S. 358

At the request of Mr. CORNYN, the names of the Senator from Georgia (Mr. CHAMBLISS), the Senator from Oregon (Mr. WYDEN) and the Senator from Pennsylvania (Mr. SPECTER) were added as cosponsors of S. 358, a bill to ensure the safety of members of the United States Armed Forces while using expeditionary facilities, infrastructure, and equipment supporting United States military operations overseas.

S. 421

At the request of Mr. SPECTER, the names of the Senator from Iowa (Mr. HARKIN), the Senator from Oregon (Mr. WYDEN), the Senator from Kansas (Mr. ROBERTS) and the Senator from West Virginia (Mr. ROCKEFELLER) were added as cosponsors of S. 421, a bill to impose a temporary moratorium on the phase out of the Medicare hospice budget neutrality adjustment factor.

S. 427

At the request of Mrs. LINCOLN, the name of the Senator from South Dakota (Mr. THUNE) was added as a cosponsor of S. 427, a bill to amend title XVI of the Social Security Act to clarify that the value of certain funeral and burial arrangements are not to be considered available resources under the supplemental security income program.

S. 433

At the request of Ms. KLOBUCHAR, her name was added as a cosponsor of S. 433, a bill to amend the Public Utility Regulatory Policies Act of 1978 to establish a renewable electricity standard, and for other purposes.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. KERRY (for himself and Mr. GRASSLEY):

S. 434. A bill to amend title XIX of the Social Security Act to improve the State plan amendment option for providing home and community-based services under the Medicaid program, and for other purposes; to the Committee on Finance.

Mr. KERRY. Mr. President, every day millions of Americans are faced with significant challenges when it comes to meeting their own personal needs or caring for a loved one who needs substantial support. Many elderly Americans and individuals of all ages with disabilities need long-term services and supports, such as assistance with dressing, bathing, preparing meals, and managing chronic conditions. They prefer to live and work in their community, and it is time that the Federal Government and states act as better partners to provide improved access to home and community-based long-term care services, HCBS.

The Medicaid program, administered by the States but jointly financed with the Federal Government, is our nation's largest payer for long-term care services. Medicaid spends about $100 billion per year on long-term services. Despite recognizing that per person spending is much lower in community settings, and that people generally prefer community services, Medicaid still spends 61 percent of its long-term services spending in institutional settings. This disparity is due, in large part, to a strong access and payment bias in the program for institutional care.

Where Medicaid does offer HCBS, it is often in short supply, with more than 280,000 Medicaid beneficiaries on waiting lists for HCBS waiver services. Further, eligibility for HCBS waiver services requires beneficiaries to already have a very significant level of disability before gaining access, and they must meet a level of functional need that qualifies them for a nursing home. This not only contributes to the unmet needs of those in the community but it also prevents states from providing services that can help prevent beneficiaries from one day requiring high-cost institutional care. While institutionalized care may be an appropriate choice for some, it should be just that: a choice that individuals and families are allowed to make about the most appropriate setting for their own care.

The result of Medicaid's ''institutional bias'' is that, according to the Georgetown Health Policy Institute, ''one in five persons living in the community with a need for assistance from others has unmet needs, endangering their health and demeaning their quality of life.'' This is simply unacceptable.

The lack of long-term care options available to families has a significant impact on their lives. Many of my constituents are affected, as are countless Americans across the country. Take the parents living in Newton who continue to wait for their physically disabled daughter, Julia, to have the opportunity to live independently. Julia is a young adult and instead of starting out on her own, she must watch as her peers move away and begin their independent lives—something she yearns to do as well. Growing up, Julia was able to attend Newton schools and keep a similar schedule to other children in the community but now has limited social interaction, as there is no other option but to live at home with her parents. Julia's parents are her full time caregivers and would like to see her able to live in an environment more conducive to both her needs and their own. Community-based care or home-based care in an apartment she could share with a roommate are options Julia and her parents would mutually benefit from. As the opportunities for the future grow for her peers, Julia's options continue to shrink because housing and home-based supports for adults with disabilities are limited at best. I have heard many stories similar to that of Julia, which emphasizes the urgency in which HCBS is needed. In addition to individual lives being put on hold, entire families must deal with the consequences of inadequate services available to their family members.

Access to HCBS affects individuals in all stages of life, including Americans dealing with conditions such as Alzheimer's. Take Ann Bowers and Jay Sweatman for example. Without access to HCBS services, Jay, who suffers from early onset Alzheimer's, was forced to first move into assisted living and then a nursing home. By the time Jay was approved for HCBS it was too late and he was no longer able to live independently. Ann had worked tirelessly to coordinate her husband's care and get additional HCBS support but the process was so difficult that by the time help came, it was simply too late. This is just one case of many where early HCBS intervention would have not only saved time, money, and stress for family members, but would have made a significant impact on the quality of life and personal independence for Jay and Ann.

Today I am introducing, with my colleague from the Finance Committee, Senator GRASSLEY, the Empowered at Home Act, a bill that increases access to home and community-based services by giving states new tools and incentives to make these services more available to those in need. It has four basic parts.

First, it will improve the Medicaid HCBS State Plan Amendment Option by giving states more flexibility in determining eligibility for which services they can offer under the program, which will create greater options for individuals in need of long-term supports. In return we ask that states no longer cap enrollment and that services be offered throughout the entire state.

Second, the bill ensures that the same spousal impoverishment protections offered for new nursing home beneficiaries will be in place for those opting for home and community-based services. In addition, low-income recipients of home and community-based services will be able to keep more of their assets when they become eligible for Medicaid, allowing them to stay in their community as long as possible.

Third, the Empowered at Home Act addresses the financial needs of spouses and family members caring for a loved one by offering tax-related provisions to support family caregivers and promotes the purchase of meaningful private long-term care insurance.

Finally, the bill seeks to improve the overall quality of home and community-based services available by providing grants for states to invest in organizations and systems that can help to ensure a sufficient supply of high quality workers, promote health, and transform home and community-based care to be more consumer-centered.

I want to say a word about the Community Choice Act, legislation long-championed by Senator HARKIN that would make HCBS a mandatory benefit in Medicaid. I am a strong supporter

and co-sponsor of this landmark legislation, and look forward to working for its enactment as soon as possible. The legislation I am introducing today seeks to supplement—not supplant—the Community Choice Act by increasing access to HCBS for those who are disabled but not at a sufficient level of need to qualify for nursing home services. These two complimentary bills will finally make HCBS a right while vastly improving HCBS availability to vulnerable citizens of varying levels of disability.

I would also like to thank a number of organizations who have been integral to the development of the Empowered at Home Act and who have endorsed it today, including the National Council on Aging, the American Association of Retired Persons, AARP, the Arc of the United States, United Cerebral Palsy, the American Association of Homes and Services for the Aging, the Alzheimer's Association, the National Association of Area Agencies on Aging, the American Geriatrics Society, ANCOR, the Trust for America's Health, and SEIU.

Improving access to a range of long-term care services for the elderly and Americans of all ages with disabilities is an issue that must not stray from our Nation's health care priorities. I believe this legislation can move forward in a bi-partisan manner to dramatically improve access to high-quality home and community-based care for the millions of Americans who are not receiving the significant supports and services they need.

Mr. GRASSLEY. Mr. President, I am pleased to join my colleague Senator KERRY today to re-introduce the Empowered at Home Act for the 111th Congress. This bill is a continuation of efforts that I undertook in 2005 and again in 2008 to improve access to home and community based services for those needing long-term care. This is an important piece of legislation that continues our efforts to make cost-effective home and community based care options more available to those who need it.

In 2005, I introduced the Improving Long-term Care Choices Act with Senator BAYH. That legislation set forth a series of proposals aimed at improving the accessibility of long-term care insurance and promoting awareness about the protection that long-term care insurance can offer. It also sought to broaden the availability of the types of long-term care services such as home and community-based care, which many people prefer to institutional care.

The year 2005 ended up being a very important year for health policy as it relates to Americans who need extensive care. In the Deficit Reduction Act of 2005, Congress passed into law the Family Opportunity Act, the Money Follows the Person initiative, and many critical pieces of the Improving Long-term Care Choices Act. With the bill I am re-introducing today with Senator KERRY, I hope to set us on the path to completing the work we started in 2005 and continued in 2008.

Making our long-term care system more efficient is a critical goal as we consider the future of health care. There are more than 35 million Americans, roughly 12 percent of the U.S. population, over the age of 65. This number is expected to increase dramatically over the next few decades as the baby boomers age and life expectancy increases. According to the U.S. Administration on Aging, by the year 2030, there will be more than 70 million elderly persons in the United States. As the U.S. population ages, more and more Americans will require long-term care services.

The need for long-term care will also be affected by the number of individuals under the age of 65 who may require a lifetime of care. Currently, almost half of all Americans who need long-term care services are individuals with disabilities under the age of 65. This number includes over 5 million working-age adults and approximately 400,000 children.

Long-term care for elderly and disabled individuals, including care at home and in nursing homes, represents almost 40 percent of Medicaid expenditures. Contrary to general assumptions, it is Medicaid, not Medicare that pays for the largest portion of long-term care for the elderly. Over 65 percent of Medicaid long-term care expenditures support elderly and disabled individuals in nursing facilities and institutions. Although most people who need long-term care prefer to remain at home, Medicaid spending for long-term care remains heavily weighted toward institutional care.

Section 6086 of the Deficit Reduction Act of 2005, DRA, P.L. 109–171, was based on the Improving Long-term Care Choices Act. The DRA provision authorized a new optional benefit under Medicaid that allows states to extend home and community-based services to Medicaid beneficiaries under the section 1915(i) Home and Community-Based Services State Option. Under this authority, states can offer Medicaid-covered home and community-based services under a state's Medicaid plan without obtaining a section 1915(c) home and community-based waiver. Eligibility for these section 1915(i) services may be extended only to Medicaid beneficiaries already enrolled in the program whose income does not exceed 150 percent of the Federal poverty level.

To date, only one State, my own state of Iowa, has sought to take advantage of the provision authorized through the DRA. While we had hoped far more states would participate, we know that the relatively low income cap, 150 percent, in the DRA provision creates an administrative complexity that has not made the option appealing for states.

The bill we are re-introducing today mirrors the one we introduced in 2008 during the 110th Congress. In this bill, the income eligibility standard would be raised for access to covered services under section 1915(i) to persons who qualify for Medicaid because their income does not exceed a specified level established by the state up to 300 percent of the maximum Supplemental Security Income, SSI, payment applicable to a person living at home. This will significantly increase the number of people eligible for these services. States will be able to align their institutional and home and community-based care income eligibility levels.

The bill would also establish two new optional eligibility pathways into Medicaid. These groups would be eligible for section 1915(i) home and community-based services as well as services offered under a state's broader Medicaid program. Under this bill, states with an approved 1915(k) state plan amendment would have the option to extend Medicaid eligibility to individuals: who are not otherwise eligible for medical assistance; whose income does not exceed 300 percent of the supplemental security income benefit rate; and who would satisfy state-established needs-based criteria based upon a state's determination that the provision of home and community-based services would reasonably be expected to prevent, delay, or decrease the need for institutionalized care. Under this new eligibility pathway, states could choose to either limit Medicaid benefits to those home and community-based services offered under section 1915(k) or allow eligibles to access services available under a state's broader Medicaid program in addition to the 1915(k) benefits. These changes will give the states the option of exploring the use of an interventional use of home and community-based services. If states have the flexibility to provide the benefit as contemplated in the bill, they can try to delay the need for institutional care and keep people in their homes longer.

As the number of Americans reaching retirement age grows proportionally larger, ultimately the number of Americans needing more extensive care will grow. Many of these Americans will look to Medicaid for assistance. States need more tools to provide numerous options to people in need so that they can stay in their own homes as long as possible.

The cost of providing long-term care in an institutional setting is far more expensive care than providing care in the home. States will benefit from having options before them that allow them to keep people appropriately in home settings longer. The more States learn how to use those tools, the more States and ultimately the Federal taxpayer will benefit from reduced costs for institutional care.

I am also pleased that this bill will include key provisions from S. 2337, the Long-Term Care Affordability and Security Act of 2007. The bill includes important tax provisions that I introduced in previous Congresses as well,

the Improving Long-term Care Choices Act of 2005, introduced in the 109th Congress.

Research shows that the elderly population will nearly double by 2030. By 2050, the population of those aged 85 and older will have grown by more than 300 percent. Research also shows that the average age at which individuals need long-term care services, such as home health care or a private room at a nursing home, is 75. Currently, the average annual cost for a private room at a nursing home is more than $75,000. This cost is expected to be in excess of $140,000 by 2030.

Based on these facts, we can see that our nation needs to prepare its citizens for the challenges they may face in old-age. One way to prepare for these challenges is by encouraging more Americans to obtain long-term care insurance coverage. To date, only 10 percent of seniors have long-term care insurance policies, and only 7 percent of all private-sector employees are offered long-term care insurance as a voluntary benefit.

Under current law, employees may pay for certain health-related benefits, which may include health insurance premiums, co-pays, and disability or life insurance, on a pre-tax basis under cafeteria plans and flexible spending arrangements, FSAs. Essentially, an employee may elect to reduce his or her annual salary to pay for these benefits, and the employee doesn't pay taxes on the amounts used to pay these costs. Employees, however, are explicitly prohibited from paying for the cost of long-term care insurance coverage tax-free.

Our bill would allow employers, for the first time, to offer qualified long-term care insurance to employees under FSAs and cafeteria plans. This means employees would be permitted to pay for qualified long-term care insurance premiums on a tax-free basis. This would make it easier for employees to purchase long-term care insurance, which many find unaffordable. This should also encourage younger individuals to purchase long-term care insurance. The younger the person is at the time the long-care insurance contract is purchased, the lower the insurance premium.

Our bill also allows an individual taxpayer to deduct the cost of their long-term care insurance policy. In other words, the individual can reduce their gross income by the premiums that they pay for a long-term care policy, and therefore, pay less in taxes. This tax benefit for long-term care insurance should encourage more individuals to purchase these policies. It certainly makes a policy more affordable, especially for younger individuals. This would allow a middle-aged taxpayer to start planning for the future now.

Finally a provision that is included in our bill that I am really pleased with is one that provides a tax credit to long-term caregivers. Long-term caregivers could include the taxpayer him- or herself. Senator KERRY and I recognize that these taxpayers—who have long-term care needs, yet are taking care of themselves—should be provided extra assistance. Also, taxpayers taking care of a family member with long-term care needs would also be eligible for the tax credit. These taxpayers should be given a helping hand. As our population continues to age, the least that we can do is provide a tax benefit for these struggling individuals.

By Mr. SPECTER (for himself, Mr. GRAHAM, Mr. LEAHY, Mr. WYDEN, Mr. CRAPO, Mr. MARTINEZ, and Ms. LANDRIEU):

S. 437. A bill to amend the Internal Revenue Code of 1986 to allow the deduction of attorney-advanced expenses and court costs in contingency fee cases; to the Committee on Finance.

Mr. SPECTER. Mr. President, I seek recognition to introduce legislation to amend Section 162 of the Internal Revenue Code to permit attorneys to deduct expenses and court costs incurred on behalf of contingency fee clients as an ordinary and necessary business expense in the year such expenses are sustained. I introduced the same legislation in the 110th Congress, and the bill attracted bipartisan support. My bill simply clarifies the law to make certain that attorneys who take on contingency fee cases are able to enjoy the same tax benefits as virtually every other small business in the country.

Contingency agreements between attorneys and clients are very common in personal injury, medical malpractice, product liability, Social Security disability, workers compensation, civil liberties, and employment cases. Under these agreements, an attorney pays all out-of-pocket costs associated with a case before any conclusion to the case. Such expenses include costs for expert witnesses, depositions, medical records, and court fees. Contingency agreements have numerous benefits to clients; in particular, indigent individuals who might otherwise be unable to afford legal services.

The obvious benefit to clients of contingency fee arrangements is that they do not have to incur out-of-pocket expenses for attorneys' fees. This may be particularly valuable to clients who do not have the ability to pay attorneys by the hour to advance their case. The arrangement also benefits the client by effectively spreading the risk of litigation. An hourly-rate payment agreement requires the client to assume all of the risk because the attorneys' fees are a sunk cost. However, under a contingent-fee arrangement, the attorney shares that risk and is only paid a fee if he wins the case or obtains a settlement.

Currently, the Internal Revenue Service, IRS, treats expenses and court costs on behalf of contingency clients as loans to the client. As a result, the IRS does not permit any deduction by the attorney until the litigation is resolved, sometimes many years after the attorney has incurred the expenses on behalf of their client. The IRS treats the expenses and court costs as a loan despite the fact that no interest is charged and the lawyer only recoups costs if the case is won or settled. Not only is the IRS's position illogical, but it is contrary to a ruling by the United States Court of Appeals for the 9th Circuit.

In Boccardo v. Commissioner, 56 F.3d 1016, 9t Cir. 1995, the 9th Circuit held that because the firm had a ''gross fee'' contract with the client, the firm incurred ordinary and necessary business expenses in the payment of costs and charges in connection with its clients' litigation. Consequently, litigation costs such as filing fees, witness fees, travel expenses, and medical consultation fees were deductible as ordinary and necessary business expenses in the year the costs were incurred on behalf of the clients. In a ''gross fee'' contract, the client is only obligated to pay their attorney a percentage of the amount recovered and is not expressly responsible for specific repayment of costs. While the Boccardo court contrasted ''gross fee'' contracts with ''net fee'' contracts, such a distinction is trivial for tax purposes. In both agreements, the attorney takes a considerable business risk to incur significant costs on behalf of a client and only recoups the expenses if a recovery is won.

Despite the Boccardo court's ruling in favor of attorneys, the IRS continues to treat the out-of-pocket costs related to contingency fee cases as loans. Lawyers who make the decision to deduct these costs are exposed to potential audit and litigation. Over the past 13 years, taxpayers have had to proceed at their own peril—Ninth Circuit taxpayers risk a conflict with the IRS on this matter despite the case law, and taxpayers outside of the Ninth Circuit have no guidance at all since they cannot directly rely on Boccardo.

My bill reverses an unfair IRS position by treating these businesses the same as all other small businesses. It does so by allowing attorneys with contingency fee clients to deduct their expenses and costs in the year that they are paid. My legislation does not give attorneys anything above and beyond that which is currently enjoyed by virtually every other small business in our country.

Mr. President, 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. 437

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

SECTION 1. DEDUCTION OF ATTORNEY-ADVANCED EXPENSES AND COURT COSTS IN CONTINGENCY FEE CASES.

(a) IN GENERAL.—Section 162 of the Internal Revenue Code of 1986 (relating to trade or business expenses) is amended by redesignating subsection (q) as subsection (r) and by

inserting after subsection (p) the following new subsection:

"(q) ATTORNEY-ADVANCED EXPENSES AND COURT COSTS IN CONTINGENCY FEE CASES.—There shall be allowed as a deduction under this section any expenses and court costs paid or incurred by an attorney the repayment of which is contingent on a recovery by judgment or settlement in the action to which such expenses and costs relate. Such deduction shall be allowed in the taxable year in which such expenses and costs are paid or incurred by the taxpayer.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to expenses and costs paid or incurred after the date of the enactment of this Act, in taxable years beginning after such date.

By Mr. INOUYE:

S. 439. A bill to provide for and promote the economic development of Indian tribes by furnishing the necessary capital, financial services, and technical assistance to Indian-owned business enterprises, to stimulate the development of the private sector of Indian tribal economies, and for other purposes; to the Committee on Indian Affairs.

Mr. INOUYE. Mr. President, I rise today to introduce a bill to establish an Indian Development Finance Corporation as an independent, Federally-chartered corporation that is modeled after the family of Development Banks established by the World Bank in lesser-developed countries around the world.

Mr. President, in my more than 30 years of service on the U.S. Senate Committee on Indian Affairs, I have visited many Indian communities and Alaska Native villages, and I have seen that in many parts of Indian country, there are economic and social conditions that are as dire as those conditions found in the so-called "lesser developed countries" around the world. And although we have seen some economic success in recent years across Native America as a result of the Indian Gaming Regulatory Act, most Indian tribes and Native villages are not engaged in the conduct of gaming, nor have tribal governments found the means to overcome the challenges associated with their remote locations from populations centers and market places that serve the commercially-successful tribal gambling operations.

In those rurally-isolated areas, there is real potential to succeed in developing viable local economies based on agricultural and fishery resources, and the development of the vast energy resources that are located on Indian lands. What these Native communities need is the type of development financing services that the World Bank has successfully established—institutions empowered to make small, leveraged capital investments and economic infrastructure development to support tailored industrial programs, internet-based communication services, national and international trade agreements, and economic research capabilities. An Indian Development Finance Corporation could provide these kinds of services through a network of centers that would be based in Indian Country.

Under this bill, the Corporation would be authorized to issue 500,000 shares of common stock at $50 per share to every Tribal Nation in Indian Country and Alaska. The Corporation would be managed by a Board elected by the Tribal shareholders and the Board would be charged with hiring a President and a team of managers as well as set operating policies. Seed capital would be injected into the Indian Development Finance Corporation (IDFC) by the U.S. Treasury in exchange for the issuance of capital stock. Initially, $20 million in start-up funds would be invested and after the majority of common stock was purchased by tribes, another $80 million would be authorized.

I believe that the IDFC can take advantage of opportunities to integrate the economic stimulus activities soon to be created by the American Recovery and Reinvestment Act, and. I am confident that there will be support forthcoming from those tribal governments and Alaska Native corporations that have the resources to invest in the economic infrastructure initiatives that will be established by the IDFC in this period of our greatest need.

Mr. President, 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. 439

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 "Indian Development Finance Corporation 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 policy.
Sec. 3. Definitions.

TITLE I—INDIAN DEVELOPMENT FINANCE CORPORATION

Sec. 101. Establishment of Corporation.
Sec. 102. Duties and powers.
Sec. 103. Loans and obligations.
Sec. 104. Board of Directors.
Sec. 105. President of Corporation.
Sec. 106. Annual shareholder meetings.
Sec. 107. Annual reports; development plan.

TITLE II—CAPITALIZATION

Sec. 201. Issuance of stock.
Sec. 202. Borrowing authority.

TITLE III—AUTHORIZATION OF APPROPRIATIONS

Sec. 301. Authorization of appropriations.

SEC. 2. FINDINGS AND POLICY.

(a) FINDINGS.—Congress finds that—

(1) a special relationship has existed between the United States and Indian tribes, which is recognized in clause 3 of section 8 of article I of the Constitution of the United States;

(2) pursuant to laws, treaties, and administrative authority, Congress has implemented activities to fulfill the responsibility of the United States for the protection and preservation of Indian tribes and tribal resources;

(3) despite the availability of abundant natural resources on Indian land and a rich cultural legacy that places great value on self-determination, self-reliance, and independence, Indians and Alaska Natives experience poverty and unemployment, together with associated incidences of social pathology, to an extent unequaled by any other group in the United States;

(4)(A) the reasons for that poverty and unemployment have been widely studied and documented by Congress, the Government Accountability Office, the Department of the Interior, private academic institutions, and Indian tribes; and

(B) the studies described in subparagraph (A) have consistently identified as fundamental obstacles to balanced economic growth and progress by Indians and Alaska Natives—

(i) the very limited availability of long-term development capital and sources of financial credit necessary to support in Indian country the development of a private sector economy comprised of Indian-owned business enterprises;

(ii) the lack of effective control by Indians over their own land and resources; and

(iii) the scarcity of experienced Indian managers and technicians;

(5) previous efforts by the Federal Government directed at stimulating Indian economic development through the provision of grants, direct loans, loan guarantees, and interest subsidies have fallen far short of objectives due to—

(A) inadequate funds;

(B) lack of coordination;

(C) arbitrary project selection criteria;

(D) politicization of the delivery system; and

(E) other inefficiencies characteristic of a system of publicly administered financial intermediation; and

(6) the experience acquired by multilateral lending institutions among "lesser-developed countries" has demonstrated the value and necessity of development financial institutions in achieving economic growth in underdeveloped economies and societies that are strikingly similar to Indian and Alaska Native communities in relation to matters such as—

(A) control over natural resource management;

(B) the absence of experienced, indigenous managers and technicians; and

(C) the availability of long-term development capital and private sources of financial credit.

(b) POLICY.—It is the policy of the United States that, in fulfillment of the special and long-standing responsibility of the United States to Indian tribes, the United States should provide assistance to Indians in efforts to break free from the devastating effects of extreme poverty and unemployment and achieve lasting economic self-sufficiency through the development of the private sector of tribal economies by establishing a federally chartered, mixed-ownership development financing institution to provide a broad range of financial intermediary services (including working capital, direct loans, loan guarantees, and project development assistance) using the proven efficiencies of the private market mode of operation.

SEC. 3. DEFINITIONS.

In this Act:

(1) BOARD.—The term "Board" means the Board of Directors of the Corporation.

(2) CORPORATION.—The term "Corporation" means the Indian Development Finance Corporation established by section 101(a).

(3) INDIAN.—The term "Indian" means an individual who is a member of an Indian tribe.

(4) INDIAN BUSINESS ENTERPRISE.—

(A) IN GENERAL.—The term ''Indian business enterprise'' means any commercial, industrial, or business entity—

(i) at least 51 percent of which is owned by 1 or more Indian tribes;

(ii) that produces or provides goods, services, or facilities on a for-profit basis;

(iii) that is chartered or controlled by an Indian tribe or tribal organization that is a ⟦shareholder/member⟧ of the Corporation;

(iv) the principal place of business of which is located within or adjacent to the boundaries of a reservation; and

(v) the principal business activities of which, in addition to the production of a stream of income, as determined by the Corporation—

(I) are directly beneficial to an Indian tribe; and

(II) contribute to the economy of that Indian tribe.

(B) INCLUSION.—The term ''Indian business enterprise'' includes any subsidiary entity owned and controlled by an entity described in subparagraph (A).

(5) INDIAN TRIBE.—The term ''Indian tribe'' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

(6) RESERVATION.—The term ''reservation'' has the meaning given the term in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452).

(7) SECRETARY.—The term ''Secretary'' means the Secretary of the Interior.

(8) TRIBAL ORGANIZATION.—The term ''tribal organization'' means—

(A) the governing body of an Indian tribe; and

(B) any entity established, controlled, or owned by such a governing body.

TITLE I—INDIAN DEVELOPMENT FINANCE CORPORATION

SEC. 101. ESTABLISHMENT OF CORPORATION.

(a) IN GENERAL.—There is established a corporation, to be known as the ''Indian Development Finance Corporation''.

(b) POWERS OF CONGRESS.—Congress shall have the sole authority—

(1) to amend the charter of the Corporation; and

(2) to terminate the Corporation.

SEC. 102. DUTIES AND POWERS.

(a) DUTIES.—The Corporation shall—

(1) provide development capital through financial services under section 103;

(2) encourage the development of new and existing Indian business enterprises eligible to receive assistance from the Corporation by providing, and coordinating the availability of—

(A) long-term capital and working capital;

(B) loans, loan guarantees, and other forms of specialized credit; and

(C) technical and managerial assistance and training;

(3) maintain broad-based control of the Corporation relative to the voting shareholders of the Corporation;

(4) encourage active participation in the Corporation by Indian tribes through ownership of equity securities of the Corporation; and

(5) otherwise assist in strengthening Indian tribal economies through the development of Indian business enterprises.

(b) POWERS.—In carrying out this Act, the Corporation may—

(1) adopt and alter a corporate seal, which shall be judicially noticed;

(2)(A) enter into agreements and contracts with individuals, Indian tribes, and private or governmental entities; and

(B) make payments or advance payments under those agreements and contracts without regard to section 3324 of title 31, United States Code, except that the Corporation shall provide financial assistance only in accordance with this Act;

(3) with respect to any real, personal, or mixed property (or any interest in such property)—

(A) lease, purchase, accept gifts or donations of, or otherwise acquire the property;

(B) own, hold, improve, use, or otherwise deal in or with the property; and

(C) sell, convey, mortgage, pledge, lease, exchange, or otherwise dispose of the property;

(4)(A) sue and be sued in corporate name;

(B) complain and defend in any court of competent jurisdiction; and

(C) represent itself, or contract for representation, in any judicial, legal, or other proceeding;

(5)(A) with the approval of the department or agency concerned, make use of the services, facilities, and property of any board, commission, independent establishment, or Federal department or agency in carrying out this Act; and

(B) pay for that use, with the payments to be credited to the applicable appropriation that incurred the expense;

(6) use the United States mails on the same terms and conditions as a Federal department or agency;

(7) obtain insurance or make other provisions against losses;

(8) participate with 1 or more other financial institutions, agencies, instrumentalities, trusts, or foundations in loans or guarantees provided under this Act on such terms as may be agreed on;

(9) accept guarantees from other agencies for which loans made by the Corporation may be eligible;

(10) establish, as soon as practicable, regional offices to more efficiently serve the widely disbursed Indian population;

(11) buy and sell—

(A) obligations of, or instruments insured by, the Federal Government; and

(B) securities backed by the full faith and credit of any Federal department or agency;

(12) make such investments as the Board determines to be appropriate;

(13) establish such offices within the Corporation as are necessary, including—

(A) project development;

(B) project evaluation and auditing;

(C) fiscal management;

(D) research and development; and

(E) such other activities as are authorized by the Board; and

(14) exercise all other authority necessarily or reasonably relating to the establishment of the Corporation to carry out this Act.

SEC. 103. LOANS AND OBLIGATIONS.

(a) IN GENERAL.—The Corporation may—

(1) make loans or commitments for loans to any Indian business enterprise; and

(2) purchase, insure, or discount any obligation of an Indian business enterprise, if the Indian business enterprise meets the requirements of subsection (b).

(b) REQUIREMENTS.—An Indian business enterprise meets the requirements of this subsection if the Corporation determines that—

(1) the Indian business enterprise has or will have—

(A) a sound organizational and financial structure;

(B) income in excess of the operating costs of the Indian business enterprise;

(C) assets in excess of the obligations of the Indian business enterprise; and

(D) a reasonable expectation of continuing demand for—

(i) the products, goods, commodities, or services of the Indian business enterprise; or

(ii) the facilities of the Indian business enterprise; and

(2) the loan or obligation proposed to be purchased, insured, or discounted will be fully repayable by the Indian business enterprise in accordance with the terms and conditions of the loan or obligation.

(c) TERMS, RATES, AND CHARGES.—

(1) IN GENERAL.—In establishing the terms, rates, and charges for a loan provided under this section, the Corporation, to the maximum extent practicable, shall seek to provide the type of credit needed by the applicable Indian business enterprise at the lowest reasonable cost and on a sound business basis, taking into consideration—

(A) the cost of money to the Corporation;

(B) the necessary reserve and expenses of the Corporation; and

(C) the technical and other assistance attributable to loans made available by the Corporation under this section.

(2) INTEREST RATES.—The terms of a loan under this subsection may provide for an interest rate that varies from time to time during the repayment period of the loan in accordance with the interest rates being charged by the Corporation for new loans during those periods.

(d) ADVANCING AND RELOANING.—A loan provided under this section may be advanced or reloaned by the Corporation to any member or shareholder of the Corporation for the development of an individually owned business on or adjacent to a reservation, in accordance with the bylaws of the Corporation.

(e) LOAN GUARANTEES.—

(1) IN GENERAL.—The Corporation may guarantee any part of the principal or interest of a loan that is provided—

(A) by a State-chartered or federally chartered lending institution to an Indian business enterprise that meets the requirements of subsection (b); and

(B) in accordance with such terms and conditions (including the rate of interest) as would be permissible if the loan was a direct loan provided by the Corporation.

(2) CHARGES.—The Corporation may impose a charge for a loan guarantee provided under this subsection.

(3) LIMITATION.—The Corporation shall not provide a loan guarantee under this subsection if the income to the lender from the applicable loan is excludable from the gross income of the lender for purposes of chapter 1 of the Internal Revenue Code of 1986.

(4) ASSIGNABILITY.—A loan guarantee under this subsection shall be assignable to the extent provided in the contract for the loan guarantee.

(5) INCONTESTABILITY.—A loan guarantee under this subsection shall be incontestable, except in any case of fraud or misrepresentation of which the holder of the loan had actual knowledge at the time the holder acquired the loan.

(6) PURCHASE OF GUARANTEED LOANS.—

(A) IN GENERAL.—In lieu of requiring the original lender to service a loan guaranteed under this subsection until final maturity or liquidation, the Corporation may purchase the guaranteed loan without penalty, if the Corporation determines that—

(i) the purchase would not be detrimental to the interests of the Corporation;

(ii) liquidation of the guaranteed loan would—

(I) result in the insolvency of the borrower; or

(II) deprive the borrower of an asset essential to continued operation; and

(iii)(I) the guaranteed loan will be repayable on revision of the rates, terms, payment periods, or other conditions of the loan, consistent with loans made by the Corporation under subsection (a)(1); but

(II) the lender or other holder of the guaranteed loan is unwilling to make such a revision.

(B) AMOUNT.—The amount paid by the Corporation to purchase a loan under subparagraph (A) shall not exceed an amount equal to the sum of—

(i) the balance of the principal of the loan; and

(ii) the amount of interest accrued on the loan as of the date of purchase.

(f) PURCHASES OF EQUITY AND OWNERSHIP; SUPERVISION AND PARTICIPATION.—

(1) PURCHASES OF EQUITY AND OWNERSHIP.—For purposes of providing long-term capital and working capital to Indian business enterprises, the Corporation may purchase, or make commitments to purchase, any portion of the equity or ownership interest in the Indian business enterprise if the Corporation determines, after a full and complete appraisal of all project and business plans associated with the investment, that the investment will not expose the Corporation to any unreasonable business risk, taking into consideration applicable development finance standards, as applied to Indian economic development in light of the socioeconomic, political, and legal conditions unique to reservations.

(2) SUPERVISION AND PARTICIPATION.—The Corporation may supervise or participate in the management of an Indian business enterprise in which an investment has been made under paragraph (1), in accordance with such terms and conditions as are agreed to by the Corporation and the Indian business enterprise, including the assumption of a directorship in the corporate body of the Indian business enterprise by an officer of the Corporation.

SEC. 104. BOARD OF DIRECTORS.

(a) MEMBERSHIP.—The Corporation shall be headed by a board of directors, to be composed of 21 members, of whom—

(1) 1 shall be a Federal official, to be appointed by the Secretary;

(2) 19 shall be representatives of the shareholders of the Corporation, to be appointed by the Secretary—

(A) based on consultation with, and recommendations from, Indian tribes;

(B) in accordance with subsection (b); and

(C) taking take into consideration the experience of a representative regarding—

(i) private business enterprises; and

(ii) development or commercial financing; and

(3) 1 shall be the president of the Corporation.

(b) APPOINTMENT OF SHAREHOLDER REPRESENTATIVES.—The initial members of the Board appointed under subsection (a)(2) shall be appointed by the Secretary, based on recommendations from Indian tribal leaders.

(c) TERMS OF SHAREHOLDER REPRESENTATIVES.—The terms of service of the initial members of the Board appointed under subsection (a)(2) shall terminate at the beginning of the first annual meeting of shareholders of the Corporation held as soon as practicable after the date on which subscriptions have been paid for at least 10 percent of the common stock of the Corporation initially offered for sale to Indian tribes under section 201(b).

(d) VACANCIES.—

(1) IN GENERAL.—Subject to paragraph (2), a vacancy on the Board resulting from the resignation or removal of a member of the Board shall be filled by the Board in accordance with the bylaws of the Corporation.

(2) TERM.—The term of service of a member of the Board appointed under paragraph (1) shall terminate at the beginning of the next annual shareholder meeting of the Corporation occurring after the date of appointment.

(e) REMOVAL.—A member of the Board may be removed from office by the Board only for—

(1) neglect of duty; or

(2) malfeasance in office.

(f) ADMINISTRATIVE DUTIES.—

(1) CHAIRPERSON AND VICE-CHAIRPERSON.—The Board shall annually elect from among the members of the Board described in [subsection (a)(2)] a chairperson and vice-chairperson.

(2) POLICIES AND MANAGEMENT.—The Board shall—

(A) establish the policies of the Corporation; and

(B) supervise the management of the Corporation.

(3) BYLAWS.—The Board shall adopt and amend, as necessary, such bylaws as are necessary for the proper management and function of the Corporation.

(4) MEETINGS.—

(A) IN GENERAL.—The Board shall meet at the call of the chairperson of the Board, in accordance with the bylaws of the Corporation, not less frequently than once each quarter.

(B) PRIVATE EXECUTIVE SESSIONS.—The Board may meet in a private executive session if the matter involved at the meeting may impinge on the right of privacy of an individual.

(g) MEMBER APPOINTED BY SECRETARY.—The member of the Board appointed by the Secretary under subsection (a)(1) shall—

(1) have 20 percent of the share of votes cast at each annual shareholder meeting; and

(2) be overruled only by ⅔ majority vote at a regular meeting of the Board with respect to any matter regarding—

(A) a request by the Board of capital under subsection (b)(3)(B) or (c)(2)(B) of section 201;

(B) borrowing by the Corporation of any amount in excess of $10,000,000;

(C) a loan or investment made by the Corporation in excess of $10,000,000; or

(D) a change to an investment or credit policy of the Corporation.

(h) COMPENSATION.—

(1) NON-GOVERNMENTAL EMPLOYEES.—A member of the Board who is not otherwise employed by the Federal Government or a State government shall receive compensation at a rate equal to the daily rate for GS–18 of the General Schedule under section 5332 of title 5, United States Code, for each day, including traveling time, during which the member carries out a duty as a member of the Board.

(2) GOVERNMENTAL EMPLOYEES.—A member of the Board who is an officer or employee of the Federal Government or a State government shall serve without additional compensation.

(3) TRAVEL AND OTHER EXPENSES.—Each member of the Board shall be reimbursed for travel, subsistence, and other necessary expenses incurred by the member in carrying out a duty as a member of the Board.

SEC. 105. PRESIDENT OF CORPORATION.

(a) APPOINTMENT.—The Board shall appoint a president of the Corporation.

(b) DUTIES AND POWERS.—The president shall—

(1) serve as the chief executive officer of the Corporation; and

(2) subject to the direction of the Board and the general supervision of the chairperson, carry out the policies and functions of the Corporation;

(3) manage the personnel and activities of the Corporation; and

(4) on approval of the Board, appoint and fix the compensation and duties of such officers and employees as may be necessary for the efficient administration of the Corporation, without regard to—

(A) the provisions of title 5, United States Code, governing appointments in the competitive service; or

(B) chapter 51 or subchapter III of chapter 53 of title 5, United States Code.

SEC. 106. ANNUAL SHAREHOLDER MEETINGS.

(a) MEETINGS.—

(1) IN GENERAL.—The Corporation shall hold meetings of the shareholders of the Corporation not less frequently than once each year.

(2) OPENNESS.—A shareholder meeting under this section shall be held open to the public.

(3) NOTICE.—The Corporation shall provide to each shareholder of the Corporation a notice of each shareholder meeting under this section by not later than 30 days before the date of the meeting.

(b) ACTIVITIES.—

(1) CORPORATION.—At a shareholder meeting under this section, the Corporation—

(A) shall provide to shareholders a report describing—

(i) the activities of the Corporation during the preceding calendar year; and

(ii) the financial condition of the Corporation as in effect on the date of the meeting; and

(B) may present to the shareholders proposals for future action and other matters of general concern to shareholders and Indian business enterprises eligible to receive services of the Corporation.

(2) SHAREHOLDERS.—At a shareholder meeting under this section, a shareholder of the Corporation may—

(A) present a motion or resolution relating to any matter within the scope of this Act; and

(B) participate in any discussion relating to such a matter or any other matter on the agenda of the meeting.

(c) VOTING.—Each Indian tribe that is a member of the Corporation may vote the common stock of the Indian tribe regarding—

(1) any matter on the agenda of a meeting under this section; or

(2) any other matter relating to the election of a member of the Board.

SEC. 107. ANNUAL REPORTS; DEVELOPMENT PLAN.

(a) ANNUAL REPORTS.—

(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act and annually thereafter, the Board shall submit to the appropriate committees of Congress a report describing—

(A) the activities of the Corporation during the preceding calendar year; and

(B) the capital and financial condition of the Corporation as in effect on the date of submission of the report.

(2) INCLUSION.—Each report under paragraph (1) shall include recommendations for legislation to improve the services of the Corporation.

(b) DEVELOPMENT PLAN.—Not later than 1 year after the date of enactment of this Act, the Corporation shall submit to Congress a comprehensive, 5-year organizational development plan that includes—

(1) financial projections for the Corporation;

(2) a description of the corporate structure and locations of the Corporation; and

(3) operational guidelines for the Corporation, particularly regarding the coordinating relationship the Corporation has, or plans to have, with Federal domestic assistance programs that allocate financial resources and services to Indian tribes and reservations for economic and business development purposes.

TITLE II—CAPITALIZATION

SEC. 201. ISSUANCE OF STOCK.

(a) ISSUANCE.—

(1) IN GENERAL.—The Corporation may issue shares of stock in the Corporation, in

such quantity and of such class as the Board determines to be appropriate, in accordance with this section.

(2) REQUIREMENT.—A share of stock under paragraph (1) may be issued to, and held by, only—

(A) an Indian tribe; or

(B) the Federal Government.

(3) REDEMPTION AND REPURCHASE.—The Corporation may redeem or repurchase a share of stock issued pursuant to paragraph (1) [at a price to be determined by the Board].

(b) INITIAL OFFERING OF COMMON STOCK.—

(1) IN GENERAL.—The Corporation shall make an initial offering of common stock of the Corporation to Indian tribes under this section—

(A) in a quantity of not less than 500,000 shares; and

(B) at a price of not less than $50 per share.

(2) FORM OF PAYMENT.—Of the price paid by an Indian tribe for a share of stock of the Corporation under this subsection—

(A) 20 percent shall be provided in cash or cash-equivalent securities; and

(B) 80 percent shall provided in the form of a legally binding financial commitment that is—

(i) available at the request of the Board to meet the obligations of the Corporation; but

(ii) not available for any lending activity or administrative expenses of the Corporation.

(c) SUBSCRIPTION BY SECRETARY FOR SHARES OF CAPITAL STOCK.—

(1) IN GENERAL.—The Secretary may subscribe for not more than 2,000,000 shares of capital stock of the Corporation.

(2) PAYMENTS.—

(A) INITIAL PERIOD.—Not later than 2 years after the date of enactment of this Act, the Secretary shall pay to the Corporation for subscription for capital stock under paragraph (1) not less than $20,000,000.

(B) SUBSEQUENT PERIOD.—

(i) IN GENERAL.—Beginning in fiscal year 2012, the Secretary shall pay to the Corporation for subscription for capital stock under paragraph (1)—

(I) $80,000,000; or

(II) such lesser amount as the Board may request, in accordance with clause (ii).

(ii) REQUESTS BY BOARD.—The amount of a request by the Board under clause (i)(II) shall be determined jointly by the Secretary and the Board based on an assessment of the need of the Corporation, taking into consideration a risk analysis of the investment and credit policies and practices of the Corporation.

(iii) LIMITATIONS.—A payment under this subparagraph—

(I) shall be subject to the availability of appropriations;

(II) shall be provided only as needed to meet the obligations of the Corporation; and

(III) shall not be available for any lending activity or administrative expenses of the Corporation.

(3) REQUIREMENTS.—A share of capital stock subscribed for by the Secretary under this subsection—

(A) shall be valued at not less than $50 per share;

(B) shall be nonvoting stock;

(C) shall not accrue dividends; and

(D) shall not be transferred to any individual or entity other than the Corporation.

(d) EXEMPTED SECURITIES.—A share of stock, and any other security or instrument, issued by the Corporation shall be considered to be an exempted security for purposes of the laws (including regulations) administered by the Securities and Exchange Commission.

SEC. 202. BORROWING AUTHORITY.

(a) ISSUANCE OF OBLIGATIONS.—The Corporation may issue such bonds, notes, and other obligations at such times, bearing interest at such rates, and containing such terms and conditions as the Board, in consultation with the Secretary of the Treasury, determines to be appropriate.

(b) AMOUNT OF OBLIGATIONS.—The aggregate amount of the obligations issued pursuant to subsection (a) shall not exceed an amount equal to the sum of—

(1) the product obtained by multiplying—

(A) the sum of—

(i) the paid-in capital of the Corporation; and

(ii) the retained earnings and profits of the Corporation; and

(B) 10; and

(2) the sum of the book values of—

(A) the capital subject to request of the Board represented by the total commitments of Indian tribal shareholders under section 201(b)(2)(B); and

(B) the amount paid by the Secretary under section 201(c)(2).

(c) SALE OF OBLIGATIONS.—An obligation of the Corporation under subsection (a) may be—

(1) issued through an agent by negotiation, offer, bid, syndicate sale, or otherwise; and

(2) completed by book entry, wire transfer, or any other appropriate method.

TITLE III—AUTHORIZATION OF APPROPRIATIONS

SEC. 301. AUTHORIZATION OF APPROPRIATIONS.

(a) GENERAL OPERATIONAL EXPENSES.—There are authorized to be appropriated—

(1) $2,000,000 for fiscal year 2009 to carry out this Act;

(2) $2,500,000 for each of fiscal years 2010 through 2014 to carry out project development activities under this Act; and

(3) such sums as are necessary to carry out this Act (other than subparagraphs (A) and (B) of section 201(c)(2)) for each of fiscal years 2010 through 2014.

(b) PAID-IN CAPITAL STOCK.—There are authorized to be appropriated—

(1) for each of fiscal years 2010 and 2011, $10,000,000 to carry out section 201(c)(2)(A); and

(2) for fiscal year 2011 and each fiscal year thereafter, $80,000,000 to carry out section 201(c)(2)(B).

By Mr. SPECTER (for himself and Mr. LEAHY):

S. 440. A bill to amend the Internal Revenue Code of 1986 to allow an above-the-line deduction for attorney fees and costs in connection with civil claim awards; to the Committee on Finance.

Mr. SPECTER. Mr. President, I seek recognition to introduce legislation to amend Section 62(a)(20) of the Internal Revenue Code to allow taxpayers to subtract from their taxable gross income the attorneys' fees and court costs paid by the taxpayer in connection with an award or settlement of monetary damages in a civil claim. Such a deduction is commonly referred to as an ''above-the-line'' deduction.

Under current law, there is an inequity in the tax code that results in the double taxation of attorneys' fees and costs in certain circumstances. In addition, attorneys' fees paid by individuals in recovering a taxable award in certain civil claims are only deductible as miscellaneous itemized deductions. As such, they are subject to a reduction equal to two percent of the individual's adjusted gross income and subject to a complete disallowance when calculating the alternative minimum tax. Consequently, many plaintiffs end up incurring significant tax liability beyond the amount they actually bring home after winning or settling a case.

Congress partially corrected the problem in 2004, when we passed, and President Bush signed, the American Jobs Creation Act of 2004, Jobs Act. The Jobs Act allows an above-the-line deduction for amounts attributable to attorneys' fees and costs received by individuals based on claims brought under certain statutes, including the False Claims Act, 1862(b)(3)(A) of the Social Security Act, or unlawful discrimination claims. Prior to enactment of the Jobs Act, the Internal Revenue Code already excluded from income awards arising out of claims relating to physical injury and sickness. However, attorneys' fees paid in the pursuit and collection of punitive awards, awards for libel, slander, or other awards in cases not involving a physical injury or a claim of discrimination are still not subtracted from gross income.

In 2005, the United States Supreme Court added further confusion to the issue. In *Commissioner* v. *Banks*, 543 U.S. 426 (2005), the Court attempted to resolve a circuit split on the Federal income tax treatment of attorneys' fees. In an 8–0 opinion, the Court held that when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee. Consequently, for those claims not excluded from gross income in the Jobs Act, attorneys' fees are subjected to double taxation; subjected to a reduction equal to two percent of the individual's adjusted gross income when listed as a miscellaneous itemized deduction; and subjected to a complete disallowance when calculating the alternative minimum tax.

My legislation corrects the problem by permitting taxpayers to subtract from their taxable gross income the attorneys' fees and court costs paid by the taxpayer in connection with an award or settlement of monetary damages in all civil claims. The legislation would ensure more uniform treatment of contingency fees in all types of litigation, not just the limited categories of litigation as specified in the Jobs Act. Importantly, this change does not affect the requirement that attorneys pay federal income tax on legal fees they receive. The legislation does eliminate the inequity of the client also paying taxes on attorneys' fees despite not receiving the funds under the terms of a contingency fee contract.

I encourage my colleagues to join me in this effort to bring fairness to the tax code.

Mr. President, 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. 440

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

SECTION 1. ABOVE-THE-LINE DEDUCTION FOR ATTORNEY FEES AND COSTS IN CONNECTION WITH CIVIL CLAIM AWARDS.

(a) IN GENERAL.—Paragraph (20) of section 62(a) of the Internal Revenue Code of 1986 is amended to read as follows:

''(20) COSTS INVOLVING CIVIL CASES.—Any deduction allowable under this chapter for attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a civil claim. The preceding sentence shall not apply to any deduction in excess of the amount includible in the taxpayer's gross income for the taxable year on account of a judgment or settlement (whether by suit or agreement and whether as lump sum or periodic payments) resulting from such claim.''.

(b) CONFORMING AMENDMENT.—Section 62 of the Internal Revenue Code of 1986 is amended by striking subsection (e).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to fees and costs paid after the date of the enactment of this Act with respect to any judgment or settlement occurring after such date.

Mr. LEAHY. Mr. President, I am pleased to join Senator SPECTER in the introduction of two bills, S. 437 and S. 440, that will correct inconsistencies and provide fairness to lawyers and their clients under the Federal Tax Code.

Currently, attorneys who take on contingency fee cases, and advance their clients funds for court costs, witnesses, or other expenses, cannot deduct these expenses as ordinary business expenses at the time they are made. Instead, attorneys who advance these costs may not take a deduction until the case for which they are advanced is resolved. In most cases this is a timeframe of several years. This results in an attorney carrying the burden of these costs from year to year until the case is resolved. For many small law firms or solo practitioners, this is a significant burden.

Where attorneys are advancing costs to clients so that those clients may pursue their rights in court, they deserve to be treated as any other small business owner. This disparate treatment is inequitable and correcting it will make legal representation more easily provided by attorneys and more available to clients.

The other bill we introduce today helps clients who have been awarded funds through a contingency fee arrangement. Under current tax law, punitive damages awards and awards to a plaintiff resulting from certain claims are subject to Federal taxation for the entire amount of the award, even if the plaintiff then uses a portion to satisfy a contingency fee agreement. The result is that the portion of an award to a plaintiff in a contingency fee arrangement that then goes to an attorney is taxed twice—once through the plaintiff and again through the attorney.

This legislation will allow a plaintiff who has recovered an award to take an above the line deduction for the portion of his or her award that will be transmitted to the attorney who provided the representation. This is a commonsense solution and where an individual has suffered an injury and will rely on his or her award it is sound policy to reduce this unnecessary and duplicative tax burden.

Neither of these bills gives any special treatment to attorneys or their clients. Rather, in combination, they will help attorneys provide more representation to clients who by virtue of their financial or other circumstances must enter a contingency fee arrangement, and will allow a greater amount of funds recovered to be put to use by the individual for whose benefit they were awarded.

I thank Senator SPECTER for introducing this legislation and I hope all Senators will join us in supporting these sensible corrections to our Tax Code.

By Mr. DORGAN (for himself and Ms. SNOWE):

S. 442. A bill to impose a limitation on lifetime aggregate limits imposed by health plans; to the Committee on Health, Education, Labor, and Pensions.

Ms. SNOWE. Mr. President, I join today with Senator DORGAN to address the growing problem of beneficiaries who exceed their lifetime cap on health care coverage. Today, many Americans responsibly purchase a health plan to cover themselves and their loved ones in case of illness. Tragically, some of these individuals become stricken by illness that is extremely expensive to treat, and too often exceeds their policy's lifetime cap provision. After doing all you can to act responsibly and avoid becoming a burden on society, an overly restrictive lifetime cap on benefits can cause one to go bankrupt—and ultimately shifts costs to public programs such as Medicaid.

We have seen that even beneficiaries who acquire health insurance with seemingly hefty lifetime caps have found that the high cost of modern treatments—combined with medical inflation which exceeds the consumer price index by two to threefold—has greatly deflated the true value of the lifetime cap. The legislation offered today addresses this issue by setting a higher minimum cap. It has been estimated the cost of this improved protection—spread over many insurance purchasers—will increase premiums by approximately $8 per year. This reinforces the principle of insurance—spreading high risks over many purchasers—in order to assure adequate protection should a protracted and expensive illness befall an individual. This bill will also assure that costs are not inappropriately shifted onto the government programs, such as Medicaid—where taxpayers will feel the brunt of financial responsibility for costly treatment.

As I work with my colleagues and the administration to grapple with how to make health care more affordable to the millions of Americans struggling to pay their premiums, coinsurance and copays—raising the floor on lifetime caps will provide the immediate financial relief to families so that they will have access to health care should a costly, chronic disease occur.

By Mrs. MURRAY (for herself and Ms. CANTWELL):

S. 443. A bill to transfer certain land to the United States to be held in trust for the Hoh Indian Tribe, to place land into trust for the Hoh Indian Tribe, and for other purposes; to the Committee on Indian Affairs.

Mrs. MURRAY. Mr. President, 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 placed in the RECORD, as follows:

S. 443

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 ''Hoh Indian Tribe Safe Homelands Act''.

SEC. 2. FINDINGS.

(a) FINDINGS.—Congress finds the following:

(1) The Hoh Indian Reservation, located along the Hoh River and the Pacific Ocean in a remote section of Jefferson County, Washington, is the homeland of the Hoh Indian Tribe, a federally recognized Indian tribe.

(2) Established by Executive Order in 1893, the Reservation is approximately one square mile, but its habitable acreage has been reduced over time due to storm surges, repeated flooding and erosion, and lack of river dredging.

(3) Due to its location along the river and ocean and frequent torrential rains, 90 percent of the Reservation is located within a flood zone and, in fact, has flooded repeatedly over the last five years. In addition, 100 percent of the Reservation is within a tsunami zone, leaving most of the Reservation unfit for safe occupation.

(4) The Tribe has repeatedly suffered from serious flood and wind damage to homes, tribal buildings, and utility infrastructure that have caused significant damage and resulted in critical safety and environmental hazards.

(5) Federal agencies such as the Bureau of Indian Affairs, the Department of Housing and Urban Development, and the Federal Emergency Management Agency have limited authority to assist the Tribe with housing and other improvements and services due to the dangerous and unsustainable location of the Reservation.

(6) The Tribe has purchased from private owners near the Reservation approximately 260 acres of land in order to move key infrastructure out of the flood zone.

(7) In addition, the State of Washington's Department of Natural Resources has transferred ownership of 160 acres of land to the Tribe.

(8) An approximately 37 acre parcel of logged land, administered by the National Park Service, lies between the current Reservation land and those lands acquired by the Tribe, and the only road accessing the Reservation crosses this parcel.

(9) Together, the lands described in paragraphs 6, 7, and 8 would constitute a contiguous parcel for the Reservation and would

create a safe area for members of the Tribe to live and rebuild their community.

SEC. 3. DEFINITIONS.

For the purposes of this Act——

(1) the term ''Federal land'' mean the Federal lands described in section 4(c)(2);

(2) the term ''Reservation'' means the reservation of the Hoh Indian Tribe;

(3) the term ''Secretary'' means the Secretary of the Interior; and

(4) the term ''Tribe'' means the Hoh Indian Tribe, a federally recognized Indian tribe.

SEC. 4. TRANSFER OF LANDS TO BE HELD IN TRUST AS PART OF THE TRIBE'S RESERVATION; PLACEMENT OF OTHER LAND INTO TRUST.

(a) IN GENERAL.—The Secretary shall transfer to the Tribe all right, title, and interest of the United States in and to the Federal land. Such land shall be held in trust by the United States for the benefit of the Tribe. Such land shall be excluded from the boundaries of Olympic National Park. At the request of the Tribe, at the time of transfer of the Federal land, the Secretary shall also place into trust for the benefit of the Tribe the non-Federal land owned by the Tribe and described in subsection (c)(1).

(b) RESERVATION.—Land taken into trust for the Tribe pursuant to subsection (a) shall be part of the Reservation.

(c) DESCRIPTION OF LANDS.—The land to be transferred and held in trust under subsection (a) is the land generally depicted on the map titled ''H.R. ______ Hoh Indian Tribe Safe Homelands Act'', and dated __________________ and further described as—

(1) the non-Federal land owned by the Hoh Tribe; and

(2) the Federal land administered by the National Park Service, located in Section 20, Township 26N, Range 13W, W.M. South of the Hoh River.

(d) AVAILABILITY OF MAP.—Not later than 120 days after the completion of the land transfer of Federal land under this section, the Secretary shall make the map available to the appropriate agency officials and congressional committees. The map shall be available for public inspection in the appropriate offices of the Secretary.

(e) CONGRESSIONAL INTENT.—It is the intent of Congress that—

(1) the condition of the Federal land at the time of the transfer under this section should be preserved and protected;

(2) that the natural environment existing on the Federal land at the time of the transfer under this section should not be altered, except as described in this Act; and

(3) the Tribe and the National Park Service shall work cooperatively on issues of mutual concern related to this Act.

SEC. 5. PRESERVATION OF EXISTING CONDITION OF FEDERAL LAND; TERMS OF CONSERVATION AND USE IN CONNECTION WITH LAND TRANSFER.

(a) RESTRICTIONS ON USE.—The use of the Federal land transferred pursuant to section 4 is subject to the following conditions:

(1) No commercial, residential, industrial, or other buildings or structures shall be placed on the Federal land being transferred and placed into trust. The existing road may be maintained or improved, but no major improvements or road construction shall occur on the lands.

(2) In order to maintain its use as a natural wildlife corridor and to provide for protection of existing resources, no logging or hunting shall be allowed on the land.

(3) The Tribe may authorize tribal members to engage in ceremonial and other treaty uses of these lands and existing tribal treaty rights are not diminished by this Act.

(4) The Tribe shall survey the boundaries of the Federal land and submit the survey to the National Park Service for review and concurrence.

(b) COOPERATIVE EFFORTS.—Congress urges the Secretary and the Tribe to enter into written agreements on the following:

(1) Upon completion of the Tribe's proposed emergency fire response building, Congress urges the parties to work toward mutual aid agreements.

(2) The National Park Service and the Tribe shall work collaboratively to provide opportunities for the public to learn more about the culture and traditions of the Tribe.

(3) The land may be used for the development of a multi-purpose, non-motorized trail from Highway 101 to the Pacific Ocean. The parties agree to work cooperatively in the development and placement of such trail.

SEC. 6. HOH INDIAN RESERVATION.

All lands taken into trust by the United States under this Act shall be a part of the Hoh Indian Reservation.

SEC. 7. GAMING PROHIBITION.

No land taken into trust for the benefit of the Hoh Indian Tribe under this Act shall be considered Indian lands for the purpose of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

By Mr. SPECTER (for himself, Ms. LANDRIEU, Mr. CARPER, Mr. KERRY, Mrs. MCCASKILL, and Mr. COCHRAN):

S. 445. A bill to provide appropriate protection to attorney-client privileged communications and attorney work product; to the Committee on the Judiciary.

Mr. SPECTER. Mr. President, I seek recognition today to reintroduce the Attorney-Client Privilege Protection Act of 2009, which is nearly identical to S. 3217, a bill I introduced in July of 2008 under the same name. This legislation continues to address the Department of Justice's corporate prosecution guidelines. Those guidelines, last revised by Deputy Attorney General Mark Filip in August 2008, erode the attorney-client relationship by allowing prosecutors to continue considering the provision of privileged information in order for corporations to receive cooperation credit.

To their credit, the Filip guidelines preclude prosecutors from asking for privilege waivers in nearly all circumstances. However, as evidenced by the numerous versions of the Justice Department's corporate prosecution guidelines over the past decade, the Filip reforms cannot be trusted to remain static. Moreover, unlike Federal law—which requires the assent of both houses and the President's signature or a super-majority in Congress—the Filip guidelines are subject to unilateral executive branch modification. Therefore, to avoid a recurrence of prosecutorial abuses and attorney-client privilege waiver demands, legislation is necessary.

Like my previous bills, this bill will protect the sanctity of the attorney-client relationship by statutorily prohibiting Federal prosecutors and investigators across the executive branch from requesting waiver of attorney-client privilege and attorney work product protections in corporate investigations. The bill would similarly prohibit the government from conditioning charging decisions or any adverse treatment on an organization's payment of employee legal fees, invocation of the attorney-client privilege, or agreement to a joint defense agreement.

The bill makes many subtle improvements over earlier iterations, including defining ''organization'' to make clear that continuing criminal enterprises and terrorist organizations will not benefit from the bill's protections. The bill also clarifies language that the Department of Justice had previously criticized as ambiguous. The bill further makes clear in its findings that its prohibition on informal privilege waiver demands is far from unprecedented. The bill states: ''Congress recognized that law enforcement can effectively investigate without attorney-client privileged information when it banned Attorney General demands for privileged materials in the Racketeer Influenced and Corrupt Organizations Act. See 18 U.S.C. §1968(c)(2).''

Though an improvement over past guidelines, there is no need to wait to see how the Filip guidelines will operate in practice. There is similarly no need to wait for another Department of Justice or executive branch reform that will likely fall short and become the sixth policy in the last 10 years. Any such internal reform may prove fleeting and might not address the privilege waiver policies of other government agencies that refer matters to the Department of Justice, thus allowing in through the window what isn't allowed through the door.

As I said when I introduced my first bill on this subject, the right to counsel is too important to be passed over for prosecutorial convenience or Executive Branch whimsy. It has been engrained in American jurisprudence since the 18th century when the Bill of Rights was adopted. The 6th Amendment is a fundamental right afforded to individuals charged with a crime and guarantees proper representation by counsel throughout a prosecution. However, the right to counsel is largely ineffective unless the confidential communications made by a client to his or her lawyer are protected by law. As the Supreme Court observed in Upjohn Co. v. United States, ''the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.'' When the Upjohn Court affirmed that attorney-client privilege protections apply to corporate internal legal dialogue, the Court manifested in the law the importance of the attorney-client privilege in encouraging full and frank communication between attorneys and their clients, as well as the broader public interests the privilege serves in fostering the observance of law and the administration of justice. The Upjohn Court also made clear that the value of legal advice and advocacy depends on the lawyer having been fully informed by the client.

In addition to the importance of the right to counsel, it is also fundamental

that the Government has the burden of investigating and proving its own case. Privilege waiver tends to transfer this burden to the organization under investigation. As a former prosecutor, I am well aware of the enormous power and tools a prosecutor has at his or her disposal. The prosecutor has enough power without the coercive tools of the privilege waiver, whether that waiver policy is embodied in the Holder, Thompson, McCallum, McNulty, or Filip memorandum.

As in my prior bills designed to protect the attorney-client privilege, this bill amends title 18 of the United States Code by adding a new section, §3014, that would prohibit any agent or attorney of the U.S. Government in any criminal or civil case to demand or request the disclosure of any communication protected by the attorney-client privilege or attorney work product. The bill would also prohibit government lawyers and agents from basing any charge or adverse treatment on whether an organization pays attorneys' fees for its employees or signs a joint defense agreement.

This legislation is needed to ensure that constitutional protections of the attorney-client relationship are preserved in Federal prosecutions and investigations.

By Mr. SPECTER (for himself, Mr. GRASSLEY, Mr. DURBIN, Mr. SCHUMER, Mr. FEINGOLD, and Mr. CORNYN):

S. 446. A bill to permit the televising of Supreme Court proceedings; to the Committee on the Judiciary.

Mr. SPECTER. Mr. President, once more I seek recognition to introduce legislation that will give the public greater access to our Supreme Court. This bill requires the High Court to permit television coverage of its open sessions unless it decides by a majority vote of the Justices that allowing such coverage in a particular case would violate the due process rights of one or more of the parties involved in the matter.

The purpose of this legislation is to open the Supreme Court doors so that more Americans can see the process by which the Court reaches critical decisions of law that affect this country and everyday Americans. The Supreme Court makes pronouncements on Constitutional and Federal law that have a direct impact on the rights of Americans. Those rights would be substantially enhanced by televising the oral arguments of the Court so that the public can see and hear the issues presented to the Court. With this information, the public would have insight into key issues and be better equipped to understand the impact of and reasons for the Court's decisions.

In a very fundamental sense, televising the Supreme Court has been implicitly recognized—perhaps even sanctioned—in a 1980 decision by the Supreme Court of the United States entitled Richmond Newspapers v. Virginia. In this case, the Court noted that a public trial belongs not only to the accused but to the public and the press as well and recognized that people now acquire information on court procedures chiefly through the print and electronic media.

That decision, in referencing the electronic media, appears to anticipate televising court proceedings, although I do not mean to suggest that the Supreme Court is in agreement with this legislation. I should note that the Court could, on its own initiative, televise its proceedings but has chosen not to do so. This presents, in my view, the necessity for legislating on this subject.

When I argued the case of the Navy Yard, Dalton v. Specter, back in 1994, the Court proceedings were illustrated by an artist's drawings—some of which now hang in my office. Today, the public gets a substantial portion, if not most, of its information from television and the internet. While many court proceedings are broadcast routinely on television, the public has little access to the most important and highest court in this country. Although the internet has made the Court's transcripts, and even more recently, audio recordings, more widely accessible, the public is still deprived of the real time transmission of audio and video feeds from the Court. I believe it is vital for the public to see, as well as to hear, the arguments made before the Court and the interplay among the justices. I think the American people will gain a greater respect for the way in which our High Court functions if they are able to see oral arguments.

Justice Felix Frankfurter perhaps anticipated the day when Supreme Court arguments would be televised when he said that he longed for a day when: "The news media would cover the Supreme Court as thoroughly as it did the World Series, since the public confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media's portrayal of the legal system."

When I spoke in favor of this legislation in September of 2000, I said, "I do not expect a rush to judgment on this very complex proposition, but I do believe the day will come when the Supreme Court of the United States will be televised. That day will come, and it will be decisively in the public interest so the public will know the magnitude of what the Court is deciding and its role in our democratic process." I have continued to reiterate those sentiments in September of 2005 and in January of 2007 when I re-introduced identical bills. Today, I continue to support this legislation because I believe that it is crucial to the public's awareness of Supreme Court proceedings and their impact on the daily lives of all Americans.

I pause to note that it was not until 1955 that the Supreme Court, under the leadership of Chief Justice Warren, first began permitting audio recordings of oral arguments. Between 1955 and 1993, there were apparently over 5,000 recorded arguments before the Supreme Court. That roughly translates to an average of about 132 arguments annually. But audio recordings are simply ill suited to capture the nuance of oral arguments and the sustained attention of the American citizenry. Nor is it any response that people who wish to see open sessions of the Supreme Court should come to the Capital and attend oral arguments. For, according to one source: "Several million people each year visit Washington, D.C., and many thousands tour the White House and the Capitol. But few have the chance to sit in the Supreme Court chamber and witness an entire oral argument. Most tourists are given just three minutes before they are shuttled out and a new group shuttled in. In cases that attract headlines, seats for the public are scarce and waiting lines are long. And the Court sits in open session less than two hundred hours each year. Television cameras and radio microphones are still banned from the chamber, and only a few hundred people at most can actually witness oral arguments. Protected by a marble wall from public access, the Supreme Court has long been the least understood of the three branches of our Federal Government."

In light of the increasing public desire for information, it seems untenable to continue excluding cameras from the courtroom of the Nation's highest court. As one legal commentator observes: "An effective and legitimate way to satisfy America's curiosity about the Supreme Court's holdings, Justices, and modus operandi is to permit broadcast coverage of oral arguments and decision announcements from the courtroom itself."

Televised court proceedings better enable the public to understand the role of the Supreme Court and its impact on the key decisions of the day. Not only has the Supreme Court invalidated Congressional decisions where there was, in the views of many, simply a difference of opinion as to what is preferable public policy, but the Court determines novel issues such as whether AIDS is a disability under the Americans with Disabilities Act, whether Congress can ban obscenity from the Internet, and whether states can impose term limits upon members of Congress. The current Court, like its predecessors, hands down decisions which vitally affect the lives and liberties of all Americans. Since the Court's historic 1803 decision, Marbury v. Madison, the Supreme Court has the final authority on issues of enormous importance from birth to death. In Roe v. Wade, 1973, the Court affirmed a Constitutional right to abortion in this country and struck down state statutes banning or severely restricting abortion during the first two trimesters on the grounds that they violated a right to privacy inherent in the Due Process Clause of the Fourteenth Amendment.

In the case of Washington v. Glucksberg, 1997, the court refused to create a similar right to assisted suicide. Here the Court held that the Due Process Clause does not recognize a liberty interest that includes a right to commit suicide with another's assistance.

In the Seventies, the Court first struck down then upheld state statutes imposing the death penalty for certain crimes. In Furman v. Georgia, 1972, the Court struck down Georgia's death penalty statute under the cruel and unusual punishment clause of the Eighth Amendment and stated that no death penalty law could pass constitutional muster unless it took aggravating and mitigating circumstances into account. This decision led Georgia and many States to amend their death penalty statutes and, four years later, in Gregg v. Georgia, 1976, the Supreme Court upheld Georgia's amended death penalty statute.

Over the years, the Court has also played a major role in issues of war and peace. In its opinion in Scott v. Sandford, 1857—better known as the Dred Scott decision—the Supreme Court held that Dred Scott, a slave who had been taken into ''free'' territory by his owner, was nevertheless still a slave.

The Court further held that Congress lacked the power to abolish slavery in certain territories, thereby invalidating the careful balance that had been worked out between the North and the South on the issue. Historians have noted that this opinion fanned the flames that led to the Civil War.

The Supreme Court has also ensured adherence to the Constitution during more recent conflicts. Prominent opponents of the Vietnam War repeatedly petitioned the Court to declare the Presidential action unconstitutional on the grounds that Congress had never given the President a declaration of war. The Court decided to leave this conflict in the political arena and repeatedly refused to grant writs of certiorari to hear these cases. This prompted Justice Douglas, sometimes accompanied by Justices Stewart and Harlan, to take the unusual step of writing lengthy dissents to the denials of cert.

In New York Times Co. v. United States, 1971—the so called ''Pentagon Papers'' case—the Court refused to grant the government prior restraint to prevent the New York Times from publishing leaked Defense Department documents which revealed damaging information about the Johnson Administration and the war effort. The publication of these documents by the New York Times is believed to have helped move public opinion against the war.

In its landmark civil rights opinions, the Supreme Court took the lead in effecting needed social change, helping us to address fundamental questions about our society in the courts rather than in the streets. In Brown v. Board of Education, the Court struck down the principle of ''separate but equal'' education for blacks and whites and integrated public education in this country. This case was then followed by a series of civil rights cases which enforced the concept of integration and full equality for all citizens of this country, including Gamer v. Louisiana, 1961, Burton v. Wilmington Parking Authority, 1961, and Peterson v. City of Greenville, 1963.

In recent years Marbury, Dred Scott, Furman, New York Times, and Roe, familiar names in the lexicon of lawyerly discussions concerning watershed Supreme Court precedents, have been joined with similarly important cases like Hamdi, Rasul, Roper, and Boumediene—all cases that affect fundamental individual rights. In Hamdi v. Rumsfeld, 2004, the Court concluded that although Congress authorized the detention of combatants, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker. The Court reaffirmed the nation's commitment to constitutional principles even during times of war and uncertainty. Similarly, in Rasul v. Bush, 2004, the Court held that the Federal habeas statute gave district courts jurisdiction to hear challenges of aliens held at Guantanamo Bay, Cuba in the U.S. War on Terrorism. In Roper v. Simmons, a 2005 case, the Court held that executions of individuals who were under 18 years of age at the time of their capital crimes is prohibited by Eighth and Fourteenth Amendments. In Boumediene v. Bush, 2008, the Court held that, subsequent to Hamdan v. Rumsfeld and regardless of Congress' attempts to strip federal courts of jurisdiction to consider pending habeas corpus petitions from Guantanamo detainees, the detainees nonetheless were not barred from seeking the writ and procedures under the Detainee Treatment Act were not an adequate substitute for it.

When deciding issues of such great national import, the Supreme Court is rarely unanimous. In fact, a large number of seminal Supreme Court decisions, such as Boumediene, have been reached through a vote of 5–4. Such a close margin reveals that these decisions are far from foregone conclusions distilled from the meaning of the Constitution, reason and the application of legal precedents. On the contrary, these major Supreme Court opinions embody critical decisions reached on the basis of the preferences and views of each individual justice. In a case that is decided by a vote of 5–4, an individual justice has the power by his or her vote to change the law of the land.

Since the beginning of its October 2005 term when Chief Justice Roberts first began hearing cases, the Supreme Court has issued 45 decisions with a 5–4 split, not including the current October 2008 term, in which I understand there are additional 5–4 decisions within the few cases that have already been decided. It has also issued six 5–3 decisions in which one justice recused. Finally, it has issued a rare 5–2 decision in which Chief Justice Roberts and Justice Alito took no part, and in the October 2007 term, two 4–4 ties. In sum, since the beginning of its October 2005 term and not counting the current term, the Supreme Court has issued 52 decisions establishing the law of the land in which only 5 justices explicitly concurred. Many of these narrow majorities occur in decisions involving the Court's interpretation of our Constitution—a sometimes divisive endeavor on the Court. I will not discuss all 52 thinly decided cases but will describe a few to illustrate my point about the importance of the Court and its decisions in the lives of Americans.

The first 5–4 split decision, decided on January 11, 2006, was Brown v. Sanders. In this case the Court considered ''the circumstances in which an invalidated sentencing factor will render a death sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the jury's weighing process.'' A majority of the Court held that henceforth in death penalty cases, an invalidated sentencing factor will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. The majority opinion was authored by Justice Scalia and joined by Chief Justice Roberts and Justices O'Connor, Kennedy and Thomas. Justice Stevens filed a dissenting opinion in which Justice Souter joined. Similarly, Justice Breyer filed a dissenting opinion in which Justice Ginsburg joined.

In November 2006, the Supreme Court decided Ayers v. Belmontes, a capital murder case in which the Belmontes contended that California law and the trial court's instructions precluded the jury from considering his forward looking mitigation evidence suggesting he could lead a constructive life while incarcerated. In Ayers the Supreme Court found the Ninth Circuit erred in holding that the jury was precluded by jury instructions from considering mitigation evidence. Justice Kennedy authored the majority opinion while Justice Stevens wrote a dissent joined by three other justices.

Other 5–4 split decisions since October 2005 include United States v. Gonzalez-Lopez, concerning whether a defendant's Sixth Amendment right to counsel was violated when a district court refused to grant his paid lawyer permission to represent him based upon some past ethical violation by the lawyer, June 26, 2006; LULAC v. Perry, deciding whether the 2004 Texas redistricting violated provisions of the Voting Rights Act, June 28, 2006; Kansas v. Marsh, concerning the Eighth and Fourteenth Amendments in a capital murder case in which the defense argued that a Kansas statute established

an unconstitutional presumption in favor of the death sentence when aggravating and mitigating factors were in equipoise, April 25, 2006; Clark v. Arizona, a capital murder case involving the constitutionality of an Arizona Supreme Court precedent governing the admissibility of evidence to support an insanity defense, June 29, 2006; Garcetti v. Ceballos, a case holding that when public employees make statements pursuant to their official duties they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline, May 30, 2006; and District of Columbia v. Heller, June 26, 2008, which found that Washington, D.C.'s gun laws were unconstitutionally restrictive of rights afforded under the Second Amendment.

The justices have split 5–3 six times since October 2005.

In Georgia v. Randolph, March 22, 2006, a 5–3 majority of the Supreme Court held that a physically present co-occupant's stated refusal to permit a warrantless entry and search rendered the search unreasonable and invalid as to that occupant. Justice Souter authored the majority opinion. Justice Stevens filed a concurring opinion as did Justice Breyer. The Chief Justice authored a dissent joined by Justice Scalia. Moreover, Justice Scalia issued his own dissent as did Justice Thomas. In Randolph, there were six opinions in all from a Court that only has nine justices. One can only imagine the spirited debate and interplay of ideas, facial expressions and gestures that occurred in oral arguments. Audio recordings are simply inadequate to capture all of the nuance that only cameras could capture and convey.

In House v. Bell, a 5–3 opinion authored by Justice Kennedy, June 12, 2006, the Supreme Court held that because House had made the stringent showing required by the actual innocence exception to judicially-established procedural default rules, he could challenge his conviction even after exhausting his regular appeals. Justice Alito took no part in considering or deciding the House case. It bears noting, however, that if one justice had been on the other side of this decision it would have resulted in a 4–4 tie and, ultimately, led to affirming the lower court's denial of House's post-conviction habeas petitions due to a procedural default.

In Hamdan v. Rumsfeld, a 5–3 decision in which Chief Justice Roberts took no part, the Supreme Court held that Hamdan could challenge his detention and the jurisdiction of the President's military commissions to try him despite recent enactment of the Detainee Treatment Act. A thin majority of the justices supported the decision despite knowledge that the DTA explicitly provides ''no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay.'' In deciding the merits, the Court went on to hold that the President lacked authority to establish a military commission to try Hamdan or others without enabling legislation passed by both houses of Congress and enacted into law. This case was one of a handful of recent cases in which the Supreme Court released audiotapes of oral arguments almost immediately after they occurred. Yet it would have been vastly preferable to watch the parties' advocates grapple with the legal issues as the justices peppered them with jurisdictional, constitutional and merits-related questions from the High Court's bench.

In another fascinating 5–3 case, Jones v. Flowers, April 26, 2006, the Supreme Court considered whether, when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking the owner's property. In an opinion by Chief Justice Roberts, the Court held that where the Arkansas Commissioner of State Lands had mailed Jones a certified letter and it had been returned unclaimed, the Commissioner had to take additional reasonable steps to provide Jones notice. Justices Thomas, Scalia and Kennedy dissented and Justice Alito took no part in the decision.

Though Jones v. Flowers involved the Due Process Clause of the Fourteenth Amendment, not the Takings Clause of Fifth Amendment, one could draw interesting analogies to the Court's controversial 2005 decision in Kelo v. City of New London. In Kelo, a majority of the justices held that a city's exercise of eminent domain power in furtherance of a privately initiated economic development plan satisfied the Constitution's Fifth Amendment ''public use'' requirement despite the absence of any blight. Four justices dissented in Kelo and public opinion turned sharply against the decision immediately after it was issued.

It's possible, though merely speculative, that the public ire aimed at Kelo informed what became a majority of justices in Jones v. Flowers. In a passage by Chief Justice Roberts, the Court notes, ''when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house.''

Not only lawyers but all homeowners could benefit from knowing how the Court grapples with legal issues governing the rights to their houses. My legislation creates the opportunity for all interested Americans to watch the Court in action in cases like these. From his perch on the High Court one justice has been heard to contend that most Americans could care less about the arcane legal issues argued before the Court. But as elected representatives of the people we must endeavor to view America from a bottoms-up, rather than a top-down perspective.

Regardless of one's view concerning the merits of these decisions, it is clear that they frequently have a profound effect on the interplay between the government, on the one hand, and the individual on the other. So, it is with these watershed decisions in mind that I introduce legislation designed to make the Supreme Court less esoteric and more accessible to common men and women who are so clearly affected by its decisions.

Given the enormous significance of each vote cast by each justice on the Supreme Court, televising the proceedings of the Supreme Court will allow sunlight to shine brightly on these proceedings and ensure greater public awareness and scrutiny.

In a democracy, the workings of the government at all levels should be open to public view. With respect to oral arguments, the more openness and the more real the opportunity for public observation the greater the understanding and trust. As the Supreme Court observed in the 1986 case of Press-Enterprise Co. v. Superior Court, ''People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.''

It was in this spirit that the House of Representatives opened its deliberations to meaningful public observation by allowing C–SPAN to begin televising debates in the House chamber in 1979. The Senate followed the House's lead in 1986 by voting to allow television coverage of the Senate floor.

Beyond this general policy preference for openness, however, there is a strong argument that the Constitution requires that television cameras be permitted in the Supreme Court.

It is well established that the Constitution guarantees access to judicial proceedings to the press and the public. In 1980, the Supreme Court relied on this tradition when it held in Richmond Newspapers v. Virginia that the right of a public trial belongs not just to the accused, but to the public and the press as well. The Court noted that such openness has ''long been recognized as an indisputable attribute of an Anglo-American trial.''

Recognizing that in modern society most people cannot physically attend trials, the Court specifically addressed the need for access by members of the media: ''Instead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of acting as surrogates for the public. [Media presence} contributes to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system.''

To be sure, a strong argument can be made that forbidding television cameras in the court, while permitting access to print and other media, constitutes an impermissible discrimination against one type of media over another. In recent years, the Supreme Court and lower courts have repeatedly held that differential treatment of different media is impermissible under the First Amendment absent an overriding governmental interest. For example, in 1983 the Court invalidated discriminatory tax schemes imposed only upon certain types of media in Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue. In the 1977 case of ABC v. Cuomo, the Second Circuit rejected the contention by the two candidates for mayor of New York that they could exclude some members of the media from their campaign headquarters by providing access through invitation only. The Court wrote that: ''Once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.''

However, in the 1965 case of Estes v. Texas, the Supreme Court rejected the argument that the denial of television coverage of trials violates the equal protection clause. In the same opinion, the Court held that the presence of television cameras in the Court had violated a Texas defendant's right to due process. Subsequent opinions have cast serious doubt upon the continuing relevance of both prongs of the Estes opinion.

In its 1981 opinion in Chandler v. Florida, the court recognized that Estes must be read narrowly in light of the state of television technology at that time. The television coverage of Estes' 1962 trial required cumbersome equipment, numerous additional microphones, yards of new cables, distracting lighting, and numerous technicians present in the courtroom. In contrast, the court noted, television coverage in 1980 can be achieved through the presence of one or two discreetly placed cameras without making any perceptible change in the atmosphere of the courtroom. Accordingly, the Court held that, despite Estes, the presence of television cameras in a Florida trial was not a violation of the rights of the defendants in that case. By the same logic, the holding in Estes that exclusion of television cameras from the courts did not violate the equal protection clause must be revisited in light of the dramatically different nature of television coverage today.

Given the strength of these arguments, it is not surprising that over the last two decades there has been a rapidly growing acceptance of cameras in American courtrooms which has reached almost every court except for the Supreme Court itself.

On September 6, 2000, the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts held a hearing titled ''Allowing Cameras and Electronic Media in the Courtroom.'' The primary focus of the hearing was Senate bill S. 721, legislation introduced by Senators GRASSLEY and SCHUMER that would give Federal judges the discretion to allow television coverage of court proceedings. One of the witnesses at the hearing, the late Judge Edward R. Becker, then-Chief Judge U.S. Court of Appeals for the Third Circuit, spoke in opposition to the legislation and the presence of television cameras in the courtroom. The remaining five witnesses, however, including a Federal judge, a State judge, a law professor and other legal experts, all testified in favor of the legislation. They argued that cameras in the courts would not disrupt proceedings but would provide the kind of accountability and access that is fundamental to our system of government.

On November 9, 2005, the Judiciary Committee held a hearing to address whether Federal court proceedings should be televised generally and to consider S. 1768, my earlier version of this bill, and S. 829, Senator GRASSLEY's ''Sunshine in the Courtroom Act of 2005.'' During the November 9 hearing, most witnesses spoke favorably of cameras in the courts, particularly at the appellate level. Among the witnesses favorably disposed toward the cameras were Peter Irons, author of May It Please the Court, Seth Berlin, a First Amendment expert at a local firm, Brian Lamb, founder of C–SPAN, Henry Schleif of Court TV Networks, and Barbara Cochran of the Radio-Television News Directors Association and Foundation.

The notable exception was the Honorable Judge Jan DuBois of the Eastern District of Pennsylvania, who testified on behalf of the Judicial Conference. Judge DuBois warned of problems particularly at the trial level, where witnesses who appear uncomfortable because of cameras might seem less credible to jurors. I note, however, that appellate courts do not appear susceptible to this criticism because there are no witnesses or jurors present for appellate arguments.

The Judiciary Committee considered and passed both bills on March 30, 2006. The Committee vote to report S. 1768 was 12–6, and the bill was placed on the Senate Legislative Calendar. Unfortunately, due to the press of other business neither bill was allotted time on the Senate Floor. Again, in the 110th Congress, I introduced this legislation, and it was reported out of the Judiciary Committee by a vote of 11–7.

During their confirmation hearings over the past two years, Chief Justice John Roberts stated he would keep an open mind on the issue and Justice Alito stated that as a circuit judge he unsuccessfully voted, in the minority, to permit televised open proceedings in the Third Circuit. I applaud the fact the new Chief Justice has taken steps to make the Court more open and to ensure the timely publication of audio recordings of the arguments as well as the written transcripts.

In my judgment, Congress, with the concurrence of the President, or overriding his veto, has the authority to require the Supreme Court to televise its proceedings. Such a conclusion is not free from doubt and is highly likely to be tested with the Supreme Court, as usual, having the final word. As I see it, there is clearly no constitutional prohibition against such legislation.

Article 3 of the Constitution states that the judicial power of the United States shall be vested ''in one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish.'' While the Constitution specifically creates the Supreme Court, it left it to Congress to determine how the Court would operate. For example, it was Congress that fixed the number of justices on the Supreme Court at nine. Likewise, it was Congress that decided that any six of these justices are sufficient to constitute a quorum of the Court. It was Congress that decided that the term of the Court shall commence on the first Monday in October of each year, and it was Congress that determined the procedures to be followed whenever the Chief Justice is unable to perform the duties of his office.

Beyond such basic structural and operational matters, Congress also controls more substantive aspects of the Supreme Court. Most importantly, it is Congress that in effect determines the appellate jurisdiction of the Supreme Court. Although the Constitution itself sets out the original jurisdiction of the Court, it provides that appellate jurisdiction exists ''with such exceptions and under such regulations as the Congress shall make.''

Some objections have been raised to televised proceedings of the Supreme Court on the ground that it would subject justices to undue security risks. My own view is such concerns are vastly overstated. Well-known members of Congress walk on a regular basis in public view in the Capitol complex. Other very well-known personalities, presidents, vice presidents, cabinet officers, all are on public view with even incumbent presidents exposed to risks as they mingle with the public. Such risks are minimal in my view given the relatively minor ensure that Supreme Court justices would undertake through television appearances. Also, any concerns could be mitigated by focusing only on the attorneys presenting arguments. There is no requirement that the justices permit the cameras to focus on the bench.

As I explained earlier, the Supreme Court could, of course, permit television through its own rule but has decided not to do so. Congress should be circumspect and even hesitant to impose a rule mandating the televising of Supreme Court proceedings and should do so only in the face of compelling public policy reasons. The Supreme Court has such a dominant role in key

decision-making functions that their proceedings ought to be better known to the public; and, in the absence of Court rule, public policy would be best served by enactment of legislation requiring the televising of Supreme Court proceedings.

This legislation embodies sound policy and will prove valuable to the all Americans. I urge my colleagues to support this bill.

By Mr. LEVIN:

S. 447. A bill to amend the Commodity Exchange Act to prevent excessive price speculation with respect to energy and agricultural commodities, and for other purposes; to the Committee on Agriculture, Nutrition, and Forestry.

Mr. LEVIN. Mr. President, over the past couple of years energy prices have taken the American people on an unpredictable, expensive, and damaging roller coaster ride. In early 2007, a barrel of crude oil cost about $50. Over the course of the year, the price rose steeply, nearly doubling by the end of the year to almost $100 per barrel. Oil prices continued to soar through the first half of 2008, peaking at nearly $150 per barrel in July. Then, over the next few months, oil prices crashed back down to $35 per barrel, a drop of over $110 per barrel.

These huge price swings can't be explained by simple changes in supply and demand. Even taking into account the recession now plaguing our country and the world economy, many market analysts believe that it was a stampede of speculators into the crude oil futures market that first drove prices far higher than justified by global supply and demand, and now an exodus of those same speculators has driven prices much lower than justified by supply and demand.

Like crude oil, the natural gas, gasoline, and heating oil markets have also seen large price changes. The prices are way up, they're way down, they're unpredictable—making it impossible for many businesses and consumers to plan for and afford energy costs and related goods and services.

Unpredictable energy prices continue to take a tremendous toll on millions of American consumers and businesses. Unless we act to protect our energy markets from excessive speculation and price manipulation, the American economy will continue to be vulnerable to wild price swings affecting the prices of transportation, food, manufacturing and everything in between, endangering the economic security of our people, our businesses, and our nation.

Congress should act now to help tame rampant speculation and reinvigorate supply and demand as market forces.

That is why I am re-introducing legislation today that is nearly identical to the legislation I and others introduced near the end of the last Congress that provides strong and workable measures to prevent excessive speculation and price manipulation in U.S. energy and agricultural markets. It will close the loopholes in our commodities laws that now impede the policing of U.S. energy trades on foreign exchanges and in the unregulated over-the-counter market. It will ensure that large commodity traders cannot use these markets to hide from CFTC oversight or avoid limits on speculation. It will strengthen disclosure, oversight, and enforcement in U.S. energy markets, restoring the financial oversight that is crucial to protect American consumers, American businesses, and the U.S. economy from further energy shocks.

This legislation, which addresses commodity markets, is one important piece of the broader reform effort needed to repair our financial regulatory system, stop abusive practices, and put the cop back on the beat in all of our markets.

Specifically, this particular legislation would make four sets of changes.

First, it would require the CFTC to set limits on the holdings of traders in all of the energy futures contracts traded on regulated exchanges to prevent traders from engaging in excessive speculation or price manipulation. Since we closed the Enron loophole last year all futures contracts must be traded in regulated markets.

Second, it would close the ''London loophole'' by giving the CFTC the same authority to police traders in the United States who trade U.S. futures contracts on a foreign exchange and by requiring foreign exchanges that want to install trading terminals in the United States to impose comparable limits on speculative trading as the CFTC imposes on domestic exchanges to prevent excessive speculation and price manipulation.

Third, it would close the ''swaps loophole'' by requiring traders in the over-the-counter energy markets to report large trades to the CFTC, and it would authorize the CFTC to set limits on trading in the presently unregulated over-the-counter markets to prevent excessive speculation and price manipulation.

Finally, it would require the CFTC to revise the standards that allow traders who use futures markets to hedge their holdings to exceed the speculation limits that apply to everyone else.

My Permanent Subcommittee on Investigations has shown that one key factor in price spikes of energy is increased speculation in the energy markets. Traders are now trading millions of contracts for future delivery of oil, creating a demand for paper contracts that gets translated into increases in prices and increasing price volatility.

Much of this increase in trading of futures has been due to speculators who are not in the oil business but who are buying and selling oil futures contracts in the hope of making a profit from changing prices. According to the CFTC's data, the number of futures and options contracts held by speculators grew from around 100,000 contracts in 2001, which was 20 percent of the total number of outstanding contracts, to almost 1.2 million contracts last fall, representing almost 40 percent of the outstanding futures and options contracts in oil on NYMEX. Even these statistics understate the increase in speculation, since the CFTC data classifies futures trading involving index funds as commercial trading rather than speculation, and the CFTC classifies all traders in commercial firms as commercial traders, regardless of whether any particular trader in that firm may, in fact, be speculating.

Basic economic theory tells us that the greater the demand there is to buy futures contracts for the delivery of a commodity, the higher the price will be for those futures contracts.

Not surprisingly, therefore, massive speculation that the price of oil will increase, together with massive purchases of futures contracts in pursuit of that belief, have, in fact, helped increase the price of oil to a level far above the price justified by the traditional forces of supply and demand.

In June 2006, I released a Subcommittee report, The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put a Cop on the Beat. This report found that the traditional forces of supply and demand didn't account for sustained price increases and price volatility in the oil and gasoline markets. The report concluded that, in 2006, a growing number of trades of contracts for future delivery of oil occurred without regulatory oversight and that market speculation had contributed to rising oil and gasoline prices, perhaps accounting for $20 out of a then-priced $70 barrel of oil.

Oil industry executives and experts arrived at similar conclusions. As oil prices neared $100 in late 2007, the President and CEO of Marathon Oil said, ''$100 oil isn't justified by the physical demand in the market. It has to be speculation on the futures market that is fueling this.'' At about the same time, Mr. Fadel Gheit, oil analyst for Oppenheimer and Company described the oil market as ''a farce.'' ''The speculators have seized control and it's basically a free-for-all, a global gambling hall, and it won't shut down unless and until responsible governments step in.'' In January of 2008, when oil first hit $100 per barrel, Mr. Tim Evans, oil analyst for Citigroup, wrote: ''[T]he larger supply and demand fundamentals do not support a further rise and are, in fact, more consistent with lower price levels.'' At a joint hearing on the effects of speculation my Subcommittee held in late 2007, Dr. Edward Krapels, a financial market analyst, testified: ''Of course financial trading, speculation affects the price of oil because it affects the price of everything we trade. . . . It would be amazing if oil somehow escaped this effect.'' Dr. Krapels added that as a result of this speculation ''there is a bubble in oil prices.''

Last summer, the Presidents and CEOs of major U.S. airlines described the disastrous effects of rampant speculation on the airline industry. The CEOs stated: ''normal market forces are being dangerously amplified by poorly regulated market speculation.'' The CEOs wrote: ''For airlines, ultra-expensive fuel means thousands of lost jobs and severe reductions in air service to both large and small communities.''

To rein in this rampant speculation, the first step to take is to put a cop back on the beat in all our energy markets to prevent excessive speculation, price manipulation, and trading abuses.

With respect to the commodity futures markets, the legislation we are introducing today requires the CFTC to establish limits on the amount of futures contracts any trader can hold. Currently, the CFTC allows the futures exchanges themselves to set these limits. This bill would require the CFTC to set those limits to prevent excessive speculation and price manipulation. It would preserve, however, the exchanges' obligation and ability to police their traders to ensure they remain below these limits.

This legislation would also require the CFTC to conduct a rulemaking to review and revise the criteria for allowing traders who are using the futures market to hedge their risks in a commodity to acquire holdings in excess of the limits on holdings for speculators.

Another step is to give the CFTC authority to prevent excessive speculation in the over-the-counter markets. In 2007, my Subcommittee issued a report on the effects of speculation in the energy markets entitled, Excessive Speculation in the Natural Gas Market. This investigation showed that speculation by a single hedge fund named Amaranth distorted natural gas prices during the summer of 2006 and drove up prices for average consumers. The report demonstrated how Amaranth had shifted its speculative activity to unregulated markets, under the ''Enron loophole,'' to avoid the restrictions and oversight in the regulated markets, and how Amaranth's trading in the unregulated markets contributed to price increases.

Following this investigation, I introduced a bill, S. 2058, to close the Enron loophole and regulate the un-regulated electronic energy markets. Working with Senators FEINSTEIN and SNOWE, and with the members of the Agriculture Committee in a bipartisan effort, we included an amendment to close the Enron loophole in the farm bill, which Congress passed last year.

The legislation to close the Enron loophole placed over-the-counter, OTC, electronic exchanges under CFTC regulation. However, this legislation did not address the separate issue of trading in the rest of the OTC market, which includes bilateral trades through voice brokers, swap dealers, and direct party-to-party negotiations. In order to ensure there is a cop on the beat in all of the energy commodity markets, we need to address the rest of the OTC market as well.

A large portion of this OTC market consists of the trading of swaps relating to the price of a commodity. Generally, commodity swaps are contracts between two parties where one party pays a fixed price to another party in return for some type of payment at a future time depending on the price of a commodity. Because some of these swap instruments look very much like futures contracts—except that they do not call for the actual delivery of the commodity—there is concern that the price of these swaps that are traded in the unregulated OTC market could affect the price of the very similar futures contracts traded on the regulated futures markets. We don't yet know for sure that this is the case, or that it is not, because we don't have any access to comprehensive data or reporting on the trading of these swaps in the OTC market.

The legislation introduced today includes provisions to give the CFTC oversight authority to stop excessive speculation in the over-the-counter market. These provisions represent a practical, workable approach that will enable the CFTC to obtain key information about the OTC market to enable it to prevent excessive speculation and price manipulation.

Under these provisions, the CFTC will have the authority to ensure that traders cannot avoid the CFTC reporting requirements by trading swaps in the unregulated OTC market instead of regulated exchanges. It will enable the CFTC to act, such as by requiring reductions in holdings of futures contracts or swaps, against traders with large positions in order to prevent excessive speculation or price manipulation regardless of whether the trader's position is on an exchange or in the OTC market.

This bill also gives the CFTC the authority to establish position limits in the over-the-counter market for energy and agricultural commodities in order to prevent excessive speculation and price manipulation. The CFTC needs this authority to ensure that large traders are not using the over-the-counter markets to evade the position limits in the futures markets.

The ''London loophole'' allowed crude oil traders in the U.S. to avoid the position limits that apply to trading on U.S. futures exchanges by directing their trades onto the ICE Futures Exchange in London.

In the last Congress, after I and others introduced legislation to close the London loophole that is similar to the legislation we are now introducing, the CFTC imposed more stringent requirements upon the ICE Futures Exchange's operations in the United States—for the first time requiring the London exchange to impose and enforce comparable position limits in order to be allowed to keep its trading terminals in the United States. This is the very action our legislation called for. However, the current CFTC position limits apply only to the nearest futures contract. Our legislation will ensure that foreign exchanges with trading terminals in the U.S. will apply position limits to other futures contracts once the CFTC establishes those limits for U.S. exchanges.

Although the CFTC has taken these important steps that will go a long way towards closing the London loophole, Congress should still pass this legislation to make sure the London loophole stays closed. The legislation would put the conditions the CFTC has imposed upon the London exchange into statute, and ensure that the CFTC has clear authority to take action against any U.S. trader who is manipulating the price of a commodity or excessively speculating through the London exchange, including requiring that trader to reduce positions.

The legislation also provides authorization for the CFTC to hire an additional 100 employees to oversee the commodity markets it regulates. The CFTC has been understaffed and underfunded for years. This authorization is a necessary first step to reinvigorate the agency's oversight and enforcement capabilities.

In summary, the legislation I am introducing today will give the CFTC ability to police all of our energy commodity markets to prevent excessive speculation and price manipulation. This legislation is necessary to close the loopholes in current law that permit speculators in commodity markets to avoid trading limits designed to prevent the type of excessive speculation that has been contributing to high energy and other commodity prices. I hope my colleagues will support this legislation.

Mr. President, I ask unanimous consent that the text of the bill and support material be printed in the RECORD.

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

S. 447

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 ''Prevent Excessive Speculation Act''.

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

Sec. 1. Short title; table of contents.
Sec. 2. Definition of energy and agricultural commodity.
Sec. 3. Speculative limits and transparency of off-shore trading.
Sec. 4. Authority of Commodity Futures Trading Commission with respect to certain traders.
Sec. 5. Working group of international regulators.
Sec. 6. Position limits for energy and agricultural commodities.
Sec. 7. Over-the-counter transactions.
Sec. 8. Index traders and swap dealers.
Sec. 9. Disaggregation of index funds and other data in energy and agricultural markets.

Sec. 10. Additional Commodity Futures Trading Commission employees for improved enforcement.

SEC. 2. DEFINITIONS OF ENERGY AND AGRICULTURAL COMMODITY.

(a) DEFINITION OF ENERGY COMMODITY.—Section 1a of the Commodity Exchange Act (7 U.S.C. 1a) is amended—

(1) by redesignating paragraphs (13) through (34) as paragraphs (14) through (35), respectively; and

(2) by inserting after paragraph (12) the following:

''(13) ENERGY COMMODITY.—The term 'energy commodity' means—

''(A) crude oil;

''(B) natural gas;

''(C) coal;

''(D) gasoline, heating oil, diesel fuel, and any other source of energy derived from coal, crude oil, or natural gas;

''(E) electricity;

''(F) ethanol and any other fuel derived from a renewable biomass;

''(G) any commodity that results from the management of air emissions, including but not limited to greenhouse gases, sulfur dioxide, and nitrogen oxides; and

''(H) any other substance that is used as a source of energy, as the Commission, in its discretion, deems appropriate.''.

(b) DEFINITION OF AGRICULTURAL COMMODITY.—Section 1a of the Commodity Exchange Act (7 U.S.C. 1a) is amended—

(1) by redesignating paragraphs (1) through (35) as paragraphs (2) through (36), respectively; and

(2) by inserting a new paragraph (1) as follows:

''(1) AGRICULTURAL COMMODITY.—The term 'agricultural commodity' means any commodity specifically described in paragraph (5).''.

(c) CONFORMING AMENDMENTS.—

(1) Section 2(c)(2)(B)(i)(II)(cc) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(B)(i)(II)(cc)) is amended—

(A) in subitem (AA), by striking ''section 1a(20)'' and inserting ''section 1a(21)''; and

(B) in subitem (BB), by striking ''section 1a(20)'' and inserting ''section 1a(21)''.

(2) Section 13106(b)(1) of the Food, Conservation, and Energy Act of 2008 is amended by striking ''section 1a(32)'' and inserting ''section 1a''.

(3) Section 402 of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27) is amended—

(A) in subsection (a)(7), by striking ''section 1a(20)'' and inserting ''section 1a''; and

(B) in subsection (d)—

(i) in paragraph (1)(B), by striking ''section 1a(33)'' and inserting ''section 1a''; and

(ii) in paragraph (2)(D), by striking ''section 1a(13)'' and inserting ''section 1a''.

SEC. 3. SPECULATIVE LIMITS AND TRANSPARENCY OF OFF-SHORE TRADING.

Section 4 of the Commodity Exchange Act (7 U.S.C. 6) is amended by adding at the end the following:

''(e) FOREIGN BOARDS OF TRADE.—

''(1) IN GENERAL.—The Commission may not permit a foreign board of trade to provide to the members of the foreign board of trade or other participants located in the United States, or otherwise subject to the jurisdiction of the Commission, direct access to the electronic trading and order matching system of the foreign board of trade with respect to an agreement, contract, or transaction in an energy commodity that settles against any price (including the daily or final settlement price) of one or more contracts listed for trading on a registered entity, unless—

''(A) the foreign board of trade—

''(i) makes public daily trading information regarding the agreement, contract, or transaction that is comparable to the daily trading information published by the registered entity for the one or more contracts against which the agreement, contract or transaction traded on the foreign board of trade settles; and

''(ii) promptly notifies the Commission of any change regarding—

''(I) the information that the foreign board of trade will make publicly available;

''(II) the position limits and position accountability provisions that the foreign board of trade will adopt and enforce;

''(III) the position reductions required to prevent manipulation; and

''(IV) any other area of interest expressed by the Commission to the foreign board of trade; and

''(B) the foreign board of trade (or the foreign futures authority that oversees the foreign board of trade)—

''(i) adopts position limits or position accountability provisions for the agreement, contract, or transaction that are comparable to the position limits or position accountability provisions adopted by the registered entity for the one or more contracts against which the agreement, contract or transaction traded on foreign board of trade settles;

''(ii) has the authority to require or direct market participants to limit, reduce, or liquidate any position the foreign board of trade (or the foreign futures authority that oversees the foreign board of trade) determines to be necessary to prevent or reduce the threat of price manipulation, excessive speculation, price distortion, or disruption of delivery or the cash settlement process; and

''(iii) provides information to the Commission that is comparable to the information that the Commission determines to be necessary to publish the commitments of traders report of the Commission for the one or more contracts against which the agreement, contract or transaction traded on the foreign board of trade settles.

''(2) EXISTING FOREIGN BOARDS OF TRADE.—Paragraph (1) shall not be effective with respect to any agreement, contract, or transaction in an energy commodity executed on a foreign board of trade to which the Commission had granted direct access permission prior to the date of enactment of this subsection until the date that is 180 days after the date of enactment of this subsection.

''(3) EXISTING CONTRACTS.—No contract of sale of a commodity for future delivery traded or executed on or through the facilities of a board of trade, exchange or market located outside the United States for purposes of subsection (a) shall be void, voidable or unenforceable and no party to such contract shall be entitled to rescind or recover any payments made with respect to such contract based upon the failure of the foreign board of trade to comply with any provision of this Act.''.

SEC. 4. AUTHORITY OF COMMODITY FUTURES TRADING COMMISSION WITH RESPECT TO CERTAIN TRADERS.

(a) IN GENERAL.—

(1) RESTRICTION OF FUTURES TRADING TO CONTRACT MARKETS OR DERIVATIVES TRANSACTION EXECUTION FACILITIES.—Section 4(b) of the Commodity Exchange Act (7 U.S.C. 6(b)) is amended by inserting after the first sentence the following: ''The Commission may adopt rules and regulations requiring the maintenance of books and records by any person that is located within the United States (including the territories and possessions of the United States) or that enters trades directly into the trade matching system of a foreign board of trade from the United States (including the territories and possessions of the United States).''

(2) COMMISSION AUTHORITY OVER TRADERS.—Section 4 of the Commodity Exchange Act (7 U.S.C. 6) is amended by adding at the end the following:

''(e) The Commission shall have authority under this Act to require or direct a person located in the United States, or otherwise subject to the jurisdiction of the Commission, to limit, reduce, or liquidate any position on a foreign board of trade to prevent or reduce the threat of price manipulation, excessive speculation, price distortion, or disruption of delivery or the cash settlement process with respect to any contract listed for trading on a registered entity.

''(f) CONSULTATION.—Before taking any action under subsection (e), the Commission shall consult with the appropriate—

''(1) foreign board of trade; and

''(2) foreign futures authority.''.

(3) VIOLATIONS.—Section 9(a) of the Commodity Exchange Act (7 U.S.C. 13(a)) is amended by inserting ''(including any person trading on a foreign board of trade)'' after ''Any person'' each place it appears.

(4) EFFECT.—No amendment made by this subsection limits any of the otherwise applicable authorities of the Commodity Futures Trading Commission.

SEC. 5. WORKING GROUP OF INTERNATIONAL REGULATORS.

Section 4a of the Commodity Exchange Act (7 U.S.C. 6a) (as amended by section 4(a)(2)(B)) is amended by adding at the end the following:

''(g) WORKING GROUP OF INTERNATIONAL REGULATORS.—Not later than 90 days after the date of enactment of this subsection, the Commission shall invite regulators of foreign boards of trade to participate in a working group of international regulators to develop uniform international reporting and regulatory standards to ensure the protection of the energy and agricultural futures markets from excessive speculation, manipulation, and other trading practices that may pose systemic risks to energy and agricultural futures markets, countries, and consumers.''.

SEC. 6. POSITION LIMITS FOR ENERGY AND AGRICULTURAL COMMODITIES.

Section 4a of the Commodity Exchange Act (7 U.S.C. 6a) is amended—

(1) in subsection (a)—

(A) by inserting ''(1)'' after ''(a)''; and

(B) by adding after and below the end the following:

''(2) In accordance with the standards set forth in paragraph (1) of this subsection and consistent with the good faith exception cited in subsection (b)(2), with respect to energy and agricultural commodities, the Commission, within 90 days after the date of the enactment of this paragraph, shall issue a proposed rule, and within 180 days after issuance of such proposed rule shall adopt a final rule, after notice and an opportunity for public comment, to establish limits on the amount of positions that may be held by any person with respect to contracts of sale for future delivery or with respect to options on such contracts or commodities traded on or subject to the rules of a contract market or derivatives transaction execution facility, or on an electronic trading facility with respect to a significant price discovery contract.

''(3) In establishing the limits required in paragraph (2), the Commission shall set limits—

''(A) on the number of positions that may be held by any person for the spot month, each other month, and the aggregate number of positions that may be held by any person for all months;

''(B) to the maximum extent practicable, in its discretion—

''(i) to diminish, eliminate, or prevent excessive speculation;

''(ii) to deter and prevent market manipulation, squeezes, and corners;

''(iii) to ensure sufficient market liquidity; and

''(iv) to ensure that the price discovery function of the underlying cash market is not distorted or disrupted.

''(4) In addition to the position limits for energy and agricultural commodities that the Commission establishes under paragraph (2), the Commission may require or permit a contract market, derivatives transaction execution facility, or electronic trading facility with respect to a significant price discovery contract, to establish and enforce position accountability, as the Commission determines may be necessary and appropriate to accomplish the objectives set forth in paragraph (3)(B), provided that the number of positions that may be authorized under position accountability may not exceed the position limits established under paragraph (2).

''(5) Nothing in this section shall require the Commission to revise any position limit for an agricultural commodity that is in effect on the date of enactment of this Act.''.

SEC. 7. OVER-THE-COUNTER TRANSACTIONS.

Section 2 of the Commodity Exchange Act (7 U.S.C. 2) is amended by adding at the end the following:

''(j) OVER-THE-COUNTER TRANSACTIONS.—

''(1) DEFINITIONS.—In this subsection:

''(A) COVERED PERSON.—The term 'covered person' means a person that enters into an over-the-counter transaction that is required to be reported under paragraph (3)(C).

''(B) OVER-THE-COUNTER TRANSACTION.—The term 'over-the-counter transaction' means a contract, agreement, or transaction in an energy or agricultural commodity that is—

''(i) entered into only between persons that are eligible contract participants at the time the persons enter into the agreement, contract, or transaction;

''(ii) not entered into on a trading facility; and

''(iii) not a sale of any cash commodity for delivery.

''(2) AUTHORITY IN MAJOR MARKET DISTURBANCES.—

''(A) IN GENERAL.—In the case of a major market disturbance, as determined by the Commission, the Commission may require any trader subject to the reporting requirements described in paragraph (3) to take such action as the Commission considers to be necessary to maintain or restore orderly trading in any contract listed for trading on a registered entity, including—

''(i) the liquidation of any futures contract; and

''(ii) the fixing of any limit that may apply to a market position involving any over-the-counter transaction acquired in good faith before the date of the determination of the Commission.

''(B) MAJOR MARKET DISTURBANCE.—The term 'major market disturbance' means any disturbance in a commodity market that disrupts the liquidity and price discovery function of that market from accurately reflecting the forces of supply and demand for a commodity, including—

''(i) a threatened or actual market manipulation or corner;

''(ii) excessive speculation; and

''(iii) any action of the United States or a foreign government that affects a commodity.

''(C) The term 'market disturbance' shall be interpreted in a manner consistent with section 8a(9).

''(D) JUDICIAL REVIEW.—Any action taken by the Commission under subparagraph (A) shall be subject to judicial review carried out in accordance with section 8a(9).

''(3) REPORTING; RECORDKEEPING.—

''(A) IN GENERAL.—The Commission shall require each covered person to submit to the Commission a report—

''(i) at such time and in such manner as the Commission determines to be appropriate; and

''(ii) containing the information required under subparagraph (B) to assist the Commission in detecting and preventing potential price manipulation of, or excessive speculation in, any contract listed for trading on a registered entity.

''(B) CONTENTS OF REPORT.—A report required under subparagraph (A) shall contain—

''(i) information describing large trading positions of the covered person obtained through one or more over-the-counter transactions that involve—

''(I) substantial quantities of a commodity in the cash market; or

''(II) substantial positions, investments, or trades in agreements or contracts relating to the commodity; and

''(ii) any other information relating to over-the-counter transactions required to be reported under subparagraph (C) carried out by the covered person that the Commission determines to be necessary to accomplish the purposes described in subparagraph (A).

''(C) OVER-THE-COUNTER TRANSACTIONS TO BE REPORTED.—

''(i) IN GENERAL.—The Commission shall identify each large over-the-counter transaction or class of large over-the-counter transactions the reporting of which the Commission determines to be appropriate to assist the Commission in detecting and preventing potential price manipulation of, or excessive speculation in, any contract listed for trading on a registered entity.

''(ii) MANDATORY FACTORS FOR DETERMINATIONS.—

''(I) IN GENERAL.—In carrying out a determination under clause (i), the Commission shall consider the extent to which each factor described in subclause (II) applies.

''(II) FACTORS.—The factors required for carrying out a determination under clause (i) include whether—

''(aa) a standardized agreement is used to execute the over-the-counter transaction;

''(bb) the over-the-counter transaction settles against any price (including the daily or final settlement price) of one or more contracts listed for trading on a registered entity;

''(cc) the price of the over-the-counter transaction is reported to a third party, published, or otherwise disseminated;

''(dd) the price of the over-the-counter transaction is referenced in any other transaction;

''(ee) there is a significant volume of the over-the-counter transaction or class of over-the-counter transactions; and

''(ff) there is any other factor that the Commission determines to be appropriate.

''(iii) PERIODIC REVIEW.—The Commission shall periodically conduct a review, but not less than once every 2 years, to determine whether to initiate a rulemaking to include any additional transactions or classes of transactions or to exclude any transactions or classes of transactions from the reporting requirements of this paragraph.

''(D) ALTERNATE REPORTING.—The Commission may permit any report required to be reported under paragraph (A) by—

''(i) a member of a derivatives clearing organization; or

''(ii) only one of the persons entering into the transaction, provided that each person entering into the transaction or transactions has notified the Commission, in the manner specified by the Commission, that one of the persons to the transaction or transactions has assumed, on behalf of the other person to the transaction, the legal obligations for such other person to submit reports under this section, including liabilities for failure to file such reports in accordance with the Commission's regulations. Any notification provided under this paragraph shall be effective in imposing such legal obligations and liabilities upon such person.

''(E) RECORDKEEPING.—The Commission, by rule, shall require each covered person—

''(i) in accordance with section 4i, to maintain such records as directed by the Commission for a period of 5 years, or longer, if directed by the Commission; and

''(ii) to provide such records upon request to the Commission or the Department of Justice.

''(4) POSITION LIMITS FOR OVER-THE-COUNTER TRANSACTIONS.—Upon review of the information reported to the Commission under paragraph (3), or following a major market disturbance as determined by the Commission under paragraph (2), the Commission may establish, after due notice and opportunity for hearing, by rule, regulation, or order, such limits on the amount of trading in over-the-counter transactions as the Commission determines are necessary and appropriate to accomplish one or more of the following objectives with respect to any contract listed for trading on a registered entity—

''(A) diminish, eliminate, or prevent excessive speculation;

''(B) deter and prevent market manipulation, squeezes, and corners;

''(C) ensure sufficient market liquidity; and

''(D) ensure that the price discovery function of the underlying cash market is not distorted or disrupted.

''(5) PROTECTION OF PROPRIETARY INFORMATION.—In carrying out this subsection, the Commission may not—

''(A) require the publication of any proprietary information;

''(B) prohibit the commercial sale or licensing of any proprietary information; and

''(C) except as provided in section 8, publicly disclose any information relating to any market position, business transaction, trade secret, or name of any customer of a covered person.

''(6) APPLICABILITY.—Notwithstanding subsections (g) and (h), and any exemption issued by the Commission for any energy or agricultural commodity, each over-the-counter transaction shall be subject to this subsection.

''(7) SAVINGS CLAUSE.—Nothing in this subsection modifies or alters—

''(A) the guidance of the Commission; or

''(B) any applicable requirements with respect the disclosure of proprietary information.

''(8) BONA FIDE HEDGING TRANSACTION REVIEW.—

''(A) IN GENERAL.—The Commission shall review and revise the definition of bona fide hedging transaction in subsection (c) of Section 4a of the Commodity Exchange Act (7 U.S.C 2(h)(2)(A)) as the Commission determines is necessary and appropriate to ensure that the commodity markets effectively perform their risk management and price discovery functions.''.

SEC. 8. INDEX TRADERS AND SWAP DEALERS.

Section 4 of the Commodity Exchange Act (7 U.S.C. 6) (as amended by section 3) is amended by adding at the end the following:

''(f) INDEX TRADERS AND SWAP DEALERS.—Not later than 60 days after the date of enactment of this subsection, the Commission shall—

''(1) routinely require detailed reporting from index traders and swap dealers in markets under the jurisdiction of the Commission;

''(2) reclassify the types of traders for regulatory and reporting purposes to distinguish between index traders and swaps dealers; and

''(3) review the trading practices for index traders in markets under the jurisdiction of the Commission—

''(A) to ensure that index trading is not adversely impacting the price discovery process; and

''(B) to determine whether different practices or regulations should be implemented.''.

SEC. 9. DISAGGREGATION OF INDEX FUNDS AND OTHER DATA IN ENERGY AND AGRICULTURAL MARKETS.

Section 4 of the Commodity Exchange Act (7 U.S.C. 6) (as amended by section 8) is amended by adding at the end the following:

''(g) DISAGGREGATION OF INDEX FUNDS AND OTHER DATA IN ENERGY AND AGRICULTURAL MARKETS.—The Commission shall disaggregate and make public monthly—

''(1) the number of positions and total value of index funds and other passive, long-only positions in energy and agricultural markets; and

''(2) data on speculative positions relative to bona fide physical hedgers in those markets.''.

SEC. 10. ADDITIONAL COMMODITY FUTURES TRADING COMMISSION EMPLOYEES FOR IMPROVED ENFORCEMENT.

Section 2(a)(7) of the Commodity Exchange Act (7 U.S.C. 2(a)(7)) is amended by adding at the end the following:

''(D) ADDITIONAL EMPLOYEES.—As soon as practicable after the date of enactment of this subparagraph, the Commission shall appoint at least 100 full-time employees (in addition to the employees employed by the Commission as of the date of enactment of this subparagraph)—

''(i) to increase the public transparency of operations in energy futures markets;

''(ii) to improve the enforcement of this Act in those markets; and

''(iii) to carry out such other duties as are prescribed by the Commission.''.

LEVIN PREVENT EXCESSIVE SPECULATION ACT

BILL SUMMARY

The Prevent Excessive Speculation Act would:

Authorize Speculation Limits for all Energy and Agricultural Commodities. Direct CFTC to impose position limits on energy and agricultural futures contracts to prevent excessive speculation and manipulation and to ensure sufficient market liquidity.

Authorize CFTC to permit exchanges to impose and enforce accountability levels that are lower than CFTC-established speculation limits.

Close London Loophole by Regulating Offshore Traders and Increasing Transparency of Offshore Trades. Prohibit a foreign exchange from operating in the United States unless it imposes comparable speculation limits and reporting requirements as apply to U.S. exchanges.

Provide CFTC with same enforcement authority over U.S. traders on foreign exchanges as it has over traders on U.S. exchanges, including authority to require traders to reduce their holdings to prevent excessive speculation or manipulation.

Require CFTC to invite non-U.S. regulators to form an international working group to develop uniform regulatory and reporting requirements to protect futures markets from excessive speculation and manipulation.

Close the Swaps Loophole and Regulate Over-the-Counter Transactions. Authorize CFTC to impose speculation limits on OTC transactions to protect the integrity of prices in the futures markets and cash markets.

Require large OTC trades that affect futures prices to be reported to CFTC. Allow one party to a transaction to authorize the other party to file the report. Require CFTC periodic review of reporting requirements to ensure key trades are covered.

Direct CFTC to revise bona fide hedge exemption to ensure regulation of all speculators, and strengthen data analysis and transparency of swap dealer and index trading.

Clarify definition of OTC transactions to exclude spot market transactions.

Protect Both Energy and Agriculture Commodities. Cover trades in crude oil, natural gas, gasoline, heating oil, coal, propane, electricity, other petroleum products and sources of energy from fossil fuels, as well as ethanol, biofuels, emission allowances for greenhouse gases, SO_2, NO_x, and other air emissions.

Cover trades in agricultural commodities listed in the Commodity Exchange Act.

Strengthen CFTC Oversight. Authorize CFTC to hire 100 new personnel to oversee markets.

Direct CFTC to issue proposed rules within 90 days and final rules within 180 days.

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

S. 448. A bill to maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media; to the Committee on the Judiciary.

Mr. SPECTER. Mr. President, I sought recognition to introduce the Free Flow of Information Act of 2009. I am honored to be joined in my efforts by Senators SCHUMER, LUGAR and GRAHAM, who are original cosponsors. Some 242 years ago, on January 16, 1767, Thomas Jefferson remarked in a letter to Col. Edward Carrington, ''Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.'' We take our free press for granted because it is so ingrained in our history. But we need only look at free press movements in fledgling democracies to appreciate how sometimes fragile and easily chilled freedom of press truly is.

The Free Flow of Information Act protects the public interest by ensuring an informed citizenry. In the past three years the Department of Justice has provided inconsistent numbers of subpoenaed journalists to the Judiciary Committee. We know from the public record, however, that at least 19 journalists have been subpoenaed by federal and special prosecutors for confidential source information since 2001 claim. Among them are Judith Miller, Matt Cooper, Tim Russert, Lance Williams, Mark Fainaru-Wada, and Philip Shenon. We also know 4 journalists have been imprisoned at the request either of the DoJ, U.S. Attorneys, or special prosecutors since 2000. Josh Wolf, Judith Miller, Jim Taricani, Vanessa Leggett. Collectively, these journalists have spent over 19 months imprisoned. Journalists who are not jailed for failing to comply with subpoenas still suffer the prospect of being held in contempt. Several have suffered this fate: Toni Locy, James Stewart, Walter Pincus, Jim Taricani.

In addition to the subpoenas from special prosecutors mentioned above, more than a dozen reporters have received subpoenas in civil suits, such as the Wen Ho Lee and Hatfill privacy lawsuits against the government. A preliminary report on the 2007 Media Subpoena Survey conducted by Professor RonNell Andersen Jones at the Law College Foundation at the University of Arizona states: 761 responding news organizations reported receiving a total of 3,602 subpoenas seeking information or material relating to newsgathering activities in calendar year 2006. Of these, 335 were subpoenas arising out of proceedings that took place in a federal forum. Sixty-four percent of responding newsroom leaders believe the frequency of media subpoenas to be greater than it was five years ago. Fifty percent of the media companies believe the risk of their own organization receiving a subpoena is greater than it was five years ago, while only 5 percent believe the risk to be less.

This bipartisan legislation would establish a qualified reporters' privilege protecting them from being compelled to identify confidential source information. The bill seeks to reconcile reporters' need to maintain confidentiality, in order to ensure that sources will speak openly and freely with the media, with the public's right to effective law enforcement and fair trials. The situation in the United States today is that journalists are subject to a compulsory process to disclose confidential informants—at least in Federal courts. At the State level, there are many laws providing qualified privileges for journalists. Prior versions of this bill garnered the support of numerous bipartisan cosponsors, as well as 39 media organizations, including the Washington Post, The Hearst Corporation, Time Warner, ABC Inc., CBS, CNN, The New York Times Company, and National Public Radio.

In 2005 I cosponsored two prior bills and was principle author of yet another. In the 110th Congress, I introduced S. 1035 the Free Flow of Information Act of 2007, along with Senator SCHUMER, and Senators LUGAR, GRAHAM, and DODD other senators to join as cosponsors were Senators LEAHY, JOHNSON, BOXER, KLOBUCHAR, Salazar, Obama, Clinton, Dole, MURRAY, LANDRIEU, WEBB, TESTER, LIEBERMAN, DURBIN, BAUCUS, and LAUTENBERG. On October 4, 2007, the Committee on the Judiciary favorably reported S.2035 out of committee by a 15–4 vote, which marked the first time a reporters' privilege bill had ever passed out of the Senate Judiciary Committee.

On March 6, 2008, I, along with Senator LEAHY, sent a letter to Majority Leader REID and Minority Leader MCCONNELL asking that S. 2035 receive floor time for full Senate consideration. They answered our call. On July 30, 2008, the Senate entertained a cloture vote on the motion to proceed to the measure that failed by a vote of 51–43. Nonetheless, the bill continues to enjoy broad bipartisan support—including the pledged support of former Senator, now—President Barack Obama. I urge all of my colleagues to join me in passing the Free Flow of Information Act of 2009, its high time we stop jailing or holding in contempt reporters who, in good faith, protect their confidential sources even in the face of a government subpoena.

There has been a growing consensus that we need to establish a Federal journalists' privilege to protect the integrity of the news gathering process, a process that depends on the free flow of information between journalists and whistleblowers, as well as other confidential sources.

Under my chairmanship, the Judiciary Committee held three separate hearings on this issue at which we heard from 20 witnesses, including prominent journalists like William Safire and Judith Miller, current and former Federal prosecutors, including former Deputy Attorney General Paul McNulty, and First Amendment scholars.

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 Judiciary 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 have considered these 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 confusion began 36 years ago, when the Supreme Court decided Branzburg v. Hayes. The Court held that the press' 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 more than three decades 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 apply Branzburg so as to not allow journalists to withhold information absent governmental bad faith. Four other 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, 9 of the 12 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 some form of reporters' 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 move toward resolving this problem by introducing the Free Flow of Information Act of 2009. 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.

The bill provides a qualified privilege for reporters to withhold from Federal courts, prosecutors, and other Federal entities, confidential source information and documents and materials obtained or created under a promise of confidentiality. However, the bill recognizes that, in certain instances, the public's interest in law enforcement and fair trials outweighs a source's interest in remaining anonymous through the reporter's assertion of a privilege. Therefore, it allows courts to require disclosure where certain criteria are met.

Under the legislation, in most criminal investigations and prosecutions, the Federal entity seeking the reporter's source information must show that there are reasonable grounds to believe that a crime has occurred, and that the reporter's information is essential to the prosecution or defense. In criminal investigations and prosecutions of leaks of classified information, the Federal entity seeking disclosure must additionally show that the leak caused significant, clear, and articulable harm to national security. In noncriminal actions, the Federal entity seeking source information must show that the reporter's information is essential to the resolution of the matter.

In all cases and investigations, the Federal entity must demonstrate that nondisclosure would be contrary to the public interest. In other words, the court must balance the governmental need for the information against the public interest in newsgathering and the free flow of information.

Further, the bill ensures that Federal Government entities do not engage in ''fishing expeditions'' for a reporter's information. The information a reporter reveals must, to the extent possible, be limited to verifying published information and describing the surrounding circumstances. The information must also be narrowly tailored to avoid compelling a reporter to reveal peripheral or speculative information.

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 needed for the defense of our Nation's security, as long as it outweighs the public interest in newsgathering and maintains the free flow of information to citizens, or to prevent an act of terrorism. Similarly, journalists may not withhold information reasonably necessary to stop a kidnapping or 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 tort or takes part in a crime or tort may not withhold that information on grounds of the qualified privilege. Journalists should not be permitted to hide from the law by writing a story and then claiming a reporter's privilege.

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.

By Mr. SPECTER (for himself, Mr. LIEBERMAN, and Mr. SCHUMER):

S. 449. A bill to protect free speech; to the Committee on the Judiciary.

Mr. SPECTER. Mr. President. I am introducing the Free Speech Protection Act of 2009 to address a serious challenge to one of the most basic protections in our Constitution. American journalists and academics must have the freedom to investigate, write, speak, and publish about matters of public importance, limited only by the legal standards laid out in our First Amendment jurisprudence, including precedents such as New York Times v. Sullivan. Despite the protection for free speech under our own law, the rights of the American public, and of American journalists who share information with the public, are being threatened by the forum shopping of libel suits to foreign courts with less robust protections for free speech.

These suits are filed in, and entertained by, foreign courts, despite the fact that the challenged speech or writing is written in the United States by U.S. journalists, and is published or disseminated primarily in the United States. The plaintiff in these cases may have no particular connection to the country in which the suit is filed. Nevertheless, the U.S. journalists or publications who are named as defendants in these suits must deal with the expense, inconvenience and distress of being sued in foreign courts, even though their conduct is protected by the First Amendment.

An example of why the legislation is necessary is found in litigation involving Dr. Rachel Ehrenfeld, a U.S. citizen and Director of the American Center for Democracy, whose articles have appeared in the Wall Street Journal, the National Review, and the Los Angeles Times. She has been a scholar with Columbia University, the University of New York School of Law, and Johns Hopkins, and has testified before Congress. Dr. Ehrenfeld's 2003 book, ''Funding Evil: How Terrorism is Financed and How to Stop It'', which was published solely in the United States by a U.S. publisher, alleged that a Saudi Arabian subject and his family financially supported Al Qaeda in the years preceding the attacks of September 11. He sued Ehrenfeld for libel in England, although only 23 books were sold there. Why? Because under English law, it is not necessary for a libel plaintiff to prove falsity or actual malice as is required in the United States.

Dr. Ehrenfeld did not appear, and the English court entered a default judgment for damages, an injunction against publication in the United Kingdom, a ''declaration of falsity'', and an order that she and her publisher print a correction and an apology.

Dr. Ehrenfeld sought to shield herself with a declaration from both federal and state courts that her book did not create liability under American law, but jurisdictional barriers prevented both the Federal and New York State courts from acting. Reacting to this problem, the Governor of New York, on May 1, 2008, signed into law the ''Libel Terrorism Protection Act.'' Congress must now take similar action. I note that the person who sued Dr. Ehrenfeld has filed dozens of lawsuits in England, and there is a real danger that other American writers and researchers will be afraid to address this crucial subject of terror funding and other important matters. Other countries should be free to have their own libel law, but so too should the United States. Venues that have become magnets for defamation plaintiffs from around the world permit those who want to intimidate our journalists to succeed in doing so. The stakes are high. The United Nations in 2008 noted the importance of free speech and a free press, and the threat that libel tourism poses to the world.

Following the New York example, the legislation my co-sponsors and I introduce today confers jurisdiction on federal courts to bar enforcement of foreign libel judgments if the material at issue would not constitute libel under U.S. law. Significantly, it also deters foreign suits in the first place by permitting American defendants to countersue from the moment papers are served on them. Damages available in the countersuit include the amount at issue in the foreign libel suit as well as treble damages if the foreign suit is part of a scheme to suppress a U.S. person's first amendment rights.

This deterrent mechanism is critical because those who bring these foreign libel suits are more interested in intimidating the authors than in actually collecting damages. They know that even if a foreign judgment cannot be enforced in the United States, the cost of defending the suit and the penalty for taking a default judgment can have a chilling effect on American writers and publishers. In particular, under English law a contempt citation may issue against authors or publishers who fail to satisfy default judgments, pursuant to which their property may be seized and they may be imprisoned. What is worse, defendants can no longer skirt the consequences merely by avoiding contact with England. Under recent European Commission regulations, default judgments for monetary claims are enforceable in all EU countries except Denmark.

The potentially severe ramifications of a default judgment make clear that merely barring enforcement of a foreign libel judgment in U.S. courts is entirely insufficient particularly for publishers with European offices. While it is important to bar enforcement, in the words of a New York Times editorial, that does ''not go as far as it could.''

I often remark that the Senate is the world's greatest deliberative body and all the facts and arguments ought to be examined before it acts. Accordingly, I must address a letter in opposition to this bill from a prominent British libel lawyer and explain why his arguments are unpersuasive.

He notes that a ''U.S. citizen . . . knocked down by the negligent driving'' of a London taxi driver is ''just as entitled as any British citizen'' to sue in England for damages. Why should a U.S. citizen ''not be entitled on the same basis, like any other UK citizen, to sue for damages to his reputation?'' The answer, of course, is that the analogy is inapt. In that hypothetical, the plaintiff sues the defendant in the defendant's jurisdiction for a harm committed and suffered there, an injury that is universally recognized as a tort. By contrast, the plaintiff in a foreign libel action purposely avoids suing in the jurisdiction where the defendant journalist writes and publishes, a jurisdiction where the material is not libelous. The proper analogy would be if the injured American had sued the taxi driver in the United States instead of England because the driver's conduct would not constitute negligence under English law. That hardly seems fair play. Our bill is designed specifically to prevent such forum shopping.

That essay also asks whether ''legislators will extend their intervention'' to commercial matters such as contracts and debts and warns that such extension could trigger ''retaliatory action on the part of UK legislators.'' Actually, such extension has already happened, but at the hands of British legislators not American ones. In the antitrust context, British law bars enforcement of foreign judgments for treble damages such as those awarded by U.S. courts. In addition, it allows a British corporation, against whom a judgment for treble damages was entered in a foreign court, to recover from the plaintiff any excess over actual damages. In any event, this bill is confined to the narrow area of core First Amendment rights.

''Perhaps of most significance'' he continues in his letter, is that to his knowledge ''very few of these claims have actually come before UK courts.'' But it is the chilling effect and the

mere threat of litigation that suffices to silence authors; there is no need to try the cases. In 2004, fear of a lawsuit forced Random House UK to cancel publication of ''House of Bush, House of Saud,'' a best seller in the U.S. that was written by an American author. Similarly, in 2007, the threat of a lawsuit compelled Cambridge University Press to apologize and destroy all available copies of ''Alms for Jihad,'' a book on terrorism funding by American authors. Indeed, an October 2008 study reported in The Guardian found that ''[m]edia companies are becoming less willing to fight defamation court cases all the way to a verdict. . . . With the burden of proof effectively resting on the defendant'' and attorneys' fees paid by the loser, defendants ''are forced to enter into settlement negotiations.''

Numerous organizations have endorsed the bill we offer today, including the ACLU and the Anti-Defamation League, as well as numerous journalists and publishers groups. Op-eds and editorials supporting our efforts have run in national papers, including the New York Times on September 15, 2008 and the New York Sun on July 28, 2008. Also drawing attention to the issue was an op-ed Senator LIEBERMAN and I penned that ran in the Wall Street Journal on July 14, 2008.

Freedom of speech, freedom of the press, freedom of expression of ideas, opinions, and research, and freedom of exchange of information are all essential to the functioning of a democracy. They are also essential in the fight against terrorism.

I thank Senators LIEBERMAN and SCHUMER, as well as Congressman PETE KING and his cosponsors for working with me on this important bill.

By Mr. BAUCUS (for himself, Ms. STABENOW, Mr. TESTER, Mr. CONRAD, Mr. JOHNSON, and Mr. SCHUMER):

S. 450. A bill to understand and comprehensively address the oral health problems associated with methamphetamine use; to the Committee on Health, Education, Labor, and Pensions.

Mr. BAUCUS. Mr. President, I rise today to re-introduce the Meth Mouth Prevention and Community Recovery Act in the 111th Congress.

In December 2007, the U.S. Department of Justice's National Drug Intelligence Center, NDIC, reported the increasing availability of high-purity methamphetamine throughout the country and the expansion of methamphetamine networks. According to the 2005 National Survey on Drug Use and Health, NSDUH, an estimated 10.4 million Americans aged 12 or older used methamphetamine at least once in their lifetimes for nonmedical reasons, representing 4.3 percent of the U.S. population in that age group. Its use has been destructive to individual people, families and communities in our nation. Lung disease, fatal heart attacks, mental illness and decaying teeth have been implicated with its prevalent use.

Dental problems are common among drug users. Many do not care for their teeth regularly and most do not see a dentist often. But methamphetamine seems to be taking a unique and horrific toll inside its user's mouths.

In those populated areas where its use is highly concentrated, more and more dentists are encountering patients with a distinct, painful and often debilitating pattern of oral decay. The condition, known as ''meth mouth'', is characterized by teeth that are blackened, stained, rotting and crumbling or falling apart. Some believe meth mouth is caused by the drug's acidic nature, its ability to dry the mouth, the tendency of users to grind and clench their teeth and a drug-induced craving for sugary drinks. Often the damage is so severe that extraction is the only viable treatment option.

The Meth Mouth Prevention and Community Recovery Act authorizes funding for local, school-based initiatives to educate primary and elementary school students about the dangers of methamphetamine usage. It will also provide for enhanced research and professional training in substance use disorders, oral health and the provision of dental care.

The bill I am putting forth here today will begin to address our Nation's need to better understand and educate our population along helping the dental health providers treat the oral disease originating from this drug's abuse. The studies funded and treatment offered here will begin to stem the tide on this terrible affliction.

Mr. President, 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 placed in the RECORD, as follows:

S. 450

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

SECTION 1. SHORT TITLE; PURPOSES.

(a) SHORT TITLE.—This Act may be cited as the ''Meth Mouth Prevention and Community Recovery Act''.

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

(1) to investigate and report on all aspects of meth mouth, including its causes, public health impact, innovative models for its prevention, and new and improved methods for its treatment;

(2) to ensure dentists and allied dental personnel are able to recognize the signs of substance abuse in their patients, discuss the nature of addiction as it relates to oral health and dental care, and facilitate appropriate help for patients (and family members of patients) who are affected by a substance use disorder;

(3) to determine whether, how, and to what degree educating youth about meth mouth is an effective strategy for preventing or reducing the prevalence of methamphetamine use; and

(4) to underscore the many ways that dentists and other oral health professionals can contribute to the general health of their patients, their communities, and the country as a whole.

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title; purposes.
Sec. 2. Table of contents.

TITLE I—EVIDENCE-BASED PREVENTION

Sec. 101. Findings; purpose; definitions.
Sec. 102. Methamphetamine prevention demonstration projects.
Sec. 103. Education for American Indian and Alaska native children.
Sec. 104. Authorization of appropriations.

TITLE II—METH MOUTH RESEARCH INVESTMENT ACT

Sec. 201. Findings; purpose; definitions.
Sec. 202. Research on substance abuse, oral health, and dental care.
Sec. 203. Study of methamphetamine-related oral health costs.
Sec. 204. Authorization of appropriations.

TITLE III—SUBSTANCE ABUSE EDUCATION FOR DENTAL PROFESSIONALS

Sec. 301. Findings; purpose; definitions.
Sec. 302. Substance abuse training for dental professionals.
Sec. 303. Authorization of appropriations.

TITLE I—EVIDENCE-BASED PREVENTION

SEC. 101. FINDINGS; PURPOSE; DEFINITIONS.

(a) FINDINGS.—The Congress finds as follows:

(1) According to the Substance Abuse and Mental Health Services Administration, first-time methamphetamine use is most likely to occur between the ages of 18 and 25. Prevention efforts must therefore begin during the teen years.

(2) Most young people do not realize that methamphetamine use can quickly leave their teeth blackened, stained, rotting, and crumbling or falling apart and that the treatment options are often limited.

(3) By educating youth about meth mouth, oral health advocates can play a substantial role in helping to prevent first-time methamphetamine use.

(b) PURPOSE.—The purpose of this title is to provide for a number of projects to evaluate whether, how, and to what degree educating youth about meth mouth is an effective strategy for preventing or reducing methamphetamine use.

(c) DEFINITIONS.—In this title:

(1) ANTI-DRUG COALITION.—The term ''anti-drug coalition'' has the meaning given to the term ''eligible coalition'' in section 1023 of the National Narcotics Leadership Act of 1988 (21 U.S.C. 1523).

(2) DENTAL ORGANIZATION.—The term ''dental organization'' means a group of persons organized to represent the art and science of dentistry or who are otherwise associated for the primary purpose of advancing the public's oral health.

(3) DIRECTOR.—The term ''Director'' means the Director of the Center for Substance Abuse Prevention.

(4) ELEMENTARY SCHOOL; SECONDARY SCHOOL.—The terms ''elementary school'' and ''secondary school'' have the meanings given to such terms in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801).

(5) INDIAN; INDIAN TRIBE; TRIBAL ORGANIZATION.—The terms ''Indian'', ''Indian tribe'', and ''tribal organization'' have the meanings given to such terms in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

(6) METH MOUTH.—The term ''meth mouth'' means a distinct and often severe pattern of oral decay that is commonly associated with methamphetamine use.

(7) SUBSTANCE USE DISORDER.—The term ''substance use disorder'' means any harmful pattern of alcohol or drug use that leads to clinically significant impairment in physical, psychological, interpersonal, or vocational functioning.

(8) YOUTH.—The term ''youth'' has the meaning given to such term in section 1023 of the National Narcotics Leadership Act of 1988 (21 U.S.C. 1523).

SEC. 102. METHAMPHETAMINE PREVENTION DEMONSTRATION PROJECTS.

(a) IN GENERAL.—In carrying out section 519E of the Public Health Service Act (42 U.S.C. 290bb–25e), the Director of the Center for Substance Abuse Prevention shall make grants to public and private nonprofit entities to enable such entities to determine whether, how, and to what degree educating youth about meth mouth is an effective strategy for preventing or reducing methamphetamine use.

(b) USE OF FUNDS.—

(1) MANDATORY USES.—Amounts awarded under this title shall be used for projects that focus on, or include specific information about, the oral health risks associated with methamphetamine use.

(2) AUTHORIZED USES.—Amounts awarded under this title may be used—

(A) to develop or acquire instructional aids to enhance the teaching and learning process (including audiovisual items, computer-based multimedia, supplemental print material, and similar resources);

(B) to develop or acquire promotional items to be used for display or distribution on school campuses (including posters, flyers, brochures, pamphlets, message-based apparel, buttons, stickers, and similar items);

(C) to facilitate or directly furnish school-based instruction concerning the oral health risks associated with methamphetamine use;

(D) to train State and local health officials, health professionals, members of anti-drug coalitions, parents, and others how to carry messages about the oral health risks associated with methamphetamine use to youth; and

(E) to support other activities deemed appropriate by the Director.

(c) GRANT ELIGIBILITY.—

(1) APPLICATION.—To be eligible for grants under this title, an entity shall prepare and submit an application at such time, in such manner, and containing such information as the Director may reasonably require.

(2) CONTENTS.—Each application submitted pursuant to paragraph (1) shall include—

(A) a description of the objectives to be attained;

(B) a description of the manner in which the grant funds will be used; and

(C) a plan for evaluating the project's success using methods that are evidence-based.

(3) PREFERENCE.—In awarding grants under this title, the Director shall give preference to applicants that intend to—

(A) collaborate with one or more dental organizations;

(B) partner with one or more anti-drug coalitions; and

(C) coordinate their activities with one or more national, State, or local methamphetamine prevention campaigns or oral health promotion initiatives.

(d) LIMITATIONS.—

(1) GRANT AMOUNTS.—The amount of an award under this title may not exceed $50,000 per grantee.

(2) DURATION.—The Director shall award grants under this title for a period not to exceed 3 years.

(e) EVALUATION AND DISSEMINATION.—The Director shall collect and widely disseminate information about the effectiveness of the demonstration projects assisted under this title.

SEC. 103. EDUCATION FOR AMERICAN INDIAN AND ALASKA NATIVE CHILDREN.

Not less than 5 percent of the funds appropriated pursuant to section 104 for a fiscal year shall be awarded to Indian tribes and tribal organizations for the purpose of educating Indian youth about the oral health risks associated with methamphetamine use.

SEC. 104. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for the purpose of carrying out this title $1,000,000 for each of fiscal years 2010 through 2012. Amounts authorized to be appropriated under this section are in addition to any other amounts authorized to be appropriated for such purpose.

TITLE II—METH MOUTH RESEARCH INVESTMENT ACT

SEC. 201. FINDINGS; PURPOSE; DEFINITIONS.

(a) FINDINGS.—The Congress finds as follows:

(1) As the number of regular methamphetamine users has increased, so has a peculiar set of dental problems linked to the drug. The condition (known as ''meth mouth'') develops rapidly and is attributed to the drug's acidic nature, its ability to dry the mouth, the tendency of users to grind and clench their teeth, and a drug-induced craving for sugar-laden soft drinks.

(2) Meth mouth is regarded by many as an anecdotal phenomenon. Few peer-reviewed studies have been published that examine its causes, its physical effects, its prevalence, or its public health costs.

(3) Enhanced research would help to identify the prevalence and scope of meth mouth. Such research would also help determine how substances of abuse can damage the teeth and other oral tissues, and offer the possibility of developing new and improved prevention, harm-reduction, and cost management strategies.

(b) PURPOSE.—The purpose of this title is to provide for enhanced research examining all aspects of meth mouth, including its causes, its public health impact, innovative models for its prevention, and new and improved methods for its treatment.

(c) DEFINITIONS.—In this title:

(1) CLINICAL RESEARCH; HEALTH SERVICES RESEARCH.—The terms ''clinical research'' and ''health services research'' shall have the meanings given to such terms in section 409 of the Public Health Service Act (42 U.S.C. 284d).

(2) INDIAN; INDIAN TRIBE; TRIBAL ORGANIZATION.—The terms ''Indian'', ''Indian tribe'', and ''tribal organization'' shall have the meanings given to such terms in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

(3) METH MOUTH.—The term ''meth mouth'' means a distinct and often severe pattern of oral decay that is commonly associated with methamphetamine use.

(4) PUBLIC HEALTH RESEARCH.—The term ''public health research'' means research that focuses on population-based health measures.

(5) SECRETARY.—The term ''Secretary'' means the Secretary of Health and Human Services.

(6) SUBSTANCE USE DISORDER.—The term ''substance use disorder'' means any harmful pattern of alcohol or drug use that leads to clinically significant impairment in physical, psychological, interpersonal, or vocational functioning.

SEC. 202. RESEARCH ON SUBSTANCE ABUSE, ORAL HEALTH, AND DENTAL CARE.

(a) EXPANSION OF ACTIVITY.—In carrying out part A of title III of the Public Health Service Act (42 U.S.C. 241 et seq.), the Secretary shall expand and intensify the clinical research, health services research, and public health research on associations between substance use disorders, oral health, and the provision of dental care.

(b) ADMINISTRATION.—In carrying out subsection (a), the Secretary—

(1) may enter into contracts or agreements with other Federal agencies, including interagency agreements, to delegate authority for the execution of grants and for such other activities as may be necessary to carry out this section;

(2) may carry out this section directly or through grants or cooperative agreements with State, local, and territorial units of government, Indian tribes, and tribal organizations, or other public or nonprofit private entities; and

(3) may request and use such information, data, and reports from any Federal, State, local, or private entity as may be required to carry out this section, with the consent of such entity.

SEC. 203. STUDY OF METHAMPHETAMINE-RELATED ORAL HEALTH COSTS.

(a) IN GENERAL.—In carrying out section 202, the Secretary shall conduct a study to determine whether, how, and to what degree methamphetamine use affects the demand for (and provision of) dental care. The study shall account for both genders, all racial and ethnic groups (and subgroups), and persons of all ages and from all geographic areas as appropriate for the scientific goals of the research.

(b) REPORT.—Not later than 1 year after the date of enactment of this Act, the Secretary shall publish a special report detailing the results of the study described in subsection (a), with findings that address—

(1) the prevalence and severity of oral health problems believed to be associated with methamphetamine use;

(2) the criteria most commonly used to determine whether a patient's oral health problems are associated with methamphetamine use;

(3) the therapies most commonly used to treat patients with meth mouth;

(4) the clinical prognosis for patients who received care for meth mouth; and

(5) the financial impact of meth mouth on publicly financed dental programs.

SEC. 204. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for the purpose of carrying out this title, $200,000 for each of fiscal years 2010 through 2012. Amounts authorized to be appropriated under this section are in addition to any other amounts authorized to be appropriated for such purpose.

TITLE III—SUBSTANCE ABUSE EDUCATION FOR DENTAL PROFESSIONALS

SEC. 301. FINDINGS; PURPOSE; DEFINITIONS.

(a) FINDINGS.—The Congress finds as follows:

(1) The use of certain therapeutic agents in dental treatment can jeopardize the health and affect the relapse potential of patients with substance use disorders.

(2) Screening patients for substance abuse is not a common practice among dentists, according to several peer-reviewed articles published in the ''Journal of the American Dental Association''. Limited time, inadequate training, and the potential for alienating patients are among the reasons often cited.

(3) Dentists receive little formal education and training in screening patients for substance abuse, discussing the nature of addiction as it relates to oral health and dental care, and facilitating appropriate help for patients, and family members of patients, who are affected by a substance use disorder.

(4) The American Dental Association maintains that dentists should be knowledgeable about substance use disorders in order to safely administer and prescribe controlled

substances and other medications. The American Dental Association further recommends that dentists become familiar with their community's substance abuse treatment resources and be able to make referrals when indicated.

(5) Training can greatly increase the degree to which dentists, allied dental personnel, and other health professionals can screen patients for substance abuse, discuss the nature of addiction as it relates to oral health and dental care, and facilitate appropriate help for patients, and family members of patients, who are affected by a substance use disorder.

(b) PURPOSE.—The purpose of this title is to provide for enhanced training and technical assistance to ensure that dentists and allied dental personnel are able to recognize the signs of substance abuse in their patients, discuss the nature of addiction as it relates to oral health and dental care, and facilitate appropriate help for patients, and family members of patients, who are affected by a substance use disorder.

(c) DEFINITIONS.—For the purposes of this title:

(1) ALLIED DENTAL PERSONNEL.—The term ''allied dental personnel'' means individuals who assist the dentist in the provision of oral health care services to patients, including dental assistants, dental hygienists, and dental laboratory technicians who are employed in dental offices or other patient care facilities.

(2) CONTINUING EDUCATION.—The term ''continuing education'' means extracurricular learning activities (including classes, lecture series, conferences, workshops, seminars, correspondence courses, and other programs) whose purpose is to incorporate the latest advances in science, clinical, and professional knowledge into the practice of health care (and whose completion is often a condition of professional licensing).

(3) CONTINUING EDUCATION CREDIT.—The term ''continuing education credit'' means a unit of study that is used to officially certify or recognize the successful completion of an activity that is consistent with professional standards for continuing education.

SEC. 302. SUBSTANCE ABUSE TRAINING FOR DENTAL PROFESSIONALS.

(a) IN GENERAL.—In carrying out title V of the Public Health Service Act (42 U.S.C. 290 et seq.), the Administrator of the Substance Abuse and Mental Health Services Administration shall support training and offer technical assistance to ensure that dentists and allied dental personnel are prepared to—

(1) recognize signs of alcohol or drug addiction in their patients and the family members of their patients;

(2) discuss the nature of substance abuse as it relates to their area of expertise;

(3) understand how certain dental therapies can affect the relapse potential of substance dependent patients; and

(4) help those affected by a substance use disorder to find appropriate treatment for their condition.

(b) CONTINUING EDUCATION CREDITS.—The Administrator of the Substance Abuse and Mental Health Services Administration may collaborate with professional accrediting bodies—

(1) to develop and support substance abuse training courses for oral health professionals; and

(2) to encourage that the activities described in paragraph (1) be recognized for continuing education purposes.

SEC. 303. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for the purpose of carrying out this title, $500,000 for each of fiscal years 2010 through 2012. Amounts authorized to be appropriated under this section are in addition to any other amounts authorized to be appropriated for such purpose.

SUBMITTED RESOLUTIONS

SENATE RESOLUTION 49—TO EXPRESS THE SENSE OF THE SENATE REGARDING THE IMPORTANCE OF PUBLIC DIPLOMACY

Mr. LUGAR submitted the following resolution; which was referred to the Committee on Foreign Relations:

S. RES. 49

Whereas public diplomacy is the conduct of foreign relations directly with the average citizen of a country, rather than with officials of a country's foreign ministry;

Whereas public diplomacy is commonly conducted through people-to-people exchanges in which experts, authors, artists, educators and students interact with their peers in other countries;

Whereas effective public diplomacy promotes free and unfiltered access to information about the United States through books, newspapers, periodicals, and the Internet;

Whereas public diplomacy requires a willingness to discuss all aspects of society, search for common values, foster a long-term bilateral relationship based on mutual respect, and recognize that certain areas of disagreement may remain unresolved on a short term basis;

Whereas a BBC World Service poll published in February 2009 that involved 13,000 respondents in 21 countries found that while 40 percent of the respondents had a positive view of the United States, 43 percent had a negative view of the United States;

Whereas Freedom House's 2008 Global Press Freedom report notes that 123 countries (66 percent of the world's countries and 80 percent of the world's population) have a press that is classified as ''Not Free'' or ''Partly Free'';

Whereas the Government of the United Kingdom, of France, and of Germany run stand-alone public diplomacy facilities throughout the world, which are known as the British Council, the Alliance Francaise, and the Goethe Institute, respectively;

Whereas these government-run facilities teach the national languages of their respective countries, offer libraries, newspapers, and periodicals, sponsor public lecture and film series that engage local audiences in dialogues that foster better understandings between these countries and create an environment promoting greater trust and openness;

Whereas the United States has historically operated similar facilities, known as American Centers, which—

(1) offered classes in English, extensive libraries housing collections of American literature, history, economics, business, and social studies, and reading rooms offering the latest American newspapers, periodicals, and academic journals;

(2) hosted visiting American speakers and scholars on these topics; and

(3) ran United States film series on topics related to American values;

Whereas in societies in which freedom of speech, freedom of the press, or local investment in education were minimal, American Centers provided vital outposts of information for citizens throughout the world, giving many of them their only exposure to uncensored information about the United States;

Whereas this need for uncensored information about the United States has accelerated as more foreign governments have restricted Internet access or blocked Web sites viewed as hostile to their political regimes;

Whereas following the end of the Cold War and the attacks on United States embassies in Kenya and Tanzania, budgetary and security pressures resulted in the drastic downsizing or closure of most of the American Centers;

Whereas beginning in 1999, American Centers began to be renamed Information Resource Centers and relocated primarily inside United States embassy compounds;

Whereas of the 177 Information Resource Centers operating in February 2009, 87, or 49 percent, operate on a ''By Appointment Only'' basis and 18, or 11 percent, do not permit any public access;

Whereas Information Resource Centers located outside United States embassy compounds receive significantly more visitors than those inside such compounds, including twice the number of visitors in Africa, 6 times more visitors in the Middle East, and 22 times more visitors in Asia;

Whereas Iran has increased the number of similar Iranian facilities, known as Iranian Cultural Centers, to about 60 throughout the world: Now, therefore, be it

Resolved, That—

(1) the Secretary of State should initiate a reexamination of the public diplomacy platform strategy of the United States with a goal of reestablishing publicly accessible American Centers;

(2) after taking into account relevant security considerations, the Secretary of State should consider placing United States public diplomacy facilities at locations conducive to maximizing their use, consistent with the authority given to the Secretary under section 606(a)(2)(B) of the Secure Embassy Construction and Counterterrorism Act of 1999 (22 U.S.C. 4865(a)(2)(B)) to waive certain requirements of that Act.

SENATE RESOLUTION 50—AUTHORIZING EXPENDITURES BY THE COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP

Ms. LANDRIEU submitted the following resolution; from the Committee on Small Business and Entrepreneurship; which was referred to the Committee on Rules and Administration:

S. RES. 50

Resolved, That, in carrying out its powers, duties, and functions under the Standing Rules of the Senate, in accordance with jurisdiction under rule XXV of such rules, including holding hearings, reporting such hearings, and making investigations as authorized by paragraphs 1 and 8 of rule XXVI of the Standing Rules of the Senate, the Committee on Small Business and Entrepreneurship is authorized from March 1, 2009, through September 30, 2009, and October 1, 2009, through September 30, 2010, and October 1, 2010, through February 28, 2011, in its discretion—

(1) to make expenditures from the contingent fund of the Senate;

(2) to employ personnel; and

(3) with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable or non-reimbursable basis the services of personnel of any such department or agency.

SEC. 2. (a) The expense of the committee for the period March 1, 2009, through September 30, 2009, under this resolution shall not exceed $1,693,240, of which amount—

(1) not to exceed $25,000 may be expended for the procurement of the services of individual consultants, or organizations thereof