

(4) A description of the manner in which the eligible entity intends to continue providing the training and assistance to be funded by the grant after the end of the grant period, including any partnerships or arrangements established for that purpose.

(5) A description of how the eligible entity will work with local workforce investment boards to ensure that training and assistance to be funded with the grant will further local workforce goals, including the creation of educational opportunities for individuals who are from economically disadvantaged backgrounds or are displaced workers.

(6) Such other information as the Administration may require.

#### SEC. 5. USE OF FUNDS.

(a) IN GENERAL.—An eligible entity receiving a grant under section 3 shall use the grant amount for purposes relating to the recruitment, training and assistance, and job placement of individuals, including individuals who have completed a court reporting training program, as realtime writers, including—

- (1) recruitment;
- (2) subject to subsection (b), the provision of scholarships;
- (3) distance learning;
- (4) education and training;
- (5) job placement assistance;
- (6) encouragement of individuals with disabilities to pursue a career in realtime writing; and
- (7) the employment and payment of personnel for such purposes.

(b) SCHOLARSHIPS.—

(1) AMOUNT.—The amount of a scholarship under subsection (a)(2) shall be based on the amount of need of the recipient of the scholarship for financial assistance, as determined in accordance with part F of title IV of the Higher Education Act of 1965 (20 U.S.C. 1087kk).

(2) AGREEMENT.—Each recipient of a scholarship under subsection (a)(2) shall enter into an agreement with the National Telecommunications and Information Administration to provide realtime writing services for a period of time (as determined by the Administration) that is appropriate (as so determined) for the amount of the scholarship received.

(3) COURSEWORK AND EMPLOYMENT.—The Administration shall establish requirements for coursework and employment for recipients of scholarships under subsection (a)(2), including requirements for repayment of scholarship amounts in the event of failure to meet such requirements for coursework and employment. Requirements for repayment of scholarship amounts shall take into account the effect of economic conditions on the capacity of scholarship recipients to find work as realtime writers.

(c) ADMINISTRATIVE COSTS.—The recipient of a grant under section 3 may not use more than 5 percent of the grant amount to pay administrative costs associated with activities funded by the grant.

(d) SUPPLEMENT NOT SUPPLANT.—Grants amounts under this Act shall supplement and not supplant other Federal or non-Federal funds of the grant recipient for purposes of promoting the training and placement of individuals as realtime writers

#### SEC. 6. REPORTS.

(a) ANNUAL REPORTS.—Each eligible entity receiving a grant under section 3 shall submit to the National Telecommunications and Information Administration, at the end of each year of the grant period, a report on the activities of such entity with respect to the use of grant amounts during such year.

(b) REPORT INFORMATION.—

(1) IN GENERAL.—Each report of an entity for a year under subsection (a) shall include

a description of the use of grant amounts by the entity during such year, including an assessment by the entity of the effectiveness of activities carried out using such funds in increasing the number of realtime writers. The assessment shall utilize the performance measures submitted by the entity in the application for the grant under section 4(b).

(2) FINAL REPORT.—The final report of an entity on a grant under subsection (a) shall include a description of the best practices identified by the entity as a result of the grant for increasing the number of individuals who are trained, employed, and retained in employment as realtime writers.

#### SEC. 7. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated to carry out this Act, amounts as follows:

(1) \$15,000,000 for each of fiscal years 2003, 2004, and 2005.

(2) Such sums as may be necessary for each of fiscal years 2006 and 2007.

Mr. GRASSLEY. Mr. President, I am pleased to join my colleague from Iowa, Senator HARKIN, in introducing legislation to provide grants for the training of realtime reporters and captioners. Many Senators may not be aware of a looming problem related to a shortage of what are called "realtime writers." Realtime writers are essentially trained court reporters, much like the official reporters of debates here in the Senate, who use a combination of additional specialized training and technology to transform words into text as they are spoken. This can allow deaf and hard of hearing individuals to understand live television as well as follow proceedings at a civic function or in a classroom.

In the Telecommunications Act of 1996, Congress mandated that most television programming be fully captioned by 2006 in order to allow the 28 million Americans who are deaf or hard of hearing to have access to the same news and information that many of us take for granted. I know that most of us were glued to the television on and after September 11 in order to absorb every scrap of information we could about the events that took place. In order for those who are deaf and hard of hearing to receive the same information as it is broadcast on live television, groups of captioners must work around the clock transcribing words as they are spoken.

As of this year, 2002, the required number of hours of captioned programming that must be provided by video-programming distributors increased from 450 to 900. In 2004, this will increase to 1350 hours. By 2006, 100 percent of new nonexempt programming must be provided with captions. At the same time, student enrollment in programs that provide essential training in captioning has decreased significantly, with programs closing on many campuses. In order to meet the growing demand for realtime writers caused by this mandate, we must do everything we can to increase the number of individuals receiving this very specialized training.

The legislation that Senator HARKIN and I are introducing, along with a number of other senators, will help ad-

dress the shortage of individuals trained as realtime writers by providing grants to up to 20 court reporting programs to promote the training and placement of individuals as realtime writers. Specifically, court reporting programs could use these grants for items like recruitment of students for realtime writing programs, need-based scholarships, distance learning, education and training, job placement assistance, the encouragement of individuals with disabilities to pursue a career as a realtime writer, and personnel costs.

The expansion of distance learning opportunities in particular will have an enormous impact by making training accessible to individuals who want to become realtime writers but do not live in metropolitan areas. Also, need based scholarships offered using these grant funds would be subject to an agreement with the National Telecommunications and Information Administration to provide realtime writing services for a period of time.

Unless we act now, the shortage of individuals trained as realtime writers will only grow more severe. This would leave the 28 million deaf or hard of hearing Americans without the ability to fully participate in many of the professional, educational, and civic activities that other Americans enjoy. I would therefore urge my fellow Senators to support the swift passage of this legislation.

#### STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS—MAY 15, 2002

By Mr. HATCH (for himself, Mr. LEAHY, Mr. SESSIONS, Mr. HUTCHINSON, Mr. BROWNBACK, Mr. EDWARDS, and Mr. DEWINE):

S. 2520. A bill to amend title 18, United States Code, with respect to the sexual exploitation of children; to the Committee on the Judiciary.

Mr. HATCH. Mr. President, every decent American joins with me in seeking to rid our country of child pornography. Unfortunately, the growth of technology and the rise of the internet have flooded our nation with it. Child pornography is inherently repulsive, but even more damaging are the purposes for which it routinely is used. Perverts and pedophiles not only use child pornography to whet their sick desires, but also to lure our defenseless children into unspeakable acts of sexual exploitation.

There is no place for child pornography even in our free society. Mr. President, I have long championed legislation designed to punish those who produce, peddle or possess this reprehensible material. As I stated in introducing the Child Pornography Prevention Act of 1996 ("CPPA"), we have both the constitutional right and moral obligation to protect our children from the horrors of child pornography.

I remain fully committed to these principles today. We were disappointed some weeks ago, when a majority of the Supreme Court struck down some key provisions of the CPPA under the first amendment. While I firmly respect the Supreme Court's role in interpreting the Constitution, the decision left some gaping holes in our nation's ability to prosecute child pornography effectively. We must now act quickly to repair our child pornography laws to provide for effective law enforcement in a manner that accords with the Court's ruling.

Mr. President, the legislation I introduce today strikes a necessary balance between the first amendment and our nation's critically important interest in protecting children. This Act does many things to aid the prosecution of child pornography, and I highlight some of its most significant provisions here.

First, the act plugs the loophole that exists today where child pornographers can escape prosecution by claiming that their sexually explicit material did not actually involve real children. Technology has advanced so far that even experts often cannot say with absolute certainty that an image is real or a "virtual" computer creation. If our criminal laws fail to take account of such advances in technology, they become completely worthless. For this reason, the act permits a prosecution to proceed when the child pornography includes persons who appear virtually indistinguishable from actual minors. And even when this occurs, the accused is afforded a complete affirmative defense by showing that the child pornography did not involve a minor.

Second, the act prohibits the pandering or solicitation of anything represented to be obscene child pornography. The Supreme Court has ruled that this type of conduct does not constitute protected speech. Congress, moreover, should severely punish those who would try to profit or satisfy their depraved desires by dealing in such filth.

Third, the act prohibits any depictions of minors, or apparent minors, in actual—not simulated—acts of bestiality, sadistic or masochistic abuse, or sexual intercourse, when such depictions lack literary, artistic, political or scientific value. This type of hardcore sexually explicit material merits our highest form of disdain and disgust and is something that our society ought to try hard to eradicate. Nor does the first amendment bar us from banning the depictions of children actually engaging in the most explicit and disturbing forms of sexual activity.

Fourth, the act beefs up existing record keeping requirements for those who chose to produce sexually explicit materials. These record keeping requirements are unobjectionable since they do not ban anything. Rather, the act simply requires such producers to keep records confirming that no actual minors were involved in the making of

the sexually explicit materials. In light of the difficulty experts face in determining an actor's true age and identity just by viewing the material itself, increasing the criminal penalties for failing to maintain these records are vital to ensuring that only adults appear in such productions.

Finally, the act creates a new civil action for those aggrieved by the depraved acts of those who violate our child pornography laws. Mr. President, this is one area of the law where society as a whole can benefit from more vigorous enforcement, both on the criminal and civil fronts.

Mr. President, we will not need to wait long before those who deal in child pornography will take advantage of the Supreme Court's decision. Congress can and should act, promptly and decisively, to close any gaps in current law to protect our children from the immeasurable harms posed by child pornography.

I strongly urge my colleagues to join with me in promptly passing this important legislation.

I ask unanimous consent that the text of the bill be printed in the RECORD.

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

S. 2520

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

#### SECTION 1. SHORT TITLE.

This Act may be cited as the "Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2002".

#### SEC. 2. CERTAIN ACTIVITIES RELATING TO MATERIAL CONSTITUTING OR CONTAINING CHILD PORNOGRAPHY.

Section 2252A of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) by striking paragraph (3) and inserting the following:

“(3) knowingly—

“(A) reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer; or

“(B) advertises, promotes, presents, describes, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material in a manner that conveys the impression that the material is, or contains, an obscene visual depiction of a minor engaging in sexually explicit conduct;”;

(B) in paragraph (4), by striking “or” at the end;

(C) in paragraph (5), by striking the period at the end and inserting “; or”; and

(D) by adding at the end the following:

“(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

“(A) that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer;

“(B) that was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or

“(C) which distribution, offer, sending, or provision is accomplished using the mails or by transmitting or causing to be transmitted any wire communication in interstate or foreign commerce, including by computer, for purposes of inducing or persuading such minor to participate in any activity that is illegal.”;

(2) in subsection (b)(1), by striking “(1), (2), (3), or (4)” and inserting “(1), (2), (3), (4), or (6)”; and

(3) by striking subsection (c) and inserting the following:

“(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3), (4), or (5) of subsection (a) that—

“(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

“(B) each such person was an adult at the time the material was produced; or

“(2) the alleged child pornography was not produced using any actual minor or minors. No affirmative defense shall be available in any prosecution that involves obscene child pornography or child pornography as described in section 2256(8)(D). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting a defense to a charge of violating paragraph (1), (2), (3), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.”.

#### SEC. 3. ADMISSIBILITY OF EVIDENCE.

Section 2252A of title 18, United States Code, is amended by adding at the end the following:

“(e) ADMISSIBILITY OF EVIDENCE.—In any prosecution under this chapter, the name, address, or other identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.”.

#### SEC. 4. DEFINITIONS.

Section 2256 of title 18, United States Code, is amended—

(1) in paragraph (1), by inserting before the semicolon the following: “and shall not be construed to require proof of the actual identity of the person”;;

(2) in paragraph (8)—

(A) in subparagraph (B), by inserting “is obscene and” before “is”;;

(B) in subparagraph (C), by striking “or” at the end; and

(C) by striking subparagraph (D) and inserting the following:

“(D) such visual depiction—

“(i) is of a minor, or an individual who appears to be a minor, actually engaging in bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and

“(ii) lacks serious literary, artistic, political, or scientific value; or

“(E) the production of such visual depiction involves the use of an identifiable minor engaging in sexually explicit conduct; and”; and

(3) in paragraph (9)(A)(ii)—

(A) by striking “(ii) who is” and inserting the following:

“(ii)(I) who is”; and

(B) by striking “and” at the end and inserting the following: “or

“(II) who is virtually indistinguishable from an actual minor; and”.

#### SEC. 5. RECORDKEEPING REQUIREMENTS.

Section 2257 of title 18, United States Code, is amended—

(1) in subsection (d)(2), by striking “of this section” and inserting “of this chapter or chapter 71.”;

(2) in subsection (h)(3), by inserting “, computer generated image or picture,” after “video tape”; and

(3) in subsection (i)—

(A) by striking “not more than 2 years” and inserting “not more than 5 years”; and

(B) by striking “5 years” and inserting “10 years”.

#### SEC. 6. FEDERAL VICTIMS’ PROTECTIONS AND RIGHTS.

Section 227(f)(1)(D) of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032(f)(1)(D)) is amended to read as follows:

“(D) where the report discloses a violation of State criminal law to an appropriate official of that State or subdivision of that State for the purpose of enforcing such State law.”.

#### SEC. 7. CONTENTS DISCLOSURE OF STORED COMMUNICATIONS.

Section 2702 of title 18, United States Code, is amended—

(1) in subsection (b)—

(A) in paragraph (5), by striking “or” at the end;

(B) in paragraph (6)—

(i) in subparagraph (A)(ii), by inserting “or” at the end;

(ii) by striking subparagraph (B); and

(iii) by redesignating subparagraph (C) as subparagraph (B);

(C) by redesignating paragraph (6) as paragraph (7); and

(D) by inserting after paragraph (5) the following:

“(6) to the National Center for Missing and Exploited Children, in connection with a report submitted under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or”; and

(2) in subsection (c)—

(A) in paragraph (4), by striking “or” at the end;

(B) by redesignating paragraph (5) as paragraph (6); and

(C) by inserting after paragraph (4) the following:

“(5) to the National Center for Missing and Exploited Children, in connection with a report submitted under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or”.

#### SEC. 8. EXTRATERRITORIAL PRODUCTION OF CHILD PORNOGRAPHY FOR DISTRIBUTION IN THE UNITED STATES.

Section 2251 of title 18, United States Code, is amended—

(1) by striking “subsection (d)” each place that term appears and inserting “subsection (e)”;

(2) by redesignating subsections (c) and (d) as subsections (d) and (e), respectively; and

(3) by inserting after subsection (b) the following:

“(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexu-

ally explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

“(2) The circumstance referred to in paragraph (1) is that—

“(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by computer or mail; or

“(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by computer or mail.”.

#### SEC. 9. CIVIL REMEDIES.

Section 2252A of title 18, United States Code, as amended by this Act, is amended by adding at the end the following:

“(f) CIVIL REMEDIES.—

“(1) IN GENERAL.—Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) may commence a civil action for the relief set forth in paragraph (2).

“(2) RELIEF.—In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

“(A) temporary, preliminary, or permanent injunctive relief;

“(B) compensatory and punitive damages; and

“(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.”.

#### SEC. 10. ENHANCED PENALTIES FOR RECIDIVISTS.

Sections 2251(d), 2252(b), and 2252A(b) of title 18, United States Code, are amended by inserting “chapter 71,” before “chapter 109A,” each place it appears.

#### SEC. 11. SENTENCING ENHANCEMENTS FOR INTERSTATE TRAVEL TO ENGAGE IN SEXUAL ACT WITH A JUVENILE.

Pursuant to its authority under section 994(p) of title 18, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that guideline penalties are adequate in cases that involve interstate travel with the intent to engage in a sexual act with a juvenile in violation of section 2423 of title 18, United States Code, to deter and punish such conduct.

#### SEC. 12. MISCELLANEOUS PROVISIONS.

(a) APPOINTMENT OF TRIAL ATTORNEYS.—Not later than 6 months after the date of enactment of this Act, the Attorney General shall appoint 25 additional trial attorneys to the Child Exploitation and Obscenity Section of the Criminal Division of the Department of Justice or to appropriate U.S. Attorney's Offices, and those trial attorneys shall have as their primary focus, the investigation and prosecution of Federal child pornography laws.

(b) REPORT TO CONGRESSIONAL COMMITTEES.—

(1) IN GENERAL.—Not later than 9 months after the date of enactment of this Act, and every 2 years thereafter, the Attorney General shall report to the Chairpersons and Ranking Members of the Committees on the Judiciary of the Senate and the House of Representatives on the Federal enforcement actions under chapter 110 of title 18, United States Code.

(2) CONTENTS.—The report required under paragraph (1) shall include—

(A) an evaluation of the prosecutions brought under chapter 110 of title 18, United States Code;

(B) an outcome-based measurement of performance; and

(C) an analysis of the technology being used by the child pornography industry.

(c) SENTENCING GUIDELINES.—Pursuant to its authority under section 994(p) of title 18, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that the guidelines are adequate to deter and punish conduct that involves a violation of paragraph (3)(B) or (6) of section 2252A(a) of title 18, United States Code, as created by this Act. With respect to the guidelines for section 2252A(a)(3)(B), the Commission shall consider the relative culpability of promoting, presenting, describing, or distributing material in violation of that section as compared with solicitation of such material.

#### SEC. 13. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

Mr. LEAHY. Mr. President, today I join Senator HATCH in introducing the PROTECT Act of 2002. This bill is intended to protect our Nation's children from exploitation and protect our constitution at the same time.

In the Free Speech Coalition case, seven Justices of the Supreme Court ruled that the definition of child pornography in the CPPA was overbroad and covered such non-obscene movies as Traffic, Romeo and Juliet, and American Beauty. No one intended that.

It also ruled that Congress could not broadly ban all “virtual child pornography,” which may make prosecutors' jobs very tough in the internet age.

The Court in Free Speech faced a difficult task—as do we here—applying the time honored principles of the first amendment to the computer age. I join Senator HATCH today in introducing a bill carefully drawn to stick. As a former prosecutor, I am more interested in making real cases that protect children than making new first amendment law. There are many people who do not agree with the Supreme Court's decision in Free Speech, but that will not erase it from the books. Everyone wants to protect our children, but we need to do it with cases and laws that don't get tossed out in court. It is tempting to rush to come up with a “quick fix,” but we owe our children more than just a press conference on this matter. We owe them careful and thoughtful action.

My initial review of the administration's proposal, now working its way through the House, gives me serious concern. Already I have a letter from six constitutional experts—prominent practitioners and law professors alike—that expresses “grave concern” about the Department of Justice's proposal from a first amendment perspective. I will put that statement in the RECORD at the conclusion of my remarks.

Indeed, the entire approach that the administration has taken in this matter is to reach as far as possible, not to hedge its bets, and simply to throw

down the gauntlet on the steps of the Supreme Court, daring it to strike down the law yet again. That will help no one. In contrast, the bipartisan bill we introduce today is not an attempt to “get around” the Supreme Court’s decision, or to ignore that decision.

Instead, Senator HATCH and I have together to craft a bill that attempts to work within the limits set by the Supreme Court. At the same time, the bill contains tough enforcement tools which are not in the administration’s bill. For instance, it creates a new crime aimed at people who actually use child pornography, whether real or virtual, to entice children to do illegal acts. This crime carries a tough 15-year maximum prison sentence for a first offense. Second, the bill requires the U.S. Sentencing Commission to address a disturbing disparity in the current Sentencing Guidelines.

The current sentences for a person who actually travels across state lines to have sex with a child are not as high as for producing child pornography. The Commission needs to correct this disparity immediately, so that prosecutors are able to deal just as effectively with dangerous sexual predators off the street as with child pornographers.

Third, this bill has several provisions designed to protect the children so that they are not victimized again in the criminal process. This bill provides for the first time ever a “shield law” that prohibits the name or other identifying information of the child victim from being admitted at any child pornography trial.

Next, this bill also provides a new private right of action for the victims of child pornography. This provision has teeth, including punitive damages that will put those who produce child pornography out of business. I commend Senator HATCH for including this provision. None of these new prosecutorial tools presents first amendment issues. They are not going to result in Supreme Court arguments—all they will do is get bad guys in jail and protect children. Other parts of the bill are closer to the first amendment line, and I expect that the debate on the constitutional issues raised by this bill will be vigorous. That being said, this bill reflects a good faith attempt to protect children to the greatest extent possible while not crossing that line.

I look forward to the debate on these issues, and I do not pretend that I or any of us here have a monopoly on wisdom when it comes to such important constitutional questions. For all of these reasons, I am pleased to introduce this legislation with Senator HATCH.

To reiterate, this bill is intended to protect our nation’s children from exploitation by those who produce and distribute child pornography, within the parameters of the first amendment. Just last month, the Supreme Court in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (April 16, 2002) (“*Free Speech*”), struck down portions of the 1996 Child

Pornography Protection Act (“CPPA”) as being in violation of the first amendment. I voted for that act when it became law in 1996, and I join Senator HATCH today in introducing a bill carefully drawn to square with the Supreme Court’s decision and protect our children with a law that when used by prosecutors, will produce convictions that will stick. While that task is not an easy one, Senator HATCH and I are working together to do all we can to protect our children and protect our Constitution at the same time.

In *Free Speech*, the Supreme Court voided two provisions of the CPPA as being overbroad and imposing substantial restrictions on protected speech. The specific provisions struck down in that case targeted No. 1 virtual child pornography—that is, child porn made not using real children but with computer images or adults and No. 2 material which is “pandered” as child pornography (though the material may not in fact be as advertised). In a complex and divided opinion, seven Justices ruled that some part of the CPPA was unconstitutional as currently drafted. Only Chief Justice Rehnquist and Justice Scalia, in dissent, would have upheld the CPPA in its entirety and only by reading the statute more narrowly than it appears on its face.

The Court in *Free Speech* faced a difficult task—applying the time honored principles of the first amendment to the computer age. The Internet provides many opportunities for doing good, but also for doing harm. Over the past few years, the Congress has paid a lot of attention to how the Internet is being used to purvey child pornography manufactured through the sexual abuse of children, and has not always been successful in crafting legislation to address this problem that passes constitutional muster. Past efforts, such as the Communications Decency Act, the CPPA and the Child Online Protection Act have all had difficulty overcoming constitutional challenges.

The majority opinion in *Free Speech* is grounded on two basic premises. First, the Court ruled that the definition of child pornography in the CPPA was overbroad and covered a substantial amount of material that was not “obscene” under the Supreme Court’s traditional obscenity test. The Supreme Court’s *Miller* test provides that only “obscene” pornographic images can be prohibited without violating the first amendment. See *Miller v. California*, 413 U.S. 15 (1973). Under the *Miller* test, the material must be viewed as a whole, and not judged by any single scene so that material with serious literary, artistic, or scientific value cannot be banned in a blanket manner. Thus, the Court ruled in the *Free Speech* case that the CPPA went well beyond *Miller* and covered such non-obscene movies as *Traffic*, *Romeo and Juliet*, and *American Beauty*.

Second, the Court ruled that the CPPA could not be saved by the so-called “child pornography doctrine,”

which excludes yet another class of speech from first amendment protection. Because the CPPA covers a broad array of pornographic material that only “appears to be” of children, such as computer images or youthful adults, the Court ruled that such material could not be banned and criminalized under the child porn doctrine first articulated in *New York v. Ferber*, 458 U.S. 747 (1982) (“*Ferber*”). The Court ruled that the *Ferber* doctrine was justified based on the harm to real children, and that “virtual porn,” or material that “appeared to be” child pornography under the CPPA was not sufficiently lined to real child abuse to justify the CPPA’s complete ban on it. In reaching this decision the Court considered and rejected some of the government’s forceful arguments regarding the harmful secondary effects of even virtual child pornography, finding them insufficient under the first amendment to justify a comprehensive ban. Since certain provisions of the CPPA were overboard and covered such “protected” speech, however offensive, the Court struck those provisions down. The Court also struck down the CPPA’s definition of “pandered” child pornography as overbroad, finding that it criminalized possession of non-obscene material not just by the so-called “panderer,” but by downstream possessors who might not have any knowledge as to how it was originally sold or marketed.

The *Free Speech* decision has placed prosecutors in a difficult position. With key portions of the CPPA gone, the decision invites all child porn defendants, even those who exploit real children, to assert a “virtual porn” defense in which they claim that the material at issue is not illegal because no real child was used in its creation. The increasing technological ability to create computer images closely resembling real children may make it difficult for prosecutors to obtain prompt guilty pleas in clear-cut child porn cases and even to defeat such a defense at trial, even in cases where real children were victimized in producing the sexually explicit material. In short, unless we attempt to rewrite portions of the CPPA, the future bodes poorly for the ability of the federal government to combat a wave of child pornography made ever more accessible over the Internet.

The bill we introduce today is not an attempt to “get around” the Supreme Court’s decision, or to ignore that decision, as do sizable portions of the administration’s bill, which has been introduced in the House of Representatives. Ignoring the law will simply land America’s children right back where they started—unprotected.

Instead, Senator HATCH and I have together crafted a bipartisan bill that works within the limits set by the Supreme Court. I expect that the debate on the complicated constitutional issues raised by this bill will be vigorous, and I appreciate that they may

be isolated provisions of the bill that some may think crosses the first amendment line drawn by the court in the *Free Speech* case. That being said, this bill reflects a good faith attempt to protect children to the greatest extent possible by going up to that line, but not crossing it. I look forward to the debate on these issues as the legislative process moves forward, and I do not pretend that I or any Member of this body has a monopoly on wisdom when it comes to such important and complex constitutional questions. Let me summarize some of the bill's provisions.

Section 2 of the bill creates two new crimes aimed at people who distribute child pornography and those who use such material to entice children to do illegal acts. Each of these new crimes carry a 15-year maximum prison sentence for a first offense and double that term for repeat offenders. First, the bill criminalizes the pandering of child pornography, creating a new crime to respond to the Supreme Court's recent ruling striking down the CPPA's definition of pandering. This provision is narrower than the old "pandering" definition for two reasons, both of which respond to specific Court criticisms: First, the new crime only applies to the people who actually pander the child pornography or solicit it, not to all those who possess the material "downstream." The bill also contains a directive to the Sentencing Commission which asks them to distinguish between those who pander or distribute such material who are more culpable than those who solicit the material. Second, the pandering in this provision must be linked to "obscene" material, which is totally unprotected speech under *Miller*. Thus, while I acknowledge that this provision may well be challenged on some of the same grounds as the prior CPPA provision, it responds to specific concerns raised by the Supreme Court and is significantly narrower than the CPPA's definition of pandering.

Second, the bill creates a new crime to take direct aim at one of the chief evils of child pornography: namely, its use by sexual predators to entice minors either to engage in sexual activity or the production of more child pornography. This was one of the compelling arguments made by the government before the Supreme Court in support of the CPPA, but the Court rejected that argument as an insufficient basis to ban the production, distribution or possession of "virtual" child pornography. This bill addresses that same harm in a more targeted manner. It creates a new felony, which applies to both actual and virtual child pornography, for people who use such material to entice minors to participate in illegal activity. This will provide prosecutors a potent new tool to put away those who prey upon children using such pornography—whether the child pornography is virtual or not.

Next, this bill attempts to revamp the existing affirmative defense in

child pornography cases both in response to criticisms of the Supreme Court and so that the defense does not erect unfair hurdles to the prosecution of cases involving real children. Responding directly to criticisms of the Court, the new affirmative defense applies equally to those who are charged with possessing child pornography and to those who actually produce it, a change from current law. It also allows, again responding to specific Supreme Court criticisms, for a defense that no actual children were used in the production of the child pornography—i.e. that it was made using computers. At the same time, this provision protects prosecutors from unfair surprise in the use of this affirmative defense by requiring that a defendant give advance notice of his intent to assert it, just as defendants are currently required to give if they plan to assert an alibi or insanity defense. As a former prosecutor I suggested this provision because it effects the real way that these important trials are conducted. With the provision, the government can marshal the expert testimony that may be needed to rebut this "virtual porn" defense in cases where real children were victimized.

This improved affirmative defense provides important support for the constitutionality of much of this bill after the *Free Speech* decision. Even Justice Thomas specifically wrote that it would be a key factor for him. This is one reason for making the defense applicable to all non-obscene, child pornography, as defined in 18 U.S.C. §2256. In the bill's current form, however, the affirmative defense is *not* available in one of the new proposed classes of virtual child pornography, which would be found at 18 U.S.C. §2256(8)(D). This omission may render that provision unconstitutional under the first Amendment, and I hope that, as the legislative process continues, we can work with constitutional experts to improve the bill in this and other ways. I do not want to be here again in five years, after yet another Supreme Court decision striking this law down.

The bill also provides needed assistance to prosecutors in rebutting the virtual porn defense by removing a restriction on the use of records of performers portrayed in certain sexually explicit conduct that are required to be maintained under 18 U.S.C. §2257, and expanding such records to cover computer images. These records, which will be helpful in proving that the material in question is not "virtual" child pornography, may be used in federal child pornography and obscenity prosecutions under this act. The purpose of this provision is to protect real children from exploitation. It is important that prosecutors have access to this information in both child pornography and obscenity prosecutions, since the Supreme Court's recent decision has had the effect of narrowing the child pornography laws, making more likely that the general obscenity statutes

will be important tools in protecting children from exploitation. In addition, the act raises the penalties for not keeping accurate records, further deterring the exploitation of minors and enhancing the reliability of the records.

Next, this bill contains several provisions altering the definition of "child pornography" in response to the *Free Speech* case. One approach would have been simply to add an "obscenity" requirement to the child pornography definitions. Outlawing all obscene child pornography—real and virtual; minor and "youthful-adult;" simulated and real—would clearly pass a constitutional challenge because obscene speech enjoys no protection at all. Under the *Miller* test, such material (1) "appeals to the prurient interest," (2) is utterly "offensive" in any "community," and (3) has absolutely no "literary, artistic or scientific value."

Some new provisions of this bill do take this "obscenity" approach, like the new §2256(8)(B). Other provisions, however, take a different approach. They attempt to address the fatal flaws identified by the Supreme Court in the CPPA with more narrow definitions of what the Court found were overbroad definitions of "child pornography," which still might not be obscene speech under the test set forth by the Supreme Court. While these new provisions are more narrowly tailored than both the original CPPA and the administration's proposal introduced in the House, these provisions may continue to benefit from further examination by constitutional scholars.

Specifically, the CPPA's definition of "identifiable minor" has been modified in the bill to include a prong for persons who are "virtually indistinguishable from an actual minor." This adopts language from Justice O'Connor's concurrence in the *Free Speech* case. Thus, while this language is defensible, I predict that this provision will be the center of much constitutional debate. Unlike Senator HATCH, I believe that this new prong may not be needed, and may both confuse the statute unnecessarily and endanger the already upheld "morphing" section of the CPPA because it applies to that provision as well. This new definition may create both overbreadth and vagueness problems in a later constitutional challenge both the new and existing parts of the "child pornography" definition. In short, while these new definitional provisions are a good faith effort to go as far as the Constitution allows, they risk crossing the line.

It does not do America's children any good to write a law that might get struck down by our courts in order to prove an ideological point. Since most all the real cases being prosecuted even under the CPPA involve clearly obscene material, by anyone's standard, one could legitimately ask, 'Why push the envelope and risk cases getting thrown out of court?' These provisions should be fully debated and examined during the legislative process.

The bill also contains a variety of other measures designed to increase jail sentences in cases where children are victimized by sexual predators. First, it enhances penalties for repeat offenders of child sex offenses by expanding the predicate crimes which trigger tough, mandatory minimum sentences. Second, the bill requires the U.S. Sentencing Commission to address a disturbing disparity in the current Sentencing Guidelines. The current sentences for a person who actually travels across state lines to have sex with a child are not as high as for child pornography. The Commission needs to correct this oversight immediately, so that prosecutors can take these dangerous sexual predators off the street. These are all strong measures designed to protect children and increase prison sentences for child molesters and those who otherwise exploit children.

The act also has several provisions designed to protect the children who are victims in these horrible cases. Privacy of the children must be paramount. It is important that they not be victimized yet again in the criminal process. This bill provides for the first time ever an explicit shield law that prohibits the name or other identifying information of the child victim (other than the age or approximate age) from being admitted at any child pornography trial. It is also intended that judges will take appropriate steps to ensure that such information as the child's name, address or other identifying information not be publicly disclosed during the pretrial phase of the case or at sentencing. The bill also contains a provision requiring the judge to instruct the jury, upon request of the government, that no inference should be drawn against the United States because of information inadmissible under the new shield law.

The act also amends certain reporting provisions governing child pornography. Specifically, it allows federal authorities to report information they receive from the Center for Missing and Exploited Children ("CMEC") to state and local police without a court order. In addition, the bill removes the restrictions under the Electronic Communications Privacy Act (ECPA) for reporting the contents of, and information pertaining to, a subscriber of stored electronic communications to the CMEC when a mandatory child porn report is filed with the CMEC pursuant to 42 U.S.C. §13032. This change may invite federal, state or local authorities to circumvent all subpoena and court order requirements under ECPA and allow them to obtain subscriber e-mails and information by triggering the initial report to the CMEC themselves. To the extent that these changes in ECPA may have that unintended effect, as this bill is considered in the Judiciary Committee and on the floor, we should consider mechanisms to guard against subverting the safeguards in ECPA from government officials going on fishing expeditions

for stored electronic communications under the rubric of child porn investigations. This may include clarifying 42 U.S.C. §13032 that the initial tip triggering the report may not be generated by the government itself. A tip line to the CMEC is just that—a way for outsiders to report wrongdoing to the CMEC and the government, not for the government to generate a report to itself without following otherwise required lawful process.

The bill provides for extraterritorial jurisdiction where a defendant induces a child to engage in sexually explicit conduct outside the United States for the purposes of producing child pornography which they intend to transport to the United States. The provision is crafted to require the intent of actual transport of the material into the United States, unlike the House bill which criminalizes even an intent to make such material "accessible." Under that overly broad wording, any material posted on a web site internationally could be covered, whether or not it was ever intended that the material be downloaded in the United States.

Finally, the bill provides also a new private right of action for the victims of child pornography. This provision has teeth, including injunctive relief and punitive damages that will help to put those who produce child pornography out of business for good. I commend Senator HATCH for his leadership on this provision.

There are many people who do not agree with the Supreme Court's decision in *Free Speech*, but that will not erase it from the books. It is the law of the land, and resulted from seven Justices who had problems with the overbreadth of the last child pornography law passed by Congress. That alone should counsel a thoughtful approach this time around. Everyone wants to protect our children, but we need to do it with cases and laws that stick.

It is tempting to rush to come up with a "quick fix," but we owe our children more than a press conference on this matter. My initial review of the administration's proposal, now working its way through the House of Representatives, gives me serious concern. Already, the constitutional law experts and law professors with whom I have consulted on this matter have expressed a near consensus that large parts of that proposal will not withstand scrutiny under the first amendment after the *Free Speech* case.

Indeed, the entire approach that the administration has taken in this matter is to reach as far as possible, not to hedge its bets, and simply to throw down the gauntlet on the steps of the Supreme Court, daring it to strike down the law yet again. That does not serve anyone's interest, least of all the real victims of child pornography. Criminal prosecution is not about making an ideological point—whether one agrees with it or not—that is for speeches and law review articles.

Criminal prosecution should be about helping victims and punishing criminals with cases that do not get thrown out of court.

Let me discuss a couple of the most problematic aspects of the Department's proposal. First, it sweepingly rejects any attempt to incorporate the Supreme Court's doctrine of "obscenity" into the definition of child pornography. Not even one provision takes that approach, which would at least ensure that some of the law was upheld. Instead, in its new 2256(8)(B) definition of "child pornography," the Department simply changes the words "appears to be" in the current statute to "appears virtually indistinguishable from" in the new provision. The problem with that approach is this is the same argument that was tried by the Department in the *Free Speech* case and overwhelmingly lost. Although Justice O'Connor wrote that such an approach might satisfy her, she was not the deciding vote in the case—indeed she was the seventh vote to strike down the statute.

Second, the administration's proposal regarding the new crime for child pornography involving "prepubescent" children is also problematic under the Court's *Free Speech* case. Although the section is entitled "Obscene visual depictions of young children" the Department has assiduously avoided any "obscenity" requirement in the provision itself. I recognize that headlines and titles like "prepubescent" and "obscene" are popular, but one has to ask if the Department of Justice really believes that it can fool our federal judges with such linguistic sleight of hand when there is no obscenity requirement in the statute itself, only the title? Or perhaps it is only the public that is supposed to be fooled.

In any event, as a legal matter, the provision contains absolutely no requirement that the material be judged as a whole for artistic, literary, or scientific value. That was a point that the Supreme Court repeatedly pounded home in the *Free Speech* case, yet it is simply ignored in this provision. This approach is especially frustrating because in the cases that the Department is likely to actually prosecute, it would be easy to meet the obscenity test. Under the Department's current approach, however, one can already predict the parade of legitimate movies and scientific or educational materials that those challenging the act will produce which meet the new definition. In addition, no affirmative defense is available under this new crime, so it cannot be saved from the *Free Speech* case on that basis either.

There are other problematic provisions in the administration proposal, but I simply raise these two in order to make the point that the Department's proposal seems to be more concerned with making a public point than with making successful cases. If the Department's proposal becomes law, it will result in yet another round of court



cases, followed by another round of cases being thrown out, followed by another round of legislation. America's children deserve better, and I think that, while we may disagree on some of the specifics, that Senator HATCH and I have made a good faith and bipartisan effort to come up with a law that will survive judicial scrutiny and protect them for years to come.

For all of these reasons, I am pleased to introduce this legislation with Senator HATCH to help protect our nation's children. I hope that we can continue to work together to address the complex constitutional issues raised in this area. Mr. President, I ask unanimous consent that the letter from constitutional scholars to which I referred be printed in the RECORD.

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

MAY 13, 2002.

Chairman PATRICK J. LEAHY,  
U.S. Senate Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN LEAHY: We write to express our grave concern with the legislation recently proposed by the Department of Justice in response to the Supreme Court's decision in *Ashcroft, et al. v. The Free Speech Coalition, et al.*, No. 00-795 (Apr. 16, 2002). In particular, the pornography (indeed, the bill expressly targets images that do not involve real human beings at all). Accordingly, in our view, it suffers from the same infirmities that led the Court to invalidate the statute at issue in *Ashcroft*.

We emphasize that we share the revulsion all Americans feel toward those who harm children, and fully support legitimate efforts to eradicate child pornography. As the Court in *Ashcroft* emphasized, however, in doing so Congress must act within the limits of the First Amendment, in our view, the bill proposed by the Department of Justice fails to do so.

Respectfully submitted,

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ERWIN CHERMERINSKY,  
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Los Angeles, CA.

PAUL HOFFMAN,  
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ern California Law  
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GREGORY P. MAGARIAN,  
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JAMIN RASKIN,  
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sity, Washington  
College of Law,  
Washington, DC.

DONALD B. VERRILLI, Jr.,  
Partner, Jenner & Block,  
LLC, Washington, DC.

Mr. HUTCHINSON. Mr. President, I am pleased to join with my colleagues, Senators HATCH and LEAHY, in introducing the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2002, PROTECT, S. 2520. The spread of child pornography is one of the gravest dangers in our society because it harms the weakest among us, our children.

Since the Supreme Court's April 16, 2002, decision in *Ashcroft v. Free Speech Coalition*, I have been extremely concerned that those who would prey on our children through the Internet have a shield from prosecution. They can simply claim the images they are posting, often computer files which are difficult to closely examine, are not of actual children but rather are computer generated. As the law currently stands, it is offering protection to the predators, not to the child victims.

Those who collect and engage in child pornography are oftentimes full-fledged sexual predators themselves who have abused real children. This has been proven by the highly successful Federal Bureau of Investigation operation, Operation Candyman. Investigators found 7,200 Internet child pornography traffickers. At this point, of the 90 people arrested through Operation Candyman in March of 2002, 13 have admitted to molesting a total of 48 different children.

There is an achievable balance between preserving our first amendment right to freedom of speech and protecting children from Internet predators. I believe this bill strikes that balance, and I have confidence that the Supreme Court will agree.

I would also like to thank Attorney General John Ashcroft for working with Congress to draft this legislation.

By Mr. BINGAMAN (for himself  
and Mrs. HUTCHISON):

S. 2522. A bill to establish the Southwest Regional Border Authority; to the Committee on Environment and Public Works.

Mr. BINGAMAN. Mr. President, I rise today to introduce legislation along with Senator KAY BAILEY HUTCHISON that will help raise the standard of living for hundreds of thousands of Americans who live near the United States-Mexico border. The Southwest Regional Border Authority Act would create an economic development authority for the Southwest border region, charged with awarding grants to border communities in support of their local economic development projects.

The need for a regional border authority is acute: The poverty rate in the Southwest border region is 20 percent—nearly double the national average; unemployment rates in Southwest border counties often reach as high as five times the national unemployment rate; per capita personal income in the region is greatly below the national average; and lack of adequate access to capital has made it difficult for businesses to start up in the region.

In addition, the development of key infrastructures—such as water and wastewater, transportation, public health, and telecommunications—has not kept pace with the population explosion and the increase in cross-border commerce.

The counties in the Southwest border region are among the most economically distressed in the Nation. In fact, there are only a few such regions of economic distress throughout the country—almost all of which are currently served by regional economic development commissions. These commissions, which are authorized by Congress, include the Appalachian Regional Commission, the Delta Regional Authority, and the Denali Commission. In order to address the needs of the border region in a similar fashion, I propose the creation of a regional economic development authority for the Southwest border.

My bill, which is modeled after the Appalachian Regional Commission, is based on four guiding principles. First, it starts from the premise that the people who live in the Southwest border region know best when it comes to making decisions that affect their communities. Second, it employs a regional approach to economic development and encourages communities to work across county and State lines when appropriate. All too often, past efforts to improve the Southwest border region have hit roadblocks as a result of poor coordination and communication between communities.

Third, it creates an economic development entity that is independent, meaning it will be able to make decisions that are in the best interest of border communities, without being subject to the politics of Federal agencies. Finally, it brings together representatives of the four Southwest border States and the Federal Government as equal partners, all of whom will work to improve the quality of life and standard of living for border residents.

This is not just another commission, and it is certainly not just another grant program. I believe the Southwest Regional Border Authority not only will help leverage new private sector funding, but also will help better target Federal funding to those projects that are most likely to achieve the desired outcome of increased economic development.

The legislation accomplishes this through a sensible mechanism of development planning. Under the bill, communities in each of the four border States will work through local development districts to create development plans that reflect the needs and priorities specific to each locality. These local development plans then go to the State in which the communities are located, where they become the basis for a State development plan. The four State development plans, in turn, form the basis for a regional development

plan, which is put together by the Authority. The purpose of this planning process is to ensure that local priorities are reflected in the projects funded by the Authority, while also providing flexibility to the Authority to fund projects that are regional in nature.

This process has several advantages. First, by ensuring that Federal dollars are targeted to projects that have gone through thorough planning at the local level, we will greatly improve the probability of success for those projects—thereby increasing the Federal Government's return on its investment. Second, local development plans are essential to attracting private sector funding. Increased private investment means less need for Federal, State, and local public sector funding. Third, combining resources in such a way will help communities get more funding than they can currently get from any one program. This is particularly important now as we in Congress grapple with how to fund the needs of the border in the current budget climate.

I believe there are additional benefits to be derived from the Border Authority. As the only independent, quasi-Federal entity charged with economic development for the entire Southwest border region, the Authority will become a clearinghouse of sorts on all the funding available to the border region. This will enable the Authority to help border communities learn which programs are best suited to their needs and most likely to achieve the goals of their local development plans. Another benefit is its focus on economically distressed counties. Under the bill, the Authority can provide funding to increase the Federal share of a Federal grant program to up to 90 percent of the total cost. This is particularly helpful to the many communities that are often unable to utilize Federal funding because they can't afford the required local match.

For far too long the needs of the Southwest border have been ignored, overlooked, or underfunded. I am confident that the creation of a Southwest Regional Border Authority not only will call attention to the great needs that exist along the border, but also provide resources to local communities where the dollars will do the most good. I urge the Senate to move swiftly on this legislation, and I ask my colleagues for their support.

I ask unanimous consent that the text of the bill be printed in the RECORD.

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

S. 2522

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

#### SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Southwest Regional Border Authority Act".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Findings and purposes.

Sec. 3. Definitions.

#### TITLE I—SOUTHWEST REGIONAL BORDER AUTHORITY

Sec. 101. Membership and voting.

Sec. 102. Duties and powers.

Sec. 103. Authority personnel matters.

#### TITLE II—GRANTS AND DEVELOPMENT PLANNING

Sec. 201. Infrastructure development and improvement.

Sec. 202. Technology development.

Sec. 203. Community development and entrepreneurship.

Sec. 204. Education and workforce development.

Sec. 205. Funding.

Sec. 206. Supplements to Federal grant programs.

Sec. 207. Demonstration projects.

Sec. 208. Local development districts; certification and administrative expenses.

Sec. 209. Distressed counties and areas and economically strong counties.

Sec. 210. Development planning process.

#### TITLE III—ADMINISTRATION

Sec. 301. Program development criteria.

Sec. 302. Approval of development plans and projects.

Sec. 303. Consent of States.

Sec. 304. Records.

Sec. 305. Annual report.

Sec. 306. Authorization of appropriations.

Sec. 307. Termination of authority.

#### SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) a rapid increase in population in the Southwest border region is placing a significant strain on the infrastructure of the region, including transportation, water and wastewater, public health, and telecommunications;

(2) 20 percent of the residents of the region have incomes below the poverty level;

(3) unemployment rates in counties in the region are up to 5 times the national unemployment rate;

(4) per capita personal income in the region is significantly below the national average and much of the income in the region is distributed through welfare programs, retirement programs, and unemployment payments;

(5) a lack of adequate access to capital in the region—

(A) has created economic disparities in the region; and

(B) has made it difficult for businesses to start up in the region;

(6) many residents of the region live in communities referred to as "colonias" that lack basic necessities, including running water, sewers, storm drainage, and electricity;

(7) many of the problems that exist in the region could be solved or ameliorated by technology that would contribute to economic development in the region;

(8) while numerous Federal, State, and local programs target financial resources to the region, those programs are often uncoordinated, duplicative, and, in some cases, unavailable to eligible border communities because those communities cannot afford the required funding match;

(9) Congress has established several regional economic development commissions, including the Appalachian Regional Commission, the Delta Regional Authority, and the Denali Commission, to improve the economies of those areas of the United States that experience the greatest economic distress; and

(10) many of the counties in the region are among the most economically distressed in

the United States and would benefit from a regional economic development commission.

(b) PURPOSES.—The purposes of this Act are—

(1) to establish a regional economic development authority for the Southwest Border region to address critical issues relating to the economic health and well-being of the residents of the region;

(2) to provide funding to communities in the region to stimulate and foster infrastructure development, technology development, community development and entrepreneurship, and education and workforce development in the region;

(3) to increase the total amount of Federal funding available for border economic development projects by coordinating with and reducing duplication of other Federal, State, and local programs; and

(4) to empower the people of the region through the use of local development districts and State and regional development plans that reflect State and local priorities.

#### SEC. 3. DEFINITIONS.

In this Act:

(1) ATTAINMENT COUNTY.—The term "attainment county" means an economically strong county that is not a distressed county or a competitive county.

(2) AUTHORITY.—The term "Authority" means the Southwest Regional Border Authority established by section 101(a)(1).

(3) BINATIONAL REGION.—The term "bimational region" means the 150 miles on either side of the United States-Mexico border.

(4) BUSINESS INCUBATOR SERVICE.—The term "business incubator service" means—

(A) a legal service, including aid in preparing a corporate charter, partnership agreement, or contract;

(B) a service in support of the protection of intellectual property through a patent, a trademark, or any other means;

(C) a service in support of the acquisition or use of advanced technology, including the use of Internet services and Web-based services; and

(D) consultation on strategic planning, marketing, or advertising.

(5) COMPETITIVE COUNTY.—The term "competitive county" means an economically strong county that meets at least 1, but not all, of the criteria for a distressed county specified in paragraph (5).

(6) DISTRESSED COUNTY.—The term "distressed county" means a county in the region that—

(A)(i) has a poverty rate that is at least 150 percent of the poverty rate of the United States;

(ii) has a per capita market income that is not more than 67 percent of the per capita market income of the United States; and

(iii) has a 3-year unemployment rate that is at least 150 percent of the unemployment rate of the United States; or

(B)(i) has a poverty rate that is at least 200 percent of the poverty rate of the United States; and

(ii)(I) has a per capita market income that is not more than 67 percent of the per capita market income of the United States; or

(II) has a 3-year unemployment rate that is at least 150 percent of the unemployment rate of the United States.

(7) ECONOMICALLY STRONG COUNTY.—The term "economically strong county" means a county in the region that is not a distressed county.

(8) FEDERAL GRANT PROGRAM.—The term "Federal grant program" means a Federal grant program to provide assistance in—

(A) acquiring or developing land;

(B) constructing or equipping a highway, road, bridge, or facility; or

(C) carrying out other economic development activities.



(9) ISOLATED AREA OF DISTRESS.—The term “isolated area of distress” means an area located in an economically strong county that has a high rate of poverty, unemployment, or outmigration, as determined by the Authority.

(10) LOCAL DEVELOPMENT DISTRICT.—The term “local development district” means an entity that—

(A)(i) is a planning district in existence on the date of enactment of this Act that is recognized by the Economic Development Administration of the Department of Commerce; or

(ii) in the case of an area for which an entity described in clause (i) does not exist, is—

(I) organized and operated in a manner that ensures broad-based community participation and an effective opportunity for other nonprofit groups to contribute to the development and implementation of programs in the region;

(II) governed by a policy board with at least a simple majority of members consisting of elected officials or employees of a general purpose unit of local government who have been appointed to represent the government;

(III) certified to the Authority as having a charter or authority that includes the economic development of counties or parts of counties or other political subdivisions within the region—

(aa) by the Governor of each State in which the entity is located; or

(bb) by the State officer designated by the appropriate State law to make the certification; and

(IV)(aa) a nonprofit incorporated body organized or chartered under the law of the State in which the entity is located;

(bb) a nonprofit agency or instrumentality of a State or local government;

(cc) a public organization established before the date of enactment of this Act under State law for creation of multijurisdictional, area-wide planning organizations;

(dd) a nonprofit association or combination of bodies, agencies, and instrumentalities described in subclauses (I) through (III); or

(ee) a nonprofit, binational organization; and

(B) has not, as certified by the Federal cochairperson—

(i) inappropriately used Federal grant funds from any Federal source; or

(ii) appointed an officer who, during the period in which another entity inappropriately used Federal grant funds from any Federal source, was an officer of the other entity.

(11) REGION.—The term “region” means—  
(A) the counties of Cochise, Gila, Graham, Greenlee, La Paz, Maricopa, Pima, Pinal, Santa Cruz, and Yuma in the State of Arizona;

(B) the counties of Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura in the State of California;

(C) the counties of Catron, Chaves, Doña Ana, Eddy, Grant, Hidalgo, Lincoln, Luna, Otero, Sierra, and Socorro in the State of New Mexico; and

(D) the counties of Atascosa, Bandera, Bee, Bexar, Brewster, Brooks, Cameron, Coke, Concho, Crane, Crockett, Culberson, Dimmit, Duval, Ector, Edwards, El Paso, Frio, Gillespie, Glasscock, Hidalgo, Hudspeth, Irion, Jeff Davis, Jim Hogg, Jim Wells, Karnes, Kendall, Kenedy, Kerr, Kimble, Kinney, Kleberg, La Salle, Live Oak, Loving, Mason, Maverick, McMullen, Medina, Menard, Midland, Nueces, Pecos, Presidio, Reagan, Real, Reeves, San Patricio, Shleicher, Sutton, Starr, Sterling, Terrell, Tom Green, Upton, Uvalde, Val Verde, Ward, Webb, Willacy, Wilson, Winkler, Zapata, and Zavala in the State of Texas.

(12) SMALL BUSINESS.—The term “small business” has the meaning given the term “small business concern” in section 3(a) of the Small Business Act (15 U.S.C. 632(a)).

## **TITLE I—SOUTHWEST REGIONAL BORDER AUTHORITY**

### **SEC. 101. MEMBERSHIP AND VOTING.**

(a) ESTABLISHMENT.—

(1) IN GENERAL.—There is established the Southwest Regional Border Authority.

(2) COMPOSITION.—The Authority shall be composed of—

(A) a Federal member, to be appointed by the President, by and with the advice and consent of the Senate; and

(B) State members who shall consist of the Governor (or a designee of the Governor) of each State in the region that elects to participate in the Authority.

(3) COCHAIRPERSONS.—The Authority shall be headed by—

(A) the Federal member, who shall serve—  
(i) as the Federal cochairperson; and

(ii) as a liaison between the Federal Government and the Authority; and

(B) a State cochairperson, who shall—  
(i) be a Governor of a State described in paragraph (2)(B);

(ii) be elected by the State members for a term of not more than 2 years; and

(iii) serve only 1 term during any 4 year period.

(b) ALTERNATE MEMBERS.—

(1) STATE ALTERNATES.—The State member of a State described in paragraph (2)(B) may have a single alternate, who shall be—

(A) a resident of that State; and

(B) appointed by the Governor of the State, from among the members of the cabinet or personal staff of the Governor.

(2) ALTERNATE FEDERAL COCHAIRPERSON.—The President shall appoint an alternate Federal cochairperson.

(3) QUORUM.—Subject to subsection (d)(4), a State alternate member shall not be counted toward the establishment of a quorum of the members of the Authority in any case in which a quorum of the State members is required to be present.

(4) DELEGATION OF POWER.—No power or responsibility of the Authority specified in paragraph (2) or (3) of subsection (d), and no voting right of any member of the Authority, shall be delegated to any person who is not—

(A) a member of the Authority; or

(B) entitled to vote at meetings of the Authority.

(c) MEETINGS.—

(1) INITIAL MEETING.—The initial meeting of the Authority shall be conducted not later than the date that is the earlier of—

(A) 180 days after the date of enactment of this Act; or

(B) 60 days after the date on which the Federal cochairperson is appointed.

(2) OTHER MEETINGS.—The Authority shall hold meetings at such times as the Authority determines, but not less often than semi-annually.

(3) LOCATION.—Meetings of the Authority shall be conducted, on a rotating basis, at a site in the region in each of the States of Arizona, California, New Mexico, and Texas.

(d) VOTING.—

(1) IN GENERAL.—To be effective, a decision by the Authority shall require the approval of the Federal cochairperson and not less than 60 percent of the State members of the Authority (not including any member representing a State that is delinquent under section 102(d)(2)(D)).

(2) QUORUM.—

(A) IN GENERAL.—A majority of the State members shall constitute a quorum.

(B) REQUIRED FOR POLICY DECISION.—A quorum of State members shall be required

to be present for the Authority to make any policy decision, including—

(i) a modification or revision of a policy decision of the Authority;

(ii) approval of a State or regional development plan; and

(iii) any allocation of funds among the States.

(3) PROJECT AND GRANT PROPOSALS.—The approval of project and grant proposals shall be—

(A) a responsibility of the Authority; and

(B) conducted in accordance with section 302.

(4) VOTING BY ALTERNATE MEMBERS.—An alternate member shall vote in the case of the absence, death, disability, removal, or resignation of the Federal or State member for which the alternate member is an alternate.

### **SEC. 102. DUTIES AND POWERS.**

(a) DUTIES.—The Authority shall—

(1) develop comprehensive and coordinated plans and programs to establish priorities and approve grants for the economic development of the region, giving due consideration to other Federal, State, and local planning and development activities in the region;

(2) conduct and sponsor investigations, research, and studies, including an inventory and analysis of the resources of the region, using, in part, the materials compiled by the Interagency Task Force on the Economic Development of the Southwest Border established by Executive Order No. 13122 (64 Fed. Reg. 29201);

(3) sponsor demonstration projects under section 207;

(4) review and study Federal, State, and local public and private programs and, as appropriate, recommend modifications or additions to increase the effectiveness of the programs;

(5) formulate and recommend, as appropriate, interstate and international compacts and other forms of interstate and international cooperation;

(6) encourage private investment in industrial, commercial, and recreational projects in the region;

(7) provide a forum for consideration of the problems of the region and any proposed solutions to those problems;

(8) establish and use, as appropriate, citizens, special advisory counsels, and public conferences; and

(9) provide a coordinating mechanism to avoid duplication of efforts among the border programs of the Federal agencies and the programs established under the North American Free Trade Agreement entered into by the United States, Mexico, and Canada on December 17, 1992.

(b) POWERS.—In carrying out subsection (a), the Authority may—

(1) hold such hearings, sit and act at such times and places, take such testimony, receive such evidence, and print or otherwise reproduce and distribute a description of the proceedings of, and reports on actions by, the Authority as the Authority considers appropriate;

(2) request from any Federal, State, or local agency such information as may be available to or procurable by the agency that may be of use to the Authority in carrying out the duties of the Authority;

(3) maintain an accurate and complete record of all transactions and activities of the Authority, to be available for audit and examination by the Comptroller General of the United States;

(4) adopt, amend, and repeal bylaws and rules governing the conduct of business and the performance of duties of the Authority;

(5) request the head of any Federal agency to detail to the Authority, for a specified period of time, such personnel as the Authority

requires to carry out duties of the Authority, each such detail to be without loss of seniority, pay, or other employee status;

(6) request the head of any State department or agency or local government to detail to the Authority, for a specified period of time, such personnel as the Authority requires to carry out the duties of the Authority, each such detail to be without loss of seniority, pay, or other employee status;

(7) make recommendations to the President regarding—

(A) the expenditure of funds at the Federal, State, and local levels under this Act; and

(B) additional Federal, State, and local legislation that may be necessary to further the purposes of this Act;

(8) provide for coverage of Authority employees in a suitable retirement and employee benefit system by—

(A) making arrangements or entering into contracts with any participating State government; or

(B) otherwise providing retirement and other employee benefit coverage;

(9) accept, use, and dispose of gifts or donations of services or real, personal, tangible, or intangible property;

(10) enter into and perform such contracts, leases, cooperative agreements, or other transactions as are necessary to carry out the duties of the Authority; and

(11) establish and maintain—

(A) a central office, to be located at a site that is not more than 100 miles from the United States-Mexico border; and

(B) at least 1 field office in each of the States of Arizona, California, New Mexico, and Texas, to be located at sites in the region that the Authority determines to be appropriate.

(C) FEDERAL AGENCY COOPERATION.—A Federal agency shall—

(1) cooperate with the Authority; and

(2) provide, on request of the Federal cochairperson, appropriate assistance in carrying out this Act, in accordance with applicable Federal laws (including regulations).

(D) ADMINISTRATIVE EXPENSES.—

(1) IN GENERAL.—

(A) ADMINISTRATIVE EXPENSES.—Subject to paragraph (2), administrative expenses of the Authority shall be paid—

(i) by the Federal Government, in an amount equal to 60 percent of the administrative expenses; and

(ii) by the States in the region that elect to participate in the Authority, in an amount equal to 40 percent of the administrative expenses.

(B) EXPENSES OF FEDERAL CHAIRPERSON.—All expenses of the Federal cochairperson, including expenses of the alternate and staff of the Federal cochairperson, shall be paid by the Federal Government.

(2) STATE SHARE.—

(A) IN GENERAL.—Subject to subparagraph (C), the share of administrative expenses of the Authority to be paid by each State shall be determined by a unanimous vote of the State members of the Authority.

(B) NO FEDERAL PARTICIPATION.—The Federal cochairperson shall not participate or vote in any decision under subparagraph (A).

(C) LIMITATION.—A State shall not pay less than 10 nor more than 40 percent of the share of administrative expenses of the Authority determined under paragraph (1)(A)(ii).

(D) DELINQUENT STATES.—During any period in which a State is more than 1 year delinquent in payment of the State's share of administrative expenses of the Authority under this subsection (as determined by the Secretary)—

(i) no assistance under this Act shall be provided to the State (including assistance to a political subdivision or a resident of the State) for any project not approved as of the

date of the commencement of the delinquency; and

(ii) no member of the Authority from the State shall participate or vote in any action by the Authority.

(E) EFFECT ON ASSISTANCE.—A State's share of administrative expenses of the Authority under this subsection shall not be taken into consideration in determining the amount of assistance provided to the State under title II.

#### SEC. 103. AUTHORITY PERSONNEL MATTERS.

(A) COMPENSATION OF MEMBERS.—

(1) FEDERAL COCHAIRPERSON.—The Federal cochairperson shall be compensated by the Federal Government at the annual rate of basic pay prescribed for level III of the Executive Schedule in subchapter II of chapter 53 of title 5, United States Code.

(2) ALTERNATE FEDERAL COCHAIRPERSON.—The alternate Federal cochairperson—

(A) shall be compensated by the Federal Government at the annual rate of basic pay prescribed for level V of the Executive Schedule described in paragraph (1); and

(B) when not actively serving as an alternate for the Federal cochairperson, shall perform such functions and duties as are delegated by the Federal cochairperson.

(3) STATE MEMBERS AND ALTERNATES.—

(A) IN GENERAL.—A State shall compensate each member and alternate member representing the State on the Authority at the rate established by State law.

(B) NO ADDITIONAL COMPENSATION.—No State member or alternate member shall receive any salary, or any contribution to or supplementation of salary, from any source other than the State for services provided by the member or alternate member to the Authority.

(C) DETAILED EMPLOYEES.—

(1) IN GENERAL.—No person detailed to serve the Authority under section 102(b)(6) shall receive any salary, or any contribution to or supplementation of salary, for services provided to the Authority from—

(A) any source other than the State, local, or intergovernmental department or agency from which the person was detailed; or

(B) the Authority.

(2) VIOLATION.—Any person that violates this subsection shall be fined not more than \$5,000, imprisoned not more than 1 year, or both.

(C) ADDITIONAL PERSONNEL.—

(1) COMPENSATION.—

(A) IN GENERAL.—The Authority may appoint and fix the compensation of an executive director and such other personnel as are necessary to enable the Authority to carry out the duties of the Authority.

(B) EXCEPTION.—Compensation under subparagraph (A) shall not exceed the maximum rate of basic pay established for the Senior Executive Service under section 5382 of title 5, United States Code, including any applicable locality-based comparability payment that may be authorized under section 5304(h)(2)(C) of that title.

(2) EXECUTIVE DIRECTOR.—The executive director—

(A) shall be a Federal employee; and

(B) shall be responsible for—

(i) carrying out the administrative duties of the Authority;

(ii) directing the Authority staff; and

(iii) such other duties as the Authority may assign.

(D) CONFLICTS OF INTEREST.—

(1) IN GENERAL.—Except as provided under paragraph (2), no State member, State alternate, officer, employee, or detailee of the Authority shall participate personally and substantially as a member, alternate, officer, employee, or detailee of the Authority, through decision, approval, disapproval, rec-

ommendation, the rendering of advice, investigation, or otherwise, in any proceeding, application, request for a ruling or other determination, contract, claim, controversy, or other matter in which the member, alternate, officer, employee, or detailee has a financial interest.

(2) DISCLOSURE.—Paragraph (1) shall not apply if the State member, State alternate, officer, employee, or detailee—

(A) immediately advises the Authority of the nature and circumstances of the proceeding, application, request for a ruling or other determination, contract, claim, controversy, or other particular matter presenting a potential conflict of interest;

(B) makes full disclosure of the financial interest; and

(C) before the proceeding concerning the matter presenting the conflict of interest, receives a written determination by the Authority that the interest is not so substantial as to be likely to affect the integrity of the services that the Authority may expect from the State member, State alternate, officer, employee, or detailee.

(3) VIOLATION.—Any person that violates this subsection shall be fined not more than \$10,000, imprisoned not more than 2 years, or both.

(E) VALIDITY OF CONTRACTS, LOANS, AND GRANTS.—The Authority may declare void any contract, loan, or grant of or by the Authority in relation to which the Authority determines that there has been a violation of subsection (b), subsection (d), or any of sections 202 through 209 of title 18, United States Code.

(F) APPLICABLE LABOR STANDARDS.—

(1) IN GENERAL.—All laborers and mechanics employed by contractors or subcontractors in the construction, alteration, or repair, including painting and decorating, of projects, buildings, and works funded by the United States under this Act, shall be paid wages at not less than the prevailing wages on similar construction in the locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931 (40 U.S.C. 276a et seq.).

(2) AUTHORITY.—With respect to the determination of wages under paragraph (1), the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan No. 14 of 1950 (64 Stat. 1267) and section 2 of the Act of June 13, 1934 (40 U.S.C. 276c).

#### TITLE II—GRANTS AND DEVELOPMENT PLANNING

##### SEC. 201. INFRASTRUCTURE DEVELOPMENT AND IMPROVEMENT.

The Authority may approve grants to States, local governments, and public and nonprofit organizations in the region for projects, approved in accordance with section 302, to develop and improve the transportation, water and wastewater, public health, and telecommunications infrastructure of the region.

##### SEC. 202. TECHNOLOGY DEVELOPMENT.

The Authority may approve grants to small businesses, universities, national laboratories, and nonprofit organizations in the region to research, develop, and demonstrate technology that addresses—

- (1) water quality;
- (2) water quantity;
- (3) pollution;
- (4) transportation;
- (5) energy consumption;
- (6) public health;
- (7) border and port security; and

(8) any other related matter that stimulates job creation or enhances economic development, as determined by the Authority.

##### SEC. 203. COMMUNITY DEVELOPMENT AND ENTREPRENEURSHIP.

The Authority may approve grants to States, local governments, and public or

nonprofit entities for projects, approved in accordance with section 302—

(1) to create dynamic local economies by—  
(A) recruiting businesses to the region; and  
(B) increasing and expanding international trade to other countries;

(2) to foster entrepreneurship by—  
(A) supporting the advancement of, and providing entrepreneurial training and education for, youths, students, and businesspersons;

(B) improving access to debt and equity capital by facilitating the establishment of development venture capital funds and other appropriate means;

(C) providing aid to communities in identifying, developing, and implementing development strategies for various sectors of the economy; and

(D)(i) developing a working network of business incubators; and

(ii) supporting entities that provide business incubator services.

(3) to promote civic responsibility and leadership through activities that include—

(A) the identification and training of emerging leaders;

(B) the encouragement of citizen participation; and

(C) the provision of assistance for strategic planning and organization development.

#### **SEC. 204. EDUCATION AND WORKFORCE DEVELOPMENT.**

The Authority, in coordination with State and local workforce development boards, may approve grants to States, local governments, and public or nonprofit entities for projects, approved in accordance with section 302—

(1) to assist the region in obtaining the job training, employment-related education, and business development (with an emphasis on entrepreneurship) that are needed to build and maintain strong local economies; and

(2) to supplement in-plant training programs offered by State and local governments to attract new businesses to the region.

#### **SEC. 205. FUNDING.**

(a) IN GENERAL.—Funds for grants under sections 201 through 204 may be provided—

(1) entirely from appropriations to carry out this Act;

(2) in combination with funds available under another Federal grant program or other Federal program; or

(3) in combination with funds from any other source, including—

(A) State and local governments, nonprofit organizations, and the private sector in the United States;

(B) the federal and local government of, and private sector in, Mexico; and

(C) the North American Development Bank.

(b) PRIORITY OF FUNDING.—The Authority shall award funding to each State in the region for activities in accordance with an order of priority to be determined by the State.

(c) BINATIONAL PROJECTS.—

(1) PROHIBITION ON PROVISION OF FUNDING TO NON-UNITED STATES ENTITIES.—The Authority shall not award funding to any entity that is not incorporated in the United States.

(2) FUNDING OF BINATIONAL PROJECTS.—The Authority may award funding to a project in which an entity that is incorporated outside the United States participates if, for any fiscal year, the entity matches with an equal amount, in cash or in-kind, the assistance received under this Act for the fiscal year.

#### **SEC. 206. SUPPLEMENTS TO FEDERAL GRANT PROGRAMS.**

(a) FINDING.—Congress finds that certain States and local communities of the region, including local development districts, may

be unable to take maximum advantage of Federal grant programs for which the States and communities are eligible because—

(1) they lack the economic resources to provide the required matching share; or

(2) there are insufficient funds available under the Federal law authorizing the Federal grant program to meet pressing needs of the region.

(b) FEDERAL GRANT PROGRAM FUNDING.—Notwithstanding any provision of law limiting the Federal share, the areas eligible for assistance, or the authorizations of appropriations, under any Federal grant program, and in accordance with subsection (c), the Authority, with the approval of the Federal cochairperson and with respect to a project to be carried out in the region, may—

(1) increase the Federal share of the costs of a project under any Federal grant program to not more than 90 percent (except as provided in section 209(b)); and

(2) use amounts made available to carry out this Act to pay all or a portion of the increased Federal share.

(c) CERTIFICATIONS.—

(1) IN GENERAL.—In the case of any project for which all or any portion of the basic Federal share of the costs of the project is proposed to be paid under this section, no Federal contribution shall be made until the Federal official administering the Federal law that authorizes the Federal grant program certifies that the project—

(A) meets (except as provided in subsection (b)) the applicable requirements of the applicable Federal grant program; and

(B) could be approved for Federal contribution under the Federal grant program if funds were available under the law for the project.

(2) CERTIFICATION BY AUTHORITY.—

(A) IN GENERAL.—The certifications and determinations required to be made by the Authority for approval of projects under this Act in accordance with section 302—

(i) shall be controlling; and

(ii) shall be accepted by the Federal agencies.

(B) ACCEPTANCE BY FEDERAL COCHAIRPERSON.—In the case of any project described in paragraph (1), any finding, report, certification, or documentation required to be submitted with respect to the project to the head of the department, agency, or instrumentality of the Federal Government responsible for the administration of the Federal grant program under which the project is carried out shall be accepted by the Federal cochairperson.

#### **SEC. 207. DEMONSTRATION PROJECTS.**

(a) IN GENERAL.—For each fiscal year, the Authority may approve not more than 10 demonstration projects to carry out activities described in sections 201 through 204, of which not more than 3 shall be carried out in any 1 State.

(b) REQUIREMENTS.—A demonstration project carried out under this section shall—

(1) be carried out on a multistate or multicounty basis; and

(2) be developed in accordance with the regional development plan prepared under section 210(d).

#### **SEC. 208. LOCAL DEVELOPMENT DISTRICTS; CERTIFICATION AND ADMINISTRATIVE EXPENSES.**

(a) GRANTS TO LOCAL DEVELOPMENT DISTRICTS.—

(1) IN GENERAL.—The Authority may make grants to local development districts to pay the administrative expenses of the local development districts.

(2) CONDITIONS FOR GRANTS.—

(A) MAXIMUM AMOUNT.—The amount of any grant awarded under paragraph (1) shall not exceed 80 percent of the administrative ex-

penses of the local development district receiving the grant.

(B) MAXIMUM PERIOD.—No grant described in paragraph (1) shall be awarded for a period greater than 3 years to a State agency certified as a local development district.

(C) LOCAL SHARE.—The contributions of a local development district for administrative expenses may be in cash or in kind, fairly evaluated, including space, equipment, and services.

(b) DUTIES OF LOCAL DEVELOPMENT DISTRICTS.—A local development district shall—

(1) operate as a lead organization serving multicounty areas in the region at the local level; and

(2) serve as a liaison between State and local governments, nonprofit organizations (including community-based groups and educational institutions), the business community, and citizens that—

(A) are involved in multijurisdictional planning;

(B) provide technical assistance to local jurisdictions and potential grantees; and

(C) provide leadership and civic development assistance.

#### **SEC. 209. DISTRESSED COUNTIES AND AREAS AND ECONOMICALLY STRONG COUNTIES.**

(a) DESIGNATIONS.—At the initial meeting of the Authority and annually thereafter, the Authority, in accordance with such criteria as the Authority may establish, shall designate—

(1) distressed counties;

(2) economically strong counties;

(3) attainment counties;

(4) competitive counties; and

(5) isolated areas of distress.

(b) DISTRESSED COUNTIES.—

(1) IN GENERAL.—For each fiscal year, the Authority shall allocate at least 40 percent of the amounts made available under section 306 for programs and projects designed to serve the needs of distressed counties and isolated areas of distress in the region.

(2) FUNDING LIMITATIONS.—The funding limitations under section 206(b) shall not apply to a project to provide transportation or basic public services to residents of 1 or more distressed counties or isolated areas of distress in the region.

(c) ECONOMICALLY STRONG COUNTIES.—

(1) ATTAINMENT COUNTIES.—Except as provided in paragraph (3), the Authority shall not provide funds for a project located in a county designated as an attainment county under subsection (a)(2)(A).

(2) COMPETITIVE COUNTIES.—Except as provided in paragraph (3), the Authority shall not provide more than 30 percent of the total cost of any project carried out in a county designated as a competitive county under subsection (a)(2)(B).

(3) EXCEPTIONS.—

(A) IN GENERAL.—The funding prohibition under paragraph (1) and the funding limitation under paragraph (2) shall not apply to grants to fund the administrative expenses of local development districts under section 208(a).

(B) MULTICOUNTY PROJECTS.—If the Authority determines that a project could bring significant benefits to areas of the region outside an attainment or competitive county, the Authority may waive the application of the funding prohibition under paragraph (1) and the funding limitation under paragraph (2) to—

(i) a multicounty project that includes participation by an attainment or competitive county; or

(ii) any other type of project.

(4) ISOLATED AREAS OF DISTRESS.—For a designation of an isolated area of distress for assistance to be effective, the designation shall be supported—

(A) by the most recent Federal data available; or

(B) if no recent Federal data are available, by the most recent data available through the government of the State in which the isolated area of distress is located.

#### SEC. 210. DEVELOPMENT PLANNING PROCESS.

(a) STATE DEVELOPMENT PLAN.—In accordance with policies established by the Authority, each State member shall submit an annual development plan for the area of the region represented by the State member to assist the Authority in determining funding priorities under section 205(b).

(b) CONSULTATION WITH INTERESTED PARTIES.—In carrying out the development planning process (including the selection of programs and projects for assistance), a State shall—

(1) consult with—

- (A) local development districts; and
- (B) local units of government;

(2) take into consideration the goals, objectives, priorities, and recommendations of the entities described in paragraph (1); and

(3) solicit input on and take into consideration the potential impact of the State development plan on the binational region.

(c) PUBLIC PARTICIPATION.—

(1) IN GENERAL.—The Authority and applicable State and local development districts shall encourage and assist, to the maximum extent practicable, public participation in the development, revision, and implementation of all plans and programs under this Act.

(2) REGULATIONS.—The Authority shall develop guidelines for providing public participation described in paragraph (1), including public hearings.

(d) REGIONAL DEVELOPMENT PLAN.—The Authority shall prepare an annual regional development plan that—

(1) is based on State development plans submitted under subsection (a);

(2) takes into account—

(A) the input of the private sector, academia, and nongovernmental organizations; and

(B) the potential impact of the regional development plan on the binational region;

(3) establishes 5-year goals for the development of the region;

(4) identifies and recommends to the States—

(A) potential multistate or multicounty projects that further the goals for the region; and

(B) potential development projects for the binational region; and

(5) identifies and recommends to the Authority for funding demonstration projects under section 207.

### TITLE III—ADMINISTRATION

#### SEC. 301. PROGRAM DEVELOPMENT CRITERIA.

(a) IN GENERAL.—In considering programs and projects to be provided assistance under this Act, and in establishing a priority ranking of the requests for assistance provided to the Authority, the Authority shall follow procedures that ensure, to the maximum extent practicable, consideration of—

(1) the relationship of the project or class of projects to overall regional development;

(2) the per capita income and poverty and unemployment rates in an area;

(3) the financial resources available to the applicants for assistance seeking to carry out the project, with emphasis on ensuring that projects are adequately financed to maximize the probability of successful economic development;

(4) the socioeconomic importance of the project or class of projects in relation to other projects or classes of projects that may be in competition for the same funds;

(5) the prospects that the project for which assistance is sought will improve, on a con-

tinuing rather than a temporary basis, the opportunities for employment, the average level of income, or the economic development of the area to be served by the project; and

(6) the extent to which the project design provides for detailed outcome measurements by which grant expenditures and the results of the expenditures may be evaluated.

(b) NO RELOCATION ASSISTANCE.—No financial assistance authorized by this Act shall be used to assist a person or entity in relocating from 1 area to another, except that financial assistance may be used as otherwise authorized by this Act to attract businesses from outside the region to the region.

(c) MAINTENANCE OF EFFORT.—Funds may be provided for a program or project in a State under this Act only if the Authority determines that the level of Federal or State financial assistance provided under a law other than this Act, for the same type of program or project in the same area of the State within the region, will not be reduced as a result of funds made available by this Act.

#### SEC. 302. APPROVAL OF DEVELOPMENT PLANS AND PROJECTS.

(a) IN GENERAL.—A State or regional development plan or any multistate subregional plan that is proposed for development under this Act shall be reviewed by the Authority.

(b) EVALUATION BY STATE MEMBER.—An application for a grant or any other assistance for a project under this Act shall be made through and evaluated for approval by the State member of the Authority representing the applicant.

(c) CERTIFICATION.—An application for a grant or other assistance for a project shall be approved only on certification by the State member that the application for the project—

(1) describes ways in which the project complies with any applicable State development plan;

(2) meets applicable criteria under section 301;

(3) provides adequate assurance that the proposed project will be properly administered, operated, and maintained; and

(4) otherwise meets the requirements of this Act.

(d) VOTES FOR DECISIONS.—On certification by a State member of the Authority of an application for a grant or other assistance for a specific project under this section, an affirmative vote of the Authority under section 101(d) shall be required for approval of the application.

#### SEC. 303. CONSENT OF STATES.

Nothing in this Act requires any State to engage in or accept any program under this Act without the consent of the State.

#### SEC. 304. RECORDS.

(a) RECORDS OF THE AUTHORITY.—

(1) IN GENERAL.—The Authority shall maintain accurate and complete records of all transactions and activities of the Authority.

(2) AVAILABILITY.—All records of the Authority shall be available for audit and examination by the Comptroller General of the United States (including authorized representatives of the Comptroller General).

(b) RECORDS OF RECIPIENTS OF FEDERAL ASSISTANCE.—

(1) IN GENERAL.—A recipient of Federal funds under this Act shall, as required by the Authority, maintain accurate and complete records of transactions and activities financed with Federal funds and report to the Authority on the transactions and activities.

(2) AVAILABILITY.—All records required under paragraph (1) shall be available for audit by the Comptroller General of the United States and the Authority (including authorized representatives of the Comptroller General and the Authority).

(c) ANNUAL AUDIT.—The Comptroller General of the United States shall audit the activities, transactions, and records of the Authority on an annual basis.

#### SEC. 305. ANNUAL REPORT.

(a) IN GENERAL.—Not later than 180 days after the end of each fiscal year, the Authority shall submit to the President and to Congress a report describing the activities carried out under this Act.

(b) CONTENTS.—

(1) IN GENERAL.—The report shall include—

(A) an evaluation of the progress of the Authority—

(i) in meeting the goals set forth in the regional development plan and the State development plans; and

(ii) in working with other Federal agencies and the border programs administered by the Federal agencies;

(B) examples of notable projects in each State;

(C) a description of all demonstration projects funded under section 306(b) during the fiscal year preceding submission of the report; and

(D) any policy recommendations approved by the Authority.

(2) INITIAL REPORT.—In addition to the contents specified in paragraph (1), the initial report submitted under this section shall include—

(A) a determination as to whether the creation of a loan fund to be administered by the Authority is necessary; and

(B) if the Authority determines that a loan fund is necessary—

(i) a request for the authority to establish a loan fund; and

(ii) a description of the eligibility criteria and performance requirements for the loans.

#### SEC. 306. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—There are authorized to be appropriated to the Authority to carry out this Act, to remain available until expended—

(1) \$50,000,000 for fiscal year 2003;

(2) \$75,000,000 for fiscal year 2004;

(3) \$90,000,000 for fiscal year 2005; and

(4) \$92,000,000 for fiscal year 2006.

(b) DEMONSTRATION PROJECTS.—Of the funds made available under subsection (a), \$5,000,000 for each fiscal year shall be available to the Authority to carry out section 207.

#### SEC. 307. TERMINATION OF AUTHORITY.

The authority provided by this Act terminates effective October 1, 2006.

By Mr. KERRY (for himself, Mr. FRIST, Mr. BIDEN, Mr. HELMS, Mr. DASCHLE, Mr. LEAHY, Mr. FEINGOLD, Mr. DODD, Mr. HAGEL, Mrs. BOXER, Mr. SARBANES, Mr. SMITH of Oregon, Mr. DEWINE, and Mr. WELLSTONE):

S. 2525. A bill to amend the Foreign Assistance Act of 1961 to increase assistance for foreign countries seriously affected by HIV/AIDS, tuberculosis, and malaria, and for other purposes; to the Committee on Foreign Relations.

Mr. KERRY. Mr. President, today I am introducing legislation along with Senators FRIST, BIDEN, HELMS, DASCHLE and others that offers our Nation's most comprehensive response to date to the global HIV/AIDS crisis. It authorizes \$4.7 billion over the next two years for U.S. contributions to the Global Fund to Fight AIDS, Tuberculosis and Malaria and for a dramatic expansion of bilateral U.S. programs

administered by the US Agency for International Development, USAID.

There can be no question that the AIDS pandemic has truly reached a crisis point, not only for the 40 million people infected worldwide, but also for the communities in which they live. The pandemic strikes at the foundations of societies, devastating families, undermining economies, and weakening a broad range of institutions by taking the lives of educators, health care providers, police, military personnel, and civil servants. These forces cripple the potential for long-term economic development and jeopardize political and social stability in Sub-Saharan Africa, the most-severely affected region, and increasingly in all corners of the world.

Although 95 percent of people infected with HIV live in developing countries, this crisis ultimately affects us all. Here in the United States, we cannot afford to ignore the fact that instability anywhere threatens security everywhere. While this is certainly not a new reality, it became painfully evident on September 11 of last year that the fate of our people is inextricably bound to the lives of those living thousands of miles across the globe. We are called by moral duty and by our national interest to forcefully combat the further spread of HIV/AIDS. Only the United States has the capacity to lead and enhance the effectiveness of the international community's response. Clearly we have not done enough to address this crisis. The need for strong action has never been so urgent or so great.

AIDS has become the fourth-highest cause of death globally, already claiming the lives of 22 million people. More than three-quarters of these deaths, more than 17 million, have been in Sub-Saharan Africa, where AIDS is now the leading cause of death. Last year alone, AIDS killed 2.3 million African people, and experts project that the disease will eventually take the lives of one in four adults throughout that region. Because of AIDS, Botswana, Zimbabwe, and South Africa are already experiencing negative population growth, and life expectancy for children born in some parts of the continent has dropped as low as 35 years. Of the estimated 40 million people now living with HIV globally, 28.1 million are in Sub-Saharan Africa. This number includes 3.4 million people who were infected last year alone.

Other parts of the world are going down the same path as Africa. The Caribbean is now the second most affected region, with 2.3 percent of adults infected with HIV. Eastern Europe, especially the Russian Federation, is experiencing the world's fastest-growing epidemic, mainly from injection drug use. In Asia and the Pacific region, 7.1 million people are infected with HIV or living with AIDS. Although national prevalence rates in most countries throughout that region are relatively low, localized epidemics have broken

out in many areas, and there is a serious threat of major outbreaks of the virus in China, India, and a number of other countries.

More than 20 years after the first cases were reported, basic knowledge about HIV/AIDS remains disturbingly low. Half of all teenage girls in Sub-Saharan Africa still do not know that healthy-looking people can have HIV. In Mozambique, 74 percent of young women and 62 percent of young men aged 15 to 19 cannot name a single method of protecting themselves against HIV/AIDS. Worldwide, nine out of ten HIV infected individuals are unaware they are infected.

The AIDS crisis is affecting females at an increasing rate. In 1997, 41 percent of adults living with HIV/AIDS were women. By 2000, that proportion had increased to 47 percent. Biologically, the risk of becoming infected with HIV during unprotected intercourse is greater for women than for men, and gender inequalities in social and economic status and access to medical care increase women's vulnerability. This gender imbalance is even stronger for younger females, in some countries, the rate of new infections among girls is as much as 5 to 6 times higher than among boys.

Although girls are hardest-hit, the HIV/AIDS crisis takes a disproportionate toll on young people in general. Nearly one-third of the 40 million people currently living with HIV are between the ages of 15 and 24, and half of all new infections occur in this age group. Mother-to-child transmission is responsible for the vast majority of infections among children under the age of 15. Without preventive measures, 35 percent of infants born to HIV-positive mothers contract the virus. Even those who are not infected in this manner can confront tremendous difficulties, more than 13 million children under age 15 have already lost their mothers or both parents to AIDS, and this number is expected to more than double by the end of the decade. Children orphaned by AIDS are susceptible to extreme poverty, malnutrition, psychological distress, and a long list of other hardships. Many of these orphans turn to crime in order to survive.

HIV/AIDS can undermine the economic security of individual families, communities, and even entire nations. The disease weakens the productivity and longevity of the labor force across a broad array of economic sectors, reducing the potential for immediate and long-term economic growth. In some countries, AIDS is reversing progress brought by decades of economic development efforts. But the ripple effects of this pandemic go far beyond the economic realm, touching virtually all aspects of life in the countries that are hardest-hit. HIV/AIDS strikes at the most mobile and educated members of society, many of whom are responsible for governance, health care, education, and security.

Earlier this month, the World Bank reported that AIDS is spreading so rap-

idly in parts of Africa that it is killing teachers faster than countries can train them. At the same time, HIV-infected children and those orphaned by AIDS must often leave school. These trends have combined to create an education crisis. Africa is also confronting a mounting security crisis with ramifications for the broader international community. According to UNAIDS, many military forces in Sub-Saharan Africa face infection rates as high as five times that of the civilian population. These military forces are losing their capacity to preserve stability within their own borders and to engage in regional peacekeeping and conflict prevention efforts. This pattern is likely to compound the problem of failing states throughout Africa.

My words have barely begun to chronicle the extent to which this pandemic has spread, the devastation it has wrought, and the myriad threats it poses to distant countries and to our own. We are facing the world's worst health crisis since the bubonic plague and it is not "someone else's problem." It is humanity's problem.

It is up to us to respond. American leadership is needed as never before. The United States can not afford to sit on the sidelines or tinker at the edges of a global pandemic. Only the United States is in a position to lead the effort with other governments and private sector partners to beat this pandemic and only the United States has the resources to make a difference. History is going to judge how we react to this crisis and we want history to judge us well.

There is so much we can do—if we commit ourselves to the effort. We have learned that we can change behavior through prevention and education programs, especially if those programs make treatment available for those already sick. We can stop the transmission of the HIV virus from mother-to-child through the use of the drug nevirapine. And we can reduce the growing number of "AIDS orphans" if we start adding voluntary counseling, testing and treatment of parents and care-givers to children—in other words adding a Plus to the MTCT, mother-to-child transmission, programs.

That is the goal of this legislation. It will provide clear American leadership, helping to harness resources here at home and around the globe for research and development to eradicate these deadly diseases. It will inject unprecedented amounts of capital in effective prevention and treatment programs and direct resources to the people on the ground fighting these diseases.

The legislation that we are introducing today represents the first effort ever to create a comprehensive long term strategy for American leadership in responding to this global pandemic. If passed into law, this bill would represent the largest single monetary commitment ever made by the United States to deal with AIDS pandemic. It would double U.S. spending on global

AIDS from roughly \$1 billion this year to more than \$2 billion per year over the next two years. But equally important, it would require the U.S. government to develop a comprehensive, detailed five-year plan to significantly reduce the spread of HIV/AIDS around the world and meet the targets set by the international community at the June 2001 United Nations Special Session on HIV/AIDS.

This legislation authorizes \$1 billion in this fiscal year and \$1.2 billion in the next for US contributions to the Global Fund to Fight AIDS, Tuberculosis and Malaria—the international community's new combined effort to increase resources against this pandemic. It authorizes more than \$800 million this year and \$900 million next year for an expansion of existing USAID programs and creation of new programs to increase our efforts not only in the areas of prevention and education but also in the equally important areas of care and prevention. It provides significant new funding levels for programs to combat tuberculosis and malaria—serious infectious diseases which, together with HIV/AIDS, killed 5.7 million people last year.

The fight against HIV/AIDS has started to produce results in some countries. Cambodia and Thailand, driven by strong political leadership and public commitment, have developed successful prevention programs. HIV prevalence among pregnant women in Cambodia dropped by almost a third between 1997 and 2000. In Uganda, rates of HIV infection among adults continue to fall, largely because President Yoweri Museveni has pursued an aggressive education campaign to make people in his country aware of ways they can protect themselves from this disease. President Museveni has displayed courage in his willingness to break through cultural boundaries to discuss the AIDS crisis openly and realistically.

Leadership within the countries that are most severely-affected by HIV/AIDS is absolutely indispensable. Our legislation seeks to encourage that leadership by offering the possibility of obtaining greater resources to be used for health programs through a new round of international negotiations to further reduce the debt of many of these countries. Ultimately the fight against AIDS requires a broad partnership between the governments of those countries severely affected, governments like ours in a position to provide assistance, and the private sector which can bring not only resources but scientific and medical knowledge and expertise to bear.

Various organizations in the private sector have already contributed a great deal to the struggle against HIV/AIDS. Philanthropies like the Bill & Melinda Gates Foundation have donated hundreds of millions of dollars to purchase drugs, improve health delivery systems, and bolster prevention campaigns, among other means of support.

Pharmaceutical companies such as Merck and Pfizer have also offered a number of life-extending therapies to the developing world at no cost or at a very discounted rate.

These contributions and these public/private sector partnerships are critical to the success of our effort. The bill that we are introducing makes it clear that these kinds of partnerships should be strengthened and expanded. And for the first time, it also sets out a voluntary code of conduct for American businesses who have operations in countries affected by the AIDS pandemic to follow, not unlike the Sullivan Code of Conduct that many American firms followed during the days of apartheid in South Africa.

The global HIV/AIDS crisis is a matter of money, for words alone will not beat back the greatest challenge the world has ever witnessed to the very survival of a continent, Africa, and an ever growing number of other areas. But it is more than that, this is a question of leadership, not fate; of willpower, not capacity. The question before us is not whether we can win this fight, but whether we will choose to, whether 'here on earth,' as President Kennedy said, we are going to make "God's work truly our own."

I believe we will. That is why there is such a broad coalition supporting this effort. That is why my friend and colleague Senator KENNEDY, chairman of the HELP Committee, is working in concert with us to produce a bill that will authorize another \$500 million for the CDC and other HHS agencies to help fight this epidemic. And that is why Democrats and Republicans together are going to demonstrate the full measure of America's ability to respond to enormous tragedy with enormous strength.

#### STATEMENTS ON SUBMITTED RESOLUTIONS—MAY 14, 2002

#### SENATE RESOLUTION 267—EX- PRESSING THE SENSE OF THE SENATE REGARDING THE POL- ICY OF THE UNITED STATES AT THE 54TH ANNUAL MEETING OF THE INTERNATIONAL WHALING COMMISSION

Mr. KERRY (for himself, Ms. SNOWE, Mr. HOLLINGS, Mr. MCCAIN, Mr. LIEBERMAN, Mr. WYDEN, Mr. AKAKA, Mr. REED, Mr. TORRICELLI, Mr. FITZGERALD, Ms. COLLINS, Mr. LUGAR, Mrs. BOXER, and Mr. KENNEDY) submitted the following resolution, which was referred to the Committee on Foreign Relations:

(The resolution can be found in the RECORD of May 14, 2002, on page S4333.)

Ms. SNOWE. Mr. President, the resolution that Senator KERRY and I are submitting is very timely and important. As we work here in the Senate today, representatives of nations from around the globe are preparing for the 54th annual Meeting of the Inter-

national Whaling Commission to be held in Japan, May 20–24, 2002. At this meeting, the IWC will determine the fate of the world's whales through consideration of proposals to end the current global moratorium on commercial whaling. The adoption of any such proposals by the IWC would mark a major setback in whale conservation. It is imperative that the United States remain firm in its opposition to any proposals to resume commercial whaling and that we, as a Nation, continue to speak out passionately against this practice.

It is also time to close one of the loopholes used by nations to continue to whale without regard to the moratorium or established whale sanctuaries. The practice of unnecessary lethal scientific whaling is outdated and the value of the data of such research has been called into question by an international array of scientists who study the same population dynamics questions as those who harvest whales in the name of science. This same whale meat is then processed and sold in the marketplace. These sentiments have been echoed by the Scientific Committee of the IWC which has repeatedly passed resolutions calling for the cessation of lethal scientific whaling, particularly that occurring in designated whale sanctuaries. They have offered to work with all interested parties to design research protocols that will not require scientists to harm or kill whales.

Last year, Japan expanded their scientific whaling program over the IWC's objections. The resolution that we are offering expresses the Sense of the Senate that the United States should continue to remain firmly opposed to any resumption of commercial whaling and oppose, at the upcoming IWC meeting, the non-necessary lethal taking of whales for scientific purposes.

Commercial whaling has been prohibited for many species for more than sixty years. In 1982, the continued decline of commercially targeted stocks led the IWC to declare a global moratorium on all commercial whaling which went into effect in 1986. The United States was a leader in the effort to establish the moratorium, and since then we have consistently provided a strong voice against commercial whaling and have worked to uphold the moratorium. This resolution reaffirms the United States' strong support for a ban on commercial whaling at a time when our negotiations at the IWC most need that support. Norway, Japan, and other countries have made it clear that they intend to push for the elimination of the moratorium, and for a return to the days when whales were retreated as commodities.

The resolution would reiterate the U.S. objection to activities being conducted under reservations to the IWC's moratorium. The resolution would also oppose the proposal to allow a non-member country to join the Convention with a reservation that would allow it to commercially whale. The