

sanctions on certain officials of Uzbekistan responsible for the Andijan massacre.

S. 2810

At the request of Mr. GRASSLEY, the names of the Senator from West Virginia (Mr. BYRD), the Senator from Ohio (Mr. VOINOVICH), the Senator from New York (Mrs. CLINTON), the Senator from Maryland (Ms. MIKULSKI), the Senator from Rhode Island (Mr. CHAFEE), the Senator from Alaska (Mr. STEVENS), the Senator from Rhode Island (Mr. REED), the Senator from Colorado (Mr. SALAZAR), the Senator from Pennsylvania (Mr. SPECTER), the Senator from Minnesota (Mr. COLEMAN) and the Senator from Florida (Mr. MARTINEZ) were added as cosponsors of S. 2810, a bill to amend title XVIII of the Social Security Act to eliminate months in 2006 from the calculation of any late enrollment penalty under the Medicare part D prescription drug program and to provide for additional funding for State health insurance counseling program and area agencies on aging, and for other purposes.

S. 2819

At the request of Mr. COLEMAN, the name of the Senator from Iowa (Mr. HARKIN) was added as a cosponsor of S. 2819, a bill to amend part C of title XVIII of the Social Security Act to provide for a minimum payment rate by Medicare Advantage organizations for services furnished by a critical access hospital and a rural health clinic under the Medicare program.

S. 2824

At the request of Mr. DEMINT, the name of the Senator from Missouri (Mr. BOND) was added as a cosponsor of S. 2824, a bill to reduce the burdens of the implementation of section 404 of the Sarbanes-Oxley Act of 2002.

S. RES. 450

At the request of Mr. DEWINE, the names of the Senator from Georgia (Mr. CHAMBLISS), the Senator from Georgia (Mr. ISAKSON) and the Senator from Alaska (Ms. MURKOWSKI) were added as cosponsors of S. Res. 450, a resolution designating June 2006 as National Safety Month.

S. RES. 469

At the request of Mr. MCCAIN, the names of the Senator from Ohio (Mr. DEWINE) and the Senator from Georgia (Mr. CHAMBLISS) were added as cosponsors of S. Res. 469, a resolution condemning the April 25, 2006, beating and intimidation of Cuban dissident Martha Beatriz Roque.

At the request of Mr. LIEBERMAN, the name of the Senator from New Jersey (Mr. LAUTENBERG) was added as a cosponsor of S. Res. 469, *supra*.

AMENDMENT NO. 4009

At the request of Mr. CHAMBLISS, the names of the Senator from Tennessee (Mr. ALEXANDER) and the Senator from Missouri (Mr. BOND) were added as cosponsors of amendment No. 4009 proposed to S. 2611, a bill to provide for comprehensive immigration reform and for other purposes.

AMENDMENT NO. 4023

At the request of Mr. DOMENICI, the name of the Senator from Connecticut (Mr. DODD) was added as a cosponsor of amendment No. 4023 intended to be proposed to S. 2611, a bill to provide for comprehensive immigration reform and for other purposes.

AMENDMENT NO. 4025

At the request of Mr. DEMINT, the name of the Senator from Kansas (Mr. BROWNBACK) was added as a cosponsor of amendment No. 4025 intended to be proposed to S. 2611, a bill to provide for comprehensive immigration reform and for other purposes.

AMENDMENT NO. 4029

At the request of Mr. AKAKA, the names of the Senator from Washington (Mrs. MURRAY) and the Senator from Washington (Ms. CANTWELL) were added as cosponsors of amendment No. 4029 proposed to S. 2611, a bill to provide for comprehensive immigration reform and for other purposes.

AMENDMENT NO. 4057

At the request of Mr. THOMAS, the name of the Senator from California (Mrs. BOXER) was added as a cosponsor of amendment No. 4057 intended to be proposed to S. 2611, a bill to provide for comprehensive immigration reform and for other purposes.

AMENDMENT NO. 4064

At the request of Mr. INHOFE, the names of the Senator from Tennessee (Mr. ALEXANDER), the Senator from Arizona (Mr. KYL) and the Senator from Tennessee (Mr. FRIST) were added as cosponsors of amendment No. 4064 proposed to S. 2611, a bill to provide for comprehensive immigration reform and for other purposes.

#### STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. LOTT (for himself and Mr. PRYOR):

S. 2830. A bill to amend the automobile fuel economy provisions of title 49, United States Code, to reform the setting and calculation of fuel economy standards for passenger automobiles, and for other purposes; to the Committee on Commerce, Science, and Transportation.

Mr. LOTT. Mr. President, I rise today to introduce The Corporate Average Fuel Economy, CAFE, Program Reform Act of 2006. I am pleased to be joined in this effort by Senator PRYOR, who serves on the Commerce Committee with me.

Since being introduced in the 1970s, CAFE standards have been controversial. The effectiveness of these standards is often debated as is their effect on safety, consumer choice, and the automobile industry.

CAFE became so controversial that it essentially was frozen for many years.

The stand-off over CAFE finally eased a little bit when a Congressionally commissioned National Academy of Sciences review of the CAFE pro-

gram was released in 2002. Although that study found that CAFE had in fact reduced energy consumption, the Academy was critical of how the program was structured and found that there was a negative impact on safety.

Just this spring, the Department of Transportation issued new reformed CAFE rules for pickup trucks, vans, and SUVs. This rule is a radical departure from prior CAFE rules in that it applies different standards to different sized vehicles rather than a uniform standard across the whole fleet. The Department's approach addresses many of the criticisms in the academy's study.

The recent rule did not, however, include new standards for cars. Those standards have been the same since 1984 and there is considerable legal ambiguity about the secretary's ability to increase the existing standards. It is clear, however, that the law does not allow the secretary to "reform" CAFE standards for cars, since that part of the statute is written differently than for light trucks.

As chairman of the Subcommittee on Surface Transportation and Merchant Marine, I held a hearing on reforming CAFE standards last week. We heard from Secretary Mineta, as well as the automobile industry, safety advocates, and fuel economy experts. After listening to what our witnesses had to say, I am convinced that "reform" is a necessary approach.

After that hearing, Secretary Mineta transmitted legislation to Congress asking for the authority to reform CAFE standards.

The bill we are introducing today is very straightforward. The main feature of the legislation is that it gives the Secretary of Transportation the authority to reform the CAFE program in a manner similar to the rule that he issued for light trucks. The bill puts the responsibility of setting CAFE standards where it belongs—and that is with the scientists and technical experts at the Department of Transportation.

The reformed CAFE program authorized by this legislation will address many of the past criticisms. For example, the legislation specifies that the Secretary must take motor vehicle safety into consideration when developing new CAFE standards. The legislation also allows the trading of CAFE credits between a manufacturer's passenger car and light truck fleets. This gives manufacturers the flexibility to increase CAFE where it is most cost effective to do so.

Let me briefly address one issue that is potentially controversial. That is the issue of what is being called "backsliding." The concern is that under a reformed CAFE program, manufacturers could simply stop manufacturing some of their smaller cars since these cars are no longer needed to "average out" the larger, less fuel efficient models. The manufacturer's overall fuel economy average could then end up

being below where it is presently. Although this is very unlikely to happen and that isn't the intent of a "reformed" CAFE system, I understand the concern. Senator PRYOR and I have included a provision in our legislation to address that problem. I know that there are many opinions on how to deal with this backsliding issue, and some people may not feel that our approach is strong enough. On the other hand, if the provision is too strict then the benefits of reform are potentially wiped out.

In the past, many in Congress have played politics with CAFE—offering bills that try to set unrealistically high or arbitrary CAFE standards. On the other side are those that have simply opposed doing anything. This has resulted in a stalemate and lots of finger pointing. I hope this doesn't happen again, because we really do need to get tougher standards in place as soon as we can.

Senator PRYOR and I are committed to improving the fuel economy of our vehicles without reducing safety and reliability or losing jobs. I urge my colleagues to support this legislation.

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

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

S. 2830

*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 "Corporate Average Fuel Economy Reform Act of 2006".

#### SEC. 2. CAFE STANDARDS FOR PASSENGER AUTOMOBILES.

(a) AVERAGE FUEL ECONOMY STANDARDS FOR AUTOMOBILES.—Section 32902 of title 49, United States Code, is amended—

(1) by striking subsections (b) and (c) and inserting the following:

“(b) PASSENGER AUTOMOBILES.—

“(1) IN GENERAL.—At least 18 months before the beginning of each model year, the Secretary of Transportation shall prescribe by regulation average fuel economy standards for passenger automobiles manufactured by a manufacturer in that model year. Each standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year. The Secretary may prescribe separate standards for different classes of passenger automobiles.

“(2) MINIMUM STANDARD.—In prescribing a standard under paragraph (1), the Secretary shall ensure that no manufacturer's standard for a particular model year is less than the greater of—

“(A) the standard in effect on the date of enactment of the Corporate Average Fuel Economy Reform Act of 2006; or

“(B) a standard established in accordance with the requirement of section 5(c)(2) of that Act.

“(c) FLEXIBILITY OF AUTHORITY.—

“(1) IN GENERAL.—The authority of the Secretary to prescribe by regulation average fuel economy standards for automobiles under this section includes the authority to prescribe standards based on one or more vehicle attributes that relate to fuel economy, and to express the standards in the form of a

mathematical function. The Secretary may issue a regulation prescribing standards for one or more model years.

“(2) REQUIRED LEAD-TIME.—When the Secretary prescribes an amendment to a standard under this section that makes an average fuel economy standard more stringent, the Secretary shall prescribe the amendment at least 18 months before the beginning of the model year to which the amendment applies.

“(3) NO ACROSS-THE-BOARD INCREASES.—When the Secretary prescribes a standard, or prescribes an amendment under this section that changes a standard, the standard may not be expressed as a uniform percentage increase from the fuel-economy performance of automobile classes or categories already achieved in a model year by a manufacturer.”;

(2) by inserting “motor vehicle safety, emissions,” in subsection (f) after “economy,”;

(3) by striking “energy,” in subsection (f) and inserting “energy and reduce its dependence on oil for transportation.”;

(4) by striking subsection (j) and inserting the following:

“(j) COMMENTS FROM DOE AND EPA.—

“(1) NOTICE OF PROPOSED RULEMAKING.—Before issuing a notice proposing to prescribe or amend an average fuel economy standard under subsection (a), (b), or (g), the Secretary of Transportation shall give the Secretary of Energy and the Administrator of the Environmental Protection Agency at least 10 days to comment on the proposed standard or amendment. If the Secretary of Energy or the Administrator concludes that the proposed standard or amendment would adversely affect the conservation goals of the Department of Energy or the environmental protection goals of the Environmental Protection Agency, respectively, the Secretary or the Administrator may provide written comments to the Secretary of Transportation about the impact of the proposed standard or amendment on those goals. To the extent that the Secretary of Transportation does not revise a proposed standard or amendment to take into account the comments, if any, the Secretary shall include the comments in the notice.

“(2) NOTICE OF FINAL RULE.—Before taking final action on a standard or an exemption from a standard under this section, the Secretary of Transportation shall notify the Secretary of Energy and the Administrator of the Environmental Protection Agency and provide them a reasonable time to comment on the standard or exemption.”; and

(5) by adding at the end thereof the following:

“(k) COSTS-BENEFITS.—The Secretary of Transportation may not prescribe an average fuel economy standard under this section that imposes marginal costs that exceed marginal benefits, as determined at the time any change in the standard is promulgated.”.

(b) EXEMPTION CRITERIA.—The first sentence of section 32904(b)(6)(B) of title 49, United States Code, is amended—

(1) by striking “exemption would result in reduced” and inserting “manufacturer requesting the exemption will transfer”;

(2) by striking “in the United States” and inserting “from the United States”; and

(3) by inserting “because of the grant of the exemption” after “manufacturing”.

(c) CONFORMING AMENDMENTS.—

(1) Section 32902 of title 49, United States Code, is amended—

(A) by striking “or (c)” in subsection (d)(1);

(B) by striking “(c),” in subsection (e)(2);

(C) by striking “subsection (a) or (d)” each place it appears in subsection (g)(1) and inserting “subsection (a), (b), or (d)”;

(D) by striking “(1) The” in subsection (g)(1) and inserting “The”;

(E) by striking subsection (g)(2); and

(F) by striking “(c),” in subsection (h) and inserting “(b),”.

(2) Section 32903 of such title is amended by striking “section 32902(b)-(d)” each place it appears and inserting “subsection (b) or (d) of section 32902”.

(3) Section 32904(a)(1)(B) of such title is amended by striking “section 32902(b)-(d)” and inserting “subsection (b) or (d) of section 32902”.

(4) The first sentence of section 32909(b) of such title is amended to read “The petition must be filed not later than 59 days after the regulation is prescribed.”.

(5) Section 32917(b)(1)(B) of such title is amended by striking “or (c)”.

#### SEC. 3. USE OF EARNED CREDITS.

Section 32903 of title 49, United States Code, is amended—

(1) by striking “3 consecutive model years” in subsection (a)(1) and subsection (a)(2) and inserting “5 consecutive model years”;

(2) by striking “3 model years” in subsection (b)(2) and inserting “5 model years”;

(3) by redesignating subsection (f) as subsection (g); and

(4) by inserting after subsection (e) the following:

“(f) CREDIT TRANSFERS.—The Secretary of Transportation may permit by regulation, on such terms and conditions as the Secretary may specify, a manufacturer of automobiles that earns credits to transfer such credits attributable to one of the following production segments in a model year to apply those credits in that model year to the other production segment:

“(1) Passenger-automobile production.

“(2) Non-passenger-automobile production.

In promulgating such a regulation, the Secretary shall take into consideration the potential effect of such transfers on creating incentives for manufacturers to produce more efficient vehicles and domestic automotive employment.”.

#### SEC. 4. USE OF CIVIL PENALTIES FOR RESEARCH AND DEVELOPMENT.

Section 32912 of title 49, United States Code, is amended by adding at the end thereof the following:

“(e) RESEARCH AND DEVELOPMENT AND USE OF CIVIL PENALTIES.—

“(1) All civil penalties assessed by the Secretary or by a Court shall be credited to an account at the Department of Transportation and shall be available to the Secretary to carry out the research program described in paragraph (2).

“(2) The Secretary shall carry out a program of research and development into fuel saving automotive technologies and to support rulemaking related to the corporate average fuel economy program.”.

#### SEC. 5. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), this Act, and the amendments made by this Act, take effect on the date of enactment of this Act.

(b) TRANSITION FOR PASSENGER AUTOMOBILE STANDARD.—Notwithstanding subsection (a), and except as provided in subsection (c)(2), until the effective date of a standard for passenger automobiles that is issued under the authority of section 32902(b) of title 49, United States Code, as amended by this Act, the standard or standards in place for passenger automobiles under the authority of section 32902 of that title, as that section was in effect on the day before the date of enactment of this Act, shall remain in effect.

(c) RULEMAKING.—

(1) INITIATION OF RULEMAKING UNDER AMENDED LAW.—Within 60 days after the date of enactment of this Act, the Secretary of Transportation shall initiate a rulemaking for passenger automobiles under section

32902(b) of title 49, United States Code, as amended by this Act.

(2) AMENDMENT OF EXISTING STANDARD.—Until the Secretary issues a final rule pursuant to the rulemaking initiated in accordance with paragraph (1), the Secretary shall amend the average fuel economy standard prescribed pursuant to section 32092(b) of title 49, United States Code, with respect to passenger automobiles in model years to which the standard adopted by such final rule does not apply.

Mr. PRYOR. Mr. President, I rise today with my good friend and colleague from Mississippi, Senator LOTT, to introduce legislation to reform and raise the corporate average fuel economy standard for the first time since its inception over 30 years ago.

In 1975 this body passed, as a part of the Energy Policy and Conservation Act, the very first fuel economy standards for our passenger car fleet, setting a standard that all manufacturers must achieve 27.5 miles per gallon. This was done in response to the first oil embargo and the energy crisis of the early 1970s. Americans realized for the first time that we as a nation must set and achieve attainable goals for energy conservation, not only for our economic security but also for our national security.

At that time, the fuel economy of passenger cars averaged around 14 miles per gallon. Ten years after CAFE was enacted, the fuel economy of passenger cars had almost doubled, saving an estimated 2.8 million barrels of oil a day. There can be no doubts as to the benefits of the original CAFE standard. Still 20 years after reaching this peak around 1985, the fuel economy of the Nation's passenger car fleet has stagnated. Some have even argued the fleet of vehicles entering the marketplace today gets less fuel economy than those models in 1985. While fuel efficient technology has improved over the years, the fuel economy of the Nation's passenger fleet has not. Also today, our dependence on oil is greater than ever before. This dependence has complicated decisions we make as a country, such as foreign policy decisions, and as individuals, such as whether or not to fill up your gas tank or buy groceries.

I believe we must do better for families in Arkansas and around the Nation. We must protect our national security by reducing our dependence on foreign oil and uncomplicating our foreign policy decision-making in oil-rich regions. We must protect the environment by reducing greenhouse gas emissions. We must reduce the cost of transportation for consumers. We must begin implementing more stringent CAFE standards now before these problems worsen. Gasoline is over 70 cents higher than this time last year, and the number of miles driven by every American over the age of 16 has risen over 60 percent since 1970—and is continuing to climb at a rapid pace.

This is why I have joined my colleague and worked in a bipartisan manner to introduce comprehensive CAFE

reform. For over 30 years the original CAFE standard has remained in place while a rapidly advancing marketplace and rapidly advancing technology have left it behind. Each time fuel economy standards have been debated in this body, they have been mired in partisan politics resulting in nothing but stalemate.

Senator LOTT and I are choosing progress over politics with our common sense legislation, the Corporate Average Fuel Economy Reform Act of 2006. The bill will help accomplish our national security and energy conservation goals while preserving motor vehicle safety, American manufacturing jobs, and consumer choice for vehicles.

Specifically, it will clarify the authority of the Secretary of Transportation to raise and reform CAFE standards. It requires the Secretary to begin the reform process within 60 days in addition to requiring the Secretary to complete an expedited rulemaking to immediately amend the current CAFE standard before a reformed standard takes effect.

For the first time, it will require the Secretary to consider greenhouse gas emissions when promulgating a CAFE standard as well as require the Secretary to obtain comments from the Administrator of the Environmental Protection Agency on the impact of any new rule on the environment.

Our legislation also gives automobile manufacturers more flexibility in the way they can apply CAFE credits in order to help them preserve American jobs. It preserves the 18-month lead time required before the Secretary can issue more stringent CAFE standards. It also allows the Secretary to use the fines collected for violations of the CAFE standard for research and development of fuel saving technologies and to conduct CAFE rulemakings. Finally, our bill provides a backstop fuel economy average which no manufacturer can go below, regardless of their fleet mix.

There is no silver bullet in accomplishing our national security and energy goals, and we must seek short-term alternatives in addition to long-term solutions. CAFE reform is one part of a long-term solution to reduce our dependence on oil, but it is one that can have lasting impact. Still, I believe for the long-term security of our country, this is as good a place as any to start. We must start now.

I thank my colleague from the Commerce Committee, Senator LOTT, for his hard work on this bipartisan legislation. I look forward to working with him and the rest of my colleagues to ensure that this reform becomes law.

By Mr. LUGAR (for himself, Mr. SPECTER, Mr. DODD, Mr. GRAHAM, and Mr. SCHUMER):

S. 2831. A bill to guarantee the free flow of information to the public through a free and active press while protecting the right of the public to effective law enforcement and the fair

administration of justice; to the Committee on the Judiciary.

Mr. LUGAR. Mr. President, the bill at the desk is introduced on behalf of myself, Senators SPECTER, DODD, GRAHAM, and SCHUMER. I am pleased to join my good friends and colleagues, Senators SPECTER and DODD, in introducing a revised version of the Free Flow of Information Act.

I believe that the free flow of information essential element of democracy. In order for the United States to foster the spread of freedom and democracy globally, it is incumbent that we first support an open and free press nationally. The role of the media as a conduit between government and the citizens it serves must not be devalued.

Unfortunately, the free flow of information to citizens of the United States is inhibited. Over 30 reporters were recently served or threatened with jail sentences in at least four different Federal jurisdictions for refusing to reveal confidential sources. I fear the end result of such actions is that many whistleblowers will refuse to come forward and reporters will be unable to provide our constituents with information they have a right to know.

In 1972, the Supreme Court held in *Branzburg v. Hayes*, that reporters did not have an absolute privilege as third party witnesses to protect their sources from prosecutors. Since *Branzburg*, every State and the District of Columbia, excluding Wyoming has created a privilege for reporters not to reveal their confidential sources. My own State of Indiana provides qualified reporters an absolute protection from having to reveal any such information in court.

The Federal courts of appeals, however, have an incongruent view of this matter. Each circuit has addressed the question of the privilege in a different manner. Some circuits allow the privilege in one category of cases, while others, have expressed skepticism about whether any privilege exists at all.

Congress should clarify the extraordinary differences of opinion in the Federal courts of appeals and the effect they have on undermining the general policy of protection already in place among the States. Likewise, the ambiguity between official Department of Justice rules and unofficial criteria used to secure media subpoenas is unacceptable.

There is an urgent need for Congress to state clear and concise policy guidance.

Senators SPECTER, DODD, and I have introduced legislation today that preserves the free flow of information to the public by providing the press the ability to obtain and protect confidential sources. It provides journalists with certain rights and abilities to sources and report appropriate information without fear of intimidation or imprisonment. This bill sets national standards, based on Department of Justice guidelines, for subpoenas issued to reporters by the Federal Government.

Our legislation promotes greater transparency of government, maintains the ability of the courts to operate effectively, and protects the whistleblowers that identify government or corporate misdeeds and protect national security.

It is also important to note what this legislation does not do. The legislation does not permit rule breaking, give reporters a license to break the law, or permit reporters to interfere with crimes prevention efforts. Furthermore, the Free Flow of Information Act does not weaken national security nor restrict law enforcement. Additional protections have been added to this bill to ensure that information will be disclosed in cases where the guilt or innocence of a criminal is in question, in cases where a reporter was an eye witness to a crime, and in cases where the information is critical to prevent death or bodily harm. The national security exception and continued strict standards relating to classified information will ensure that reporters are protected while maintaining an avenue for prosecution and disclosure when considering the defense of our country.

Reporters Without Borders has reported that more than 100 journalists are currently in jail around the world, with more than half in China, Cuba, and Burma. This is not good company for the United States of America. Global public opinion is always on the lookout to advertise perceived American double standards.

I believe that passage of this bill would have positive diplomatic consequences. This legislation not only confirms America's constitutional commitment to press freedom, it also advances President Bush's American foreign policy initiatives to promote and protect democracy. When we support the development of free and independent press organizations worldwide, it is important to maintain these ideals at home.

In conclusion, I thank, again, my colleagues, Senator SPECTER, the distinguished chairman of the Judiciary Committee, and Senator DODD for their tireless work on this issue. With their assistance, I look forward to working with each of my colleagues to ensure that the free flow of information is unimpeded.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I am pleased to join with Senator LUGAR, the principal sponsor, and Senators DODD, GRAHAM, and SCHUMER on the introduction of legislation which will codify a reporter's privilege, something that is very necessary. The matter came into sharp focus recently with the contempt citation and the incarceration of New York Times reporter, Judith Miller, for some 85 days. The Judiciary Committee held two hearings on this subject. Senator LUGAR, with Congressman PENCE in the House, introduced legislation which has formed

the nucleus of the bill we are introducing today.

The Branzburg v. Hayes case, 33 years ago, which was a 5-to-4 decision, with a concurring opinion by Justice Powell, has led to what is accurately called a "crazy quilt" situation in the circuits—five circuits going one way, four circuits going another way, and laws unsettled in some circuits. This bill, modeled significantly after the Department of Justice regulations, will codify this important issue.

There is an exception on reporter's privilege for national security cases. Keeping in mind the incarceration of Judith Miller, this bill makes a sharp distinction between national security and an inquiry in the grand jury for obstruction of justice or perjury. As a prosecutor in the past, I have great appreciation for the offenses of obstruction of justice and perjury. But in my judgment, they do not rise to the level of importance as a national security case. When a special prosecutor's investigation shifts from the disclosure of a CIA agent, to a question of obstruction of justice, it is a very different situation. This bill would not permit, would not compel the disclosure of a source for obstruction of justice or perjury, but would compel the disclosure of a source for a national security case.

This legislation has the endorsement of 39 of the major media organizations in the United States: The New York Times, the Washington Post, the Associated Press, Time, Hearst Corporation, Philadelphia Inquirer, Newspaper Association of America, ABC, NBC, and CBS. It goes a long way to protecting sources, but it also leaves latitude, in the form of a balancing test, for Federal prosecutors to gain information under limited circumstances for plaintiffs and defendants in civil cases to have access to sources. And, it does not have a shield if a reporter is a witness to some criminal incident.

In recent months, there has been a growing consensus that we need to establish a Federal journalists' privilege to protect the integrity of the newsgathering process—a process that depends on the free flow of information between journalists and whistleblowers, as well as other confidential sources. I do not reach this conclusion lightly. The Judiciary Committee held two separate hearings in which it heard from sixteen witnesses. Included in this number were seven journalists, six attorneys, including current or former prosecutors and some of the Nation's most distinguished experts on the first amendment.

These witnesses demonstrated that there are two vital, competing concerns at stake. On one hand, reporters cite the need to maintain confidentiality in order to ensure that sources will speak openly and freely with the news media. The renowned William Safire, former columnist for the New York Times, testified that "the essence of news gathering is this: if you don't have sources you trust and who trust

you, then you don't have a solid story—and the public suffers for it." Reporter Matthew Cooper of Time magazine said this to the Committee: "As someone who relies on confidential sources all the time, I simply could not do my job reporting stories big and small without being able to speak with officials under varying degrees of anonymity."

On the other hand, the public has a right to effective law enforcement and fair trials. Our judicial system needs access to information in order to prosecute crime and to guarantee fair administration of the law for plaintiffs and defendants alike. As a Justice Department representative told the committee, prosecutors need to "maintain the ability, in certain vitally important circumstances, to obtain information identifying a source when a paramount interest is at stake. For example, obtaining source information may be the only available means of preventing a murder, locating a kidnapped child, or identifying a serial arsonist."

As Federal courts considered such competing interests, they adopted rules that went in several different directions. Rather than a clear, uniform standard for deciding claims of journalist privilege, the Federal courts currently observe a "crazy quilt" of different judicial standards.

The current confusion began 33 years ago, when the Supreme Court decided Branzburg v. Hayes. The Court held that the press's first amendment right to publish information does not include a right to keep information secret from a grand jury investigating a criminal matter. The Supreme Court also held that the common law did not exempt reporters from the duty of every citizen to provide information to a grand jury.

The Court reasoned that just as newspapers and journalists are subject to the same laws and restrictions as other citizens, they are also subject to the same duty to provide information to a court as other citizens. However, Justice Powell, who joined the 5-4 majority, wrote a separate concurrence in which he explained that the Court's holding was not an invitation for the government to harass journalists. If a journalist could show that the grand jury investigation was being conducted in bad faith, the journalist could ask the court to quash the subpoena. Justice Powell indicated that courts might assess such claims on a case-by-case basis by balancing the freedom of the press against the obligation to give testimony relevant to criminal conduct.

In attempting to apply Justice Powell's concurring opinion, Federal courts have split on the question of when a journalist is required to testify. In the 33 years since Branzburg, the Federal courts are split in at least three ways in their approaches to Federal criminal and civil cases.

With respect to Federal criminal cases, five circuits—the first, fourth, fifth, sixth, and seventh circuits—have

applied Branzburg so as to not allow journalists to withhold information absent governmental bad faith. Four other circuits—the second, third, ninth, and eleventh circuits—recognize a qualified privilege, which requires courts to balance the freedom of the press against the obligation to provide testimony on a case-by-case basis. The law in the District of Columbia Circuit is unsettled.

With respect to Federal civil cases, nine of the twelve circuits apply a balancing test when deciding whether journalists must disclose confidential sources. One circuit affords journalists no privilege in any context. Two other circuits have yet to decide whether journalists have any privilege in civil cases. Meanwhile, 49 States plus the District of Columbia have recognized a privilege within their own jurisdictions. Thirty-one States plus the District of Columbia have passed some form of reporter's shield statute, and 18 States have recognized a privilege at common law.

There is little wonder that there is a growing consensus concerning the need for a uniform journalists' privilege in Federal courts. This system must be simplified.

Today, we are taking the first step to resolving this problem by introducing the Free Flow of Information Act. This bill draws upon 33 years of experience, as embodied in the Department of Justice's regulations, the law established by the Federal courts of appeals, State statutes, and existing national security provisions. The purpose of this bill is to guarantee the flow of information to the public through a free and active press, while protecting the public's right to effective law enforcement and individuals' rights to the fair administration of justice.

This bill provides ample protection for the Nation's journalists, as demonstrated by the fact that it has been endorsed by 39 news organizations identified in a list I will include at the end of my remarks.

This bill also provides ample protection to the public's interest in law enforcement and fair trials. In drafting this legislation, we started with what works. Both the Department of Justice and the vast majority of journalists with whom we have met—in individual meetings and over the course of two hearings—have generally voiced strong support for the regulations that the Department of Justice currently applies to all of its prosecutors. Moreover, time has proven that these regulations are workable. The Department of Justice has been effectively prosecuting cases under these regulations for 25 years and a majority of State prosecutors carry out their duties under similar statutes.

I have two concerns with the Department's regulations, however. First, under current law, these regulations do not apply to special prosecutors. Special prosecutors are often called upon in cases that are politically sensitive,

may potentially be embarrassing to senior government officials, and are high profile—those cases that seem to carry the greatest risk of an overzealous prosecutor needlessly subpoenaing journalists.

Second, the Department regulations are presently enforced by the Attorney General, not a neutral court of law. This places the Attorney General in a difficult position; namely, the primary check on Federal prosecutors' ability to subpoena journalists is the nation's highest Federal prosecutor. Most Americans, I believe, would feel more comfortable having the competing interests weighed by a neutral judge instead of a political appointee who answers to the President. Accordingly, this bill, in large part, codifies the Department of Justice's regulations into law; applies them to all Federal prosecutors, including special prosecutors; and provides that the courts, not a political official, shall decide whether the public's need for information outweighs the interest in allowing a journalist to protect a confidential source.

The Free Flow of Information Act addresses two additional areas of considerable confusion and concern. First, it addresses the situation of a criminal defendant who subpoenas a journalist. To ensure that every criminal defendant has a fair trial, a criminal defendant has less of a burden than a prosecutor does, to show that the journalist's privilege should be waived. This is consistent with our long standing belief as a nation that a criminal defendant must be given ample opportunity to defend himself.

Second, it addresses private civil litigation. This bill provides that before a private party may subpoena a journalist in a civil suit, the court must find that the party is not trying to harass or punish the journalist, and that the public interest requires disclosure. Again, this should help clarify the existing law in federal courts.

Finally, the Free Flow of Information Act adds layers of safeguards for the public. Reporters are not allowed to withhold information if a federal court concludes that the information is important to the defense of our Nation's security or is needed to prevent or stop a crime that could lead to death or physical injury. Also, the bill ensures that both crime victims and criminal defendants will have a fair hearing in court. Under this bill, a journalist who is an eyewitness to a crime or takes part in a crime may not withhold that information. Journalists should not be permitted to hide from the law by writing a story and then claiming a reporter's privilege.

It is time to simplify the patchwork of court decisions and legislation that has grown over the last three decades. It is time for Congress to clear up the ambiguities journalists and the Federal judicial system face in balancing the protections journalists need in providing confidential information to the public with the ability of the courts to

conduct fair and accurate trials. I urge my colleagues to support this legislation and help create a fair and efficient means to serve journalists and the news media, prosecutors and the courts, and most importantly the public interest on both ends of the spectrum.

I ask unanimous consent to print the list of organizations and companies that support the legislation in the RECORD.

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

ORGANIZATIONS/COMPANIES SUPPORTING  
"FREE FLOW OF INFORMATION ACT OF 2006"

ABC Inc.; Advance Publications, Inc.; American Business Media; American Society of Newspaper Editors; Associated Press; Association of American Publishers, Inc.; Association of Capitol Reporters and Editors; Belo Corp.; CBS; CNN; Coalition of Journalists for Open Government; The Copley Press, Inc.; Court TV; Cox Enterprises, Inc.; Freedom Communication, Inc.; Gannett Co., Inc.; The Hearst Corporation; Magazine Publishers of America; The McClatchy Company; The McGraw-Hill Companies.

Media Law Resources Center; National Newspaper Association; Nation Press Photographers Association; National Public Radio; NBC Universal; News Corporation; Newspaper Association of America; Newsweek; The New York Times Company; Radio-Television News Directors Association; Raycom Media, Inc.; The Reporters Committee for Freedom of the Press; E. W. Scripps; Society of Professional Journalists; Time Inc.; Time Warner; Tribune Company; The Washington Post; White House Correspondents' Association.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, let me express my gratitude to my colleague from Indiana, Senator LUGAR, and his colleague from Indiana, Congressman PENCE, and his colleague, Congressman BOUCHER of Virginia, who are drafting similar legislation and propose similar legislation in the other body and, of course, Senator SPECTER, the chairman of the Judiciary Committee, my colleague from New York, Senator SCHUMER, and the Presiding Officer for their work on pulling together this bill which is a very sound proposal. As the Senator from Pennsylvania has explained, it deals with an issue that many were concerned about, and that is the national security question.

The point I would like to make is that while this is about journalists and the collection of information and revealing stories that might otherwise not be told, the real winners of this proposal are not journalists or news media outlets, television stations, or the like. The real winners are the people we represent, our constituents, and the consumers of information. This is most important for them. It is really not that significant. If it were only about journalists, frankly, we might have second questions about it.

Jefferson, of course, said it better than anyone many years ago when he said if he had to choose between a free country and a free press, he would select the latter. Madison, on the same

subject, talking about freedom of information, freedom of the press, had this quote:

Popular government without popular information or the means of acquiring it is but a prologue to a farce, or tragedy, or perhaps both.

Today, that fundamental principle—that a well-informed citizenry is the cornerstone of self-government—is at risk in a manner in which it has not been at risk previously.

In the past year alone, some two dozen reporters have been subpoenaed or questioned about their confidential sources. Most of them face fines or prison time. Seven have already been held in contempt. One has been jailed. Another was found guilty of criminal contempt for refusing to reveal a confidential source and served 6 months under house arrest. Why? Because they received information from confidential sources and pledged to protect the confidentiality of those sources. In other words, they have committed the “offense” of being journalists.

These actions by our Government against journalists are having a profound impact on news gathering. For example, in testimony last summer before the Senate Judiciary Committee, Norman Pearlstine, the editor in chief of Time, Inc., said this about the fallout from the Justice Department’s efforts to obtain confidential information from a Time reporter:

Valuable sources have insisted that they no longer trusted the magazine and that they would no longer cooperate on stories. The chilling effect is obvious.

Confidential evidence may be just the tip of the iceberg. We have no way of knowing for certain the number of journalists who have been ordered or requested to reveal confidential sources. We can only speculate as to how many editors and publishers put the brakes on a story for fear that it could land one of their reporters in a spider web spun by the Federal prosecutors that could include prison. If citizens with knowledge of wrongdoing could not or would not come forward to share what they know in confidence with members of the press, serious journalism would cease to exist, in my view. Serious wrongs would remain unexposed. The scandals known as Watergate, the Enron failure, the Abu Ghraib prison photos—none of these would have been known to the public but for good journalists doing their work.

That scenario is no longer purely hypothetical. It is, in some respects, already a reality. When journalists are hauled into court by prosecutors and threatened with fines and imprisonment if they don’t divulge the sources of their information, we are entering a dangerous territory for a democracy. That is when not only journalists, but ordinary citizens, will fear prosecution simply for exposing wrongdoing. When that happens, the information our citizens need to remain sovereign will be degraded, making it more and more difficult to hold accountable those in

power. When the public’s right to know is threatened, then I suggest to you that all of the liberties we hold dear are threatened, as well.

Again, I thank Senator SPECTER for working out this compromise, and I emphasize that the issue of national security, which was a very legitimate concern, has been handled by this proposal. The underlying issue is the right of citizens to have access to important information that might otherwise never become available were it not for the ability to have confidential sources share that information and the ability of these journalists to protect the confidentiality of those sources. Thirty-nine States have provisions dealing with the shield law. I think 10 States have regulations regarding the same matter.

I think it is long overdue that the Federal Government have a similar piece of legislation to protect the kind of information we seek. I commend my colleagues for their efforts in this regard. I am happy to join them.

Mr. SESSIONS. Mr. President, I say with regard to what has just taken place, these are complex areas, and we need to be careful about protecting our free speech rights. Nobody denies that. But you have to be careful, too. I was thinking that if a spy comes into our country and gets secure information and gives it to our enemy, we put him in jail, and they can be convicted, I guess, of treason. If a reporter gets information and publishes it to our enemies and to the whole world, they get the Pulitzer prize.

I think we have to be careful about how we word this. I am sure we will come up with a pretty good solution.

Mr. SPECTER. Mr. President, I ask unanimous consent that Senator SCHUMER be recognized for 4 minutes to speak on the Lugar-Specter-Dodd bill.

The PRESIDING OFFICER. The Senator from New York is recognized.

Mr. SCHUMER. Mr. President, I join as a cosponsor of the bill just introduced because I think it really cuts the Gordian knot. There has been a deadlock on improving the shield law for the very reason that not all disclosures by Government officials to members of the press are equal. We certainly want to protect a whistleblower. We certainly want a person, if they work at the FDA and see that tests are being short-circuited and they go to higher-ups and get nowhere, to be able to go to the press and expose it. It is a far different matter when something is prohibited by statute from being made public, such as with grand jury minutes. Frankly, that dealt with the Plame case. In both cases making that information public was a violation of law. There was a public policy against disclosure, which there is not in the typical whistleblower case.

I believe the reason that the legislation my colleagues from Indiana and Connecticut put in didn’t get as much support is that it failed to distinguish that difference. We need to protect the

press, especially with a large Government that keeps things secret more and more. But we also have to have some respect for the fact that there are certain things that should not be made public by statute in open debate.

As I said, this legislation cuts the Gordian knot. It protects those matters that should not be made public and doesn’t put them under the shield of law but strengthens the protections for whistleblowers and others who might want to expose Government wrongdoing when there is no other way to expose it.

This is a large step forward. It is legislation I am proud to cosponsor. I am very glad that the deadlock has been broken by this thoughtful legislation, which I now believe will garner enough support to become law. Whereas, the previous legislation, as sweeping as it was, would not.

I compliment my colleagues from Indiana, Connecticut, Pennsylvania, and South Carolina, with whom I join as lead cosponsors because it is going to make our country a better place.

By Mr. KOHL (for himself and Mr. DEWINE):

S. 2854. A bill to prevent anti-competitive mergers and acquisitions in the oil and gas industry; to the Committee on the Judiciary.

Mr. KOHL. Mr. President, I rise today to introduce the Oil Industry Merger Antitrust Enforcement Act. This legislation will significantly strengthen the antitrust laws to prevent anticompetitive mergers and acquisitions in oil and gas industry.

We have all seen the suffering felt by consumers and our national economy resulting from rising energy prices. Gasoline prices have now shattered the once unthinkable \$3.00 a gallon level, have doubled in the last 5 years, and increased more than 30 percent in the last year alone. And prices for other crucial energy products—such as natural gas and home heating oil—have undergone similar sharp increases.

Industry experts debate the causes of these extraordinarily high prices. Possible culprits are growing worldwide demand, supply disruptions, the actions of the OPEC oil cartel and limits on refinery capacity in the United States. But about one thing there can be no doubt—the substantial rise in concentration and consolidation in the oil industry. Since 1990, the Government Accountability Office has counted over 2,600 mergers, acquisitions and joint ventures in the oil industry. Led by gigantic mergers such as Exxon/Mobil, BP/Arco, Conoco/Phillips and Chevron/Texaco, by 2004, the five largest U.S. oil refining companies controlled over 56 percent of domestic refining capacity, a greater market share than that controlled by the top 10 companies a decade earlier.

This merger wave has led to substantially less competition in the oil industry. In 2004, the GAO concluded that these mergers have directly caused increases in the price of gasoline. A



study by the independent consumer watchdog Public Citizen found that in the 5 years between 1999 and 2004, U.S. oil refiners increased their average profits on every gallon of gasoline refined from 22.8 cents to 40.8 cents, a 79 percent jump. And the grossly inflated profit numbers of the major oil companies—led by Exxon Mobil's \$8.4 billion profit in the first quarter of 2006, which followed its \$36 billion profit in 2005, the highest corporate profits ever achieved in U.S. history, are conclusive evidence—if any more was needed—of the lack of competition in the U.S. oil industry. While it is true that the world price of crude oil has substantially increased, the fact that the oil companies can so easily pass along all of these price increases to consumers of gasoline and other refined products—and greatly compound their profits along the way—confirms that there is a failure of competition in our oil and gas markets.

More than 90 years ago, one of our Nation's basic antitrust laws—the Clayton Act—was written to prevent just such industry concentration harming competition. It makes illegal any merger or acquisition the effect of which “may be substantially to lessen competition.” Despite the plain command of this law, the Federal Trade Commission—the Federal agency with responsibility for enforcing antitrust law in the oil and gas industry—has failed to take any effective action to prevent undue concentration in this industry. Instead, it permitted almost all of these 2,600 oil mergers and acquisitions to proceed without challenge. And where the FTC has ordered divestitures, they have been wholly ineffective to restore competition. Consumers have been at the mercy of an increasingly powerful oligopoly of a few giant oil companies, passing along price increases without remorse as the market becomes increasingly concentrated and competition diminishes. It is past time for us in Congress to take action to strengthen our antitrust law so that it will, as intended, stand as a bulwark to protect consumers and prevent any further loss of competition in this essential industry.

Our bill will strengthen merger enforcement under the antitrust law in two respects. First, it will direct that the FTC, in conjunction with the Justice Department, revise its Merger Guidelines to take into account the special conditions prevailing in the oil industry. In reviewing a pending merger or acquisition to determine whether to approve it or take legal action to block it, the FTC follows what are known as “Merger Guidelines.” The Merger Guidelines set forth the factors that the agency must examine to determine if a merger or acquisition lessens competition, and sets forth the legal tests the FTC is to follow in deciding whether to approve or challenge a merger. As presently written, the Merger Guidelines fail to direct the FTC, when reviewing an oil industry

merger, to pay any heed at all to the special economic conditions prevailing in that industry.

Our bill will correct this deficiency. Many special conditions prevail in the oil and gas marketplace that warrant scrutiny, conditions that do not occur in other industries, and the Merger Guidelines should reflect these conditions. In most industries, when demand rises and existing producers earn ever-increasing profits, new producers enter the market and new supply expands, reducing the pressure on price. However, in the oil industry, there are severe limitations on supply and environmental and regulatory difficulty in opening new refineries, so this normal market mechanism cannot work. Additionally, in most industries, consumers shift to alternative products in the face of sharp price increases, leading to a reduction in demand and a corresponding reduction in the pressure to increase prices. But for such an essential commodity as gasoline, consumers have no such option—they must continue to consume gasoline to get to work, to go to school, and to shop. These factors all mean that antitrust enforcers should be especially cautious about permitting increases in concentration in the oil industry.

Accordingly, our bill directs the FTC and Justice Department to revise its Merger Guidelines to take into account the special conditions prevailing in the oil industry—including the high inelasticity of demand for oil and petroleum-related products; the ease of gaining market power; supply and refining capacity limits; difficulties of market entry; and unique regulatory requirements applying to the oil industry. This revision of the Merger Guidelines must be completed within 6 months of enactment of this legislation.

The second manner in which this legislation will strengthen antitrust enforcement will be to shift the burden of proof in Clayton Act challenges to oil industry mergers and acquisitions. In such cases, the burden will be placed on the merging parties to establish, by a preponderance of evidence, that their transaction does *not* substantially lessen competition. This provision would reverse the usual rule that the government or private plaintiff challenging the merger must prove that the transaction harms competition. As the parties seeking to effect a merger with a competitor in an already concentrated industry, and possessing all the relevant data regarding the transaction, it is entirely appropriate that the merging parties bear this burden. This provision does not forbid all mergers in the oil industry if the merging parties can establish that their merger does not substantially harm competition, it may proceed. However, shifting the burden of proof in this manner will undoubtedly make it more difficult for oil mergers and acquisition to survive court challenge, thereby enhancing the law's ability to block truly anti-competitive transactions and deterring

companies from even attempting such transactions. In today's concentrated oil industry and with consumers suffering record high prices, mergers and acquisitions that even the merging parties cannot justify should not be tolerated.

As ranking member on the Senate Antitrust Subcommittee, I believe that this bill is a crucial step to ending this unprecedented move towards industry concentration and to begin to restore competitive balance to the oil and gas industry. Since the days of the breakup of the Standard Oil trust 100 years ago, antitrust enforcement has been essential to prevent undue concentration in this industry. This bill is an essential step to ensure that our antitrust laws are sufficiently strong to ensure a competitive oil industry in the 21st century. I urge my colleagues to support the Oil Industry Merger Antitrust Enforcement Act.

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

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

S. 2854

*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 “Oil Industry Merger Antitrust Enforcement Act”.

#### SEC. 2. STATEMENT OF FINDINGS AND DECLARATIONS OF PURPOSES.

(a) FINDINGS.—Congress finds the following:

(1) American consumers are suffering from excessively high prices for gasoline, natural gas, heating oil, and other energy products.

(2) These excessively high energy prices have been caused, at least in substantial part, by undue concentration among companies involved in the production, refining, distribution, and retail sale of oil, gasoline, natural gas, heating oil, and other petroleum-related products.

(3) There has been a sharp consolidation caused by mergers and acquisitions among oil companies over the last decade, and the antitrust enforcement agencies (the Federal Trade Commission and the Department of Justice Antitrust Division) have failed to employ the antitrust laws to prevent this consolidation, to the detriment of consumers and competition. This consolidation has caused substantial injury to competition and has enabled the remaining oil companies to gain market power over the sale, refining, and distribution of petroleum-related products.

(4) The demand for oil, gasoline, and other petroleum-based products is highly inelastic so that oil companies can easily utilize market power to raise prices.

(5) Maintaining competitive markets for oil, gasoline, natural gas, and other petroleum-related products is in the highest national interest.

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

(1) ensure vigorous enforcement of the antitrust laws in the oil industry;

(2) restore competition to the oil industry and to the production, refining, distribution, and marketing of gasoline and other petroleum-related products; and

(3) prevent the accumulation and exercise of market power by oil companies.

**SEC. 3. BURDEN OF PROOF.**

Section 7 of the Clayton Act (15 U.S.C. 18) is amended by adding at the end the following:

"In any civil action brought against any person for violating this section in which the plaintiff—

"(1) alleges that the effect of a merger, acquisition, or other transaction affecting commerce may be to substantially lessen competition, or to tend to create a monopoly, in the business of exploring for, producing, refining, or otherwise processing, storing, marketing, selling, or otherwise making available petroleum, oil, or natural gas, or products derived from petroleum, oil, or natural gas; and

"(2) establishes that a merger, acquisition, or transaction is between or involves persons competing in the business of exploring for, producing, refining, or otherwise processing, storing, marketing, selling, or otherwise making available petroleum, oil, or natural gas, or products derived from petroleum, oil, or natural gas;

the burden of proof shall be on the defendant or defendants to establish by a preponderance of the evidence that the merger, acquisition, or transaction at issue will not substantially lessen competition or tend to create a monopoly."

**SEC. 4. ENSURING FULL AND FREE COMPETITION.**

(a) REVIEW.—The Federal Trade Commission and the Antitrust Division of the Department of Justice shall jointly review and revise all enforcement guidelines and policies, including the Horizontal Merger Guidelines issued April 2, 1992 and revised April 8, 1997, and the Non-Horizontal Merger Guidelines issued June 14, 1984, and modify those guidelines in order to—

(1) specifically address mergers and acquisitions in oil companies and among companies involved in the production, refining, distribution, or marketing of oil, gasoline, natural gas, heating oil, or other petroleum-related products; and

(2) ensure that the application of these guidelines will prevent any merger and acquisition in the oil industry, when the effect of such a merger or acquisition may be to substantially lessen competition, or to tend to create a monopoly, and reflect the special conditions prevailing in the oil industry described in subsection (b).

(b) SPECIAL CONDITIONS.—The guidelines described in subsection (a) shall be revised to take into account the special conditions prevailing in the oil industry, including—

(1) the high inelasticity of demand for oil and petroleum-related products;

(2) the ease of gaining market power in the oil industry;

(3) supply and refining capacity limits in the oil industry;

(4) difficulties of market entry in the oil industry; and

(5) unique regulatory requirements applying to the oil industry.

(c) COMPETITION.—The review and revision of the enforcement guidelines required by this section shall be completed not later than 6 months after the date of enactment of this Act.

(d) REPORT.—Not later than 6 months after the date of enactment of this Act, the Federal Trade Commission and the Antitrust Division of the Department of Justice shall jointly report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives regarding the review and revision of the enforcement guidelines mandated by this section.

**SEC. 5. DEFINITIONS.**

In this Act:

(1) OIL INDUSTRY.—The term "oil industry" means companies and persons involved in the production, refining, distribution, or marketing of oil or petroleum-based products.

(2) PETROLEUM-BASED PRODUCT.—The term "petroleum-based product" means gasoline, diesel fuel, jet fuel, home heating oil, natural gas, or other products derived from the refining of oil or petroleum.

By Mr. BIDEN (for himself and Mr. JEFFORDS):

S. 2855. A bill to amend the Safe Drinking Water Act to eliminate security risks by replacing the use of extremely hazardous gaseous chemicals with inherently safer technologies; to the Committee on Environment and Public Works.

Mr. BIDEN. Mr. President, I rise today to introduce the Community Water Treatment Hazards Reduction Act of 2006. This legislation would completely eliminate a known security risk to millions of Americans across the United States by facilitating the transfer to safer technologies from deadly toxic chemicals at our Nation's water treatment facilities.

Across our Nation, there are thousands of water treatment facilities that utilize gaseous toxic chemicals to treat drinking and wastewater. Approximately 2,850 facilities are currently regulated under the Clean Air Act because they store large quantities of these dangerous chemicals. In fact, 98 of these facilities threaten over 100,000 citizens. For example, the Fiveash Water Treatment Plant in Fort Lauderdale, FL, threatens 1,526,000 citizens. The Bachman Water Treatment in Dallas, TX, threatens up to 2 million citizens. And there are similar examples in communities throughout the Nation. If these facilities—and the 95 other facilities that threaten over 100,000 citizens—switched from the use of toxic chemicals to safer technologies that are widely used within the industry we could completely eliminate a known threat to nearly 50 million Americans.

Many facilities have already made the prudent decision to switch without intervention by the government. The Middlesex County Utilities Authority in Sayreville, NJ, switched to safer technologies and eliminated the risk to 10.7 million people. The Nottingham Water Treatment Plant in Cleveland, OH, switched and eliminated the risk to 1.1 million citizens. The Blue Plains Wastewater Treatment Plant switched and eliminated the risk to 1.7 million people. In my hometown of Wilmington, DE, the Wilmington Water Pollution Control Facility switched from using chlorine gas to liquid bleach. This commendable decision has eliminated the risk to 560,000 citizens, including the entire city of Wilmington. In fact, this facility no longer has to submit risk management plans to the Environmental Protection Agency required by the Clean Air Act because the threat has been completely eliminated. There are many other examples of facilities that have done the

right thing and eliminated the use of these dangerous, gaseous chemicals.

The bottom line is that if we can eliminate a known risk, we should. The legislation I am introducing today will do just that. It will require the Administrator of the Environmental Protection Agency, in consultation with the Secretary of Homeland Security, to do a few simple things. First, water facilities will be prioritized based upon the risk that they pose to citizens and critical infrastructure. These facilities—beginning with the most dangerous ones—will be required to submit a report on the feasibility of utilizing safer technologies and the anticipated costs to transition. If grant funding is available, the Administrator will issue a grant and order the facility to transition to the safer technology chosen by the owner of the facility. I believe that this approach will allow us to use Federal funds responsibly while reducing risk to our citizens.

Once the transition is complete, the facility will be required to track all cost-savings related to the switch, such as decreased security costs, costs saving by eliminating administrative requirements under the EPA risk management plan, lower insurance premiums, and others. If savings are ultimately realized by the facility, it will be required to return one half of these savings, not to exceed the grant amount, back to the EPA. In turn, the EPA will utilize any returned savings to help facilitate the transition of more water facilities.

A 2005 report by the Government Accountability Office found that providing grants to assist water facilities to transition to safer technologies was an appropriate use of Federal funds. The costs for an individual facility to transition will vary, but the cost is very cheap when you consider the security benefits. For example, the Wilmington facility invested approximately \$160,000 to transition and eliminated the risk to nearly 600,000 people. Similarly, the Blue Plains facility spent \$500,000 to transition after 9-11 and eliminated the risk to 1.2 million citizens immediately. This, in my view, is a sound use of funds. And, this legislation will provide sufficient funding to transition all of our high-priority facilities throughout Nation.

Finally, I would like to point out that facilities making the decision to transition after 9-11, but before the enactment date of this legislation will be eligible to participate in the program authorized by this legislation. I have included this provision because I believe that the Federal Government should acknowledge—and promote—local decisions that enhance our homeland security. In addition, we don't want to create a situation where water facilities wait for Federal funding, before doing the right thing and eliminating those dangerous gaseous chemicals.

Last December the 9-11 Discourse Project released its report card for the



administration and Congress on efforts to implement the 9-11 Commission recommendations. It was replete with D's and F's demonstrating that we have been going in the wrong direction with respect to homeland security. One of the most troubling findings made by the 9-11 Commission is that with respect to our Nation's critical infrastructure that "no risk and vulnerability assessments actually made; no national priorities established; no recommendations made on allocations of scarce resources. All key decisions are at least a year away. It is time that we stop talking about priorities and actually set some." While much remains to be done, the Community Water Treatment Hazards Reduction Act of 2006 sets an important priority for our homeland security and it affirmatively addresses it. I urge my colleagues to support this important legislation.

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

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

S. 2855

*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 "Community Water Treatment Hazards Reduction Act of 2006".

#### SEC. 2. USE OF INHERENTLY SAFER TECHNOLOGIES AT WATER FACILITIES.

Part F of the Safe Drinking Water Act (42 U.S.C. 300j-21 et seq.) is amended by adding at the end the following:

##### "SEC. 1466. USE OF INHERENTLY SAFER TECHNOLOGIES AT WATER FACILITIES.

"(a) DEFINITIONS.—In this section:

"(1) HARMFUL INTENTIONAL ACT.—The term 'harmful intentional act' means a terrorist attack or other intentional act carried out upon a water facility that is intended—

"(A) to substantially disrupt the ability of the water facility to provide safe and reliable—

"(i) conveyance and treatment of wastewater or drinking water;

"(ii) disposal of effluent; or

"(iii) storage of a potentially hazardous chemical used to treat wastewater or drinking water;

"(B) to damage critical infrastructure;

"(C) to have an adverse effect on the environment; or

"(D) to otherwise pose a significant threat to public health or safety.

"(2) INHERENTLY SAFER TECHNOLOGY.—The term 'inherently safer technology' means a technology, product, raw material, or practice the use of which, as compared to the current use of technologies, products, raw materials, or practices, significantly reduces or eliminates—

"(A) the possibility of release of a substance of concern; and

"(B) the hazards to public health and safety and the environment associated with the release or potential release of a substance of concern.

"(3) SECRETARY.—The term 'Secretary' means the Secretary of Homeland Security (or a designee).

"(4) SUBSTANCE OF CONCERN.—

"(A) IN GENERAL.—The term 'substance of concern' means any chemical, toxin, or other substance that, if transported or stored in a

sufficient quantity, would have a high likelihood of causing casualties and economic damage if released or otherwise successfully targeted by a harmful intentional act, as determined by the Administrator, in consultation with the Secretary.

"(B) INCLUSIONS.—The term 'substance of concern' includes—

"(i) any substance included in Table 1 or 2 contained in section 68.130 of title 40, Code of Federal Regulations (or a successor regulation), published in accordance with section 112(r)(3) of the Clean Air Act (42 U.S.C. 7412(r)(3)); and

"(ii) any other highly hazardous gaseous toxic material or substance that, if transported or stored in a sufficient quantity, could cause casualties or economic damage if released or otherwise successfully targeted by a harmful intentional act, as determined by the Administrator, in consultation with the Secretary.

"(5) TREATMENT WORKS.—The term 'treatment works' has the meaning given the term in section 212 of the Federal Water Pollution Control Act (33 U.S.C. 1292).

"(6) VULNERABILITY ZONE.—The term 'vulnerability zone' means, with respect to a substance of concern, the geographic area that would be affected by a worst-case release of the substance of concern, as determined by the Administrator on the basis of—

"(A) an assessment that includes the information described in section 112(r)(7)(B)(i)(I) of the Clean Air Act (42 U.S.C. 7412(r)(7)(B)(i)(I)); or

"(B) such other assessment or criteria as the Administrator determines to be appropriate.

"(7) WATER FACILITY.—The term 'water facility' means a treatment works or public water system owned or operated by any person.

"(b) REGULATIONS.—

"(1) IN GENERAL.—Not later than 90 days after the date of enactment of this section, the Administrator, in consultation with the Secretary and other Federal, State, and local governmental entities, security experts, owners and operators of water facilities, and other interested persons shall—

"(A) compile a list of all high-consequence water facilities, as determined in accordance with paragraph (2); and

"(B) notify each owner and operator of a water facility that is included on the list.

"(2) IDENTIFICATION OF HIGH-CONSEQUENCE WATER FACILITIES.—

"(A) IN GENERAL.—Subject to subparagraph (B), in determining whether a water facility is a high-consequence water facility, the Administrator shall consider—

"(i) the number of people located in the vulnerability zone of each substance of concern that could be released at the water facility;

"(ii) the critical infrastructure (such as health care, governmental, or industrial facilities or centers) served by the water facility;

"(iii) any use by the water facility of large quantities of 1 or more substances of concern; and

"(iv) the quantity and volume of annual shipments of substances of concern to or from the water facility.

"(B) TIERS OF FACILITIES.—

"(i) IN GENERAL.—Except as provided in clauses (ii) through (iv), the Administrator shall classify high-consequence water facilities designated under this paragraph into 3 tiers, and give priority to orders issued for, actions taken by, and other matters relating to the security of, high-consequence water facilities based on the tier classification of the high-consequence water facilities, as follows:

"(I) TIER 1 FACILITIES.—A Tier 1 high-consequence water facility shall have a vulnerability zone that covers more than 100,000 individuals and shall be given the highest priority by the Administrator.

"(II) TIER 2 FACILITIES.—A Tier 2 high-consequence water facility shall have a vulnerability zone that covers more than 25,000, but not more than 100,000, individuals and shall be given the second-highest priority by the Administrator.

"(III) TIER 3 FACILITIES.—A Tier 3 high-consequence water facility shall have a vulnerability zone that covers more than 10,000, but not more than 25,000, individuals and shall be given the third-highest priority by the Administrator.

"(ii) MANDATORY DESIGNATION.—If the vulnerability zone for a substance of concern at a water facility contains more than 10,000 individuals, the water facility shall be—

"(I) considered to be a high-consequence water facility; and

"(II) classified by the Administrator to an appropriate tier under clause (i).

"(iii) DISCRETIONARY CLASSIFICATION.—A water facility with a vulnerability zone that covers 10,000 or fewer individuals may be designated as a high consequence facility, on the request of the owner or operator of a water facility, and classified into a tier described in clause (i), at the discretion of the Administrator.

"(iv) RECLASSIFICATION.—The Administrator—

"(I) may reclassify a high-consequence water facility into a tier with higher priority, as described in clause (i), based on an increase of population covered by the vulnerability zone or any other appropriate factor, as determined by the Administrator; but

"(II) may not reclassify a high-consequence water facility into a tier with a lower priority, as described in clause (i), for any reason.

"(3) OPTIONS FEASIBILITY ASSESSMENT ON USE OF INHERENTLY SAFER TECHNOLOGY.—

"(A) IN GENERAL.—Not later than 90 days after the date on which the owner or operator of a high-consequence water facility receives notice under paragraph (1)(B), the owner or operator shall submit to the Administrator an options feasibility assessment that describes—

"(i) an estimate of the costs that would be directly incurred by the high-consequence water facility in transitioning from the use of the current technology used for 1 or more substances of concern to inherently safer technologies; and

"(ii) comparisons of the costs and benefits to transitioning between different inherently safer technologies, including the use of—

"(I) sodium hypochlorite;

"(II) ultraviolet light;

"(III) other inherently safer technologies that are in use within the applicable industry; or

"(IV) any combination of the technologies described in subclauses (I) through (III).

"(B) CONSIDERATIONS IN DETERMINING ESTIMATED COSTS.—In estimating the transition costs described in subparagraph (A)(i), an owner or operator of a high-consequence water facility shall consider—

"(i) the costs of capital upgrades to transition to the use of inherently safer technologies;

"(ii) anticipated increases in operating costs of the high-consequence water facility;

"(iii) offsets that may be available to reduce or eliminate the transition costs, such as the savings that may be achieved by—

"(I) eliminating security needs (such as personnel and fencing);

"(II) complying with safety regulations;

"(III) complying with environmental regulations and permits;

“(IV) complying with fire code requirements;

“(V) providing personal protective equipment;

“(VI) installing safety devices (such as alarms and scrubbers);

“(VII) purchasing and maintaining insurance coverage;

“(VIII) conducting appropriate emergency response and contingency planning;

“(IX) conducting employee background checks; and

“(X) potential liability for personal injury and damage to property; and

“(iv) the efficacy of each technology in treating or neutralizing biological or chemical agents that could be introduced into a drinking water supply by a terrorist or act of terrorism.

“(C) USE OF INHERENTLY SAFER TECHNOLOGIES.—

“(i) IN GENERAL.—Subject to clause (ii), not later than 90 days after the date of submission of the options feasibility assessment required under this paragraph, the owner or operator of a high-consequence water facility, in consultation with the Administrator, the Secretary, the United States Chemical Safety and Hazard Investigation Board, local officials, and other interested parties, shall determine which inherently safer technologies are to be used by the high-consequence water facility.

“(ii) CONSIDERATIONS.—In making the determination under clause (i), an owner or operator—

“(I) may consider transition costs estimated in the options feasibility assessment of the owner or operator (except that those transition costs shall not be the sole basis for the determination of the owner or operator);

“(II) shall consider long-term security enhancement of the high-consequence water facility;

“(III) shall consider comparable water facilities that have transitioned to inherently safer technologies; and

“(IV) shall consider the overall security impact of the determination, including on the production, processing, and transportation of substances of concern at other facilities.

“(c) ENFORCEMENT.—

“(1) IN GENERAL.—In accordance with the tiers and priority system established under subsection (b)(2)(B), subject to paragraph (2), the Administrator—

“(A) shall prioritize the use of inherently safer technologies at high-consequence facilities listed under subsection (b)(1);

“(B) subject to the availability of grant funds under this section, not later than 90 days after the date on which the Administrator receives an options feasibility assessment from an owner or operator of a high-consequence water facility under subsection (b)(3)(A), shall issue an order requiring the high-consequence water facility to eliminate the use of 1 or more substances of concern and adopt 1 or more inherently safer technologies; and

“(C) may seek enforcement of an order issued under paragraph (2) in the appropriate United States district court.

“(2) DE MINIMIS USE.—Nothing in this section prohibits the de minimis use of a substance of concern as a residual disinfectant.

“(d) GRANTS.—

“(1) IN GENERAL.—In accordance with the tiers and priority system established under subsection (b)(2)(B), the Administrator shall provide grants to high-consequence facilities (including high-consequence facilities subject to an order issued under subsection (c)(1)(C) and water facilities described in paragraph (6)) for use in paying capital expenditures directly required to complete the

transition of the high-consequence water facility to the use of 1 or more inherently safer technologies.

“(2) APPLICATION.—A high-consequence water facility that seeks to receive a grant under this subsection shall submit to the Administrator an application by such date, in such form, and containing such information as the Administrator shall require, including information relating to the transfer to inherently safer technologies, and the proposed date of such a transfer, described in subsection (b)(3)(B).

“(3) DEADLINE FOR TRANSITION.—An owner or operator of a high-consequence water facility that is subject to an order under subsection (c)(1)(C) and that receives a grant under this subsection shall begin the transition to inherently safer technologies described in paragraph (1) not later than 90 days after the date of issuance of the order under subsection (c)(1)(C).

“(4) FACILITY UPGRADES.—An owner or operator of a high-consequence water facility—

“(A) may complete the transition to inherently safer technologies described in paragraph (1) within the scope of a greater facility upgrade; but

“(B) shall use amounts from a grant received under this subsection only for the capital expenditures directly relating to the transition to inherently safer technologies.

“(5) OPERATIONAL COSTS.—An owner or operator of a high-consequence water facility that receives a grant under this subsection may not use funds from the grant to pay or offset any ongoing operational cost of the high-consequence water facility.

“(6) OTHER REQUIREMENTS.—As a condition of receiving a grant under this subsection, the owner or operator of a high-consequence water facility shall—

“(A) upon receipt of a grant, track all cost savings resulting from the transition to inherently safer technologies, including those savings identified in subsection (b)(4)(B)(iii); and

“(B) for each fiscal year for which grant funds are received, return an amount to the Administrator equal to 50 percent of the savings achieved by the high-consequence water facility (but not to exceed the amount of grant funds received for the fiscal year) for use by the Administrator in facilitating the future transition of other high-consequence water facilities to the use of inherently safer technologies.

“(7) INTERIM TRANSITIONS.—A water facility that transitioned to the use of 1 or more inherently safer technologies after September 11, 2001, but before the date of enactment of this section, and that qualifies as a high-consequence facility under subsection (b)(2), in accordance with any previous report submitted by the water facility under section 112(r) of the Clean Air Act (42 U.S.C. 7412(r)) and as determined by the Administrator, shall be eligible to receive a grant under this subsection.

“(e) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this section \$125,000,000 for each of fiscal years 2007 through 2011.”.

#### SUBMITTED RESOLUTIONS

#### SENATE RESOLUTION 483—EXPRESSING THE SENSE OF THE SENATE REGARDING THE IMPORTANCE OF ORAL HEALTH, AND FOR OTHER PURPOSES

Mr. COCHRAN submitted the following resolution; which was referred to the Committee on Health, Education, Labor, and Pensions:

S. RES. 483

Whereas the Surgeon General has determined that oral health is integral to general health;

Whereas the Surgeon General has identified numerous oral-systemic disease connections, including possible associations between chronic oral infections and diabetes, heart and lung diseases, stroke, low-birth-weight, and premature births;

Whereas the burden of dental and oral health diseases restricts activities of an individual at school, at work, and at home, and often significantly diminishes the quality of life of an individual;

Whereas oral health diseases, including dental caries and periodontal disease, are largely preventable;

Whereas the effective treatment and prevention of those diseases are substantially aided by access to highly trained dental primary care professionals;

Whereas the Academy of General Dentistry was officially incorporated in 1952, with the mission to serve as the premier resource for general dentists who are committed to improving patient care through lifelong learning and continuing education;

Whereas the Academy of General Dentistry has grown to represent over 33,000 general dentists who provide primary care, oral health care services;

Whereas the Academy of General Dentistry encourages excellence in continuing education and professionalism through its earned professional designation programs known as “Mastership”, “Fellowship and Lifelong Learning”, and “Service Recognition”; and

Whereas the Academy of General Dentistry has signed a memorandum of understanding with the Department of Health and Human Services to help improve the oral health status of the citizens of the United States and achieve the objectives of the Healthy People 2010 initiative of the Department: Now, therefore, be it

*Resolved*, That it is the sense of the Senate that—

(1) access to oral health care services and the prevention of oral health care disease is integral to achieving and maintaining good health; and

(2) the Academy of General Dentistry and the members of that organization are recognized for—

(A) promoting—

(i) excellence in continuing dental education; and

(ii) high standards of training and professionalism in the field of primary dental care; and

(B) helping to address the treatment and prevention of oral health disease.

#### SENATE RESOLUTION 484—EXPRESSING THE SENSE OF THE SENATE CONDEMNING THE MILITARY JUNTA IN BURMA FOR ITS RECENT CAMPAIGN OF TERROR AGAINST ETHNIC MINORITIES AND CALLING ON THE UNITED NATIONS SECURITY COUNCIL TO ADOPT IMMEDIATELY A BINDING NON-PUNITIVE RESOLUTION ON BURMA

Mr. MCCONNELL (for himself, Mr. BROWNBACK, Mrs. FEINSTEIN, Mr. LEAHY, Mr. LAUTENBERG, Mr. FRIST, Mr. OBAMA, Mr. MCCAIN, Mr. LIEBERMAN, and Mr. REID) submitted the following resolution, which was considered and agreed to: