I saw him in a committee room where he would come in—you always get a nice smile from him—and I would see him go over, find a great angle, take a couple shots, and often, if there was a new photographer there, he would point that angle out to him.

The article that is printed at the end of this from the Associated Press speaks far better about him, as I think Mr. Abrams is far more eloquent than I, and that is why I want it included.

I was pleased to see the distinguished majority leader, Senator LOTT, also spoke about him last week. He well deserves that.

EXHIBIT 1

[From the Associated Press, Sept. 24, 1996]

AP PHOTOGRAPHER PRAISED

(By Jim Abrams)

The Senate and House opened their sessions Tuesday with tributes to AP photographer John A. Duricka, a veteran of Capitol Hill photo coverage who died Monday.

''The Senate and all Americans lost a true professional yesterday,'' Senate Majority Leader Trent Lott, R-Miss. ''The measure of John's professionalism and dedication is he was on the job almost up to the time of his death doing what he loved and doing it wonderfully well.''

Lott spoke of Duricka's ''combination of mature demeanor and tough determination'' and added: ''All who treasure our freedoms of the press and free expression will miss his outstanding contributions to that end.''

In the House, Rep. David Dreier, R-Calif., said Duricka was ''a great friend to me.'' Dreier recalled that he delivered the eulogy at the funeral of Duricka's brother, a photographer at the San Gabriel Valley Tribune who was killed in a plane crash several years ago.

''John Duricka was a great man and he took wonderful, photographs and he's one of those institutions in this Capitol who will be sorely missed,'' Dreier said.

Jonathan Wolman, AP's Washington bureau chief, said: ''From Bobby Byrd to Newt Gingrich, John captured all the great figures of Congress. He illustrated the legislative process with pictures of leaders, lobbyists and hundreds of ordinary citizens who appeared in committee hearings.''

Duricka was ''a professional's professional,'' Sen. Patrick Leahy, D-Vt., recalled Monday. ''His work was seen by millions who never knew his name. He was a familiar presence on Capitol Hill and I always looked for him among the photographers. He was a friend to many, and he will be missed.''

Duricka, 58, had a 30-year career as an AP photographer. He was chairman of the congressional Standing Committee of Press Photographers, which represents the interests of still photographers.

Mr. LEAHY. Mr. President, I yield the floor and 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. HATCH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

OMNIBUS CONSOLIDATED APPROPRIATIONS ACT, 1997

The Senate continued with the consideration of the bill.

Mr. HATCH. Mr. President, we are coming on to the end of this session. It is a very, very important session. I think we have accomplished a lot in this Congress. We have made changes, seen major changes in how the budget is going to be handled. We now have the President of the United States talking, for the first time—a Democratic President talking for the first time—in 60 years about balancing the budget. I do not think we have any choice in the matter. We have to move toward a balanced budget.

But we have to see change in welfare reform. For the first time we have actually done something to entitlement programs. We have certainly passed a whole raft of other bills that are outlined in the newspapers almost on a daily basis. I think people are amazed what a terrific and important Congress this has been.

I would like to just take a few minutes this morning to address some of the measures in the omnibus bill before the Senate. One such measure is the vast bulk of the immigration conference report. The American people expect the Federal Government to control our country's borders. We have not yet done so. The American people expect Congress and the President to strengthen the national effort against illegal immigration.

Despite the last-minute political gamesmanship of the President, we have included in the omnibus measure provisions dealing with the problem of illegal immigration. This omnibus measure includes the conference report on H.R. 2202, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, with certain modifications to title V of the conference report. The legislative history of the immigration portion of this measure includes the legislative history of H.R. 2202 and S. 1664, with their accompanying committee reports and floor debates and, in addition, a joint explanatory statement of the committee of conference in Report 104–828.

The American people should make no mistake about it. There is no thanks owed to President Clinton for this achievement.

On August 2, 1996, President Clinton wrote to Speaker Gingrich. Remarkably, he said unequivocally he would veto this bill even with the significantly modified Gallegly provision on public education for illegal aliens, a compromise which was not even yet at that point in final form. Republican conferees removed that provision from the proposed conference report, a draft of which was initially circulated on September 10, 1996. It was the only issue upon which the President said he would veto this bill.

The President had 2 weeks before the actual conference to register other objections to the draft conference report. Yet, only after the conference committee met and filed its report did the President interpose final objections related to title V of the conference report, which addresses immigrants' financial responsibilities. The President was apparently willing to shut down the Government or kill the immigration bill on his last-minute demands. The immigration measure in this appropriations bill now contains further concessions to the President. We have finally cleared away the obstructions, and it is my understanding that he no longer has any major objections.

This bill is an important bill. It cracks down on illegal immigration. Among other things, it builds up and strengthens the Border Patrol. It authorizes 5,000 new agents and 1,500 new support personnel for the Border Patrol over the next 5 years. This increase basically doubles the size of the Border Patrol. The proposal adds as many as 450 investigators and related personnel to combat illegal alien smuggling into our country over 3 years. The bill provides 300 personnel to investigate those who overstay their visas and thus remain illegally in our country.

The conference report requires the Attorney General to establish an automated entry and exit control system to match arriving and departing aliens and to identify visa overstayers. It authorizes acquisition of improved equipment and technology for border control, including helicopters, four-wheel drive vehicles, night vision scopes and sensor units, just to name a few things.

The bill adds civil penalties to existing criminal penalties against aliens illegally entering our country. Criminal and civil penalties for document fraud are increased. Criminal penalties against those who smuggle aliens into our country are also increased. High speed flight from an INS checkpoint is a felony punishable by up to 5 years imprisonment under this bill.

The bill makes it illegal to falsely claim American citizenship with the purpose of obtaining any Federal or State benefit or service or for the purpose of voting or registering to vote in any Federal, State or local election.

This bill gives the INS, the Immigration and Naturalization Service, wiretap authority in alien smuggling and document fraud cases.

The bill broadens the definition of ''aggravated felony'' for purposes of our immigration laws, even beyond the new Terrorism Act, to include crimes of rape and sexual abuse of a minor. It lowers the fine threshold for money laundering from $100,000 to $10,000. It decreases the imprisonment threshold for theft, violence, racketeering, and document fraud from 5 years to 1 year. That is the threshold. The broadened definition of aggravated felony adds new offenses related to gambling, bribery, perjury, revealing the identity of undercover agents, and transporting prostitutes. What does this mean? More criminal aliens will be deportable and fewer will be eligible for waivers of deportation.

To assist in the identification and removal of deportable criminal aliens, the bill authorizes the registration of

aliens on probation or parole; requires that the criminal alien identification system be used to assist Federal, State, and local law enforcement agencies in identifying and locating removable criminal aliens; and authorizes $5 million per year from 1997 to 2001 for the criminal alien tracking center. The bill also provides that funds under the State Criminal Alien Assistance Program may be used for costs of imprisoning criminal aliens in State or local facilities.

This bill also provides that the fee for adjustment of status be increased to $1,000 and that at least 80 percent of those fees be spent on enhancing the Immigration and Naturalization Service's capacity to detain criminal aliens and others subject to detention. The bill also authorizes $150 million for detaining and removing deportable and inadmissible aliens.

To facilitate legal entry, this measure provides for increased full-time land border inspectors to ensure full staffing of border crossing lanes during peak crossing hours. The bill will result in the establishment of preinspection stations at a limited number of foreign airports.

These provisions are desperately needed to stem the tide of illegal immigration.

I note that I am not happy with all of the immigration bill's provisions, but I have to say, I do not think anybody is. The vast majority of them, however, are good provisions. But let me give you a couple of illustrations that I am not very happy about. It adds, for example, personnel for the enforcement of employer sanctions. I believe we ought to repeal employer sanctions outright as a costly, counterproductive failure. I cannot help but note that President Clinton has gone much further than even this bill proposes by signing an Executive order penalizing Federal contractors who violate the employer sanctions law. In doing so, he not only throws more good money after bad, he is inadvertently fostering more discrimination against those ethnic minorities in our society who look and sound different from the majority.

I am no fan of verification schemes, and I am skeptical that the pilot programs provided for in this bill will be worthwhile. Here again, the President is already using existing authority to implement verification projects, which I do not believe can work on a national scale.

Despite my great reluctance, I have agreed to allow the Attorney General to certify to Congress that she cannot comply with the mandatory criminal alien detention provisions of the recently enacted terrorism law, antiterrorism law, thereby obtaining a 1-year grace period which could be extended or can be extended under this bill for 1 additional year on top of that 1-year grace period. The Clinton administration has been tenacious in pleading with Congress to ease this criminal alien detention requirement. I would have preferred that the administration find facilities necessary to implement these provisions.

On balance, though, the immigration bill is a very worthy measure, and I am pleased that it has been included in the omnibus spending bill.

I ask unanimous consent a statement of legislative history be printed in the RECORD.

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

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

DIVISION C: STATEMENT OF LEGISLATIVE HISTORY

Division C shall be considered as the enactment of the Conference Report (Rept. 104–828) on H.R. 2202, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, with certain modifications to Title V of the Conference Report.

The legislative history of Division C shall be considered to include the Joint Explanatory Statement of the Committee of Conference in Report 104–828, as well as the reports of the Committees on the Judiciary, Agriculture, and Economic and Educational Opportunities of the House of Representatives on H.R. 2202 (Rept. 104–469, Parts I, II, and III), and the report of the Committee on the Judiciary of the Senate on S. 1664 (Rept. 104–249).

The following records the disposition in Division C of the provisions in Title V of the Conference Report. (The remaining Titles of the Conference Report have not been modified.) Technical and conforming amendments are not noted.

Section 500: Strike.

Section 501: Modify to amend section 431 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Public Law 104–193) to insert the provisions in section 501(c)(2) of the Conference Report relating to an exception to ineligibility for benefits for certain battered aliens. Strike all other provisions of section 501

Section 502: Modify to authorize States to establish pilot programs, pursuant to regulations promulgated by the Attorney General. Under the pilot programs, States may deny drivers' licenses to illegal aliens and otherwise determine the viability, advisability, and cost effectiveness of denying driver's licenses to aliens unlawfully in the United States.

Section 503: Strike.

Section 504: Redesignate as section 503 and modify to include only amendments to section 202 of the Social Security Act, and new effective date. Strike all other provisions.

Section 505: Redesignate as section 504 and modify to amend section 432(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 to provide that the Attorney General shall establish a procedure for persons applying for public benefits to provide proof of citizenship. Strike all other provisions.

Section 506: Strike.

Section 507: Redesignate as section 505.

Section 508. Redesignate as section 506 and modify. Strike subsection (a) and modify requirements in subsection (b) regarding Report of the Comptroller General.

Section 509. Redesignate as section 507.

Section 510. Redesignate as section 508. Modify subsection (a) and redesignate as an amendment to section 432 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Strike subsection (b).

Section 511. Redesignate as section 509. Modify to change references to ''eligible aliens'' to ''qualified aliens'' and make other changes in terminology.

Section 531. No change.

Section 532. Strike.

Section 551. Modify to reduce sponsor income requirements to 125 percent of poverty level. Strike subsection (e) of Immigration and Nationality Act (INA) section 213A as added by this section. Make other changes to conform INA section 213A as added by this section to similar provision enacted in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Strike subsection (c).

Section 552. Modify to amend section 421 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 to include the provisions in section 552(d)(1) and 552(f). Strike all other provisions.

Section 553. Strike.

Section 554. Redesignate as section 553.

Section 561. No change.

Section 562. Strike.

Section 563. Redesignate as section 562.

Section 564. Redesignate as section 563.

Section 565. Redesignate as section 564.

Section 566. Redesignate as section 565 and modify to strike (4).

Sections 571 through 576. Strike and insert sections 221 through 227 of the Senate amendment to H.R. 2202, as modified.

Section 591. No change.

Section 592. Strike.

Section 593. Redesignate as 592.

Section 594. Redesignate as 593.

Section 595. Redesignate as 594.

Mr. ABRAHAM. Mr. President, I would like to ask the Chairman of the Judiciary Committee a few questions to clarify the changes made in the asylum provisions of the Senate immigration bill when the House and Senate conferees adopted the conference report on H.R. 2202, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. These provisions are included in this omnibus appropriations measure. Senator HATCH was a conferee on this legislation and was deeply involved in the development of this provision.

Section 604 of the conference report would add to the Immigration and Nationality Act a new section providing that an alien may not apply for asylum unless he or she demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States. That section also includes two important exceptions—one for changed circumstances that materially affect the applicant's eligibility for asylum, and the other relating to the delay in filing an application. Would the Chairman explain the meaning of these exceptions?

Mr. HATCH. The conference report does include a 1-year time limit, from the time of entering the United States, on filing applications for asylum. Conferees also adopted important exceptions, both for changed circumstances that materially affect an applicant's eligibility for asylum and for extraordinary circumstances that relate to the delay in filing the application.

Like my distinguished colleague from Michigan, I too supported the Senate provision, which received overwhelming, bipartisan support in the Senate. In fact, that provision was

adopted by an amendment in the Judiciary Committee that passed by unanimous consent. The Senate provisions had established a 1-year time limit only on defensive claims of asylum, that is, those raised for the first time in deportation proceedings, and provided for a good cause exception.

Let me say that I share the Senator's concern that we continue to ensure that asylum is available for those with legitimate claims of asylum. The way in which the time limit was rewritten in the conference report—with the two exceptions specified—was intended to provide adequate protections to those with legitimate claims of asylum. I expect that circumstances covered by the Senate's good cause exception will likely be covered by either the changed circumstances exception or the extraordinary circumstances exception contained in the conference report language. The conference report provision represents a compromise in that, unlike the Senate provision, it applies to all claims of asylum, whether raised affirmatively or defensively.

Mr. ABRAHAM. Would you say that the intent in the changed circumstances exception is to cover a broad range of circumstances that may have changed and that affect the applicant's ability to obtain asylum?

Mr. HATCH. Yes. That exception is intended to deal with circumstances that changed after the applicant entered the United States and that are relevant to the applicant's eligibility for asylum. The changed circumstances provision will deal with situations like those in which the situation in the alien's home country may have changed, the applicant obtains more information about likely retribution he or she might face if the applicant returned home, and other situations that we in Congress may not be able to anticipate at this time.

Mr. ABRAHAM. It is my understanding that the second exception, for extraordinary circumstances, relates to legitimate reasons excusing the alien's failure to meet the 1-year deadline. Is that the case?

Mr. HATCH. Yes, the extraordinary circumstances exception applies to reasons that are, quite literally, out of the ordinary and that explain the alien's inability to meet the 1-year deadline. Extraordinary circumstances excusing the delay could include, for instance, physical or mental disability, unsuccessful efforts to seek asylum that failed due to technical defects or errors for which the alien was not responsible, and other extenuating circumstances.

Mr. ABRAHAM. If the time limit and the exceptions you have discussed do not provide sufficient protection to aliens with bona fide claims of asylum, I will be prepared to work with my colleagues to address that problem. Is my understanding correct that you too will pay close attention to how this provision is interpreted?

Mr. HATCH. Yes. Like you, I am committed to ensuring that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies. If the time limit is not implemented fairly, or cannot be implemented fairly, I will be prepared to revisit this issue in a later Congress. I would also like to let the Senator from Michigan know how much I appreciate his commitment and dedication on this issue.

Mr. ABRAHAM. Thank you. I would likewise thank the Chairman of the Judiciary Committee for his diligent efforts on this issue in conference and his explanation of the conference report's provisions.

Mr. HATCH. I will note, briefly, that the bill modifies the antiterrorism law's provisions on summary exclusion, in order to better assure that those who are bona fide asylees are not erroneously compelled to leave this country.

On a related point, the Clinton administration has recently announced its plans to cut refugee admissions next year to 78,000. I oppose this cut. In fiscal year 1995, the level was 110,000. Last year, the level of refugee admissions was set at 90,000. I believe we should set the same level of 90,000 refugee admissions for next year. A further cut is unwarranted, especially with the renewed steps against alien immigration embodied in the bill. Moreover, I think it sends the wrong signal to the world.

A Hatch-Biden substitute for my Child Pornography Protection Act, S. 1237, has been included in the omnibus measure. I thank the appropriators on both sides of the aisle for their cooperation in including this important measure in this omnibus bill. The legislative history of the child pornography provisions of this bill includes the legislative history of S. 1237, including the report of the Committee of the Judiciary, Report 104–358.

Senators FEINSTEIN and GRASSLEY have important provisions in the child pornography provisions of this measure and I want to thank them, as well as Senator BIDEN, for their important work on these matters. They have done a very good job, and I have a lot of respect for my colleagues.

CHILD PORNOGRAPHY PREVENTION ACT

Mr. HATCH. Mr. President, modern computer imaging and morphing technology has made possible the production of pornographic depictions of minors which are virtually indistinguishable to the unsuspecting viewer from unretouched photographs of actual children engaging in sexually explicit conduct.

Such computer generated child pornography has many of the same harmful effects, and thus poses the same threat to the physical and mental health, safety and well-being of our children and of our society as pornographic material produced using actual children. However, because current Federal law pertaining to the sexual exploitation of children and the production, distribution, possession, sale, or transportation of child pornography is limited to material produced using actual children engaging in sexually explicit conduct, computer generated child pornography is presently outside the scope of Federal law.

The omnibus bill includes the Child Pornography Prevention Act of 1996. This act will close this computer generated loophole and give our law enforcement authorities the tools they need to protect our children by stemming the increasing flow of high-technology child pornography.

The Child Pornography Prevention Act, as introduced, as S. 1237, addresses the problem of ''high-tech kiddie porn'' by creating a comprehensive statutory definition of the term ''child pornography'' to include visual depictions of sexually explicit conduct: First, produced using children engaging in sexually explicit conduct; Second, computer generated depictions which are, or appear to be, of minors engaging in sexually explicit conduct; or Third, materials advertised, described, or otherwise presented as a visual depiction of a minor engaging in sexually explicit conduct.

The act establishes a new section in U.S. Code Title 18, §2252A, prohibiting the distribution, possession, receipt, reproduction, sale, or transportation of child pornography. The act contains congressional findings as to the harmful effects of child pornography and the threat to the physical and mental health, safety, and well-being of children and society posed by child pornography, both computer generated depictions and depictions produced using actual children. The act also increases the penalties for child sexual exploitation and child pornography offenses.

At the Judiciary Committee markup of S. 1237, Senator BIDEN expressed concern that the bill, as introduced, may not be upheld by the courts. Specifically, Senator BIDEN was concerned as to the constitutionality of the provision in the bill's definition section that classifies as child pornography a visual depiction which appears to be of a minor engaging in sexually explicit conduct, even if no actual child was involved in its production.

In *New York* v. *Ferber,* 458 U.S. 747 (1982), the Supreme Court, while upholding prohibitions on child pornography, not otherwise obscene, where the pornography included actual minors, noted that ''distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.''

Senator BIDEN, and some others, worried that, to the extent the bill reached both child pornography that is within Ferber's four corners, i.e., material produced utilizing actual minors, and visual depictions of those who merely appear to be minors—through the use of computer ''morphing,'' for example—it could be struck down. In light of this

concern, Senator BIDEN wanted to include in the bill a separate section expressly covering pornography involving identifiable minors, so that if the broader appears to be provision is struck down, coverage of identifiable minor child pornography will survive.

I am confident that the Child Pornography Prevention Act's prohibition on computer-generated visual depictions which appear to be of a child engaging in sexually explicit conduct would be found constitutional, a view shared by the Department of Justice and other legal experts in this field, and the definition of child pornography contained in this legislation would be upheld by the courts in its entirety.

I believe the Supreme Court, in light of technological advances since the Ferber decision and the record Congress has established with respect to the harmful effects of computer-generated material which appears to be of a child engaging in sexually explicit conduct, including the use of such material to seduce children for sexual abuse and exploitation, will find it constitutional.

At the same time, I agree that it would be reasonable to include in the act a fall-back provision specifically covering only identifiable minor material. Since this type of material involves a depiction of, and is therefore likely to result in harm to, a real child, i.e., the child being depicted, such a provision is indisputably constitutional under Ferber and would provide an enforceable weapon against at least some computer-generated child pornography in the event that the act's broader prohibition on computer-generated material which appears to be of a child engaging in sexually explicit conduct is overturned by the courts.

Despite concerns about the method proposed by Senator BIDEN to address the problem of identifiable minor pornographic material, I agreed at the markup to accept his amendment, with the understanding that we would work together to improve the way we are achieving his objective.

Senator BIDEN's amendment added to S. 1237 another new statutory section, as 18 U.S.C. §2252B, which is directed at one particular type of computer-created or generated images—visual depictions which have been created, adapted or modified to make it appear that an identifiable minor was engaged in sexually explicit conduct. The term identifiable minor was defined to mean a minor who is capable of being recognized as an actual person by, for example, his face or other distinguishing feature or physical characteristic, although a prosecutor would not be required to prove the minor's actual identity.

Section 2252B duplicated, with respect to identifiable minor material, the prohibitions and penalties established under §2252A for the distribution, possession, receipt, sale or transportation of material which would be classified as child pornography under this bill. The bill, as modified in the Judiciary Committee, however, did not expressly include identifiable minor material in the statutory definition of ''child pornography,'' although such material could be classified as child pornography under the definition's ''appears to be'' language.

I agreed with the goal of Senator BIDEN's amendment. Visual depictions of a minor engaging in sexually explicit conduct can haunt that person for his or her entire life. In addition, there is the threat that a child molester or pedophile could take pictures of a child he finds sexually desirable and then produce pornographic depictions featuring that child engaging in sexual conduct—depictions which he can use to stimulate his own sexual appetites, sell or distribute to others, or use in an effort to seduce that child or others into submitting to sexual exploitation.

The threat posed by, and the harm resulting from, visual depictions of identifiable minors which have been created or altered so as to make it appear that the minor is engaging in sexually explicit conduct is sufficiently distinct and serious to warrant inclusion in the act of language specifically addressing this type of material.

My concern regarding the Biden amendment was directed solely at the method used to achieve the goal of prohibiting pornographic material which uses the image or depiction of an identifiable minor as a clearly separate offense. It was, in my view, unnecessarily duplicative to enact two virtually identical statutory sections, 2252A and 2252B, to deal with computer created or generated child pornography, as the committee-passed bill with Senator BIDEN's amendment did.

Further, it was inconsistent and potentially very confusing specifically to address identifiable minor pornographic material in the context of this bill, to treat such material in the identical manner as material formally classified as child pornography under this bill, but not to include identifiable minor material in the bill's statutory definition of child pornography. It seemed to me that there is a far stronger case for the creation of one new section to deal with the new technology of child pornography, rather than two.

In addition, if we included in this legislation a provision dealing specifically with identifiable minor material, but failed to include such material in the bill's definition of child pornography, this fact could be seized upon by child pornographers and pedophiles to make the legal argument that identifiable minor material cannot be considered child pornography within the meaning of federal law. This could have an adverse impact on law enforcement efforts where, for example, an individual's involvement with or prior conviction for child pornography was relevant to an investigation or prosecution, or a factor in sentencing.

Following continued discussions, Senator BIDEN and I concluded that the most appropriate and effective method of dealing with identifiable minor material, and that most compatible with the framework for dealing with all forms of child pornography set out by the act, is to include in the proposed statutory definition of the term child pornography a subsection specifically covering such material. The Child Pornography Prevention Act contained in the omnibus bill is the Hatch/Biden substitute.

Under this bill, a visual depiction would be classified as child pornography if such visual depiction has been created, adapted or modified to appear that an identifiable minor is engaging in sexually explicit conduct. The term identifiable minor would be defined as a person who was a minor at the time the visual depiction was created, adapted, or modified, or whose image as a minor was used in creating, adapting, or modifying the visual depiction, and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature, but such term does not require proof of the minor's actual identity.

Modifying the definition of child pornography to include identifiable minor child pornographic material, eliminates any need to establish an additional section in title 18 pertaining specifically and exclusively to that particular type of material. Since identifiable minor material would be classified as child pornography, its distribution, possession, receipt, reproduction, sale or transportation would, like all other material so classified pursuant to the Act, be prohibited under the section 2252A created under this bill.

The act also resolves any concern as to the severability of the definition's identifiable minor provision in the event the definition's appears to be language were to be struck down.

S. 1237, as introduced, resolved the question of severability by the bill's severability clause, which explicitly states that if any provision of this act, which would include the legislation's definition of child pornography, is held to be unconstitutional, the remainder of the act shall not be affected. In order to set to rest any lingering concern, however, the Hatch/Biden substitute amended the act's severability clause to specifically state that if any provision of section of the definition of the term child pornography is held to be unconstitutional, any remaining provision or section of the definition shall not be affected.

We know that child pornography aggravates child sexual molestation. We must take steps to deal with this latest technological challenge to our laws protecting children. I believe that the Child Pornography Prevention Act shows that the intent of Congress is not to stand idle and thereby abet this pernicious activity. I urge all senators to support this act.

I ask unanimous consent a section-by-section analysis of the child pornography provision be printed in the RECORD.

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

CHILD PORNOGRAPHY PREVENTION ACT OF 1996

SECTION 1

This section sets forth the short title for the legislation, the ''Child Pornography Prevention Act of 1996.''

SECTION 2

This section sets forth a statement of Congressional findings with respect to child pornography and computer-generated depictions of, or which appear to be of, minors engaging in sexually explicit conduct. Child pornography is a form of sexual abuse and exploitation which can result in physical or psychological harm, or both, to children. Child pornography permanently records the victim's abuse, can cause continuing harm to the depicted individual for years to come, can be used to seduce minors into sexual activity, and is used by pedophiles and child sex abusers to stimulate and whet their own sexual appetites.

New photographic and computer imaging technologies are capable of producing computer-generated visual depictions of children engaging in sexually explicit conduct which are virtually indistinguishable to an unsuspecting viewer from unretouched photographs of actual minors engaging in such conduct. The effect of such child pornography on a child molester or pedophile using the material to whet his sexual appetites, or on a child shown such material as a means of seducing the child into sexual activity, is the same whether the material is photographic or computer-generated depictions of child sexual activity. Computer-generated child pornography results in many of the same types of harm, and poses the same danger to the well-being of children, as photographic child pornography, and provide a compelling governmental interest for prohibiting the production, distribution, possessing, sale or viewing of all forms of child pornography, including computer-generated depictions which are, or appear to be, of children engaging in sexually explicit conduct.

SECTION 3

This section amends the definition of the term ''visual depiction'' at 18 U.S.C. §2256(5) to include stored computer data.

This section further amends Title 18 of the United States Code by adding a new subsection, as 18 U.S.C. §2256(8), establishing a definition of the term ''child pornography,'' which is defined as ''any visual depiction, including any photograph, film, video, picture, drawing or computer or computer-generated image or picture, which is produced by electronic, mechanical or other means, of sexually explicit conduct, where: (1) its production involved the use of a minor engaging in sexually explicit conduct, or; (2) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (3) such visual depiction has been created, adapted or modified to appear that an ''identifiable minor'' is engaging in sexually explicit conduct; or (4) it is advertised, distributed, promoted or presented in such a manner as to convey the impression that it is a visual depiction of a minor engaging in sexually explicit conduct.''

The term ''identifiable minor'' would be identified in 18 U.S.C. §2256(9) to mean a minor who is capable of being recognized as an actual person by, for example, his face or other distinguishing feature or physical characteristic, although a prosecutor would not be required to prove the minor's actual identity.

SECTION 4

This section adds a new and distinct section to title 18 of the United States Code, as 18 U.S.C. §2252A. This section makes it unlawful for any person to knowingly mail, or ship, or transport child pornography in interstate or foreign commerce; to receive or distribute in interstate or foreign commerce child pornography, or material containing child pornography that has been mailed, or shipped, or transported in interstate or foreign commerce; or to reproduce child pornography for distribution through the mail. This section further makes it unlawful in the special maritime and territorial jurisdiction of the United States, or on any land or building owned or controlled by the United States, or in the Indian territory, to knowingly sell, or possess with intent to sell, any child pornography; or to possess any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography.

Section 2252A mirrors with respect to ''child pornography'' (as that term is defined under Section 3 of this bill) the prohibitions on the distribution, possession, receipt, reproduction, sale or transportation of material produced using an actual minor engaging in sexually explicit conduct contained in 18 U.S.C. §2252. The penalties in §§2252 and 2252A would be identical. Violation of paragraphs (1), (2), or (3) of §2252A(a) pertaining to the distribution, reproduction, receipt, sale or transportation of child pornography would be fined or imprisoned for not less than 15 years, or both; a repeat offender with a prior conviction under Chapter 109A or 110 of Title 18, or under any state child abuse law or law relating to the production, receipt or distribution of child pornography would be fined and imprisoned for not less than 5 years nor more than 30 years. Any person who violates paragraph (4) of §2252A(a) pertaining to the possession of child pornography would be fined or imprisoned for not more than 5 years, or both; a repeat offender with a prior conviction under Chapter 109A or 110 of Title 18, or under any state law relating to the possession of child pornography would be fined and imprisoned for not less than 2 years nor more than 10 years.

This section also establishes an affirmative defense for material depicting sexually explicit conduct where the material was produced using actual persons engaging in sexually explicit conduct and each such person was an adult at the time the material was produced, provided the material has not been pandered as child pornography.

SECTION 5

This section amends 18 U.S.C. §2251(d) to increase the penalties for sexual exploitation of children. An individual who violates §2251 would be fined or imprisoned for not less than 10 years nor more than 20 years, or both. A repeat offender with one prior conviction under Chapter 109A or 110 of Title 18, or under any state law relating to the sexual exploitation of children would be fined and imprisoned for not less than 15 years nor more than 30 years; an individual with two or more prior such convictions would be fined and imprisoned for not less than 30 years nor more than life. If an offense under §2251 resulted in the death of a person, the offender would be punished by death or imprisonment for any term of years or for life.

SECTION 6

This section amends 18 U.S.C. §2252(d) to increase the penalties for offenses involving material produced using a minor engaging in sexually explicit conduct. As amended, 18 U.S.C. §2252 will provide the identical penalties as 18 U.S.C. §2252A for offenses relating to the distribution, possession, receipt, reproduction, sale or transportation of prohibited child pornographic material.

SECTION 7

This section amends the Privacy Protection Act, 42 U.S.C. §2000aa, to extend the existing exemption for searches and seizures where the offense consists of the receipt, possession or communication of information pertaining to the national defense, classified information or restricted data, to include an exemption for searches and seizures where the offense involves the sexual exploitation of children, the sale or buying of children, or the production, possession, sale or distribution of child pornography under Title 18 of the United States Code, 2251, 2251A, 2252, or 2252A.

SECTION 8

This section, the Amber Hagerman Child Protection Act of 1996, amends 18 U.S.C. §§2241(c) and 2243(a) to provide for a mandatory sentence of life in prison for repeat offenders convicted of sexual abuse of a minor or aggravated sexual abuse of a minor.

SECTION 9

This section includes in the bill a severability clause providing that in the event any provision of the bill, specifically including any provision or section of the definition of the term child pornography, amendment made by the bill, or application of the bill to any person or circumstance is held to be unconstitutional, the remainder of the bill shall not be affected.

Mr. HATCH. Mr. President, in addition, we were able to include a measure I sponsored which reimburses Billy Dale and the other members of the White House Travel Office for the legal expenses they incurred in defending themselves against the Clinton administration's politically generated investigation into the office. I am pleased that the Congress will soon pass this measure.

I want to commend Senator GREGG of New Hampshire for his efforts in securing $1.4 billion in funding for our Federal antiterrorism effort. As well, this bill enhances the Federal commitment to combat illegal drugs by providing a significant increase in our drug control budget. I have to say that Senator GREGG has played a significant and pivotal war in the antiterrorism fights of this past Congress. He has done a terrific job and he deserves a lot of credit for the strides we have been able to make. I want to pay public acknowledgment to him for the good work he has done.

With regard to the significant increase in our drug control budget, for example, the bill provides $140 million in funding for five new high intensity trafficking area task forces, one of which the Judiciary Committee expects will serve several Rocky Mountain States.

An additional $197 million for the Drug Enforcement Administration, $46 million more than the President's request, has been provided as well as a significant increase in funding for the Office of National Drug Control Policy, the drug czar's office.

Further, the omnibus bill also contains legislation which I introduced to allow the Office of Independent Counsel to obtain an additional 6-month extension for travel expenses. Ken Starr needs this time extension, and I am

pleased the leadership saw fit to include this measure.

As well, the bill contains $11.4 million in funding for the first phase of construction of a long-needed annex for the Federal courthouse in Salt Lake City. This has been a priority of the judicial branch for some time and it is a highly warranted expenditure.

Moreover, I urged the negotiators to include a provision which clarifies the effective date of an important change to the rules of evidence which allows evidence of prior conduct to be admitted into evidence in Federal sex offense cases. This was a much needed clarification which Senator KYL and Congresswoman MOLINARI urged be adopted. I am very pleased it was included.

Finally, I express my opposition to the medical patents provision which was included in this bill. This measure was added notwithstanding the fact that there were no Senate hearings, and over the objections of myself, the chairman of the Finance Committee and the U.S. Trade Representative. It is an unprecedented change to our patent code and it is my intention to closely scrutinize the implementation of this new law.

Mr. President, before I close, I wanted also to make a few comments about a provision tucked inside this omnibus legislation which is of great concern to me. The provision would functionally eliminate the patenting of medical procedures.

I know that the authors of this provision are doing what they think is in the best interest of our citizens.

Nevertheless, I take exception to their amendment on medical process patents. I think this amendment is bad patent policy and questionable trade law.

A patent that is not enforceable is like no patent at all. That is simply what this issue boils down to.

And further, to exempt large multimillion-dollar organizations such as HMOs from the reach of patent code enforcement, flies in the face of the American tradition of encouraging individual initiative.

My final concern, a very serious concern, is about the Uruguay Round Agreements Act [URAA], the General Agreement on Tariffs and Trade [GATT] implementing legislation. Substantial questions have been raised about whether this provision is consistent with the Agreement on Trade-Related Intellectual Property [TRIPs]. In fact, it now appears that the amendment may not be consistent with TRIPs, a grave matter of international import.

I also have concerns about the process implications of inserting this language in the appropriations bill. As chairman of the Judiciary Committee, I try to take special care of all of the statutes under the Committee's primary jurisdiction such as the patent code.

As a member of the Finance Committee, I am also charged with the responsibility of upholding the laws that affect our Nation's international trade.

In this regard, after serious study of this issue, on September 27, Chairman ROTH and I wrote to our colleagues, Senators LOTT, DASCHLE, HATFIELD and BYRD, and indicated our concern about inserting this provision in the final legislation due to its unstudied impact.

Mr. President, I ask unanimous consent that a copy of that letter be printed in the RECORD at this point.

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

U.S. SENATE,
Washington, DC, September 27, 1996.

Hon. TRENT LOTT,
Majority Leader,
U.S. Senate, Washington, DC.

DEAR MR. LEADER: As Chairmen of the Senate Finance and Judiciary Committees, we strongly oppose inclusion of proposed section 616 in the omnibus appropriations bill. Inclusion of the provision, which concerns medical procedure patents, is inappropriate for several reasons.

Section 616 implicates U.S. obligations under an international trade agreement, specifically the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) administered by the World Trade Organization (WTO). As a result, this aspect of section 616 falls under the Senate Committee on Finance's jurisdiction on international trade agreements.

Moreover, the provision raises serious questions regarding U.S. compliance with its obligations under TRIPs. It could also establish a precedent which other countries might invoke to deny or weaken patent protection afforded to U.S. industry under the TRIPs. The Committee on Finance has not had an opportunity to hold a hearing on this matter to consider these broader ramifications for U.S. trade policy.

Section 616 is very controversial and constitutes a significant departure from principles of American patent law that have been on the books for over two hundred years. The amendment would preclude a certain class of patent-holders from enforcing their patent rights against infringement, a change that renders these patents virtually meaningless. That there is no consensus on this significant change in U.S. patent law is underscored by the fact that the Clinton Administration, the American Intellectual Property Law Association, the Intellectual Property Owners, and the Intellectual Property Law Section of the American Bar Association are on record as opposing the provisions contained in section 616.

As noted, section 616 has not been properly vetted through the Committees of jurisdiction. This is exactly the type of complex, technical provision that should not be hastily included in end-of-the-session omnibus legislation. As two Committee Chairmen with jurisdiction over this provision, we urge that you not include this provision in the bill.

Sincerely,

ORRIN G. HATCH,
Chairman, Committee on the Judiciary.
WILLIAM V. ROTH, JR.,
Chairman, Committee on Finance.

Mr. HATCH. In short, this letter said, that as chairmen of the committees with jurisdiction over key substantive issues raised by the medical process patent amendment, we did not think that this complex, technical legislation with such a substantive impact should be included at this time and in this vehicle given there has been no study by the relevant authorizing committees. I feel it would have been preferable to look carefully before we leap into this legislative abyss which has such far reaching precedential significance.

Subsequent to that letter, I received a letter from the General Counsel of the Office of the U.S. Trade Representative [USTR] stating, in sum, that the proposed policy may run afoul of the TRIP's agreement and also encourage our trading partners to follow this example to discriminate against other types of technologies.

I ask unanimous consent to place in the RECORD at this point a copy of this September 27, 1996 letter from the Office of the U.S. Trade Representative with respect to the application of articles 27, 28 and 30 of TRIP's and how our trading partners may use this unfortunate precedent. I wish to commend the staff at USTR for their work on this vexatious issue.

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

OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, DC, September 27, 1996.

Hon. ORRIN G. HATCH,
U.S. Senate, Senate Judiciary Committee, Washington, DC.

DEAR CHAIRMAN HATCH: You have requested the Office of the U.S. Trade Representative's views on whether the proposed limitation on patient infringements relating to a medical practitioners performance of a medical activity are consistent with U.S. obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). As I understand the proposal, it would generally deny the remedies available under title 35 for infringement of patents on diagnostic, therapeutic and surgical techniques.

USTR has serious concerns about the consistency of this provision with the TRIPs Agreement. Moreover, we believe that the proposal sets a damaging precedent that other TRIPs Members might apply to other technologies.

Although TRIPs Article 27:3 permits Members to exclude diagnostic, therapeutic and surgical techniques from patentability, we believe that if a member makes patents available for this field of technology, a Member must accord the full rights required under the TRIPs Agreement. Article 27:1 requires that patent rights be enjoyable without discrimination as to the field of technology. Those rights are specified in Article 28 and include the right to prevent third parties from the act of using a patented process. Moreover, TRIPs Articles 44 and 45 specify remedies, including injunctions and damages; that must be made available to address patent infringement.

While TRIPs Article 30 permits Members to provide limited exceptions to the exclusive rights conferred by a patent, such exceptions must not unreasonably conflict with the normal exploitation of the patent and must not unreasonably prejudice the legitimate interests of the patent holder. Precluding the grant of damages and injunctive relief for patent infringement under the circumstances set forth in the proposed legislation, goes far beyond other exceptions provided in title 35 and raises questions about

whether the exception is covered by Article 30.

We are particularly concerned because other TRIPs Members might follow this example and apply this type of exception to other technologies. We could be seen as endorsing this type of action.

Please contact me or my staff if we can provide further information or assistance.

Sincerely,

JENNIFER HILLMAN,
General Counsel.

Mr. HATCH. Now that this amendment will become law, I hope that those who interpret the bill as being consistent with TRIP's are correct. For if they are not, we will have unwittingly shown the way for our trading partners to absolve themselves of their responsibilities under TRIP's.

The stakes are high. Virtually every trade expert believes that worldwide adherence to TRIP means jobs for American workers, and lowered costs for American consumers as piracy of products is reduced and others pay their fair share of research and development costs.

Let me take a few moments to explain my concern about the impact that this provision will have on the patent code.

Section 101 of the patent code has been essentially unchanged since 1793. Section 101 broadly states: ''Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent * * *''

One leading Supreme Court case, Diamond versus Diehr, decided in 1981, quoted approvingly from the Judiciary Committee bill report on the 1952 recodification of the patent code, and emphasized that patentable subject matter under section 101 ''includes everything under the sun invented by man'' and noted that process patents have been available since 1793.

Judge Giles Rich of the Federal Circuit is one of America's greatest all-time experts in patent law. Circuit Judge Rich drafted the 1952 recodification in which the word ''process'' was substituted for ''art''—the first and only change in section 101 since 1793.

Incidentally, I am told that Thomas Jefferson apparently helped draft this statute and in his capacity of Secretary of State had a ministerial role in actually issuing some of our Nation's first letters patent.

In a leading decision in the area of biotechnology, In Re Chackrabarty, written in 1979 by Judge Rich—then of the predecessor Court of Customs and Patent Appeals —and affirmed by the Supreme Court in 1981, Judge Rich noted that a broad interpretation of what is patentable under section 101 has served our Nation well through out history:

> The present recital of categories in section 101. . . has been the same ever since the Patent Act of 1793, except for substituting ''process'' for ''art'' and defining it . . . to include art. For nearly 200 years since, those words have been liberally construed to include the most diverse range imaginable of unforseen developments in technology. The list is endless and beyond recitation. We merely suggest that the Founding Fathers and the Congresses of the past century could not have foreseen the technologies that have allowed man to walk on the moon, switch travel from railroads to heavier- than-air craft, fill the houses with color TV, cure normally fatal diseases with antibiotics produced by cultures of molds . . . and give to schoolchildren at small cost pocket calculators with which they can produce square roots on an . . . integrated circuit so small the circuits are not visible to the naked eye . . . We believe section 101 and its predecessor statutes were broadly drawn in general terms to broadly encompass unforeseeable future developments.

In contrast to this soaring rendition of why a policy of broad patentability is beneficial to society, comes now this cleverly drafted and hastily adopted medical procedure patent amendment.

Although the amendment goes through the back door of the enforcement provisions of section 287, when all is said and done the practical effect is to preclude an important class of endeavor—medical procedures—from protection under section 101.

Somehow I cannot help but think that Thomas Jefferson and Judge Rich and many others will be disappointed in this shrinking of the patent code.

Putting aside my major concerns about the trade ramifications, in terms of pure patent law, I think there should be a very heavy burden on those advocating change of a law that appears to be working well and has worked well for a long time.

In my view, this burden has not been met.

What is broken? Can anyone show me an actual example of health care negatively affected due to the existence of a procedure patent?

How can we be sure that research on tomorrow's medical procedures will continue apace absent patent protection?

Frankly, I find it odd that in the case that precipitated this alleged ''crisis'' that compels adoption of this particular amendment before there has been even one hearing—the Pallin ''stitchless'' cataract surgery process, the patent was not upheld by the courts.

Some argue that such process patents will drive up health care costs. But in the Pallin case the requested $4 per operation fee was much less than the $17 per stitch charge, so money was saved.

Where is the crisis that justifies inviting considerable mischief by our trading partners in dragging their feet in implementing TRIP's?

If we have unwittingly misinterpreted TRIP's, we will all be asking down the road, where was the Finance Committee and the Ways and Means Committee when this happened?

Before we set this precedent by adopting the curious rule that you-can-have-a-patent-but-you-just-cannot-enforce-it, would it not have been better for the Judiciary Committee and full Senate to study and carefully debate the merits of this proposal?

While this rule may be good in the short run for physician organizations, the health care products industry and large organizations like HMO's and hospitals, can we say for certain that categorically taking away the incentives to patent medical procedures is in the interests of the American public?

One allegation that has been stressed repeatedly by the authors of this amendment is that ''pure'' process patents cost very little to develop, and thus, patent protections for such processes should not lead to substantial royalties. What this somewhat simplistic argument fails to consider are cases in which there has been substantial R&D for a process, at a cost to the inventor. For now, under the language we will approve today, any incentive for inventors to patent those discoveries will be removed, and very possibly, the incentive for research and development as well. Medical research, and medical progress, can only suffer.

Over the course of the last few days, when it became clear that the negotiators for the omnibus bill might include this medical process patent provision in the final compromise, I sent three dear colleague letters in opposition to the provision. I regret that my colleagues were either unaware, or unpersuaded by, my arguments.

Mr. President, I ask unanimous consent that those letters be printed in the RECORD at this point.

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

September 26, 1996.

DEAR COLLEAGUE: H.L. Mencken once said, ''There is always an easy solution to every human problem—neat, plausible, and wrong.'' I am afraid that this is the case with the Ganske/Frist amendment on medical procedure patents.

As Chairman of the Committee with substantive jurisdiction over the patent code, I urge your opposition to inclusion in the omnibus appropriations bill of the Ganske/Frist amendment, a provision that would effectively preclude the enforcement of medical process patents. With all due respect to my colleagues Congressman Ganske and Senator Frist, this language, either as passed by the House or in a more recent form, raises significant procedural and substantive questions, and should not be adopted without a full review by this body.

PROCEDURAL CONCERNS

Authorizing Language on Appropriations Bill: The Ganske/Frist amendment circumvents the normal Committee process by misusing the appropriations mechanism to amend a highly technical and very complex area of substantive patent law. This is precisely the type of non-germane amendment that Senators Hatfield and Byrd and others have admonished the Senate not to incorporate within this type of omnibus appropriations vehicle.

Not Reviewed by Judiciary Committee: The language of the latest Ganske/Frist compromise has never been the subject of a hearing or mark-up by any Committee of Congress. The Senate Judiciary Committee and the full Senate should have the opportunity to carefully consider and meaningfully debate this issue before final action is taken on this provision.

The original Ganske proposal, which would have excluded surgical and medical procedures from patentability, was the subject of

a 1995 hearing of the House Judiciary Committee, Subcommittee on Courts and Intellectual Property. The bill, H.R. 1127, was opposed by the Biotechnology industry Organization, the Section of Intellectual Property Law of the American Bar Association, and the American Intellectual Property Law Association.

An amendment to bar the Patent and Trademark Office from spending its funds to issue such patents was adopted on the Commerce-State-Justice appropriations bill in the House on July 24, 1996. Joining those opposed to this amendment were the Intellectual Property Owners, the Pharmaceutical Research and Manufacturers of America, and Chairman Moorhead and Ranking Member Schroeder of the Subcommittee that conducted the earlier hearing.

SUBSTANTIVE CONCERNS

Administration Opposition: The Commissioner of Patents and Trademarks, Bruce Lehman, testified before the Senate Judiciary Committee on September 18, 1996, and stated that the Administration opposes both the Ganske Amendment and the latest Ganske/Frist compromise. Commissioner Lehman noted that the area of medical technology is particularly patent-dependent and expressed his concern that we not overreact in a fashion that jeopardizes ''the goose that lays the golden egg''.

Impact on Medical Research: The supporters of the Ganske/FRIST compromise can provide no assurance that enactment of this legislation would not impede timely future development of critical ''pure'' medical procedures. As Commissioner Lehman has testified, patents are often useful in attracting investment capital. It is impossible to state categorically today, as the Ganske/Frist legislation seems to presume, that tomorrow's advances in ''pure'' medical procedures will take place as expeditiously as possible absent patent protection. As Commissioner Lehman told the Judiciary Committee: ''It would be really quite tragic if we were to find that a very large loophole were to be opened in the patent system that would cause investment in some of the most important technology—not just from an economic point of view but from a life-saving point of view, to cause that investment to dry up.''

Biomedical researchers, physicians, and other health care professionals are to be saluted for their rich tradition of public disclosure and free exchange of ideas. That this long-standing iterative educational process often acts to preclude compliance with the strict legal requirements of the patent system does necessarily lead to the conclusion that all medical processes should not be patentable. In no other field would one suggest that the incentives of the patent system be eliminated in the hope that technical progress would proceed unabated.

Patent Protection Available to All: For these reasons, the Administration is joined in opposing this legislation by the Section of Intellectual Property Law of the American Bar Association which believes the proposals:

'' . . . violate a fundamental principle of our law under which patent protection is available without discrimination as to field of invention or technology. The Frist/Coalition approach is doubly discriminatory in that it would achieve this result by discriminatory treatment based on the identity or profession of the infringer. . . The Section of Intellectual Property Law believes that it would be both unfair and counterproductive to single out one area of creativity—the creation of new and improved medical procedures—and deny rewards to those creators while providing them to all others.''

The Case for Changing the Law Has Not Been Made: Section 101 of the patent code—which broadly defines the subject matter eligible for patenting—has been essentially unchanged for over 200 years. The Ganske/Frist initiative reverses this long history of statutory and case law and, without adequate justification, precludes the patenting of an extremely important field of endeavor—medical processes. The patent code should not be changed on the basis of anecdotal evidence.

It is particularly perplexing that in the case that precipitated the current controversy, the Pallin suture-less cataract operation, the system worked, and the patent has not been enforced by the courts.

Moreover, to the extent that the Ganske/Frist compromise is designed to reduce litigation costs, it is difficult to see how it accomplishes this goal. Where a medical process involves any type of instrument, a motion for summary judgment could likely involve contested issues of fact that would subject physicians to the expenses of litigation, even where they would ultimately not be subject to remedies.

A Right Without a Remedy: The latest Ganske/Frist compromise provides the right to patent medical procedure without a remedy against the most likely class of infringers (medical practitioners). This violates one of the most fundamental benefits of the United States patent system—the right to exclusive use. Severely limiting the remedies available under section 287 of the patent code is tantamount to amending what is patentable under the 200 year old language of section 101. A patent without a meaningful remedy against infringement is like no patent at all.

Individual Inventors vs. Multi-Million Dollar Corporations: By extending protection to organizations that employ physicians such as health maintenance organizations, the Ganske/Frist legislation raises equity questions concerning the proper balancing of rights of individual inventors versus large corporations. We must think carefully before we take away the rights of individual inventors by not allowing enforcement against patent infringement by multi-million dollar corporations.

Trade Implications: The House-passed Ganske amendment to limit the authority to expend funds to issue medical procedure patents undercuts the hard fought gains of the GATT Treaty TRIPS provisions (Trade-Related Intellectual Property Rights). The House language invites, however unintentionally, our trading partners to adopt intellectual property protections that comply with TRIPS but, at the same time, functionally nullifies these apparent gains by simply not appropriating administrative funds. If this technique were used by our foreign trading partners not to enforce American-owned patents on, for example, pharmaceuticals or automobile parts, Congress and the public would demand action.

Not Reviewed by Finance Committee: This latest Ganske/Frist compromise raises novel, complicated, and sensitive issues of far-ranging precedential significance relating to Articles 27, 28, and 30 of TRIPS. These issues need to be thoroughly examined and merit careful consideration and debate by the Judiciary Committee, the Finance Committee, and the full Senate. There is no consensus on these issues. We have not had an opportunity to hear from the United States Trade Representative or the Secretary of Commerce on these matters. For example, the American Intellectual Property Law Association has noted that this amendment:

''. . . would be very deleterious to the patent law and raises serious questions regarding the compliance by the United States with its obligations under TRIPS. This amendment . . . should be rejected. The proponents have failed to demonstrate a need for this amendment. The amendment would proclaim an open season for exceptions to patent protection to address other alleged problems. Moreover, it would clearly be inimical to the interests of American industry for the United States to take the lead in weakening the patent protection required under Articles 28 and 30 of the TRIPS.''

OPPOSE THE GANSKE/FRIST AMENDMENT

Oppose the Ganske/Frist Amendment: In sum, the laws that allow the patenting of the broadest possible range of subject matter coupled with the three basic legal requirements of novelty, utility, and nonobviousness have proven effective over the long run. Our current statutory framework has met the Constitutional charge ''to promote science and useful arts'' and has helped make the United States the world's leader in medical technology. We should not change these laws absent a demonstration of a compelling need, and we should not use the omnibus appropriations vehicle for such a controversial change in substantive patent law.

Sincerely,

ORRIN G. HATCH,
Chairman.

SEPTEMBER 27, 1996.

SUBSTANTIAL OPPOSITION VOICED TO GANSKE/FRIST AMENDMENT

DEAR COLLEAGUE: In view of the upcoming debate on the omnibus appropriations bill, I thought you would want to be aware of several compelling arguments raised in opposition to proposed language barring medical procedure patents or their enforcement. I continue to oppose this proposal on both procedural and substantive grounds. Here's what some top intellectual property authorities are saying:

The Clinton Administration: The Clinton Administration opposes the Ganske/Frist amendment both as it passed the House and in its more recent version. In a July 17, 1996 letter to the House Appropriations Subcommittee, the Commerce Department stated,

''We continue to oppose enactment of H.R. 1127 (the Ganske bill) and any amendment that contains the substance of it. We still believe that it is premature to adopt such drastic steps when we have the opportunity to adopt administrative measures to mitigate the problem.''

Moreover, in September 18, 1996 testimony before the Senate Judiciary Committee, PTO Commissioner Bruce Lehman expressed opposition to the latest compromise and the unprecedented loophole it would establish. PTO Commissioner Lehman said,

''I, personally, the Office, and the Administration are against the Ganske amendment, and we would be against a variation of that, too, and let me tell you why.''

Commissioner Lehman's major points in opposition were:

This could be a case of overreaction to a specific circumstance. Even though that situation may be controversial, it is important not to kill the ''goose that lays the golden egg,'' that is, the incentive for medical research;

There is no requirement that patent applications be filed. Historically, surgical procedures are not patented. When they are, it is usually because it is required as part of a business plan to attract the necessary capital for research and development;

We would not have the wonderful therapies we have right now in this country—we wouldn't have the medical and pharmaceutical industry that leads the world, that provides a level of health care second to none, if it weren't for the patent system. It