It is interesting to note he has not granted that waiver yet. Maybe he made a speech and got some points for it, but the fact is, by his granting the DC waiver, maybe he is trying to placate some liberal people who did not like him signing the welfare reform bill. I do not know. But today, I am introducing legislation to reverse the 10-year exemption, or welfare waiver, that he granted to the District of Columbia.

It basically says that any other waiver that would come forward must comply with the 5-year time limit on cash benefits that passed by an overwhelming majority in both the House and the Senate.

Mr. President, I send that to the desk, and ask unanimous consent that the text of the bill be printed in the RECORD. It is my hope and it is my plan to pass this legislation before we go out of session this year.

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

S. 2060

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

SECTION 1. REQUIREMENT FOR THE DISTRICT OF COLUMBIA TO COMPLY WITH 5-YEAR TIME LIMIT FOR WELFARE ASSISTANCE.

(a) IN GENERAL.—Not later than 10 days after the date of the enactment of this Act, the Secretary of Health and Human Services (in this Act referred to as the ''Secretary'') shall rescind approval of the waiver described in subsection (b). Upon such rescission, the Secretary shall immediately approve such waiver in accordance with subsection (c).

(b) WAIVER DESCRIBED.—The waiver described in this subsection is the approval by the Secretary on August 19, 1996, of the District of Columbia's Welfare Reform Demonstration Special Application for waivers, which was submitted under section 1115 of the Social Security Act, and entitled the District of Columbia's Project on Work, Employment, and Responsibility (POWER).

(c) CONDITION FOR WAIVER APPROVAL.—The Secretary of Health and Human Services shall not approve any part of the waiver described in subsection (b) that relates to a waiver of the requirement under section 408(a)(7) of the Social Security Act to not use any part of the grant made under section 403 of such Act to provide assistance to a family that includes an adult who has received assistance under any State program funded under part A of title IV of such Act attributable to funds provided by the Federal Government for 60 months (whether or not consecutive).

SEC. 2. NO WAIVER OF 5-YEAR TIME LIMIT FOR WELFARE ASSISTANCE.

Beginning on and after the date of the enactment of this Act, the Secretary shall not approve any application submitted under section 1115 of the Social Security Act, or under any other provision of law, for a waiver of the requirement under section 408(a)(7) of such Act to not use any part of the grant made under section 403 of such Act to provide assistance to a family that includes an adult who has received assistance under any State program funded under part A of title IV of such Act attributable to funds provided by the Federal Government for 60 months (whether or not consecutive).

ADDITIONAL COSPONSORS

S. 1556

At the request of Mr. KOHL, the name of the Senator from California [Mrs. FEINSTEIN] was added as a cosponsor of S. 1556, a bill to prohibit economic espionage, to provide for the protection of United States proprietary economic information in interstate and foreign commerce, and for other purposes.

S. 1797

At the request of Mr. LEVIN, the name of the Senator from Hawaii [Mr. AKAKA] was added as a cosponsor of S. 1797, a bill to revise the requirements for procurement of products of Federal Prison Industries to meet needs of Federal agencies, and for other purposes.

S. 1967

At the request of Mr. BROWN, the names of the Senator from Mississippi [Mr. COCHRAN], and the Senator from Texas [Mrs. HUTCHISON] were added as cosponsors of S. 1967, a bill to provide that members of the Armed Forces who performed services for the peacekeeping efforts in Somalia shall be entitled to tax benefits in the same manner as if such services were performed in a combat zone, and for other purposes.

S. 2052

At the request of Mrs. BOXER, the name of the Senator from California [Mrs. FEINSTEIN] was added as a cosponsor of S. 2052, a bill to provide for disposal of certain public lands in support of the Manzanar National Historic Site in the State of California, and for other purposes.

AMENDMENTS SUBMITTED

THE ORGAN AND BONE MARROW TRANSPLANT PROGRAM REAUTHORIZATION ACT OF 1996

KASSEBAUM AMENDMENT NO. 5205

Mr. LOTT (for Mrs. KASSEBAUM) proposed an amendment to the bill (S. 1324) to amend the Public Health Service Act to revise and extend the solid-organ procurement and transplantation programs, and the bone marrow donor program, and for other purposes; as follows:

Beginning on page 41, strike line 23, and all that follows through line 4 on page 42, and insert the following:

''(i) in clause (i)—''

On page 43, between lines 6 and 7, insert the following:

''(i) in clause (ii), by inserting ', administrative functions of the organ procurement organization,' after 'organ'; and

''(iii) in clause (iii), to read as follows:

'(iii) in the case of a hospital-based organ procurement organization, has no authority over any non-transplant-related activity of the organization.';''

AUTHORITY FOR COMMITTEE TO MEET

SUBCOMMITTEE ON EAST ASIAN AND PACIFIC AFFAIRS

Mr. THURMOND. Mr. President, I ask unanimous consent that the Subcommittee on East Asian and Pacific Affairs of the Committee on Foreign Relations be authorized to hold a briefing during the session of the Senate on Monday, September 9, 1996, at 1 p.m.

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

ADDITIONAL STATEMENTS

DEFENSE OF MARRIAGE ACT

● Mr. HATCH. Mr. President, I ask that written testimony from Rabbi David Saperstein, director and counsel for the Religious Action Center of Reform Judaism, and a letter from Herman Hill Kay concerning S. 1740, the Defense of Marriage Act, be printed in the RECORD. Both Rabbi Saperstein and Mr. Kay submitted these materials to be included in the transcript of the hearing held before the Senate Judiciary Committee on July 11, 1996. Unfortunately, their statements were received too late to be included, and for that reason, I ask that they be printed in the CONGRESSIONAL RECORD.

The material follows:

TESTIMONY OF RABBI DAVID SAPERSTEIN

I. INTRODUCTION

Mr. Chairman, members of the committee, thank you for this opportunity to comment on the ''Defense of Marriage Act'' (S. 1740). My name is Rabbi David Saperstein, and I am Director and Counsel of the Religious Action Center of Reform Judaism (RAC). The RAC represents the Union of American Hebrew Congregations and the Central Conference of American Rabbis, the lay and clerical bodies of Reform Judaism, with membership of over 1.5 million Reform Jews and 1700 Reform rabbis in 850 congregations nationwide. In recent years, both the parent bodies of the RAC have passed formal resolutions supporting gay civil marriage, and I have included copies of those statements as appendices to my testimony this morning.

I am also an attorney who teaches advanced Constitutional Law, especially on the First Amendment's religion clauses at the Georgetown University Law Center. Over the years, I have written a number of books and articles addressing church-state and constitutional legal issues.

This bill is woefully ill-advised and is morally wrong. Let me first address the legal concerns, lay out why this bill would likely fail to pass even the most forgiving constitutional test and why, under the current legal system, it is, unnecessary. I will then turn to some of the broader political and moral issues the bill raises.

II. LEGAL OBSERVATIONS ON THE DEFENSE OF MARRIAGE ACT

There are two key legal issues at stake in this legislation. The first is that the legislation is almost certain to be found unconstitutional both for its violation of the Full Faith and Credit clause and for its denigration of states rights as protected in the Tenth Amendment. The second issue is that it is, in all likelihood,—and from the perspective of my organizations, sadly—legally unnecessary since many of its key aims would be accomplished under the ''public policy exception'' to the conflict of laws rules, i.e. states would be able to avoid being forced to recognize same sex marriages if they determine such marriages to be in violation of fundamental public policy interests.

A. Why Federal Government Intrusion in this Area is Unconstitutional

The key issue in this regard is whether Congress has the power to abridge in any fashion the full faith and credit accorded sister states' judgments. While it will be offered by the proponents of the legislation that the measure does not restrict states' ability to offer full faith and credit, the plain face of the Constitution does not speak of a state's right to recognize sister states' judgments, rather, it is a mandate.

As a doctrinal matter, while the proponents purport to be protecting states' rights and interests, they are, in fact, diluting those rights and interests. The clear expression in this legislation that the Congress has a role in determining when a state may not offer full faith and credit creates a standard of Federal control antithetical to the Tenth Amendment (and, ironically, to conservative political philosophy): that powers not enumerated for the Federal Government are reserved to the States. This legislation enumerates a Federal power, namely the power to deny sister states recognition, grants that power to the state, and therefore dangerously pronounces, expressio unius est exclusio alterius, that the Federal government in fact retains the power to limit full faith and credit and, for that matter, to regulate marital law more broadly. And it only need express that power substantive issue by substantive issue. This is an arrogation of power to the federal government which one would have assumed heretical to the expressed philosophy of conservative legislating. Under the guise of protecting states' interests, the proposed statutes would infringe upon state sovereignty and effectively transfer broad power to the federal government.

Further, without exception, domestic relations has been a matter of state, not federal, concern and control since the founding of the Republic. *Ankenbrandt* v. *Richards*, 112 SCT 2206 (1992) (no subject matter jurisdiction in federal courts for domestic relations cases). There is simply ''no federal law of domestic relations.'' *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956). ''[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the U.S.'' *In re Burrus*, 136 U.S. 586, 593–4(1890). As a result, Congress has never before passed legislation dealing purely with domestic relations issues, especially marriage.

As to the second prong of the Full Faith and Credit Clause, only rarely has Congress exercised the implementing authority that the Clause grants to it, and never in ways that limited application of the clause. The first, passed in 1790, 28 U.S.C.A. Sec. 1738, provides for ways to authenticate acts, records and judicial proceedings, and repeats the constitutional injunction that such acts, records and judicial proceedings of the states are entitled to full faith and credit in other states, as well as by the federal government. The second, dating from 1804, provides methods of authenticating non-judicial records. 28 U.S.C.A. Sec. 1739.

Since 1804 these provisions have been amended only twice: the Parental Kidnapping Prevention Act of 1980, 28 U.S.C.A. Sec. 1739A, which provides that custody determinations of a state shall be enforced in different states, and 28 U.S.C.A. Sec. 1738B, ''Full Faith and Credit for Child Support Orders'' (1994). Neither of these statutes purported to limit full faith and credit; to the contrary, each of these statutes reinforced or expanded the faith and credit given to states.

While the Supreme Court has not yet passed explicitly on the manner in which marriages *per se* are entitled to full faith and credit, it would appear from the face of the clause they should be afforded full faith and credit as either ''Acts'' or ''Records.'' In the absence of an express constitutional protection under full faith and credit, the general rule for determining the validity of a marriage legally created and recognized in another jurisdiction is to apply the law of the state in which the Marriage was performed. Albert A. Ehrenzweig, A Treatise on the Conflict of Laws, Sec. 138 (1961).

Both Restatements support this general rule. Commentators to the Restatement urge that a choice of law rule that validates out-of-state marriages provides stability and predictability in questions of marriage, ensures the legitimization of children, protects party expectations, and promotes interstate comity. See, e.g., Hovermill. 53 Md.L.Rev. 450, 453 (1994).

B. Why the Public Policy Exception Makes this Legislation Unnecessary

There is, however, a recognized exception to this choice of law rule: a court will refuse to recognize a valid foreign marriage if the recognition of that marriage would violate a strongly held public policy of the forum state. Restatement (Second) Conflict of Laws Sec. 283 (1971).

While we believe strongly that states should not invoke this power in this situation, that such a stance would be morally wrong and we will, accordingly, vigorously oppose all such efforts, until the Court makes a Constitutional ruling upholding same sex marriages within the rubric of a fundamental right (in which case the proposed legislation would clearly be useless), states will have a stronger argument under the public policy exception than they will under this legislation.

Those states which desire to avoid the general rule favoring lex celebri will rely on an enumerated public policy exception to the rule through state statute, common law, or practice, and will make a showing that honoring a sister state's celebration of marriage ''would be the approval of a transaction which is inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense.'' *Intercontinental Hotels Corp.* v. *Golden,* 203 N.E. 2d 210, 212 (N.Y. 1964). The rhetoric notwithstanding, the public policy exception will provide a means for states to withhold full faith and credit, (subject to the limitations of other constitutional provisions, i.e. equal protection, substantive due process, etc.) States will express their public policy exception to recognize same-sex marriages in other states by offering such legislation as gender specific marriage laws, and anti-sodomy statutes.

Different courts have required different levels of clarity in their own state's expression of public policy before that exception could be sustained in that stat's court. Some have required explicit statutory expressions, *Etheridge* v. *Shaddock,* 706 S.W.2d 396 (AR 1986), while others much less clearly so, *Condado Aruba Caribbean Hotel* v. *Tickel*, 561 P.2d 23, 24 (CO Ct App 1977).

Courts have considered a marriage offensive to a state's public policy either because it is contrary to natural law or because it violates a positive law enacted by the state legislature. Courts have invalidated foreign marriages that are incestuous, polygamous, and interracial, or marriages with a minor on the ground that they violate natural law, e.g., *Earle* v. *Earle,* 126 N.Y.S. 317, 319 (1910). For invalidation based on positive law, some courts have required clear statutory expressions that the marriages prohibited are void regardless of where they are performed, *State* v. *Graves,* 307 S.W. 2d 545 (AR 1957), and sometimes a clear intent to preempt the general rule of validation. E.g., *Estate of Loughmiller,* 629 P.2d 156 (KS 1981). Other courts create not so high a hurdle, such that a statutory enactment against the substantive issue was sufficient. *Catalano* v. *Catalano,* 170 A.2d 726 (Ct 1961) (finding express prohibition in a marriage statute and the criminalization of incestuous marriages sufficient to invalidate an out-of-state marriage). Those states that are enacting anti-same sex marriage statutes will likely find they have satisfied the first exception to the choice of law rule validating a marriage where celebrated, *lex celebri.*

Interracial marriages were, before *Loving* v. *Virginia*, treated with the above choice of law analysis, and courts frequently determined the validity of interracial marriages based on an analysis of the public policy exception. ''Early decisions treated such marriages as contrary to natural law, but later courts considered the question one of positive law interpretation.'' 53 Md LRev at 464.

How do these rules, then, apply to the question at hand? First, it would seem that states do have the ability to check the impact of the conflict of laws recognition as described above. However, it should be noted that where there have been such limitations those that have held up over time are those that have been aimed at protecting parties involved in marriage (i.e. spouses and potential children) such as prohibitions against incestuous relations, marriages involving a minor, polygamy. The ban on interracial marriages—the argument most analogous to this situation—was aimed at protecting the society's perception of public mores and public morals at a given moment. That shifted from a natural law argument to a positive law argument to its rejection based on Constitutional doctrine. I suggest that this is the very direction laws related to same sex marriages are moving—a direction we wholeheartedly approve of, but, under current law, the public exception doctrine would probably prevail in most states.

It should be noted, however, that in 17 states, the status of the public policy exception is called into question by the Uniform Marriage and Divorce Act, which provides that ''[a]ll marriages contracted within this State prior to the effective date of the act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State.'' 9A U.L.A. Sec. 210 (1979). The Act specifically drops the public policy exceptions; ''the section expressly fails to incorporate the 'strong public policy' exception to the Restatement and thus may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated in the past.'' Id., official comment. Of course, any state that wants to reassert a public policy exception for same sex marriages retains the right to so legislate, or not. The proposed federal bill has no effect on that.

C. Constitutional Restraints

There are several possible Constitutional limits on a state's ability to invoke a public policy exception to the general rule of validating foreign marriages under the Full Faith and Credit Clause, the Due Process Clause, Equal Protection or Substantive Due Process.

As to due process, the second state must, before it can apply its own law, satisfy that it has ''significant contact or a significant aggregation of contacts'' with the parties and the occurrence or transaction to which it is applying its own law. *Allstate Ins Co* v. *Hague,* 449 U.S. 302 (1981). The contacts necessary to survive a due process challenge have been characterized as ''incidental,'' 53 Md L Rev at 467, and the fact that the same sex couple is probably a domiciliary of the

second state would be enough to satisfy the *Hague* test.

Substantive due process and equal protection can bar a state's application of the public policy exception as well. For the former, a court would have to find that there is a fundamental right for gay couples to marry. There is complete agreement that there is a fundamental right to marry, Zablocki, v. Redhail, 434 U.S. 374 (1978), and the argument will be pursued that this incorporates marriage of gay men and lesbians to each other.

Turning to an Equal Protection analysis, a state's anti-same sex marriage statute could be subjected to one of three levels of scrutiny. *City of Cleburne* v. *Cleburne Living Center,* 473 U.S. 432 (1985). If it is viewed as almost all statutory enactments, it will receive rational basis review, and will, in almost all circumstances, survive challenge. If an argument can be persuasive that the anti same sex marriage statute is discrimination based on gender, it may well receive intermediate scrutiny. No court has yet been persuaded that anti-same sex marriage laws are gender-based discrimination, e.g., *Baker* v. *Nelson,* 191 N.W. 2d 185 (MN 1971). For strict scrutiny, the court would have to elevate, for the first time, classifications based on sexual orientation to that of strict scrutiny—a level which we believe is appropriate in theory, but nowhere operative.

The key point here is that if our view on the standard should prevail and becomes the standard adopted by the federal courts, then the legislation before you would be invalidated just as the public policy exception would be validated. So, again, the legislation would accomplish nothing.

D. Conclusion

Whatever the result of this proposed legislation, a legal quagmire awaits us. If under any of these scenarios the Full Faith and Credit Clause does not compel states to honor each other's marriages, there is virtually universal argument that it does operate to compel recognition of each other's adoption judgments, divorce decrees, and final custody determinations. We could someday find ourselves in legal situations in which a couple, considered married in one state and unmarried in another, seeks divorce in the first state and recognition of a divorce decree in a state which did not ever consider them married. This is not the uniformity one would desire from the plain language of the Full Faith and Credit clause, but the proposed legislation has no bearings on the situation anyway. Congress simply cannot change the core application of the Full Faith and Credit Clause no matter how it legislates. Until a court determines that marriage is entitled to the same full faith and credit accorded divorce or other judgments, the anomalies will remain.

III. MORAL AND POLITICAL CONCERNS

If the legislation is unconstitutional and unnecessary, why we are here today at all?

We all know that same-sex civil marriage is not an issue of overwhelming importance to the average citizen. From our perspective, of course, we wish more people did care about this issue, about according gays and lesbians this fundamental right. Sadly, that is not yet the case,—but someday it will be. But the reality as we sit here today, discussing this specious proposal, is that our cities are mired in poverty, violence is on the rise, the middle class is shrinking and losing ground economically, talented, educated young people cannot find jobs; and incivility and divisiveness abounds in our public and culture life. Does anyone here doubt that if we left the dignified solemnity of this room and ventured onto the streets outside the Capitol—or onto the streets of your home states—to ask people what most troubles them, very few, if any, would say ''same-sex civil marriage.''

This bill is not about protecting families. Certainly my family and your families will not be hurt by giving states the freedom to recognize the committed relationship of two loving adults. This bill is about politics, and whether it is your intent or not, this bill will surely turn out to be about gay bashing and scapegoating.

Who gives us this bill? The same people who elsewhere complain of big, intrusive government; who believe that the Federal Government overregulates; who stand on ideological principle for the rights of State and local governments. These same people now want to weaken States' rights by enacting a dubious and discriminatory exemption to the ''Full Faith and Credit'' Clause. How strange.

How odd that politicians who elsewhere wax eloquent about the sanctity of marriage and the wisdom of small government would now have the Federal Government massively moved into an arena effecting the most intimate aspects of people's lives shattering the Constitution's protections of States' rights and legitimizing the invalidation of civil marriages of committed, loving adult couples simply because they happen to be of the same sex.

Mr. Chairman, my mind keeps returning to one question: How can two living adults coming together to form a family harm family values? Are our families and marriages and communities so fragile and shallow that they are threatened by the love between two adults of the same sex?

Proponents of this legislation argue that families are the cornerstone of our society, and that, today, families are threatened. I agree. But what truly threatens families?

Poverty threatens families, yet we face assaults on all types of programs aimed at supporting families in economic distress.

Unemployment, underemployment and stagnant wages threaten families, yet this Congress has been tragically silent as corporations cut jobs and employees in a myopic obsession with short-term profits.

Efforts to thwart a livable minimum wage, quality child care, and lack of education threatens families, yet almost every vital part of this country's public education infrastructure, from the Department of Education to Head Start is under attack today.

Polluted air and drinking water threaten families, yet the vital environmental laws that keep our water and our air and our communities clean are similarly under attack.

And that, sadly, is what this bill is all about. It is about saying to the American people, ''Pay no attention to these truly anit-family policies; gay men and lesbians are the real threats to the security and sanctity of your marriages, your homes, and your communities.''

This bill is about targeting scapegoats; and as a people who have been the quintessential scapegoats of Western civilization, we stand with our gay and lesbian brothers and sisters in saying that this bill is immoral and unjust. A national debate over this unnecessary and unconstitutional bill will only distract America from finding real solutions to real problems.

Above all, the bill will only serve to codify bigotry. It has been proposed for no other reason than because some States and localities have properly interpreted the spirit, if not the letter, of the Fourteenth Amendment to the Constitution to require them to treat gays and lesbians no different under the law than heterosexuals.

Mr. Chairman, the stamp of the divine is found in the souls of all God's children—gay, lesbian and straight. The love that God calls us to, the love that binds two people together in a loving and devoted commitment, is accessible to all God's children. Let the State acknowledge that. This legislation betrays those values. This Congress deserves a better legacy; the American people deserve a better, and more loving, vision.

Thank you for your consideration.

APPENDIX A

Adopted by the General Assembly Union of American Hebrew Congregations, October 21–October 25, 1993—San Francisco

RECOGNITION FOR LESBIAN AND GAY PARTNERSHIPS

Background: The Union of American Hebrew Congregations has been in the vanguard of support for the full recognition of equality for lesbians and gays in society. This has been clearly articulated in UAHC resolutions dating back to 1977. But far more remains to be accomplished. Today, committed lesbian and gay couples are denied the benefits routinely accorded to married heterosexual couples: they cannot share in their partner's health programs; they do not have spousal survivor rights; and, as seen in recent court rulings, individual lesbian or gay parents have been adjudged unfit to raise their own children because they are lesbian or gay and/or living with a lesbian or gay partner, even though they meet the ''parenting'' standards required of heterosexual couples.

It is heartening to note the steps being made toward recognition of the legitimacy of lesbian and gay relationships. Adoption of Domestic Partnership registration in cities such as San Francisco and New York and extension of spousal benefits to partners of lesbian and gay employees by companies such as Levi Strauss, Lotus, Maimonides Hospital in New York City, are models for adoption by other governmental authorities and corporations.

Therefore the Union of American Hebrew Congregations resolves to:

1. call upon our Federal, Provincial, State and local governments to adopt legislation that will:

(a) afford partners in committed lesbian and gay partnerships spousal benefits, that include participation in health care plans and survivor benefits:

(b) ensure that lesbians and gay men are not ajudged unfit to raise children because of their sexual orientation; and

(c) afford partners in committed lesbian and gay relationships the means of legally acknowledged such relationships; and

2. call upon our congregations, the Central Conference of American Rabbis and the Hebrew Union College-Jewish Institute of Religion to join with us in seeking to extend the same benefits that are extended to the spouses of married staff members and employees to the partners of all staff members and employees living in committed lesbian and gay partnerships.

ON GAY AND LESBIAN MARRIAGE

Adopted by the 107th Annual Convention of the Central Conference of American Rabbis, March, 1996

Background: Consistent with our Jewish commitment to the fundamental principle that we are all created in the divine image, the Reform Movement has ''been in the vanguard of the support for the full recognition of equality for lesbians and gays in society.'' In 1977, the CCAR adopted a resolution encouraging legislation which decriminalizes homosexual acts between consenting adults; and prohibits discrimination against them as persons, followed by its adoption in 1990 of a substantial position paper on homosexuality and the rabbinsic. Then, in 1993, the Union of American Hebrew Congregation observed that ''committed lesbian and gay couples are

denied the benefit routinely accorded to married heterosexual couples.'' The UAHC resolved that full equality under the law for lesbian and gay people requires legal recognition of lesbian and gay relationships.

In light of this background,

Be it resolved, That the Central Conference of American Rabbis support the right of gay and lesbian couples to share fully and equally in the rights of civil marriage, and

Be it further resolved, That the CCAR oppose governmental efforts to ban bay and lesbian marriage.

Be it further resolved, That this is a matter of civil law, and is separate from the question of rabbinic officiation at such marriages.

UNIVERSITY OF CALIFORNIA,
SCHOOL OF LAW
Berkeley, CA, June 14, 1996.

Senator DIANNE FEINSTEIN,
Hart Senate Office Building,
Washington, DC.

DEAR DIANNE: Thank you for inviting me to give you my views on the Defense of Marriage Act, I do so from the perspective of a law professor who has taught both in the areas of family law and the conflict of laws.

As I said to you on the telephone, I think that the Act is ill-advised regardless of what one's attitudes may be toward the legalization of same-sex marriage.

The Act, as presently drafted in H.R. 3396, contains two substantive provisions. Section Two exempts sister states from any obligation imposed by the Full Faith and Credit Clause of the United States Constitution or its implementing statute ''to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, . . . or a right or claim arising from such relationship.'' Section Three defines the terms ''marriage'' and ''spouse'' for the purpose of federal law, including eligibility for federal benefit programs, as follows: ''the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.''

Section Three changes a uniform and long-standing federal practice of deferring to state law on questions affecting the family. Eligibility for federal entitlement programs, such as social security, Medicare, and veteran's benefits traditionally have been measured by state, not federal law. Similarly, marital status for the purpose of applying federal statutes such as tax codes and immigration laws has been defined by state law. This long-standing practice appropriately recognizes the prerogative of state legislatures to regulate the family as a matter of local policy, and the greater experience of state court judges, charged with implementing the state laws governing family dissolution as well as matrimony, in determining marital status. The Defense of Marriage Act would reverse that wholesome tradition by creating a federal law of marriage for purposes of the federal code. As Professor Laurence H. Tribe observed, in the New York Times on May 26, 1996, ''[i]t is ironic . . . that such a measure should be defended in the name of states' rights.''

Moreover, despite the claims of proponents who assert that the Act does not prohibit states from legalizing same-sex marriage, Section Three would make even-handed administration of such a state's family law impossible. Take, for example, the ability of married couples to split their income for purposes of the federal income tax laws. Single-earner opposite-sex married couples could take advantages of the lower tax burden made available by this provision, while similarly situated same-sex married couples could not. This difference would arise, not from the state law defining marriage, but from the federal policy against same-sex marriage. Same-sex couples would thus have less available assets for the support of their families, perhaps placing a burden on the state. This outcome might influence a state in deciding whether to permit same-sex marriage in the first place. The impact of Section Three on other federal benefit programs is open to a similar analysis.

Section Two is designed to excuse states that do not wish to legalize same-sex marriage from any supposed obligation imposed by the Full Faith and Credit Clause to recognize such marriages that may be validly performed in other states. This section is both unnecessary to achieve its desired end and pernicious as a matter of sister state relations.

The usual conflict of laws doctrine governing the recognition of a marriage performed in another state is that the state where recognition is sought need not recognize a marriage that would violate its public policy. A state with a clear prohibition against same-sex marriage could, if it chose to do so, invoke that prohibition as declaratory of its public policy and as a justification for refusing recognition. The provisions of Section Two merely confirm what such a state may already do for itself, and are therefore superfluous.

Finally, Section Two does not facilitate sister state relations: rather it intrudes federal authority into a state's decision whether to extend voluntary recognition to another state's action. This is contrary to prior congressional action, which has been confined to requiring recognition of one state's action by other states, and thus has acted as a unifying force. By stating instead that recognition is unnecessary, Congress would be approving dissention among the states.

I hope these comments are helpful. If you have any questions, please feel free to let me know.

Sincerely,

HERMA HILL KAY,
Dean.●

THE FIREMAN'S MUTUAL BENEFIT ASSOCIATION'S 100TH ANNUAL CONVENTION

● Mr. LAUTENBERG. Mr. President, today I rise to salute one of New Jersey's finest enduring examples of public service. On September 10, 1996, the New Jersey Firemen's Mutual Benevolent Association will meet for the 100th time at its annual convention in Atlantic City.

Since it was established on December 11, 1897, the New Jersey Fireman's Mutual Benevolent Association has had a tremendously positive impact on its members, their families and the general public. For the past century NJFMBA has conducted fire safety programs in our schools. They have worked tirelessly for burn victims through their fund raising efforts, and they have helped to establish state of the art burn centers in several New Jersey hospitals.

Mr. President, the life of a firefighter is among the most demanding of professions. They answer every alarm and risk their lives to protect our communities. They hold the line against our most devastating natural enemy, uncontrolled fire. We live and work every day under the security and safety that firefighters provide.

Mr. President, it is with great pleasure and gratitude that I acknowledge the efforts, accomplishments and heroism of the 5,000 members of the New Jersey Fireman's Mutual Benefit Association.●

AN EXCEPTIONAL PRESS SECRETARY

● Mr. SIMON. Mr. President, Bob Estill, an experienced and distinguished columnist in the Washington Bureau of the Copley News Service, recently wrote a column paying tribute to my departing press secretary, David Carle.

Since the 1960's Mr. Estill has covered Illinois politics and worked closely with the Illinois congressional delegation. Press secretaries, especially the very good ones like David, rarely are mentioned in the media. But David's outstanding work, his honesty, and his loyalty and commitment to family and friends truly merits special mention, so I submit this column for the RECORD.

The column follows:

LONGTIME SIMON AIDE EXITS TO KUDOS

(By Bob Estill)

WASHINGTON.—Retiring Sen. Paul Simon's highly regarded press secretary, David Carle, is leaving the cornfields and gently rolling hills of the ''Prairie State'' for the Green Mountains of verdant Vermont.

The longtime spokesman for the Illinois Democrat will begin work after Labor Day as press secretary for Sen. Patrick Leahy, D-Vt., a four-term veteran from a state so sparsely populated it has only one congressional district.

Spending most of his adult life as Simon's spokesman, the 44-year-old Carle has worked with reporters from small weekly newspapers to metropolitan dailies, from rural radio stations to the major television networks.

''It was an exhilarating ride that included two Senate campaigns and a presidential campaign,'' noted Carle, who had planned to return to graduate school in his native Utah if he hadn't landed the job with Simon in January, 1981.

Usually, the comings and goings of congressional press secretaries are frequent, routine, and scarcely noteworthy.

But the soft-spoken, unassuming Carle is exceptional in longevity, dedication and performance, creating a model congressional press operation that mirrors Simon's reputation for integrity.

Simon extols Carle as a ''fine human being'' and an ''incredibly hard worker'' who is on the job before Simon shows up at 8 a.m. and, even on weekends, keeps Simon posted on any news breaking anywhere.

The Senator, a onetime newspaper owner and longtime columnist, said Carle's philosophy on dealing with reporters meshes with his own.

''Sometimes you have to say 'no comment' or sometimes you duck a question by giving an evasive answer,'' Simon noted. ''But you never lie to anyone.''

Carle also has earned the respect of Republican and Democratic staffers and lawmakers, as well as reporters covering the Illinois congressional delegation.

As Major League Baseball's lobbyist, Springfield native Gene Callahan knows a ''most valuable player'' when he sees one.