o'clock; is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. BIDEN. The Senator is correct.

Mr. KERRY. Mr. President, I will yield my time back 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 Senator from Connecticut I would yield him 3 minutes.

Mr. DODD. I thank the Senator for yielding.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I would hope that there may be an extension 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 votes are historic. I think we probably use those words describing matters that come before 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 disagree, 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. 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 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 need not get to the question 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.

Mr. DODD. Mr. President, if I may——

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, with regard to Justice Rehnquist, I feel clearly on the issue of technical skills, as has been said over and over again, he passes muster on that point. Mr. President, I see that my time has expired. I will finish my remarks on this nomination after the vote on the cloture petition is taken.

The PRESIDING OFFICER. The Senator's time has expired. Who yields time?

Mr. EXON. Mr. President, a point of inquiry?

The PRESIDING OFFICER. Who yields for the purpose of an inquiry by the Senator from Nebraska?

Mr. BIDEN. If it is less than 30 seconds, I yield.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. I yield for the purpose of an inquiry for 30 seconds.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. EXON. Mr. President, one of the problems with the Senate is that when we have blacks and whites we cannot get time for those of us who have not made up our minds. You cannot get any time unless you are for or against. I think that is unfortunate. I would like to ask unanimous consent that I be allowed to proceed for 3 minutes and no more without the time being charged to either side.

The PRESIDING OFFICER. Is there objection to the request?

Mr. THURMOND. Mr. President, personally, I would like to accommodate all Senators. We are under restrictive circumstances. I have conferred with the leader. I will have to object.

The PRESIDING OFFICER. An objection is heard.

Mr. THURMOND. They knew how much time they had, we knew how much time we had, and we will have to restrict ours and they will have to restrict theirs.

Mr. EXON. I would like to ask the distinguished chairman of the committee——

The PRESIDING OFFICER. Who yields time to the Senator from Nebraska? Who yields time?

Mr. BIDEN addressed the Chair.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. How much time remains under the control of the Senator from Delaware?

The PRESIDING OFFICER. One minute, forty seconds.

Mr. BIDEN. Mr. President, in a moment of magnanimity, I will yield to the man who is probably going to vote the other way, but I yield to my colleague from Nebraska since I have no time to say anything intelligent anyway.

Mr. EXON. I thank my friend for the consideration. I wish it was shared by the other side, which this Senator was probably going to vote for until today. I am going to vote in support of this side of the aisle on this matter. I have been inclined to vote for this man all the way along but I have been listening to the debate. I do not like the ramrodding. I do not like the fact that those of us who have not thoroughly made up our minds cannot have a say. The reason I sought time, Mr. President, to explain my position a little further was that I do not believe we have fully explored the matter of credibility and reliability of the nominee.

I do not know how I am going to vote, up or down, when this comes up. But I have some concerns and considerations that I would like to bring to the Senate when I have time and when we can get off of this kick that right or wrong, black or white, you do not get any time. It is wrong. And I am somewhat taken aback by the distinguished chairman of the Judiciary Committee, the main ramrodder, who would not even allow me the courtesy of 3 minutes. I thank my friend from Delaware.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. THURMOND. Mr. President, in response to the distinguished Senator from Nebraska, my good friend, I want to say we have already given you all 10 minutes, 10½ minutes of our time.

Mr. EXON. You have not given me any of your time and I want the record to so recognize. When you say we, because I am a Democrat you assume I am "we." I am a Member of the U.S. Senate, and I respectfully remind the President pro tempore of that fact.

Mr. THURMOND. Mr. President, I just want to say that the agreement was entered into; the time would be equally divided, and that is the way it has been handled. The leader of the Democrats, my good friend, the ranking member here, was handling their time. If the Senator from Nebraska wanted time, he could have gotten it from him, I presume.

Mr. President, I want to say in the beginning there has been more distortion, and more assertions made about this nomination without foundation than any nomination I have handled in the time I have been in the Senate. Who is this man we are talking about? He is a man who served in private practice, he is a man who served as a clerk to a Supreme Court Justice, he is a man who was first undergraduate in law school, he is a man who has been on the Supreme Court now for how long? Fifteen years. Fifteen years on the Supreme Court.

□ 1450

Mr. President, what do some of the people say who have investigated this man carefully?

The American Bar Association's Standing Committee on the Federal Judiciary found Justice Rehnquist to be well qualified and so informed the Judiciary Committee. That is the highest rating the American Bar can give. They rarely give the highest rating. They generally give a middle rating. They gave this man the highest rating they could, and it was unanimous. It was not a divided opinion. It was a unanimous finding in granting the highest evaluation possible.

The ABA committee interviewed all the current Associate Justices of the Supreme Court. How did they feel, his associates? They are not all Republicans. Some are liberal, way out in left field. They all said that they thought this man would be fair and would make a good Chief Justice. That is what the members of the Supreme Court said, the people he has sat with for 15 years.

What about Federal and State judges? They interviewed a lot of Federal and State judges. They interviewed 180 Federal and State judges. What did they say? They said he is well qualified, and they endorsed him. They should know. They describe him as a true scholar, unbelievably brilliant, a very capable individual in every respect. He enjoys the respect and esteem of his colleagues on the Court.

What about some practicing attorneys, those who have tried cases before the Supreme Court, those who are actively practicing? The ABA committee interviewed approximately 65 practicing attorneys throughout the United States—not in one area, but all over. These attorneys, including some who disagree with him politically and philosophically, spoke of warm admiration for him and described him as a very talented man, a very bright and able man, always well prepared, one who brings out the best in people and will facilitate the work of the Court. That is what the practicing attorneys said about him.

Some say we ought to listen to the deans and the teachers and the professors. So they went to them and interviewed 50 deans and law school faculty members. What did they say about him? They said that his legal analysis and writing ability were of the highest quality. They approved him; they recommended him.

So, Mr. President, here you have the American Bar, which did a very careful investigation. You have the Supreme Court Justices, his colleagues on the Court. One hundred eighty Federal and State judges were interviewed. Very capable lawyers all over the country and deans and faculty members were interviewed.

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 here that is 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 the President's nominee for Chief Justice should not be rejected. He has a public record of 15 years on the Court, and I think his record 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 problems in a low-keyed, 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 American life. 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. THURMOND. 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 its will.

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:

SEPTEMBER 12, 1986.

HON. STROM THURMOND,
Chairman, Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: News articles appearing in The Wall Street Journal on September 10 headlined "New Questions Raised About Rehnquist's Role in Army Surveillance of Protestors" and The Washington Post of September 11 headlined "Rehnquist Role in Army Spy Case Called Unethical" greatly preturb me. These newspaper articles wrongly charge Justice Rehnquist with developing an Army domestic surveillance program of antiwar protestors while working for the Justice Department during the Nixon Administration.

As the Chief of Plans and Operations for the Military District of Washington during the period February 1964 to August 1966 and the Chief of Plans and Operations, Office Chief of Military History, Department of the Army (1966–May 1968), I have personal knowledge that Army surveillance activities were not only planned but were operational, i.e., in use, against so called war protestors and additionally, so called "civil rights activists" prior to the Nixon Administration. Such surveillance was conducted specifically during the period 1964–1968 by a Counter-Intelligence-Corps (C. I. C.) Battalion assigned to the Washington area. Specific surveillance of so called "civil rights activists" by the C. I. C. unit was being conducted prior to my assignment to the Military District of Washington and apparently (from reports submitted to me) was initiated

during Martin Luther King's "March on Washington" in the fall of 1963. At any rate the Army C. I. C. unit was actively conducting widespread surveillance of "civil rights activists" in the Washington area during the 1964-66 period and when the so called war protestors commenced their activities those activities were also put under surveillance by the Army C. I. C. unit in the Washington area. The Federal Bureau of Investigation supplied the Military District of Washington and the so called "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 rioting 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 Chief of Military History in the fall of 1966 until I retired from the Army in May of 1968, I maintained close contact with my Army friends at the Military District of Washington; my observation was that the surveillance mission continued at least until my retirement. My statement in this matter can easily be documented from Army records.

I trust this information might be useful in bringing out the real truth in Justice Rehnquist's confirmation proceedings.

Respectfully,

THOMAS E. ADAMS, Jr.,
LTC U.S. Army Ret.

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.

There 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 reasons for 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, of the proper role of the Supreme Court in the governing of this Republic, and inevitably, of the activities of the nominee himself, Justice Abe Fortas. This discussion has produced three sound and highly persuasive reasons why this nomination should not be confirmed: First, the positions taken by Justice Fortas since he went on the Supreme Court as Associate Justice have reflected a view to the Constitution insufficiently rooted to the Constitution as it is written; second, the conditional wording of Chief Justice Warren's resignation, in which the Senate is told, in effect, confirm this nominee, or the Chief Justice remains at his post, is indicative of a desire by the Chief Justice to influence the choice of his successor in an extraconstitutional manner; and third, Justice Fortas himself has involved himself in extrajudicial activities which raise doubts as to his desire to maintain that degree of isolation and impartiality required of a Chief Justice.

With regard to the decisions in which Justice Fortas has participated, four categories of cases are of particular concern: Criminal procedure, pornography, State-Federal relations, and subversive activities.

CRIMINAL PROCEDURE

Crime and lawlessness have become of utmost concern to the vast majority of Americans, and understandably so. The maintenance of public order and the security of person and property which accompany this order is necessarily the first requirement of government. The Supreme Court's decsion in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which freed a confessed rapist and completed the destruction of the voluntary confession in criminal cases, unfortunately typifies the Court's approach to criminal procedure. Justice Fortas sided with the majority in this 5-to-4 decision. Justice White, in his strong dissent to the *Miranda* ruling, stated:

In some unknown number of cases the Court's rule will return a killer, a rapist, or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him.

PORNOGRAPHY

A society which refuses to defend its standards cannot preserve them. *Redrup* v. *New York*, 386 U.S. 767 (1967), in which Justice Fortas concurred, set the stage for massive reversals of obscenity convictions. Justice Fortas has voted to reverse obscenity convictions in 35 of 38 cases since he became an Associate Justice. Testimony before the Judiciary Committee made clear that these decisions have opened the floodgates for pornographic material of all kinds and created chaos in the efforts to enforce laws against such material.

STATE-FEDERAL RELATIONS

With regard to State-Federal relations, Justice Fortas has shown a strong distrust of the States. In his dissent in *Cardona* v. *Power*, 384 U.S. 672 (1966), he concluded that the 14th amendment left New York powerless to require literacy in English as a prerequisite to voting. In *Katzenbach* v. *Morgan*, 348 U.S. 641 (1966), he agreed with a majority that Congress could prohibit New York from enacting such a voting requirement. In *Brown* v. *Louisiana*, 383 U.S. 131 (1966) he wrote the prevailing opinion holding Louisiana powerless to punish demonstrators who refused to leave a public library.

In *Harper* v. *Board of Elections*, 383 U.S. 663 (1966), Justice Fortas agreed with the majority that Virginia was powerless to enact a poll tax as a voting requirement. Regardless of one's view of the poll tax, and as Governor of South Carolina, I sponsored legislation to repeal it in our State, Justice Black's dissent in this case should be noted:

It seems to me that this is an attack not only on the great value of our Constitution itself, but also on the concept of a written constitution which is to survive through the years as originally written unless through the amendment process which the framers wisely provided.

SUBVERSIVE ACTIVITIES

Another category of cases in which Justice Fortas' record should be noted concerns the internal security of this Nation. In *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965), Justice Fortas voted with the majority to overthrow a Federal requirement that Communist Party members register with the Subversive Activities Control Board. In *Keyishian* v. *New York Board of Regents*, 385 U.S. 589 (1967), Justice Fortas concurred in a 5-to-4 decision which struck down the New York loyalty oath prohibiting Communists from teaching in the public schools. Justice Fortas also sided with the majority in *United States* v. *Robel*, 389 U.S. 258 (1967), to overthrow a law of Congress prohibiting Communists from working in defense plants. Justice Fortas voted with the majority again in *DeGregory* v. *New Hampshire*, 383 U.S. 824 (1967), to deny the State of New Hampshire the power to investigate Communist activities in that State. Considering the wealth of knowledge Congress has accumulated on the Communist apparatus, distinguishing it from a mere political association, I find these decisions indefensible.

Some have objected that prior Supreme Court decisions and the role of Justice Fortas in these decisions have no proper part in these deliberations. Let us recall these words attributed to Abraham Lincoln:

The candid citizen must confess that if the policy of government upon vital questions is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own selves, having to that extent practically resigned their government into the hands of that eminent tribunal.

A second question to be considered is the curious matter in which Chief Justice Warren tendered his resignation to the President. In our system of checks and balances, the Supreme Court is appointed by the President with the advice and consent of the Senate. There is no provision for the members of the Court to participate in this process. Chief Justice Warren, by resigning effective upon the qualification of his successor, has created a situation in which we are not called upon to fill an existing vacancy: If we refuse to confirm this appointment, Chief Justice Warren will continue to serve. It is unclear just how long he intends to serve or whether a new President in January may simply submit another name in the absence of any further action from the Chief Justice. If Justice Fortas is confirmed, the Senate will have also acquiesced in setting a precedent by which sitting Justices attempt to perpetuate their philosophies by influencing the choice of their successors. Such a precedent would be unwise and could accelerate the growing influence of the Supreme Court in American government.

Finally, we must consider certain nonjudicial activities of Justice Fortas which are relevant to this nomination. It is well known that Justice Fortas, prior to his elevation to the Supreme Court in 1965, was a man of great influence in the councils of Government here in Washington. His friendships were numerous, uncommonly influential, and well placed both in and out of Government. It is only natural that he acquired a reputation for an ability to influence the course of events in Government. There is, of course, nothing necessarily wrong in such an arrangement. His counsel was apparently sought, and freely given. Involvement in all branches of Government became a habit with Mr. Fortas. When he became a Supreme Court Justice, he did not break the habit.

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, which came from credible sources and was not refuted, indicates that Justice Fortas participated in the drafting of President Johnson's state of the Union message 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. Tennery, 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 firm. As far as can be determined, none of the five individuals had any prior association with American University. Apparently the five are friends of Mr. Porter and/or Justice Fortas. All of the contributions have extensive business interests and are directors of large corporations, any of which could have cases before the Supreme Court. One is chairman of the New York Stock Exchange. According to press reports, one of the contributor's son has a conviction for mail fraud on appeal before the U.S. court of appeals.

The role of a Supreme Court Justice is unique in government. A Member of Congress for example, is an advocate for the people and cannot remain indifferent to the outcome of causes which he believes are in the best interest of the Nation. A Supreme Court Justice cannot allow himself to appear to be active in public affairs. He cannot involve himself in situations which could compromise or constrict his work on the Court. The price of judicial detachment is high in human terms; but the dignity and authority and reserve of the Court come from the stature of those who are willing to pay the price.

For all of the reasons outlined above, I believe the Judiciary Committee should not have reported this nomination to the Senate floor. The U.S. Senate should refuse to concur in this appointment.

Mr. THURMOND. Mr. President, I yield the remainder of our time to the able majority leader, Senator DOLE.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. DOLE. Mr. President, we are about to have a vote on cloture, to end the debate on the nomination, and I hope it is overwhelming.

I know there are some who have very strong differences; and I indicate, and I think the Record will reflect, that there has been an effort by the distinguished chairman of the committee, Senator THURMOND, and by the leader to keep this as free from partisanship as possible.

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 on 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 we proceed to vote on the nomination. I know this is important. I know that we should not let other important work interfere with this nomination. We do have a lot of work to do, but we have tried to temper any effort to rush to judgment, with parts of at least 4 or 5 days on the Rehnquist nomination.

□ 1500

I believe for 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.

I urge my colleagues—those who are opposed, all right—I urge all who can to vote for the cloture motion. Let us get on with this nomination and get on with the rest of our work so we can leave here on October 3.

CLOTURE MOTION

The PRESIDING OFFICER. The hour of 3 p.m. having arrived, under the previous order, the clerk will state the motion to invoke cloture.

The legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on the nomination of William H. Rehnquist, of Virginia, to be Chief Justice of the United States.

Bob Dole, Strom Thurmond, Thad Cochran, Chic Hecht, Dan Quayle, James A. McClure, William L. Armstrong, Jesse Helms, Phil Gramm, Mack Mattingly, Jeramiah Denton, Orrin G. Hatch, James Abdnor, Paul Trible, Malcolm Wallop, and Al Simpson.

VOTE

The PRESIDING OFFICER. 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.

The legislative clerk called 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.]

YEAS—68

Abdnor	Gorton	Nickles
Andrews	Gramm	Nunn
Armstrong	Grassley	Packwood
Bentsen	Hatch	Pell
Bingaman	Hatfield	Pressler
Boren	Hawkins	Proxmire
Boschwitz	Hecht	Quayle
Broyhill	Heflin	Roth
Bumpers	Heinz	Rudman
Chafee	Helms	Simpson
Chiles	Hollings	Specter
Cochran	Humphrey	Stafford
Cohen	Kassebaum	Stennis
D'Amato	Kasten	Stevens
Danforth	Laxalt	Symms
DeConcini	Leahy	Thurmond
Denton	Long	Trible
Dole	Lugar	Wallop
Domenici	Mathias	Warner
Durenberger	Mattingly	Weicker
Evans	McClure	Wilson
Ford	McConnell	Zorinsky
Goldwater	Murkowski	

NAYS—31

Baucus	Gore	Metzenbaum
Biden	Harkin	Mitchell
Bradley	Hart	Moynihan
Burdick	Inouye	Pryor
Byrd	Johnston	Riegle
Cranston	Kennedy	Rockefeller
Dixon	Kerry	Sarbanes
Dodd	Lautenberg	Sasser
Eagleton	Levin	Simon
Exon	Matsunaga	
Glenn	Melcher	

NOT VOTING—1

Garn

□ 1520

The PRESIDING OFFICER. On this vote, there are 68 yeas and 31 nays. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

Mr. THURMOND. Mr. President, I move to reconsider the vote.

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

The PRESIDING OFFICER. A motion to reconsider a successful cloture vote is not in order.

Mr. LEAHY addressed the Chair.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, a parliamentary inquiry: What is the situation now?

The PRESIDING OFFICER. Will the Senate be in order now, please?

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 was, I 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 a matter 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 withhold? 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 in 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 working of the Court and an appreciation for the responsibilites of the Chief Justice.

However, there are other, equally important qualities requisite to be 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 assurances 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 our principles of justice. Because of that important role, I 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-to-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 was not only troubled by Justice Rehnquist's decision to sit on that case, but also by the testimony he gave in answer to my questions concerning Laird versus Tatum.

In order to understand Justice Rehnquist's conduct and his testimony before the committee, it is important to review the history of the Army's Domestic Surveillance Program—the program which led to the Laird versus Tatum case.

The Army's Domestic Surveillance Program began during the Johnson administration. It grew more as a result of the FBI's failure to provide accurate intelligence concerning the potential for riots in urban ghettos than from a lack of intelligence concerning antiwar protests.

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 collect intelligence and plan for civil disturbances. Meetings were held to plan for potential incidents, to coordinate the Federal response, and to establish rules for engagement for the use of 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 concern about potential antiwar demonstrations.

In 1969, when President Nixon's team came to Justice, Deputy Attorney General Kleindienst took over command of the working group.

At that time, the Department of the Army sought specific civilian authorization for its role in civil disturbance planning and it sought to limit its role 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 memo 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 memorandum accompanying his 1974 testimony to Senator Ervin, Mr. Jordan wrote the Army had suggested that the term "should" 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 those changes were made at the request of Deputy Attorney General Kleindienst. 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 civilians. That is certainly not my recollection. 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 opponents of reducing 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 refusal of Justice Rehnquist to recuse himself in the Laird care.

Some information about the Army's Domestic Surveillance Program had come out as a result of press 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, MD, headquarters for the Army Intelligence Command.

Public exposure of the program and the Fort Holabird blacklist 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 Government collection and computer storage of information about individual Americans. The focus 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 went on to testify about a central 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 such 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 where there 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 Justice 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. This memorandum describes the Defense Department strategy for dealing with the then upcoming Ervin hearings, and the role of 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 Buzhardt, General Counsel, Department of Defense] negotiations has been to avoid the presence of any military personnel as witnesses at the hearings. Apparently, 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 that the Army had terminated its 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 facts he had previously testified to, but which were hotly 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 discussions of the Army Surveillance Program which went on in the Department of Defense from coming to public light—a position he previously counseled 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 very, very bad mistake? 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 lower courts, 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. His answer was, "I had—if you would consider 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 so many 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—to vote for Justice Rehnquist's confirmation or against it. Yet, as the statements of the Senators during Judiciary Committee consideration of the confirmation demonstrate, even among those who come to the same conclusion on how they should vote, there is no one compelling reason that unites, no agreement 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 Senators, 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 reflect my commitment to this great body, 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 confirmed 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.

□ 1540

Mr. KERRY. Mr. President, I ask unanimous consent that further proceedings under the quorum call be rescinded.

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

Mr. KERRY. Mr. President, there is no doubt that 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 I certainly do not 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 true 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 even than 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 Justices—only 15 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 may make 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 on his fellow Justices 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 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 toward 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 immeasurably 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 he or she in solitary opposition to colleagues on the bench. No, we applaud 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.

□ 1550

I believe 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 a Chief Justice as a builder of consensus on the Court. That is the most 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 our 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 law clerk for Justice Robert H. 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 every time private discrimination raises its admittedly 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 views.

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-

ten makes it clear whose views were being expressed.

The weight of the evidence clearly shows that assertion by Justice Rehnquist is of dubious credibility. It has been contradicted 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 examples 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 of 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 assert that the establishment clause did not require Government neutrality on religious issues. In Cruz versus Beto, he was the only Justice to reject the application of the free exercise clause to imprisoned convicts. He was the only Justice to dissent from a decision in Cleveland versus Loudermill requiring notice and opportunity to be heard before permanent civil service workers can be terminated. He was the only Justice to say that churches can be given discretionary governmental power, in Larkin versus Grendel's Den. He was the only Justice to say that the State can deny medical care to nonresident indigents, in Maricopa Hospital versus Maricopa. He was the only Justice to say that criminal trials can be closed to the public, in Carter versus Kentucky. And he was the only Justice to say, in In Re Primus, that an ACLU lawyer could be disciplined for telling a poor person that the ACLU provides free legal services.

In 80 out of 83 cases in which members of the Court have disagreed about the interpretation or application of a modern civil rights statute, Justice Rehnquist has joined the interpretation or application of the law which is least favorable to minorities, women, the elderly, or the disabled. In the 23 cases involving constitutional claims of sex discrimination which were decided during Justice Rehnquist's tenure, he voted to uphold the challenged statute or practice in 20 out of the 23 cases. In 25 cases involving separation of church and state, Justice Rehnquist voted to uphold the challenged statute completely in 23 cases, and voted to uphold part of the statute in the other 2 cases. In 30 cases involving claims of cruel and unusual punishment, Justice Rehnquist found a violation in none of the cases. The full Court found a constitutional violation in 15 of the 30 cases. And in cases involving challenges by individuals to government action, Justice Rehnquist cast the deciding vote in 120 out of 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 legal ethics. 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. There is no question—many of my colleagues have pointed out, and as the distinguished Senator from Vermont most recently among them pointed out—that Justice Rehnquist had been deeply involved in this case while he was in the Justice Department, and that his participation in the case as a Justice violated both 28 U.S.C. 455, and the ABA code of judicial ethics. This ethical violation has been discussed at length elsewhere, and I will not repeat all of those arguments.

But I think it is fair to say that the fact that this violation of legal ethics by Justice Rehnquist took place while he was a sitting Justice of the Supreme Court makes his conduct even more questionable. I cannot but conclude that he exercised bad judgment or let his personal bias in this case interfere with the fair and impartial administration of justice.

□ 1600

(Mr. BROYHILL assumed the chair.)

Mr. KERRY. Mr. President, the release within the past few days of two additional memos written by Justice Rehnquist, which were not provided to the Senate Judiciary Committee, provide additional insight, I believe, as to why Justice Rehnquist is not a suitable candidate for the position of Chief Justice. These memos were written by Mr. Rehnquist when he served in the Nixon administration as an Assistant Attorney General. One of the memos, written in March 1970, contains a proposal for a constitutional amendment to overturn Supreme Court rulings which brought about desegregation in the South. Its purpose was plainly and simply to halt the desegregation of America's public schools.

The other memo, also written while Mr. Rehnquist served as Assistant Attorney General, expressed his arguments in opposition to the equal rights amendment. No one faults anyone for being opposed to the equal rights amendment for one reason or another, but the memo expresses views which I believe can only be deemed to be reactionary about the role of women in American society. In Mr. Rehnquist's view, women should be second-class citizens in American society—subservient to their husbands, and passive onlookers in the decisionmaking processes of family and society. In his memo, Mr. Rehnquist candidly expresses the view that women should not have equal rights with men in American society. At one point in his memo, he states that—

> 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 in 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 and subsequent to the hearings. It is the opinion of this Senator from the testimony of many credible witnesses that Mr. Rehnquist did participate 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 breaking new ground in upholding the rights of minorities, and President Kennedy and Attorney General Robert Kennedy were bringing the power of the Federal Government 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 fact that we are confirming conceivably a man for the role of Chief Justice who has put before us just totally conflicting testimony and one has to measure the motives of those who said otherwise.

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 Cornell, 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 not the question 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 this trust makes the violation 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 convenants, 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 convenants and they were commonplace at one time—but Justice Rehnquist originally 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 convenant. Justice Rehnquist then admitted at the moment that the letter was about to become 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 the decisions themselves, they paint the picture, I believe, of a man who is at least insensitive to the rights of women, blacks, Jews, the handicapped, and other minority groups. They convey the picture of a man whose mind is not open and whose biases lead him to twist legal precedents and constitutional principles in order to reach a preordained result. And they paint 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 they paint the picture of a man whose own credibility as he were to perhaps assume the responsibility of the most important position for reenforcing credibility in our system is in doubt.

These, Mr. President, are not the qualities that this Senator wants to confirm in a Chief Justice of the United States.

I believe that the U.S. Senate should be more than a rubberstamp for the nominations of any President. We obviously have an obligation to the American people, to ourselves, to our system of justice to search our consciences and to determine whether a nominee for this office meets the high standards of ethics, integrity, judgment, and commitment to the constitutional principles which a Chief Justice should embody.

Above the portals to the Supreme Court, Mr. President, are written the words "Equal Justice Under Law," equal justice under the law.

It was only 10 years ago or so that this Senator began to practice law as an attorney and I had the privilege of serving for 5 years as a prosecutor and for 3 years as a private attorney. I know the feelings that I had as a law student as well as a fledgling attorney as I looked at the Supreme Court of the United States before which I am privileged to say I am permitted to appear, and I believe, Mr. President, that as I think about walking under those portals and about the meaning of those words "Equal Justice Under Law" the record of the cases decided, the record regarding the lack of ability to be able to bring about the consensus of a court to make those words 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 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 clearly this 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.

□ 1610

The PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, I first want to commend the Senator from Massachusetts, Mr. KERRY. I think he has given a very important statement, one that I might presumptuously say he will 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, it is 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. 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. 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, coequal 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 who could not 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 be entrusted 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 office of 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 must be entirely 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 responsbility, and fidelity to law. That person must have demonstrated exceptional legal ability and sound judgment. And finally, the Senate must consider how the nominee would lead the Court, and how such leadership might affect the fundamental constitutional principles upon which our Government is based.

INTEGRITY OF THE NOMINEE

In my judgment, Justice Rehnquist 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 numerous 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.

□ 1620

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.

NOMINEE'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 in good conscience 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 segregation in Brown versus Board of Education to ordering President Nixon to turn over the Watergate tapes.

Based on his record as an Associate Justice, I fear that Justice Rehnquist will be more likely to divide the Court than to unite the Nation.

Justice Rehnquist has dissented frequently during his tenure on the Court. Every Justice has the right and, indeed, many argue the responsibility, to dissent when the Court adopts a position with which that Justice disagrees.

However, Justice Rehnquist has repeatedly stood alone in 8-1 decisions on cases involving vital issues affecting constitutional rights and personal freedoms.

His record raises deep doubts about his ability to rally the Court and unify the Nation in times of crisis and uncertainty.

CONCLUSION

The framers of the Constitution created the Federal judiciary to protect the integrity of the Constitution, and to ensure that individual freedoms will be protected. That is after all what the Constitution is all about under our constitutional form of government—to assure that individual freedoms are protected. For as Alexander Hamilton said in Federalist Paper 78, without such a judiciary, "all reservations of particular rights or privileges would amount to nothing."

The Senate was not meant to be a rubberstamp. The advice and consent clause gives the Senate great power. Senators must ensure that members of the judiciary are worthy of the people's trust and confidence.

In fact, I believe that Senators should look more deeply into the history of the writing of the Constitution because when they do they will see that the U.S. Senate was meant to be an equal partner with the President in the selection of nominees to the Supreme Court. The Senate was not meant to be a rubberstamp of the President's nominees. The Senate was not meant to give undue deference to the President's choice. In fact, in earlier drafts of the Constitution, it was the Senate that was going to decide who the members of the Court would be—not the President, but the Senate. In later drafts it was determined that the President should appoint with the advice and consent of the Senate.

It does not make sense for one branch of the Government to pay virtually no attention to the second when deciding who is to serve in the third. That does not make sense. If we have three coequal branches of Government, the U.S. Congress must have an equal role along with the President in determining who should be on the U.S. Supreme Court.

I submit very strongly that the U.S. Senate has as great an obligation as

the President to make sure that the right person is on that Court. This is particularly true for the Chief Justice, who like the rest of the Court is appointed for life: not elected, but appointed for life.

I suggest, Mr. President, when Senators look deeply into the history of this nominee, and look into their own consciences and ask themselves whether they in good conscience feel this man should be appointed for life to be Chief Justice of the United States, in the privacy of their own conscience, they have to answer that question regrettably and sadly and profoundly.

I also submit that if he is confirmed, that this vote will haunt this body because this vote will be one of the most important votes that Senators will cast during this decade. When this Court decides constitutional issues, civil rights, civil liberties, search and seizure, and other constitutional provisions which are so near and dear to America's freedoms; when that Court decides against Americans' personal freedoms; Senators are going to go back and wonder why they voted to confirm this man.

In conclusion, Mr. President, I ask all of us, all of us in this body, who took this oath of office that we swear to as profoundly as we humanly can; to ask ourselves what is right here and cast the appropriate vote. Mindful of my constitutional duty and my oath of office, I cannot in good conscience support the confirmation of the nominee.

Mr. President, I yield the floor.

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

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

The Senator from Connecticut is recognized.

Mr. DODD. Mr. President, prior to the vote on cloture, I did not get a full opportunity to express my views on this nomination. I would like to take these few minutes this afternoon to share with my colleagues and others the rationale underlying the position I take on 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 to it that constitutional responsibility is fulfilled as to every nomination which is presented to us.

There is no more significant vote, short of an actual vote on a constitutional amendment, than on nominations to the Federal judiciary. Within that context, the most important nominations that we give our advice and consent on are, of course, appointments to the Supreme Court of the United States. And further, within that 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." Certainly, 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 Justice, 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. The votes we cast this 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 since President Reagan announced the nomination of Mr. Justice Rehnquist to be Chief Justice, I have monitored, as I know my colleagues have, with keen interest the very lengthy and thorough confirmation hearings; I have listened intently to the debate here on the floor over the last several days and to the various points that my colleagues have made—both pro and against—this nomination; and I have sought out and read with eagerness numerous press and constituent accounts of the nominee and his record. I began that process, Mr. President, with an open mind, one harboring neither a hidden proclivity to oppose the nominee simply because he is a conservative jurist, nor a presumption that he should be rubberstamped by me or the Senate simply because he is the President's choice or a sitting member of the U.S. Supreme Court.

□ 1630

Article II of the Constitution vests in the Senate the privilege—and the solemn duty—to assess the qualifications of each judicial nominee. While the framers unquestionably intended that the Senate take an active role in the confirmation process, the Constitution nowhere delineates those factors against which each Senator should judge the fitness of a judicial nominee to serve his or her lifetime on the Federal bench. As with other crucial decisions we are called upon to make in this arena, each Senator must, in my view, begin and end his or her examination of the nominee with one overriding question: Is confirmation of this nominee in the best interests of the United States as a whole?

Answering this question in the affirmative first requires that each Senator satisfy himself or herself that the nominee possesses the excellent technical and legal skills which we must demand of all Federal judges. If the nominee lacks those skills, our examination need proceed no further, and we are duty bound to reject the nominee.

Our next mission is to ensure that the nominee is of the highest character and free from any conflicts of interest. The nominee's testimony before the Judiciary Committee—what he or she said or failed to say—becomes critical in this regard.

Finally, we must vigorously examine the nominee to see whether he or she is capable of and committed to upholding the Constitution of the United States. Under this final test, we must focus on two critical elements, both of which require that we examine, to a certain extent, the nominee's personal ideological views on a range of substantive issues.

First, we examine the nominee's judicial temperament. As to this element, we look to see whether the nominee is so wedded to his or her views on controversial issues—be they termed "prolife," "anticapital punishment," "progun control," or the like—that he or she is simply not capable of deciding cases fairly on the basis of the facts as presented and the law as previously decided.

Second, not only must we examine the nominee's temperament, but we must take a reading of the nominee's temperature as well. It is under this crucial test that we look to see how committed the nominee is to carrying out the fundamental constitutional principle upon which our Nation has been built, namely, the guarantee of liberty and equal justice for all. In other words, as to civil rights, is the nominee on fire, icy cold, or merely lukewarm?

It is up to each Senator to decide for himself or herself at what point the nominee's views become so contrary to

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 he or she holds concededly conservative views regarding the Constitution and the Court's role in interpreting and applying it. In fact, I intend to vote for the nomination of Judge Scalia to be an Associate Justice of the Supreme Court. I voted for Justice Sandra Day O'Connor. In fact, I have voted for about 96 percent, or more, of the judicial nominations that have been sent to this body by President Reagan during the last 5½ years. So it is not a nominee's views on any particular ideological issue on which I think any Member of this body, including myself, wants to base their decision on the nomination.

Rather, I base my decision on this nomination on three factors under the framework laid out above. These are three reasons why I do not feel that confirmation of Mr. Justice Rehnquist is in the best interests of my State or my country.

First, I am troubled by several areas of the nominee's testimony before the Senate Judiciary Committee which, in my view, reflect a lack of full candor on his part. Exemplary of these is the nominee's testimony regarding two restrictive covenants found to be contained on his property. When confronted with this issue, Mr. Justice Rehnquist denied any and all knowledge of these covenants and expressed surprise in learning about them from the FBI report which uncovered their existence. Several days later, however, the nominee sent to the committee a letter which he received in 1974 explicitly referring to the covenant on his Vermont property. I would not reject Mr. Justice Rehnquist solely on this basis, but certainly his testimony raises questions about whether or not he should have been aware of those restrictive covenants and whether the nominee was as candid as he should have been before the Judiciary Committee.

Second, and more importantly, the nominee's temperament and temperature are, in my view, called into serious question by his well-developed record on civil rights and liberties. An objective analysis of that record reveals that the nominee has, with few exceptions, decided against civil rights plaintiffs and in favor of allowing the State or Federal Government to act discriminatorily or in ways which restrict individual liberties. That same record does not reflect merely a lukewarm commitment to equal rights for our citizens. Rather, it mirrors an icy cold indifference to the equal protection guarantee embodied in our Constitution.

Mr. President, other Members have adequately delineated the specific number of cases and the votes that the nominee has cast during the 15 years he has served on the Supreme Court as an Associate Justice. I would merely point out that it appears to this Senator that Justice Rehnquist does not see the Constitution as a living document. Rather he seems to view it rigidly—frozen in time, as it were—in the latter part of the 18th century or the early part of the 19th century.

The Constitution, as we have seen, evolves. Not that the fundamental meaning ought to change, but certainly the world in which we live changes and has changed dramatically. Mr. Rehnquist appears to have made the intellectual decision that we ought to interpret the Constitution very rigidly, as it was written, as it applied during the days in which it was drafted.

That may seem to be an overbearing interpretation of his decisions but, frankly, I am left with no other conclusion when I look at the decisions in which Justice Rehnquist has been involved.

Consider the some 83 nonunanimous cases where civil rights statutes were interpreted. Justice Rehnquist voted against the civil rights plaintiff in 80 out of those 83 cases, that, in my view, reflects a rigidity. It reflects, as well, an unwillingness to recognize that the times in fact have changed, that evalution has occurred over the last 200 years and most importantly in the last 40 years, and that the Constitution must be read in light of those changes.

Let us remember what we are doing today. We are attempting to fill the position of Chief Justice of the United States—without question the highest, most revered judicial office in our Nation. The man or woman who occupies that seat must, as the title of the position reflects, above all else actively work for and embody justice. Not justice for some. Not justice only for whites. Not justice for men exclusively. But Chief Justice for all. Whatever other qualifications Mr. Justice Rehnquist possesses, I do not believe he stands as a symbol and reality of equal justice for all.

Finally, while Mr. Justice Rehnquist undoubtedly possesses a sharp legal mind, he lacks one particular ability which he must possess in order to be an effective leader on the Court: the ability and the desire, and I emphasize desire, to activate and effectuate consensus among the Court's nine individual members.

The nominee has not only concededly been in dissent more frequently than most but, more importantly, it seems to me, he simply does not reach out. In fact, in testimony before the Judiciary Committee, the American Bar Association, through its investigation and discussion with others, indicates that Justice Rehnquist rarely, if ever, has sought out, as one might in a collegial fashion, the views of those other members of the Court.

Certainly, all of us in this body, while we are not a judicial body, even though we know we may disagree with one another, we respect the intelligence, we respect the compassion, we respect the integrity of each other enough to seek each other out on policy matters and the like.

In fact, it is not an uncommon occurrence for a very conservative Member of the other side of the aisle to approach a very liberal Member on this side of the aisle and to ask, "Why are you voting that way? What is your rationale, your thinking? Likewise, it is not uncommon to see Members here approach that side of the aisle and raise the same kind of question. They may not end up voting alike, but there is enough respect for each other's integrity that we seek out the motivation of our colleagues.

□ 1640

You would think that on the Supreme Court, that same kind of collegial environment might exist. And yet, Justice Rehnquist has demonstrated little or no inclination to reach out and discuss with his colleagues on the Bench why they reach their decisions as they do.

That worries me deeply because the Chief Justice must perform, as head of the Court, the role of consensus builder.

At critical junctures in our Nation's history, the Chief Justice has recognized the need to forge a consensus to achieve a greater social good. Chief Justice Earl Warren cajolled recalcitrant Justices in order to persuade them to concur in the Court's opinion in Brown versus Board of Education. Chief Justice Warren foresaw the firestorm that the decision would create, and convinced his brethren that unanimity was required to weather the storm ahead. Similarly, Chief Justice Warren Burger recognized the importance of consensus when the Court was making preparations to order President Nixon to surrender the Watergate tapes.

I fear that Mr. Justice Rehnquist, put in similar situations which will undoubtedly arise during his tenure on the Court, would be unable to develop that same type of consensus among his colleagues on the Bench. This would be harmful not only to the Court, but to our country as well.

Finally, Mr. President, there has been extensive debate over the memorandum that the nominee wrote to Justice Jackson regarding the 1896, Plessy versus Ferguson decision which upheld segregation. Let me briefly remark on that discussion.

Almost a week from today, we will commemorate the 40th anniversary of the termination of the Nuremberg

trials. Justice Jackson, of course, was the chief prosecutor for the United States at those trials. I have more than just a passing interest in all of that since the executive trial counsel for Justice Jackson at those trials was my father, who happened to be a Member of this body. I went back over the correspondence between my father and Justice Jackson, 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 crimes of the Nazis 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 of 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 Justice Rehnquist's testimony that he was writing a memorandum for Justice Jackson only to comply with Justice Jackson's views of civil rights. Justice Jackson was as determined as any human being in public life to uphold the inalienable rights of every human being, and to suggest otherwise does a great disservice to a man whose memory we ought to be remembering in these days 40 years after the conclusion of the Nuremberg trials.

In conclusion, Mr. President, I have no choice but to oppose the confirmation of Mr. Justice Rehnquist to be Chief Justice of the United States for a number of reasons. More than anything else, however, this office demands from its occupant more than mere mental acuity: it demands someone who is red hot to ensure that the guarantees of our national charter apply with equal justice for all. It is precisely this burning desire to protect the civil liberties of all citizens which, I am saddened to say, is most lacking in this nominee.

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. It seems to me 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 happening which took place just before—I emphasize just before—the cloture vote earlier today. The Senator sought recognition from the Chair to ask unanimous consent that I be allowed to speak for 3 minutes without such time being charged to either side of the issue, being fully aware of the parliamentary agreement then in effect, under the dwindling time that was assigned to both managers of the bill. Since this Senator had not at that time made up his mind what his vote would be on the cloture motion, I sought to make a statement and then ask a question. I did not think it was proper for me to declare at that time to either manager of the bill the pro side or the con side on what I was going to do because I had not come down to that final determination.

The minority Member was kind enough, however, to give me the last few moments of his time to make a brief statement. The majority manager of the bill objected to the additional 3 minutes. Frankly, at that time, Mr. President, this Senator intended to vote "present" on the cloture vote, willing to move ahead if it was the will of 60 of my colleagues to get on with the up or down vote. I would like to have had the opportunity to ask questions then. But some of the questions and some of the statements I intended to make in those brief 3 minutes will be included in the remarks I am about to give.

When we get down to one of these time agreements, Mr. President, where the time is allotted to either those for or against, it leaves no time whatsoever for the views of those yet undecided or to ask questions to help us make up our mind.

Mr. President, we have before us an extremely—an extremely important matter—probably one of the most important votes that any of us will cast in the Senate. But now we are down to the final vote up or down and it is time to make the call.

□ 1650

Mr. President, from the very beginning, I had indicated my likely approval of the 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 should 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 not 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, which has 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 Jutice 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 in

the whole United States of America to be moved up to this important position.

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 Justice Rehnquist whatsoever. I hope and pray that after his nomination is confirmed, 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 Rehnquist has the ability to grow. Therefore, in conclusion, let me say that I hope history will show that he will eventually be recognized through accomplishments as a great Chief Justice. 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 consensus-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.

□ 1700

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

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

The minority leader is recognized.

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

Mr. President, if the Chair will indulge me I am awaiting the promulgating of a unanimous-consent request before I begin.

Mr. KASTEN addressed the Chair.

The PRESIDING OFFICER. The Senator 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 distinguished acting Republican leader for the purpose of his making a unanimous-consent request.

Mr. KASTEN. I thank the distinguished minority leader.

IMPEACHMENT TRIAL OF JUDGE HARRY E. CLAIBORNE

Mr. KASTEN. As in legislative session, Mr. President, I ask unanimous consent that, notwithstanding the provisions 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 Committee on the Impeachment Trial of Judge Harry E. Claiborne is authorized to permit members of said committee to pose questions orally to the impeached person, witnesses, House managers, and counsels appearing before the committee, on such terms and with such restrictions as the chairman shall prescribe for the expeditious completion of the committee's business.

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

Mr. KASTEN. I thank the Chair, and I thank the distinguished minority leader.

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

The Senate continued with considerations of the nomination.

The PRESIDING OFFICER (Mr. DANFORTH). 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 judgment 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 carefully.

One might say "Well, I have not seen you on the floor, Senator." That is true.

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 nomination, and last Sunday I spent all afternoon and until 1 o'clock in the morning 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 having to bend one's ear to a colleague. One can concentrate wholly and totally on what a Senator is saying.

May I say I have been very impressed 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 decision. 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 extreme in this individual as to make him insensitive to the rights of minorities. He favors government over individuals.

Three, those who oppose the nomination 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 summation of the points that have been debated back and forth, and to which I shall briefly address my own remarks.

First, give the President his choice. Well, we have heard this argument time and time again, Mr. President. 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," meaning the President, "he shall nominate, and by and with the advice and consent of the senate, shall appoint * * * judges of the supreme court." The President only can nominate. But he shall appoint "by and with the advice and consent of the senate." Those words are not meaningless. They mean something.

They mean that the Senate has an equal 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 decision, once the President has been notified, once he has tendered the commission to Mr. Rehnquist, once Mr. Rehnquist takes the oath as Chief Justice of the United States, then the Senate has no opportunity to reconsider its decision.

Only in the case of impeachment trials does the Senate take a second

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.

□ 1710

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 us 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 sobering 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 that he has an insensitivity to the rights of minorities, and he favors government over individuals.

Mr. President, I happen to believe that there is something in the mind and heart of most men and women which, when inspired and challenged, will cause them to rise to the challenge and to the needs of the office, the moment, and the occasion. I do not subscribe to the idea that Mr. Rehnquist is so insensitive of the rights of minorities that he cannot rise to the occasion and meet that test.

Time and time again we have all seen men become Presidents, or become U.S. Senators, or who have held other high offices, either appointive or elective, when who would have believed that they would have later proved to be equal to the task, or even have proved outstanding. But we have seen it happen time and time again.

I do not think we should pin a label on a Justice just by counting how many cases decided by that individual reflected liberal decisions—whatever that means—or how many reflected conservative decisions—whatever that means. It takes a close look at the substance, at the content of the reasoning and rationale behind the decisions.

Mr. Rehnquist's decisions on sexual harassment of women in the workplace is a perfect example. Did Justice Rehnquist take that position because it is his traditional views of women and the family, or did he write the opinion because he clearly understood the need to ensure that women are protected from that kind of pressure in the workplace and can advance on the merits of their work performance and receive equal treatment?

So it is not the volume of cases, it is not the number of cases, it is the substance. What were the issues? Perhaps a loose way of saying it would be that it is the "quality," the quality of his judgment, the rightness of his judgment, the substance of the case. What did this involve and how did he reach his decision?

I do not believe that Mr. Rehnquist is so straitjacketed in his conservative beliefs that he is insensitive. Perhaps his experience thus far would lead some people to believe that he would have a difficult time being more sensitive. But I still believe that men can improve themselves, can rise to meet the occasion, the challenge, the requirements of the office, the moment, the circumstances, the needs of the people.

Well, let me go on from there.

The third point of contention here seems to be that "ideololgy" has no place in this decision. I have heard that said here.

> All those who are opposed to the nomination are opposing it on the basis of ideology. It should not be done. Experience, ability, integrity, these are the qualifications. The President may decide on the basis of ideology. Let him choose whomever he wishes and let him make a judgment as to that particular individual's judicial philosophy. But not the Senate.

I maintain, Mr. President, that, any President of the United States has a right 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 of all judicial positions, Chief Justice of the United States. I would think he was lacking in judgment.

And I think the same thing about Senators. Why should Senators not have the same right and duty?

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 "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 of these sympathies 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.

□ 1720

I intended at first to vote for him. I said to my staff before I went home on that particular day, "Prepare me a speech in support of Mr. Marshall. I want to vote for him." I had filibustered against the 1964 Civil Rights Act, which I voted against—one of the two votes that I have cast in this Senate for which I have been sorry, and have regretted. Incidentally, the other vote, as I have indicated many times, was to deregulate the airlines. But, I had spoken 16 hours on this Senate floor in opposition to the Civil Rights Act of 1964.

I was just out of law school, I had gone to law school 10 years, I had been on the Armed Services Committee and the Appropriations Committee, and I decided I wanted to go on the Judiciary Committee now that I had earned a law degree. I sat on the Judiciary Committee. And here I sat in the shadow of constitutional giants in this Chamber—Senator Ervin, Senator Russell. And you can name others one by one. I was impressed with their constitutional arguments against the 1964 Civil Rights Act. And I in my own conscience spoke against that act, and I in my own good conscience voted against it. Later, I have come to be sorry for that vote.

But here came the nomination to the Senate of Thurgood Marshall. I thought to myself, I had spoken

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 aside from politics, 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. "This is a historic vote. 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 on the appellate court in New York." 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 personally did not agree.

So lying in bed that night, it suddenly dawned on me, well, here I cannot vote for this nominee. If he were white, I definitely would not vote for him because I do not subscribe to his judicial philosophy. I do not subscribe to his ideology. Then why should I vote for him just because he is black, if I do not subscribe to his judicial philosophy? So I cast my vote against Mr. Justice Marshall. That is nothing to his discredit. I am simply saying that ideology was the controlling factor in my decision.

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. But when it came to elevating him 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 an officeholder within 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 or not 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 precincts in Maricopa County in the Phoenix area at any election, is that correct?

Justice REHNQUIST. I think that is correct

Going on, Senator Kennedy said:

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 or intimidating 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 reviewed my testimony, and I think I said I did not challenge during particular years. I think it is conceivable that [in] 1954 I might at least have been a poll watcher at a westside precinct.

Senator KENNEDY. Well, did you challenge individuals then?

Justice REHNQUIST. I think it was simply watching the vote 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, way back, 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 would simply 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?

Justice REHNQUIST. In 1974, I believe.

Senator LEAHY. Justice Rehnquist, I am told that you have a warranty deed, 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."

Are you aware 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 parcehe 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 & Lium. 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 see these 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 Hebrew race.

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 that same day 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 woud seem most 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, would certainly have taken notice of that convenant the astract 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 demonstrations. He said he did not. There is evidence to the contrary.

Let me go on quickly now to the last of these specific items, the Rehnquist memo to the late Mr. Justice Jackson.

Mr. President, in this situation, a memo entitled "A Random Thought on the Segregation Cases," came to light after the Judiciary Committee had closed its hearings in 1971 on the nomination of Mr. Rehnquist to the office of Associate Justice of the Supreme Court of the United States.

This memo, titled as I have indicated, expounded on whether or not the Court in considering the facts in Brown versus Board of Education should adhere to the constitutional pillar of Plessy versus Ferguson, decided in 1896, the "separate-but-equal" doctrine.

The memorandum was supportive of the Plessy versus Ferguson "separate but-equal" doctrine. I quote from that memorandum:

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy* v. *Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's "Social Statics," it just as surely did not enact Myrdahl's "American Dilemna."

At the time this memorandum was written, Mr. Rehnquist was law clerk for the late Mr. Justice Jackson. When this memorandum came to light, Mr. Rehnquist wrote to Senator Eastland. The committee had closed its hearings and the matter was before the Senate.

In the New York Times of December 9, 1971, we find the following, with explanatory material:

WASHINGTON, December 8.—Following is the text of a letter from William H. Rehnquist, Supreme Court nominee, to Senator James O. Eastland about a memorandum that has become involved in the Senate debate over his confirmation, and the text of the memorandum:

The following is an excerpt from the letter by Mr. Rehnquist to Mr. Eastland.

As best I can reconstruct the circumstances after some 19 years, this memorandum was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of his views at the conference of the Justices, rather than as a statement of my views.

Going on to another excerpt:

He very definitely did not—

"He" meaning Mr. Justice Jackson—

either expect or welcome the incorporation by a clerk of his own philosophical view of how a case should be decided.

And then further:

I am satisfied that the memorandum was not designed to be a statement of my views on these cases. Justice Jackson not only would not have welcomed such a submission in this form, but he would have quite emphatically rejected it and, I believe, admonished the clerk who had submitted it.

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 my 'liberal' colleagues, but I think Plessy versus 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:

DEAR SENATOR KENNEDY: I have been following the proceedings on the confirmation 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 than 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 I served as secretary for many years. Justice Jackson did not ask law 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 leaves a very serious 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 simply 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 those who say, "Give Mr. Rehnquist the benefit of the doubt." Mr. President, it is not a question of giving Mr. Rehnquist the benefit of the doubt. That is the same thing that was said, although in a different form, when the Manion nomination was before the Senate, when it was argued, "Well, here is a young man whose future depends upon this decision." The young man's future was one tiny thing. What counted most was the future of the people of the seventh judicial circuit. Now we hear it said, "Give Mr. Rehnquist the benefit of the doubt." It is not Mr. Rehnquist I am so concerned about. He would still be on the Court as an Associate Justice if not confirmed to be Chief Justice. The benefit of any doubt should be resolved in favor of the people of the United States. Let us think of the people of the United States. There can always be some other Chief Justice, one equally as conservative, one of the same judicial philosophy. But let us give the benefit of the doubt to the people of the United States.

□ 1750

Mr. President, I have reached my conclusion. We are today considering the position of Chief Justice of the United States, and this decision affects every man, woman, boy and girl in these United States.

Chief Justice Marshall said: "The Judicial Department comes home, in its effects, to every man's fireside; it passes on his property, his reputation, his life, his all."

The Court, Mr. President, has no patronage, no control of purse, no bayonets, no battalions. Its power and its influence rest upon the confidence reposed in it by the American people and by the public acceptance of the fact that there should be a tribunal to which all may appeal. The public trust. That is the basis for the power and the influence of the Court, and the symbol of that Court must be the Chief Justice of the United States.

Justice Holmes said:

> If American law were to be represented by a single figure, skeptic and worshiper alike would agree without dispute that the figure could be one alone, and that one, John Marshall.

John Marshall was the Chief Justice of the United States.

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.

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 man's experience 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 remember here, was unable to recall there, when it should 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; those who cheer today 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 complete confidence in this Justice for that exalted office. He would still be an Associate Justice of the Supreme Court. I would have wished that the President would have withdrawn the nomination and submitted in lieu thereof the nomination of Mr. Scalia, but that is perhaps too late. We know what the outcome will be.

Mr. President, for the reasons I have already stated, I cannot vote for the confirmation of Mr. William Rehnquist to be the Chief Justice of the United States.

I yield the floor.

Mr. BIDEN. Mr. President, I say to my friend from Arizona that I will not make my entire statement at this point. I will just take about 5 minutes, and I will cease and desist until later this evening.

First of all, I compliment my colleagues, the Democratic leader, the Senator from West Virginia, on his statement.

Second, I suggest that he pointed out one of the three serious flaws in this nomination.

Let me just illustrate, because I often hear from my colleagues who have not followed this enough, and from my constituents, "Why are you all spending so much time talking about something that happened 8, 10, 15, 18, 20, 25 years ago? Why is that relevant? What difference does that make?"

Let me suggest that if you look at the facts and the time back in 1970 when Justice Rehnquist first came to the Court, 90 percent of these documents and these points were not able to be made because they were not available to us. That is No. 1.

No. 2, Justice Rehnquist has come before the U.S. Senate Judiciary Committee and the American people and repeated some statements which, on their face, seem to be ridiculous. Let me just take one series of points that relate to Justice Rehnquist's testimony.

Justice Rehnquist claimed in 1971 that the memorandum we keep talking about—the memorandum we are talking about now is the memorandum that he, as a clerk for Mr. Justice Jackson, wrote. Senator BYRD referred to it; others referred to it. In that memorandum, it is a clear statement that he thinks, that someone thinks, Plessy versus Ferguson—separate but equal—is a good idea.

In fairness, I might add that Mr. Justice Rehnquist at the time had been the No. 2 man. Here he had been the No. 1 man at the Justice Department in terms of legal counsel for the President and part of his responsibility was to honcho through the nominations of two men who had just gone 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 occurring but Justice Rehnquist figured 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. That was the attitude at the time. He was smart enough to know in this Senator's view had he gone up there and said, "Yes, I once or still believe Plessy versus Ferguson is a good idea," 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.

So he turns and he says, "This memorandum,"—the only thing that was talked about being surfaced,—"was something that Justice Jackson," and keep in mind Justice Jackson was

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 memorandas 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 giving his view.

Third, in a memorandum on three lawsuits by baseball players against the major leagues for violation of the antitrust laws, Rehnquist wrote:

> I feel it is only fair to lay bare my strong personal animus in these cases . . . I feel instinctively that baseball, like other sports, is sui generis, and not suitably regulated by a bunch of lawyers in the Justice Department or by a bunch of shyster lawyers stirring up triple damage suits.

This is a memorandum to Justice Jackson.

I see the majority leader standing. I want to make a few more points, if he would like to make a comment.

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 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.

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 guess maximum we are talking about anywhere from an hour and 20 minutes to a maximum of an hour and 50 minutes is my guess remaining to be spoken on this nomination.

Mr. DOLE. 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. 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 no 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." Do not forget in 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."

□ 1810

Well, I hope I have just pointed out that he consistently gave his own views 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.

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 must have been 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.

His arguments 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."

Yet, consistently, when he was a clerk for Justice Jackson, he gave his own views and stated them that way. And I have submitted those for the RECORD.

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. And Senator BYRD put that in the RECORD.

But, not only on that score is it clear he is not telling the truth, it is clear on the score that when he tried, in a fallback position, to defend his argument to say he is not lying to us or not misrepresenting, he said, "Well, only Justices use imperious language." And yet in every memo he writes—because that is what he is known for. He is quick witted. He is sarcastic. He is sometimes sardonic. He does it all the time, and I just cited three of those examples.

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 unhumanitarian position for which I"—Justice Rehnquist—"have been excoriated by my colleagues," the clerks.

Continuing the quote: "But I think *Plessy* v. *Ferguson* was right and should be reaffirmed."

And, by the way, throughout his memorandum, which I will submit for the RECORD, he consistently refers to his fellow clerks as "the liberals." He was not talking about the other judges. He is talking about his fellow clerks.

In an 1983 interview by a reporter from the New York Times, Justice Rehnquist was asked whether his views on Plessy had changed since his days as a clerk. This is before he knew he was going to be nominated to be Chief Justice of the United States. He replied: "I think they probably have."

Now, why would he say in 1983 that his views on Plessy had changed from when he was a clerk and yet he swore in 1971 his views as a clerk were in support of Brown versus the Board of Education? What are we, fools? I mean, it is crazy. Obviously, he believed that. And there is nothing wrong with him believing that. As the Senator from West Virginia stated, almost half of the United States believed Plessy versus Ferguson was right. Over half of them stood here on the floor and said "Separate but equal is equal." And obviously, he did, too.

So why is he not telling us the truth under oath? Why, in 1983, would he say: "My views have changed since that of when I was a clerk"?

If you take his statements in 1971 and 1986 as being accurate, where he swore under oath that he was for Brown, then I am really worried. That means he is now for Plessy. That means he has changed his mind. That means he is going to rule, if another case like it comes up that says separate but equal is equal.

Now, nobody believes that; do they? God willing, he does not mean that.

So, obviously, as my mom might say, he might have tole us a little white lie about who wrote the memorandum.

Another point in his testimony before the Judiciary Committee this year: He testified that he never reached a personal conclusion—I asked him, I said, "By the way, did you have an opinion? Did you have an opinion back when you were a clerk?" And he said, "Clerks don't have opinions."

Well, here is one of the most opinionated men that has probably ever served as a clerk, one of the most opinionated Justice—and that is not bad—and he says he had no opinion. He had no opinion at all back at that time on whether or not Brown should be reaffirmed.

Given that the Brown decision was the most controversial constitutional decision of the century, it is absolutely inconceivable to me that a person with such strong views as Justice Rehnquist held would not have a view regarding the correctness of the decision.

Similarly, Justice Rehnquist's corollary assertion that the memo represented the views of Justice Jackson is wholly contradictory to the evidence. 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; cannot find any evidence Jackson ever held those views.

□ 1820

Ms. Douglas, who we referred to earlier, Jackson's personal secretary, refutes the assertion that Jackson ever had any of 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. I will yield on that point, and 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 law clerks to express his views. He expressed his own, and they expressed theirs. That is what happended 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, hey, I held that view. I was wrong. I regret having held that view. It was my view at the time but I do not hold it any more. But I concluded he could not say that because he was afraid, in this Senator's judgment, that had he said that in 1970 that the array of Senators in this Chamber in 1970, the mood of the country in 1970, the civil rights atmosphere in 1970, they would have said notwithstanding you have recanted, we still do not want you on the Court because you held those views. That was the mood of the country.

So in fairness to Justice Rehnquist he sat there and he had himself in a bind. He had a chance to do something he never thought he would ever be able to do in his life—be a Supreme Court Justice. And he allowed himself in my view to succumb because obviously every single thing points to the fact that they were his views. Let me make a concluding point on this area.

Justice Rehnquist stated in 1971, and he expressed again, "Since I fully support the legal review and the rightness from the standpoint of fundamental fairness of the Brown decision."

Clearly, this statement was intended to deflect criticism by indicating that he consistently agreed with Brown. But Justice Rehnquist's unequivocal endorsement of Brown in 1971, is clearly questionable in light of the statements he made about integration in 1964 and 1967, and in 1970. You heard my colleague, the distinguished Senator from Utah. He said, look—and you will hear from my friend from Arizona. He was required to write a position. My boss asked me to write a position. Put away the issue of Justice Jackson, which I cannot believe a reasonable person can conclude that they were not his, Rehnquist's, views. Put that all aside. Let us look at a few facts.

In 1964, Justice Rehnquist while a private lawyer in Phoenix, AZ, testified against the passage of the Phoenix City Ordinance which would prohibit racial discrimination in places of public accommodation. He also wrote a letter, then wrote a letter to the newspaper. Now this is a private citizen. He had a right to do that. He wrote a letter to the newspaper in which he equated the indignity suffered by victims of discrimination barred from a lunch counter with "the indignity suffered by the segregationist forced to serve the meal." I ask unanimous consent that an excerpt relating to that matter be printed in the statement.

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

THE 1964 PUBLIC ACCOMMODATIONS ORDINANCE

In June of 1964 the Phoenix City Council was considering a public accommodations ordinance which declared that—

"It is . . . contrary to the policy of the City and unlawful to discriminate in places of public accommodation against any person because of race, color, creed, national origin, or ancestry."

The ordinance applied only to "public places" offering entertainment, food or lodging, and specifically excluded "any place which is in its nature distinctly private." In testimony before the City Council, be submitted to the people for a vote rather than being passed by the Council. He also said:

"I am a lawyer without a client tonight. I am speaking only for myself. I would like to speak in opposition to the proposed ordinance because I believe that the values that it sacrifices are greater than the values which it gives. . . . There have been zoning ordinances and that sort of thing but I venture to say that there has never been this sort of an assault on the institution where you are told, not what you can build on your property, but who can come on your property. This, to me, is a matter for the most serious consideration and, to me, would lead to the conclusion that the ordinance ought to be rejected."

The ordinance was passed unanimously by the City Council the next day. Mr. Rehnquist, still without a client save himself, then wrote a letter to the editor of the Arizona Republic calling passage of the ordinance "a mistake." Incredibly, the letter first equated the indignity suffered by a victim of discrimination barred from a lunch counter with the "indignity" suffered by the segregationist forced to serve a meal, and then concluded:

"It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this."

The freedom to which he referred was the freedom of the property owner to do with his property as he wished. As Mr. Rehnquist recognized in the letter, this freedom has been impinged upon by a great many laws, such as zoning laws, and health and safety regulations. While Mr. Rehnquist thought that imposition on property rights was acceptable for purposes of zoning, he thought an impingement on property rights designed to assure equal access regardless of race to places which hold themselves out to the public was unjustified. In other words, in 1964 the nominee, as he agreed at the hearings, "felt that personal property rights were more important than individual freedoms, the individual freedom of the black to go up to a lunch counter."

It is important to understand the time at which this ordinance was being considered. The fight to end discrimination in public accommodations was in full swing across the nation. The encounters at Selma and Birmingham were recent history. The Congress was in the midst of considering the broadest and most significant piece of civil rights legislation it had ever passed, and that legislation included a meaningful public accommodations section. By the time Mr. Rehnquist spoke in Phoenix, the House had passed the bill, and the Senate had invoked cloture on it. Even more important, the most substantial objections to the federal act came from those who doubted the federal government's constitutional power to enact public accommodations legislation. This was not an argument the nominee used. He fought the measure solely on its merits.

When questioned at the hearings about his opposition to the ordinance, Mr. Rehnquist said he has changed his mind. Asked why, he replied:

"I think the ordinance really worked very well in Phoenix. It was readily accepted, and I think I have come to realize since it, more than I did at the time, the strong concern that minorities have for the recognition of these rights."

Subsequently, Mr. Rehnquist, perhaps recognizing that a pragmatic argument is weak where principle is involved, stated that even if the ordinance had been less readily accepted he would no longer oppose it. Thus the real reason for Mr. Rehnquist's change of heart is, according to him, his realization within the past 7 years of the "strong concern that minorities have for the recognition of these rights." Significantly, it is still not a matter of the nominee's feeling that such discrimination is an injustice, but only

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, when he was 40 years old, 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—particulary 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. He said, "It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedoms for a purpose such as this."

A 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.

Again, a lot of reasonable women and men held that view in 1964. But this was not as a clerk to the Court. This was a full-blown respected lawyer, a prominent citizen in Phoenix, all on his own, as a concerned citizen writing a letter to the editor of the Phoenix newspaper.

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. In the letter to the editor, he said, "We are no more dedicated to an integrated society than we are dedicated to a segregated society." Again, a view that is not unreasonable. Some will argue that we are required under the Constitution to eliminate discrimination but we are not required to promote integration. That is an intellectually defensible argument. That is the one he made. This is the guy now who is saying in 1971, "I fully support Brown, and I always have." Does that sound like a guy who fully supports Brown, and always had?

In 1970, it now appears that Justice Rehnquist drafted a proposed constitutional amendment while he was working for the Government, an amendment that had it passed would have halted the desegregation of the Nation's public high schools. In a memo accompanying this proposal, then attorney Rehnquist said, "This amendment would stop Federal courts from interfering even if local officials set up school attendance zones 'with a motive of segregating the races in the schools.'"

He drafted an amendment, and he attached a memo to the amendment sending it on to the President, a defensible position in which he said that it is all right to "set up school attendance boundaries under this proposed amendment even where there is a motive of separating 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 holding these views, but to demonstrate that 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 in America held those views.

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."

□ 1830

Let me speak to another point, and I had no intention of speaking to this but I am going to speak to it now because it was referred to by the Senator from West Virginia, restrictive covenants.

I have never once raised during the hearings the issue of restrictive covenants with regard to blacks or "members of the Hebrew race."

In all honesty, whoever wrote that covenant not only indicates how prejudiced they were but how stupid they were. There is no Hebrew race. I find this offensive all by itself to my friends.

Having said that, it has been pointed out by supporters of Justice Rehnquist, the way I have read some of the accounts, "Even Senator BIDEN had a restrictive covenant in his deed."

I have read that now so many times in the press I think it warrants commenting.

A lot of us in America have restrictive covenants in deeds. I might point out I never had any restrictive covenant in any deed in which I was a property owner.

It turns out my father's home in which I lived, like some of us do—we lived in our father's home as children—there was a restrictive covenant in my father's deed.

Let me show you how it is different than Justice Rehnquist's and how most Americans' are different than Rehnquist's.

In my father's deed, about the second line from the bottom line, it says, "There are restrictions and covenants to be found in volume 479, pages 376 and 377 at the recorder of deeds office in the county of New castle, Delaware."

Any reasonable person reading that, I am sure if my father read it which 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 99 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 big, bold 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 say, is 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 between what I think 90 percent of Americans would do.

The day my father was made aware because some Republican worker went

down to the recorder of deeds and said, "Let's check BIDEN out and his family," the day that became known, do you know what my father did? He went to a lawyer and said, "I want that taken out of my deed."

The lawyer told my father, "You can't have it taken out of your deed because the court will not hear the case because it is moot anyway."

My dad said, "What can I do?"

He said, "You can attach an amendment to the deed and say you do not consider it legal and you find it repugnant."

That is what my father did.

What did Justice Rehnquist do when he found this out? To the best of my knowledge, nothing.

Let us assume he did not know anything about it. Let us assume he did not have any notion of it. Let us assume it never crossed his mind. Let us assume he never read the letter. Let us assume he did not see the deed.

When he found it out, what did he say? Did he say at the hearing "I want to get that taken out of my deed"?

Did he say this was horrible?

It goes to the question of a little bit of sensitivity.

I do not see any of my colleagues wishing to speak and since we are going to try to finish, let me keep going. Let me shift to another subject, if I may.

By the way, if it has not already been put into the RECORD, I ask unanimous consent that the New York University Law Review article written in April 1982, entitled "How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor With an Application to Justice Rehnquist," be printed in the RECORD.

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

HOW JUDGES SPEAK: SOME LESSONS ON ADJUDICATION IN BILLY BUDD, SAILOR* WITH AN APPLICATION TO JUSTICE REHNQUIST

(Richard Weisberg)**

(Professor Weisberg, recognizing the relationship of literature to the law, closely examines Melville's Billy Budd, Sailor as a vehicle for exploring the importance of language in adjudication. His approach to Melville's story emphasizes the concept of considerate communication. The concept is then developed through a detailed analysis of Justice Rehnquist's opinion in Paul v. Davis. This analysis of the concept provides a useful demonstration of how language can affect adjudication.)

INTRODUCTION: FICTION, LAW AND BILLY BUDD, SAILOR

Can there really be something over and above these clear ascertainable facts, some extra element, which guides the judge and justifies or gives him a reason for punishing? . . . We are here in the realm of fiction, with which it is said the law has always been connected.[1]

The normal subject matter of the law review writer is, of course, statutory or adjudicatory prose. Through compilation, comparison, and interpretation of this matter, the legal analyst attempts to predict, criticize, and suggest. The writer may thereby enrich a particular area of law and 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 imaginative for legal prose? Do we not intrude sufficiently into the abstract in jurisprudential pieces without adding literary art to the legal cannon?

There are good reasons for insisting on the importance of some fictional works to legal scholarship. First, legal analysts, in fact, have long employed fiction to illuminate law.[2] Second, despite the present tendency of some legal writers to ignore fiction in favor of more fashionable "extrinsic" methodologies,[3] other distinguished scholars continue to find its influence irresistibly beneficial.[4] Third, some literary texts so richly contribute to our understanding of the law that it would be a mistake to ignore their implications for legal analysis. Certain fictive situations command the attention of lawyers in each generation,[5] some for generations at a time.[6] These situations occasionally surpass in their legal significance the utterances, on similar subjects, of judges, legislators, administrators, or law professors.

Billy Budd, Sailor is such a text. Since its publication[7] several decades after Melville died,[8] this novella has captivated literary scholars.[9] Lawyers have written about the text at least since the mid-sixties,[10] and as recently as the summer of 1980, it became the centerpiece of an interdisciplinary conference at Princeton University.[11] The dilemma of the story's central adjudicator, Captain Edwin Fairfax Vere, in bringing the morally innocent Billy to trial and execution for striking and killing the evil John Claggart, has entered into the spirits of legal and literary scholars alike, provoking debate and even passion.

Thus, for example, contemporary legal analysts such as Robert Cover[12] and David Richards[13] have integrated the pivotal trial scene, and the text as a whole, into an understanding of legal history on the one hand and moral judicial behavior on the other. In a fine earlier work by a nonlawyer, Vere's legal argument to the court-martial was preliminarily analyzed and employed to further an understanding of what Melville is saying about law in his story.[14] Teachers of jurisprudence and of law and literature have carefully examined the long passage in which Vere defends his view that, on occasion, moral innocence must bow to legal culpability,[15] recognizing in it a paradigm for theories of adjudication.

A complete analysis of the law of this "case," however, has not yet been presented. Therefore, after summarizing the "plot" of Billy Budd, Sailor and introducing a narrative theme that will echo throughout the piece, this Article will examine the law that a court-martial should have applied in Billy's case. The analysis demonstrates that Captain Vere's articulation and application of the law in many respects were erroneous, and that Melville intended his reader both to realize this fact and to consider its broader implications. Our reading thus challenges the prevaling interpretation[16] that Vere was confronted with a situation in which positive law dictated legal action wholly opposed to his natural sense of justice.

Since Vere successfully posits a dilemma he did not really face, the moral and legal significance of the story turns not on conflicts arising from the correct application of externally imposed forms, but on the articulate adjudicator's ability to impose a subjectively attractive result that the law does not require. So understood, the novella indicates Melville's view that language frequently controls the outcome of adjudication. The Article develops this insight by extracting the notion of "considerate communication" from an early passage in the story. It further explores some of the narrative techniques that mark this mode of communication through an analysis of Justice Rehnquist's opinion in *Paul* v. *Davis*[17] as viewed through the lens of Vere's argument in Billy's case. Following Melville's lead, the Article then relates "considerate communication" to the moral nature 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 many judges today 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 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 entered into the majestic complexity of Melville's final work. Such attempts, made by filmmakers,[18] opera writers,[19] and some literary critics,[20] impoverish 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 introduce the central theme 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 type, the "Handsome Sailor":

It was strength and beauty. Tales of his prowess were recited. Ashore he was the champion; afloat the spokesman; on every suitable occasion always foremost. Close-reefing topsails in a gale, there he was, astride the weather yardarm-end, foot in the Flemish horse as stirrup, both hands tugging at the earing as at a bridle, in very much the attitude of young Alexander curbing the fiery Bucephalus. A superb figure, tossed up as by the horns of Taurus against the thunderous sky, cheerily hallooing to the strenuous file along the spar.

The moral nature was seldom out of keeping with the physical make.[21]

The story's title hero is a fine (albeit flawed) example of the type:

Such a cynosure, at least in aspect, and something such too in nature, though with important variations made apparent as the story proceeds, was welkin-eyed Billy Budd—or Baby Budd, as more familiarly, under circumstances hereafter to be given, he at last came to be called—aged twenty-one, a foretopman of the British fleet toward the close of the last decade of the eighteenth century.[22]

Billy brings the overt values of his sailor-like type to the specific historical environment of this novella. Melville's tale unravels not in an allegorical locus of anytime and

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 1797,"[23] we are told, shortly after "The Great Mutiny" at the Nore.[24] Billy is impressed from a merchant ship, the *Rights of Man,* onto the action-bound *Bellipotent,* cheerfully accepting his fate.[25] Resentment and "double meanings and insinuations of any sort [being] quite foreign to his nature,"[26] he departs from the homeward-bound ship, leaving with the *Rights* only the memory of "the jewel"[27] of that crew, and bringing to the *Bellipotent* his popularity 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,' "[28] is the subject of two full chapters; he will be mentioned twice again as the text proceeds.[29] Nelson here appears as a kind of Handsome Sailor himself. Evocative of Billy on the *Rights,*[30] but on a far higher level of significance, 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 heroic personality, back to an allegiance if not as enthusiastic as his own yet as true."[31] (Vere's subsequent tactics at Billy's trial will have to be tested against this narrative model.)

As the story winds through self-admitted "bypaths" [32] to the exposition of its central actions, Captain Vere is finally introduced. A good, if somewhat pedantic,[33] perhaps overly prudent[34] and bookish officer,[35] he bears the nickname "Starry Vere" partly because he would occasionally gaze dreamily at the blank sea,[36] but more so because Andrew Marvell had written a poem about his ancestor, "starry Vere," who was noted for his discipline severe." [37]

From Vere, Melville moves to the *Bellipotent's* master-at-arms, John Claggart. "His portrait I essay," admits the always equivocal narrator, "but shall never hit it." [38] Like Vere [39] (and unlike Billy), Claggart is twice described as "exceptional." [40] Both Vere and Claggart are unusual on a ship because their verbal gifts and complex intelligence 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—no intricate game of chess where few moves are made in straight-forwardness and ends are attained by indirection, an oblique, tedious, barren game hardly worth that poor candle burnt out in playing it.

Yes, as a class, sailors are in character a juvenile race.[41]

Claggart, like Vere, "is finesse," particularly finesse with language, with verbal obfuscation, and with achieving ends through "indirection." [42]

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 passage:

But the thing which in eminent instances signalizes so exceptional a nature is this: Though the man's even temper and discreet bearing would seem to imitate a mind peculiarly subject to the law of reason, not the less in heart he would seem to riot in complete exemption from that law, having apparently little to do with reason further than to employ it as an ambidexter 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 cool judgment sagacious and sound. These are madmen, and of the most dangerous sort, for their lunacy is not continuous, but occasional, evoked by some special object; it 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—the method and the outward proceeding are always perfectly rational. [43]

Why does Claggart have it in for Billy? As the narrative proceeds, it affords us some oblique hints. Billy and Claggart are *types in opposition.* It has become a critical commonplace to think of this as an opposition between good and evil, or "heart and head," but these are reductive analyses, unworthy of the text in its fullness. [44] 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 "ingratiating" [45] indirectness, or, as we shall call these qualities here, *overtness* and *covertness.*[46]

Claggart proves himself a master at covertness, as well as arms, during the tale's famous "soup spilling" episode.[47] When Billy accidentally spills "the greasy liquid" [48] in Claggart's path, the master-at-arms, about to chastise the perpetrator, "checked himself." [49] Claggart's physiognomy, locked into sternness, immediately alters; a smile adorns his not-unpleasant features, and he says merely, "Handsomely done, my lad! And handsome is as handsome did it, too!" [50] Not a sailor in the mess hall now believes that Claggart has it in for Billy. As he extracts himself from the view of his fellow crewmen, however, Claggart vents his deliberately repressed rage on a passing drummer boy, who perhaps evokes Billy's own youth and spontaneity. Melville thus establishes a model for covert communication which we will have occasion to recall when discussing the adjudicatory process.[51]

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.[52] Finally, Claggart takes a fateful step. Before Captain Vere, he accuses Billy of conspiracy to mutiny.[53] Using his customary indirectness[54] and deftness of covert expression, he forces the reluctant and angrily unbelieving Vere to call Billy to defend himself against the charges.

Billy, a stutterer, cannot frame a coherent answer to Claggart's incredible charge. "Speak, man!" implores his captain.[55] But the Handsome Sailor is a doer, not a say-er; his essential harmony—the perfect matching of outward form and inner essence—compels him to express his aversion to the unjust attack. Thus, Billy strikes, and Claggart falls to the cabin floor.[56] Propelled by these events to a wholly uncharacteristic show of emotion, Vere intones, "Struck dead by an angel of God! Yet the angel must hang!" [57] The ship's surgeon, amazed to see the usually calm captain so passionate, confirms Claggart's death. Vere immediately summons a drumhead court, although the surgeon and other officers privately deem it proper to refer the matter "to the admiral." [58]

Chapter 21, the longest in the text, describes the trial of Billy Budd for striking a senior officer in time of war. The hand-picked members of the court, listening to Captain Vere's arguments as sole non-party witness, prosecutor, and fellow adjudicator,[59] overcome their innate sympathies and legal misgivings, and sentence Billy to hang.

Early the very next day, before an awe-struck crew, Billy is executed.[60] Mustering the men quickly back to work, Vere appeases his fellow officer's ironic [61] fear that the men might mutiny in seeing their favorite hanged by counselling the dampening influence of "forms, measured forms" [62] upon the crew. The sailors docilely return to their duties (for, indeed, as we learned of the *Bellipotent* earlier in the tale, "very little in the manner of men . . . would have suggested to an ordinary observer that the Great Mutiny was a recent event" [63]); they are perhaps partially satisfied by the always-loyal and finally articulate Billy's last words, "God bless Captain Vere!" [64]

The event stands thus, unremarked until Melville's narrative by any but the men who were present and, curiously, by the readers of an official naval chronicle of the time called *News from the Mediterranean.* This "long ago superannuated and forgotten" [65] account, recited towards the end of the novella, reports it incorrectly: Claggart is described as an upstanding model of loyalty and Billy as a depraved foreigner who stabbed him vindictively to the heart.[66]

As for Captain Vere, profoundly affected by the choice he says the law compelled him to make, he never really recovers. Wounded in an insignificant batt[illegible] prior to the magnificent episodes at the Nile and Trafalgar, Vere, "[t]he spirit that 'spite its philosophic austerity may yet have indulged in the most secret of all passions, ambition, never attained to the fulness of fame." [67] He dies mumbling, "Billy Budd, Billy Budd," a phrase well understood by at least one who hears it.[68]

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 simply verses speak of the heroic Billy at death, the jewel of the crew who can only observe, without bitterness, "—O, 'tis me, not the sentence they'll suspend." [69]

II. Melville's Use of the Law in Billy Budd, Sailor

For the trial of criminal cases concerned with loyalty to the regime, special military tribunals are established and these tribunals disregard, whenever it suits their convenience, the rules that are supposed to control their decisions.[70]

A. The Trial Scene: Earlier Critical Views

The centerpiece of this amazing short story is its trial scene. Chapter 21 stands as its microcosm of meaning, just as trial scenes in other literary masterpieces so frequently carry forth the fullest sense of the larger text.[71] The chapter's focus, not sur-

prisingly, is on Captain Vere and his explanation to a restive court-martial that duty to law overrides the apparent claims of natural justice. Critics have been particularly attentive to the following speech:

"But your scruples: do they move as in a dusk? Challenge them. Make them advance and declare themselves. Come now; do they 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 whereof 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 attest that our allegiance is to Nature? No, to the King. Though the ocean, which is inviolate Nature primeval, though this be the element where we move and have our being as sailors, yet as the King's officers lies our duty in a sphere correspondingly natural? So little is that true, that in receiving our commissions we in the most important regards ceased to be natural free agents. When war is declared are we the commissioned fighters previously consulted? We fight at command. If our judgments approve the war, that is but coincidence. So in other particulars. So now. For suppose condemnation 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 that law and the rigor of it, we are not responsible. Our vowed responsibility is that: That however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it.

"But the exceptional in the matter moves the hearts within you. Even so too is mine moved. But let not warm hearts betray heads that should be cool." [72]

As we demonstrate shortly,[73] Melville intends such jurisprudential statements [74] as these to shed "light" [75] on Vere's "exceptional . . . moral quality." [76] Perhaps the novella's most puzzling character, Vere has won the admiration of the vast majority of critics, who seem to accept without question his remarks during the trial scene.[77] In the late 1940's and 1950's in this country, negative perceptions of Vere were virtually nonexistent; when expressed, they were greeted with serious professional antipathy.[78] As recently as 1967, *legal* analysts of Vere's position were likely to have full faith in his veracity and thus to show respect for his dilemma. Charles Reich therefore could say:

The chief agent of the law is Captain Vere. . . . Melville allows Vere no choice within the terms of the law itself; if the law is obeyed, Billy must hang. . . . We may perhaps criticize the law, but not the officer whose "vowed responsibility" is to "adhere to it and administer it." . . . As Melville presents the case, there is no escape for Vere. It is in this light that we must appreciate Vere's reactions.[79]

In the 1970's, Robert Cover spoke admiringly of Vere's "righteousness," [80] under the circumstances. Comparing Vere to Melville's father-in-law, Lemuel Shaw,[81] Cover sensitively asks: "What deep urge leads a man to . . . embrace, personally, the opportunity to do an impersonal, distasteful task?" [82] Cover's historical approach to Shaw understandably forestalled a more intensive analysis of Vere; as a result, his view of the fictional adjudicator essentially agrees with Reich's.[83]

A small minority of literary critics, however, began the slow process of attacking the foundation upon which Vere's "righteousness" must lie: his assertion that the positive law *compelled* the court to sentence and execute Billy. In an article provocatively entitled *The Case Against Captain Vere*,[84] Leonard Casper cited an allusion to the *Somers* mutiny of 1842 [85] in Melville's decades-earlier tale *White-Jacket* [86]—"Three men, in a time of peace, were then hung at the yard-arm, merely because, in the captain's judgment, it became necessary to hang them" [87]—and asked the question, in Vere's case, "how necessary is necessity?" [88]

Casper's approach opens the entire story to the legal analyst. "Vere's behavior," he noted, "demands explanation because of its unnaturalness." [89] For Casper, the text as a whole, Melville's biography, and even the trial scene itself indicated that "[t]he trial is a pretense at deliberative justice, and is made to appear so by Melville." [90] Where Reich saw Vere as nobly applying the dictates of an unnatural law, Casper suggested the converse: "By refusing all natural considerations, Vere makes his verdict unnatural, a perversion as serious as Claggart's. By shifting responsibility for his decision to the King, Vere denies that he is a free agent with an individual sense of discrimination and judgment." [91] Although Casper's article forms a meritorious basis for inquiring into the legal meaning of the story, it uses no legal materials. Nor did Casper elaborate his hint that Vere and Claggart participate in a similar spiritual disease.

Merlin Bowen, however, a lifelong Melville specialist, went further in comparing Captain Vere (thought to be a "good" character) to John Claggart (the novella'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 this view, he appears as a uniformed and conscientious servant of "Cain's city," an overcivilized man who has stifled the sound of 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 modern doctrine of the rights of man has, in his opinion, any place in the government of this man-of-war world. And when the simple and loyal-hearted sailor, Billy Budd, left speechless 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 use of the word. . . .

. . . *Billy Budd* will appear as a much more coherent, though still puzzling, work of art if regarded as a study in the possible consequences of a commitment to a fixed and theoretic pattern rather than to patternless life itself with all its contradictions, crosscurrents and inescapable risks.

In the book's central opposition of civilization and nature, head and heart, there can be no real question where Captain the Honorable Edward Fairfax Vere stands: quite clearly, and despite his own instinctive feelings in the matter, he stands with Claggart and against Billy. By both temperament and training, he is much closer to the petty officer he despises than to the young foretopman he admires.[92]

Writing in 1962,[93] C.B. Ives employed technical legal material to further his perception that an understanding of the story's allegorical or metaphysical levels of meaning can be reached only after the reader has explored the *tangible* data that Melville himself knew so well.[94] Accordingly, Ives decided not to accept Vere's position at "face value"; [95] instead, he carefully examined the provisions of the actual British statutes Vere invoked. Ives noted some of the procedural defects in Vere's approach, [96] some of the substantive oddities,[97] and some of the legal history and custom that cast into doubt the harshness of the drumhead court's decision to hang Billy.[98] 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 sacrifical gesture, born to a kind of self-punishment that had become habitual in Vere's life." [99] Ives thus failed to appreciate the broader implications of Melville's perceptions about law and moral choice. But, along with Casper and Bowen, he alterted us to the need to scrutinize the idea that Vere's action is best understood as a response to the imperatives of the positive law.

B. VERE'S CHOICES: LAW AND MORALITY IN THE TRIAL SCENE

1. THE FRAMEWORK FOR ADJUDICATION; VERE'S POSSIBLE "INSANITY"

Not to endorse Vere's dichotomy of moral innocence and legal guilt might appear to lessen the force of the story's posed moral problem.[100] But a textual demonstration that Vere's behavior is marked by adjudicatory "insanity" [101] would not dilute the story's complex moral or legal interest; it would, rather, reinvigorate it.

Accordingly, we should recall that the trial scene begins in a strange way. Vere's state of mind, and not the law of Billy's case, is discussed first, during a seeming digression on the difficulties of distinguishing sane from insane behavior.[102] The narrator quickly indicates that the adjudicator, as much as the accused, is to be judged. He advises each reader to decide about Vere based on "such light as this narrative may afford," [103] and returns to the scene of the drumhead court. But we should not minimize the aesthetic importance of this insanity allusion beginning the chapter; it affords narrative legitimacy to the surgeon's fear that Billy's care has caused his captain to become "unhinged." [104] The question of Vere's sanity is reiterated at the end of the chapter, during a passage too frequently misread as an endorsement of Vere's behavior:[105]

Not unlikely [the court was] brought to something more or less akin to that harassed frame of mind which in the year 1842 actuated the commander of the U.S. brig-of-war Somers to resolve, under the so-called Articles of War, Articles modeled upon the English Mutiny Act, to resolve upon 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's 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 on board the Bellipotent. But the urgency felt, well-warranted or otherwise, was much the same.[106]

The insanity passage and the Somers reference frame the trial itself. Both emphasize that it is the adjudicator's "harassed frame of mind," and not necessarily legal compulsion, that led to the capital sentence. Futhermore, the comparison with the Somers case casts doubt on the "urgency felt" by Vere. After all, Vere knows well that Billy Budd is no mutineer. Whether or not Mackenzie actually believed his three crewmen were guilty, his dilemma at least appeared to derive from a genuine crisis of command. No one on the Bellipotent, Vere excepted, perceives any general threat of mutiny on the quiet ship. Billy's crime is not conspiracy, but striking one of the most hated figures on board. Was the capital sentence truly necessary? Only Vere seems to think so. On the Somers, several officers joined the captain in endorsing the hangings; we know that Vere's sense of imminent danger reverberates in no other officer privy to the incident.[107]

Thus, Vere's courtroom pronouncements are meant to be analyzed, not simply accepted as true. They are the "light" that the narrator hints will be shed on the careful regarding the adjudicator's state of mind during the trial. The legal argument must be rigorously dissected to discover both the essential Vere and Melville's view of the adjudicatory act itself.[108]

2. VERE'S PROCEDURAL ERRORS

As with the insantiy motif, Melville clearly employs his legal theme to indicate profound, if hidden, textual meanings. Chapter 20, a short but significant bridge between Billy's fateful act and Vere's lengthy legal argument, explicitly serves to raise doubts about the captain's procedural handling of the case. The surgeon, that careful officer whom Vere summons to confirm Claggart's death, simply cannot fathom his captain's behavior:

As to the drumhead court, it struck the surgeon as impolitic, if nothing more. The thing to do, he thought, was to place Billy Budd in confinement, and in a way dictated by usage, and postpone further action in so extraordinary a case to such time as they should rejoin the squadron, and then refer it to the admiral. . . .

In obedience to Captain Vere, he communicated what had happened to the lieutenants and captain of the marines, saying nothing as to the captain's state. They fully shared his own surprise and concern. Like him too, they seemed to think that such a matter should be referred to the admiral.[109]

The junior officer's skepticism suggests that Melville, who knew naval law well,[110] intended the legal aspects of Billy's case to be examined. The officers' fear that Vere's procedures were not "dictated by usage" [111] further suggests their suspicion—soon confirmed by Vere at the trial—that the *substantive* law of the case would derive from the Articles of War of 1749.[112] Melville's own experience on a naval vessel taught him that these Articles were publicly recited, with amazing frequency, on warships.[113] Thus, the officers certainly knew that the twenty-second paragraph of the Articles' second section contained the following language:

If any officer, mariner, soldier, or other person in the fleet, shall strike any of his superior officers, or draw, or offer to draw, or lift up any weapon against him, being in the execution of his office, on any pretence whatsoever, every such person being convicted of any such offence, by the sentence of a court-martial, shall suffer death. . . .[114]

In the midst of the confusing admixture of substantive law theories that he offers to the court,[115] Vere indeed does identify this provision as the operative element in the case: "To steady us a bit, let us recur to the facts. In wartime at sea a man-of-war's man strikes his superior in grade, and the blow kills. Apart from its effect the blow itself is, according to the Articles of War, a capital crime." [116] But, as Vere's junior officers recognize, this substantive law (itself questionably interpreted by Vere [117]) 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 [118] 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 captain committed no fewer than *eight* procedural errors.

A. NECESSITY TO REJOIN THE FLEET FOR TRIAL

The surgeon and his discomfitted fellow officers have two main concerns about Vere's decision to assemble a drumhead court. First, they feel he should "postpone further action in so extraordinary a case to such time as they should rejoin the squadron." [119] On this point, their apprehension is grounded in the Articles, which specifically grant court-martial commissions exclusively to fleet or squadron commanders, *not* to individual commanders.[120] Captains could be so commissioned only when their ships were docked in Great Britain or Ireland, and then only if expediency dictated that the usual procedures not be followed.[121]

B. RECOURSE TO THE ADMIRAL OR FLEET COMMANDER

The narrator's second indication of surprise derives from Vere's choice not to "refer [the case] to the admiral." [122] Every educated man on the Bellipotent (and probably a good number of ordinary sailors) would have known that, under the Articles, capital crimes must be brought to the attention of either the lord high admiral or the commander of the fleet.[123] According to the Articles, the high officers' jurisdictional interest in such matters commenced at the earliest stages of the proceedings [124] and continued to the stage beyond conviction, in which the admiral or fleet commander was to have full review powers.[125]

By its terms and by tradition, the Articles indicate that only for trials concerning mutiny might sentencing and execution occur without admiralty of fleet command review.[126] Billy, it must be recalled, was neither a deserter nor, despite Vere's extremely clever use of the idea of mutiny during the trial,[127] 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.[128] 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.[129] Although he places Billy's substantive crime under the sign of the Articles of War,[130] Vere decides that "summary" court procedures should determine the number of judges.[131] He hand-picks three [132] officers, one of whom, the captain of marines, is not even a naval officer.[133]

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, has Vere correctly employed his so-called "summary" powers? After all, the Articles of War themselves, from which Vere culls 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.[134] The American navy, for example, allowed for summary courts-martial consisting of three officers,[135] but such jurisdiction covered only those offenses "not sufficient to require trial by general courts-martial." [136] 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 cannot be justified by a simple reference to "summary" courts.

E. CONCEALED NATURE OF PROCEEDINGS

Vere's proclivity to summary proceedings apparently motivates him to conduct Billy's trial with the utmost secrecy. Yet, Ives 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 all, who will, may be present." [137] An American naval handbook states, "The sessions of courts-martial shall be public."[138] In disregard of this long custom, Vere proceeds covertly; his procedure arouses controversy and criticism among some of his officers.[139] We will return to this breach later,[140] for it evokes the larger meaning both of Vere's personality and Melville's feelings about the law.

F. VERE'S MULTIPLE ROLE PLAYING

Vere's own behavior during Billy's trial flies in the face of naval procedure. The captain, perhaps sensing that even his docile court might question his active role in the proceedings, takes pains to dampen their perceived apprehensions.

"What he said was to this effect: 'Hitherto I have been but the witness, little more; and I should hardly think now to take another tone, that of your coadjutor 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 moral scruple—scruple vitalized by companies. For the compassion, how can I otherwise than share it? But mindful of paramount obligations, I strive against scruples that may tend to enervate decision. . . .'" [141]

Vere clearly doubted the propriety of assuming the role of sole witness, implicit accuser, and presiding adjudicator. And with good reason. One of the specific novelties in the Articles of 1749 was their sense that commanders-in-chief should not preside at courts-martial.[142] (Indeed, the ongoing tradition of Anglo-American military law is of strict antipathy to multiple role playing.[143]) Vere's personality again produces his procedural breach. As we shall examine shortly,[144] his desire totally to control the case and his surroundings predominates over his conscious awareness of proper procedure.

G. TRADITIONAL LENIENCY IN SUCH CASES

Cowed by the articulate captain who hand-picked them, Billy's judges still manage, however hesitatingly, to suggest leniency. " 'Can we not convict,' " one of them "falteringly" inquires of Vere, " 'and yet mitigate the penalty?' " [145] Vere promptly quashes the court's final attempt at independence by implying that leniency might not be "clearly lawful for us under the circumstances." [146]

In this one instance Vere has a point. On its terms, section 2, paragraph 22 of the Articles, which speaks to Billy's offense, does not allow for any penalty except death.[147] (Some other capital crimes under the Articles, such as concealment of "traitorous or mutinous practice or design," [148] a crime not wholly irrelevant to Billy's case,[149] are punishable by "death, or such other punishment as a court-martial shall think fit." [150] There was extensive debate on this point,[151] which apparently raged until 1757 (forty years before Billy's trial) when a certain Admiral Byng was actually executed under this provision.[152] Sometime after that controversial trial, according to naval historian John Snedeker, death under section 2, paragraph 22 "was again made discretionary." [153]

Melville knew this history,[154] and Vere's equivocation on the legality of his court's request may be meant to indicate the fictional captain's awareness of the leniency debate. And more. Whatever the wording of British naval statutes, there was a strong tradition of leniency in enforcement. Discussing the "Cromwellian" naval Articles,[155] Snedeker observes: "While severe in their terms, these articles were enforced with discretion. There is no known instance of the death penalty being executed during the period of the Commonwealth." [156] As we noted earlier, only in cases of convicted mutineers was execution permissible prior to reporting the proceedings to the admiral or fleet commander.[157] Snedeker's research indicates that even for this extreme offense, few if any commanders found it necessary to rush through to a hanging.[159]

In sum, the proper stance of a captain toward enforcement of punishments at sea was that "[h]e alone is to order punishment to be inflicted, which he is never to do without sufficient cause, nor ever with greater severity than the offence shall really deserve." [159] It is the traditional stance, but Vere categorically violates it.

H. EXECUTION IMPERMISSIBLE WITHOUT REVIEW

Perhaps no procedure was better settled than the court-martial convenor's duty to seek review on the highest level before executing a capital sentence.[160] The admiralty or the crown in Britain,[161] sometimes the President himself in the United States,[162] were to be the reviewing authorities for all death sentences.[163] So strict was this view that, in the *Somers* case,[164] several American naval officers (including Melville's first cousin [165] were court-martialled for having hanged three sailors who may well have been engaged in a *mutiny*.[166] But Billy, we must always recall, was not even accused of mutiny, and "on board the [*Bellipotent*] . . . very little in the manner of the men and nothing obvious in the demeanor of the officers would have suggested to an ordinary observer that the Great Mutiny was a recent event." [167]

Vere must have known that in the British navy a mere ship's captain could not lawfully execute a summary sentence exceeding *twelve lashes* (mutiny cases arguably aside [168]). Thus, even if Vere deemed his hand-picked court to satisfy all the procedural exigencies of the Articles of War, he had no legal right to bring to fruition its severe sentence.[169]

3. VERE'S SUBSTANTIVE ARGUMENTS

Vere's numerous procedural errors, jarring in a man who so consistently appeals to legal formality, merge subtly into substantive mistakes as the trail scene progresses. Vere seems to proceed under the Articles of War; as we have seen, however, he superimposes on this statute the inapposite procedures of a summary court. Moreover, he manages to confuse the issue by articulating three other substantive bodies of law during his argument to the court.

A. "MARTIAL LAW"

Vere deploys the first of these, "martial law," in several conflicting ways. Vere's initial reference attempts to distinguish his military tribunal's mode of judgment from that of other possible approaches: "But for us here, acting not as casuists or moralists, it is a case practical, and under martial law practically to be dealt with." [170] Using the phrase a few minutes later, Vere answers the officer of the marines' emotional defense of Billy's motives by saying, "And before a court less arbitary and more merciful than a martial one, that plea would largely extenuate. At the Last . . ., it shall acquit. But how here? We proceed under the law of the Mutiny Act." [171] In these two parallel arguments, Vere appears to remind the court of its legal, as opposed to moral, jurisdiction over the case.[172] General usage confirms Vere's rhetorical invocation of the phrase, since the court obviously finds its jurisdiction under the applicable military law, and not under any ethical or philosophical code. But a keen irony pervades Vere's dialectic once his own gross violations of this law are discovered. If Vere invokes "martial law" to stress the strictly legal aspects of the court's authenticity, then his own covert illegality attains a reprehensible level.

So, in Vere's behalf, it must be observed that there is a second meaning of "martial law," which provides the best (though still flawed) argument for the summary procedure. Contrary to the first sense of the phrase, this alternative meaning calls for the abrogation of formally established law in favor of what one commentator calls "the will of a military commander operating without any restraint, save his judgment, upon the lives, upon the property, upon the entire social and individual condition of all over whom this law extends." [173] The essential feature of this use of the term is its invocation of necessity.[174]

Covered by "the haze of uncertainty which envelops it," [175] this meaning of "martial law" would appear to appy only at a time of great urgency. Furthermore, it usually applies to civilian populations placed under military rule due to some crisis necessitating extraordinary measures. In Britain, the executive agency declaring martial law during the period of the story would probably have been the crown, parliament, a governor, or perhaps the admiral of the fleet, but rarely, if ever, a single ship's captain.[176] If, extraordinarily, a captain did declare it on his own, "his judgment would be subject to review by his military superiors," [177] a form of review not imposed upon higher ranking executive authorities.

At best, therefore, Vere could properly invoke martial law only if the situation fully warranted a fear of insurrection on the ship. As Ives observes:

"[A] captain might hang the mutineers as a matter of necessity, in disregard of the Articles of War. In such cases it was normal to secure the advice and judgment of his officers in a summary court.

"But Billy Budd was not a mutineer. . . . Vere's stated reasons for the hanging were that Billy had struck his superior and that there was *danger* of mutiny by some other members of the crew." [178]

As we have seen, none of the other officers privy to the incident feared an impending crisis.[179] Moreover, recourse to martial law was not frequent in the England of the story's historical period.[180] It was a period of war, yes; of a "crisis for Christendom," [181] yes; but far more inflammatory shipboard situations that year had been dampened without violence.[182] Above all, on the *Bellipotent*, as the narrative explicitly states,[183] mutiny was not in the air; indeed, Vere's control over the court itself proves the docility of his men (even the surgeon never dares to voice his procedural concerns to the captain).

Vere's best argument—that "martial law" calls for an abridgment of proper procedures—thus appears unjustified.[184] As Frederick Wiener, an expert on military law, has observed, "[w]hat constitutes necessity is a question of fact in each case." [185] In Billy's case, all evidence suggests it is only Vere's power and masterful use of language that convince crew and reader alike of the necessity for a hanging.[186]

B. THE MUTING ACT

As Ives [187] and Hayford and Sealts [188] have pointed out, the Mutiny Act applied only to *land forces*.[189] Vere's invocation of the statute as a reason for ignoring Billy's intent [190] appears inapposite, indeed quite surprising. After all, the use of the phrase "martial law" serves his rhetorical purposes sufficiently, albeit unorthodoxically. The mistake may, of course, be Melville's, but the extreme accuracy of so much of the legal detail in chapters 20 and 21, coupled with the body of naval law experienced by Melville biographically,[191] places the burden on those who so argue.[192]

C. "PLAIN HOMICIDE"

As noted earlier, Vere answers the sailing master's plea for penalty mitigation by conjuring a threat of mutiny and arguing that the hanging is necessary to quell it.[193] In elaborating this point, Vere invokes yet another body of laws: "No, to the people the foretopman's deed, however it be worded in the announcement, will be plain homicide committed in a flagrant act of mutiny." [194]

Implausible as well as inaccurate, the theory of "plain homicide" fails because there is simply nothing "plain" (or mutinous) about Billy's act if analyzed as a "homicide." Questions about Billy's intent, the degree of premeditation, the defenses of provocation or of temporary insanity, and the like would necessarily be raised under any criminal code (including the Articles [195]) if the charge were homicide instead of striking a superior officer.[196] Since any impartial judge would see that these facts complicate the question of Billy's guilt, Vere's casual assumption that men already favorably disposed to Billy would attribute homicidal and mutinous motives to him is clearly suspect.

So, in disregard of the procedural requirements of the Articles of War, the only statute correctly applicable to the case,[197] and in violation of each of the other laws he distractingly cites to his impressionable court, Vere contrives to have Billy hanged. The

skepticism of both surgeon and narrator as to Vere's formal objectivity, and that of the court itself as to the punishment, is fully sustained by a legal analysis of the case. Vere's behavior is dictated not by law, but by his own intuitive predilection, clearly articulated in the captain's outburst seconds after Billy's fatal blow—"Strck dead by an angel of God! Yet the angel must hang!"[198] The trial's arguments form the necessary mediation between this preordained subjective desire—Vere's not so peculiar "insanity," the source of which we will discuss presently[199]—and the court's need for reasoned analysis. Thus, it is important to set forth, as perhaps the prevailing theme and system of *Billy Budd, Sailor* itself, the clever *mode* of communication that permits Vere to assuage his fellow officers' doubts about the propriety of summarily executing the Handsome Sailor.

III. BILLY BUDD, SAILOR AND A THEORY OF ADJUDICATORY COMMUNICATION

A. JUDICIAL CLEVERNESS: THE "CONSIDERATE" WAY

Captain Vere recognizes the primal value of language and form to a communicator seeking authoritative force, particularly when the analytical logic behind the communication is fatally flawed. Although he does not wear the impressive robe or wig of a land-based judge, he stands on the "weather side"[200] of the ship, elevating his physical self to the appropriate judicial grandeur and leaving his hand-picked court no doubt about who directs the proceedings. Then, as we have seen, he intercedes verbally, using rhetorical devices, repetition, arousal of fear, and other techniques to urge his audience to the acceptance of a desired conclusion. Billy must hang.

Verbally gifted judges generally do not hesitate to bring style and structure to the service of legal logic and factual analysis.[201] In close cases especially, language serves function[202] as the judge influences his audience to accept his reasoning and actual decision.[203] Few would argue against the propriety of rhetoric and form in the service of a substantive position. But Melville, in a seminal passage quite early in Billy Budd, implies that the form of a communication is actually likely to control understanding and prevail over substance when decision-makers or authoritative individuals issue verbal declarations. This passage, leading into the "digressions" on the great mutinies and Admiral Nelson, explicitly deals with the way the British historians described the Nore mutiny to the interested audience back home, but the paragraph's message is meant to apply to Vere's adjudicatory communication in chapter 21.

Such an episode in the Island's grand naval story her naval historians naturally abridge, one of them (William James) candidly acknowledging that fain would he pass it over did not "impartiality forbid fastidiousness." And yet his mention is less a narration 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 befalling states everywhere, including America, the Great Mutiny was of such character that national pride along with views of policy would fain shade it off into the historical background. Such events cannot be ignored, but there is a considerate way of historically treating them. If a well-constituted individual refrains from blazoning aught amiss or calamitous in his family, a nation in the like circumstance may without reproach be equally discreet.[204]

Melville makes "considerate communication" a generative theme in his story. Closing out lifetime almost totally devoted to verbal craftsmanship, he not surprisingly emphasizes the relationship of speaker (or author) and audience in his final tale. "Considerate communication" seems to require three elements: (1) that the communicator's perception of the audience's well-being stand uppermost in his mind, whatever the ancillary motivations for the speech; (2) that whatever factual distortions occur because of that perception involve predominantly omissions, or, at the worst, trivial misstatements of fact; and (3) that the communicator faithfully convey the essence of the underlying reality he is discussing (either through overt language, or tonal or structural elements), despite the omissions or mild misrepresentations of detail.

Melville seems more to be describing the way things are, in the seminal passage, than to be criticizing either authoritative statements or the audiences to which those statements are directed. He is simply announcing a theory of communication, much in the manner of Leo Strauss, in his brilliant and highly relevant Persecution and the Art of Writing,[205] when he refers to the general public's tendency to believe "a statement made by a responsible and respected man."[206] So, if the Nore historians, reluctantly deciding that the public deserves some news of the mutiny, go on substantially to omit almost all the relevant details, they nevertheless "considerately" serve the needs of that public. Why "blazon aught amiss" when a small number of carefully selected facts, woven into the fabric of a subtly organized communication, will suffice to give people a sense of well-being predicated on their appreciation of participating in the authoritative truth?

The actions of the Nore historians embody all three prerequisites of considerate communication. They have at heart the well-being of the audience, not their own self-interest. If they distort reality, they do so only by omission, not commission. Finally, they convey the news about the mutiny, however troubling, albeit in the form of a carefully selective abridgment. Thus, although a bit of the Grand Inquisitor[207] inheres in the authoritative communicator's power to control the flow of information, this represents a fact of social life, not a negative element. If the communicator preserves the three requirements, he may proceed "without reproach."[208] So, as *Billy Budd, Sailor* progresses, Melville presents us with several other nonpejorative examples of considerate communication. The Dansker repetitively intones a selective truth to Billy about Claggart: "Jemmy Legs is down on you."[209] Recognizing both the needs and the limitations of his audience, the Dansker restricts his speech to this oracular declaration. When Billy chooses to disbelieve this statement, we again learn that authority and verbal complexity must combine (as they do not in the poetic Dansker)[210] to steer an audience towards a desired viewpoint.

Far more "considerate" than the Dansker's speech act is the *News from the Mediterranean*, the journalistic account of the events on the *Bellipotent* which "is all that hitherto has stood in human record to attest what manner of men respectively were John Claggart and Billy Budd."[211] Reporters, like judges and historians, can exercise verbal control over their audiences and establish authoritative versions of the truth. To allow their naval audience a sense of continuity and comfort, the gazette's editors paint Vere's decision to execute Billy in the most radiant colors of legality and necessity. As always, most of the actual reality is omitted. Although Billy becomes a villian who "vindictively stabbed" the upstanding Claggart,[212] the overriding goal of preserving the audience's well-being[213] may have required such nontrivial distortions. The event cannot be undone. Why "blazon aught amiss"? Better to report the actual homicide and its legal aftermath in the discreet shades of the audience's established beliefs.

Considerate communication, or Strauss' "responsible and respected" speech, then, 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,[214] and these have fewer "ragged edges" than the pure truth itself.[215]

But, as we have seen, the verbally and hierarchically superior adjudicator can give the force of seeming legality to drastic decisions the law does not support. The propriety of Vere's own "considerate" use of form and style during Billy's trial, therefore, is cast into doubt. Vere at trial in fact does not follow the example of the Nore historians or even the *Mediterranean* newsmen. He does not communicate a selective view of reality primarily to establish comforting authoritarian interpretations of otherwise troubling realities. Rather, he uses legal argument to distort the law and to further purely *subjective* ends. In Straussian terms he "persecutes" his audience directly[216] through his adjudicatory arguments, utterly falsifying the reality that he purports to convey. Vere desperately seeks, and masterfully finds, the key to controlling his hand-picked audience. He moves from four separate substantive law theories of guilt to an overriding (and thoroughly fanciful) vision of a ship in chaos if Billy is not hanged, whatever the theory of culpability. So effective is his pattern of argumentation that the critics, as well as the drumhead court, have largely granted it credence.

The narrative makes it quite clear that Vere's articulated reasons for hanging Billy do not withstand the analysis of even his junior officers.[217] Since the men's well-being does not require Billy's death, it must be Vere's subjective desires that motivate his actions.[218] This is narratively indicated by the captain's uncharacteristic show of extreme emotion during Billy's violent act and its immediate aftermath—the "excited manner" that the surgeon "had never before observed"[219]—and by the irrational, visceral (*i.e.*, inconsiderate) declarations that were its result: "It is the divine judgment of Ananias! Look!"[220] and "Struck dead by an angel of God! Yet the angel must hang!"[221]

Given this intense personal reaction, and since Vere apparently saw the result of the trial to be morally, even divinely, preordained, Melville's allusion to Vere's "insanity" at the trial[222] comes into focus. Furthermore, Vere's repetitive direction to the court to ignore both their own subjective sympathies and the moral issues raised by the case moves beyond irony to outright calumny.

Vere's legal errors, therefore, were consciously placed in his mouth by the knowledgeable Melville,[223] leaving to us the twin tasks of overcoming our own inclinations to believe such a thoughtful, verbally gifted character,[224] and of finding the narrative "light" on the *causes* of Vere's behavior.[225]

This latter task we defer to a later section of the Article,[226] but it would be well as to the former task to recall here that Vere's form of considerateness has been implicitly criticized throughout the narrative. For one thing, it stands at odds with the "frankness" of the average sailor;[227] it is the medium of a land-oriented being, quite "exceptional" [228] on a ship; that of a "martinet," [229] whose "queer streak of the pedantic," [230] "discreet envoy" [231] appearance, humorlessness,[232] and "bookish" predilections [233] create and odd impression in which "scarce anyone would have taken him for a sailor" [234] at all.

That Vere's speech smacks of the landsman's covertness is also indicated by three of his more peculiar actions during the trial. Vere displays an attraction to land-oriented law when he oddly appoints a marine to the court, [235] then goes on twice to tell the court to apply the Mutiny Act (a statute applicable only to land forces [236]) and finally conjures for them the model of a judge, "ashore in a criminal case." [237] It is almost as though the prudent, well-ordered Vere yearns to be on land where, as the narrator strongly tells us, "considerate" communication is the normative mode of behavior, men never communicate simply and directly with each other, and life is an "intricate game of chess." [238]

But Vere wound up on the water, with which he feels discordant, but in which formless element he must somehow operate. He does so by using language and intelligence so effectively that, given his position of authority, he overcomes the natural inclinations of his more "juvenile" [239] shipmates. He learns, to recall the narrative language first used about Claggart's insanity (but clearly meant to foreshadow Vere's),[240] to display an "even temper and discreet bearing," a "mind peculiarly subject to the law of reason" [241] and "a cool judgment sagacious and sound." [242] This outward form masks the "irrational," [243] the "protectively secret" [244] and even "the accomplishment of an aim which in wantonness of atrocity would seem to partake of the insane," [245] so that "whatever its aims may be—and the aim is never declared—the method and outward proceeding are always perfectly rational." [246]

Thus, the argument at trial comes from the mouth of a character whose methods have already been associated with duplicitous landsmen and, specifically, with Claggart himself. When these types have their passions aroused, they do everything possible to hide from any significant audience the true source of their emotion.[247] And so, Vere conceals (or fails to recognize) his desire, instead showing to the court the face of a man who would rather save Billy but who is forced to execute him by "duty and the law."

Gentlemen, were that clearly lawful for us under the circumstances, consider the consequences of such clemency. The people (meaning the ship's company) have native sense; most of them are familiar with our naval usage and tradition; and how would they take it? Even could you explain to them—which our official position forbids—they, long molded by arbitrary discipline, have not that kind of intelligent responsiveness that might qualify them to comprehend and discriminate. No, to the people the foretopman's deed, however it be worded in the announcement, will be plain homicide committed in a flagrant act of mutiny. What penalty for that should follow, they know. But it does not follow. *Why?* They will ruminate. You know what sailors are. Will they not revert to the recent outbreak at the Nore? Ay. They know the well-founded alarm—the panic it struck throughout England. Your clement sentence they would account pusillanimous. They would think that we flinch, that we are afraid of them—afraid of practicing a lawful rigor singularly demanded at this juncture, lest it would provoke new troubles. What shame to us such a conjecture on their part, and how deadly to discipline. You see then, whither, prompted by duty and law, I steadfastly drive. But I beseech you, my friends, do not take me amiss. I feel as you do for this unfortunate boy. But did he know our hearts, I take him to be of that generous nature that he would feel even for us on whom in this military necessity so heavy a compulsion is laid.[248]

In this, his final argument, Vere sucessfully exercises over the members of the court the precise form of deception that he counsels them to use on "the people." Advising them, through the clever medium of a subordinate clause, that the crew will react mutinously to news of Billy's unpunished deed "however it be worded in the announcement," Vere effectively dissembles. He means, of course, "as I intend to word it in the announcement," for the full power of communication (as this speech itself proves) lies in his authoritative hands. It would not have been difficult to tell the crew the story in a manner that would have appeased their sense of order and saved the life of their favorite. Instead, in the service of his own unstated desires. Vere, through his landsman's mode of communication, succeeds in sentencing a moral innocent to a needless death.

Adjudicatory communication, as its highest level of articulateness and sophistication, is therefore cast into doubt by Melville in this tale. The questions he poses should not be lost on us, his legal audience, and they bear repetition by application to a fascinating actual subject, Justice Rehnquist.

B. CONSIDERATE COMMUNICATION AND JUSTICE REHNQUIST

Whatever we may think of his substantive positions, Justice Rehnquist has come to be seen as perhaps the least doctrinally disinterested judge currently on the Supreme Court.[249] He also stands as the contemporary master of judicial language.[250] Thus, any random sampling of Justice Rehnquist's opinions would readily illustrate how language can control adjudication. And few opinions better demonstrate Rehnquist's awareness of the tactics of "considerate communication" than Paul v. David.[251] Widely criticized for its legal reasoning and use of precedent,[252] Justice Rehnquist's opinion is thereby an all the more brilliant contemporary example of narrative prose in the service of the adjudicator's unspoken desires.[253] Moreover, Paul merits particularly intensive analysis here as a remarkable analogue to Melville's novella.

Let us take up this judicial text, not to criticize anew its legal analysis, but rather to appreciate the clevely persuasive manner in which Justice Rehnquist, ever considerate of his audience's needs, uses language to dispel critical probing into his logic and use of precedent.

I. FACT DENEUTRALIZATION

Paul v. Davis' story (and is that not the proper term for an actual event once it has been syphoned through the appellate process?) has by now become a kind of "inside narrative" too, renowned not necessarily as it occurred, but at least as it is reported by the authorities.

Yet, each new factual rendition of the case is its own new story, inevitably emphasizing some facts, minimizing or deleting others, using descriptive terms that quietly affect the listener or reader. To demonstrate this again (for we have just been analyzing the way various "reporters" manipulated facts in Billy Budd's case), we need only compare Justice Rehnquist's own restatement of the facts [254] with that of a law review Note about the case. First, the Note:

> Who steals my purse steals trash; tis something, nothing;
> Twas mine, 'tis his and has been slave to thousands.
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.—Othello, Act III, Scene iii

In June of 1971, plaintiff Edward Charles Davis, a photographer for the Louisville Courier-Journal and Times, was arrested in Louisville, Kentucky on a charge of shoplifting. He pleaded not guilty. In September, the charge was "filed away with leave [to reinstate]." but he was never called upon to face that charge in court. With the onset of the Christmas season in 1972, defendants McDaniel and Paul, the chiefs of police for Jefferson County and Louisville, jointly prepared a five-page flyer containing the names and mug-shots of "Active Shoplifters." Copies of this bulletin were distributed to local merchants in the Louisville area, warning them of possible shoplifters. In fact, the flyer was composed not only of persons actually convicted of shoplifting, but included persons who had merely been arrested for shoplifting either in 1971 or 1972. Plaintiff's name and mug-shot were included in the flyer, even though the charge against him was dropped six days after the flyer was distributed. After discovering the affront, Davis commenced a civil rights action in the District Court for the Western District of Kentucky. . . .[255]

Although it is of course impossible to restate any fact situation without adding subjective color to the pristine original reality, Justice Rehnquist's approach now attracts our careful attention; not the defamed Davis of the law review Note but rather the police chiefs Paul and McDaniel become the sympathetic protagonists of his tale.

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972 they agree to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a "flyer,". . . [of active shoplifters].

The flyer consisted of five pages of "mug shot" photos, arranged alphabetically. . . . In approximately the center of page 2 there appeared photos and the name of the respondent, Edward Charles Davis III.[256]

Just as Vere must await his entrance until Admiral Nelson is fully discussed (thus lending narrative emphasis to Nelson's person), so Davis and his grievance must tarry a score of lines before surfacing.[257] By then, the render has assimilated a pleasant picture of two dutiful officers (the event's protagonists) who "agreed to combine their efforts" to prevent crime, all of this "during the Christmas season," no less.

As to the intrusive David, Justice Rehnquist's narrative emphasizes the aura of suspicion surrounding Davis' arrest for shoplifting, which apparently justifies the police flyer's publicizing this arrest prior to trial.[258] Instead of saying that the state never overcame its burden of proof, Rehnquist declares that his guilt or innocence of that offense had never been resolved,"[259] although later the shoplifting charge was "finally dismissed."[260] This last adverb speaks volumes, for like Vere's "pitilessly" in his remarks to the court,[261] it sticks in the audience's mind, cleverly attaching a new sense to the verb it modifies. Just as Vere's hard view of Billy's case is justified because the law operates pitilessly, so David is made to seem culpable because the dismissal of his case was so long in coming. Even the Christmas season had to suffer suspicions of this alleged shoplifter; perhaps we, like Davis' supervisor,[262] should blame him for finding himself in such a situation in the first place.

2. Law Deneutralization

While Justice Rehnquist's narration of the factual events leaves Davis looking a bit sheepish, and Paul and McDaniel looking cooperative and dutiful, his rendition of the plaintiff's legal strategy[263] utterly reduces Davis (and his lawyers) to calumny. Starting out much like his imaginative progenitor, Captain Vere, Justice Rehnquist stresses the litigant's chances of success in some other court;[264] it would be well to recall the fictional figure's relevant language:

Not, gentlemen, that I hide from myself that the case is an exceptional one. Speculatively regarded, it well might be referred to a jury of casuists. But for us here, acting not as casuists or moralists, it is a case practical, and under martial law practically to be dealt with. . . .

"Ay, sir," emotionally broke in the officer of marines. . . . "But surely Budd purposed neither mutiny nor homicide."

"Surely not, my good man. And before a court less arbitrary and more merciful than a martial one, that plea would largely extenuate. At the Last Assizes it shall acquit. But how here? We proceed under the law of the Mutiny Act."[265]

Justice Rehnquist, no more than Vere, needed (analytically) to discuss other "courts." His offhand talk of defamation per se as the basis for Davis' claim in the Kentucky courts[266] is as technically irrelevant and questionable as Vere's allusion to casuists and the Last Assizes.[267] The action has been brought in federal court on nondefamation grounds.

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 jurisiction to dispose, definitively, of Billy's case; Justice Rehnquist posits the state courts' jurisdiction to impel his audience to see that the federal courts *did not* have jurisdiction over Davis and his claim. Through structure and language, both adjudicators create a distraction designed to evoke the sense that the unfortunate litigant before them has wound up in the wrong arena. This strategy, placed at the outset of their legal arguments, deflects attention from the only true jurisdictional issue at hand: does the *instant* court have the authority to determine the case? This deflective technique usually contrives to conceal more germane information which, if known to the audience, would be detrimental to the communicator's well-being.[268]

Justice Rehnquist lingers on the jurisdictional point, ensuring its effectiveness by choosing an adverb and a verb geared to emphasize Davis' unfortunate choice of forums: Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby *transmuted* into one for deprivation by the State of rights secured under the Fourteenth Amendment.[269]

Justice Rehnquist's ability to use the parts of speech syntactically available to a communicator is impressive. Here, the adverb "concededly"[270] passes over the inattentive reader and further colors his impression of Davis; it implicitly links the respondent to the earlier view that a state court action is mandated. But has Davis made such a concession? Perhaps he might have if his case had anything to do with "private" behavior; it is, however, so imbued with police activity that Davis surely never considered, much less conceded, the authenticity of such a statement. Yet, "he" contends that the police action here has "transmuted" the defamation claim into one under the Constitution.

Justice Rehnquist's depiction of the respondent's "strange" choice of forums thus makes Davis out to be almost a buffoon, or worse, an alien to our system of law. Like Billy's striking of Claggart, Davis' act of raising federal law claims is—through the use of one verb—exacerbated into a threat to normative law; like a visitor from outer space (or a Handsome Sailor), he takes civilized processes and *transmutes* them into something threatening.

These two words unclench Justice Rehnquist's "parade of horribles."[271] But this is no parade trotted out by a judge of modest narrative talent. Could it be that Justice Rehnquist, who sometimes alludes to fiction in his opinions,[272] might have recently read *Billy Budd, Sailor* or, at least, that section of it in which Vere speaks to the potential snowball effect on the sailors' sense of loyalty if the court treats Billy leniently?[273]

Your clement sentence they would account pusillanimous. They would think that we flinch, that we are afraid of them—afraid of practicing a lawful rigor singularly demanded at this juncture, lest it should provoke new troubles. What shame to us such a conjecture on their part, and how deadly to discipline. You see then, whither, prompted by duty and the law, I steadfastly drive.[274]

Justice Rehnquist starts his "slippery slope" in similar fashion: "If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under § 1983."[275] Hypotheticals, the stuff of opinion writers as well as professors, come creatively and imaginatively to the fore in these two texts. Both arguments conjure the worst possible disruption of order if these litigants are permitted to prevail. If Billy is to be adjudged innocent, says Vere, discipline will disintegrate; if our Court hears Davis, argues Justice Rehnquist, the populace will be aroused. Finally, to clamp the lid on respondent's plea, Justice Rehnquist recalls the "trouble-making" Davis of his factual presentation[276] by suggesting that this litigation even threatens the repose of certain patriots long departed: "We think it would come as a great surprise to those who *drafted* and *shepherded* the adoption of that Amendment to learn that it worked such a result. . . ."[277] Two verbs, artfully inserted, conjure the ultimate effect of Davis' otherwise straightforward and innocuous claim. History itself, the constitutional tradition of the fourteenth amendment, cannot be cast into disarray.

If Vere's underlying message to his court evokes Billy as a threat to the stability of the Empire, Justice Rehnquist's to his sees Davis as a force of lawlessness challenging the basis of fundamental legal order. Most considerately, each adjudicator provides his court with a litigant who must not be allowed to succeed.

3. Rhetorical Devices

One of Justice Rehnquist's precursors in the craft of judicial considerateness, Benjamin N. Cardozo, had this to say about the effective appellate utterance: "The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb, and the maxim. Neglect the help of these allies, and it may never win its way."[278] Justice Cardozo stressed that rhetoric, as much as logic, dictated the acceptance and ultimate authority of an opinion.[279] 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 authorship of fledgling law clerks.

In some of the passages of *Paul* already analyzed, 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: anacoenosis, aporia, epitrope, prosopopoeia, and sarcasm. At the beginning of what we have called the "law deneutralization" process, Rehnquist throws a few bones to Davis: "Accepting that such [defamatory] consequences may flow from the flyer in question";[280] "Imputing criminal behavior to an individual is generally considered defamatory *per se*."[281] Here, and in only one later section,[282] Justice Rehnquist employs anacoenosis—the opponent is seemingly allowed full sway in forcefully furthering his argument. Together with epitrope—ironically permitting an opponent to do what he proposes to do—this device deliberately misleads the audience as to the substance and effect of the opponent's (here Davis') argument. All of this leads to the general casting of doubt (aporia) upon Davis' now thoroughly distorted position: "It is hard to perceive any logical stopping place to such a line of reasoning."[283] These doubts are heightened by the device of prosopopoeia: representing imaginary or absent figures, here the drafters of the fourteenth amendment,[284] as though present or alive. And the sarcastic tone of the first part of the opinion reverberates in such phrases as "nothing more than," "'strained interpretation,'" "surely far more clear," and "difficult to see why."[285]

Indeed, in part II, section B of the opinion, as we shall stress further on, the Sixth Circuit receives treatment similar to Davis': the lower court is several times allowed full sway when Justice Rehnquist seems to let it speak in its own voice,[286] but his call to absent authority (particularly the ironic and inapposite dependence on Justice Douglas' language[287]) undermines the lower

court's premises and interpretations. There are also the mildly sarcastic locutions, "could be taken to mean," [i]f read that way," "[w]e should not read this language,"[228] and the omnipresent quotation marks around the word "stigma,"[289] implying that both Davis and the court of appeals might be on doubtful ground even in asserting that those 800 flyers injured respondent's reputation.

There is no need to repeat the commentators' critiques of Justice Rehnquist's use of precedent in part II, section B.[290] The point here is to recognize that Justice Rehnquist's rhetorical facility goes as far to explain his success in cases such as *Paul* as Justice Cardozo's did in more agreeable decisions—and as Vere's did in *Billy Budd, Sailor.*

4. Structure and Organization

As has been established, Justice Rehnquist's manner of depicting fact and law subtly deneutralizes the Court's ostensibly objective reasoning process. Rather than offering his audience the passion and fire of, say, Justice Brennan's dissent, Justice Rehnquist seeks to convince coolly. But this should not be taken for disinterest. The considerate communicator knows that structure (Cardozo's "architectonics")[291] is as forceful as logic when a given situation might take an audience either way.

To appreciate the structure of *Paul v. Davis*, we need only start with Justice Rehnquist's overt compartmentalization. Prior to part I, he sets forth the "facts."[292] These fifty-nine lines thus are made to seem almost by-the-way; yet, as we have indicated, they serve a vital coloring function.[293] It is only in the sixty-four lines that constitute part I,[294] however, that Justice Rehnquist educes his basic structuring thesis: Davis, through the temerity of his claim, challenges an ordered system of law. Masterful in its progression, this part builds on the reader's skepticism, imbued earlier, about a respondent who, after all, *had been arrested.*[295] Justice Rehnquist continues to depict Davis as opposing, in turn, the basic premises of the federal system,[296] the police who are trying "to claim the fears of an aroused populace,"[297] the natural limits of legal liability,[298] and the studious reflectiveness of the Court itself.[299]

Like Vere, who used clever words and phrases to aid structural suggestiveness.[300] Justice Rehnquist cogently chooses words to set Davis up against one or more of his audience's basic values. We noted the centrality to substance of the embellishing words "concededly," "transmuted," "drafted," and "shepherded."[301] The concluding phrase, "a study of our decisions convinces us they do not support the construction urged by respondent,"[302] climaxes the mounting sense of uneasiness about Davis. Davis has challenged the police, and, according to Justice Rehnquist, the legislative drafters of a noble amendment; but his gravest offense, it seems, is attempting to distort the studious processes of the Supreme Court itself.

The concluding lines of part I also provide an enjambement[303] to part II; they connect the idea of there being no "stopping place" to Davis' line of reasoning or to the circuit court's analysis. Indeed, the structure of sections A and B of the second part largely duplicates that of the first, but with one essential difference: the overt butt of Justice Rehnquist's now gentler rhetoric is the Court of Appeals for the Sixth Circuit. To convince his audience that the court below should have been more reflective. Justice Rehnquist immediately introduces the primary formal device of the rest of the opinion: the positing of "premises" from which his logic seems inevitably to flow. But these premises, usually expressed in what Cardozo called the "type magesterial."[304] are often drafted out of Justice Rehnquist's whole cloth. Like Vere, who disequilibrates his audience by telling them that they would be weak and feminine to acquit or mitigate in Billy's case,[305] Justice Rehnquist disorients his reader by asserting two premises upon which the result below "must be bottomed."[306] Neither premise though, truly express the grounds upon which the court of appeals rendered its finding for Davis.[307] Vere's awareness of the substantive and procedural weakness of his legal argument leads him to shift the focus of the court's perception.[308] Similarly, Justice Rehnquist proceeds by ignoring significant language from two Supreme Court precedents. From *Wisconsin v. Constantineau:*[309] "The only issue present here is whether the label or characterization given a person by 'posing' . . . is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard."[310] And, most tellingly, from *Board of Regents v. Roth:*[311]

> The State . . . did not make any charge against [respondent] that might seriously damage his standing and associations in his community. . . . Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[312]

Justice Rehnquist's structure—the repetitive undermining of the premises upon which Davis and the court of appeals ostensibly thought they could rely—serves to displace the audience's attention from his own monumental task, which is nothing less than to reconstrue a whole line of precedents without overruling them.[313] And indeed, when Justice Rehnquist finally, turns to precedents like *Constantineau* and *Roth*, his tendency to follow a given structure begins to lose its charm.[314] This is particularly true in these lines about *Roth.*

While *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment.[315]

In light of the language from *Roth* just cited, this statement, however glib, appears difficult to support. With his characteristically considerate understanding of what, at a minimum, his audience requires, Justice Rehnquist nonetheless perseveres, quoting elliptically from *Roth*:

> "The State, *in declining to rehire the respondent,* did not make any charge against him that might seriously damage his standing and associations in his community. . . .
>
> "Similarly, there is no suggestion that the State, *in declining to re-employ the respondent,* imposed on him a stigma or another disability that foreclosed his freedom to take advantage of other employment opportunities."[316]

"Thus," somewhat fantastically but still forcefully continues Justice Rehnquist, "it was not thought sufficient to establish a claim under §1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment."[317]

Surely no opinion less well crafted to this point could have survived this logical distortion and brought four other Justices along with it to a majority. Justice Rehnquist deftly avoids the *Roth* Court's explicit disjunction: if state action imposed *either* defamation *or* employment deprivation on Roth, "this, again, would be a different case,"[318] entitling him to notice and a hearing. Justice Rehnquist instead formalistically constructs the distorted premise that *both* are necessary by avoiding language to the contrary and emphasizing words that might lead the unwary audience to agreement.

In addition to H.L.A. Hart's observation about the power every judge possesses because of his creative capacity to interpret precedents,[319] 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 detests his ally in covertness, John Claggart, that he finds himself urging the master-at-arms to "Be direct, man."[320] In another novel, Dickens' *Great Expectations,* the protagonist, Pip, implores the always secretive solicitor, Jaggers, "to be more frank"[321] in conveying information that Pip needs. The third quotation, from John Barth's *The Floating Opera,* probably explains better the *success* of a judicial writer like Justice Rehnquist in an opinion such as *Paul:* "How could mere justice cope with poetry? Men, I think, are ever attracted to the *bon mot* rather than the *mot juste,* and judges, no less than other men, are often moved by considerations more aesthetic than judicial"[322]

Having posited major premises based on such creative misreadings of the precedents, Justice Rehnquist now glides into part III, in which new law, 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 Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondent 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.[323]

The opinion's critics have observed the retreat to a kind of outmoded "entitlement" theory articulated in these lines.[324] Structurally, the passage also retreats to an earlier theme in the opinion: Davis should look to state tort law.[325] Circularity, always an esthetically pleasing structural device, conjoins here with what might be called "single-phrase evocation" to link the two ends of Justice Rehnquist's opinion.[326] Recall how effectively Melville uses the phrase "sanity and insanity" with reference to Vere in the opening paragraph of the trial scene;[327] it evokes in the reader a connection with the first use of those words in the text,[328] ostensibly regarding John Clag-

gart.[329] Just as Claggart and Vere are thus artfully connected in the domain of irrationality, so the Court's use of entitlement is carefully linked, through the key phrase "by virtue of its tort law,"[330] to its earlier pejorative view of Davis' claim: "But [Davis'] reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[331]

The good narrative writer weaves into his structure certain code words to which he can return, knowing that his reader will follow the associative pattern connected with those words. Thus, Justice Rehnquist buttresses the substantive legal concept of entitlement by joining it with the already established image of the state's protective tort law. The "virtue" of the states, in whose bosom a grievant can find relief through tort-based actions, is not lightly to be "superimposed" upon the unwilling federal courts. No "font" to which a plaintiff may crawl for spiritual and legal solace, the federal laws apply themselves sparingly. Davis, as we have been taught, is not one of the chosen; he is not entitled to the Court's protection.

Words like "font" and "superimposed," and evocative structuring devices like enjambement and circularity, are impressive tools of appellate opinion writing; they contribute to the art of adjudication, and we should appreciate them for what they are. But when claims are denied, perhaps wrongly, with the help of the crafty use of language and form, commentators must move beyond logical criticism alone[332] and into an understanding of appellate communication. Literary techniques can help pry open the source of an adjudicator's capacity to persuade when logic and tradition seem to support a contrary result. Thus, examining *Paul v. Davis*[333] in the light of *Billy Budd, Sailor* illustrates how, to achieve a subjective goal,[334] an adjudicator can win over an audience by considerately providing it with a story it needs to hear, thereby assuaging its doubts and dampening its spirit for further rational inquiry.

IV. Melville's Thoughts on Adjudicatory Communication: Outer Form and Inner Essence Disjoined

> The moral nature was seldom out of keeping with the physical make.[335]

A. Vere's Hidden Motive

Examples, real and fictional, illustrate the important adjudicatory role played by rhetorical skill in the dual service of the communicator's unspoken desires and the audience's minimal demands. As we have seen, however, Melville questions this mode of communication when employed by Vere: the captain's considerate way with words distracts the drumhead court sufficiently to permit him to win his way despite his legal improprieties. Vere's adjudicatory "insanity," however, consists not only in cleverly using language to reach a result that lacks sense; his communication is result-oriented, and his reason for contriving to have Billy hanged must be sought if the legal significance of the tale is fully to be grasped.

Melville does not readily reveal Vere's motives; his, too, is a nonovert narrative. Carefully exposed, the captain's impression of the defendant prior to the central incident seems unironically clear: Vere likes Billy. To the extent that it has been noticed at all, Billy's presence on the Bellipotent strikes Vere as a "'King's bargain.'"[336] Vere even deems him an intelligent enough sailor to be considered for a promotion to the "captaincy of the mizzentop."[337] 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 answer links the captain's "insanity" at the trial with Claggart's behavior toward Billy, but reveals the object of Vere's rage to be a far more considerable one.

Vere joins Claggart in being marked by a prudent dissembling of underlying obsessions, and a burning envy directed at a sublime 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 the crew, he does so to destroy a symobl. Billy, the embodiment of the mode opposite to Vere's own, the ultimate model of sailor-like "frankness,"[338] dies not for any of the legal or political reasons articulated by a man of Vere's landsman-like "finesse,"[339] but because he unwittingly stands in the place of the envied, magnificently overt Admiral Nelson. The far-reaching narrative opposition of overtness and covertness finally underlies Vere's substantive decision to have Billy hanged.[340] Unable to wreak his vengeance on Nelson directly, Vere finds a surrogate in the heroic Billy, who is emblematic of Nelson in his overt popularity and ability to use that popularity for good. So, when Vere speaks of the threat of mutiny requiring a violent sacrifice, we are meant to recognize the active irony of the statement; we must 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 pennant from the Captain to the Theseus; and for this reason: that the latter ship having newly arrived on the station from home, where it had taken part in the Great Mutiny, danger was apprehended from the temper of the men; and it was thought that an officer like Nelson was the one, not indeed to terrorize the crew into base subjection, but to win them, by force of his mere presence and heroic personality, back to an allegiance if not as enthusiastic as his own yet as true.[341]

Nelson's mere presence quashed the very real threat of a mutiny on the *Theseus*.[342] Vere, on the other hand, creates an artificial 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 bloodless 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 in Vere's actions at the trial; as with Claggart's rage against Billy, Vere's against Nelson can be understood as the complex man's strange attraction-hatred for the straightforward, essentially non-verbal hero.[343] Like Claggart's, Vere's aims are "never declared."[344] If the master-at-arms' personality is "hidden,"[345] Vere's is "undemonstrative," "not conspicuous," and "discreet."[346] If Claggart has "shown considerable tact in his function,"[347] so Vere tends to "guard as much as possible against publicity."[348]

A consummate dissimulator, Claggart fools everyone in the "soup spilling" scene,[349] one that we may now understand as deliberately foreshadowing Vere's covert methodology during the trial. Claggart's remark—"Handsomely done, my lad! And handsome is as handsome did it, too!"[350]—well exemplifies the clever communicator's tendency to distract his audience at any crucial point in which the communicator's true desires might otherwise be revealed. His wisecrack succeeds in hiding his villainous motives both from the "tickled" foretopman, and such onlookers as Billy's friend, Donald, all of whom thereafter disbelieve the Dansker's warnings to Billy about Claggart.[351] Perhaps still more important to the developing narrative conjunction of Vere and Claggart, the master-at-arms' subsequent attack on the unfortunate drummer boy asserts the covert individual's tendency to lash out at surrogate bystanders (the resentful man's "innocent victims").[352] Unwilling as yet to chastise publicly the real object of his bitterness, the master-at-arms instead attacks another youthful sailor during the "less guarded"[353] moment leaving the mess hall.

Only someone who had both seen Claggart depart and grasped the interpretative principle which we here call parallelism would have correctly ascertained the implied object of Claggart's rattan-lashing of the drummer boy. For the clever communicator never shows his true colors, or perhaps may just hint at them through the use of a "parallel" object, and then only when his audience is sufficiently distracted not to notice them. Like Claggart, Vere finds 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 "parallel" object of his violence is Billy, a suitably emblematic, overt figure, a kind of mini-Nelson.[354] 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."[355] There natures are stamped by a consistent harmonic integration of inner and outer man and an almost organic rejection of hypocrisy and covertness. 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 mean to emphasize that Nelson too represents a kind of simplicity, sailor-like honesty on the highest level. Just as the foretopman is "a superior figure of . . . [his] own class,"[356] so Nelson has been called by the narratively invoked Tennyson, "'the greatest sailor since our world began.'"[357]

When Vere sees Billy strike Claggart, he experiences a violent, cathartic emotion. He intuits instantly the opportunity this event affords his imaginatively complex nature. Merely a competent pragmatist in battle, Vere will seek a form of immortality by creating a scenario out of the stuff of Billy's deed, one that will satisfy his own most basic subjective goals. In this light, Vere's complexity joins Claggart's, no longer as a positive attribute, but as negatively antithetical to the sailor-like condition. When Vere gazes at Billy, he does not feel any of Claggart's venom; but, when Billy strikes the captain's covert ally, all of Vere's subtle

envy for Nelson emerges in a violent urge to indirect vengeance.

To fathom Vere's unarticulated resentment toward Nelson, one need only consider the dilemma of a man whose very considerable talents might have garnered him a glorious reputation in any other historical period, but whose career must constantly lie in the shadow of the unmatchable figure of the Nile, the *Theseus*, and 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 streak of the pedantic running through'" Vere has kept him from the deserved fame bestowed by "'the gazettes'" upon Sir Horatio Nelson.[358]

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." [359] Unable to respond to his men with a Nelson-like (or Billy-like) naturalness, Vere implicitly adopts the precedent of his "starry" ancestor; [360] imaginatively formalized discipline.[361] As the central events unfold, he attempts, at the trial and thereafter, to create a narrative form that will enable him to destroy the representation of overt naval heroism, the Nelson-in-Billy. But like the unsymmetrical European ironclads compared with the "grand lines" of Nelson's *Victory*,[362] Vere's aberrational aesthetic also degrades the artistic mode, one better exemplified by Nelson's literary gestures at Trafalgar.[363]

Consistently false in his verbal approach to the legal reality, Vere proceeds after the trial to communicate the sentence both to Billy [364] and the crew.[365] The atmosphere still hangs heavy with deception. The narrative casts a pejorative pall of secrecy over Vere's communications to the doomed sailor.[366] And, though an abstract compassion 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 nature has at least twice before been imperiled by "closed interviews." [367]

Vere's death shortly after these events forces the character to be judged by his actions at the trial, his only real attempt to fulfill "the most secret of all passions, ambition." [368] Even in death, however, Vere remains true to his primary characteristic, *covertness*. For, in uttering Billy Budd's name,[369] the dying man fittingly invokes the heroic mode most perfectly embodied in the rival 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 (but is this "righteousness"? [370]) is that he sought a legitimate, external compulsion for what was, in fact, a subconscious and all-consuming subjective desire. Unlike the Nore historians, who were genuinely considerate in order to permit the British public to assimilate 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 uses the outward show of an "uncommon prudence" [371] "as an ambidexter implement for effecting the irrational." [372] In Vere's hands, authoritative communication, once "considerate," becomes, finally, covert.

B. RAMIFICATIONS FOR ADJUDICATION

[I]n 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 herself as in Shakespeare and other masters of the great Art of telling the Truth—even though it be covertly and by snatches.[373]

When a judge claims that positive law prohibits him from acting according to the dictates of his own moral nature, we should be on guard. The sanctuary of formal, positive law too often subtly conceals the naturalistic impulses that bring the adjudicator to a decision. This insight is the most basic contribution of *Billy Budd, Sailor* to a theory of adjudication.[374] Melville indicates that the judge's imagination (*i.e.*, subjective creativity) must inevitably be brought to bear on the facts and law before him.[375] In particular, the judge's need and *power* to use language afford him an engaging opportunity to act out his subjective motives within the acceptable form of legal discourse and reasoning. Melville reminds us that judges who claim to be disinterestedly applying the law may well be implementing their consciences, particularly when the law could take them either way.[376] The formalistic strictures of the law simply aid them to appear more "professional." [377]

Thus, as David Richards notes in his perceptive treatment of *Billy Budd, Sailor*, "*noting* dictates th[e] grotesque result but Vere himself,"[378] who "*chooses* to read the statute in a certain way." [379] 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,[380] and the role of ethics in legal reasoning.[381]

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 reasoning" of general deterrence.[382] Richards, thus, is properly skeptical of Vere's legal argument and perceives that the captain wrongfully denies responsibility for the hanging by attributing it to the law.[383] But Richards accepts Vere's articulated reason for handing Billy—a fear of mutiny—at face value. The analysis offered here suggests that this reason, too, is suspect; it is Vere's covert way of persuading his impressionable drumhead court. Far from betraying his conscience in hanging Billy, Vere acts out his innermost desire—his resentful antipathy to the sailor-like directness and unpragmatic heroism of Admiral Nelson. The difference is analyses is profound, asserting a limitation on the ability of the unexamined judicial conscience to reach objectively disinterested and morally correct results.

Professor Richards agrees that Vere's behavior is a species of adjudicatory insanity: Vere indulges "crude reasons of policy that, without the sham defense of principle, . . . [his] own considerable conscience would reject," [384] The source of Vere's "corruption of moral conscience," of his tragedy, "is not egoism nor a failure of courage, but a defect in self-conception, a belief that professional identity requires . . . the separation of moral passion and professional role." [385] *Billy Budd, Sailor*, in this view, is a dramatic illustration of how law divorced from ethics is repressive—and irrational. An adjudicator can reach a just conclusion through rational inquiry, but only by taking account of the claims of conscience and acknowledging personal responsibility.[386] To deny the role of ethics in legal reasoning, in the name of legal formalism, is a fatal failure of rational understanding.

The reading of *Billy Budd, Sailor* offered here located Vere's adjudicatory insanity in a very different source and thereby poses a yet more troubling question. Is ethical adjudication available to the average judge through purely rational processes? Melville's answer, linked to the even wider critique of modern culture found in this tale, is decidedly negative.

Vere, let us recall, is not an evil character; in most circumstances, he is indifferently honest,[387] Yet, we learn that neither his conscience nor his mode of communicating is to be trusted. Resentment, envy, and other prevalent negative forces throw the capacity for both reasoned judgment and rational discourse into doubt. Judges are mortal being, prone to contemporary crises in values. Through Vere, Melville suggests that the barriers to the rational discovery of a just result are deeper than Professor Richards imagines; they are rooted in the normative structure of the culture in which adjudicators act.[388]

For Melville, Vere's "insanity" was emblematic of an entire culture in distress. The headnote of an earlier version of the story spoke of a "crisis in Christendom." [389] The extreme care bestowed on the tale by its author (extending over the last five years of his life) [390] indicates that its significance goes beyond even what we have said. As to this fuller cultural perspective, only part of which we have discussed here,[391] it may suffice to add (in the spirit of this article's predominant outlook) that Melville found it necessary in the final story to join forces with his covert communicators, Claggart and Vere. The novella's deepest meanings are sheltered beneath a cloak of narrative equivocation, irony, and selective omission. In Leo Strauss' eminently applicable terms,[392] Melville was writing as a "persecuted" author, required by the iconoclasm of his message to enunciate it "between the lines." [393]

Thus, Vere's methods and motives define those of society (at least literate society) as a whole. The narrative's own considerateness hints that Vere's approach is normative; no significant moral act, and certainly no important act of authoritative communication, is to be taken at face value in the modern world. News from the Mediterranean has hitherto made John Claggart the hero and Billy Budd the villain, and those "superannuated" gospels [394] 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, even when he is playing with a full 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) [395] to enter into the more baffling mysteries of Melville's portentous tale.

CONCLUSION: ON THE USES OF LITERATURE FOR LAW

This Article has had several interconnected aims. First, our approach has attempted to illuminate certain puzzling aspects of 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 "extrinsic" data—can add to our understanding of basic legal issues. Second, at some length (but less than it deserves), the notion of "considerate communication" has been gleaned from Billy Budd, Sailor, furthered, and applied to a recent piece of actual Supreme Court craftsmanship. More work is needed on this aspect of legal meaning, which Llewellyn once called the "range of creative effort which no individual rule can offer." [396] Finally, in a far more schematic and tentative way, the Article has suggested that the study of literature itself, the reabsorption of the legal community in its cultural roots, may be a modern-day necessity. Western culture, as Melville predicted in the late nineteenth century, was preparing itself for some shocks. Vere's covert rage and effective formalism were to become, only a generation or two later, the model of European behavior; millions of actual innocents would take the place of the one fictional foretopman. Law has its place in that scheme. Literary culture has its place in the development of contemporary legal theories that may realistically aspire to the renaissance of a just society.

FOOTNOTES

*H. Melville, Billy Budd, Sailor (H. Hayford & M. Sealts eds. 1962) [hereinafter cited by page number only].

**Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, B.A., 1965, Brandeis University; M.A. (French Literature), 1967, Ph. D. (Comparative Literature), 1970, Cornell University; J.D., 1974, Columbia University. Former Assistant Professor of French and Comparative Literature, University of Chicago (1971-1975). Versions of the present paper were given at the Philological Society of the University of Chicago (June 1975); at the Modern Language Association session on "Law and Literature" (December 1976); at the January 1980 meeting of the Association of American Law Schools (Law and Humanities section); and at a conference on "A Moral Critique of Law: The Example of Melville," Princeton University (June 1980).

Although I think of this paper as a tentative first step into the mysteries of a complex masterpiece, I have ventured this far only through the steadying guidance of many mentors. Foremost among these have been the student and professional audiences whose acceptance of at least some of these ideas has encouraged me to proceed. Among the individuals whose willingness to discuss the paper at length allowed me to refine the inquiry over the years are Merlin Bowen, Michael Braff, Robert Cover, David Haber, Arthur Jacobson, Robert Lawry, David Richards, Benno Schmidt, Paul Shupack, Cheryl Weisberg, and Edward Yorio.

[1] H.L.A. Hart, The Concept of Law 11 (1961).

[2] For a survey of this scholarship, see Suretsky, Search for a Theory: An annotated Bibliography of Writings on the Relation of Law to Literature and the Humanities, 32 Rutgers L. Rev. 727 (1979).

[3] The currently popular "extrinsic" methodologies are the various social sciences. See, e.g., D. Baldus & J. Cole, Statistical Proof of Discrimination (1980); Forst, Rhodes & Wellford, Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines, 7 Hofstra L. Rev. 355 (1979); Symposium: The Courts, Social Science, and School Desegregation (pts. 1 & 2), 39 Law & Contemp. Probs. 1, 217 (1975); Wolfgang, The Death Penalty: Social Philosophy and Social Science Research, 14 Crim. L. Bull. 18 (1978). For perspectives critical of excessive judicial reliance on statistical and social scientific analyses, see, e.g., O'Brien, Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law, 64 Judicature 285 (1981); O'Brien, The Seduction of the Judiciary: Social Science and the Courts, 64 Judicature 8 (1980); Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329 (1971).

[4] See, for example, the central use of *Billy Budd, Sailor* and Sophocles, Antigone (Athens 440 B.C.) in the prelude to R. Cover, Justice Accused 1-7 (1975). Four recent full-issue symposia on law and literature demonstrate a contemporary interest in the application of literary structures to legal issues. See Law and Literature, 32 Rutgers L. Rev. 603 (1979); Law and Literature, 9 U. Hartford Stud. Literature 83 (1977); Law and the Humanities, 29 Rutgers L. Rev. 223 (1976); Law and the Humanities, 7 U. Md. L.F. 84 (1977); see also Weisberg, Law, Literature and Cardozo's Judicial Poetics, 1 Cardozo L. Rev. 283 (1979) [hereinafter Weisberg, Literature and Cardozo]. See generally M. Ball, The Promise of American Law (1981), for an excellent and creative approach to the importance of the humanities for law; J.B. White, The Legal Imagination (1973), for a rich approach to the use of literature in the law school curriculum.

[5] For one distinguished figure's presentation of fictional works considered, in its time, to be each lawyer's "professional duty" to read, see Wigmore, A List of One Hundred Legal Novels, 17 Ill. L. Rev. 26 (1922), reprinted with corrections from Wigmore, A List of Legal Novels, 2 Ill. L. Rev. 574 (1908). Wigmore's list has recently been expanded and the theoretical introduction modified. See Weisberg & Kretschman, Wigmore's "Legal Novels" Expanded: A Collaborative Effort, 7 U. Md. L.F. 94 (1977), revised from Weisberg, Wigmore's "Legal Novels" Revisted: New Resources for the Expansive Lawyer, 71 Nw. U.L. Rev. 17 (1976) [hereinafter Weisberg, Wigmore's Novels].

[6] For a seminal anthology in this field, including selections from great literary works and legal writings, see The World of Law (E. London ed. 1960). Among those authors frequently discussed by lawyers are Shakespeare, see, e.g., W.N. Knight, Shakespeare's Hidden Life (1973); O. Phillips, Shakespeare and the Lawyers (1972); Dickens, see, e.g., W. Holdsworth, Charles Dickens as a Legal Historian (1928); E.T. Jaques, Charles Dickens in Chancery (1914); Dostoevski, see, e.g., Rabinowitz, The Click of the Spring: The Detective Story as Parallel Structure in Dostoyevsky and Faulkner, 76 Mod. Philology 355 (1979); Weisberg, Comparative Law in Comparative Literature: The Figure of the "Examining Magistrate" in Dostoevski and Camus, 29 Rutgers L. Rev. 237 (1976) [hereinafter Weisberg, Comparative Law]. Among recent studies by nonlawyers, see Sussman, The Court as Text: Inversion, Supplanting, and Derangement in Kafka's *Der Prozeß*, 92 PMLA 41 (1977).

[7] *"Billy Budd* remained unpublished until 1924, when it was edited by Raymond Weaver in Volume XIII of the Standard Edition of Melville's *Complete Works* (London: Constable and Company)," Hayford & Sealts, Editors' Introduction to H. Melville, Billy Budd, Sailor 12 (H. Hayford & M. Sealts eds. 1962). Our text is the definitive Hayford & Sealts edition.

More recently, an edition by Milton Stern has challenged some of Hayford and Sealts' positions. See H. Melville, Billy Budd, Sailor (M. Stern ed. 1975).

[8] Melville labored over the manuscript from late 1885 or early 1886 until his death in 1891. See Hayford & Sealts, supra note 7, at 1.

[9] Space does not permit a listing of every piece of scholarship on or criticism of *Billy Budd, Sailor.* From those representative of the various schools, see, e.g., R. Chase, Herman Melville 258-77, 298 (1949); L. Fiedler, Love and Death in the American Novel 359, 362, 434-35 (1960); L. Thompson, Melville's Quarrel with God (1952); Braswell, Melville's *Billy Budd* as "An Inside Narrative," 29 Am. Literature 133 (1957); Watson, Melville's Testament of Acceptance, 6 New Eng. Q. 321 (1933); Withim, *Billy Budd*: Testament of Resistance, 20 Mod. Language Q. 115 (1959). Representative of more recent approaches, increasingly sensitive to the importance of communication and language use in the story is Johnson, Melville's Fist: The Execution of *Billy Budd*, 18 Stud. Romanticism 567 (1979). For scholarship on the legal aspects of the story, see text accompanying notes 10-14 infra. For a bibliography of published criticism and scholarship on *Billy Budd* and other works by Melville, see Hayford & Sealts, Bibliography to H. Melville, Billy Budd, Sailor 203-12 (H. Hayford & M. Sealts ed. 1926).

[10] E.g., R. Cover, supra note 4, at 1-7; Reich, The Tragedy of Justice in *Billy Budd*, 56 Yale Rev. 368 (1967).

[11] Conference on "A Moral Critique of Law: The Example of Melville," held at the Woodrow Wilson School of Public and International Affairs, Princeton University, June 20-21, 1980. Among those papers presented were D. Richards, Ethical Autonomy and the Legal Mind; R. Weisberg, The Lawyer's Way: "Considerate Communication" in *Billy Budd, Sailor* (unpublished papers on file at New York University Law Review).

[12] R. Cover, supra note 4, at 1-7, 250-51. Cover analogizes the dilemma of antislavery judges confronted with the Fugitive Slave Act to Vere's dilemma in *Billy Budd.*

[13] D. Richards, supra note 11, at 11-15. For further discussion of Richards' piece, which is in partial accord with the view taken here, see text accompanying notes 377-89 infra.

[14] Ives, *Billy Budd* and the Articles of War, 34 Am. Literature 31 (1962).

[15] See text accompanying note 72 infra.

[16] See, e.g., R. Cover, supra note 4, at 250-51; Reich, supra note 10, at 378-79. But see D. Richards, supra note 11, at 12-14.

[17] 424 U.S. 693 (1976).

[18] The best known film re-creation of the story is the Peter Ustinov version with Ustinov as Vere and Terrence Stamp as Billy.

[19] In the libretto for Benjamin Britten's striking opera, the "plot" is virtually reduced to Claggart's unambiguous evil and Billy's lyrical innocence, producing Vere's tragic dilemma. See E.M. Forster & E. Crozier, Libretto for *Billy Budd* (rev. 1961). Melville's narrative, as we shall see, supplies infinitely more meaning than does the libretto.

[20] Whatever we may think of Vere, he is not the "tragic" hero of this tale. Critics who reduce the "plot" to the three most obvious characters tend to miss the central narrative (not tragic) quality of the tale. As we shall see, the story is at least as much about Nelson, the "Handsome Sailor" type, "a certain X," or the narrator himself, as it is about Vere.

[21] P. 44.

[22] Id.

[23] P. 54.

[24] Id.

[25] Pp. 44-45.

[26] P. 49.

[27] P. 47.

[28] P. 58.

[29] Pp. 63, 69. There is also a strong allusion to Nelson during the depiction of Vere's death, see p. 129.

[30] Billy pacified the upstart "Red Whiskers," in an incident foreshadowing the Claggart situation. See p. 47.

[31] P. 59; see text accompanying note 342 infra.

[32] P. 56.

[33] P. 63.

[34] See p. 60.

[35] Pp. 62-63.

[36] P. 61.

[37] Id.

[38] P. 64.

[39] Pp. 62, 96. Like Claggart, Vere's "exceptional" quality lies specifically in his keen intelligence and complex "moral" nature. Id. The narrative implies that these two are the only figures on the ship "intellectually capable of adequately appreciating the moral phenomenon presented in Billy Budd." P. 78.

[40] Pp. 74, 76.

[41] Pp. 86-87.

[42] See, e.g., text accompanying notes 47-54 infra.

[43] P. 76.

[44] Melville specifically mitigates the "goodness" of Billy and the "evil" of Claggart through his use of narrative epithet and detail. Billy, for example, is organically violent (albeit justifiably at times), e.g., p. 47, and, when on shore leave, as prone to sailor-like "fun" as the next 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 good looks, and pragmatic hard work. See pp. 64-65. This is hardly a straightforward allegory.

[45] P. 67

[46] For a further discussion of this central opposition, see text accompanying notes 337-41 infra.

[47] Pp. 72-73.

[48] P. 72. This incident is understandably beloved of Freudian analysts of the novella. See, e.g., R. Chase, supra note 9, at 269-77, one of the finest analyses of the story.

[49] P. 72

[50] Id.

[51] See text accompanying 349-53 infra. As we will see, Melville's full view of adjudication encompasses both the particular manner in which the adjudicator uses language, see sectoin III, A infra, and the adjudicator's inner nature, see section IV, A infra.

[52] Pp. 80–85.
[53] P. 96.
[54] See p. 92.
[55] P. 98.
[56] P. 99.
[57] P. 101.
[58] Pp. 101–02. As we shall discuss, the whole of chapter 20 concerns Vere's fellow officers' skepticism about his procedureal approach to the case. See section II, B, 2 infra.
[59] Vere admits the inappropriateness of these combined roles in his famous speech to the court, Pp. 109–10. This is analyzed more fully at text accompanying notes 141–44 infra.
[60] Pp. 122–24.
[61] After all, Vere's main justification for the hasty trial and execution is that, absent these, the crew might consider him weak and proceed to mutiny. See pp. 112–13.
[62] P. 128.
[63] Pp. 59–60.
[64] P. 123.
[65] P. 131.
[66] P. 130–31.
[67] P. 129.
[68] The officer of marines, the member of Billy's court-martial who was "the most reluctant to condemn," id., comprehends the centrality of Billy's trial and execution to Vere's whole existence. See id. True to the theory of "considerate communication," however, see section III, A infra, this officer "kept the knowledge to himself."
[69] P. 132.
[70] L. Fuller, The Morality of Law 40 (1964).
[71] See Weisberg, Wigmore's Novels, supra note 5, at 19–20, for a discusson of such famous trial scenes, especially those in W. Shakespeare, The Merchant of Venice (1st Quarto London 1600), and F. Dostoevski, The Brothers Karamazov (C. Garnett trans. 1937).
[72] PP. 110–11.
[73] See text accompanying notes 102–06 infra.
[74] Vere, in this speech, states his judicial dilemma in a classically jurisprudential way: * * * The judge claims that the law must predominate over morality when the two conflict but the law is "clear"; he conjures the possibility of a precise notion of the law of a given case and then sees a direct path to professionalism and judicial duty. There is even some pride in the idea of being forced to choose objective duty over personal inclination: "hard cases" give the judge a chance to prove he is a professional. For an alternative view of what Vere really may be doing during the trial scene, see notes 218, 253 infra.
[75] P. 102.
[76] P. 96.
[77] For an influential model for such approaches, see Watson, supra note 9.
[78] A distinguished Melville scholar tells of his early days in the field during the mid-1950's when he took the then "radical" stand that Captain Vere was not unambiguously righteous and indeed shared some of Claggart's circumspect evil. The professional audience for this scholar's remarks would grow restive; some faces turned beet red. A very private chord had been struck.
[79] Reich, supra note 10, at 377–79.
[80] R. Cover, supra note 4, at 4. Robert Cover's analytical use of the story in his exceptional study of the judicial response to the ante-bellum slavery laws, see id. at 2–6, has yet to be fully understood.
[81] Id. at 4–6. Shaw, the Chief Judge of the Massachusetts Supreme Court (famous for such seminal torts opinions as Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850)), felt he had to apply the Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (repealed 1865), against the dictates of his private conscience, as he did in Thomas Sims' Case, 61 Mass. (7 Cush.) 285 (1851). See R. Cover, supra note 4, at 4–6, 249–52. Melville was no doubt influenced by having so distinguished a jurist in his family. Indeed, Shaw may, in part, have been a model for Captain Vere. See id. at 5–6.
[82] R. Cover, supra note 4, at 4.
[83] See id. at 4–5. In discussions I have had subsequently with Professor Cover, I have been struck by his generous appreciation of the substantially different approach to Vere taken here.
[84] Casper, The Case Against Captain Vere, 5 Persp. 146 (1952). Casper's challenge to orthodoxy appeared in the midst of this country's most recent authoritarian period.
[85] The mutiny on the *Somers* in 1842, in which Melville's first cousin, Guert Gansevoort, was a principal, clearly was on Melville's mind throughout his life. See The Somers Mutiny Affair 198 (H. Hayford ed. 1959). It is arguable that the case, which generated "great public excitement" when its facts became known J. Snedeker, A Brief History of Courts-Martial 55 (1954), lay at the heart of the novelist's motivation in examining the vital legal issues raised in *Billy Budd, Sailor*; it merits a significant paragraph within the novella's pages, pp. 113–14. The relationship of Vere-Billy-Claggart was paralleled on the *Somers* by Mackenzie-Spencer-Wales: Wales succeeded in ingratiating himself with Captain Mackenzie (who had an active antipathy for Spencer) by reporting Spencer's mutiny plot. See Proceedings of the Naval Court Martial in the Case of Alexander Slidell Mackenzie 202–06 (New York 1844) [hereinafter Mackenzie Court-Martial]. Mackenzie and Vere both craved secrecy. See text accompanying notes 137–40 infra. James Fenimore Cooper, another novelist fascinated by the case, said of Mackenzie what Melville seems to say of Vere: "The mental obliquity, so very obvious throughout the whole of the affair, renders any ordinary analysis of human motives exceedingly precarious. The act was, unquestionably, one of high moral courage, one of the basest cowardice, one of deep guilt, or one of lamentable deficiency of judgment." Cooper, Review of the Proceedings of the Naval Court Martial, in Mackenzie Court-Martial, supra, at 263, 344. Both Mackenzie and Vere were questioned on board about the justification for their summary action in hanging defendants without right of appeal, Mackenzie Court-Martial, supra, at 205; both received the blessing of a man they had condemned (three men were hanged on the *Somers*), id. at 206; newspaper accounts distorted both situations by falsifying facts and praising the executioners, id. at 264–65.

Some have argued that the *Somers* affair may not have been sufficiently alive in Melville's memory to be the precise inspiration for his final story. See Hayford & Sealts, supra note 7, at 29–31. But see Rogin, The Somers Mutiny and *Billy Budd*: Melville in the Penal Colony, 1 Crim. Just. Hist. 187, 196 (1980) (*Billy Budd* reimagined family-based conflicts which the *Somers* mutiny had first brought to Melville's fiction in *White-Jacket*). As Rogin notes, however, the press had revived the *Somers* affair during the period when Melville was writing *Billy Budd, Sailor*, Id; e.g., Hanged from the Yard-Arm, Albany Times, Aug. 2, 1890, at 1, col. 3; Argus, May 17, 1886, at 1, col. 1. In any case, Hayford and Sealts acknowledge that the *Somers* incident was related to the emergence of Captain Vere and the trial scene. See Hayford & Sealts, supra note 7, at 29–30.
[86] H. Melville, White-Jacket (London 1850), 5 Writings of Herman Melville (H. Hayford, H. Porter & G. Tanselle eds. 1970).
[87] Id. at 303.
[88] Casper, supra note 84, at 149.
[89] Id. at 150.
[90] Id.
[91] Id. at 151.
[92] M. Bowen, The Long Encounter 217–18 (1960).
[93] Ives, supra note 14.
[94] Ives therefore ask: "Did Melville make his captain's case so strong that the problem disappeared?—so strong that every reasonable captain would have acted as he did? If so, the story has lost some of its realistic appeal. Vere's position was exactly that; he said that he had no choice and that, in fact, he was faced with no problem at all. I believe that the reader is mistaken if he accepts Vere's position at face value." Id. at 32.
[95] Id.
[96] See id. at 35–36; text accompanying notes 137–39 infra.
[97] See Ives, supra note 14, at 32–34; text accompanying notes 187–89 infra.
[98] See, e.g., Ives, supra note 14, at 34 n.14, on the custom of "leniency in cases involving the death penalty . . . in the early days of the Articles."
[99] Id. at 38.
[100] Thus, critics normally avoid the specific issue of Vere's (questionable) application of the law and proceed to discuss the novella in vaguer terms not so tangibly suggested by the text. For example, the story is analyzed as a contrast between absolutism and relativism, e.g., Glick, Expediency and Absolute Morality in *Billy Budd*, 68 PMLA 103 (1953), individual and communal needs, e.g., Watson, supra note 9; Withim, supra note 9, or innocence and maturity, e.g., R. Mason, The Spirit Above the Dust 245–60 (1951).
[101] Ives suggests this is the case: "The customs of the sea did not require [Billy's hanging]; and the Articles of War provided only a deceptive excuse for the exercise of Vere's extraordinary 'priestly motive,' which, as Melville suggests at the beginning of Chapter XXII [*sic: XXI*], may well have contained the elements of true insanity," Ives, supra note 14, at 39; see id. at 35.
[102] Who in the rainbow can draw the line where the violet tint ends and the orange tint begins? Distinctly we see the difference of the colors, but where exactly does the one first blendingly enter into the other? So with sanity and insanity. In pronounced cases there is no question about them. But in some supposed cases, in various degrees supposedly less pronounced, to draw the exact line of demarcation few will undertake. . . . P. 102. This passage echoes Melville's comments about "a certain X" earlier in the tale. See pp. 74–76; text accompanying note 43 supra.
[103] P. 102.
[104] Id. The surgeon expresses his concern just before we enter chapter 21, the trial scene.
[105] See, e.g., Reich, supra note 10, at 378.
[106] Pp. 113–14.
[107] See Ives, supra note 14, at 35–36.
[108] Melville, explicitly as well as tonally, invites informed inquiries into his complex tale's meaning. It seems to our reading to be insufficient, given the narrator's equivocal tone and overt advice that each reader "must determine for himself" an explanation of Vere's behavior, p. 102, merely to accept Vere's statements at face value; since Melville's narrator, and his biography, ground the trial scene in a material setting of legal custom, history, and precedent, it would be foolish to ignore the lessons of considerate communication and to rest easy with superficial explanations. There is too much internal evidence tending to demonstrate Melville's intention that every word used by Vere—and particularly every allusion to law or to theories of communication—be thoroughly explored.

Without this painstaking process we will never arrive at the story's "higher" (symbolic, allegorical) meanings. These latter meanings must be approached with the care mandated by the text's subtlety. As C.B. Ives put it 20 years ago: "Allegory is often so patent in *Billy Budd* that many critics have found in the novel not a story but Melville's philosophical generalizations about man's fate and others have read the book as a statement regarding the nature of the struggle between good and evil. It seems to me, however, that the novel contains realistic elements worth examining and that one of these is Captain Vere's appeal to the Articles of War to justify his hanging Billy." Ives, supra note 14, at 31. Melville refrains here, in his final painstaking creative deed, from offering his reader simple and self-satisfying resolutions to enormously complicated cultural problems. We must, in the first instance, come to grips with the text.
[109] Pp. 101–02.
[110] Melville knew British and American naval statutes well not only because of his lifelong fascination with sailors, but also as a result of having served in 1843 and 1844 on a naval vessel upon which the applicable American statute was read in full at frequent intervals. See N. Arvin, Herman Melville 72 (1950): "Then, on the first Sunday of every month he would take part with the rest of the crew in the "muster round the capstan"; passing in review before the officers, being inspected by them, and listening—Melville, with angry rebellion in his heart—to a reading of the grim Articles of War."

Thus, in an earlier work, Melville carefully recited, and criticized, specific provisions of the statute governing the American navy. See H. Melville, White-Jacket, supra note 86, . . .-304. In a historical note to this portion of his story, Melville observed that these Articles "may be found in the second volume of the 'United States Statutes at Large,' under chapter xxxiii." Id. at 298 n. *; see note 128 infra. He referred also to the British Articles, those enacted "in the twenty-second year of the reign of George the Second." H. Melville, supra, at 298 n. *; see note 112 infra. Although less overt, the older Melville was no less knowledgeable. For a fine, detailed analysis of Melville's lifelong inquiry into the use and abuse of the American Articles (including a source-guide to Melville's wide reading on the subject), see H. Vincent, The Tailoring of Melville's *White-Jacket* 90, 103–06 (1970). But see E. Rosenberry, Melville 112 (1979). Rosenberry agrees that "neither Mackenzie's action nor Vere's . . . was required or even sanctioned by law," id., but (oddly, considering the novelist's biography) concludes that "Melville tampered with history, or simply

worked from inadequate research . . . in establishing the legal framework of his plot," id.

In addition, as noted previously, Melville's interest in legal matters was also informed by the *Somers* mutiny, see note 85 supra, and by his father-in-law Lemuel Shaw's experience with the Fugitive Slave Act, see note 81 supra. Further, Melville maintained an active interest in current legal matters. The infamous Haymarket trials, held toward the end of Melville's life, may well have reinspired him to treat the essential moral issues so frequently encapsulated in courtroom dramas. See Wallace, *Billy Budd* and the Haymarket Hangings, 47 Am. Literature 108, 109–13 (1975).

[111] P. 101.

[112] 22 Geo. 2, ch. 33 (repealed 1860).

[113] See note 110 supra. An American historian of the British Articles reports: "It was ordered that the articles be read openly twice each week." J. Snedeker, supra note 85, at 44. A typical contemporary American naval statute was "to be hung up in some public places of the ship, and read to the ship's company once a month." Rules for the Regulation of the Navy of the United Colonies, 3 J. Continental Cong. 328, 329 (1775) (W. Ford ed. 1905). The comparable American military statute was "to be read and published once in every two months, at the head of every regiment, troop or company, mustered, or to be mustered in the service of the United States." Articles of War, § 18, art. 1, 5 J. Continental Cong. 788, 806 (1776) (W. Ford ed. 1906).

[114] Articles of War of 1749, 22 Geo. 2, ch. 33, § 2, ¶ 22 (repealed 1860).

[115] See text accompanying notes 169–99 infra.

[116] P. 111.

[117] See note 197 infra.

[118] See J. Snedeker, supra note 85, at 45.

[119] P. 101.

[120] Articles of War of 1749, 22 Geo. 2, ch. 33, §§ 6–10 (repealed 1860).

[121] Id. § 11.

[122] P. 101.

[123] Section 19 provides in relevant part:

[A]nd if the said court shall have been held beyond the narrow seas, then such sentence of death shall not be carried into execution but by order of the commander of the fleet or squadron wherein sentence was passed; and in cases where sentence of death shall be passed in any squadron, detached from any other fleet or squadron upon a separate service, then such sentence of death (except in cases of mutiny) shall not be put in execution, but by order of the commander of the fleet or squadron from which such detachment shall have been made, or of the lord high admiral, or commissioners for executing the office of lord high admiral. . . .

Articles of War of 1749, 22 Geo. 2, ch. 33, § 19 (repealed 1860).

Billy was impressed onto the *Bellipotent* as it was heading out to sea, pp. 44–45, to join the Mediterranean fleet, p. 54. The ship was on "detached service" from that fleet, beyond the Narrow Seas, the channels separating Great Britain from the Continent and from Ireland, when the events in the story occurred. Pp. 54, 90, 129, Captain Vere was therefore obliged to refer the case to either the admiral or the commander of the Mediterranean fleet.

[124] Provided always, and be it further enacted, That no person or persons not flying from justice, shall be tried or punished by any court-martial for any offence to be committed against this act, unless the complaint of such offence be made in writing to the lord high admiral, or to the commissioners for executing the office of lord high admiral for the time being, or any commander in chief of his Majesty's squadrons or ships impowered to hold courts-martial, or unless a court-martial to try such offender shall be ordered by the said lord high admiral, or the said commissioners, or the said commander in chief. . . .

Articles of War of 1749, 22 Geo. 2, ch. 33, § 12 (repealed 1860).

[125] See note 123 supra; see also I J. McArthur, Principles and Practices of Naval and Military Courts Martial 67–68 (4th ed. London 1813) (1st ed. London 1792).

[126] See note 123 supra; I J. McArthur, supra note 125, at 67–68. For a typical contemporary American equivalent of this provision, see Rules for the Regulation of the Navy of the United Colonies, 3 J. Continental Cong. 378, 378 (1775) (W. Ford ed. 1905).

[127] P. 112.

[128] Articles of War of 1749, 22 Geo. 2, ch. 33, §§ 12-14 (repealed 1860). The Articles retained the customary minimum of five, but apparently altered the maximum from the traditional nine to 13, occasioning some debate. See 14 Parl. Hist. Eng. 416-17 (1749). The higher number seemed easier to achieve than it might appear, for naval custom "obliges every captain who comes in sight of the [court-martial] flag to go on board and take his place in the court." Id. at 416. In America, the numbers five and 13 were the clear tradition; any captain operating under naval law would have known them. See, e.g., Act for the Better Government of the Navy, ch. 33, art. 35, 2 Stat. 45, 50 (1800) (repealed 1950). For the equivalent army provisions, see, e.g., Act of May 31, 1786, art 1, 30 J. Continental Cong. 316, 316 (J. Fitzpatrick ed. 1934) (repealed 1874).

[129] Articles of War of 1749, 22 Geo. 2, ch. 33, § 14 (repealed 1860).

[130] P. 111.

[131] P. 104.

[132] Id. Melville, again, may be adverting to the *Somers* matter, in view of the three defendants there. See note 85 supra.

[133] P. 104. The disjunction of sailors and marines apparently was a tradition on naval courts-martial. See, e.g., U.S. Dep't of the Navy, Naval Courts and Boards § 405 (1917) [hereinafter Naval Courts and Boards]: "When a marine is to be tried by summary court-martial, one or more marine officers shall, if practicable, be detailed as members of the court." Melville may stress this detail because Vere's land-oriented personality again is coming to the fore. Although Billy is a sailor, Vere feels more comfortable with a marine officer on the court. It is this officer, we should recall, who is at Vere's deathbed later when he mumbles "Billy Budd, Billy Budd." P. 129. He may be one of several "Melville figures" in the text.

[134] Writing about English naval law of the period, McArthur observes: [A] captain or commander of any of his majesty's ships or vessels, has the power of inflicting punishment upon a seaman in a summary manner for any faults or offences committed, contrary to the rules of discipline and obedience established in the navy; this power the framers of our naval articles and orders wisely considered preferable to establishing inferior courts martial for trying trivial offences, as calculated less to obstruct his majesty's service at sea, and as carrying more promptly into execution the rules and articles laid down for its regulation.

Moreover, the prompt punishment of trivial offences is attended with salutary effects in the discipline of a ship, and from the public example makes a great impression on seamen's minds, thereby deterring them from committing greater crimes.

By the 4th article of the Old Printed Instructions, a captain was not authorized to punish a seaman beyond 12 lashes upon his bare back, with a cat-of-nine-tails; but, if the fault should deserve a greater punishment, he was directed to apply for a court martial.

J. McArthur, supra note 125, at 162-63.

[135] See Articles for the Government of the Navy, Rev. Stat. § 1624, art. 26, 27, reprinted in 18 Stat. 274, 281 (1874) (repealed 1950); see also Naval Courts and Boards, supra note 133, §§ 407, 412, 417.

[136] Article for the Government of the Navy, Rev. Stat. § 1624, art. 26, reprinted in 18 Stat. 274, 281 (1874) (repealed 1950); Naval Courts and Boards, supra note 133, § 412.

[137] Ives, supra note 14, at 36 n.22 (quoting Regulations and Instructions Relating to His Majesty's Service at Sea art. 3 (11th ed. 1772)).

[138] Naval Courts and Boards, supra note 133, § 217. The Rules for the Regulation of the Navy of the United Colonies, 3 J. Continental Cong. 328 (1775) (W. Ford ed. 1905), was the first American statute for the governance of the navy. The next comprehensive revision was the Act for the Better Government of the Navy, ch. 204, 12 Stat. 600 (1862) (repealed 1950). This statute remained essentially unchanged until the major overhaul of military and naval law in 1950, Uniform Code of Military Justice, ch. 169, 64 Stat. 107 (1950) (current version at 10 U.S.C. §§ 801-940 (1976 & Supp. IV 1980)). See 96 Cong. Rec. 1353 (1950) (remarks of Sen. Kefauver); see alsi E. Byrne, Military Law I-16 (3d ed. 1981). Thus, the 1917 handbook is a compilation of the naval law with which Melville was familiar.

[139] P. 103.

[140] See test accompanying notes 366–67 infra.

[141] Pp. 109–10.

[142] Articles of War of 1749, 22 Geo. 2, ch. 33, § 7 (repealed 1860); see 14 Parl. Hist. Eng. 411 (1749). Apparently, opponents of the Articles felt that "[t]o pretend that the chief commander, by being president, may influence the court to do as he pleases, is contrary to experience." Id. As, presumably, did the proponents of the statute, Melville strongly disagreed; Vere's control—even when he is not speaking—is felt throughout the trial. As sole witness, and as the unmatched authority figure on the ship, he should surely have withdrawn after offering his testimony, as the law required.

[143] A 1917 naval handbook, for example, gives the accused in general and summary courts-martial the right to challenge any member of the Board. Naval Courts and Boards, supra note 133, §§ 277, 427. The handbook states that "care be exercised in selecting the personnel of a court," id. § 406, and provides that: "A challenge upon the ground, admitted or proven, that a member preferred the charges or is a material witness in support thereof. . . should be sustained by the court." Id. § 278.

Similarly, the American Articles of War of 1874 (governing armies) prescribes that any commanding officer of any army may appoint a court-martial. It adds: "But when any such commander is the accuser or prosecutor. . . the court shall be appointed by the President. . . ." Articles of War, Rev. Stat. § 1342, art. 72, reprinted in 18 Stat. 228, 236 (1874) (repealed 1920). More recently, an army officers' handbook specifically states that "an officer is legally incompetent if he is the accuser or witness for the prosecution. . . . Should the accuser sit on the court the trial is a nullity." F. Munson & W. Jaeger, Military Law and Court-Martial Procedure: "Army Officers' Blue Book" 13 (1941). Again, the accused may challenge (and upon proof, automatically procure the removal of) a court member who is either the accuser or a witness for the defense or procesution, id. at 49; the defendant is in fact usually powerless even to waive objections based on such dual role playing, id. at 50.

[144] See section III, A infra.

[145] P. 112.

[146] Id.

[147] Articles of War of 1749, 22 Geo. 2, ch. 33, § 2, ¶ 22 (repealed 1860).

[148] Id. ¶ 20.

[149] Billy has failed to inform on "the stranger" who tempts him with lucre if he will join other "impressed ones" to do some unnamed mischief. P. 82. The stranger probably has been dispatched by Claggart, but the naive Billy does not suspect this. Since the stranger, whom Billy forthwith rebuffs, does not specifically mention mutiny, the foretopman's failure to inform might not have been actionable even if it had come to light, although Melville apparently thought it would be. See pp. 106–07. In any event, the incident serves to demonstrate again Billy's essential loyalty as well as his inclination to handle troublemakers himself instead of becoming an informer.

[150] Articles of War of 1749, 22 Geo. 2, ch. 33, § 2, ¶ 20 (repealed 1860).

[151] John McArthur, in his classic text, recapitulated the opponents' basic position:

But when we consider the infirmities inseparable from human nature, which abound even in the most upright hearts—the unguarded moments of passion, which at times no prudence or circumspection can govern, and the numberless unforeseen causes which may suddenly arise amidst the fluctuating humours and caprices of mankind, it is devoutly to be wished, that, on a legislative revision of this article, a discretionary power may be vested in a court martial to inflict death, *or such other punishment as the crime, from the palliating circumstances attending it, shall merit.*

Indeed this is so essentially requisite towards the administration of justice, that the omission of this discretionary power must have proceeded from oversight and not from intention; for, it is to be observed, that the original article on this subject introduced by the statute 13 Charles II. c. 9. contains the discretionary alternative alluded to, and is distinguished by its conciseness and simplicity. The words are, "none shall presume to quarrel with any superior officer upon pain of severe punishment, nor to strike any such person upon pain of death, or *otherwise as a court martial shall find the matter to deserve.*"

1 J. McArthur, supra note 125, at 70–71 (emphasis added).

[152] See J. Snedeker, supra note 85, at 47.

[153] Id.

[154] Beginning at least in *White-Jacket* (London 1850), Melville drew on actual historical sources to make the point in his fiction that the practice or custom of punishment on board naval vessels often

differed from the letter of the law. See H. Vincent, supra note 110, at 99-102.

[155] These rules, the first regular "Articles of War" for the British Navy, were adopted in 1649 and recast and applied to all British naval forces in 1652. Essentially, the rules codified traditional naval practice. See J. Snedeker, supra note 85, at 46. The code is "the formal ancestor of all British and American naval articles." Id.

[156] Id.

[157] See text accompanying notes 122-27 supra.

[158] J. Snedeker, supra note 85, at 46.

[159] 1 J. McArthur, supra note 125, at 164 (quoting the New Regulations and Instructions for the Navy (1806)).

[160] See text accompanying notes 122-27 supra.

[161] See 1 J. McArthur, supra note 125, at 67-68.

[162] D. Walker, Military Law 108 (1954): "Cases resulting [under the earliest American Articles for the Government of the Navy] in dismissal of an officer or in the death penalty required Presidential confirmation prior to execution." See generally W. Winthrop, Military Law and Precedents 48-56 (2d rev. ed. 1920) (army courts-martial).

[163] The policy behind these high-level reviews of severe sentences in courts-martial is adequately expressed in the following passage from a handbook prepared for United States Army officers:

Until the sentence of a court-martial has been approved by the proper commanding officer, it is not effective. This follows logically from the fact that these tribunals are adjuncts to the executive power, rather than part of the judicial function. . . . Nevertheless, courts-martial must carry out their duties in a judicial manner—fundamental principles of justice and rules of law and of evidence must be adhered to even as in courts of civil law.

F. Munson & W. Jaeger, supra note 143, at 16.

[164] See note 85 supra.

[165] For more on Gansevoort, see, e.g., Anderson, The Genesis of *Billy Budd*, 12 Am. Literature 329 (1940); Rogin, supra note 85, at 197-98. Gansevoort, a lieutenant on the *Somers*, jointed with Mackenzie in recommending execution for the three sailors.

[166] See Rogin, supra note 85, at 197.

[167] Pp. 59-60.

[168] See 1 J. McArthur, supra note 125, at 163.

[169] Interestingly, in American army law, there was some movement toward allowing the *convening* officer to execute even a serious sentence in time of war. See Articles of War, ch. 20, art. 65, 2 Stat. 359, 367 (1806) (repealed 1830). Article 89 of the same statute, however, gave that same convening officer "power to pardon or mitigate . . . [or, in capital cases] he may suspend, until the pleasure of the President of the United States can be known." Id. art. 89, 2 Stat. at 369-70. Vital here is the discretion allowed the convenor. And, in any case, the convening officer's power was short-lived. This portion of article 65 was repealed by Act of May 29, 1830, ch. 179, 4 Stat. 417, 417, and the statute again came to insist on presidential review of death sentences, with the usual exception for wartime mutineers. See Act of July 17, 1862, ch. 201, § 5, 12 Stat. 597, 598, as amended by Act of Mar. 31, 1863, ch. 75, § 21, 12 Stat. 731, 735 (repealed 1950).

[170] P. 110.

[171] P. 111.

[172] In rhetorical terms, such a statement duplicates the device used by Vere in the famous passage from the same lengthy speech: "Well, the heart here, sometimes the feminine in man, is as that piteous woman, and hard though it be, she must here be ruled out." Id.

[173] W. Birkhimer, Military Government and Martial Law 375 (3d ed. 1914).

[174] As one military law expert puts it: "It is because an appreciation of the importance of necessity as the underlying justification is so essential to understanding of the principles of martial law that the point is so strongly emphasized here." F. Weiner, A Practical Manual of Martial Law 16 (1940).

[175] C. Fairman, The Law of Martial Rule 19 (2d ed. 1943).

[176] See W. Birkhimer, supra note 173, at 404.

[177] Id. at 416.

[178] Ives, supra note 14, at 33.

[179] See text accompanying notes 106-07 supra.

[180] See C. Fairman, supra note 175, at 50-63 (no mention of the late eighteenth century as among those periods in English history compelling frequent use of martial law). Ireland, which experienced British martial rule in 1798-1799, was an exception. See id.

[181] The phrase is from a purported "Preface" to the story to be found in many earlier versions of Billy Budd, Sailor. Hayford's and Sealts' research indicated that the "Preface" did not belong in Melville's final version at all. See Hayford & Sealts, supra note at 18-19. Yet, the phrase lends insight into the larger meanings of the story, meanings that must build on the kind of analysis presented in this paper, but that we cannot explore fully at his time. See text accompanying notes 389-95 infra.

[182] See p. 59.

[183] Pp. 59-60.

[184] We shall later recall Melville's suspicion of adjudicators who counsel breach of legal form in the name of "necessity." See text accompanying notes 214-49 infra.

[185] F. Weiner, supra note 174, at 16. Weiner continues:

As a distinguished soldier-jurist [Holmes] has said, "We need education in the obvious more than investigation of the obscure." Now, viewed in the light of the principle of necessity, martial law is nothing more and nothing less than an application of the common law doctrine that force, to whatever degree necessary, may be used to repress illegal force.

Id. at 16-17. Did Billy in any way still threaten illegal force?

[186] As Leonard Casper has noted, Melville's interest in the *Somers* case, see note 85 supra, indicates a concern with the question "just how necessary is necessity?" See Casper, supra note 84, at 149. As applied to Billy's case, Holmes' "education in the obvious," see note 185 supra, would have led to no more than imprisonment until the fleet was rejoined.

[187] Ives, supra note 14, at 32.

[188] Hayford & Sealts, Notes & Commentary to H. Melville, Billy Budd, Sailor 181 (H. Hayford & M. Sealts eds. 1962).

[189] The statute controls "every person being in Their Majestye's Service in the Army . . . who shall . . . excite, cause, or joyne in any mutiny or sedition in the Army." Mutiny Act, 1 W. & M., ch. 5, § 1 (1689). Except for a few brief intervals, the Mutiny Act was reenacted annually until 1879, when it was merged with the Articles of War of 1749 to form the Army Discipline Act, 42 & 43 Vict., ch. 33 (1879) (repealed 1881). See W. Winthrop, supra note 162, at 20.

As to the possibility that this is Melville's unintended error, perhaps based on the 1879 merging of the two statutes, see pp. 113-14. But even Hayford and Sealts speculate that Melville may have deliberately had Vere apply military rather than naval law. See Hayford & Sealts, supra note 188, at 181. And evocative in the use of the term "Mutiny Act," whether the error be (atypically) Melville's or Vere's, is both the continuing indication of Vere's attraction to the *land* and his use of the phrase to imply, covertly, that "mutiny" is actually a part of the instant litigation. See notes 192, 223 infra.

[190] "War looks but to the frontage, the appearance. And the Mutiny Act, War's child, takes after the father. Budd's intent or non-intent is nothing to the purpose." P. 112. Vere earlier (erroneously) noted: "We proceed under the law of the Mutiny Act." P. 111.

[191] See note 110 supra.

[192] The strong inference from all the evidence is that Melville was conscious of every single legal detail (including Vere's mistakes and omissions) in this story. See, e.g., note 110 supra; see also note 223 infra. For a view contra, see Hayford & Sealts, supra note 188, at 176. I can only assume that the editors, despite some of their own research indicating the biographical and literary logic of assuming Melville's expertise in naval law and history, were not prepared to deal with the ramifications of that logic, particularly since the thrust of their compendious notes is pro-Vere, see, e.g., id. at 175-77 (Hayford's and Sealts' comments to their notes 223, 241-42).

[193] See text accompanying notes 145-46 supra.

[194] P. 112.

[195] See Articles of War of 1749, 22 Geo. 2, ch. 33, § 2, ¶ 28 (repealed 1860) ("All murders committed by any person in the fleet, shall be punished with death by the sentence of a courtmartial.").

[196] Of course, Vere is not here actually charging Billy with homicide. Nevertheless, he deploys this substantive law to explain the risks of leniency and to assuage doubts about the necessity for the hanging.

[197] Even Vere's interpretation of the Articles of War is open to question. The applicable section speaks of striking a superior officer "being in the execution of his office." Articles of War of 1749, 22 Geo. 2, ch 33, § 2, ¶ 22 (repealed 1860). This phrase leaves room for interpretation. Claggart, arguably, was not "executing his office" when, out of personal animus unrelated to official duty, he lied to his captain about a crewman's loyalty. Although Vere was unaware of all the facts, he decided not to pursue his suspicions about Claggart. See pp. 94-96. Had Vere inquired into the full circumstances of the case, he might have discovered the incident in which Claggart's henchman vainly tempts Billy to mutiny, pp. 80-83, a violation of § 2, ¶ 19 of the Articles (endeavor to make mutinous assembly), as well as Claggart's bad faith in informing on Billy.

The significance of Vere's refusal to contemplate Claggart's role in the matter is heightened by his apparent earlier omission to *swear in* the members of the court. Section 16 of the Articles, which supplies the statutory text for the oath, expressly charges members of a court-martial to "duly administer justice according to [their] conscience[s]" in "any case [that] shall arise, which is not particularly mentioned in the said articles and orders." Articles of War of 1749, 22 Geo. 2, ch. 33, § 16 (repealed 1860). See generally 1 J. McArthur, supra note 125, at 368, 374 (necessity for oath since time of King William; relationship of oath-taking to secrecy); D. Walker, supra note 162, at 108 (American procedures "copied almost verbatim from the contemporary English laws"). Had Vere pursued Claggart's role in the matter, Billy's case might have been thrown into the domain of conscience: it would not fall under § 2, ¶ 22, because no officer was struck "in the execution of his office"; it would not be murder under § 2, ¶ 28, because of the defense of provocation and other matters, see text accompanying notes 194-97 supra.

These arguments, of course, are not unassailable. But the court was seeking an escape from the death sentence apparently mandated by the statute; Vere had the power to provide one. As befits a "considerate" communicator, see section III, A infra, he chose to conceal, or at least not to pursue, all the facts.

[198] P. 101.

[199] See section IV, A infra.

[200] P.105.

[201] See generally Weisberg, Literature and Cardozo, supra note 4.

[202] See Llewellyn, On the Good, the True, the Beautiful, in Law 9 U. Chi. L. Rev. 224, 249 (1942).

[203] When a 16 year-old boy, arguably, a trespasser, dies upon impact with the defendant railroad's negligently maintained electrical wiring, it helps to build a bare majority of an appellate court in favor of his heirs by referring to him at the outset as "a lad of 16," Hynes v. New York Cent. R.R., 231 N.Y. 229, 230, 131 N.E. 898, 898 (1921) (Cardozo, J.), instead of the legalistic "plaintiff's decedent." Similarly, when the defendant railroad's negligently dislodged scales hit an innocent woman travelling to the beach with her children, the same majority may be swayed for the railroad if the judge refers to the injured party throughout as merely "respondent" or "plaintiff." Palsgraf v. Long Island R.R. 248 N.Y. 339, 162 N.E. 99 (1928((Cardozo, J.).

[204] P. 55.

[205] L. Strauss, Persecution and the Art of Writing (1952).

[206] Id. at 23. According to Strauss, authoritative communication, particularly if repeated often, ultimately establishes what most people think of as "truth"; such statements, like those of Melville's Nore historians, become "morally certain." Id. The authorities abide dissenting points of view because they thereby allow the apperance of freedom of thought in the audience by creating a perceived choice between several conflicting positions. See id. The general audience, however, is likely to accept the authoritative position and view the heterodox communication as false. The latter then ceases to be repeated, and the accepted view increases in credibility. See id. To avoid ridicule, therefore, the "persecuted" dissenter must hide his basic views by "writing between the lines." Id. at 24. A recent example of this phenomenon would be the various accounts of the assassination of John F. Kennedy. Vere's junior officers are in this "persecuted" category. See next accompanying notes 261-17 infra.

By "writing between the lines," disbelieving, "persecuted" individuals lodge their dissent to the ensconced position, hoping and expecting that only a small number of like-minded readers will appreciate what they are saying. See L. Strauss, supra note 205, at 25, 34-35. Considerate communications, on the other hand, *establish* doctrinal truths by conveying and repeating a selective version of reality, one that they fully expect the vast majority of

their audience to accept. We shall late recall Strauss' notion of "writing between the lines" when reflecting on Melville's own mode of communication in *Billy Budd*. See text accompanying notes 389–94 infra.

[207] F. Dostoevski, The Brothers Karamazov 227–44 (C. Garnett trans. 1937). Dostoevski was Melville's virtual contemporary; The Brothers Karamazov originally was published in 1880.

[208] P. 55. Why does Melville state that such a nonforthright approach can be taken "without reproach"? (There may be irony here, of course, but Melville tells us throughout the tale that truth emerges more from the "ragged edges," see, e.g., p. 128, of these digressions than from the characters and descriptions of the basic story line itself. In a passage on communication, in particular, we may divine an unmediated message meant to be taken at face value.) We must recall that "considerate communication" is *essentially truthful* and primarily designed to *serve* the audience. Although the full story is truncated by the authoritative communicator, his account adequately fulfills the needs of his readers or auditors without really deceiving them. Indeed, the average English person probably would not take the time even to delve into a more detailed and accurate report about the mutiny.

To be distinguished from "considerate communication" is *propaganda* itself, which is essentially false and which aids only the communicator while victimizing and persecuting the audience. We might contrast the authoritative accounts of the John F. Kennedy assassination (probably "considerate") to the collected speeches of Goebbels (propaganda).

Finally, we must distinguish from both of these that which the *audience itself* chooses to do with individuals who attempt to contradict or elaborate upon the official account. Theirs may be a sentence of ostracism or worse, but this is not the fault of the original authoritative communicator. Consider the fate of those who have tried, over the past twenty years, to differ from the Warren Commission report of the Kennedy assassination. Ridicule from the *New York Times* was the kindest of their destinies. See notes 206 supra, 392–93 infra for a discussion of the theories of Leo Strauss.

[209] Pp. 71, 85.

[210] Melville seems to convey the belief that the lyrical poem as a genre (and lyrical speech generally) is more direct, more sailor-like, and less "considerate" than authoritative, narrative discourse. The beautifully simple ballad that closes the story, "Billy in the Darbies," p. 132, contrasts keenly with all the convoluted prose that has preceded it about the events on the *Bellipotent*.

[211] P. 131. The narrator specifically labels this account "authoritative" and adds that it was "written in good faith" despite the distortions. P. 130; see text accompanying note 65 supra.

[212] Pp. 130–31.

[213] The audience for the *Mediterranean News* symbolically includes everyone. See note 394 and accompanying test infra.

[214] P. 128.

[215] Id.

[216] See L. Strauss, supra note 205, at 32. This form of persecution goes beyond the milder "social ostracism," id., or even "persecution of free inquiry," id. at 33, to Strauss' "most cruel" type, id. at 32, in which the audience is directly coerced and robbed of its ability to reason freely altogether.

[217] P. 102; see text accompanying note 58 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 decides 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 likelihood of gaining credibility anyway. See L. Strauss, supra note 205, at 24–26. For another example of Vere's officers' keeping knowledge to themselves, see note 68 supra.

[218] The paradigmatic structure of adjudication outlined in note 74 supra is thus modified as follows: * * * In this modification, neither objective duty nor subjective moral inclination is immediately achieved. We have, for example, neither Justice Harlan's complex professionalism nor Justice Douglas' result-oriented (but not always carefully reasoned) directness. Instead, a kind of triangle, arguably more typical yet of judges, is formed, only two sides of which are part of the finished 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 mutiny if the court does not sentence Billy to hang), which is usually freely articulated since it *seems* a legitimate judicial concern. (Note, though, that "policy" contains strongly subjective elements, may be questionably proffered, and is rarely required by "the law" of the case.) But, other subjective goals may not be stated at all. They are not necessarily "moral." Indeed, in this structure, the moral side of the triangle is totally skirted. Such covert goals emerge from the judge's whole personality and may be as disparately and even subconsciously motivated as "what the judge ate for breakfast" (the "legal realist" model) or how the judge reflects the values of the surrounding culture in everything he does (Cardozo's model). See Weisberg, Literature and Cardozo, supra note 4, at 306, for an analysis of the vital similarities and differences in the realist and Cardozo approaches; see also note 374 infra. 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 253 infra.

[219] P. 100.

[220] Id.

[221] P. 101.

[222] See text accompanying notes 100–09 supra.

[223] See notes 110, 192 supra. As to the possibility that Melville accidentally made some of these errors despite his generally thorough knowledge of naval law, we should now add the words of Strauss (writing about the way in which authors communicate about delicate themes): "If a master of the art of writing commits such blunders as would shame an intelligent high school boy, 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.

[224] I have suggested in other context that highly verbal and literate characters usually gain the sympathetic praise of most readers unless they are overtly presented as evil. See Weisberg, Hamlet and Ressentiment, 29 Am. Imago 318, 333–37 (1972). This occurs simply because most readers of complex fiction share the verbal acumen of these characters. It is harder to like, or accept as "real," those figures who do not do well with words. This observation has particular importance for works of fiction in which lawyers play central roles. See note 343 and accompanying text infra.

[225] 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.

[226] See text accompanying notes 336–69 infra.

[227] P. 86.

[228] Pp. 62, 96.

[229] P. 128.

[230] P. 63.

[231] P. 60.

[232] Id.

[233] P. 63

[234] P. 60.

[235] P. 104; see notes 133, 191 supra. Vere, true to his internal scenario, found in the marine an intelligent enough fellow but one who, like the other members of the court, was more a warrior than an analytical thinker. See p. 105.

[236] See note 189 infra.

[237] P. 111.

[238] P. 86; see also text accompanying note 41 supra.

[239] P. 87.

[240] P. 76. As we point out a bit later, see note 392 infra, Melville's own communication is of the Staussian "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 a lower level of importance. See note 102 supra. Billy stands in the same relation to Nelson. See text accompanying notes 30–31 supra.

[241] P. 76.

[242] Id.

[243] Id.

[244] Id.

[245] Id.

[246] Id.

[247] The clearest narrative example is the "soup spilling" episode. See text accompanying notes 48–50 supra.

[248] 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, its structure and tone convey the pathos of a court necessarily torn between two unhappy choices: hang the morally innocent Billy or provoke the crew to mutiny. "You know what sailors are," Vere remarks, suddenly confiding in these junior officers. But his communication hides the truth about these particular sailors; that they are not prone to mutiny and that the news of their favorite colleague having killed the despised shipboard policeman (if, indeed, such news had to be published at all until the ship regained the fleet) would less likely produce mutinous rumblings than the sight of Billy hanging by the yard-arm itself as punishment for that homicide. For, without the worst possible construction being imposed on Billy's act, "the people" would rather see their Handsome Sailor alive and well. Indeed, Vere's construction does become the authoritative naval version of the incident, in which Billy becomes the villainous alien-upstart and Claggart the patriotic hero. See pp. 130–31.

[249] See, e.g., Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv. L. Rev. 293, 328 (1976): "I fear that in too many instances Justice Rehnquist's efforts have been impeded by his ideological commitment to a particular result."

[250] In his facility with language, Justice Rehnquist is in the tradition of Justice Cardozo, although perhaps without the latter's innate sense of cultural balance. See Weisberg, Literature and Cardozo, supra note 4, at 308–42.

[251] 424 U.S. 693 (1976). References to "line" numbers in the text are to this report of the decision. For other Rehnquist opinions notable in this light, see, e.g., note 270 infra.

[252] See, e.g., Shapiro, supra, note 249, at 324–28; Note, Paul v. Davis: The Taming of 1983, 43 Brooklyn L. Rev. 147 (1976) [hereinafter Brooklyn Note]; Note, Paul v. Davis: Reputation Succumbs to Judicial Self-Restraint, 38 Pitt. L. Rev. 417 (1976); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 87–102; Hofstra L. Rev. 199 (1976); 60 Marq. L. Rev. 162 (1976); 22 N.Y.L. Sch. L. Rev. 340 (1976); 17 Santa Clara L. Rev. 959 (1977).

[253] Recalling our structure at note 218 surpa, we might say that Justice Rehnquist uses the law to implement the articulated goal of supporting the state through its police and the unarticulated desire further to support the states through limiting the jurisdiction of the federal courts whenever possible. Other unstated subjective motivations may be present, but can probably be detected only through a rigorous reading of all of Justice Rehnquist's opinions (a methodology advisable vis-a-vis any influential judge).

I have argued that to some degree, all appellate opinions use language and form to conceal both analytical imprecisions and subjective motive. See R. Weisberg, Narrative Aspects of Appellate Opinions (Jan. 3, 1980) (principal paper delivered before the Law and Humanities Section of the Conference of the Association of American Law Schools) (available on tape).

[254] 424 U.S. at 694–96.

[255] Brooklyn Note, supra note 252, at 147–48 (footnotes omitted).

[256] 424 U.S. at 694–95.

[257] Contrast the dissenting opinion's approach to the *Paul* facts. See id. at 718–20 (Brennan, J., dissenting).

[258] Id. at 695–96.

[259] Id. at 696.

[260] Id.

[261] "That however pitilessly [martial] law may operate in any instances, we nevertheless adhere to it and administer it." P. 111.

[262] Although Davis was not fired, his supervisor told him "he had best not find himself in a similar situation in the future." 424 U.S. at 696.

[263] Id. at 697–99.

[264] "[R]espondent's complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State." Id. at 697.

[265] Pp. 110–11.

[266] "Inputing criminal behavior to an individual is generally considered defamatory *per se* . . . ." 424 U.S. at 697 (emphasis by the Court).

[267] On the irrelevance of the availability of a state court action to Davis' § 1983 claim, see, e.g., 5 Hofstra L. Rev. 199, 201–04 (1976).

[268] We shall shortly examine several other passages involving the use of audience deflection, 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.

[269] 424 U.S. at 698 (emphasis added).

[270] For a similar use by Justice Rehnquist of the word "concededly," see Rummel v. Estelle, 445 U.S. 263 (1980), an opinion well worth analyzing in terms of considerate communication.

Justice Rehnquist's use of the word in *Paul* deserves more intensive study here. The word is used oddly; precisely which other word or words in the remainder of the sentence does "concededly" modify? And who, exactly, is making the implied concession? Would anyone except the Court itself necessarily go along with the statement that follows the adverb? Yet, the strong impression on the reader is that the point is too clear to abide further analysis and that even the losing litigant would agree with it.

Such a word, with its potential for effective and clever manipulation of the casual reader of the opinion, is likely to be a favorite of writers like Justice Rehnquist, and research reveals this to be true. Over the past 60 years or so (as far back as *Lexis* can search), Supreme Court Justices have used the word in 686 cases. Of these, 189 arose during Justice Rehnquist's tenure on the bench. Out of these 189 cases, Justice Rehnquist authored the majority opinion in 26 and either a concurring or dissenting opinion in 60 others. In the 26 cases for which he authored the majority view, there are 41 actual usages of the word "concededly"; 28 are by Justice Rehnquist and 13 by either concurring or dissenting opinions. In *Rummel*, and of course, *Paul*, he uses the word thrice and twice, respectively; in United States v. Santana, 427 U.S. 38 (1976), and Gooding v. United States, 416 U.S. 430 (1974), he uses it thrice, and in Moose Lodge No. 107 v. Irvis, 407 U.S. 1963 (1972), twice again. In the 60 cases about which he wrote dissents or concurrences, the word is used 82 times, 29 times by Justice Rehnquist and 53 times by other Justices. There are five separate instances in this category of multiple use of the word by Justice Rehnquist in the same opinion.

Thus, of the 244 uses of the word "concededly" by the Supreme Court since Justice Rehnquist has been a member, he has used the word 57 times and others have used it on a mere 187 occasions. Perhaps indicative of the Paul and Rummel variety of usage is the following phrase from his dissent in Duren v. Missouri, 439 U.S. 357, 371 n. (1979): "The reversal of concededly fair convictions returned by concededly impartial juries is, to say the least, an irrational means of vindicating the equal protection rights of those unconstitutionally excluded from jury service." Again, who would make such concessions? Can "fair" and "impartial" rationally be modified by the word "concededly" when the litigants' very claim is based on the view that certain categories of jurors had been unconstitutionally excluded from jury service, thus affecting the makeup of actually constituted juries? Justice Rehnquist's use of the adjective "irrational" here artfully conceals the rhetorically based irrationality of his own argument.

[271] If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under § 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle would not have claims equally cognizable under § 1983.

It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and study of our decisions convinces us they do not support the construction urged by respondent. 424 U.S. at 698–99.

[272] See Brooklyn Note, supra note 252, at 147. For a recent use of Shakespeare by Justice Rehnquist, which perhaps indicates his growing sensitivity to the literary aspects of the subjects he adjudicates, see Dames & Moore v. Regan, 101 S. Ct. 2972, 2984 n.7 (1981).

[273] For discussion of this passage, see text accompanying notes 246–49 supra.

[274] P. 113.

[275] 424 U.S. at 698; see note 271 supra.

[276] See notes 258–62 and accompanying text supra.

[277] 424 U.S. at 699 (emphasis added).

[278] B. Cardozo, Law and Literature, in Selected Writings of Benjamin Nathan Cardozo 342 (M. Hall ed. 1947).

[279] See, for example, Cardozo's remarks on Chief Justice Marshall. Id. at 355.

[280] 424 U.S. at 697.

[281] Id.

[282] Id. at 707 ("There is undoubtedly language in *Constantineau*, which is sufficiently ambiguous to justify the reliance upon it by the Court of Appeals . . . .").

[283] Id. at 698–99.

[284] See id. at 699; text accompanying note 277 supra.

[285] Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law . . . .

In *Greenwood v. Peacock*, 384 U.S. 808 (1966) . . . , the Court said that "[i]t is worth contemplating what the result would be if the strained interpretation of § 1443 (1) urged by the individual petitioners were to prevail." *Id.*, at 832. We, too, pause to consider the result should respondent's interpretation of § 1983 and of the Fourteenth Amendment be accepted. . . .

. . . And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983. 424 U.S. at 698.

[286] The second premise upon which the result reached by the Court of Appeals could be rested—that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from infliction by a state official of harm to other interests protected by state law—is equally untenable. Id. at 701. "There is undoubtedly language in *Constantineau*, which is sufficiently ambiguous to justify the reliance upon it by the Court of Appeals . . . ." Id. at 707.

[287] Justice Rehnquist quotes Justice Douglas' opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 175 (1951) (Douglas, J., concurring), a case involving the validity of the Attorney General's designating certain organizations as "Communist" on a list he gave to the Civil Service Commission: "Mr. Justice Douglas, who likewise concluded that petitioners had stated a claim, observed in his separate opinion: 'This is not an instance of name calling by public officials. This is a determination of status—a proceeding to ascertain whether the organization is or is not "subversive." ' " 424 U.S. at 703. This is one of a long series of references to precedents designed to show that, contrary to the Sixth Circuit's opinion, mere defamation by a state official as opposed, *e.g.*, to defamation that affects legal status) does not violate the fourteenth amendment. See id. at 701–10; note 288 infra.

[288] The last paragraph of the quotation could be taken to mean that if a government official defames a person, without more, the procedural requirements of the Due Process Clause of the Fourteenth Amendment are brought into play. If read that way, it would represent a significant broadening of the holdings of [precedent cases]. . . . We should not read this language as significantly broadening those holdings without in any way adverting to the fact if there is any other possible interpretation of Constantineau's language. We believe there is. 424 U.S. at 708.

[289] Id. at 701, 705, 709.

[290] See, e.g., Shapiro, supra note 249; Brooklyn Note, supra note 252; The Supreme Court, 1975 Term, supra note 252, all of which are critical of at least one of the readings of the precedents offered by Justice Rehnquist.

[291] B. Cardozo, Law and Literature, supra note 278, at 352, Cardozo continues: "The groupings of fact and argument and illustration so as to produce a cumulative and mass effect; these are the things, after all, that count above all others." Id.; see Weisberg, Literature and Cardozo, supra note 4, at 312–15.

[292] 424 U.S. at 694–97.

[293] See text accompanying notes 254–62 supra.

[294] 424 U.S. at 697–99.

[295] See id. at 695–96.

[296] Id. (Davis should have sued for defamation in Kentucky state court): see text accompanying notes 264–70 supra.

[297] 424 U.S. at 698 (Justice Rehnquist's "parade of horribles"), see text accompanying notes 271–77 supra.

[298] "It is hard to perceive any logical stopping place to [Davis'] line of reasoning." 424 U.S. at 698–99.

[299] Id. at 699; see text accompanying note 302 infra.

[300] Thus, for example, in presenting the "plain homicide" theory to the drumhead court, see text accompanying notes 193–99 supra, Vere says, "No, to the people the foretopman's deed, however it be worded in the announcement, will be plain homicide. . . ." P. 112. In the tradition of manipulative communicators. Vere state precisely the opposite of what he means. See note 248 supra.

[301] See text accompanying notes 269, 277 supra.

[302] 424 U.S. at 699. This phrase is rendered particularly effective by its juxtaposition with the preceding infinitive "to learn": "We think it would come as a great surprise to those who drafted and shepherded the adoption of . . . [the fourteenth] Amendment to learn that . . . ["every legally cognizable injury which may have been inflicted by a state official acting 'under color of law' "]" violates that Amendment. Id.

[303] Enjambement, a poetic term, means the running over of a syntactical sentence from one verse to another so that closely related words fall on different lines. Justice Rehnquist merges here the related idea of "no stopping place" to the court of appeals' reasoning, and runs the relation from part I to part II.

[304] B. Cardozo, Law and Literature, supra note 278, at 342, Cardozo wrote: "It eschews ornament. It is meager in illustration and analogy. If it argues, it does so with the downward rush and overwhelming conviction of the syllogism, seldom with tentative groping towards the inductive apprehension of a truth imperfectly discerned." Id.

[305] P. 111.

[306] The first is that the Due Process Clause of the Fourteenth Amendment and § 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims. The second premise is that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from the infliction by the same official of harm or injury to other interests protected by state law, so that an injury to reputation is actionable under § 1983 and the Fourteenth Amendment even if other such harms are not. 424 U.S. at 699.

[307] See Davis v. Paul, 505 F.2d 1180, 1182–84 (6th Cir. 1974), rev'd 424 U.S. 693 (1976).

[308] See section II, B, 3 supra; text accompanying notes 247–49 supra.

[309] 400 U.S. 433 (1971).

[310] Id. at 436.

[311] 408 U.S. 564 (1972).

[312] Id. at 573 (citing *Constantineau*, 400 U.S. at 437).

[313] See note 252 supra.

[314] Karl Llewellyn once asserted that "a graceful structure of doctrine can intoxicate. . . . But if it does not serve sense, it remains bad legal esthetics." Llewellyn. On the Good, the True, the Beautiful, in Law, 9 U. Chi. L. Rev. 224, 249 (1942).

[315] 424 U.S. at 709.

[316] Id. at 709–10 (quoting Roth, 408 U.S. at 573 (emphasis and ellipsis by Paul Court)).

[317] Id. at 710.

[318] 408 U.S. at 573.

[319] See H.L.A. Hart, The Concept of Law 200 (1961).

[320] P. 92. The context of this remark, from chapter 18 of the story, has Claggart unctuously and cleverly unfolding his lie about Billy's alleged disloyalty. See text accompanying notes 53–54 supra. During the same conversation, Vere prevents Claggart from mentioning the Nore mutiny, shouting "Never mind that!" P. 93. The scene stands as a fine example of the tension arising when two considerate communicators confront each other.

[321] C. Dickens, Great Expectations 442 (Signet ed. 1963) (London 1861). The reference here is to the

brilliant chapter 51 conversation between Pip, Jaggers, and Wemmick about Estella's parentage.

[322] J. Barth, The Floating Opera 92 (Bantam ed. 1967). The protagonist of the story, which was written in 1956, is an estates lawyer. The reference here is to a verbally gifted lawyer's argument before a probate judge.

[323] 424 U.S. at 711–12.

[324] See, e.g., The Supreme Court, 1975 Term, supra note 252, at 90–102. The author wrote: Justice Rehnquist's opinion in Paul v. Davis raises serious questions as to the continued protection of . . . "core" interests [like "liberty" and "property"]. In determining that due process offers no procedural safeguards against injury to a person's reputation, the Court departed from a growing line of its own decisions that appeared to find reputation to be a protect interest independent of state authorization. Id. at 92–93.

[325] See 424 U.S. at 699–701 (part II, section A of the opinion).

[326] The off-handed treatment of the privacy aspect of Davis' claim in part IV of the opinion, id. at 712–13, is beyond the scope of our treatment here.

[327] See p. 102; text accompanying notes 102–04 supra.

[328] P. 76.

[329] See text accompanying notes 240–46 supra.

[330] 424 U.S. at 712.

[331] Id. at 701.

[332] See, e.g., Shapiro, supra note 249; Brooklyn Note, supra note 252. The Supreme Court, 1975 Term, supra note 252. Perhaps the best of these in dealing with the line of precedent cases interpreted by Justice Rehnquist is the Brooklyn Note, supra, at 152–60.

[333] *Paul v. Davis* has not been, in the words of the hopeful dissenting opinion, a "short-lived aberration," 424 U.S. at 735 (Brennan, J., dissenting); it has been followed, see, e.g., Bishop v. Wood, 426 U.S. 341, 348–50 (1975).

[334] The next section explores Vere's motives for hanging Billy. We cannot now analyze the goals for which Justice Rehnquist deploys his narrative gifts. Other commentators have noted that he seems to bring a particular personal goal (or "judicial philosophy") to all cases: the reduction of the authority of the federal courts. See, e.g., Shapiro, supra note 249, at 293–99.

[335] P. 44.

[336] P. 95.

[337] Id. Critics who stretch Billy's "simplicity" into outright stupidity appear to disregard such elements as this—Vere's evident respect for Billy's responsible seamanship.

[338] P. 86; see text accompanying notes 234–35 supra.

[339] P. 86.

[340] See text accompanying notes 44–46 supra.

[341] P. 59.

[342] As is each of Melville's invocations of Nelson's name, this one is historically accurate. See 1 A. Mahan, The Life of Nelson: The Embodiment of the Sea Power of Great Britain 289–91 (1897).

[343] This theme, of course, is no stranger to modern literature. It goes far toward explaining the attraction of novelists to the law as a theme. Writers like Melville see in lawyers and legal anlaysis a reflection of their own proclivity toward complexity, sometimes at the expense of simpler people or ideas. See, e.g., Weisberg, Comparative Law, supra, note 6, for further remarks about this aspect of the law-literature relationship; see also note 224 supra.

[344] P. 76; see pp. 96, 112.

[345] P. 76.

[346] P. 60.

[347] P. 93.

[348] P. 103. On Vere's predilection for secrecy, see text accompanying notes 137–40 supra. Vere breaches naval procedures by holding Billy's trial in secret.

[349] See text accompanying notes 47–51 supra.

[350] P. 72.

[351] See pp. 71, 85.

[352] For a fascinating and highly relevant study of clinical resentment (of the type peculiarly experienced by Claggart and, in our view, Vere), see M. Scheler, Ressentiment (W. Holdheim trans, 1961). Max Scheler, a student of Nietzsche's at the end of the nineteenth century, agreed with his teacher that "ressentiment" was the dominant spiritual and sociological malaise of modern western cultures. Some of his best examples are taken from literary art, though he did not know Melville or (of course) Billy Budd. See text accompanying note 374 infra.

[353] P. 73.

[354] See note 240 supra.

[355] P. 44.

[356] P. 43.

[357] P. 58.

[358] P. 63.

[359] P. 58.

[360] See text accompanying note 37 supra.

[361] The mode of the literary artist himself, Vere's "forms, measured forms" during and after the trial make of him a clear "author-figure." Whatever criticism narratively flows to Vere thus implicitly seeks its true destination in Melville and all similarly situated, highly complex narrative artists. "Parallelism" works to effects, therefore, on the highest literary meaning of the tale: just as the descriptions of Claggart find their significance in Vere, so those of Vere achieve true meaning when applied to Melville himself.

[362] P. 57.

[363] The description of Nelson's ship here, together with the elaborate allusion to Nelson's act of writing and self-adornment at Trafalgar, p. 58, clearly 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 a more overt, life-affirming aesthetic. Melville's self-indictment implicates most modern literary art as of the Vere variety: repressed, overly verbal, and essentially life-denying.

[364] See pp. 114–15.

[365] See pp. 116–17.

[366] The words "closeted" (thrice), "concealed," "seldom . . . revealed," "privacy," "covers," "absence," "blotted," "shadows," "refrained," and "tacit" help cast this spell. See pp. 114–17.

[367] See Billy's "screened," "refined," and "obscured" interview in the ship's "shrouds" with the stranger who tempts him with the mutiny plot, pp. 81–82; see text accompanying note 52 supra; and his "closeted" meeting in the "decks below" with Claggart which, of course, leads to the fatal blow, see pp. 97–98.

In addition, the narrator uses no fewer than 15 negative words or phrases in the brief text discussing Vere's final interview with Billy, and his explanation to the crew. See pp. 116–17.

To speculate a bit in this vein, might not Vere, that master communicator, have used his interview with Billy to advise the always-obedient lad to intone "God bless Captain Vere!," p. 123, at the moment of his death? What better way to complete the brilliantly scripted scenario?

[368] P. 129.

[369] Id.6

[370] See note 80 supra.

[371] P. 80.

[372] P. 76.

[373] H. Melville, Mobby Dick 542 (H. Hayford & H. Parker eds. 1967) (New York 1851).

[374] This insight differs from that of the so-called "realists," e.g., J. Frank, Law and the Modern Mind (1930); Llewellyn, A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431 (1930), not only in its concomitant stress on the importance of language in law, but also in its recognition that the entirety of a judge's innate value system comes to the fore (and not what he happened to eat for breakfast) when he makes a decision. See note 218 supra. Melville's story leads us less to a nihilistic sense of total arbitrariness in the law than to an ordered inquiry into the predominant values of our own culture, because these, more than pure logic or any ephemeral emotion, are likely to motivate adjudicatory acts.

[375] Cardozo makes a similar point. See B. Cardozo, The Nature of the Judicial Process 35–36 (1921).

[376] Cardozo proceeds to observe that more cases than we usually think can be decided either way. See id. at 40.

[377] Sometimes a judge may imply that acting his conscience is mandated not so much by the law as by a professional sense of what it means to be a judge. A more benign view of Vere might place him in this category. See note 74 supra; see also D. Richards, supra note 11 at 14–15; text accompanying notes 384–86 supra. But is it really the essential function of a judge to strive to divorce his actions from his conscience?

[378] D. Richards, supra note 11, at 13.

[379] Id. at 12.

[380] The literary and legal bibliography on this point would form the basis of an entirely separate, book length-work. It must suffice here to call attention again to James B. White's *The Legal Imagination*, supra note 4, particularly the section on "The Lawyer as Writer," id. at 3–80, and the sections contrasting the formalism of "rules" with the artistic flexibility of legal language artistry, id. at 232–37, 623–85. As one who reviewed White's book eight years ago, see Weisberg, Book Review, 74 Colum. L. Rev. 327 (1974), I can attest to a personal reaction of still greater appreciation each time I reopen its pages. For other favorable reactions to White in the context of recent books furthering the discourse on language and its relationship to legal formalism, see M. Ball, supra note 4, at 128–38; J. Cueto-Rua, Judicial Methods of Interpretation of the Law 31 n.10, 276–77 (1981).

[381] For the sophisticated positivist position, see H.L.A. Hart, The Concept of Law 181–207 (1961). Prominent critics include R. Dworkin, Taking Rights Seriously 22–45, 81–130 (1977); L. Fuller, The Morality of Law 106–18, 145–57 (1964); D. Richards, The Moral Criticism of Law 31–36 (1977).

[382] See D. Richards, supra note 11, at 13.

[383] See id. at 13–14.

[384] Id. at 14.

[385] Id. at 14–15.

[386] See id. at 2–5, 14–18; see also D. Richards, The Moral Criticism of Law 31–36 (1977).

[387] Although Vere's "honesty," p. 63, is almost excessive when it comes to certain subjects, he is resolutely close-mouthed as to others. One of these subjects is, precisely, the threat of mutiny. When the plotting Claggart, whose insinuating verbosity first annoys Vere ("Be direct, man!" he orders the master-at-arms), begins to speak of mutiny, the following fascinating situation occurs:

"Never mind that!" here peremptorily broke in the superior, his face altering with anger, instinctively divining the ship that the other was about to name, one in which the Nore Mutiny has assumed a singularly tragical character that for a time jeopardized the life of its commander. Under the circumstances he was indignant at the purposed allusion. When the commissioned officers themselves were on all occasions very heedful how they referred to the recent events in the fleet, for a petty officer unnecessarily to allude to them in the presence of his captain, this struck him as a most immodest presumption. Besides, to his quick sense of self-respect it even looked under the circumstances something like an attempt to alarm him. Nor at first was he without some surprise that one who so far as he had hitherto come under his notice had shown considerable tact in his function should in this particular evince such lack of it.

P. 93. Mutiny is a sensitive subject to Vere; when it suits his purpose, "considerateness" rather than "honesty" becomes the operative mode of communication. So it goes during the trial scene itself.

[388] Melville's tale, thus, suggests that the neo-Kantian approach to problems of justice, articulated most comprehensively in J. Rawls, A Theory of Justice 251–57 (1971), and relied on by, among others, Professors Richards, see D. Richards, The Moral Criticism of Law 44–49 (1977); D. Richards, supra note 11, at 2–5, and Dworkin, see R. Dworkin, Taking Rights Seriously (1977), carves out only a small section of the complex fullness of adjudicatory behavior. "There are more things in heaven and earth, Horatio, Than are dreamt of in your philosophy." W. Shakespeare, Hamlet, Act I, Scene v (G. Kittredge ed. 1939) (1st Quarto London 1603). Let us move to appreciate those "things," for, like it or not, they are ours.

[389] We need to recall that the text of the story is still somewhat in doubt, but there is considerable support for Hayford and Sealts' conclusion that Melville did not intend the "crisis in Christendom" preface to be in the final version of the tale. For our purposes, it suffices that Melville's words (superannuated or not) and the text as it was ultimately organized are in essential harmony that Christian and other institutional values of the nineteenth century were in a state of transition and even crisis. See Hayford & Sealts, supra note 7, at 18–20, for the textual analysis that led them to delete this and other passages; see also note 181 supra.

[390] See Hayford & Sealts, supra note 7, at 2–3.

[391] For sections of the present analysis touching on the implications of the story for institutions besides law, see notes 9, 48, 205, 224, 343, 352, 361, 380 and accompanying text supra.

[392] See L. Strauss, supra note 205, at 25–37.

[393] Id. at 24. "Persecution, then, gives rise to a peculiar technique of writing, and therewith to a peculiar type of literature, in which the truth about all crucial things is presented exclusively between the lines. That literature is addressed, not to all readers, but to trustworthy and intelligent readers only." Id. at 25. Strauss feels that such writers as Plato, Aristotle, Maimonides, Descartes, Hobbes, Locke, Rousseau, and Kant, among others that he deals with, "witnessed or suffered . . . a kind of persecution which was more tangible than social ostracism." Id. at 33. They wrote what Strauss goes on to call "exoteric" books, namely, books that contain "two teachings: a popular teaching of an edifying character, which is in the foreground; and a philosophic teaching concerning the most important subject, which is indicated only between the lines." Id. at 36.

[394] I do not use the word "gospels" casually. (Neither would Melville, who deleted it from his final version in at least one key place, see Hayford & Sealts, supra note 7, at 5.) The *News from the Mediterranean* is nothing other than the Gospels, and its way of handling reality is meant to reflect the mode of the Gospel writers. That a character with the initials J.C. becomes the hero of both is not coincidental.

[395] The present writer is concluding a book-length manuscript called "Justice's End: Legal Themes in the Modern Novel," in which *Billy Budd, Sailor*, of course, plays a major role. Other texts analyzed in that forum are J. Barth, The Floating Opera (1956); A. Camus, The Fall (J. O'Brien trans. 1957); C. Dickens, Great Expectations (London 1861); A. Camus, The Fall (J. O'Brien trans. 1957); C. Dickens, Great Expectations (London 1861); F. Dostoevski, The Brothers Karamazov (C. Garnett trans. 1937); F. Dostoevski, Crime and Punishment (J. Coulson trans. 1967) (St. Petersburg 1866); W. Faulkner, Intruder in the Dust (1948); B. Malamud, The Fixer (1966); M. Twain, Pudd'nhead Wilson (1894).

[396] Llewellyn, On the Good, the True, the Beautiful, in Law, 9 U. Chi. L. Rev. 224, 249 (1942).

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. So 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 to show 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 arrive at 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 clearly knows the decision 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 Scalia will be, a man with conservative views, 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 descrimination.

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 there is some compelling Government interest in descriminating, then it is discriminatory and unconstitutional.

□ 1840

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 obtainment of that interest.

In other words, it does not have to be a compelling reason to have a law, just it be 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, it seems to me, through reading his opinions, based on his interpretation of the constitutional protections accorded blacks under the 14th amendment, says that any law or regulation that had a purpose of discrimining on the basis of race would be subject to the strict scrutiny, the most rigorous test for judging constitutionality of such measures. However, it is also clear, if you read him, 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 those based on 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 classification 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 discrimination, 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.

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 is 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 discusion. I regret 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 America's commitment to the Constitution and the Bill of Rights. He is the ulti-

mate protector of our freedoms and our system of equal justice under law.

The record on Mr. Rehnquist compiled in the hearings before the Judiciary Committee contains 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 protected by the Constitution. And he is not just wrong on this 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 Republican ballot security program, to his proposal of a constitutional amendment to legalize segregated schools, to his appalling 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 desegregation" 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 Surpreme 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, 4 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, some of these opinions also cite decisions which Justice Rehnquist believes were wrongly decided, including cases upholding affirmative action and the right to abortion, and denying the constitutionality of capital punishment.

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 local 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.

□ 1850

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 proceeding. 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 cause. He sat as a member of the Supreme Court and cast the deciding vote in the very case that upheld the shocking policy 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.

□ 1900

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.

□ 1910

ORDER OF PROCEDURE

Mr. DOLE. Mr. President, let me indicate that both sides have been trying to see if we can agree that we will have two votes at 9 o'clock, one on Justice Rehnquist to become Chief Justice and one on Judge Scalia to become an Associate Justice of the Supreme Court.

A question has been raised—and we are checking it now—whether or not it would be appropriate to vote on Judge Scalia tonight because there would not be an Associate Justice vacancy until Justice Rehnquist has been sworn in as Chief Justice. So we are checking that with some of our legal scholars, if we can find them. We should have that information in the next 30 minutes.

RECESS UNTIL 7:45 P.M.

Mr. DOLE. Mr. President, since there does not seem to be too many people clamoring to speak, ask unanimous consent that we stand in recess until 7:45 p.m.

The PRESIDING OFFICER. Without objection, it is so ordered

Thereupon, at 7:12 p.m., the Senate recessed until 7:45 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. GRAMM).

□ 1945

The PRESIDING OFFICER. The Senate will come to order.

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.

□ 1950

Mr. DOLE. Mr. President, I as unanimous consent for the order for the quorum call be rescinded.

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

Mr. DOLE. Mr. President, the pending business is the Rehnquist nomination?

The PRESIDING OFFICER. It is.

Mr. LAXALT. Mr. President, I rise in strong support of the nomination of William Rehnquist to be Chief Justice of the United States. William Rehnquist is superbly qualified for this most important position by virtue of his character, his temperament, his intelligence and competence, and his sound legal judgment.

As we are all acutely aware, the decision to confirm a Chief Justice is one to be taken with the greatest care and

with reference to as much information and knowledge about the nominee as possible. In the case of Justice Rehnquist, this task has been relatively simple. The 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 attack 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. Let me comment briefly on each of these.

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 bully and intimidate voters, 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 did agree that the events in question took place at polling places in predominantly 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 politics 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 22, 24, or 26 years ago 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 and one an active Democrat—who defend him?

In my opinion, all of the witnesses—partisan and not partisan—told the committee the truth to the best of their recollection. But I believe that Senator LEAHY is correct when he says that the evidence here is not "clear and convincing." And Senator MATHIAS, one of the sages of the Senate, also wisely remarked that the testimony "probably tells us more about the uncertainties of human memory than about the nominee's veracity and fitness for office."

For my part, after observing Justice Rehnquist over the years and during the 2 days of cross-examination by the Judiciary Committee, I must admit that I have a difficult time accepting the image of "Rambo Rehnquist" that the accusing witnesses portray. The conduct described by these witnesses is totally inconsistent with the scholarly, soft-spoken, gentle character that we all witnessed during the hearing and that is so well known to Justice Rehnquist's colleagues on the Court. I simply cannot believe that he bullied any voters at any time anywhere and, in particular, 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 called for 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, carefully 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, then, 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, Justice Rehnquist in one sense 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 "official responsibility." 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 what the 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 deliberation 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 so bent on deciding 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. From

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 action on the election days of 1960, 1962, and 1964. And there is no absolute way of determining the extent of his actual knowledge of the disputed facts in the Laird 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 his allegedly extreme and doctrinaire position 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 first 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 prosegregationist 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 the time that they were written: that does not make sense in light of the contrary positions taken in the two memos. Nor, I believe, were the memos primarily intended to persuade Justice Jackson to adopt one or the other position.

Rather, the memos were intended to present coherent, logically sound and defensible rationales for either of the two principal legal positions being considered 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 Express 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, but 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 believe that the 1952 memo and Justice Rehnquist's subsequent explanation cast doubt upon neither his fairmindedness nor his integrity.

THE OPINIONS IN "CIVIL RIGHTS CASES"

Finally, I want to address the criticism that is based on Justice Rehnquist's opinions in civil rights decisions over the years. The claim is that William Rehnquist is at the wrong "extreme" in these cases, and it is implied that the right position—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."

The term "civil rights cases"conjures up the image of intentional, malicious discrimination against an individual solely because of that individual's race, sex, creed, or national origin. I unconditionally agree—I am sure that all of us unconditionally agree—that such discrimination is bad and illegal and that it should always be opposed by good men and women everywhere.

But "civil rights cases" seldom center on so simple an issue. Civil rights litigation and civil rights jurisprudence over the past few decades have focused instead upon efforts to use civil right statutes and constitutional doctrines in new ways, ways that arguably were never intended by the authors of the statutes and the Framers of the Constitution. Many of these cases trivialize the sound meaning of "civil rights," "equal protection," and "due process." Many other cases present unprecedented legal questions upon which reasonable men of good faith may, and often must, differ. Often the question presented for decision in these cases is implicitly that of whether the courts should correct an alleged wrong by twisting and contorting the legal interpretations of existing statutes or whether the task of justice must be left to Congress and the political process. In short, theplaintiff is not always right: justice is not always on his side.

It is on these types of civil rights questions that Justice Rehnquist has often differed from his colleagues in the past. I should note, however, that his dissents of the past are increasingly becoming the basis of the sound majority decisions of the present, and I see no cause for alarm to anyone in this development.

I have no difficulty whatever in saying that it is just as wrong to call William Rehnquist "weak" on civil rights as it is to call him a bigot. Both suggestions are dead wrong and do injustice to a good man who will become a great Chief Justice.

I have taken some time here to respond to the major charges against the nominee. In conclusion, let me say that our Nation is fortunate indeed to have a nominee of William Rehnquist's caliber. I urge my colleagues to approve the nomination and to allow Justice Rehnquist to take his proper place as "first among equals" on the Court.

Mr. DOLE. Mr. President, we are prepared to complete debate on the Rehnquist nomination. Once that is done, if we can, we will either vote or take up the Scalia nomination and have two votes back to back.

Some question has been raised about whether the Scalia nomination could be voted upon prior to a vacancy occurring of an Associate Justice of the Supreme Court. I am advised that it is not a problem. We now have the

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 have other material.

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, he ought to be confirmed; that 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 this man 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 respect it does at this time; or will 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 State 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.

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 heretofore 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 ennunciated 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 who thinks that somehow, some way, 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 surveillance 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 want 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.

The Jackson memo—it has been discussed time and time again, but again we 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 agrees with a particular position that the Supreme Court had reached at an earlier time 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 1952, 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 not challenged the situation. Bad enough not to have done something about it. But far worse not to have leveled, not to have stated the facts to the Judiciary Committee when we inquired of him about it. He told us he only learned about the restrictive covenants 3 or 4 days before the hearing when he saw the FBI report. And then lo and behold, the Washington Legal Times writes a story about having talked with his lawyers and having talked with his lawyers they report that the lawyers had advised him in writing about the restrictive covenants concerning restrictions against the Hebrew race.

There is no such thing as the Hebrew race, I might point out, but everybody understands what was intended.

And then what does Justice Rehnquist do? On the very day that the Washington Legal Times reports the story about the two lawyers having said that they had sent him letters in connection with these restrictive covenants in the deed, then and only then does he sit down and write a letter to the chairman of the Judiciary Com-

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 the whole world 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 insufferable 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 when 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 you have ever cast since you have been 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 upon the American people 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 them up a little bit and say you have a 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 be your guide, 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. TRIBLE). The Senator from Delaware is recognized.

Mr. BIDEN. Mr. President, you know we are 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 everybody who has written about Justice Rehnquist's nomination to the Court by the President has said something to the following effect. All the supporters of the nomination have said: "The President chose Justice Rehnquist because he was a brilliant conservative who shared Ronald Reagan's philosophic point of view on the issues." And everyone automatically says, "Well a President can go and decide that he wants someone and pick them solely on ideology."

□ 2010

President Reagan had a choice of a number of conservatives he could have appointed to the Chief Justice slot, but they made it clear they wanted the most conservative jurist they could find for that slot. And in his choice of all of his other judicial nominees, he said the same thing. And that is his right.

But when any of us raise the issue of whether or not Justice Rehnquist's stretched interpretation of the law, the Constitution as it related to women and blacks and, by the way, individuals against the state, we are told, "Well, we should not look at the ideology of that person." As if to say, the way that is interpreted, the Constitution says that it is all right for the 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 how he or she thinks 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."

Well, that is also 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 coequal branch of the Government. And to suggest that the Senate has to prove that 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 to do that. 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."

And yet we 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 the burden is on 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 that 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 American people believe 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, the 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 those occasions the Senate has rejected the President's nominee. I believe that the facts compel this body to again accept its ultimate responsibility and to reject a 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 have more significance for our future as a nation than debate over the scope and intent of the equal protection clause of the Constitution? What could be more important than defining the character as characteristics that the next Chief Justice—the very symbol of justice—ought to possess. My colleagues have approached these issues with intelligence, with insight, and with courage. Their 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 as there are Senators who oppose this nomination. Many Senators have based their decision to oppose this nomination on the poor judgment shown by Justice Rehnquist in his refusal to recuse himself in the case of Laird versus Tatum. Others reach their decision because they question whether Justice Rehnquist was sufficiently forthcoming and candid 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—to quote the distinguished 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? For me the answer to that question is a clear and unqualified "No." Anyone who reviews the record with an open mind will be compelled to reach the same answer.

During this debate 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.

The record demonstrates that Justice Rehnquist does not meet the high standards this role requires:

A man whose judgment is so poor and sensitivity to ethical concerns so lacking that he would choose to sit and cast the deciding vote in a case where he had previously offered an opinion as to its proper resolution—a case challenging the validity of a policy he helped to establish does not pass the test.

A man whose testimony at his confirmation hearings led Senators and the public to question his candor and forthrightness does not pass the test.

And a man who has consistently and unremittingly displayed a "hostility toward the rights of women and minorities", a man whose actions have led Members of this body to question his commitment to individual rights and liberties, a man whose confirmation will, as one of my colleagues has stated, "retard, not advance our quest for a truly colorblind society" clearly does not pass the test.

Because William Rehnquist does not pass the test, does not possess the qualities that would allow him to fulfill the important symbolic role of the Chief Justice of the United States, I cannot in good conscience vote to confirm him as the next Chief Justice of the United States. I urge all of my colleagues to consider the record, consider the past week's debate, and consider their own consciences. I trust that if they do so with an open mind, they will join with me in opposing this nomination.

Mr. President, let me summarize, if I may, why I am against Justice Rehnquist.

First of all, Mr. Justice Rehnquist does not, in my opinion, fulfill the necessary requirements to be the Chief Justice of the United States. To be the Chief Justice of the United States of America, one, in my view, has to be able to have demonstrated in a career that they are openminded, that they are not rigid, that they are capable of building a consensus and, even more importantly, capable of recognizing that there are periods in the tenure of every Chief Justice where it is vitally important for the Court and well-being of the United States of America that the Supreme Court speak with one voice. And a rigid woman or man is not capable, in my view, of subsuming his or her particular point of view on a critical matter to the whole Court.

□ 2020

Had there not been a unanimous decision in Brown versus the Board of Education, we could have had considerably more civil unrest in this country than we in fact had. Had Justice Reed not succumbed to the persuasive arguments of Justice Earl Warren, it would not have been a united Court. Had Justice Burger failed to understand the significance of the requirement for a totally unanimous Court in the Nixon tapes case, we would have precipitated, in my view, a constitutional crisis. Justice Rehnquist—nothing in his background demonstrates that he has a sense of that, that he has a sense of history, that he has a sense of requirements that are needed to be the Chief Justice. The Chief Justice is a metaphor for justice in America.

Second, everything in Justice Rehnquist's background suggests at a minimum a hostility toward advancing the causes of minorities in this country, and a generous disposition to engage in narrative prose in the service of his unspoken desires. He has been very, very, very adept at setting up strawmen. In the famous case involving Kentucky where he ruled that notwithstanding the fact that it is discriminatory to insist upon all blacks being kept off a jury when there is a

black defendant—he acknowledged that is discriminatory but when he engages in narrative prose 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, and discriminate against blacks the same way, totally lacking any knowledge or apparent understanding of American history where black juries, white juries—where we kept 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 name hundreds 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 is here.

Mr. DECONCINI addressed the Chair.

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 here 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 be the next pending speaker.

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

The Senator from Iowa.

Mr. HARKIN. 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 served on the Judiciary Committee. I had not looked at the record. But I had only assumed that he had gone through a hearing process many years ago when he was put on the Supreme Court, and that if in fact he was qualified to be a Justice of the Supreme Court then I saw no reason why he was not also then qualified to be Chief Justice.

So based upon just that kind of a cursory, preliminary thinking, I had decided that I would support Mr. Rehnquist to be Chief Justice of the United States.

However, a lot has occurred since that time. I have listened to the debate. I have read some of the opinions that Mr. Justice Rehnquist has written. I have followed the questioning that happened on the committee. And quite frankly, Mr. President, I have changed my mind.

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 commitments upon 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 as 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 traditions built on equal justice for 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.

□ 2030

So, Mr. President, unfortunately, I do not think that William Rehnquist measures up to these criteria. That is, I say that after, again, having read the record, listened to the debate, and read some of the opinions that Mr. Rehnquist has written.

His conflicting testimony before the committee casts great doubt on his candor and honesty. His record on school desegregation, voting rights, and other cases displays a hostility that I believe abandons the fundamental principles of equal justice under law.

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 their entirely.

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 how consumed a president is with turning the court to the philosophical right or left.

This much we admit: Since his appointment to the bench as an associate justice in 1971 by Richard Nixon, Rehnquist has been consistent in his decisions.

He has consistently voted for the death penalty; anti-abortion laws; public financing

of private and parochial schools; government control of free expression; the limitation of privacy rights; narrowing of the Miranda rule; limiting what can be reported in the press; freeing police from strict obedience to court-imposed restrictions; and government control of pornography.

In Rehnquist's case, consistency is no asset.

The most cursory of reviews shows the Rehnquist past littered with opinions bordering on the archaic. A more examined study reveals the man to be an arch conservative who favors the majority in individual rights cases.

In the landmark abortion ruling of 1972 (*Roe vs. Wade*), the court stated the government has no right to interfere with a woman's privacy in making such a personal decision. Rehnquist voted in the minority, calling the decision ". . . an improvident and extravagant exercise of the power of judicial review."

The nominee, obviously, is opposed to judicial activism. He suggests issues such as abortion should be decided by elected representatives, allowing individual states to prohibit abortions if they so desire. That position is a step back to the Old World church-state tyranny that the framers of our Constitution sought to escape.

In individual rights cases, Rehnquist's reading of the Constitution takes little note of individual liberties. In fact, he has compiled a near perfect record in voting for the government and against the individual. We believe interpretations should favor broad liberties for people and ironclad protections against government interference in their private lives.

It comes as no surprise, then, that Rehnquist is opposed to the Incorporation Doctrine of 1925, which permits the Supreme Court to extend Bill of Rights provisions to the states. The doctrine prohibits states from encroaching on human rights and extends the Fourteenth Amendment's guarantee of due process to the states.

On the relationship between religion and government, Rehnquist wrote in the 1985 *Wallace* vs. *Jaffree* decision that he believes "the 'wall of separation between church and state' is a metaphor based on bad history, a metaphor which has proven useless as a guide to judging. It should be frankly and explicitly abandoned."

Should the Rehnquist interpretation of the establishment clause ever command a court majority—and as the court's chief justice, he certainly would have the influence of leadership—the ramification would be enormous and harmful to the tranquil church-state relations enjoyed in our country.

Rehnquist also has consistently ruled in favor of the states in conflicts between state and federal authority. He seemingly favors Bible reading, state-sanctioned prayers and other religious exercises in public schools, should a state adopt laws allowing such activities. Such a viewpoint would ensure that any religious group commanding a majority on a school board could institute whatever sectarian practices and programs it wants in the public schools.

And then there are those disturbing Rehnquist memos.

In the early '50s, during debate of the *Brown* vs. *Board of Education* case, Rehnquist authored a memo stating that "separate but equal" public education for blacks was "right and should be reaffirmed."

In 1970, as an assistant attorney general in the Nixon administration, Rehnquist wrote a memo that the Equal Rights Amendment could "turn holy wedlock into holy deadlock." The overall implication of the Equal Rights Amendment, he continued, "is nothing less than the sharp reduction in importance of the family unit, with the eventual elimination of that unit by no means improbable."

The positions are ones that are dated and espoused now by only the most radically reactionary. They are not the moderate views we want to see embodied in a chief justice.

We need a justice who understands the purpose of the Constitution in this day and age—and beyond. Rehnquist clearly does not. Though it seems unlikely to happen, we urge the Senate to deny his nomination.

Cause To Reject Rehnquist

The Senate should take a fresh look at William H. Rehnquist's nomination to be chief justice in light of new evidence turned up since the Judiciary Committee recommended confirmation.

That new evidence is Rehnquist's proposal in 1970, when he was an assistant attorney general, that the Constitution be amended to nullify Supreme Court school-desegregation decisions.

The amendment, according to the Los Angeles 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—16 years after the Supreme Court in Brown vs. Board of Education unanimously struck down school segregation, a time when great strides have been taken to topple the institutional barriers of racism. Yet, here is a man who proposes wiping all of that out by rewriting the Constitution to permit segregated schools.

It is probably of no great consequence that this damning evidence should turn up after the Judiciary Committee hearings ended. Rehnquist would likely have suffered another "amnesia attack" before the committee. 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 career: that he does not believe the government should 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 professors raising doubts about his fitness is far from courageous. Pusillanimous is the word it brings to mind.

While the Senate considers Rehnquist's confirmation as chief justice, the professors have taken it upon themselves to counsel the senators in an open letter raising "serious questions of [Rehnquist's] intellectual honesty, . . . integrity and ethical standards."

For specifics, the letter lists various accusations made in confirmation hearings: that Rehnquist harassed voters, approved racist clauses in real-estate contracts, argued for separate-but-equal schools for blacks, sought to cheat a relative out of an inheritance and failed to disqualify himself from a case in which he had a conflict.

The academics' advice? Oppose Rehnquist if the senator "entertains the slightest doubt" about the justice's conduct.

The senators can be forgiven for reacting to this letter with a "Thank you very much, but we can read the papers, too."

The great irony is that the professors had the temerity to accuse Rehnquist of intellectual dishonesty in a letter containing a powerful bill of indictment yet stopping short of urging his rejection. What more do senators need to entertain the "slightest doubt" of Rehnquist's fitness?

This effort to undermine the nominee while carefully avoiding personal risk reminds us of a line that a writer attributed to Dante: "The hottest places in hell are reserved for those who in a moment of moral crisis seek to maintain their neutrality."

If the senators need more evidence of Rehnquist's all-male WASPish perspective, consider the just-uncovered memo from 1970 in which, as assistant attorney general, he said the Equal Rights Amendment could "turn holy wedlock into holy deadlock" and would end any distinction between the sexes outside of separate restrooms.

No need to belabor the implications of this memo, for it merely confirms what opponents of Rehnquist have been saying all along: that his mind seems stuck in 1950.

With each new disclosure, it becomes increasingly clear that Rehnquist is not only sadly out of touch with contemporary American values but with the values embodied in the Constitution.

Unfortunately, the Republican-controlled Senate is on a course to confirm Rehnquist and dismiss all questions about him as political. That may be good politics but it is not statesmanship because it will result in a chief justice whose veracity, integrity, ethical standards and, hence, judgment will always be open to question.

Reject Rehnquist

The U.S. Senate is scheduled to begin debate this week on the nomination of William Rehnquist to be chief justice.

Senate watchers are saying he's a shoo-in.

Rehnquist should be rejected for a very compelling reason—one that overrides whatever qualifications he might bring to the position.

He's insensitive on matters of race.

Over a period of several decades—in his personal conduct, in his legal advice and in his judicial opinions—he has demonstrated that he is on the wrong side of one of the great legal and moral questions of our time.

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 investigation into his nomination.

Consider:

As a law clerk for Justice Robert Jackson in the 1950s, Rehnquist wrote a memo defending an 1896 Supreme Court ruling upholding racial segregation.

As a political operative in Phoenix in the 1960s, he tried to prevent minorities fom voting using tactics witnesses described as intimidating.

While a top attorney in the Nixon administration in the 1970s, he drafted a proposed constituional amendment that would have halted, desegregation of the nation's public schools.

As a private citizen, he bought a home in Phoenix by signing 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 on matters of individual rights generally and of minority rights specifically.

It is not the record of a man who should be the top judge in the country.

Senate should vote "no."

Mr. HARKIN. Mr. President, I again thank my distinguished friend from Arizona for yielding this time.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. DECONCINI. Mr. President, there is no one I have more respect for then my friend from Iowa, Senator HARKIN. He is a real tribute to that State and is a thoughtful Senator who carefully looks at these things. We just happen to be in disagreement here.

Mr. President, I am privileged today to be able to participate in the Senate's consideration of the nomination of a Chief Justice of the United States. I was not in the Senate when Chief Justice Burger was confirmed by this body. It is probable that neither I nor most of my colleagues will be here when this responsibility next comes to the Senate. We must approach our constitutional responsibility for advise 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 is all the more important because of the leadership role of the Chief Justice. I have spent many hours considering the nomination of William Rehnquist to be Chief Justice. I have attended hours of hearings. I have listened carefully to the testimony of many witnesses both pro and con. I have met with and heard the testimony of the Justice himself, and of people who are in diametric opposition to what he says and to what other witnesses say.

I have read hundreds of pages of documents pertaining to Justice Rehnquist's qualifications, temperament, and integrity. I have read dozens of decisions and articles by the Justice. And finally, I have talked to my constituents to get the benefit of their views on the nomination.

Even in the State of Arizona, where the Justice lived a long time, it is not unanimous.

As a result of all of the study and deliberation, I have concluded that Justice Rehnquist should indeed be elevated to be Chief Justice of the United States.

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 humorous 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.

I ask my colleagues here, if you know a judge on the Supreme Court—or if you do not, call one, even after the vote call one—you will be 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.

The last criterion that I examine in determining whether to vote in favor of a judicial nomination is whether the nominee has the integrity and reputation for truthfulness and honesty required of the Federal judiciary.

In determining whether Justice Rehnquist meets the test of this standard, I have relied heavily on those who have worked closely with Justice Rehnquist and those who know him best.

The American Bar Association rated Justice Rehnquist as well qualified, their highest rating for Supreme Court nominees.

Mr. Gene Lafitte and Mr. John Lane, members of the ABA Standing Committee of Federal Judiciary testified before the Judiciary Committee that the standing committee had reached this recommendation unanimously after extensive investigation—my recollection is some 300 or more contacts: lawyers, judges, clients, and many individuals.

In addition to the ABA witnesses, Justice Rehnquist had a most impressive roster of witnesses testify as to his character and qualifications.

These witnesses included Griffin Bell, former Attorney General of the United States under Jimmy Carter; Irwin Griswold, former Solicitor General of the United States and former long-term dean of the Harvard Law School; and Rex Lee, also a former Solicitor General.

We also heard from several distinguished attorneys, who have worked with Justice Rehnquist, as to his abilities and integrity.

I believe it is a high compliment to Justice Rehnquist that such a group of distinguished Americans enthusiastically testified in his favor.

There have been allegations that Justice Rehnquist engaged in improper activities in Phoenix in the early 1960's and subsequently failed to testify truthfully about these activities to the Judiciary Committee.

I am concerned about the activities of the Republican Party in Phoenix at that time.

I was involved in efforts by the Democratic Party in southern Arizona to protect individuals, mostly minority individuals, who were attempting to exercise their constitutional right to vote.

There is no question in my mind that the Republican Party in Arizona, for political purposes, was engaged in an all-out campaign to prevent minority voters from voting for Democratic candidates.

However, I believe that the proper forum for examination of the activities that took place in Arizona during these years is in Arizona.

The allegations made against Justice Rehnquist should have been examined by the Arizona attorney general, the Arizona Bar Association or the Arizona Supreme Court.

The fact is that the allegations against Justice Rehnquist were not made to the proper authorities at the time.

No one thought they were important enough or credible enough to bring them up then.

We, in Arizona, do not need the Federal Government in Washington or Members of this body to tell us what the standards are. If there are complaints, we are very able to handle them. There were none.

I believe that Justice Rehnquist was involved in the planning and supervising of this political strategy. While I do not believe that these incidents were either Justice Rehnquist's nor Arizona's finest hour, I do not find that Justice Rehnquist was either directly involved in challenging voters or subsequently was untruthful about his activities.

The Judiciary Committee received a full 12-hour day of testimony concerning the election day activities of the

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.

Six 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 Maggiore, who would have been aware of any complaints by Democrats of illegal voter challenges, testified under oath that he received no such complaint about William Rehnquist.

Melvin Mirking, a very respected lawyer in Phoenix, was a volunteer Democratic party worker in the early 1960's

He 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 on this or 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 without connecting Justice Rehnquist to the 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 watcher 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 Maggiore, 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 Bulter 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 his picture in the newspaper 9 years later.

I am afraid that Senator Pena's allegation 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 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 been unethical activities if they had been performed by a lawyer such as William Rehnquist.

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 to have been, in my opinion, he merely put on a show without contributing any substantive or prohibitive 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-

quist was directly involved in challenging voters.

Parenthetically, the State law requires that party workers who were to engage in challenging voters had to be registered with the Election Commission and nominated by the chairman of their party.

There is no record that Justice Rehnquist was ever so registered or nominated or appointed.

I believe that Justice Rehnquist was too good a lawyer and was too smart to either challenge voters without being registered under State law or to challenge voters in an illegal manner.

He is not dumb.

□ 2050

I will comment briefly on other issues that have arisen in connection with the nomination of Justice Rehnquist to be Chief Justice. First, I find that the criticism of Justice Rehnquist based on the restrictions in the deeds to his homes in Arizona and Vermont to be totally without merit and beneath the dignity of the Senate. I believe that Senator LEAHY brought up the Vermont deed restriction in a responsible manner, and I compliment him for doing it early and casting no aspersions when he did so.

When Justice Rehnquist explained what had happened and what he planned to do to remedy the problem, that should have been the end of the discussion. Indeed, at that point, Senator LEAHY responsibly dropped the matter entirely. Some critics of Justice Rehnquist have, however, sought to blow the existence of the restrictions out of proportion. I do not doubt for a minute that property I now own or have owned in Arizona contains deed restrictions similar to those in Justice Rehnquist's deeds. I dare say that most of my colleagues have owned property with these kind of restrictions.

Even the distinguished Senator from Delaware—unfortunately for him, but no fault of his—was involved in such a situation. His father had such a deed. Look at what the press and the critics did to Senator BIDEN—unfair as could be, condemning that he, as a child, lived in such a home that had such a restriction, that there was something bad about it. Nonsense.

We all know that they are unenforceable and meaningless.

The U.S. court found such restrictions to be unconstitutional and therefore totally unenforceable in *Shelley* v. *Kramer*, 334 U.S. 1 (1948).

Most people have more important things to do with their time and money than worrying about contractual provisions that are void and have no effect on the transaction.

I suggest that we also find better ways to spend our time and effort.

Concerns have also arisen about two memoranda Justice Rehnquist wrote as Assistant Attorney General and when he was clerk for Justice Jackson.

One of these memos concerned school integration and the other concerned the equal rights amendment and its effect on families. I disagree with the arguments presented in each of these memos. Some of the stuff I read by Justice Rehnquist is repugnant to me. I oppose busing as a remedy for school segregation, but I certainly do not believe that freedom of choice plans should be used as a means to avoid integration. I would have earnestly opposed legislation such as that proposed in the school integration memo written by then Attorney Rehnquist.

Similarly, I am a cosponsor of the equal rights amendment.

I voted for expanding and extending the time for confirmation of the equal rights amendment, and I am proud of it. It was right. It has not passed, but it will. Those of us who are supporting Rehnquist, and are for the equal rights amendment are still going to be for 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 hearings 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 HATCH 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 is that in both these memos, the President or 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 constantly 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 for views he expressed 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 responsbility 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 enforcement of 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—intellectual 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 December 6, 1864. Because 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.

□ 2100

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 politics undermining the proper functioning of the Court. These political games have been played both by the Senate and by the President. President Franklin Roosevelt attempted 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 voted on 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 Wald, 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.

Mr. President, I thank a couple people. Ed Baxter, of my office, Brad Kirby, and Bill Wood, and many who helped in this process.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I compliment my distinguished colleague and dear friend from Arizona for, I think, one of the better sets of remarks made on this nomination throughout this whole process.

I personally mention my respect for him because I know that it has been very difficult for him to stand up on his side of the floor throughout these proceedings and do the excellent job that he has done in being fair to Mr. Justice Rehnquist.

It is typical of Senator DECONCINI. It is typical of the way he handled himself in the Senate. He is a fair man. He is honest and does a very good job, and I consider him one of my best friends in this body. I have gained even more respect—I did not think it possible—but I gained even more respect because of his leadership for Justice Rehnquist throughout this battle.

THE REHNQUISITION IS NEARLY OVER

The Rehnquisition is nearly over. The Nation has watched in horror as the grand inquisitors have turned the Senate Chamber into a star chamber. The inquisitors have dragged out their racks and stretched the truth. Let me give an example of how the truth has been twisted, beaten, and gouged in this arduous debate:

JACKSON MEMO

The inquisitors have used a 34-year-old memo written by a young law clerk to say that Justice Rehnquist questioned appropriate civil rights policies. In fact, both the Justice and his co-clerk, Don Cronson, the only other living person knowledgable about the genesis of that memo, state that the memo was written at the request of Justice Rehnquist's employer. The inquisitors complain that it is shameful to attribute those beliefs to Justice Jackson. This is another stretching of the truth. Neither Justice Rehnquist nor Cronson contend that Justice Jackson held these views, but only that he asked his clerks to present him with arguments on both sides of a difficult case.

In other words, Justice Rehnquist was asked to play devil's advocate. But 34 years later, the inquisitors want to label Justice Rehnquist as the devil. Where is the fairness?

LAIRD VERSUS TATUM

Another stretching of the truth on the rack of these inquisitors concerns Justice Rehnquist's decision to hear the Laird versus Tatum case. Even the inquisitors agree now that Justice Rehnquist violated no law in his decision, but they contend it was unethical to hear a case when he had a "personal knowledge of the evidentiary facts" before he went on the Court. The inquisitors base this claim on his testimony to Senator Ervin's subcommittee in 1971. As current chairman of that subcommittee, I have reviewed the record and learned that Justice Rehnquist told Senator Ervin four times during that hearing that he lacked any "personal knowledge" about Army information gathering—the subject of the later Laird case.

The inquisitors have not only stretched the truth, they have also hauled out their thumbscrews and twisted the facts.

EXTREMISM

The charge that Justice Rehnquist is extreme is just such an instance of fact twisting. In fact, Justice Rehnquist has written more majority opinions over the last four terms—73 to be exact—than any other Justice. It is simply impossible for the Court's leading opinion-writer and consensus-shaper to be "extreme." A study of the Court's 20 top civil rights cases of 1986 shows that Justice Rehnquist voted in the mainstream 70 percent of the time. Only three other Justices had better mainstream ratings.

Just like the real inquisition, these inquisitors were not interested in Justice Rehnquist's faithfulness to the Constitution; they were interested in whether he agreed with their narrow dogmas. They ignore that he wrote the leading women's rights case of last term and that he consistently votes to end proven discrimination. At least 27 times he has voted for women and minorities. This is not enough for them. Faithfulness to desegregation is not enough for them, they must have total obedience to the dogma of racial balance even if it means using quotas, busing, and judgment by statistics and effects tests. Even if it means ignoring the principle of the "color-blind constitution" and striking down laws passed by the States with no discriminatory purpose at all, they must have racial balance.

Justice Rehnquist is no heretic on civil rights. He simply reads the Constitution and laws as most Americans would read them. He believes in a colorblind constitution and fights genuine discrimination wherever it arises. He just happens to disagree with the real extremists and for that they call him "insensitive" and twist the facts.

The real test of extremism came when the inquisitors accused the Justice of extremism because he would have allowed Alabama's silent prayer to stand in the Jaffree case. 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 blur memories, the past can be molded to mean anything. The best example of that was the testimony from Phoenix about vote challenging. This testified more in the frailities of human memory than to anything else. Nothing the committee found in 1986 sig-

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 Justice Rehnquist engage 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 180 other judges interviewed 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 that they might use to justify their foreordained verdict—guilty, guilty, guilty. I would ask guilty of what? The record shows Justice Rehnquist is guilty of elevating the rights of victims alongside those of criminals; guilty of advocating equal treatment of all—not special treatment for some; guilty of defending the Constitution as it was written. If there is any guilt in this proceeding, it is not fairly attributed to Justice Rehnquist.

This body has one question remaining: will it let justice be done or permit a Justice to be done in.

It is the time for the Senate to end the Rehnquisition and proceed to a fair vote on the merits of this issue. Today, September 17, 1986, is the 199th anniversary of the day that 39 men at the Convention in Philadelphia signed the Constitution. It is fitting that we choose this day to approve the 16th Chief Justice of the United States. It was on this day in 1787 that George Washington delivered his first official oration to the Convention to voice his approval of the amended Virginia plan, whose sponsor, Edmund Randolph, would refuse to sign along with the celebrated George Mason. That split would help produce the bill of rights. This is an important day in American history. It is appropriate to celebrate it with this historic constitutional action. I urge my colleagues to approve Justice Rehnquist as Chief Justice.

I yield the floor.

Mr. THURMOND. Mr. President, I did not intend to speak further but after the opponents have gone so far in some of these matters, I feel it necessary to keep the record straight to make a brief reply to a few of those allegations that have been made.

Mr. President, the allegation about the polling place incident. The allegation is that Justice Rehnquist challenged or harassed minority voters at a polling place in Phoenix, AZ during the 1960's.

RESPONSE

Similar allegations were raised in 1971. The committee concluded at that time that the allegations were wholly unsubstantiated, and probably a case of mistaken identity.

Justice Rehnquist acknowledged that he was a legal advisor to the Republican Party and did visit some precincts in 1962.

In 1986, the committee expanded its investigative effort and invited numerous witnesses to testify regarding the allegation.

Only three of the five witnesses testifying against Justice Rehnquist said they saw him challenging minority voters. Some recognized him as the individual involved several years after the incident when they saw his picture in the paper. All eight witnesses testifying in support of Justice Rehnquist said that he did not harass, intimidate, or challenge minority voters.

Judge Vincent Maggiore, the 1962 Democratic Party chairman for Maricopa County, testified that Justice Rehnquist was not involved in voter harassament.

Judge Thomas Murphy, the 1964 Democratic Party chairman told the committee that he personally investigated the allegations about Justice Rehnquist and that they were totally unfounded.

A Republican challenger by the name of Wayne C. Bentson was involved in a disturbance at the Bethune Polling Place in 1962.

Mr. Bentson admitted to the FBI in 1962, 1971 and again in 1986 that he was the individual involved at the Bethune Polling Place in 1962.

A 1962 FBI Report concerning voter harassment at the Bethune Polling Place refers to Mr. Bentson. Justice Rehnquist's name is not even mentioned.

A 1962 Phoenix police report concerning an instance at Bethune Polling Place refers to Mr. Bentson. Again this report does not mention Justice Rehnquist's name.

A 1962 FBI report, the 1962 Phoenix, AR Police report, and Mr. Bentson all acknowledge that Wayne C. Bentson was the individual involved in the disturbance at the Bethune Polling Place in 1962.

Although Justice Rehnquist was a legal advisor and did visit some precincts, there is no truth to the allegation that Justice Rehnquist participated in any voter challenging, harassment or intimidation of minority voters.

LAIRD V. TATUM

ALLEGATION

Justice Rehnquist was not candid with the Judiciary Committee in 1971 regarding the Laird versus Tatum case involving surveillance activities by the Department of the Army.

RESPONSE

Justice Rehnquist issued a comprehensive memorandum on October 10, 1972, detailing his reasons for declining to recuse himself in the Laird versus Tatum case. In that memorandum Justice Rehnquist reviewed his involvement in the case, analyzed the disqualification statute and reviewed the precedents of the Supreme Court on the 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 to the subcommittee. 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 realize people might disagree with me 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 *Laird V. Tatum;* 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

The trust fund was established by Dr. Cornell, Harold's father, with the express purpose of providing appropriate care for Harold Cornell upon his inability to provide for himself.

It was Dr. Cornell's express wish that the trust fund be kept secret from Harold Cornell. But Dr. Cornell made all of his other children aware of the secret trust.

Justice Rehnquist had no responsibilities to administer the trust or provide for its beneficiaries. This was up to Harold Cornell's brother, George, the trustee.

George Cornell in accordance with his father's wish never disclosed the existence of the trust to Harold Cornell. However, he did provide money from his own personal funds for Harold's use. The trust fund was never violated and was given to Harold intact.

At no time does Harold Cornell assert that Justice Rehnquist or anyone else took any money from the trust fund.

The claim by Harold Cornell of unethical behavior on the part of Justice Rehnquist apparently involves nothing more than a longstanding family dispute by an alienated family member.

The allegation totally lacks merit.

RESTRICTIVE COVENANTS

ALLEGATION

Properties formerly and currently owned by Justice Rehnquist, contained restrictive covenants which prohibited the sale or transfer of these properties to certain individuals.

RESPONSE

Such restrictive covenants in the early part of this century were a common occurrence.

Under current law there is no requirement to have covenants removed.

The covenants are unenforceable and meaningless on their face.

The Judiciary Committee in 1971 was aware of the restrictive covenant on his former Arizona property. However, it was appropriately not an issue in 1971 during consideration of his nomination to be Associate Justice.

Raising this issue now is nothing more than an attempt to portray Justice Rehnquist as insensitive to certain individuals. Nothing could be further from the truth.

Justice Rehnquist has taken steps to have the restrictive covenant on the Vermont property removed even though there is no requirement for this action.

LONE DISSENTER-OUT OF THE MAINSTREAM

ALLEGATION

Justice Rehnquist is out of the mainstream of constitutional thought and by far the greatest lone dissenter.

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 current Court with 27 solo dissents over the last four terms of the Court.

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

ALLEGATION

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 rightness from the standpoint of fundamental fairness 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 separation 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 phraseology 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 to me, signed by John R. Bolton, Assistant Attorney General, with attachments, be printed in the RECORD.

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

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND
INTERGOVERNMENTAL AFFAIRS,
Washington, DC. 20530.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: This letter is written to you as Chairman of the Committee on the Judiciary to discuss the respective powers of the President to nominate, and the Senate 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 Mr. Justice Fortas to be Chief Justice and Judge Thornberry to be Associate Justice of the Supreme Court, July 11, 1968, printed in, Hearings before the Committee on the Judiciary, United States Senate, 90th Cong. 2d Sess., on Nominations of Abe Fortas and Homer Thornberry, Appendix, Exhibit 1 (1968) (copy attached).

A prospective vacancy on the Supreme Court arises when a Justice announces his or her intention to retire on a specific date, or upon the qualification of a successor.[1] A prospective vacancy also arises when an incumbent Justice is nominated for elevation to the Chief Justiceship. In any of these instances, the President has the power to nominate, and the Senate the power to confirm, in anticipation of the vacancy. This practice is entirely compatible with the constitutional plan and has been followed on numerous occasions.

As explained in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 153–157 (1803), the constitutional appointment process consists of three major steps: (1) the nomination by the President; (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 assumption of authority by the officer or Justice, as the case may be. *Id.*[2] Thus, the Constitution clearly permits the President to nominate, and the Senate to confirm, a successor while the incumbent still holds office. Confirmation does not confer any rights of the nominee; the President remains free to decide that he does not want to make the appointment, which is not legally completed until the execution of the commission. If the President nominates a person to be an Associate Justice of the Supreme Court in anticipation that an incumbent Justice will be elevated to the Chief Justiceship, and the Senate then fails to confirm the latter, thereby preventing the creation of a vacancy, the appointment, of course, cannot go forward.[3]

On several previous occasions, the President has simultaneously elevated a sitting judge and nominated his replacement. For example, 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 Supreme Court, vice Justice Shiras; (b) Solicitor General Richards to be Circuit Judge, vice Judge Day; and (c) Assistant Attorney General Hoyt to be Solicitor General, vice Solicitor General Richards. All three nominations were confirmed on February 23, one day prior to the effective date of Justice Shiras' resignation. 34 Journal of the Executive Proceedings of the Senate, 202, 215 (hereinafter "Journal"). More recently, on December 11, 1974, President Ford nominated Judge William J. Bauer of the Northern District of Illinois to replace Judge Otto Kerner on the Seventh Circuit. On the same day, the President also nominated Alfred Kirkland to the seat vacated by Judge Bauer's elevation. 116 Journal at 805.[4]

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 be permitted, 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 a specific statutory prohibition, 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 which 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.

Attachment.

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 your pleasure." In his reply, dated 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.[1]

On June 26, the President also submitted to the Senate the nominations of Mr. Justice Fortas to be Chief Justice of the United States vice Chief Justice Warren, and of Judge Thornberry, of the United States Court of Appeals for the Fifth Circuit, to be Associate Justice of the Supreme Court vice Justice Fortas. 114 Cong. Rec. (Daily Ed. June 26, 1968) S7834.

Questions 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 at present no vacancy in the office of Chief Justice, and that nomination and confirmation of Mr. Justice Fortas is therefore improper. Secondarily, there 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 taken. The terms of Chief Justice Warren's retirement, established in the correspondence between him and the President, are that the Chief Justice's retirement will take effect upon the qualification of his successor.[2] Judge Thornberry has been nominated in anticipation of the elevation of Mr. Justice Fortas. As this nomination will show, it is well established that the President has power to nominate, and the Senate power to confirm, in anticipation of a vacancy. This power exists where it has been agreed that retirement of an incumbent Justice or judge will be effective upon the qualification of his successor. Such power also exists where an incumbent Justice or judge is simultaneously nominated for elevation to a higher position.

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[1] 28 U.S.C. 371(b) provides in relevant part: "The President shall appoint, and by and with the consent of the Senate, a successor to a justice or judge who retires." This section does not prescribe the procedures or timetable for such appointments.

[2] See also 4 Op. A.G. 217, 219–220 (1843); 12 Op. A.G. 32, 41–42 (1866); 36 Op A.G. 382, 384–385 (1931).

[3] For example, when Justice Fortas' nomination to the Chief Justiceship was withdrawn in October 1978, after the Senate failed to end a filibuster preventing a vote on his elevation the prospective vacancy for which President Johnson had nominated Judge Thornberry was eliminated.

[4] Moreover, successors to district court judges who have been elevated to the court of appeals have frequently been nominated while the Senate is still considering the nomination of the incumbent. On December 15, 1970, while the Senate Judiciary Committee was considering the nomination of Judge Wallace Kent to the Sixth Circuit, President Nixon nominated Albert Engel to fill Judge Kent's seat on the district court for the Western District of Michigan. Judge Kent's elevation was approved a few days later. 112 Journal at 680, 682.

[1] See Appendix I, Nos. 1-3 for the texts of the letters and telegram exchanged between Chief Justice Warren and the President. The letters appear in 4 Weekly Compilation of Presidential Documents 1013-14.

[2] The term "qualification" or "qualifies" refers in this context to the taking of the two oaths prerequisite to holding federal judicial office, (1) the oath to support the Constitution required by Article VI, clause 3 of the Constitution of all officers of the United States, and (2) that required by 28 U.S.C. 453 of each Justice or judge before performing the duties of his office.

I.

It is not unusual for a Justice or judge to advise the President of his intention to retire and to leave it to the President to propose a timing best suited to prevent an extended vacancy and the resulting disruption of the operation of the court on which he sits. Nomination of a successor in such circumstances is but one example 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 advised President Theodore Roosevelt on July 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 receive 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 on the appointment of you successor.[3]

Mr. Justice Gray died in September, before his successor, Mr. Justice Holmes, took office (187 U.S. iii).[4] The Memorial Proceedings in honor of Mr. Justice Gray pointed out that "he submitted his resignation to take effect upon the appointment and qualification of his successor. So he died in office." See also Lewis, "Great American Lawyers." Vol. 8, p. 163.

More recently, Circuit Judge Prettyman advised President Kennedy on December 14, 1961, that he intended to take advantage of the statutory retirement provisions of section 371(b), Title 28, United States Code, and continued:

"The statute prescribes no procedure for retiring; accordingly I simply hereby retire from regular active service, retaining my office.

"The statute provides that you shall appoint a successor to a judge who retires. Hence I am sending you this note."

President Kennedy replied on December 19:

"It was with regret that I received the notification that you were retiring from 'regular active service.' The way in which you phrased your letter left me with no alternative but to accept your decision."

A few days later, however, President Kennedy sent the following additional note to Judge Prettyman:

"As you know, I have announced that I intend to fill the vacancy which will be created when you retire from active service. However, I hope you will continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office. Your letter does not specifically mention when your retirement from regular active service takes effect, but I have been informed that you have no objection to continuing in your present capacity until your successor is sworn in.

"I appreciate your willingness to continue for this limited period in order that the Court may not be handicapped 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 takes effect. My notice to you was purposely indefinite." [5]

Judge J. Skelly Wright was nominated on Februray 2, 1962, confirmed on February 28, and appointed March 30. He qualified on April 16, and Judge Prettyman retired as of April 15.

The exchange of communications between Chief Justice Warren and the President must be understood in the light of these precedents. The Chief Justice advised the President of his intention to retire, leaving it to the President to suggest terms of retirement which would be suitable in allowing sufficient time for nomination and confirmation of a successor without the disruption and over-burdening of the remaining Justices which might result from an extended vacancy, in particular such a vacancy in the Office of the Chief Justice. The President suggested that the Chief Justice's retirement should take effect upon the appointment and qualification of his successor. The Chief Justice agreed to this condition.

It is a condition of retirement that was used with respect to the Supreme Court in the case of Mr. Justice Gray. It has been frequently resorted to in the case of other judicial retirements. (For a partial list of retirements by federal judges effective upon the appointment and qualification of their successors, see Appendix II.)

The effect of this form of retirement is that the Chief Justice remains in office until the condition occurs; i.e., until his successor qualifies by taking the oaths of office.

II.

The power of the President to appoint Justices of the Supreme Court, by and with the advice and consent of the Senate, is specified in Article II, section 2, clause 2 of the Constitution. It provides that the President shall

"nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law * * *."

Article II, section 3 provides additionally that the President shall "Commission all the Officers of the United States."

As explained in *Marbury* v. *Madison*, 1 Cranch 137, 153-157 (1803), the Constitutional appointment process consists of three major steps: The nomination by the President; the Senatorial advice and consent (confirmation); and the appointment by the President, of which the Commission is merely the evidence. See also 4 Op. A.G. 218, 219-220.

There is no indication in this early analysis of the constitutional appointment process that a matured vacancy is a necessary prerequisite. Nomination and confirmation to fill anticipated vacancies are consistent with the constitutional plan, and have been frequent occurrences in our history.

It should be noted that anticipated vacancies may be grouped into two categories: First, those that will take effect on a day certain; e.g., when a resignation is submitted as of a specific date, or a statutory term is about to expire. Second, those that will take effect upon fulfillment of a condition; e.g., when the removal or elevation of the incumbent takes effect, or the appointment and qualification of his successor. Nothing in the Constitution prevents advance nomination and confirmation to fill either category of anticipated vacancies. Logic and experience, running from the earliest years of the Republic to the present, support this conclusion.

If the Senate's power to confirm were conditioned on the present effectiveness of the vacancy, there would continually be gaps in the holding of important offices. In all cases, nomination, confirmation and appointment would have to wait until the incumbent leaves office. Interruptions in the discharge of public business would necessarily result. The needs of prudent administration suggest the unsoundness of a constitutional interpretation that would force this result upon every resignation or retirement of Presidential appointees.

As a matter of fact, from the earliest years the Senate has exercised the power to confirm nominations to offices in which a vacancy in the near future is anticipated to take effect, by action of the incumbent or of the President, as the case may be. The first volume of the Executive Journal of the Senate, covering the years from 1789 to 1805, gives instances in which the Senate confirmed nominees in the following situations: To fill a vacancy to be created by the promotion of the incumbent; to replace an official who desired to be recalled; to rename an officer whose term was about to expire; to replace an official who had resigned as of a day certain; and to replace an official about to be superseded. (For details as to these nominations, see Appendix III.)

This practical interpretation of the Constitution by the early Presidents and the Senate has been judicially supported in a number of Supreme Court decisions holding that an officer who serves at the pleasure of the President is ousted from his office when the President appoints a successor by and with the advice and consent of the Senate. *McElrath* v. *United States*, 102 U.S. 426; *Blake* v. *United States*, 103 U.S. 227, 237; *Mullan* v. *United States*, 140 U.S. 240, 245. 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 Presidents and the Senate, to fill positions of Justices and 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 20, 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, Stanton never ascended to the Bench. See Warren, "The Supreme Court—United States History" (1937 Edition) Vol. 2, pp. 504, 506.

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 Oliver Wendell Holmes had been "appointed" to suc-

[3] See Appendix I, Nos. 4-5 for the pertinent passages of the Gray-Roosevelt correspondence.

[4] The circumstances surrounding the Holmes appointment will be discussed infra.

[5] See Appendix I, Nos. 6-9 for the pertinent passages of the Kennedy-Prettyman correspondence.

ceed Mr. Justice Gray. Bowen, "Yankee from Olympus," 346. President Roosevelt had in fact on that day given Holmes a recess commission, which subsequently was canceled. Holmes, who then was Chief Judge of the highest court of Massachusetts, apparently did not want to serve without prior confirmation by the Senate. "Holmes-Pollock Letters," Vol. I, p. 103.[6]

As shown above, Mr. Justice Gray died on September 15. The President nominated Holmes on December 2, the day after the Senate reconvened. The nomination was confirmed two days later. "Journal of the Executive Proceedings of the Senate," 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 Supreme Court, vice Mr. Justice Shiras; (b) Solicitor General Richards to be Circuit Judge, vice Judge Day; and (c) Assistant Attorney General Hoyt to be Solicitor General, vice Solicitor General Richards. All three nominations were confirmed on February 23, one day prior to the effective date of Justice Shiras' resignation. "Journal of the Executive Proceedings of the Senate," Vol. XXXIV, pp. 202, 215.

4. On September 1, 1922, Associate Justice Clarke tendered his resignation as of September 18. On September 5, President Harding nominated George Sutherland to succeed Mr. Justice Clarke. The Senate confirmed his nomination on the same day. 260 U.S. iii. The records of the Department of Justice indicate that Justice Sutherland's commission was dated September 5, "commencing September 18, 1922."

5. On June 2, 1941, Chief Justice Hughes announced that he would retire from active service on July 1. 313 U.S. iii. On June 12, President Franklin D. Roosevelt nominated Associate Justice Stone to be Chief Justice, and Attorney General Robert H. Jackson "to be an Associate Justice of the Supreme Court, in place of Harlan F. Stone, this day nominated to be Chief Justice of the United States." 87 Cong. Rec. 5097. The Senate confirmed Chief Justice Stone's nomination on June 27, and Associate Justice Jackson's nomination on July 7. 314 U.S. iv.[7]

These precedents relating to Supreme Court appointments thus show instances in which the Senate confirmed judicial nominations which were made in anticipation of a vacancy, either where a resignation or retirement was to take effect on a day certain (Stanton; Day; Sutherland; Stone), or where the nomination was vice an Associate Justice nominated to be Chief Justice (Jackson) or vice a judge nominated to be a Justice (Richards).[8]

As noted earlier, in recent years a very sizable number of federal judges have retired subject to the appointment and qualification of their successors. The Senate has confirmed their successors in the same way it acts on other nominations which are submitted in anticipation of a vacancy. (See examples in Appendix II.) The same is true of the situations, very frequent in the lower Federal courts, in which nominations have been made and confirmed to replace incumbent judges being elevated to higher posts at the same time. Thus, acceptance of the assertion that the Senate lacks the power to confirm Mr. Justice Fortas on account of the condition affecting the timing of Chief Justice Warren's retirement, or that it lacks the power to confirm Judge Thornberry at this time to replace Justice Fortas, would create serious doubt about the validity of the appointments of a sizable portion of the Federal judiciary.

There is nothing inconsistent with the Constitution in the practice of anticipatory and confirmation in the present circumstances. To the contrary, this practice is sanctioned by the Constitution and the experience under it throughout our history. As President Kennedy wrote to Judge Prettyman in 1961, it has the beneficial effect that the "Court may not be handicapped for any time during which a vacancy might otherwise exist."

APPENDIX I

1. Letters from Chief Justice Warren to President Johnson, dated June 13, 1968:

a. MY DEAR MR. PRESIDENT: Pursuant to the provisions of 28 U.S.C., Section 371(B), I hereby advise you of my intention to retire as Chief Justice of the United States effective at your pleasure.

Respectfully yours,

EARL WARREN.

b. MY DEAR MR. PRESIDENT: In connection with my retirement letter of today, I desire to state my reason for doing so at this time.

I want you to know that it is not because of reasons of health or on account of any personal or associational problems, but solely because of age. I have been advised that I am in as good physical condition as a person of my age has any right to expect. My associations on the court have been cordial and satisfying in every respect, and I have enjoyed each day of the fifteen years I have been here.

The problem of age, however, is one that no man can combat and, therefore, eventually must bow to it. I have been continuously in the public service for more than 50 years. When I entered the public service, 150 million of our 200 million people were not yet born. I, therefore, conceive it to be my duty to give way to someone who will 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 I. I take leave of the Court with the warmest of feelings for every member on it and for the institution which we have jointly served in the years I have been privileged to be part of it.

With my very best wishes for your continued good health and happiness.

Sincerely,

EARL WARREN.

2. Letter from President Johnson to Chief Justice Warren dated June 26, 1968:

MY DEAR MR. CHIEF JUSTICE: It is with the deepest regret that I learn of your desire to retire, knowing how much the nation has benefited from your service as Chief Justice. However, in deference to your wishes, I will seek a replacement to fill the vacancy in the office of Chief Justice that will be occasioned when you depart. With your agreement, I will accept your decision to retire effective at such time as a successor is qualified.

You have won for yourself the esteem of your fellow citizens. You have served your nation with exceptional distinction and deserve the nation's gratitude.

Under your leadership, the Supreme Court of the United States has once again demonstrated the vitality of this nation's institutions and their capacity to meet with vigor and strength the challenge of changing times. The Court has acted to achieve justice, fairness, and equality before the law for all people.

Your wisdom and strength will inspire generations of Americans for many decades to come.

Fortunately, retirement does not mean that you will withdraw from service to your nation and to the institutions of the law. I am sure that you will continue, although retired from active 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 so well advanced.

Sincerely,

LYNDON B. JOHNSON.

3. Telegram from Chief Justice Warren to President Johnson, dated June 26, 1968:

The President,
The White House,

DEAR 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.

EARL WARREN.

4. Letter from Mr. Justice Gray to President Theodore Roosevelt, dated July 9, 1902:

DEAR 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. I should resign to take effect immediately, but for a doubt whether a resignation

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[6] 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 until you have been confirmed by the Senate, which I think will be two or three days after it meets. Meanwhile, I strongly feel that you should continue as Chief Justice of Massachusetts."

[7] Chief Justice Stone took his oath on July 3 (314 U.S. iv), but the delay 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 reported on the nomination June 30. On the same day the Jackson confirmation by arrangement was put over until the next session for conducting substantial business of the Senate, which was July 7. 87 Cong. Rec. 5,701, 5756, 5759 (1941).

[8] Recently, in connection with a nomination elevating a judge to a higher court and a simultaneously submitted nomination designed to fill the vacancy caused by that elevation, the Senate confirmed the judge who was to fill the vacancy ahead of the one who was to be elevated. These were the nominations, dated October 6, 1966, of John Lewis Smith, Jr., Chief Judge of the District of Columbia Court of General Sessions, to the United States District Court for the District of Columbia, and of Harold H. Greene, vice the elevation of Judge Smith. 112 Cong. Rec. 25524. The confirmation of Judge Greene occurred on October 18, 1966, and that of Judge Smith on October 20. 112 Cong. Rec. 27397, 28086.

to take effect at a future day, or on the appointment of my successor, may be more agreeable 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:

MY DEAR JUDGE 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 on 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 this postion is yours. It has been your good fortune to render striking and distinguished service to the whole 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 great constitutional jurists 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 prescribes no procedure for retiring; accordingly I simply hereby retire from regular active service, retaining my office.

The statute provides that you shall appoint a successor to a judge who retirees. Hence I am sending you this note.

With great respect I have the honor to be

Yours sincerely,

E. BARRETT PRETTYMAN.

7. Letter from President Kennedy to Judge Prettyman, dated December 19, 1961:

DEAR JUDGE PRETTYMAN: It was with regret that I received the notification that you were retiring from "regular active service." The way in which you phrased your letter left me with no alternative but to accept your decision.

I was pleased, however, that you were retaining your office and would be available to continue your distinguished service on the Bench. Your record for justice and humanity, your efforts in behalf of more efficient administration of the law, and your legacy of sound precedent entitle you to some relaxation from the demands of regular active service.

I am happy that you have elected to continue in the capacity of chairman of the Administrative Conference. I am looking forward to receiving the recommendations and suggestions which flow from the meetings of the Conference. It seems to me that this offers an opportunity to make a major contribution toward the improvement of the regulatory agency procedures. Under your leadership I am sure that the Conference will take advantage of that opportunity.

With every good wish, I am

Sincerely yours,

JOHN F. KENNEDY.

8. Letter from President Kennedy to Judge Prettyman, dated December 26, 1961:

DEAR JUDGE PRETTYMAN: As you know, I have announced that I intend to fill the vacancy which will be created when you retire from active service. However, I hope you will continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office. Your letter does not specifically mention when your retirement from regular active service takes effect, but I have been informed that you have no objection to continuing in your present capacity until your successor is sworn in.

I appreciate your willingness to continue for this limited period in order that the Court may not be handicapped for any time during which a vacancy might otherwise exist.

Sincerely,

JOHN F. KENNEDY.

9. Letter from Judge Prettyman to President Kennedy, dated January 2, 1962:

MY DEAR MR. PRESIDENT: I have your note of December 26th. I am glad to comply with your preference in respect to the date upon which my retirement takes effect. My notice to you was purposely indefinite. I shall advise the keepers of the records to enter my retirement upon the date when my successor qualifies.

May I take advantage of this opportunity to express to you my deep appreciation of your generous remarks regarding my service.

With great respect.

Yours sincerely,

E. BARRETT PRETTYMAN.

APPENDIX II

By letter dated February 24, 1968, Judge Wilson Warlick, North Carolina, Western, retired effective upon the appointment and qualification of his successor. James McMillan was nominated on April 25, appointed June 7, and entered on duty June 24. Judge Warlick retired June 23.

By letter dated March 30, 1967, Judge Frank M. Scarlett, Georgia, Southern, retired 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 service.

By letter dated November 28, 1966, Judge Frank A. Hooper, Georgia, Northern, retired effective upon the appointment and qualification of his successor. Newell Edenfield was nominated May 24, 1967, appointed June 12, and entered on duty June 30. Judge Hooper retired June 29.

By letter dated September 21, 1965, Judge William G. East, Oregon, retired effective upon the appointment and qualification of his successor. Robert Belloni was nominated February 21, 1967, appointed April 4, and entered on duty April 10. Judge East retired April 9.

By letter dated March 12, 1965, Judge William C. Mathes, California, Southern, retired effective upon the appointment and qualification of his successor, or not later than June 30, 1965. Irving Hill was nominated May 18, appointed June 10, and entered on duty June 25. Judge Mathes retired June 9.

By letter dated February 19, 1964, Judge Walter M. Bastian, D. C. Circuit, retired effective upon the appointment and qualification of his successor. Edward A. Tamm was nominated March 1, 1965, appointed March 11, and entered on duty March 17. Judge Bastian retired March 16.

By letter dated March 26, 1963, Judge David W. Ling, Arizona, retired effective upon the appointment and qualification of his successor. C. A. Muecke was nominated August 17, 1964, appointed October 1, and entered on duty October 12. Judge Ling retired October 11.

A number of other instances early in this century of retirements to be effective upon the appointment and qualification of the successor have been assembled from incomplete records of the Department of Justice. It is believed that in these cases the successor was appointed between the date of the announcement of retirement as shown in the second column and the effective date of retirement as shown in the third column.

Name and Court	Announcement of retirement	Effective date of retirement
Benedict, Charles, New York, E	5/26/97	7/20/97
Brown, Addison, New York, S	7/1/01	9/3/01
Baker, John, Indiana	11/8/02	12/18/02
Hallett, Moses, Colorado	4/7/06	5/1/06
Lockren, Wm., Minnesota	4/3/08	7/11/08
Saunders, Eugene, Louisiana, E	1/8/09	2/8/09
Dallas, George, Third Circuit	3/15/09	5/24/09
Reid, Silas, Alaksa	6/14/09	7/1/09
Cooley, Alford, New Mexico	6/6/10	7/10/10
Brawley, Wm., S. Carolina	4/18/11	6/14/11
Donwroth, George, Washington	1/24/12	7/8/12
Locke, James, Florida, So	7/9/12	9/2/12
Peele, Stanton, Court of Claims	1/2/13	2/11/13
Stuart, Thomas, Hawaii	8/8/16	11/23/16
Whitney, Wm., Hawaii	1/25/17	3/19/17
Shepherd, Seth, D.C. Ct. Appeals	5/1/17	9/30/17
Dyer, David, Missouri, E	5/15/19	11/3/19
Batts, Robert, Fifth Circuit	8/22/19	4/9/20
Davis, John, New Jersey	6/5/20	6/12/20
Riner, John, Wyoming	10/13/21	10/31/21
Rudkin, Frank, Washington	1/17/23	1/18/23
Anderson, Albert, Seventh Circuit	10/31/29	11/6/29

APPENDIX III

Examples in Vol. I of the Journal of the Executive Proceedings of the Senate, of Senatorial Confirmations in Anticipation of a Vacancy.

I. Nominations vice an incumbent who is being elevated at the same time.

December 21, 1976, p. 216.[1]

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 Supervisor 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, 1796, p. 217. A number of similar nominations and confirmations took place in February, 1801, 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

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[1] 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;

John Hobby, for the District of Maine; Philip B. Bradley, for the district of Connecticut; Thomas Lowry, for the district of New Jersey; Samuel McDowell, Jr., for the district of Kentucky: each for the term of four years, to commence on the twenty-eighth of January, current, when their present terms will expire.

Confirmed, January 12, 1798, p. 258.

2. December 9, 1799, p. 325

I nominate * * * David Mead Randolph the present Marshal of the District of Virginia, for the term of four years, to commence on the 15th instant when his existing commission will expire.

Confirmed, December 6, 1799, p. 326.

3. February 4, 1803, p. 441

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 vacancy 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. 353

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. 354

V. Nomination to fill office, the incumbent of which is to be superseded.

December 23, 1799, p. 329

I nominate Ambrose Gordon, of Georgia, to be Marshal of the district of Georgia, in the place of Oliver Bowen, to be superseded.

Confirmed, December 24, 1799, pp. 329-330.

NOMINATIONS OF SUPREME COURT JUSTICES IN ELECTION YEARS [1]

	Total nominations	Confirmed	Rejected	Withdrawn, postponed, or not acted upon
Before election in election year (see table I)	15	11	1	3
Between election and inauguration of different President (see table II)	15	[2] 9	1	5
Nominations other than above categories	96	[3] 85	7	4
Total	126	105	9	12

[1] Includes the period between Jan. 1 of an election year and the inauguration date of the following year.

[2] Includes Stanley Matthews, the relevant dates of whose nomination and confirmation are as follows: Nominated—Jan. 26, 1881; not acted upon when Senate adjourned Mar. 3, 1881; resubmitted—Mar. 14, 1881; confirmed—Dec. 20, 1881.

[3] Includes these special cases: William Paterson: Nominated—Feb. 27, 1793; nomination recalled by President—Feb. 28, 1793; resubmitted—Mar. 4, 1793; confirmed—Mar. 4, 1793.

I. NOMINATIONS IN ELECTION YEAR: BEFORE ELECTION

Name of nominee	Date of nomination	Disposition of nomination	Nominating President and party	Succeeding President and party
William Cushing	Jan. 26, 1796 [1]	Confirmed Jan. 27, 1796; declined Feb. 2, 1796	Washington, Federalist	Adams, Federalist.
Samuel Chase	Jan. 26, 1796	Confirmed Jan. 27, 1796	do	Do.
Oliver Ellsworth	Mar. 3, 1796	Confirmed Mar. 4, 1796	do	Do.
William Johnson	Mar. 22, 1804	Confirmed Mar. 24, 1804	Jefferson, Democrat-Republican.	Jefferson, Democrat-Republic.
John Spencer	Jan. 8, 1844	Rejected Jan. 31, 1844	Tyler, Democrat	Polk, Democrat.
Reuben Walworth	Mar. 13, 1844	Postponed Jan. 15, 1844; withdrawn June 17, 1844	do	Do.
Edward King	June 5, 1844	Postponed June 15, 1844	do	Do.
Edward A. Bradford	Aug. 16, 1852	Not acted upon	Fillmore, Whig	Pierce, Democrat.
Melville Fuller	Apr. 30, 1888	Confirmed July 20, 1888	Cleveland, Democrat	Harrison, Republican.
George Shiras	July 19, 1892	Confirmed July 26, 1892	B. Harrison, Republican	Cleveland, Democrat.
Mahlon Pitney	Feb. 19, 1912	Confirmed Mar. 13, 1912	Taft, Republican	Wilson, Democrat.
Louis D. Brandeis	Jan. 28, 1916	Confirmed June 1, 1916	Wilson, Democrat	Do.
John H. Clarke	July 14, 1916	Confirmed July 24, 1916	do Do.	
Benjamin N. Cardozo	Feb. 15, 1932	Confirmed Feb. 24, 1932	Hoover, Republican	Roosevelt, Democrat.
William Brennan	Oct. 15, 1956 recess appt. Jan. 14, 1957 (after election)	Confirmed Mar. 19, 1957	Eisenhower, Republican	Eisenhower, Republican.

[1] Nominated as Chief Justice; had been Associate Justice since 1789.

II. NOMINATIONS BETWEEN ELECTION AND INAUGURATION OF DIFFERENT PRESIDENT

Name of nominee	Date of nomination	Disposition of nomination	Nominating President and party	Succeeding President and partry
John Jay	Dec. 18, 1800	Confirmed Dec. 19, 1800, declined Jan. 2, 1801	Adams, Federalist	Jefferson, Democrat-Republican.
John Marshall	Jan. 20, 1801	Confirmed Jan. 27, 1801	do	Do
John J. Crittenden	Dec. 17, 1828	Postponed Fed. 12, 1829	J.Q. Adams, Nat.-Republican	Jackson, Democrat.
William Smith	Mar. 3, 1837	Confirmed Mar. 8, 1837; declined later in same month	Jackson, Democrat	Van Buren, Democrat.
John Catron	Mar. 3, 1837	Confirmed Mar. 8, 1837	do	Do
Peter V. Daniel	Feb. 26, 1841	Confirmed Mar. 2, 1841	Van Buren, Democrat	Harrison, Whig.
Edward King	Dec. 4, 1844	Postponed Jan. 23, 1845; withdrawn Feb. 7, 1845	Tyler, Democrat	Polk, Democrat.
Samuel Nelson	Feb. 4, 1845	Confirmed Feb. 14, 1845	do	Do
John Read	Feb. 7, 1845	Not acted upon	do	Do
George Badger	Jan. 10, 1856	Postponed Feb. 11, 1853	Fillmore, Whig	Pierce Democrat.
William Micou	Feb. 24, 1853	Not acted upon	do	Do
Jeremiah Black	Feb. 5, 1861	Rejected Feb. 21, 1861	Buchanan, Democrat	Lincoln, Republican.
William B. Woods	Dec. 15, 1880	Confirmed Dec. 21, 1880	Hayes, Republican	Garfield, Republican.
Stanley Matthews	Jan. 26, 1881	Not acted upon	do	Do
	Resubmitted Mar. 14, 1881	Confirmed Dec. 20, 1881	Garfield, Republican	Arthur, Republican (Sept. 20, 1881).
Howell E. Jackson	Feb. 2, 1893	Confirmed Feb. 18, 1893	B. Harison, Republican	Cleveland, Democrat.

Note: Includes these special cases: (2) Roger B. Taney: Nominated as Associate Judge—Jan. 15, 1835; postponed—Mar. 3, 1835; nominated as Chief Justice—Dec. 28, 1835; confirmed—Mar. 15, 1836. (3) Edwin M. Stanton: Nominated—Dec. 20, 1869; confirmed—same day; died—Dec. 24, 1896—without ever taking seat on Court.

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 Senators who supported this nomination, at least in voting for cloture 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 HATCH'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 on to 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 wanted to intimidate him 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 for 15 years and 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.

Nor do I pass judgment on his nomination on the basis of his evident, consistent conservative philosophy. That conservative philosophy and Justice Rehnquist's legal expertise and experience on the Supreme Court gives President Reagan the confidence to nominate him for Chief Justice.

My vote on the Rehnquist nomination turns on a fundamental issue that involves him personally where I find his determinations to be seriously inadequate.

News accounts published in mid-August brought to public attention charges made by Harold Cornell of San Diego.

Cornell charged Rehnquist with improperly withholding from him the existence of a trust fund established by Cornell's father to benefit Howard Cornell. Rehnquist is his brother-in-law, married to Cornell's sister.

I have previously noted Chairman THURMOND's explanation of the circumstances of the Cornell trust.

I have talked to Harold Cornell questioning him on the matters of the trust and the facts surrounding it.

The facts are not disputed.

In 1961, the father, Dr. Cornell, asked Rehnquist to draw up a trust fund for his son Harold; that his other son, George, be trustee; and, that the family not inform Harold of its existence. Further, that the trust was to benefit Harold if he was in serious need; that the funds ($25,000) be invested for his benefit; that in the event of Harold's death the surviving family members would be the beneficiaries; and, that in the event of George Cornell's death, named as trustee, the succeeding trustee would be a bank in San Diego.

George Cornell did die in 1981. A few months later in 1982 the San Diego bank refused to accept trustee status; a motion filed in court brought to Harold Cornell's attention that the trust fund existed.

Harold Cornell promptly took action to claim the entire trust fund. He succeeded in his claim.

The trust fund after 21 years amounted to $35,000.

Harold Cornell has multiple sclerosis and receives veterans' benefits. Prior to being determined to be eligible for veterans' benefits, Cornell beginning in 1962, 1 year after the establishment of the trust, his earnings from his law practice declined rapidly as he became afflicted increasingly with multiple sclerosis. His needs for financial assistance within a few years became apparent and for a time prior to gaining veterans' benefits his needs were great.

He was not aware of the existence of the trust.

I have reached several conclusions:

The trust funds terms should have benefited Harold Cornell when his apparent and serious needs started.

Although the family was instructed by Dr. Cornell, the father, not to inform Harold of the trust fund, it did instruct assistance to him if and when he needed it. That assistance was not provided.

In fact, the purpose of the trust fund, the very purpose, and the requirement of the trust fund was that financial assistance be provided if the needs were there.

Although he was not the trustee, Rehnquist having drawn up the trust knew its terms. That established a special responsibility on Rehnquist to advice the trustee, George Cornell to follow the terms of the trust and to provide benefits of the trust to Harold Cornell in his time of need.

Further, Harold Cornell, as a victim of multiple sclerosis attained a permanently debilitated condition. Measured by the trust's terms required continuous financial benefits for Harold.

I find it extraordinary that Harold Cornell only learned of the existence of the trust, 21 years old, when the San Diego bank refused to become the trustee following the death of George Cornell. Had the bank not refused which necessitated a motion to be filed in court to appoint a new trustee and that was published as required, Harold Cornell, then about 70 years old, might never have learned of the trust set up by his father for his benefit if he became in need of help.

The basic fundamental responsibility of Rehnquist to help his brother-in-law cannot he excused because the trustee, George Cornell, did not act.

Rehnquist had a special binding obligation to assure that Harold Cornell benefited from the trust in his days and years of need.

As he became incapacitated his income dwindled, multiple sclerosis gradually ended any earnings. That should have dictated that he be helped from the trust.

When Dr. Cornell set up the trust just before his death he could not have anticipated any more serious

needs than did in fact become the fate of his son.

Legal scholars may argue or quibble over the legal obligations of Rehnquist versus the primary duty of the trustee George Cornell.

But I shall not argue or quibble legal nuances.

This is a question of basic right or wrong.

I believe Rehnquist was wrong in not assuring the benefits flowed to Howard Cornell in his time of need, and not advising the trustees of his primary duty to make sure that the trust benefits were given to Howard Cornell, and I find it wrong that did not happen in not informing Howard Cornell of the existence of the trust.

I believe it is a moral family obligation required of Rehnquist to have taken those actions. I believe he failed in a basic responsibility. And I regret that I believe it demonstrates a flaw in his judgment, and in his compassion.

Our duty here in the Senate of the confirmation of the Chief Justice is clear. It is an obligation and a responsibility that we have to use every facet of a person's character, his knowledge, his wisdom in determining whether or not he should indeed be confirmed for the highest position in the highest court of our country.

I find with regret that I do not believe that Chief Justice Rehnquist should receive confirmation. I regret that I find that to be the case. But for those reasons, I shall vote against the nomination.

Mr. PELL. 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 never voted in support of 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, 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.

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 competence of those individuals nominated by the President in order to meet the responsibility imposed by the Constitution.

During the Senate Judiciary Committee's hearings and the Senate's debate on the nomination of Associate Justice 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, his 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 and integrity, is among 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, the head 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 must also say that I am troubled by the performance of Justice Rehnquist during the Judiciary Committee's confirmation hearings. His failure to be more candid and forthright with the committee has raised serious questions regarding his credibility. In addition, I am dismayed by some of the statements and writings made by Justice Rehnquist during his tenure in the Justice Department's Office of Legal Counsel and as a private citizen prior to his joining the Court in 1971 regarding civil rights issues and the equal rights amendment. These statements have understandably raised concerns regarding Justice Rehnquist's sensitivity to our Nation's commitment to equal rights for minorities and women.

While these statements should not be ignored by the Senate in its consideration of the nomination, I believe the more important and relevant indicator of Justice Rehnquist's fitness is his established record over the past 15 years as Associate Justice. An examination of this record reveals that Justice Rehnquist is, without question, a conservative jurist, an assessment with which few, if any, would disagree. However, the fact that his conservative judicial philosophy has led him to judgments on complex and controversial issues with which I and many others differ, neither makes him unfit nor does it necessarily indicate a hostility or insensitivity to the values of equality and justice.

Despite my differences with Justice Rehnquist's conclusions on various constitutional and legal issues, I do not question his integrity, or his respect for the rule of law and the Constitution. And, it is by these standards, together with professional competence, that Justice Rehnquist and other nominees to the Federal judiciary should, in my opinion, be judged.

Those who would have the Senate reject this nomination bear the burden of demonstrating why an individual who has served honorably and with distinction on the Supreme Court for over a decade should not be elevated to the position of Chief Justice. While there is much in Justice Rehnquist's record that precludes me from giving my enthusiastic support for his nomination, I do not believe that this burden has been met. I will, therefore, vote to confirm William Rehnquist as the next Chief Justice.

FAILING THE NATION'S IDEALS

Mr. LAUTENBERG. Mr. President, I rise to oppose the nomination. Justice Rehnquist should not become Chief Justice Rehnquist.

Mr. President, I do not reach this conclusion lightly. But, I do not come to it with any doubts or hesitation. I have thought a lot about the nominee. And I have thought a lot about my role and the Senate's role, in this process.

It is my role to apply, as best I can, certain high standards that a Chief Justice must meet. Standards of intelligence and integrity. But also standards of loyalty and service to ideals we hold so dear. Ideals of freedom and equality. Ideals embedded in the Con-

stitution, 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 post of Chief 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 coequal 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's views. It is fine 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.

Mr. President, 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 not of some nominee to a district or circuit court. For that, questions about a person's views perhaps should be balanced against a person's obedience to precedent.

But, 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 serve as 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 decide for 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. I can accept that. 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.

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 the 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 not as a statement of his own views. He did so at the request of Justice Jackson, who was seeking both sides of the argument.

The issue is not opposition, well over 30 years ago, to what would be the result in Brown versus Board of Education. While I would reject such opposition, I could accept that someone might have opposed the decision then, if that person accepts the decision now.

But, Justice Rehnquist denies that his memo reflected his views. That's hard to believe. His memo reads, "I have been excoriated by liberal colleagues, but I think Plessy versus Ferguson was right and should be reaffirmed." He says "I think". "I have been excoriated." This doesn't sound like the memo prepared to reflect another view.

Justice Jackson's secretary today refutes Justice Rehnquist. So does Justice Rehnquist's co-clerk at the time.

Indeed, it is Justce Rehnquist's own opinions, his own views, as expressed over the years following his clerkship, that make it much more believable that the memo expressed Justice Rehnquist's views. The memo expressed the views of a man who would later propose a constitutional amendment to strip the court of power to enforce Brown versus Board of Education. A man who would give Brown a narrow and cramped reading.

Mr. President, I could accept someone who said I thought separate but equal was right, but in retrospect, I was wrong. But, Justice Rehnquist does not show us to be a man of growth. He instead raises doubts about his integrity and credibility.

Similar doubts about the Justice's credibility are raised by his explanation of the terms of deeds on his homes. These were terms that restricted the sale of his homes on racial and religious grounds.

The deed on his Vermont home read that it could not be "leased or sold to any member of the Hebrew race."

The Justice claims that he was not aware that his deed so stated. But, can we believe that a skilled lawyer would not notice such a provision? We are talking about a purchase of a home not in 1950, but 1974.

By letter, Justice Rehnquist was specifically advised by his attorney that the deed was restrictive. Justice Rehnquist replied that he did not recall being advised. How could he forget? And even if he did, how could he accept that deed back then?

Justice Rehnquist is said to have personally challenged, accosted, and questioned would-be black voters in Phoenix, AZ. This was part of a Republican ballot-security program. A program said to be designed to intimidate black voters from the exercise of their rights. Justice Rehnquist denies that he had such a role. But, several witnesses dispute the Justice's account. Questions remain about the Justice's actions then, and what they say about his respect for voter's rights. Questions remain about his honesty today.

THE DUTY TO RECUSE ONESELF

The Chief Justice must uphold the highest standards of legal ethics. He must uphold the standard for the system and the legal profession.

One basic rule of judicial ethics, is that a judge should not sit in a case in which he has been involved; whose facts and subject matter has personal knowledge of; a case about which he has already formed an opinion.

The evidence shows that Justice Rehnquist violated that rule. He sat on the Supreme Court and cast the deciding vote, in the case of Laird versus Tatum. That case challenged the military's program of surveillance of citizens. The Court said that the plaintiffs had no right to bring the case.

Mr. President, when he served in the Justice Department, then attorney Rehnquist was head of the office that reviewed legal aspects of the surveillance policy. The office negotiated with the Army about the details of the policy. Negotiations were extensive. The office Mr. Rehnquist headed was small. Mr. Rehnquist himself sent a key transmittal memorandum. It is hard to believe that government attor-

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 Laird versus Tatum 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. That was the same 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's unfair. It's 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 kept down: racial minorities, women, the handicapped. To give them an equal chance to live a good life.

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, that 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 become 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. It stands as a defender of 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 exercise of religion, and the proviso 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 the 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 stood for. 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, in fact decisive, he fails to meet the highest standards of fidelity to the ideas of freedom and equality that we hold so dear.

Mr. HECHT. Mr. President, I rise today to speak in support of the nomination of William Rehnquist to be Chief Justice of the U.S. Supreme Court.

Justice Rehnquist is a man blessed as both a learned scholar and an accomplished attorney. More importantly, however, Mr. President, the Justice has a long and distinguished career of government service. As former President Richard Nixon so aptly noted in his speech nominating Mr. Rehnquist to the Supreme Court; Mr. Rehnquist was "awarded one of the highest honors a law graduate can achieve," when, shortly after completion of law school, he was given the position of clerk to Supreme Court Justice Robert H. Jackson.

Subsequent to this clerkship, Mr. Rehnquist was appointed during the Nixon administration to head the Justice Department's office of legal counsel as an Assistant Attorney General—an important public policy position. In this capacity Mr. Rehnquist reviewed the legality of all presidential executive orders and other constitutional law questions of the executive branch. He also frequently testified before congressional committees in support of that administration's policies. In fact, so well reasoned and articulate were his congressional presentations that even many liberal Members of Congress applauded his abilities.

Mr. Rehnquist was next nominated as a Justice on the Supreme Court where his tenure has been equally impressive. After 15 years and hundreds of cases on the Court, the Justice has clearly established his stance as to the Court's role—one of judicial restraint. Justice Rehnquist believes that the Court should exercise its powers with deference to its partners in the Federal system—Congress, the President, and the States—a philosophy with which I concur.

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 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 touches 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.

In a moment, 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 responsibility as a Senator regarding this appointment.

I believe that a Senator should require the following attributes in a nominee to 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 Mr. Rehnquist during his confirmation hearing in the Senate Jusiciary Committee.

Mr. President, the American Bar Association has examined these qualifications. If I may quote briefly 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 is entitled to the committee's highest evaluation * * * well qualified.

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 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 admits election involvement, but essentially denies partisan excessiveness. As a participant in the elective process for a good many years, I must first observe 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 committed 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 Mr. 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.

Frankly, 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 in 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. President, 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 are without substance. I am a lawyer, Mr. President. Lawyers draw up trusts all the time. Mr. Rehnquist drew one up for the benefit of his brother-in-law, at the request of his father-in-law, who also asked that the existence of the trust be kept secret. On the basis of the information I have, Mr. President, I do not believe I can withhold my vote on this account.

Also at issue before this body today is the propriety of Justice Rehnquist's decision against recusing himself from Supreme Court consideration of the case, Laird versus Tatum. In considering this matter, I examined the statute which must govern a decision of this type. I also read Mr. Geoffrey Hazard, Jr.'s letter to the Judiciary Committee, and examined the great variety of testimony available.

Mr. President, I find this case against Justice Rehnquist to be circumstantial. By this I mean that I have not seen substantial, direct evidence which involves William Rehnquist specifically in the formulation of the Office of Legal Counsel's surveillance policy.

Lacking definitive evidence, I believe the Senate must take Justice Rehnquist at his word. As he testified before the Senate Judiciary Committee:

> I conclude that the applicable statute does not warrant my disqualification in this case. Having so said, I would certainly concede that fair-minded judges might disagree about the matter.

Mr. President, the most serious deficiency in this nominee, so far as this Senator is concerned, is his failure to be more forthcoming and helpful in advancing the cause of civil rights in this country, both in his private life, and in his service of 15 years on the Supreme Court.

In this connection, he falls far short of the minimum standard I would demand in a nominee. I would demand a greater commitment to individual quality and opportunity for minorities in our country. I would demand a greater sensitivity to civil liberties. My candidate for this post would advocate a judicial and political philosophy far different than that of Justice Rehnquist. But, here, I should observe—he is the President's nominee, not mine.

The President has made it clear that he wants a strict constructionist, and a certified conservative, as Chief Justice of the U.S. Supreme Court. President Reagan carried 49 of the 50 States in this country and enjoys a staggeringly high approval rating nationally.

The President is entitled to a Chief Justice of his choice. It comes as no surprise to this Senator that President Reagan has chosen for the post of Chief Justice one who shares his philosophical attitudes. Opposing the political or judicial philosophy of a President's nominee is not, in my view, generally a basis for a vote against that nominee.

I do not agree with, nor do I condone, Mr. Rehnquist's views. I do, however, suggest the following:

First, the President is entitled to a Chief Justice who shares his views; and

Second, if we rejected Mr. Rehnquist on philosophical grounds, the President would send us another nominee of exactly the same persuasion who would probably not be as well qualified as Mr. Rehnquist.

Why do I say that?

Because I set forth three criteria in my opening remarks, and, in my mind, Mr. Rehnquist more than meets them.

First, he is exceedingly bright—he meets the test on intellectual capacity;

Second, he is a respected member of the Supreme Court—he meets the requirements regarding background and training; and

Third, despite an extensive and thorough hearing, no substantial evidence has developed destroying his reputation, or disqualifying his character.

Mr. President, I voted against Dan Manion because he lacked intellectual capacity, and is an inferior writer. He was not fit for the Seventh Circuit Court of Appeals in Chicago. I also disagreed significantly with his political philosophy.

Mr. President, I likewise disagree with Mr. Rehnquist's philosophy, but I will vote for him because he is qualified for the post. When the question is put: "Will the Senate advise and consent to the nomination of William Rehnquist to be Chief Justice of the U.S. Supreme Court?"—this Senator will vote "aye."

Mr. DOLE. Mr. President, the Senate now begins its final debate on the nomination of William H. Rehnquist to be Chief Justice. Since I have already spoken at length previously, I will not take more time now except to highlight briefly the reasons why I shall vote to confirm Justice Rehnquist; and will do so with a firm conviction that the President has acted wisely in submitting this nominee to us for our advice and consent.

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 Committee on the Judiciary held 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 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 everywhere to follow. 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 80. This is the third highest number among those currently on the Court.

He has unequalled experience, and has the temperament and collegiality necessary to provide effective leadership 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; 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 present a strong enough case 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 more often than any other 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. If that is extremism, then the majority of the American people fit into that same mold.

It is said that his views on school desegregation are exteme—a throwback to Plessey versus Fergusen 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 partisans, 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 belated nature of much of the accusatory material, again the argument must favor the nominee.

Attempts have also been made to discredit the nominee because of the racial restrictive covenants contained 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 are littered across the land in record books of every courthouse in the country. Since 1948, they are utterly uninforcible, 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 Laird versus Tatum. This case involved the 1970 May-day demonstrations and disturbances. While serving as Assistant Attorney General at the time, he prepared memoranda and was otherwise involved in the Nixon administration response to the situation. I am satisfied that the code of judicial ethics that applied at the time did not preclude his participation in the subsequent high court proceedings. Again, I say it was a close call, but not of a sufficient stature to persuade me that this was a fatal error.

Attempts have been made to allege a serious breach of legal ethics by Attorney Rehnquist in the handling of a family trust for the brother of his wife. To me, this is the sorriest aspect of this whole proceeding. It was an internal family matter. All other members of the family have specifically denied the brother's charges. An investigation by the FBI affirmed their denials. Yet critics persist—as if Mr. Rehnquist actively participated in some scheme to deceive a helpless invalid. Nothing could be further from the truth. Frankly, Mr. President, these charges have not added to the dignity of this institution. It is most regrettable they have seen the light of day.

In conclusion, Mr. President, I shall vote to confirm Justice Rehnquist as 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. He will be a creative and congenial leader. He will build a Federal judiciary that will be equipped to deal with the immense and complex legal business that will arise in the coming years. I have every confidence that he will be fair and just. He will get my vote.

The PRESIDING OFFICER. Is there further debate?

Mr. DOLE. Mr. President, there is no further debate, but I hope we are now in the position to vote.

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.

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. It is a 20-hour time agreement on reconciliation. That should be of some encouragement. But we will not try to finish it 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.]

YEAS—65

Abdnor	Domenici	Kasten
Andrews	Durenberger	Laxalt
Armstrong	Evans	Long
Bentsen	Ford	Lugar
Boren	Gorton	Mattingly
Boschwitz	Gramm	McClure
Broyhill	Grassley	McConnell
Bumpers	Hatch	Murkowski
Chafee	Hatfield	Nickles
Chiles	Hawkins	Nunn
Cochran	Hecht	Packwood
Cohen	Heflin	Pressler
D'Amato	Heinz	Proxmire
Danforth	Helms	Pryor
DeConcini	Hollings	Quayle
Denton	Humphrey	Roth
Dixon	Johnston	Rudman
Dole	Kassebaum	Simpson
Specter	Symms	Warner
Stafford	Thurmond	Wilson
Stennis	Trible	Zorinsky
Stevens	Wallop	

NAYS—33

Baucus	Gore	Melcher
Biden	Harkin	Metzenbaum
Bingaman	Hart	Mitchell
Bradley	Inouye	Moynihan
Burdick	Kennedy	Pell
Byrd	Kerry	Riegle
Cranston	Lautenberg	Rockefeller
Dodd	Leahy	Sarbanes
Eagleton	Levin	Sasser
Exon	Mathias	Simon
Glenn	Matsunaga	Weicker

NOT VOTING—2

Garn	Goldwater

So the nomination was confirmed.

□ 2150

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. BIDEN. Mr. President, I congratulate the Senator from South Carolina and the supporters of Justice Rehnquist. I hope that all that some of us fear of him does not come to fruition. I wish him well on the Court.

I am anxious to get to our next Supreme Court nominee.

The PRESIDING OFFICER. The Senate will come to order. Senators are asked to take their seats, and Senators engaged in conversations are asked to retire to the cloakroom.

THE JUDICIARY

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate proceed to the nomination of Antonin Scalia to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. The nomination will be stated.

The assistant legislative clerk read the nomination of Antonin Scalia, of Virginia, to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Is there objection to the present consideration of the nomination?

There being no objection, the Senate proceeded to consider the nomination.

Mr. STENNIS. Mr. President, may we have order?

The PRESIDING OFFICER. That is an appropriate request. The Senate is not in order. The Senate will be in order. The hour is late, and the matter before us is important. Senators are asked to be in order. Those Senators who wish to confer are asked to retire to the Cloakroom. Those Senators ambling about the Chamber are asked to take their seats or retire to the cloakroom. Staff members on the Republican side and the Democratic side are asked to be silent.

Mr. THURMOND. Mr. President, I rise today to voice my strong support for President Reagan's nomination of Judge Antonin Scalia to be Associate Justice of the U.S. Supreme Court. Judge Scalia is eminently qualified. In 1957, Judge Scalia graduated summa cum laude and No. 1 in his class from Georgetown University. In 1960, he graduated magna cum laude from Harvard law School. While at Harvard he was the note editor of the Harvard Law Review and a Sheldon fellow.

Judge Scalia practiced law with the prestigious firm of Jones, Day, Cockley, & Reavis in Cleveland, OH, from 1961 to 1967. He then embarked on a career as a law professor at the University of Virginia Law School. In 1971, he was appointed general counsel of the Office of Telecommunication Policy, Executive Office of the President. He was appointed Chairman of the Administrative Conference of the United States in 1972. During the period 1974–77, he served as the Assistant Attorney General, Office of legal Counsel, U.S. Department of Justice.

Following his Government service, Judge Scalia again returned to the academic arena. In 1977, he was a professor of law at the University of Chicago Law School. He was also a visiting professor of law at Georgetown Law School, and scholar in residence with the American Enterprise Institute. In 1980 and 1981, he was a visiting professor of law at Stanford University Law School.

Among his many other achievements, Judge Scalia has served as the editor of Regulation magazine. He was chairman of the American Bar Association's Section of Administrative Law, as well as chairman of the ABA's Conference of Section Chairman. He also served on the board of visitors of the J. Reuben Clark Law School of Brigham Young University.

In August 1982, Judge Scalia was confirmed by the Senate for the position of circuit judge for the U.S. Court of Appeals for the District of Columbia Circuit. He has served with distinction in that capacity since that time.

Judge Scalia's nomination to be an Associate Justice of the Supreme Court was received by the Senate on June 24, 1986, and was reported out of committee favorably on August 14, 1986, by a unanimous vote of 18 yeas. The Committee on the Judiciary held 2 days of hearings on the nomination. The nominee was questioned by members of the committee and testimony was heard from 25 witnesses.

A number of very prominent individuals testified in support of Judge Scalia, including Carla Hills, the former Secretary of Housing and Urban Develoment; Erwin Griswold, former Solicitor General of the United States and former dean of Harvard

Law School; Gerhard Casper, dean of the University of Chicago School of Law; Paul Verkull, president and professor of law at the College of William and Mary; and Lloyd Cutler, former counsel to President Carter. Based on personal experiences with Judge Scalia, these prominent individuals all gave him extremely high marks for legal ability, writing skills, fairness, integrity, and intellect.

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 Federal and State judges. Those 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 from the 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 and who possesses a warm and friendly personality. An individual that is not only competent but one that will seek advise when necessary and demonstrates the independent courage of his convictions when appropriate.

Judge Scalia has an excellent record of accomplishments. He had a distinguished academic career as a law professor; he has 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 posses the necessary qualities to serve with distinction in the position for which he has been nominated and I urge my colleagues to vote for confirmation of President Reagan's outstanding selection of Antonin Scalia to be an Associate Justice of the U.S. Supreme Court.

□ 2200

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 nothing found against 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 consider this 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 the question of who will lead the coordinate branch of government distract us from our responsibility in considering the equally important question of who will join the institution comprised of only nine men and women that is entrusted with the guardianship of our constitutional heritage.

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, the fact that I may disagree with the nominee about the correct outcome of one or another matter within the legitimate parameters of debate is not enough, by itself, to lead this Senator 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 a fair hearing before openminded judges, a belief that is crucial to continued faith in the judicial system. We should, therefore, proceed with extreme caution before approving the nomination of any individual 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 Justice Rehnquists, it would also be wrong to have nine Justice Brennans 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.

First, Judge Scalia's limited service on the court of appeals, both in terms of time and the nature of the issues he has addressed, does not provide a sufficient record upon which to make a determination of how his judicial philosophy would impact on settled practice in a number of important areas.

Second, although Judge Scalia's writings as an academic provide us additional information, the utility of that information to this process is in some doubt. As a scholar, Judge Scalia was fond of the provocative argument, and one is never sure when he is asserting his own view. Additionally, Judge Scalia often included policy arguments in his writings, and there is no way to determine from the writings what effect he would give his particular policy preferences in interpreting the Constitution.

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 was also 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 philosphy in a number of areas, I find his views 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 through his career that he has an intellectual flexibility. He is not a rigid 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 justice, equal 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 unconstitutional, and 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. METZENBAUM. 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 saw fit 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 conservative 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, Judge Scalia is 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 or at most one 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 continuing insensitivity to the needs of women, minorities, and the poor "and a steadfast opposition to enforcing basic constitutional rights." These concerns are reasonable given the content 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 hestitate 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 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 that transferred over from 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 This, of course, is the chief legal position 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 known 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 this view.

As in the case of Justice Rehnquist, the American Bar Association gave him its 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, judical 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 the proverbial lily. 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. 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. We must, 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 individual. His views on certain controversial issues of our time undoubtedly differ from my own. That he is conservative or possesses views with which I disagree, however, is not the point. What is the point is whether he is capable of and committed to upholding the fundamental guarantees embodied in the Constitution—the blueprint for this 200-year-old experiment in democracy—which he will be sworn to protect and cultivate.

On balance, the evidence I have reviewed convinces me that Judge Scalia is able and willing to ensure that all litigants are extended the full and equal protection of the Constitution on the basis of the facts as presented in each case and in light of the law as previously decided.

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 fish from him a compliment about the expanse 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. Size 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 above all else: that of protecting the constitutional liberties of us all.

NOMINATION OF ANTONIN SCALIA TO BE AN ASSOCIATE JUSTICE ON THE U.S. SUPREME COURT

Mr. HECHT. 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 intense curriculum in the classics. Those familiar with the judge's work up to this point have attributed this historical and philosopical background as being instrumental in his perspective 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, among 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, Mr. President, 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. I believe that 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. Clearly we have before us a nominee with the requisite legal and judicial experience. The American Bar Association has found that Judge Scalia meets the highest standards of professional competence, judicial temperament, and integrity. I am pleased to concur that he is indeed among the best available candidates for our consideration.

Judge Scalia comes to us from the D.C. Court of Appeals with an outstanding reputation. He is known for his thoroughness and attention to detail. He is clearly a man who will make his presence felt from his first term onward. He is a hard worker but one who is personable and well liked. Where the requirements of the job are hard, hard work, and collegiality—Judge Scalia will excel.

I take pride, as an Italian-American, in noting Judge Scalia's heritage. In this year that our country has shown so much pride in celebrating the 100th anniversary of the Statue of Liberty, we can take note of the contributions of Antonin Scalia, the son of an immigrant from Italy. He is but another example of a member of an immigrant family who has risen to an outstanding position in our Government and our society. As a first generation Italian-American, Judge Scalia demonstrates that the rapid assimilation of immigrating peoples pumps strength into our country.

Mr. President, I would have preferred that this statement be a thoroughly positive endorsement of the nomination of Judge Scalia. Unfortunately, one aspect of the confirmation process continues to disturb me. I am very disappointed in both Judge Scalia and in Justice Rehnquist for their protectiveness and reticence in answering the questions that I and my colleagues asked them in the Judiciary Committee hearings. I understand the need to avoid issues that will be directly before the Court, but it is very difficult for the committee and for the Senate to fulfill their responsibility when we are unable to question nominees about their judicial philosophies and views on constitutional interpretation. It is apparent to me that nominees are advised by the administration to be as evasive and passive as they can be. I believe that with nominees less qualified than those before us today, this strategy will ultimately fail the administration.

The confirmation process is a constitutional touchstone between the Judiciary and the Congress; a bridge between popularly elected Government and the life tenure of judicial officials. Because of his exemplary record, it will be my pleasure to cast my vote in favor of his confirmation to the Supreme Court.

NOMINATION OF JUDGE ANTONIN SCALIA

Mr. HATCH. Mr. President, perhaps no standard speaks more eloquently to 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 90 percent of his written opinions. Another 90 percent

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 been appointed 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 barely louder than the words of his judicial colleagues, among whom is Circuit Judge Abner Mikva who hails 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 rather than 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.

This candid assessment verifies the report of the "Alman of the Federal Judiciary" that Judge Scalia is "highly respected in all categories, admired even by those lawyers who disagree with him."

Over and over the same qualities are admired in Judge Scalia—his fairness, his integrity, his openness to varied viewpoints, his amazing mastery of the law. Judge Scalia is respected as a lawyer by lawyers, as a judge by judges. In the words of the American Bar Association, this committee is privileged to consider the nomination of an individual who "is among the best available for appointment to the Supreme Court."

CIVIL RIGHTS RECORD

On September 7, the ACLU issued a document entitled "Report on the Civil Liberties Record of Judge Scalia." The timing of the issuance of this report—and a companion piece on Justice Rehnquist—to coincide with the debate on their nominations is apparently pure coincidence, as, according to the authors, its "purpose is not to suggest that the civil liberties record of any candidate ought to determine anyone's position on such candidacy, and the reader is asked not to seek to infer any position on this question from such a report." Despite its purely educational and nonpartisan purpose, however, and despite its claim that it "presents a comprehensive description of Judge Scalia's judicial opinions on civil liberties questions," it is misleading in a number of respects. I would like to correct the record on these points.

THE FIRST AMENDMENT

The report's introductory sentence on Judge Scalia's record claims that "Judge Scalia has decided against the party invoking the protection of the First Amendment in all opinions he has authored in this area." This statement is incorrect. For example, Judge Scalia decided in favor of defendant columnist Jack Anderson on many of his claims of first amendment protection for statements in a column in Liberty Lobby Inc. versus Anderson. For example, he agreed with Anderson's claim that Anderson's statements that Liberty Lobby's president, Willis Carto, represents a trend toward "incipient fascism" and that his record was characterized by "lies and half-truths" were statements of opinion and therefore under the first amendment could not give rise to a libel action, rather than being statements of fact which could give rise to such an action. This argument surely could have been responsibly rejected. As the ACLU reports, he did decide one issue in that case, whether the "clear and convincing" standard for actual malice applies to the plaintiff's burden on summary judgment, contrary to Jack Anderson's claim, and the Supreme Court reversed. The ACLU fails to mention, however, that Justice Brennan, the author of New York Times versus Sullivan, the seminal case applying the first amendment to libel law, dissented from the Supreme Court majority, agreeing instead with Judge Scalia.

The other general way in which the introductory statement is misleading is that it only addresses opinions that Judge Scalia authored. Nevertheless, in the discussion of particular areas, it also notes some opinions Judge Scalia joined, such as Travoulareas versus Piro. The reason the introductory statement does not claim to address all opinions that Judge Scalia wrote or joined is that it would not be defensible as to his complete record. For example, the Washington Post praised Judge Scalia for joining the portion of Judge Bork's majority opinion in Lebron versus WMATA taking an expansive view of first amendment rights, ruling that Washington, DC, could not prohibit the position of an anti-Reagan advertisement on the Metro on the ground that it was deceptive because it would be an unconstitutional prior restraint. As the Post noted:

> Judge Bork and Judge Antonin Scalia—two of the court's conservative members—would have reversed Metro's action on even broader grounds if it had been necessary. Both believe that an agency of a political branch of government cannot impose prior restraint on the publication of a political message even if that message is false. . . . That is an interference by the Government with a citizen's right to engage in free political discourse. The court's message is clear and it is right.

The remainder of this section takes issue with statements the ACLU report makes in specific subareas.

LIBEL

LIBERTY LOBBY VERSUS ANDERSON

In addition to the other points made above about this opinion, it should be noted that the position Judge Scalia took on the particular issue which the ACLU selected out as the litmus test for his views on the first amendment was not surprising. Carter appointee Judge Edwards joined Scalia's opinion, and Time magazine, in fact, indicated that it seemed to be required by prior Supreme Court opinions:

> Judge Scalia's view was supported by a now famous footnote in a 1979 Supreme Court ruling written by Chief Justice Warren Burger. In that case, Burger noted that in order to prove "actual malice"—the stiff standard public figures must meet to win a libel case—plaintiffs have the right to inquire into a reporter's "state of mind." Such a complex under-taking, stated the Chief Justice, "does not readily lend itself to summary disposition." Burger's aide sent a message to lower-court judges that led to a surge of libel trials.

By its 6-to-3 decision overturning the Scalia opinion, the Court seemed to say "ignore previous message."

OLLMAN VERSUS EVANS

This case is a good example of why the ACLU's broad claim in its introductory summary that "In virtually every opinion that he has written addressing civil liberties issues, Judge Scalia has decided against the individual," report at II, is completely vacuous. This case involved a marxist professor denied the chairmanship of the department of political science at the University of Maryland, in part, he claimed because of a libelous column by conservative Columnists Evans and Novak. Ollman accordingly brought suit against the columnists for libel, focusing in particular on their statement "Ollman has no status within the (political science) profession, but is a pure and simple activist." They claimed this statement could not form the basis of these facts, it would be impossible to predict which side the ACLU would consider to be the "individual rights" side of a case. Individual rights, including rights of free expression, are at stake for both parties.

TRAVOULAREAS VERSUS PIRO

As noted above, Scalia only joined MacKinnon's opinion in this case. Contrary to the ACLU's claim, it did not "make it easier for plaintiffs to meet the New York Times standard," but simply refused to exclude evidence of a newspaper's editorial policies from the New York Times actual malice calculus. There is no precedent for the exclusion of such evidence, and hence not excluding it neither made it easier nor more difficult to meet the standard. The Court's reliance on the evidence was, however, grounded in part on a statement of Earl Warren's in a concurrence in Curtis versus Butts, who contended that in that case part of the evidence of actual malice was the defendant's editorial policy of "sophisticated muckraking." Earl Warren is not famous for his narrow construction of the bill of rights.

SCOPE OF SPEECH

CCNV VERSUS WATT

The report goes beyond the bounds of zealous advocacy in its portrayal of Scalia's dissent, which does not argue, as the report states, that expressive conduct is entitled to no first amendment protection. Rather, it distinguishes between laws directed at the expressive content of the conduct—which are supposed to receive full strict scrutiny—and laws directed at other aspects of the conduct which happen to affect its expressive content. In particular, the ACLU substituted ellipses for the italicized word in quoting the following paragraph:

> * * * to extend *equivalent* protection against laws that affect actions which happen to be conducted for the purpose of "making a point", is to stretch the constitution not only beyond its meaning but 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 expressive conduct, but a different level of protection:

> The cases find within the first amendment some protection for "expressive conduct" apart from spoken and written thought. The nature and effect of that protection, however, is quite different from the guarantee of freedom of speech narrowly speaking.

Hence the ACLU's statement that Scalia took the view that "conduct 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 record would be incomplete if it did not note the testimonials of two people: Jack Fuller, the editorial page editor of the Chicago Tribune; and Floyd Abrams, the New York Times' lawyer and the most distinguished first amendment advocate in the country. Jack Fuller stated before the Judiciary Committee:

> (Judge Scalia's) care and caution and meticulousness are, like the laws, the best and most lasting defense against encroachments upon our liberties. And I am more than willing to entrust what to me is the most cherished of our freedoms to an individual like Judge Scalia, whose whole being has been wrapped up in serving and honoring the American legal tradition.

Floyd Abrams wrote the committee as follows:

> Judge Scalia and I are * * * intellectual adversaries in that we have serious differences on major matters of constitutional law and public policy. Those differences include, but are not limited to, views expressed in Judge Scalia's judicial opinions with respect to first amendment issues. The issues we differ on matter greatly to me.
>
> Nonetheless, I support the confirmation of Judge Scalia for the following reasons:
>
> First, he is a person of the highest personal character. He is honorable, trustworthy and decent. He is a warm human being who—as this letter may well illustrate—is able to function on a collegial basis with people with whom he differs.
>
> Second, he is a person of the highest intellectual ability. His opinions rank amongst the best-written and the most thoughtful ones of appellate judges in the country. He writes with verve, wit, and intelligence. Given my views, I sometimes find that Judge Scalia's opinions read too persuasively—but that is hardly a black mark against him.
>
> Third, he has an open and inquiring mind. He is not so fixed in his views that he refuses to listen, not so certain of the immutable truth of his views that he is incapable of changing them.
>
> Finally, his views are not only sincerely held by him, but views I respect at the same time that I differ with them. But differently they are not only views that Judge Scalia believes in seriously; they are serious views about serious matters about which serious people can differ.

DISCRIMINATION

The report's statement that "Judge Scalia has never authored an opinion which found racial discrimination" portrays his record misleadingly. When one 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 plaintiff in half the race discrimination cases in which he participated: Mitchell versus Baldrige, 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.

CRIMINAL LAW AND PROCEDURE

The statement that "Judge Scalia's opinions in this area of the law all 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 exam and is not 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 for Congress to legislate automatic commitment for defendants successfully pleading insanity in District of Columbia and leaving the subject to the States outside of District of Columbia.

GOVERNMENT SECRECY

The statement "Judge Scalia has authored only one opinion holding that the Government must release information" is misleading in that it excludes two cases where the effect of Scalia's ruling is clearly pro disclosure: In Washington Post versus HHS, Scalia reversed a district court ruling that the Government could assert exemption 4 protection. It is true that the result was remand for consideration of the application of another exemption rather than an order to release the information, but Scalia's opinion made release more likely. And in Church of Scientology versus IRS—the panel

opinion, rather than the companion en banc one the report discusses—he rejected an argument that 26 U.S.C. 6103 completely preempted the Freedom 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, Meeropol versus Meese, 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 voted to reverse agencies in at least 14 cases. In one of these, 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 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 seem a bold assertion is a commentary upon how far judicial and scholarly discussion has strayed from common and commonsense understanding."

That, to 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); 53 U.S. Law Week 4385 (1985)), in which the majority of the court had issued an opinion requiring the Food and Drug Administration to consider whether the lethal injection of condemned prisoners met F.D.A. standards 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 is the prisoner 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 decide 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 advice and consent to 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, government official, and appellate judge, Antonin 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 incisive writer. During the past 4 years of judgeship his decisions have consistently displayed integrity. His wisdom and reverence for our Constitution are evidenced in his treatment of such issues as the first amendment, affirmative action, and the separation of powers.

Judge Scalia was educated at the University of Fribourg, Switzerland, and received his bachelor of arts from Georgetown University, graduating summa cum laude in 1957. In 1960 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 1967.

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 Judge 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 intent.

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 a strong conservative like Antonin Scalia.

In the debate on the Rehnquist nomination, some Rehnquist supporters on this floor used words that I believe demean the Senate and the serious deliberations that confirmation of a nominee to the Supreme Court should involve.

They attempted to raise suspicions about the motives of nearly every Senator who had any question about the fitness of the nominee, and they blurred over, ignored, misstated, or argued the irrelevance of facts leading to those questions.

Adverse witnesses before the Judiciary Committee were similarly browbeaten, including those who came to the Judiciary Committee to testify out of no apparent motive except their sense of duty to this Nation.

I believe such tactics demean those who use them and demean the Senate.

To hear a Senator during the Rehnquist debate tell it—using words like "diatribe" to describe the speech of a Senator, charging that opponents of Rehnquist "assume the worst in everything," that they make "ludicrous" charges, that "they resolve every ambiguity against Mr. Rehnquist"—no one on this side of the aisle, at least no one who has been labeled as a "liberal" by those who find such labels useful, could vote to sustain any Reagan judicial nominee for the Supreme Court.

For, Rehnquist's advocates have repeatedly charged, that is really the only judgment opponents of Mr. Rehnquist's nomination were making: That he is too conservative for us.

Well, Mr. President, that is not the case, and many of us opposing the Rehnquist nomination have told them that it is not the case.

Those who automatically support President Reagan's judicial nominations may be perfectly sincere about their view of what was happening here.

They may well 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 [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 principaled 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, even immoral. In no way would I 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 backward to justify them.

I have looked carefully at decisions Judge Scalia has rendered on fundamental rights and constitutional protections for civil liberties.

I do not know whether—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 of those 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 openminded 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, Judge Scalia 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 sit on the 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 a screening process conducted by the Justice Department or whether any administration officials had posed questions to him regarding his views on specific issues.

Because I feel so 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 an 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 been 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 of the highest quality. 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 carefully review 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 controversy there is 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 up 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 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 in charge of 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 appointed 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 copies of the Federal Reporter which contain 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 respect the President's choices of qualified 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 philosophy should not be a consideration unless that philosophy undermines the fundamental principles of our constitutional system or the nominee's dedication to his or her ideological principles is so strong that he or she cannot be an impartial judge. In the absence of such concerns, the Senate must respect the right of a President to nominate qualified candidates of his choosing.

The evidence of Judge Scalia's commitment to our constitutional system and his ability to judge impartially is abundantly clear from his tenure on the court of appeals. His 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 magnificent symbol to 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 daughter of immigrants from Italy. 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 Italian-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 proven 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 not, 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. 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 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.]

YEAS—98

Abdnor	Gore	Metzenbaum
Andrews	Gorton	Mitchell
Armstrong	Gramm	Moynihan
Baucus	Grassley	Murkowski
Bentsen	Harkin	Nickles
Biden	Hart	Nunn
Bingaman	Hatch	Packwood
Boren	Hatfield	Pell
Boschwitz	Hawkins	Pressler
Bradley	Hecht	Proxmire
Broyhill	Heflin	Pryor
Bumpers	Heinz	Quayle
Burdick	Helms	Riegle
Byrd	Hollings	Rockefeller
Chafee	Humphrey	Roth
Chiles	Inouye	Rudman
Cochran	Johnston	Sarbanes
Cohen	Kassebaum	Sasser
Cranston	Kasten	Simon
D'Amato	Kennedy	Simpson
Danforth	Kerry	Specter
DeConcini	Lautenberg	Stafford
Denton	Laxalt	Stennis
Dixon	Leahy	Stevens
Dodd	Levin	Symms
Dole	Long	Thurmond
Domenici	Lugar	Trible
Durenberger	Mathias	Wallop
Eagleton	Matsunaga	Warner
Evans	Mattingly	Weicker
Exon	McClure	Wilson
Ford	McConnell	Zorinsky
Glenn	Melcher	

NOT VOTING—2

Garn	Goldwater

So the nomination was confirmed.

□ 2220

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 Rehnquist 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. 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.

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

Mr. DOMENICI. Mr. President, I wonder if the distinguished majority leader will assign the time to the Senator from New Mexico to handle the bill as prescribed by the Budget Act.

Mr. BYRD addressed the Chair.

The PRESIDING OFFICER. The minority leader is recognized.

Mr. BYRD. Mr. President, I 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. 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.

First of all, 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 prescribed reduction levels of the Gramm-Rudman-Hollings Deficit Reduction Limitation Act.

The scoring now, if you were to cost it out to see what it does to the deficit, is about $3.4 to $3.7 billion. I regret to tell the Senate that even if we passed it in its current form in its entirety, and clearly there are many controversial measures within it, but even if we did, it would be a long way from compliance. It would be many billions of dollars short of what is required at the present time to avoid an 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 domestic 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.

Pending at the desk is the across-the-board temporary sequester that would comply with the Budget Act at this point in history and bring the deficit as of now based upon all things that have transpired down to $144 billion. It is going to be very dificult for us to avoid voting on that sequester. But we have been working in a bipartisan manner, Senator CHILES advising his side of the aisle, and I advising our side on the Friday event, that temporary sequester, what it really means, and how we might in a bona fide manner seek to avoid a sequester by producing additional savings to this $3.7 billion reconciliation bill so as to put us in a position where we could say to ourselves and to the people of this country, we do not need the sequester because we did our work.

We got the requisite savings and asset sales and/or revenues all added up which will avoid a sequester and still permit us to say we are within the $154 billion limit that we will expect to comply with by the beginning of the next fiscal year, October 1, or thereabouts.

I might say this is going to require some cooperation on the part of the Senate because obviously we have a bill that is difficult to amend presently before us, that does not do the job, 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 prescribed by leadership, either from this side or jointly, 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?

□ 2230

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 "Yes," we can. We are working on that now. We have spent a lot of time today with various Members who have ideas, who have submitted through their respective committees ideas on how to get there, but we surely do not have any kind of concurrence by way of a leadership package.

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 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 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 the temporary one which clearly is the temporary gun at our heads saying, "If you do not fix it, it is already done. You voted on it and you have to take 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.

Everyone knows we still have to appropriate, we still have to do the reconciliation bill, and we still have the tax reform. Besides those three big pieces, there are a lot of other things we have to do. I would hope we can begin an exchange with the House tomorrow and see if we can get this into the proximity of both seeking the same amount of money. Perhaps we can agree on that. And then perhaps some parameters on how we might put it together.

That is about all I know now. We have not kept any secrets. We have advised the Senators and advised the press of how we arrived at the $14.5 billion that is necessary to avoid a sequester. We have a suggested list of ways to get there. Some are noncontroversial, but the sum total of the noncontroversials do not do the job so there is a bunch of controversial ones that we have not agreed upon yet.

I have seen some preliminary House ideas and clearly they are different from some of ours. That is why I am hopeful we will use up some time. Everyone ought to understand with the passage of each hour of the 20 hours of debate we get closer to that day Friday when we have to vote on the sequester of $19.4 billion. Very little escapes that. Everybody knows what is immune and everybody knows what is in.

Plenty of domestic programs will be cut dramatically. Defense will be cut dramatically from this year's level. Frankly, I do not think there are very many people who think either of those cuts on either the defense or the domestic side are prudent or good policy, either domestically or from the standpoint of our national defense. So we want to avoid that. We will do our very best.

From my standpoint I want to say to our appropriators who work very hard to get appropriations bills through that I am going to try in this process, as I have historically, not to involve the appropriations process and the appropriations bills in this reconciliation. They have enough problems getting a continuing resolution and negotiating with the White House on both policy and money matters. I think that can take care of itself. They have targets which are pretty well established and the White House can look over their shoulder and tell them what they will accept and what they will not. We ought to get on with this in another way.

At this point I clearly do not intend in any way to involve this reconciliation in their process. Quite to the contrary, I am hopeful that we will have enough in this $14.5 billion to $15 billion which we seek to permit the appropriations to run a normal course, even if it is in a continuing resolution, to accommodate to the allocations that are presently there as mandatory targets under the Budget Act.

Some people do not like that whole process; they think we are spending too much. Others think we are not spending enough. But basically the appropriations bills have come in in every respect—defense, foreign aid, foreign assistance, and all domestic functions—right on target in terms of outlays as prescribed by the U.S. Senate when they voted in the budget resolution. I do not think we ought to use reconciliation to put another burden on that. Let it run its course.

Having said that, Mr. President, I have nothing further to say. I do not know when the leader will call us back in but I will need some time to negotiate. We will have one of the Budget Committee people handle it for me in the morning as we try to work out some compromises. At this point I yield the floor.

Mr. GORTON. Mr. President, today the Senate takes up the Budget Reconciliation Act for 1986. I must confess to mixed feelings at this moment. I commend Senator DOMENICI, the chairman of the Budget Committee, and his Democratic counterpart Senator CHILES, for the hard work and leadership they have demonstrated in bringing the process this far. But I fear that the package that is about to be laid before us is defective in one critical aspect—namely, its failure to reduce the deficit sufficiently to avoid across-the-board spending cuts that will otherwise be required under the Gramm-Rudman-Hollings Act.

I have fought as tenaciously and consistently as any member of the Senate to eliminate the Federal budget deficit. But I do not want to see across-the-board spending reductions implemented. They do not reflect this body's considered will, and they are not, I believe, generally favored among our constituents in general. It is our task to ensure that these across-the-board spending cuts are avoided, by enacting budget measures sufficient to reach the deficit goal without triggering these reductions.

Unfortunately, the bill that stands before us today will not meet this requirement. As it stands, it clearly does not yield enough deficit reduction to permit us to avoid the across-the-board spending reduction of Gramm-Rudman-Hollings. It is my hope, therefore, that we may be able to modify the bill over the next several days to generate enough savings to avoid the across-the-board spending cuts otherwise required by the Gramm-Rudman-Hollings Act. I intend to support this effort.

NOMINATION OF WILLIAM REHNQUIST TO CHIEF JUSTICE OF THE U.S. SUPREME COURT

Mr. HEINZ. Mr. President, 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 to the Highest Court in our land—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—and the paramount importance of their decisions—is even more profound. The Chief Justice of the Supreme Court may have no more than a single vote out of nine—the same weight as his or her colleagues—and yet the position of the Chief Justice is one in which we repose extraordinary 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 Justice 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 called upon 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), Batson 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 Turner versus Department of Employment Security (1975), Duren versus Missouri (1979), and Taylor versus Louisiana (1975).

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 as 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 of generally similar 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 meets 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 his choice.

Justice Rehnquist's legal and intellectual skills are impressive, even to his most severe critics. He graduated first in his class from Stanford Law School. He served on the Board of Editors of the Stanford Law Review.

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 standards 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 nominees to the Supreme Court—well qualified."

Mr. President, impressive as these credentials may be, intellect without good character and high moral values is 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—an 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 entrust 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 sole 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 has authored a majority of the majority opinions in the last four terms of the Court.

To my mind, then, the facts do not support the conclusion that Justice Rehnquist is isolated in his views and too far from the main currents of argument of contemporary jurisprudence. So, while I cannot share significant elements of 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 yesterday or 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.

□ 2240

Mr. BROYHILL. I ask unanimous consent that the quorum call be dispensed with.

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 1987 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.

While I am 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 its existence month after month, that plans for long-term development and improvement of the railroad system can be moved forward. That is one of the most important aspects of this bill, and one that I hope will be continued.

COMMEMORATION OF THE 199TH ANNIVERSARY OF THE SIGNING OF THE U.S. CONSTITUTION

Mr. DECONCINI: Mr. President, I would like to take a few moments to commemorate a very important day in the history of our country.

Today we are celebrating the 199th anniversary of the signing of the U.S. Constitution. Our Constitution is a document Prime Minister Gladstone of Britain called "the most remarkable work known in modern times to have been produced by the human intellect." I am sure we can all agree that this anniversary is one deserving of the grandest of celebrations.

We, as Democrats and Republicans, are Americans first—Americans who individually and collectively believe in the timeless, fundamental truths on which our country was founded.

We believe in peace, and we strive for it; equality, and we intend to fight for it; justice and mercy, and we pledge to administer and to teach it—and we believe in growth, which we know is only possible through freedom.

America is a land of growth and of freedom because of the struggle and faith of our forefathers who gave us the opportunity for diversity and the privilege of union.

It is in this spirit that we, as Democrats and Republicans, should be pleased to lend bipartisan support to the Bicentennial of the Constitution of the United States—a commemoration of the responsibilities and blessings of liberty.

Why should we celebrate the Constitution? Why celebrate a 200-year-old piece of yellowed parchment with faded print? Why bother?

We should bother because we cannot afford to let the Constitution become confined to our country's past. We should celebrate the Constitution not only for its role in American history—we should celebrate it for its contributions to modern government. The Constitution is much more than a document of history encased in glass at the National Archives. It is a living, functioning influence on your life and mine.

Few things endure 200 years. No other constitution has lasted so long. How many Americans know, for instance, that over the last 40 years the world has averaged two constitutions per nation? Right now, on the face of this planet, there are 160 national constitutions. Most of them—almost two-thirds—have been adopted or revised since 1970.

The U.S. Constitution stands in stark contrast. It is a document that has endured. It is a document that must be preserved for the centuries ahead. It has been said that our Constitution is America's most important export. And so each night it is stored in a bomb-proof vault in the National Archives. In times of emergency there is a special staffperson at the Archives who has the responsibility of pushing the button that will drop the Constitution into that vault.

Why celebrate the Constitution? Because it is as relevant to Americans today as it was to the Founding Fathers 200-years ago. Our Government under Law, established by the Constitution, is the longest-lasting democracy in the history of the world. Contrast, if you will, Italy, which has had 50 different governments since World War II. On average, that's more than one government per year!

And why has our Government endured? Why is it still going strong after 200 years when we see other governments toppling, when we see revolutions as a way of life? It's because our Constitution provides for separation of powers among our executive, legislative and judicial branches. It is a system of checks and balances that is unique. It is a system that provides 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 lives 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, one of the foremost is education: 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. Three-fourths 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 preamble 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, 1983, 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 Jamestown 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 stateman replied, "a Republic, if you can keep it."

For over 200 years we have kept our Republic, and 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 about our democratic system 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: Our 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, it 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 to 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. 2095. 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. 3002) 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 report of the committee of conference on the disagreeing votes of the two Houses on 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, Follow Through, 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:

S. 98. An act for the relief of Cirilo Raagas Costa and Wilma Raagas Costa.

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. 5233) 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. OBEY, Mr. ROYBAL, Mr. STOKES, Mr. EARLY, Mr. DWYER, Mr. HOYER, 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. 1755. An act for the relief of David Butler, Aldo Ciron, Richard Denisi, Warren Fallon, Charles Hotton, Harold Johnson, Jean Lavoie, Vincent Maloney, Austin Mortenson, and Kurt Olofsson;

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. 2652. An act for the relief of Kumari Rajlakshmi Bais;

H.R. 4089. An act to prohibit the construction of dams within national parks and monuments;

H.R. 4244. An act to authorize funds to preserve the official papers of Joseph W. Martin, Jr.;

H.R. 4794. An act to amend the National Trails System Act to designate the Santa Fe Trail as a National Historic Trail; and

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.

The message further announced that the House has agreed to 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. 1598. An act for the relief of Steven McKenna; to the Committee on the Judiciary.

H.R. 1755. An act for the relief of David Butler, Aldo Cirone, Richard Denisi, Warren Fallon, Charles Hotton, Harold Johnson, Jean Lavoie, Vincent Maloney, Austin Mortenson, and Kurt Olofsson; to the Committee on the Judiciary.

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. 2652. An act for the relief of Kumari Rajlakshmi Bais; to the Committee on the Judiciary.

H.R. 4089. 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. 4794. 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 read and referred as indicated:

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 further disposition:

H.R. 2574. An act for the relief of the 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. 98. 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 cumulative report on budget rescissions and deferrals dated September 1, 1986; pursuant to the order of January 30, 1975, referred jointly to the Committee on Appropriations and the Committee on the Budget.

EC-3740. A communication from the Chairman of the National Advisory Committee on Oceans and Atmosphere, 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, Department 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 Wells"; to the Committee on Energy and Natural Resources.

EC-3743. 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 Nation's Public Lands"; to the Committee on Energy and Natural Resources.

EC-3744. 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 Defense 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:

S. 2407. A bill entitled "The Animal Drug Amendments and Patent Term Restoration Act of 1986." (Rept. No. 99-448).

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:

Harold T. Duryee, of the District of Columbia, to be Federal Insurance Administrator, Federal Emergency Management Agency.

(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 commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.)

By Mr. McCLURE, 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 as Assistant 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. HEINZ):

S. 2826. 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. SPECTER:

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 of the Judiciary.

By Mr. METZENBAUM:

S. 2829. A bill for the relief of Steven McKenna; 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.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. DANFORTH (for himself and Mr. HEINZ):

S. 2826. 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.

SUSPENSION OF DUTY ON CERTAIN MIXTURES OF CROSS-LINKED SODIUM POLYACRYLATE POLYMERS

● Mr. DANFORTH. Mr. President, today I am introducing with Senator HEINZ a bill to suspend for 1 year the duty on certain mixtures of cross-linked sodium polyacrylate polymers.

This chemical substance is used in the production of disposable diapers that are made in Missouri, Pennsylvania, and other locations. Since United States suppliers are unable to meet the total demand for this material, it is currently being imported from suppliers in Germany and Japan. While it is hoped that there will eventually be sufficient U.S. production to satisfy domestic demand, I am advised that in the meantime U.S. suppliers do not object to time-limited duty suspension.

Therefore, I am proposing suspension of the duties on this material for 1 year. The bill is drafted as narrowly as possible to prevent exemption of unintended materials from duties.

Mr. President, I ask unanimous consent that the bill be printed in the RECORD.

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

S. 2826

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subpart B of part 1 of the Appendix to the Tariff Schedules of the United States is amended by inserting in numerical sequence the following item:

"907.72	Absorbent chemical material of one or more cross-linked sodium polyacrylate polymers (provided for in item 430.20, part 2D, schedule 4).	Free	No change	On or before 12/31/87".

SEC. 2. The amendment made by the first section of this Act shall apply with respect to articles entered, or withdrawn from warehouse, for consumption on or after the 15th day after the date of the enactment of this Act.●

By Mr. SPECTER:

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

● 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 emergency prison construction funding.

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 of rehabilitation of prisoners. The recent uprising at the Lorton Penitentiary in Virginia illustrates the overcrowding problem and its disasterous 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 simply 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 crowded living units.

At the Federal level, the Bureau of Prisons reports that the overall occupany 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 7,683 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 continues to worsen. 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 (19 U.S.C. 1607). Similarly, property and moneys seized or forfeited pursuant to a law enforced or administered by the Department of Justice are desposited in the Department's 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 $200 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

Federal prison overcrowding. Specifically, it would amend the existing Customs and criminal forfeiture statutes to authorize the Attorney General to allocate surplus forfeited 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 existing cap 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 ask unanimous consent that the bill be printed in the RECORD.

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

S. 2828

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

SEC. 2. 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. 3. CUSTOMS FORFEITURE FUND.

(a)(1) Subsection (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.".

(2) Subsection (h) of such section is amended by striking out the second and third sentences thereof.

(b)(1) Subsection (d) 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.".

(2) Subsection (f) of such section is amended by—

(A) striking out "(1)"; and

(B) striking out paragraph (2).●

By Mr. METZENBAUM:

S. 2829. A bill for the relief of Steven McKenna; to the Committee on the Judiciary.

RELIEF OF STEVEN MC KENNA

● 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's parents 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 drug liability law, but the law has no retroactive application. No other remedies are available under German law. When the McKennas returned to the United States they found they could not bring a claim under the Federal Tort Claims Act because the FTCA prohibits claims against the United States arising in foreign countries. Since Mrs. McKenna took thalidomide in Germany, the FTCA clearly precluded the McKenna's bringing suit. The bill would allow Steven to bring an action against the United States, the employer of the doctor who prescribed the drug.

This bill is not intended to make an exception in the law for the McKennas. Rather, this bill is intended to put the McKennas in the same category as so many others who believe they are victims of thalidomide poisoning. The only purpose of this bill is to allow the McKennas "their day in court." They have exhausted all other possibilities of obtaining compensation, and sadly, Steven McKenna is probably one of the very few thalidomide babies who have not been able to file an action for compensation. This bill would allow him access to the U.S. courts to plead his case.●

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.

STEEL IMPORT STABILIZATION ACT AMENDMENTS

● Mr. HEINZ. Mr. President, there is no need at this point to repeat in detail the series of events over the past 10 years that threaten the virtual destruction of the integrated steel industry in this country. Employment is down—cut more than half in that time period—profits are nonexistent, and plant closings and bankruptcies are rampant. On the positive side, this is adjustment, and there is no question 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 entering this country from producers who are 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 strike/lockout at U.S. Steel. Even so, the tonnage that entered the country in July is the most since last December.

Beyond the immediate upward trend, it 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 domstic 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 VRA countries 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 aparent 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 would 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 VAR 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 without voluntary 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 Canada which will hopefully lead to more open and closely integrated economies. To suggest at this point that a sectoral issue of some significance, like steel, is 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 complicate, 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, is making a good faith effort to solve 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 nonarrangement 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 quantitiative 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, 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 steel 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 the 20.2-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 presumes that agreements made or yet to be made, can in fact be enforced. That presumption may be far from valid. I am told that this year, while the administration publicly agonized over the trade imbalance and publicly deplored the growing deficit and transfer of jobs abroad, they at the same time cut 777 customs officers from the rolls and anticipate another cut of 800 next year to comply with Gramm-Rudman-Hollings. In other words, enforcement will be declining from an already low 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 customs force for all the above and other obvious reasons. It will be penny-wise and very pound-foolish to do otherwise.

I would also 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 as part 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 headed 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 have 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 torpedoes. And I believe that given the right tools and a fair chance, American workers can still outwork, outinvent, outcompete, and outproduce anyone else on the face of this planet.

I hope my colleagues will take a hard look at the bipartisan 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 full 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 1985".

S. 2454

At the request of Mr. MURKOWSKI, the name of the Senator from Michigan [Mr. LEVIN], the Senator from Maine [Mr. COHEN], the Senator from Massachusetts [Mr. KERRY], the Senator from South Dakota [Mr. ABDNOR], 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. 2454, a bill to repeal section 1631 of the Department of Defense Authorization Act, 1985, relating to the liability of Government contractors for injuries or losses of property arising out of certain atomic weapons testing programs, and for other purposes.

S. 2479

At the request of Mr. TRIBLE, the name of the Senator 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. 2551

At the request of Mr. DENTON, the name of the Senator from Pennsylvania [Mr. SPECTER] was added as a cosponsor of S. 2551, a bill to create a National Center on Youth Suicide under the Office of Justice Programs in the Department of Justice.

S. 2575

At the request of Mr. LEAHY, the name of the Senator from Arizona [Mr. DECONCINI] was added as a cosponsor of S. 2575, 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. 2576

At the request of Mr. DURENBERGER, the name of the Senator from New Hampshire [Mr. RUDMAN] was added as a cosponsor of S. 2576, a bill to amend title XVIII of the Social Security Act to require timely payment of properly submitted medicare claims.

S. 2713

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 408 of the Federal Aviation Act of 1958 to ensure the preservation of employee seniority rights in airline mergers and similar transactions.

S. 2781

At the request of Mr. EVANS, the names of the Senator 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

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North Dakota [Mr. ANDREWS], the Senator from New Jersey [Mr. LAUTENBERG], and the Senator from Vermont [Mr. STAFFORD] were added as cosponsors of Senate Joint Resolution 375, a joint resolution designating the week beginning September 21, 1986, as "National Adult Day Care Center Week."

SENATE JOINT RESOLUTION 385

At the request of Mr. D'AMATO, his name was added as a cosponsor of Senate Joint Resolution 385, a joint resolution to designate October 23, 1986 as "National Hungarian Freedom Fighters Day."

SENATE JOINT RESOLUTION 404

At the request of Mr. SIMON, the name of the Senator from Pennsylvania [Mr. HEINZ] was added as a cosponsor of Senate Joint Resolution 404, a joint resolution to designate October 1986 as "Polish American Heritage Month."

SENATE JOINT RESOLUTION 407

At the request of Mr. CHILES, the name of the Senator from Indiana [Mr. LUGAR] was added as a cosponsor of Senate Joint Resolution 407, a joint resolution designating November 12, 1986 as "Salute to School Volunteers Day."

SENATE JOINT RESOLUTION 413

At the request of Mr. BUMPERS, the names of the Senator from West Virginia [Mr. ROCKEFELLER], and the Senator from Kentucky [Mr. FORD] were added as cosponsors of Senate Joint Resolution 413, a joint resolution to designate the month of October 1986 as "Learning Disabilities Awareness Month."

SENATE JOINT RESOLUTION 414

At the request of Mr. PACKWOOD, the names of the Senator from Tennessee [Mr. GORE], the Senator from Mississippi [Mr. STENNIS], and the Senator from Arkansas [Mr. PRYOR] were added as cosponsors of Senate Joint Resolution 414, a joint resolution to designate March 16, 1987 as "Freedom of Information Day."

S.J. RES. 415

At the request of the Senator from Maine (Mr. MITCHELL) the Senator from Massachusetts (Mr. KENNEDY), the Senator from Connecticut (Mr. WEICKER), and the Senator from North Dakota (Mr. BURDICK) were added as cosponsors to S.J. Res. 415, a joint resolution to provide for a settlement to the Maine Central Railroad Company and Portland Terminal Company labor-management dispute.

SENATE CONCURRENT RESOLUTION 65

At the request of Mr. QUAYLE, the name of the Senator from Nebraska [Mr. EXON] was added as a cosponsor of Senate Concurrent Resolution 65, a concurrent resolution establishing procedures for expedited consideration by the Congress of certain bills and joint resolutions submitted by the President.

SENATE CONCURRENT RESOLUTION 154

At the request of Mr. D'AMATO, the name of the Senator from Minnesota [Mr. BOSCHWITZ] was added as a cosponsor of Senate Concurrent Resolution 154, a concurrent resolution concerning the Soviet Union's persecution of members of the Ukrainian and other public Helsinki Monitoring Groups.

SENATE RESOLUTION 435

At the request of Mr. MOYNIHAN, the name of the Senator from Arizona [Mr. GOLDWATER] was added as a cosponsor of Senate Resolution 435, a resolution to recognize Mr. Eugene Lang for his contributions to the education and the lives of disadvantaged young people.

SENATE RESOLUTION 464

At the request of Mr. ROTH, the names of the Senator from Pennsylvania [Mr. HEINZ], the Senator from Florida [Mr. CHILES], the Senator from Minnesota [Mr. DURENBERGER], and the Senator from Alaska [Mr. STEVENS] were added as cosponsors of Senate Resolution 464, a resolution to designate October 1986 as "Crack/Cocaine Awareness Month."

AMENDMENTS SUBMITTED

DEPARTMENT OF TRANSPORTATION AND RELATED AGENCIES APPROPRIATIONS, 1987

GRAMM (AND THURMOND) AMENDMENT NO. 2843

Mr. GRAMM (for himself 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. 308. (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.

(2) In any case where the parties are found to have engaged in concerted action, the liability of each defendant shall be joint and several.

(b) For purposes of this section, the trier of fact shall determine the proportion of responsibility of each party for the claimant's harm.

(c)(1) 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 trier of fact shall, in determining the proportion of responsibility under subsection (b) of this section, consider the liability of any person not a party to the action if the defendant is able to prove that any such person caused the claimant's harm.

(2) If a claimant has released any defendant or potential defendant from liability for the claimant's harm, the total amount of responsibility for the claimant's harm shall be reduced by the proportion of responsibility of any such released defendant or potential defendant.

(d) As used in this section, the term "concerted action" means any action consciously 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 is subjected to this confused state of affairs, and it has put us at a substantial competitive disadvantage in the area of world trade. Prompt, effective reform is essential.

The Commerce Committee has been struggling for over 5 years in an attempt to devise product liability which is strong enough to provide meaningful relief to American consumers, yet sensitive enough to protect plaintiffs' rights. Much work remains, 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 issue. As a cosponsor of the committee bill, I support their efforts. Senator KASTEN has already said he will be offering a fault based standards amendment. I will support that effort and

would like to ask unanimous consent to be named as a cosponsor.

JOINT AND SEVERAL LIABILITY

Throughout 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 purpose. Originally, the doctrine was applied when two or more defendants had conspired 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 either 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 notion that 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 parties 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 thought this 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 average citizen who ultimately pays 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 rates as though they were "high risk" customers. They not only have to insure against their own actions, but those of everyone with whom they come in contact or who happen to cross their border.

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 have money—or more accurately, 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 bright enough. Balloon 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 to the game. They understand 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. The need 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, that party is liable for 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 mean 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 background on that issue, 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. But as a practical matter, it has not gone far enough. I am introducing an amendment today which would extend the reform to all damages—economic and non-economic—and it would apply to all cases involving a claim of personal injury, property damages, and wrongful death.

Let me say at the outset that although I am introducing this amendment today, I remain open to further suggestions and refinement. I am not inextricably wed to this approach. I know there are strong feelings on the part of some that we should not venture beyond the realm of product liability actions in Federal tort reform proposals. Additionally, there may be some who do not want to extend the reform beyond the non-economic damages compromise. I am sensitive to both of those concerns and continue to welcome suggestions in those and other areas of the measure I am introducing today.

EXPLANATION OF THE AMENDMENT

Subsection (a) abrogates joint and several liability in all cases except those involving concerted action. The definition of concerted action was included to make clear that it does not include merely parallel actions. For example, liability for two component manufactures would normally be several if they acted independently. However if they agreed to "cut corners" in order to develop a cheaper product they would be jointly and severally liable.

This is really the heart of the amendment. The following subsections are designed to address some ancillary but important procedural issues involved in this area.

Subsection (b) makes clear that there is no burden of proof on either party as to the proper apportionment 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(s) cannot—after using best efforts—bring in a third party through impleader practices or other available procedures, then those causes should 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 allowed anytime the plaintiff releases a defendant or potential defendant. The offset should be calculated based on the percentage of responsibility attributable to the person released rather than on 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 ask unanimous consent 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. 2564, and S. 2107.

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

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

Mr. DOLE. Mr. President, I ask unanimous consent that the Subcommittee on Environmental Pollution, of the Committee on Environment, be authorized to meet during the session of the Senate on Wednesday, September 17, 1986, in order to conduct a hearing on S. 1352, and H.R. 1202, and finally S. 2741.

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.

When 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 1986, $144 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 eyar 1991—were based on an assumption of sustained 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:

* * * 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.

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 House 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-

fied: Lawrence Chimerine, chairman and chief economist for Chase Econometrics; Joseph W. 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 is continuing—if anything, the economy has actually deteriorated somewhat in recent months. Most significantly, there 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 to meet the Gramm-Rudman-Hollings deficit target of $144 billion. Dr. Chimerine forecasts real GNP of 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 economic 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 more or less 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 because the economy boomed 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 excellent 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 assuming 3.5 percent real 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:

The GRH approach is very dangerous in the current environment, because it would cause additional spending cuts to compensate for the added deficit caused by slower economic growth—this would only slow the economy further, and in effect, would circumvent the automatic stabilizers that have served the economy so well for many years.

Dr. Chimerine suggested deficit cuts of $25 billion at most for fiscal year 1987.

Herbert Stein, in a July 31 Washington Post Op-Ed commented on the current state of affairs:

Grown men with responsible positions stand up before television cameras and make this statement: Since 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. * * *

Is our revulsion against the economics of Keynes so great that we not only deny what he said 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.

On August 13, in an Op-Ed which appeared in the Washington Post, Martin and Kathleen Feldstein wrote:

* * * 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.

Roger Brinner of Data Resources, Inc., suggested in DRI's August report that the GRH targets be revised downward to take into account projected 2.75 real GNP growth and 7 percent unemployment. He further suggests that these alternative targets—$186 billion in fiscal year 1987, $152 billion in fiscal year 1988, $118 billion in fiscal year 1989, $84 billion in fiscal year 1990, and $50 billion in fiscal year 1991—be amended if the unemployment rate varies from the expected rate of 7 percent. He suggests a rule of $5 billion increase in allowed deficits per one-tenth of a percentage point increase in unemployment.

Herbert Stein, Martin Feldstein, and Roger Brinner all agree that we ought to adjust deficit reduction goals for the business cycle. We cannot simply repudiate it.

When will Congress and the administration stop and listen?

We will say that we have met the Gramm-Rudman-Hollings targets before we adjourn on October 3. Most probably we will take the one-time windfall of about $9 billion from the tax reform legislation and count that toward meeting the deficit ceiling for fiscal year 1987 of $154 billion.

That will be a mistake.

Next year, that $9 billion won't be there; instead, tax receipts will fall off some. At the same time, the deficit ceiling will drop further, to $108 billion. As a result, we will have to decrease the deficit some $50 to $75 billion to meet the Gramm-Rudman-Hollings target for fiscal year 1988. That will not be achieved, and the Gramm-Rudman-Hollings process, as recently described by the Senator from Missouri—with whom I serve on both the Finance and Budget Committees—will be a dead duck.

If, as many respected economists suggest, we cannot meet the deficit targets without causing a recession, and if, as I believe, we will find that we have a deficit of $170 or $180 billion at this time next year, why do we say we are going to do things that we know we cannot do?

I ask that the Op-Ed by Martin Feldstein and Kathleen Feldstein, and that by Herbert Stein be printed in the RECORD. I also ask that an August 17 Washington Post article, "Will Budget Cuts Hurt the Economy," be printed in the RECORD.

The material follows:

[From the Washington Post, Aug. 13, 1986]

YOU CAN'T STOP A SLOWDOWN, BUT YOU CAN EASE IT

(By Martin Feldstein and Kathleen Feldstein)

There is increasing nervousness among private economists and official forecasters about the economic climate for the remainder of this year and into 1987. This is primarily due to a new concern about the contractionary effects that will follow from the tax-reform bill and from the ongoing effort to reduce government outlays.

While the lower dollar and declining interest rates should provide a boost to the economy in the months ahead, so far the trade turnaround from the decline in the dollar has been very slow. Although our net exports will continue to increase, this expansion may not be fast enough to balance the contractionary fiscal effects that will be dragging the economy down.

The most serious drag is likely to come from the tax bill that should soon emerge from the conference committee. Although the tax bill is projected to be revenue-neutral for the first five years as a whole, the version produced by the Senate has a $20 billion revenue increase for 1987. That increased tax revenue will have the effect of

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 private business investment. Eliminating the investment tax credit and lengthening depreciation allowances for investments in structures will be a substantial disincentive for 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 contractionary effect to worry about. Over the past year, the prospect of significant deficit reduction by Congress has helped bring down interest rates and 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-edged sword.

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 means less demand for goods and services and therefore a temporary decline in economic activity.

Is there any remedy for this expected drag on the economy? We accept as inevitable that there will be a tax bill and that it will have adverse effects on investment demand that will depress economic activity over the next two years of that will slow growth 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 the outlook for the Gramm-Rudman process, financial markets would respond badly to any hint that Congress has lost the stomach for spending cuts. Loss of confidence in 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 level by $4 billion for each one-tenth 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 1987 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 this statement: Since 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 Russians 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 previously forecast 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 unutilized 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 he said 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 in fiscal year 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 $25 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 classicist or monetarist might deny that increasing government expenditures would have even a short-run stimulating effect on the economy. He woud not say that cutting expenditures would have a short-run stimulating effect on the economy, so that it was necessary to cut otherwise 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 does not imply 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 1 percent for two consecutive quarters the deficit limits are suspended 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 ceiling on the deficit 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, thay requires 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 of 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 more than a moral injunction. It has pragmatic significance. 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 unwise, to destroy completely the expectation that the size of the deficit will be brought under sufficient restraint to prevent continued increase in the size of the federal debt relative to the GNP would also be unwise. That could 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 actual deficit, which was a way of distinguishing between our long-run position and our cyclical position.

The attractive nuisance 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.

[From the Washington Post, Aug. 17, 1986]

WILL BUDGET CUTS HURT ECONOMY?

(By John M. Berry)

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 1987 deficit of $144 billion. Reaching that level from this year's deficit of $225 billion or so, these economists believe, will require too much fiscal 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, in the short run, a very large, rapid reduction in the deficit could slow economic growth.

Instead of trying for an $80 billion cut in one year—which would equal about 2 percent of the gross national product—a number of economists say a reduction of about half that size, to a deficit of around $180 billion, would be more appropriate.

Other 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 to get 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 ambitious.

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.

But like the other 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 our forecast," Penner said.

That forecast showed the economy growing at a 3.5 percent pace during 1987, after adjustment for inflation. 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 be quickly offset by an improved trade balance and by lower interest rates than would otherwise prevail. If these offsetting forces occur more slowly than expected, an increase in economic growth may be delayed."

Penner believes that the growing internationalization of the American 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 provided.

Now CBO is counting on these relationships to be symmetrical, with a falling trade deficit to provide an economic spur for U.S. production and consumption at the same time the declining budget deficit is having a restraining influence.

"Our forecast is highly dependent on that relationship," Penner said, "and some of our economists have voiced concern that they may not work in tandem.

"Interest rates are also related," he explains. "The marketplace has moved some of the good of reducing 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 part of the interest rate decision was due to a sense that we have some sense of discipline in the [budget] process."

Alan Greenspan, the former 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 weeks that the $144 billion target set for fiscal 1987 followed by a 1988 target of $108 billion is probably unreachable," Greenspan told his clients recently.

"The budget deficit for fiscal 1986 is likely to be $220 billion, or perhaps even larger. With the economic outlook somewhat subdued, the prospect of enough growth in revenues to reduce the deficit sharply, even should spending be constrained significantly, looks remote . . . Certainly, after the November elections when it becomes politically safer to oppose G-R-H, one must assume a plethora of proposals will be forthcoming to alter the path of deficit reduction."

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 an economist, wrote in a newspaper column, "In the near term the necessary process of deficit reduction is [an] important contractionary effect to worry about.

"During the past year the prospect of significant deficit reduction by Congress has helped bring down interest rates and 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-edged sword," 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 means less demand for goods and services and therefore a temporary decline in economic activity."

The Feldsteins said that it is important not to cause financial market participants to doubt that deficit reduction will occur. "Loss of confidence in 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," They continued, "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 in 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."

The Feldsteins suggested this rule of thumb: raise the target level by $4 billion for each one-tenth of a percentage point increase in the nation's unemployment rate above current levels of 7 percent.

Roger 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 instead of $4 billion.

"The targets must be amended only in detail, not in principle," Brinner wrote in the DRI Review. "The economic environment is not as robust as originally hoped, and the budgetary takeoff position is weaker. 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 unemployment rate. Furthermore, it was assumed that the fiscal 1986 deficit could be reduced to approximately $180 billion through tough budgetary initiatives early this year.

"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 path for deficit reduction are justified," he said.

Brinner's proposed path would take the deficit down to $50 billion in 1991 instead 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 $30 billion offset.

John Paulus, managing director and chief economist of Morgan Stanley & Co., a New York investment banking firm, also says that the holders of federal debt recognize the loss of real value in their holdings each year and respond by reinvesting 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 whatever adjustments one makes to the calculation of the size of the deficit and its likely economic impact, there remains the worry that reducing it by more than $80 billion in one year alone may be too much.

"For those of us who highly prize economic growth and low unemployment, the risk of insufficient fiscal stimulus must be weighted heavily," Eisner concludes in his book. "One cannot properly counsel budget balancing in an economy with unemployment 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 two of my colleagues from New England, Senator PELL and Senator STAFFORD.

For almost a year, the Education Subcommittee has been working diligently on the reauthorization of 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 achievement would 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 11 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 awards for his leadership in education are numerous. His hours of service to promoting education here in Congress are innumerable. And, his commitment to the students of our Nation is immeasureable.

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)

WASHINGTON, Aug. 16.—In 1981 a long-standing committee relationship between Senator Robert T. Stafford, Republican of Vermont, and Claiborne Pell, Democrat of Rhode Island, was turned upside down.

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 become the ranking 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 committees, where members stake out 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, they blocked its 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 Pell and Stafford," 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 that assists their easy dealings. "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."

According to Richard Jerue, vice president for government relations of the American Association of State College and Universities, who served as counsel to the subcommittee when Mr. Pell was chairman, a result has been "tremendous legislative success."

"They've worked so long together and think so much alike they're almost alter-egos," Mr. Jerue said. "Their colleagues trust them. If they agree on something it's pretty much going to be the Senate position."

The bill reauthorizing the Higher Education Act for five more years, for instance, was unanimously endorsed by the education subcommittee and by the full committee on Labor and Human Resources, a group whose members run the political spectrum from conservative Republicans like Orrin G. Hatch of Utah and Strom Thurmond of South Carolina to liberal Democrats like Edward M. Kennedy of Massachusetts and Howard M. Metzenbaum of Ohio.

In June the full Senate passed the bill, which contains hundreds of provisions, by a vote of 93-to-1. And Senators Stafford and Pell are now involved in a conference with the House to negotiate a final version to set the terms for Federal financial aid to needy students.

The chairman of the conference, Augustus F. Hawkins, the California Democrat who heads the House Education and Labor Committee, says Senators Stafford and Pell "speak with great authority and have great influence on members of Congress" who appreciate their "extreme personal integrity and strong convictions."

"They've made a tremendous contribution in the field of education," Mr. Hawkins said. "We have worked well together because I have great confidence in their judgment on issues and their cooperative spirit."

And although the excesses of senatorial courtesy are probably as legendary as the verbosity of senatorial oratory, when Mr. Stafford, and Mr. Pell praise each other, they seem to do so generously and sincerely.

On the day they introduced the bill to the full Senate, for example, Mr. Pell, who is 67 years old, hailed Mr. Stafford as "the person who is mainly responsible for this bill being on the floor today as well as protecting our student aid programs from decimation again and again over the past five years."

Without Mr. Stafford's "stewardship over these past years," Mr. Pell said, "I am afraid we would simply be picking up the pieces instead of charting a strong new course."

For his part, Mr. Stafford, who is 73, said that it "could not have been done without the equal effort of Senator Pell."

"It has been best for the country and for education that we have been able to work together without ever thinking about our political labels," he said. "I wish only that we were talking about much larger sums for education, which is the future of this country."

Such talk is not designed to please the Reagan Administration whose views on education Mr. Stafford has repeatedly bucked.

He sharply disagrees with the right-wing view that the Federal Government has no real role in education. The Government must insure "equality of access to education," he said, for the disadvantaged and the handicapped.

OF WEAPONRY AND MINDS

And it is clear that he does not approve of what he termed Education Secretary William J. Bennett's "benign neglect" of a

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. "It doesn't do much good to 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 the emotional world of 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 grassroots support 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 suffering, "often" pushing women to even 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 degrading and dangerous practice of aborting women who have not received minimum information about the abortion procedure.

The statement follows:

STATEMENT ON ABORTION, JUNE 12, 1986

YOUR 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, i.e., guilt, shame, depression, anxiety—only to name a few.

I am in a position now where I deal with other women's experiences daily. I am the State director of WEBA. Weekly another woman calls, often suicidal, unable to cope another day with her own abortion experience. We offer love and compassion and the hope that they too can work through the after effects of that traumatic experience. The most often-stated comments are "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 fairly obvious. 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 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 is accused of another rape and with abducting a Blue Island, Ill., bank director and his wife, forcing them to withdraw $15,000 from the Heritage County Bank and Trust in Blue Island, and then he is charged with shooting the couple to death.

He was caught after allegedly robbing a citizen from Elmwood Park, Ill.

I do not suggest that those who are found guilty of a violent crime should not have the right to appeal. They should. But they should not have the right to walk our streets in freedom after conviction, while they are on appeal.

On the drug issue, some action will probably emerge from Congress, but whether 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 New York Times, 85 percent of the hard drugs can be traced to crops in Peru and Bolivia. We should be working with those two governments to eliminate the source of our problems. That is basic.

The second key element on the drug problem is an effective educational program among young people. 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 friendship.

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 cable and 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 resist sensible steps, Congress should have the courage to defy them and act.●

THE NUCLEAR NON-DETERRENT

● Mr. SIMON. Mr. President, in nuclear terms, both the United States and the Soviet Union are armed far beyond anything 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 newspaper.

Gen. Bernard W. Rogers, a four-star American general and the supreme com-

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 sustaining capacity—ammunition stocks, prepositioned material to replace losses of equipment on the battlefield such as tanks and howitzers—to keep fighting 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 command to use that first nuclear weapon in war must realize that he or she may be ending civilization.

For example, 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 probably 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 10,500 of the large, 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.

The sooner we face reality, the safer our nation and world will be. We should listen to General Rogers.●

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 distinguished 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 4,000 route-miles of track and trackage rights, extending east-west from Maine to Buffalo, NY. The labor dispute in Maine has had an impact in New York State, and the potential danger of a widespread strike 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. BMWE offered to accept these recommendations. However, Guilford would not agree.

A Congressional Advisory Board [CAB] was established on August 21, 1986 (Public Law 99-385). I had cosponsored similar legislation in the Senate, Senate Joint Resolution 378, 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 and apply the recommendations of the President's Emergency Board. Further, if the parties cannot agree as to all necessary details in applying the recommendations by 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 legislation.●

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 not to build a highway if that proposed roadway conflicts with parks, wildlife refuges, recreation areas, or historic sites unless there is no feasible and prudent alternative. H-3 is currently under a permanent court injunction. The Federal courts determined that this road adversely impacted a local park, a park created with Federal dollars, and a local recreation area, and that there is an alternative alignment.

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 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 transportation decided to proceed with H-3, it could have done so by adopting the Makai alignment and in so doing would have by-passed the Luluku site. The Hawaii State 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)

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:

THE COUNCIL OF HAWAIIAN ORGANIZATIONS,
September 8, 1986.

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 studied on a piecemeal basis.

We further disagree with their contention that Luluku's historic sites would be protected by the freeway project; on the contrary, 15 of the sites would be destroyed by the freeway interchange.

The issue of Luluku's historic significance has been sadly avoided by those who would promote H-3 in Congress. Our Council was deeply disappointed recently when we invited members of Hawaii's Congressional Delegation to Luluku (during the recess) for a briefing and tour of the historic sites. They did not have the courtesy to attend, neither did they even send a representative to personally inspect this precious remnant of our Hawaiian history.

It was a sad day for our Hawaiian people, and it reflects the attitude of State officials and the Department of Transportation, whose priorities have been held more highly than the history and culture of Native Hawaiians.

It is our judgment that Luluku must and shall be surveyed, studied, and hopefully preserved as a contiguous complex, one of the most significant discoveries of Hawaiian history in this century. Please oppose any amendment that would allow this desecration of our Hawaiian heritage.

Mahalo,

LOUIS AGARD,
Council of Hawaiian Organizations.

THE CONGRESS OF THE HAWAIIAN PEOPLE
Aiea, HI, September 5, 1986.

Hon. ROBERT T. STAFFORD,
U.S. Senate,
Washington, DC.

DEAR SENATOR STAFFORD: The Congress of the Hawaiian People opposes any proposed exemption from Federal 4(f) law relating to the construction of Interstate H-3 in Hawaii.

Our organization supports the preservation of the Luluku Archaeological District in Windward Oahu. The entire district is considered part of our Hawaiian heritage and, therefore, is sacred to us. We firmly believe that no portion of the district should be used for highway purposes.

We have, over the years, been a strong advocate for actual preservation of several archaeological sites, including Kaloko Fish Pond on the Big Island of Hawaii and Kawainui Marsh in Kailua, Oahu.

Please help us preserve these precious reminders of our past so that our children, for generations to come, may enjoy these treasures left to us by our ancestors. Mahalo nui loa.

Aloha Me Kealoha Pumehana,

IRENE DUPONT,
Representative,
The Congress of the Hawaiian People.

STATE OF HAWAII,
OFFICE OF HAWAIIAN AFFAIRS,
Honolulu, HI, July 21, 1986.

Hon. ROBERT STAFFORD,
U.S. Senate,
Washington, DC.

DEAR SENATOR STAFFORD: The Board of Trustees of the Office of Hawaiian Affairs of the State of Hawaii unanimously opposes the proposed legislation which would exempt interstate highway H-3 from 23 USC 138 and 49 USC 303.

The Office of Hawaiian Affairs is a unique governmental institution created in 1978 by amendments to the Constitution of the State of Hawaii. The Office of Hawaiian Affairs was created by all of the people of Hawaii for one purpose: to better the conditions of native Hawaiians. Native Hawaiians are now a minority in their own land and at the bottom of the State's socio-economic ladder. To accomplish this difficult purpose the voters wisely made the Office of Hawaiian Affairs independent of the Executive Branch of government. The Office of Hawaiian Affairs is coequal with the Executive, Judicial and Legislative branches of government. Its affairs are directed by a Board of Trustees elected by voters of Hawaiian descent. The Hawaii Constitution also provides that the revenue of the Office of Hawaiian Affairs is independent of the legislative appropriation process and is derived from a small percentage of the rents and profits derived from former crown and government lands. A century ago those lands were taken from the Hawaiian people when non-native sugar planters and others overthrew the Hawaiian monarchy.

The Office of Hawaiian Affairs is the branch of the Government of the State of Hawaii which is the duly elected voice of the Hawaiian people. The Trustees' concern is not limited to improving the economic conditions of Native Hawaiians. The Hawaiian people are proud of their history and determined to protect their culture. The Office of Hawaiian Affairs views the preservation of places of historical and cultural importance to the Hawaiian people to be equally as important as economic concerns.

A significant component of the dwindling archeological and cultural legacy of the Hawaiian people will be destroyed if Senator Inouye's bill to exempt proposed interstate highway H-3 from the application of the 4(f) statutes (23 USC 138 and 49 USC 303) becomes law.

In 1985 the Office of Hawaiian Affairs learned that the State Department of Transportation had suppressed the discovery of a major archeological complex at Luluku on Windward Oahu which lay directly in the path of H-3. After the State's efforts to cover up the significance of the find were exposed the archeological survey which was made public revealed that some of the sites within the Luluku Archeological Complex date back to the 4th Century A.D.—one of the earliest dated archeological sites in the Hawaiian Islands. In what it euphemistically calls "salvage", the Hawaii Department of Transportation callously proposes to destroy all but two sites within the Luluku Archeological Complex to build an interchange for H-3. The two remaining sites would be encircled by an interchange off ramp thereby destroying the context and integrity of even the two remaining sites. What may well be the last remaining archeological link with the earliest settlement of Hawaiians in the islands will have been irretrievably lost. Hawaiians did not build statues or other monumental structures but the links to their past are as important to Hawaiians as is the Statue of Liberty to all Americans and Hawaiian archeological and cultural sites are no less deserving of protection and preservation.

The State Department of Transportation obdurately refused to reroute H-3 along a court approved alignment which would completely avoid the Luluku Archeological Complex (and coincidentally also would avoid nearby Ho'omaluhia Park and the Pali Golf Course). Because of the State DOT's intransigence the Board of Trustees of the Office of Hawaiian Affairs unanimously authorized the filing of a lawsuit to prevent the destruction of the Luluku Archeological Complex. That suit, which is now pending in the U.S. District Court for the District of Hawaii, relies upon the 4(f) statutes—the only statutes which protect historic sites from destruction by highways.

You are being asked to approve a bill which will deny the Office of Hawaiian Affairs the ability to protect one of the most significant Hawaiian archeological discoveries of this century.

For this reason the Board of Trustees of the Office of Hawaiian Affairs unanimously has adopted a resolution opposing the proposed exemption of H-3 from the 4(f) statutes.

Gentlemen, Hawaiian culture and history must be protected. Do not deny us the protection available to other Native Americans.

With much aloha,

THE BOARD OF TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS.

OAHU COUNCIL,
Honolulu, HI, July 10, 1986.

Re: S2405

Hon. ROBERT T. STAFFORD,
U.S. Senator, Chairman, Committee on Environmental and Public Works, Hart Senate Office Building, Washington, DC.

DEAR SENATOR STAFFORD: Our organization is made up of native Hawaiians, deeply concerned with the social, health and economic status of native Hawaiians and the preservation of unique elements of our Hawaiian culture. As you probably already know, our organization is strongly opposed to special legislation which would exempt Interstate H-3 from the protections of Section 4F to the detriment of native Hawai'i historical or archeological sites.

The recent celebration of the 100th anniversary of the Statue of Liberty carried with it a recurring theme: America is a land of immigrants! Hawai'i has a similar history, of course, and the mixture of immigrant peoples and their cultures here is a hallmark of modern Hawai'i. This is a positive result of that immigration.

There is a negative side to the story, however.

In 1778, when Captain James Cook arrived in Hawai'i, some of his crew estimated the native Hawaiian population at 300,000. Present here was a highly-complex culture founded on a stable land tenure system, a thriving cooperative subsistence economy, a sophisticated societal heirarchy, religious practices which controlled every facet of daily life, and an established political and governmental system.

As a direct result of western impact and an infusion of western diseases, concepts, politics and a whole new social order, this scene was rapidly changed.

By 1893, when the Hawaiian monarchy was overthrown, the native Hawaiian population stood at 34,000! Gone were the land tenure system (and ownership of much of the land), the cooperative subsistence economy, the religion, the social hierarchy and, of course, the government itself. The trappings of the culture were put on display in museums to be taken out and dusted off now and then for dramas and pageants. While hula and ancient chant had entertained and pleased us and our gods, they were now ridiculed as licencious.

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 irretrievably 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 officially upon the "Americanization" of Hawai'i. Politically, the leaders of the provisional government (who became the leaders of the Republic of Hawai'i) 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 (and certainly the native one) was of total importance. Thus, from 1893 until Hawai'i became a state in 1959, a major policy of its government was to prove, beyond a reasonable doubt, that Hawai'i, despite its multi-cultural population, was just another "slice of American apple pie".

To do this, the efficacy and influence of the Hawaiian culture had to be drastically reduced. The same was true of the immigrant cultures represented in Hawai'i and whose cultures also felt the impact. Happily for them, transfusions of fresh cultural knowledge and experience were readily available from their homelands. For Hawaiians, the source of their culture was the primary target of these attacks. This was their homeland. Where was the cultural replenishment expected to come from?

The whole existence of the Hawaiians as a People's complete with a culture, a standing, an ethnic foundation, was in jeopardy. Actually, the loss of the Hawaiian Culture was nearly complete. That, together with the loss of land and loss of sovereignty, added up to a complete loss of status for the Hawaiian.

In the past 20 years, native Hawaiians, with the generous help of others, have been jointed in a pervasive effort to restore and replenish our culture. We have replanted roots torn from the soil, nurtured sickly growth and gloried in how our sprouts grow strong and tall.

The preservation of sites like the Luluku complex which lies in the path of the H-3 freeway is at the heart of our effort to find the remnants of our culture and piece them painstakingly together again. If Luluku is fractured by the cloverleaf planned to be constructed in its midst, yet another irretrievable shard of our Hawaiian culture will be lost.

So, the issue here is broader, really, than enacting a case-by-case exemption to a wise law; which in itself is an unjustifiable act. The issue encompasses yet another eroding of the pitiful remnants of a once majestic culture.

Do not let it happen!

We implore you to defeat this measure.

H.K. BRUSS KEPPELER,
Pelekikena (President)

QUEEN EMMA HAWAIIAN CIVIC CLUB,
Pearl City, HI, August 28, 1986.

Re: S2405

Hon. ROBERT T. STAFFORD,
U.S. Senator, Chairman, Committee on Environment and Public Works, Washington, DC.

DEAR SENATOR STAFFORD: The Queen Emma Hawaiian Civic Club is made up of native Hawaiians active in the betterment of the lot of native Hawaiian people in the State of Hawaii. Part of this effort has a direct relationship to the preservation of our Hawaiian culture and historic sites.

Such site is Luluka in the Kaneohe District of the Island of Oahu, State of Hawaii. There at Luluku is a single site of enormous cultural value. Luluku, and integrated community containing many features of importance to us and worthy of preservation.

The State of Hawaii Department of Transportation has planned a major highway interchange that will, if built, slice Luluku into bits and pieces.

Normally, the so-called "4F provisions" would protect Luluku. Pending in Congress is 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 couple of weeks, 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 producers.

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 that 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, and has been, an effective floor. It is a guarantee that anyone can look at it and say that is 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 skeptics 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, 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 competing commodities from the United States and they are taking advantage of it.

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 capabilities to adjust for falling market prices, a fluctuating dollar, or

slumps in world demand which can leave U.S. prices stuck above world market levels.

Congress responded in 1985 by statutorily lowering the loan rates and giving the Secretary the authority to reduce the loan rates by 20 percent 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 am not, 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 the marketing 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 the gulf in July of this year was $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 which lowered loan rates was signed 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 to me that 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. World 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. What we have now is low 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 export enhancement 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 wheat and wheat flour has 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 wheat or feed grain price 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 27.5 percent. Without a corresponding increase in target prices, an increase in the acreage reduction percentage (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 Oklahoma wheat produce, Decreasing 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-cent 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 are 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 hope 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 all my colleagues will carefully consider the marketing loan proposal 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 and 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 distinguished colleague and friend from Missouri, JACK DANFORTH, has written an interesting article about the possible effects of this tax reform bill on business and the 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 investment. I am certain that when we consider this conference report on the floor of the Senate 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 chairmen of the House Ways and Means Committee and the Senate Finance Committee, was revealed to committee conferees in an 11th hour take-it-or-leave-it format. Regrettably, the conferees 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 committee chairmen—knows the details of what will be in this bill. But if the process by which the conferees 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 output, 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 efficiency in our use of economic resources, it must make America more competitive in international trade. It must create new jobs and promote educational opportunity. With respect to these goals, the Senate bill was fundamentally sound.

The Senate reduced rates for individuals and businesses far below the House. The Senate cracked down much harder than the House on tax shelters and other loopholes. The Senate imposed a more moderate tax increase of $100 billion on American commerce; the House, $180 billion. The Senate preserved tax benefits for higher education, research and development, foreign investment to enhance exports and energy and other natural resource production.

What has come down from the chairmen's summit is a bill that is far closer in every negative aspect to the original House bill.

Specifically, the Senate-House conference proposal is anti-growth, anti-competition, anti-jobs, anti-education and anti-charity. It is grossly unfair in its apportionment of the tax burden from sector to sector and from individual to individual. It will raise the cost of capital formation in the United States, thereby benefiting our international competitors. It repeals the investment tax credit for new plant and equipment. It increases capital gains taxes for individuals and businesses. 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 (hitting 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 this bill is "the greatest catastrophe for higher education in 25 years."

What about the tax bill's specific effect on Missouri? I deeply regret that this legislation is going to nail highly skilled and high-paying jobs in our manufacturing sector. Ford, General Motors and Chrysler assembly plants will be losers. Armco Steel in Kansas City is a big loser. High-tech industries such as Monsanto will get hit. Aerospace will be the hardest hit of any, McDonnell Douglas, Missouri's largest employer, will lose hundreds of millions of dollars. That's going to cost jobs and exports. In Illinois, Granite City Steel will be among the big losers.

The renewal of downtown St. Louis was made possible by the tax credit for rehabilitating historic buildings, a provision that will be gutted by the tax bill. The metropolitan area's need for low- and moderate-income rental housing would be made more severe by several different provisions in the bill. Economists who have analyzed the bill's impact on housing expect higher rents. Higher rents could more than offset the bill's reduction in taxes for low- and moderate-income families.

Retailing was supposed to be a big winner under this bill, but Missouri's largest retailer, the May Co., is a loser because of the bill's last-minute changes in the tax treatment of inventories and installment credit. Hallmark also gains nothing.

Frankly, it's almost impossible to see even one ray of sunshine piercing the smoking wreckage of the old Senate bill. It is said that removing 6 million low-income people from the tax rolls—a benefit that survives in the current proposal—may be worth the carnage. But that goal could have been achieved at a cost of roughly $2 billion.

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 politicans 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 fails higher education.

The tax bill purports to be revenue neutral. Such a contention requires a leap of faith. Clearly, changed economic circumstances in the next five years alone will bring swings in revenue of tens of billions of dollars. We already know that an important chunk of the revenue raised by the bill comes from a variety of one-time changes in accounting practices. We also know that in the near-term, this tax bill threatens the single most important economic challenge we face—reduction of the federal budget deficit.

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 $32 billion in lost revenue.

There has been some speculation that my opposition to this bill is predicted solely on my disagreement about the treatment of the three or four sections in the bill that I have taken a personal role in drafting as a member of the committee. Nothing could be further from the truth. Conversely, many of my friends said supporters see my opposition as quixotic and a political threat to me personally. Again, my own political fortune couldn't be further from my mind. It is the content of this bill from stem to stern that compels my opposition.

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 future of the country. To have remained silent under my strong convictions would have been unconscionable.●

TRIBUTE TO REV. CLYDE ADAMS, D.D.

● Mr. LUGAR. Mr. President, today I ask my colleagues in the U.S. Senate to join me in honoring Rev. Clyde Adams, D.D., for his 50 years of ministry and his 36 years of service and dedication to members and friends of the Union Baptist Church located in Fort Wayne, IN.

As the pastor of Union Baptist Church, Clyde Adams continues to display superior leadership ability and a deep devotion to correcting the wrongs of our society.

Born in Cherry Valley, AR, Dr. Adams has always been in the forefront of the fight for equal rights for minorities in economic, legal, educational, and civic areas. He received an honorary doctorate degree from the Michigan Baptist Theological Seminary and a doctorate of sacred literature from the Ministers Institute and College of West Point, MS. He served 5 years as a member of the Board of Directors of the National Baptist Convention, Inc. Dr. Clyde Adams has shown an unerring ability to motivate others by capturing their enthusiasm and harnessing it for the betterment of this Nation. His leadership and commitment to his strength of character as well is a beacon of hope to the city of Fort Wayne and to the State of Indiana. Union Baptist Church was blessed with the arrival of this religious leader; Clyde Adams has truly made a difference in the strive for human rights.

I ask my colleagues to join me in commending Reverend Adams.●

WORLD HUNGER

● Mr. DANFORTH. Mr. President, my distinguished colleague from Minnesota, Senator BOSCHWITZ, has committed time and energy to the battle against world hunger. He and I share a belief that the United States must settle for nothing less than a world where adequate nutrition is a basic right. Senator BOSCHWITZ recently addressed the issue of how best to structure our food assistance programs, and I commend his article in the Christian Science Monitor to the attention of Senators.

The article follows:

[From the Christian Science Monitor, Sept. 10, 1986]

WORLD HUNGER: IS DIRECT FOOD AID A SOLUTION?

(By Rudy Boschwitz)

Those with a philosophical bent find United States food aid programs a wonderful mire to wade in. Are US objectives humanitarian or economic? Do we want to feed hungry people or build markets for US farm products?

Being a more pragmatic soul, I must answer all these questions "Yes." In food aid, it is possible to serve two masters. And whatever our motives, Americans should be proud of the global food aid we provide.

While the US produces only a small fraction of the world's food output, it contributes more than half 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 been the leader in international efforts, such as the World Food Program. We lead the world in the amount of aid provided and in coordinating the programs.

The arguments over whether our objectives are inconsistent have persisted for years. Those who agree that humanitarian aid is our chief objective often disagree on whether the aid should focus on the neediest people or be used to promote industrial and economic growth. Controversy also exists about the nature of our agricultural objectives. Should we look at food aid as a short-term way to dispose of surplus commodities or as a long-term method of developing foreign markets? Some in the agricultural community even fear that, as developing countries produce more and more commodities, they will hurt our agriculture by becoming our 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. During that time, abundant supplies of commodities made surplus disposal and market development paramount. During the 1960s, the emphasis shifted to meeting the needs of hungry people. The tight food supply of 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 policy of "new directions," helping developed nations help themselves and providing food aid to the poorest nations rather than to those on the verge of industrial and economic growth. Since the late 1970s, domestic and world food supplies have proliferated. Consequently, the US has eased the 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 growing enough 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. We 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 '80s 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 half the malnourished people in the world—200 million—live in India. Crops grown near the coast are exported, because Indians have no satisfactory means to get them to their own people in need.

In addition to the problems of distribution and transportation, we must come to grips with the effect food aid has on the recipient country. It's easy to crush a fragile agricultural economy with food aid. Even though the agricultural base of most recipient countries doesn't provide all the food that is needed, normally it 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 incomes for farmers. Food aid can also shape politics. It may allow a repressive government to maintain the status quo or, worse, to use food to coerce or manipulate the people.

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. We will continue to have more if we learn from past experience and proceed with our eyes open.

Also, there must be greater coordination among agencies and countries providing food aid. Our goal must be to eliminate 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 prime minister, 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.

Amid growing disunity within the Hungarian Communist Party and a change of heart on the part of Moscow, Nagy, the principal proponent of the "New Course," came 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 archrival Rakosi.

Despite Nagy's ouster, the pressures for reform continued, particularly among members of the intelligencia. During this period, the former prime minister wrote a series of political essays defending reform.

Concern over continuing tensions in Hungary, the Kremlin 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 Budapest 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 coming 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, many of them children. 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 freedom and independence.

On November 3, Cardinal Mindszenty delivered an impassioned address to his fellow countrymen. His words are as meaningful today as they were three decades 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 Soviet troops would be withdrawn from Hungary. Before dawn on November 4, an estimated 200,000 Soviet troops with 2,500 tanks and armored cars had crossed the border into Hungary, launching an offensive designed to crush the revolution. Despite their courageous effort, the Hungarian freedom fighters were vastly outnumbered. 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 deported 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 Kremlin. 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 burried in graves which to this day have remained unmarked.

The address follows:

RADIO STATEMENT OF JOSEF 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 other 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, for 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 undisturbed, 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 State where laws prevail. We support private ownership which is rightly and justly limited by social interests. This is the wish of the Hungarian people.

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 occassion, however, we are reminded that many Hungarians continue in their struggle for freedom and individual human rights. Expressions of independence are met with harassment 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 Hungarian revolution 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 adoption of Senate Joint Resolution 385 as a demonstration of our support of Hungarian freedom fighters, past and present.

Thank you Mr. President.●

HANK GREENBERG—A CHAMPION OF CHAMPIONS

● Mr. LEVIN. Mr. President, many people, when they see a baseball uniform with a number 5 on it, think about Joe DiMaggio. Many fans also know that another player wore that number with equal pride and distinction: Hank Greenberg of the Detroit Tigers.

Hank Greenberg died earlier this month but he will remain a living. He lives in my mind and for more than his .313 life time batting average or the 331 homeruns he hit—58 in one season; more than the grand slam he hit on the last day of the season in 1945 to give the Tigers the league championship or the 2 years he was named MVP. No, he was more than that for me.

Greenberg was the first big time ballplayer who was Jewish. Like Jackie Robinson after him, Greenberg paid a price for being first. One of the reporters in Detroit wrote that "the other teams saw his potential and power and called 'Jew Boy' from the corners of the dugout. The Yankees were the worst." And Greenberg himself is quoted as saying "One time the Yankees even brought up a player from the minors just to get on me. He sat next to the manager for protection. I heard it all from them—every slur you could think of. It was pretty vicious."

That's the way it was back then. But it isn't that way now. Because of people like Greenberg and Robinson and players like Roberto Clemente and Fernando Valenzuela, we have white kids who grow up idolizing black ballplayers, Christian kids rooting for a Jewish homerun hitter, Anglos cheering on a player from Mexico or the Islands.

It isn't much, maybe, but it is a start. It gives a kid the sense that maybe there is something more important than color or religion or national origin—maybe if a player can help the home team win, then that player ought to be admired and accepted for what he can do rather than being rejected because of where he comes from.

No, it isn't much. But it is a beginning which hundreds of thousands of kids make every day of every year because of guys like Greenberg. And it isn't just kids that grow. Greenberg

was playing when Jackie Robinson broke into the big leagues. Years later, Greenberg recalled that "guys on our team were calling Jackie 'Coal Mine.' 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 doing fine. 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 and see what I was lucky enough to see 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 history which still lives in the minds of everyone who ever saw him play.

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 man—involved in civic affairs, caring and willing to give of himself.

Some 40 years ago, I remember reading the morning paper report on the homer he hit to win the pennant. The story started something like this: "Call him the hero of heroes. Call him the champion of champions. Call him the pride of Bengal-town." It still has the ring of truth.●

RAYMOND D. TEMPEST, HIGH SHERIFF

● Mr. PELL. Mr. President, there will soon be a big void in the law enforcement establishment of my own State of Rhode Island because Raymond D. Tempest, high sheriff of Providence County, is about to retire.

I call the void "big," not only because Ray Tempest is a big man, though there is no denying that he is. Big in size, big in heart, big in spirit.

It is also big because it will be difficult for anyone to fill the shoes of this man who has given his city of Woonsocket and his State of Rhode Island 36 years of dedicated, talented and highly professional service.

On February 19, 1951, Ray was sworn in as a patrolman in Woonsocket. He advanced through the ranks, becoming captain and head of the detective division in 1960 and becoming detective commander in 1974.

Throughout his years on the Woonsocket force Ray was a larger than life figure. He was always on the scene, always the leader who took charge in times of chaos with the levelheaded and commonsense approach that always characterized his police work.

He was a hard-nosed, fearless investigator, determined to uncover and wipe out dishonesty and corruption, no matter where he found it.

Ray was, at the same time, a gentle person whose big hand was often extended in consolation and comfort to 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, J. Joseph Garrahy, 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 such a 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 86-829S—"Implications of Uncertainty in Economic Forecasting under Gramm-Rudman-Hollings: Options for Congressional Response"—contains information that should have been understood before the Gramm-Rudman-Hollings amendment ever reached the Senate floor.

On page vii of the summary of the report, we learn that:

> The average deviations of OMB's and CBO's February economic forecasts from their subsequent outcomes, if repeated today, would result in deficit forecasts for the coming fiscal year that miss their mark by an average of more than $30 billion. Three-quarters of the forecasts by both agencies worked toward underestimating deficits by amounts averaging more than $35 billion; the remaining forecasts tended to overstate the deficits by an average of $15 to $20 billion.

The law requires that OMB and CBO make guesses about economic performance for the next fiscal year, and that Congress act on those guesses to meet specific deficit targets. We cannot say for sure whether or not we have actually met those targets until after the fiscal year has ended. Only then do we know how the economy performed, how much the Treasury collected in revenues, and how much we spent.

Table 6 of the CRS report shows the average errors in CBO's and OMB's calendar year economic assumptions.

The average CBO forecast for real GNP growth has been off by 1 percentage point. OMB has missed the mark by 1.2 percentage points. If CBO and OMB agreed that real growth were to be 3 percent in a given year, the data indicate that based on past averages, economic growth may be 2 percent, 3 percent, or 4 percent. An error of 1 percentage point is a 33 percent error.

On July 22, the Commerce Department estimated that second quarter growth was 1.1 percent. One month later, on August 19, that estimate was revised downward to 0.6 percent. Our best estimate of economic growth dropped by one-half in a month's time.

None of which is to disparage economists. Theirs is a noble profession, but not a perfect science. Things happen that cannot be forecast—at least not with the accuracy required by Gramm-Rudman-Hollings.

Congress continues to announce that we will meet the deficit targets for fiscal year 1987 and beyond. We do not really know that. Too much depends on what GNP growth turns out to be, what interest rates are, and how much unemployment there is.

Under such circumstances, we ought not continue the practice of announcing that we have met a specific deficit target. To do so is to assume we have a predictive capacity that the data shows we do not, in fact, possess.

The tables follow:

TABLE 6. AVERAGE ERRORS IN CBO's AND OMB's CALENDAR-YEAR ECONOMICS ASSUMPTIONS

[Percentage points]

	Forecast year—		
	First	Second	Third
Nominal GNP growth:			
CBO	1.0	2.8	3.0
OMB	1.2	2.6	3.2
Real GNP growth:			
CBO	1.0	2.2	3.1
OMB	1.2	2.4	3.1
GNP deflator:			
CBO	0.7	1.3	2.9
OMB	1.5	1.7	2.7
Consumer Price Index:			
CBO	1.5	2.9	4.0
OMB	1.4	2.8	3.8
Unemployment rate:			
CBO	.4	1.0	1.4
OMB	.4	1.1	1.7
91-day T-bill rate:			
CBO	1.1	2.7	2.8
OMB	1.2	2.7	3.1

Source: Congress of the United States. Congressional Budget Office. CBO's 5-year Economic Outlook. Also Executive Office of the President. Office of Management and Budget. Annual January/February Publications. CBO's and OMB's 1981 Economic Outlooks were published in March. Historical data were obtained from the Department of Commerce, Bureau of Economic Analysis, and the Department of Labor, Bureau of Labor Statistics.

TABLE 7.—HOW PREVIOUS FORECAST ERRORS WOULD AFFECT CURRENT POLICY BUDGET PROJECTIONS FOR FISCAL YEAR 1987

[Dollars in billions]

	Absolute average	Overestimates—		Underestimates—	
		Average	Freq.[1]	Average	Freq.[1]
Impacts on Revenue Projections					
Real GNP growth:					
CBO[2]	$17.69	$17.53	75.0	$18.17	25.0
OMB	18.51	19.78	62.5	16.38	37.5
Inflation rate (GNP deflator):					
CBO	23.29	26.43	50.0	20.14	50.0
OMB	24.03	28.03	50.0	20.03	50.0
Nominal GNP growth:					
CBO	31.28	43.03	50.0	19.53	50.0
OMB	28.77	38.99	50.0	18.55	50.0
Impacts on Outlay Projections					
Inflation (consumer price index):					
CBO	6.20	3.80	50.0	8.70	50.0
OMB	5.80	3.70	50.0	8.00	50.0
Unemployment rate:					
CBO	6.30	5.20	50.0	7.48	50.0
OMB	7.20	5.80	50.0	8.58	50.0
91-day Treasury Bill rate:					
CBO	13.55	12.84	25.0	13.79	75.0
OMB	14.57	6.17	25.0	17.38	75.0
Net Impact on Deficit Projections					
CBO	32.43	19.92	25.0	36.60	75.0
OMB	34.24	17.98	25.0	39.66	75.0

[1] Frequencies in percent.

[2] Column one in the first line, for example, shows that inaccuracies in CBO's real growth assumptions would affect its revenue estimates by an average of $17.69 billion in FY87. Columns two and three indicate that inaccurate real growth assumptions in 75% of the observed forecasts would tend to understate FY87 revenues by an average of $17.53 billion. Columns four and five show that in the other 25%, real growth assumptions would tend to understate FY87 revenues by an average of $18.17 billion.

Source: Author's calculation. In calculating the impacts of inaccurate real GNP growth, inflation and nominal GNP growth assumptions on revenue projections, it is assumed that revenues remain a constant share of current-dollar GNP. The impacts of inaccurate inflation, unemployment and interest-rate assumptions on projected outlays are estimated using CBO's rules-of-thumb.

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 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 education 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 Indiana 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. BROYHILL. 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 cleared on this side; however, only if we go into morning business so that the time will not be running against the bill.

Mr. BROYHILL. I would ask that we proceed as if we are in morning business.

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

Mr. BYRD. So the time will no longer be running against the reconciliation measure?

The PRESIDING OFFICER. The reconciliation bill will be temporarily laid aside.

Mr. BYRD. I thank the Chair and I thank the Senator.

Mr. BROYHILL. I ask unanimous consent that once the Senate receives from the House H.R. 2574, a bill for the private relief of the survivors of Christopher Eney, it be held at the desk pending further disposition.

The PRESIDING OFFICER. Is there objection? Hearing none, it is so ordered.

CORRECTION OF ENROLLMENT—COLORADO RIVER FLOODWAY PROTECTION ACT

Mr. ABDNOR. Mr. President, yesterday, the Senate passed H.R. 1246, the Colorado River Floodway Protection Act.

It has come to my attention that the Senate 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 Interior 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 1322 of Public Law 90-448, (82 Stat. 572), as amended by this Act.

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

TRANSFER OF CERTAIN PUBLIC LANDS

Mr. BROYHILL. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on S. 1963.

The PRESIDING OFFICER laid before the Senate the following message from the House of Representatives:

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 Sorocco 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.

(a) CONVEYANCE.—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

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.

(b) SURVEY.—The conveyance required by subsection (a) shall occur only after the Institute performs and provides to the Secretary a survey of the archeological resources of the area which identifies the mitigation measures, if any, that 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 if included 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 on file, 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 that may be found 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, 28, 28b.

Mr. BROYHILL. I move that the Senate concur in the House amendment, Mr. President.

The motion was agreed to.

Mr. BROYHILL. 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 on the table was agreed to.

□ 2250

ORDER FOR RECESS UNTIL 9:00 A.M. TOMORROW

Mr. BROYHILL. 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. BROYHILL. 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. BROYHILL. 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. BROYHILL. 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 a settlement to the Maine Central Railroad Co. and Portland Terminal Co. labor-management dispute, be taken up and that the Senate proceed to its immediate consideration.

The PRESIDING OFFICER. The joint resolution will be stated by title.

The assistant legislative clerk read as follows:

A joint resolution (S.J. Res. 415) to provide for a settlement to the Maine Central Railroad Company and Portland Terminal Company labor-management dispute.

The PRESIDING OFFICER. Is there objection to the present consideration of the joint resolution.

There being no objection, the Senate proceeded to consider the bill.

Mr. MITCHELL. Mr. President, yesterday, I joined with Senator COHEN in introducing legislation, Senate Joint Resolution 415, to bring about a settlement of the longstanding labor dispute on the Maine Central Railroad.

I ask unanimous consent that Senators KENNEDY, WEICKER, and BURDICK 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 represented by the Brotherhood of 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 continuity of transportation services by such carriers;

Whereas the President by Executive Order Numbered 12557 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;

Whereas the recommendations of Presidential Emergency Board Numbered 209 for settlement of such dispute have not yet resulted in a settlement;

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;

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 (a) 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 ante meridiem 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.

Antonin Scalia, of Virginia, to be an Associate Justice of the Supreme Court of the United States.