SENATE—*Monday, August 1, 1988*

The Senate met at 12 noon and was called to order by the Honorable George J. Mitchell, Deputy President pro tempore, a Senator from the State of Maine.

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray:

But I trusted in Thee, O Lord: I said, Thou art my God. My times are in Thy hand . . .—Psalm 31:14, 15.

As we begin this week, gracious God, our sovereign Lord, we pray for Thy righteousness to overrule in all our affairs—public, personal and family. Imbue us with the desire to start each day with a few quiet moments alone with Thee. Make us wise in waiting upon Thee for the sense of Thy presence—looking to Thee for guidance in all things—depending upon Thee for wisdom and strength to accomplish all that we ought. Give us trust in Thee in our inadequacy—love for Thee, each other, spouse and children. Help us to make this week productive in Thy will.

In Jesus' name. Amen.

RECOGNITION OF THE MAJORITY LEADER

The DEPUTY PRESIDENT pro tempore. Under the standing order, the majority leader is recognized.

THE JOURNAL

Mr. BYRD. Mr. President, I ask unanimous consent that the Journal of the proceedings be approved to date.

The DEPUTY PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER OF PROCEDURE

Mr. BYRD. Mr. President, the Senate will go to the fair housing bill today. I do not know how much time that bill will require. I would hope that it could be disposed of today and tomorrow.

At a point very early toward midweek, there will be the supplemental appropriations bill. The President will make his decision on the plant closing bill no later than midnight Wednesday. If he should sign that bill or let it become law without his signature, then I would hope that the next day the Senate could proceed to the consideration of the trade bill. If he should veto the bill, then I would hope the next day the Senate could proceed to attempt to override the veto. That will be followed then by the trade bill.

Before the week is out, if the Senate is able to dispose of the aforementioned measures, or at least beginning early next week, the Senate should be on the Department of Defense appropriations bill. We do not know yet what the President's intention will be on that bill. There is some speculation that has surfaced to the effect that he may veto that bill. So there would be the problem of attempted override on that bill as well, the DOD authorization bill. In any event, the Senate would proceed at some point to take up the DOD appropriations bill.

On the supplemental appropriations bill, there may be an effort to attach Contra aid legislation. I have had a group of Democrats of all viewpoints and inclinations meeting in the effort to develop an approach that would be a unified approach, a fairly unified approach on the part of the Democrats, liberals, conservatives, moderates, whatever we may wish to term ourselves. And then it would be my hope that if we can do that, we would then go to the Republican leadership and see if there could be a bipartisan approach here. I feel it may be possible to have a bipartisan approach to deal with this matter and to put it to rest for a while.

So we are working toward that end. We are not at liberty to discuss details yet because the working group that I have put together has not finally made a decision beyond a tentative one. We have not seen the language that results from the last meeting. I hope to have another meeting today. I still believe that we can develop legislation that will allow Democrats and Republicans to join together in dealing with the Contra aid matter. I hope we can do that soon.

Mr. President, beyond what I have said, we have this week and 4 days of next week. It would be my desire to follow the trade bill, taking into consideration measures I have already mentioned and whether or not they are completed—DOD appropriations, for example—I would like to follow at some point rather early after action on the trade bill with the textile bill. Of course, on the Canada-United States trade agreement, the joint leadership of the two Houses has assured the administration that we would take up that measure before adjourning sine die.

It seems to me once the trade bill is disposed of and at some point the textile bill, we ought to go to the Canada-United States trade legislation.

Mr. President, as of last Friday, the Senate had completed action on 12 of the 13 general appropriations bills, which I think is a record that would go back a long way; 12 of the 13 appropriations bills completed prior to August 1 in the Senate. There has been some difficulty with the conferences between the two Houses on appropriations bills. Until all of the bills have been passed and all of the bills can go to conference and there can be an overall grasp of the work of the two Houses on those bills, it would be impossible to determine what new allocations or reallocations would have to be made between and among the bills. But the Defense appropriations bill has its own numbers.

So now that the other 12 bills have been sent to conference, there is no need for further delay, it seems to me. The conferences ought to go to work, in view of the fact the defense bill has its own numbers, and we ought to begin to send those several appropriations bills down to the White House individually.

That is the goal which both the Republican leader and I and the Speaker and I have said very early on in this session; it was our intention to send those separate bills down to the President. So both Houses have acted expeditiously. I hope that the conferences can begin now to work on the several bills and we can begin to see the conference reports come back through the two Houses and those bills start going to the President. One has already gone down to the President. The energy-water appropriation bill has been signed into law. So there is no need now, Mr. President, for further delay in the conferences on those measures.

I would welcome any further suggestions or comments or observations by the distinguished Republican leader as to the program that I have attempted to outline as we go into the second of the 3 weeks that will occur before the next break.

Mr. DOLE. If the majority leader will yield——

Mr. BYRD. Yes, I will be happy to yield.

Mr. DOLE. First, I compliment the majority leader and all members of the Appropriations Committee for doing what has not been done around this place for I do not know how long, complete 12 out of 13, and certainly they are going to have the 13th up very soon.

I think the majority leader is correct. Hopefully, we can get on with our conferences, get these bills down to

● This "bullet" symbol identifies statements or insertions which are not spoken by the Member on the floor.

the White House in case there are vetoes and give us some time because, as I looked at my calendar while the majority leader was speaking, if, in fact, there would be sine die adjournment by September 30, we would have 27 legislative days remaining—27. And if it is a week later, it is 32 or 33, depending on whether or not there would be a Saturday session, or it could even be a week after that. But, in any event, there are not many days left. Fortunately, there are not many items remaining that have to be dealt with.

I have gone over a must list that the majority leader gave me several weeks ago which has DOD appropriations, trade bill, textiles, Canadian-United States trade agreement, minimum wage, Contra aid, parental leave, drug bill, fair housing. We will do fair housing today. I hope we will be able to consent to go to that following morning business. And it may be that if in fact there can be some agreement reached on Contra aid, that may be disposed of on the supplemental, and perhaps the trade bill this week. So if we can continue that momentum, hopefully most of these items can be achieved.

But I would indicate that there is a Republican leadership meeting tomorrow morning with the President. I think the purpose of that may be to discuss plant closing and the DOD authorization. I would hope on plant closing the President could maybe let that become law without his signature. We made changes in the Senate. They were not major changes but they were changes, perhaps indicating to us that he would be willing to swallow what is left of the plant closing bill even though he does not like it if we would all work together to get a trade bill done. I think we would be willing to do that. Certainly Congress is ready to go on the trade bill. And on the DOD authorization, I am just not certain what the President will do. I am not certain on the other, but I do know we are going to discuss those tomorrow.

Mr. BYRD. Mr. President, I thank the Republican leader for his comments. They are hopeful and I think generally optimistic and upbeat, and I find them to be very satisfactory. I thank him for his excellent cooperation and for the work that he had done to help move the program along. But for his cooperation and great support and help and leadership, the Senate would not have completed action on 12 appropriation bills so early.

RECOGNITION OF THE REPUBLICAN LEADER

The DEPUTY PRESIDENT pro tempore. Under the standing order, the Republican leader is recognized.

RESERVATION OF THE REPUBLICAN LEADER'S TIME

Mr. DOLE. Mr. President, I reserve my time.

MORNING BUSINESS

The DEPUTY PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of morning business not to extend beyond 12:30 p.m., with Senators permitted to speak therein for not to exceed 5 minutes each.

The Senator from Wisconsin is recognized.

NOISE POLLUTION IS SWEEPING OVER AMERICA

Mr. PROXMIRE. Mr. President, Russell Baker has done it again. This time he has written a paean—a song of joy and triumph to "the greatest thing in the world"—"Noise." As Baker writes recently in the New York Times, look around for what is coming on in our political as well as our cultural world: This is the age of noise: Raucous, shouting, yelling, unrelieved noise. Oh, sure there are a few Members of the Congress, city councils, and other legislative bodies who talk quietly and rely on the merit of their argument. But anyone who wants to make it big and make it in a hurry has to shout, pound the table, and above all interrupt. Rudeness is in and in big. Tune in on any of the really smash hit TV shows—Morton Downey, Junior, the McLaughlin Report and what do you get? You get pure, uninterrupted interruptions. Rudeness is becoming a fine art. The rule is never start talking unless you are butting in on another speaker, and never stop talking just because someone else is talking. It is no fun if one panelist is speaking all by himself. Interrupt and you begin to get some action. If two speakers interrupt a third speaker simultaneously, and all three keep talking, then you have the supreme thrill. It is like a grand slam bases loaded homer in baseball or an 80 yard pass in football. But why? One answer: With three people all talking at once, it is impossible to hear a coherent word, let alone a coherent sentence. You cannot think. But ah—there is something better than thought, much better. You can hear. And, oh, what you can hear. You hear pure, unadulterated noise. It is almost as blissful as slam, bang rock music. It is loud. It is swept up on the excitement of three contestants all shouting at each other.

This TV panel noise show is not confined to odd ball panel shows on TV. Gradually, more and more public speakers are catching on to this new rock and roll type of oratory. They are finding it is a real winner. Content is nothing. People can read content. It does not matter whether the speaker is logical or ridiculous. What matters is the loudness, the decibels. Does the speaker really get your attention? Does he slam his fist on the table? Does he stamp and shout? Does his voice range from a roar to a screech and back to a roar? Does he get really physical? Does he throw his body into it? Does he flail the air with his fists? Does he slap his hands together and keep shouting? If he does all these things, the press will call him charismatic. More and more people will come to see him and hear his noise.

Where did this disjointed, distracting noise come from? Why is it polluting our politics as well as our culture? The answer is becoming obvious. More and more people want speakers to entertain them. Whenever hot emotion and cold reasoning clash, hot emotion wins every time. For most of us it is far easier to feel than it is to think. But this has always been true. What has made this present generation so susceptible to the sheer power of noise? Is it the prevalence of rock and roll as the prevailing musical idiom for the past 20 years or so? Maybe, in part. But there is also the rise of the emotion rousing TV ministry. Television has only slowly and gradually wormed its way away from quiet, gentle persuasion and now is bursting its way to the shouting of fusillades of insults. The advent of mechanical amplifiers should have discouraged the shouting, yelling speaker. After all, the microphone and public address systems permit whispers to penetrate to the farthest reaches of huge auditoriums. Radio and television brings voices soft and gentle as well as loud and raucous across thousands of miles into millions of homes and cars and wherever people meet. Soft words come through with the same clarity as screaming shouts. So why aren't the gentle, quiet whispers as potent as the baying, bellowing, clamor?

Is the answer that the age of rock and roll has so corrupted our generation with noise that only the loudest shouters can win? Here is the way Russell Baker put it in the good gray New York Times on July 27th:

> Anybody who acts as though politics were an argument instead of an assault is too far behind the times to be rescued. Here are some slogans that the most successful crowd pleasers in America have nailed on the back of their skulls:
>
> 1. make heat, not light
> 2. straight shouters always win
> 3. bawling, baying, bellowing, clamor, commotion, din, hollering, hubbub, outcry, racket, roars, screams, shouts, tumult and yells are golden.

None of this has really come as yet to the slow, sleepy, gentle and gentlemanly conversations we carry on here in the U.S. Senate. But the kind of people who will win election to the Senate in the future are likely to be the redhot shouters. I can just imag-

ine this place 20 or 30 years from now—let's say in 2010. The Senate will look exactly the way it looks today. The Senate day will start very differently. The Senate Chaplain will deliver a rock and roll shouting, crowd pleasing morning prayer. The majority and minority leader will then set the pace with a drum beat of table-pounding, shrill, rousing rhetoric. And the Senate will be off to another day of screeching, yelling, desk pounding noise.

Result: this body will move from an ignored TV channel that no one watches to prime time and big time on the networks, the bawling, baying, bellowing, clamor and commotion of the U.S. Senate will be on the air, while the Nation listens in fascination. On the other hand, maybe the Senate will quiet down and do its work for a change.

ORDER TO PROCEED TO THE CONSIDERATION OF H.R. 1158

Mr. BYRD. Mr. President, I ask unanimous consent that at the conclusion of morning business, the Senate proceed to the consideration of Calendar Order No. 786, H.R. 1158.

The DEPUTY PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from Arkansas.

Mr. PRYOR. Mr. President, I thank the Chair for recognizing me.

After the oration of the distinguished Senator from Wisconsin relating to noise, I will deliver this speech in just a little above a whisper if that is all right.

(The remarks of Mr. PYROR are found in today's RECORD under statements on Introduced Bills and Joint Resolutions.)

BIPARTISAN APPROACH TO CONTRA AID

Mr. DOLE. Mr. President, I read with interest in this morning's Washington Post that some of our friends on the other side of the aisle are working on legislation that would permit renewed delivery of aid—apparently including some lethal aid—to the democratic resistance in Nicaragua, the so-called Contras.

On many, many occasions, I have made the point that we have sustained a Contra aid program only because of the bipartisan support we have had in the past. So I—and I am certain all of the Republican supporters of this program—welcome this new interest among our democratic colleagues.

We have so far seen none of the details of what our friends are working on. And, of course, I have already offered a package which we think meets the minimum standards necessary to maintain the Contras, both as a political force and, potentially, as a credible military force should negotiations ultimately fail because of Sandinista intransigence.

Until we do see what the other side might be contemplating, it would be premature to say anything in detail. But let me make just two brief points, which may be of some help to the Senators and staff working on the Democratic package.

First, legislation—especially legislation designed to forestall the need for any more congressional action in this administration—must provide enough aid to do the job. I see references into today's Post to "$18 million" in undelivered lethal aid. That figure is not consistent with the figures we have from the administration. We have already asked the administration to give us as much detail as possible on what does exist in this "undelivered" category.

Everything we have seen to date, though, suggests that the amounts of what would be truly needed should the Sandinistas launch new attacks are just not available in this "undelivered" category. So we need to be careful about the amounts, and not leave the impression that we have met the need, when in fact we have fallen short.

Second, to be credible, any legislation must insure that authorized aid is really available and can be delivered. I underscore "can be delivered". There may be more than one way to accomplish that—but, obviously, it is of no value whatsoever to authorize assistance, and then to see it rot away in warehouses, because we do not have the means to get it to the Contras' fighting forces.

Mr. President, the Sandinistas have shown their true stripes these past few weeks. I am glad that fact is sinking in on both sides of the aisle, and in both Houses of Congress.

Our fundamental policy is to try to achieve our goals through negotiations, not a continuation of the war. The President wants that; Republicans want it and the Democrats want that. But if that policy is to have any chance of success, we must sustain the Contras as an effective force—as leverage over the Sandinistas. We must enact legislation to keep them in the field, to maintain them as a credible presence at the bargaining table.

The best way to do that is through bipartisan legislation, enjoying wide congressional support.

So, in conclusion, let me again welcome our Democratic friends on board this effort. And let me say that we are most eager to hear what they have in mind, and to work with them to enact legislation that will do the job—that will accomplish America's goals, of peace and freedom in Central America.

BICENTENNIAL MINUTE

AUGUST 1, 1876: SECRETARY OF WAR WILLIAM BELKNAP IS ACQUITTED

Mr. DOLE. Mr. President, from time to time I have included in the RECORD what I call bicentennial minutes. I today call attention to my colleagues that it was 112 years ago today, on August 1, 1876, after a bitter and prolonged trial, the Senate acquitted Secretary of War William Belknap, the only Cabinet member ever impeached by the House.

Despite this outcome, almost no one believed Belknap innocent. Rather, he escaped conviction on a technicality. In February 1876, just as the Whiskey Ring Scandal was breaking, further tarnishing the already sullied second administration of President Ulysses Grant, the House of Representatives launched an investigation into widespread charges of corruption within the War Department. On the morning of March 2, 1876, after an insider tipped him off, Belknap rushed to the White House and thrust a hastily scribbled letter of resignation into the hands of President Grant, who accepted it with regret and surprise. Belknap had good reason for haste: The House committee was about to reveal that the Secretary of War had accepted at least $20,000 in pay-offs from a scheme, involving a trading post in Oklahoma territory, hatched by his late wife and perpetuated by his current wife, the sister of his late wife.

By resigning, Belknap hoped to avoid impeachment by the House and trial in the Senate, at which the sordid dealings of his wives, leading belles of the Capitol, would surely be revealed. But his bold move did not work. While timely resignation had derailed impeachment initiatives against suspect officials in the past, House Members, outraged by the Secretary's deviousness, proceeded with a motion for his impeachment on the afternoon he resigned.

Belknap's Senate trail in the summer of 1876 proved to be the gaudy spectacle he feared. After 2 months of damning testimony, however, the Senate voted to acquit the former Secretary of War. Senators reached this verdict not because they believed him innocent—the evidence to the contrary was overwhelming—but because they concluded that the Senate lacked jurisdiction over an individual no longer in office.

U.S. FOREIGN POLICY FOR CENTRAL AMERICA

Mr. SANFORD. Mr. President, the Sandinistas have given signs that they might be abandoning the Arias peace plan, and in all likelihood the Congress will vote additional assistance of some kind to the Contras.

In doing so, we need to keep three points in mind, and we need to clarify, for ourselves at least, what our foreign policy is. If American policy is clear, and our actions within that policy, then whatever we do will have a better chance of success.

The policy of the United States must encourage the Central American countries to achieve stability, to embrace a democratic form of government, and to observe human rights. This cannot be done by force. We have learned that. Instead, it must be done by internal reform and initiatives for economic development founded on education and freedom.

To implement this United States policy we must be prepared to help Central Americans implement their plans for economic, political, social, and human development. It is obvious that we cannot dictate to them what form their governments will take. We can encourage only. It is also true that we cannot successfully design a plan for their development. We can encourage only. When the Arias peace plan is implemented by whatever countries ultimately join, the United States must be prepared to help those countries achieve stability through development. We should be thinking now of how we might go about this, and we should be encouraging them to get their blueprints for development ready.

All of that should be a creative and productive United States foreign policy for Central America.

This foreign policy is a highway. Like some highways, this one is filled with potholes and barricades. Skillful execution of foreign policy demands that we evade, bypass, remove or correct all these barriers without forgetting that our objective is continued progress down the highway.

So, remembering what we hope to accomplish, reminding ourselves of our underlying foreign policy, how do we handle what we perceive to be action by the Sandinistas that threatens our goals for Central America?

The first of three points we need to keep in mind is that no one in Central America wants to be told by the United States what they must do. We can already see that in the forthcoming meeting of our Secretary of State with four Foreign Ministers of Costa Rica, Guatemala, Honduras, and El Salvador. They are not inclined to condemn Nicaragua in the language of a communique predrafted in Washington. We must confer with them and respect their advice.

Second, we cannot abandon the Contras to the point that their lives are endangered. If a ceasefire is to be accommodated, their views and their safety cannot be dismissed.

Third, military action in El Salvador and Nicaragua, whether by the left or the right, as anywhere else in Central America, is not the ultimate way to success, peace, and a better future.

Whatever is done in additional aid for the Contras, we need to understand that we are dealing with one of the barricades, not with the basic foreign policy. We can do better with our diplomatic efforts than we have in the past. Progress by their neighbors can better bring the Sandinistas and the contending forces in El Salvador into the economic ball game, even if it is started without them. The appeal of being a part of a broad economic development cannot be ignored by Nicaragua nor by other regional dissident groups. It is the common bond and it is the way they can achieve peace, growth, self-respect, and the promise of prosperity.

Our foreign policy mandates that we encourage all of them.

Mr. FOWLER. Mr. President, I ask unanimous consent that I may be allowed to speak for 10 minutes in morning business.

The PRESIDING OFFICER (Mr. LEVIN). Without objection it is so ordered.

NATIONAL ENERGY POLICY ACT OF 1988

Mr. FOWLER. Mr. President, this morning I rise in support of the National Energy Policy Act of 1988, introduced on Friday by the distinguished Senator from Colorado [Mr. WIRTH], and by the chairman of the Committee on Energy and Natural Resources, the Senator from Louisiana [Mr. JOHNSTON], and which I am proud to cosponsor.

Mr. President, I have now served in the Congress for over a decade. In that time, I have seen much legislation directed at the challenges that confront this Nation. But during that time I have also seen many issues of long term importance go unaddressed.

I fear our children may look back and say that one of the greatest failures of government—at least during the time I served—was our failure to adopt a sound and comprehensive strategy for meeting their energy needs.

And I want to make it clear that I am not talking about any remote, abstract future generations. I am talking about children already in our schools, already in our day care centers, the pages here in the Chamber of the U.S. Senate. I am talking about my daughter. I am talking about your son.

In the decade I have held Federal office, we have not moved closer to effecting a sustainable long-term energy policy. In fact, we have witnessed the decline of the conservation ethic. We have forms of energy developed in the 1970's to lead us toward energy security. We have actually increased our oil consumption by over a million barrels a day in the 1980's.

I share the concern of many of my colleagues about this apparent regression in policy. That is why last year I introduced the Renewable Energy and Energy Conservation Act of 1987, which seeks to revive our research and development in conservation, solar energy, wind, geothermal, biomass, and hydropower.

Our failure to achieve a comprehensive energy plan is contributing to an even more comprehensive problem. That is the global warming caused by the burning of fossil fuels and by other manmade emissions, the greenhouse effect. This prospect was raised in the 1970's, at the time of our greatest advances in renewable energy and conservation research.

Since then, a government more attuned to its own rhetoric than to reality dismissed the greenhouse effect as just another gloom and doom theory. But now scientists have documented the increased carbon dioxide levels and the resulting increases in global temperature. Unfortunately, we are no longer talking about a theory. The greenhouse effect is established scientific fact.

Our planet has already warmed by over half a degree Celsuis in the last 100 years, since the beginning of large scale industrial emissions and the advent of the automotive age. We are committed to an increase in global temperature between 1.5 and 4.5 degrees Celsius in the next three or four decades—that is if we take immediate steps to drastically reduce carbon emissions and other contributing factors.

That may not sound very alarming to the untrained ear until you consider that only 5 to 8 degrees separate us from the last ice age. A 1.5 degree warming would constitute the widest swing in the temperature range in the last 10,000 years.

We know that global warming is occurring. We know it is of a magnitude that can have serious consequences. The only thing we cannot say for sure at present is exactly what those consequences will be.

What we can expect with some degree of certainty is a melting of the ice caps and rising sea levels. That will affect more than just investments in waterfront property. On the coast of Georgia, my State, I can foresee dramatic impacts—on the coastal islands, the fisheries, the beaches, the marshes, the harbors—from a change in sea level.

We can also anticipate that may plant and animal species will have difficulty adjusting to the climate changes, that with human development restricting the natural paths of migration, that the survival of many species will be threatened.

And this year's drought, though it cannot be definitively linked to the

pattern of global warming, serves as a strong warning—a strong warning of the dangers posed to agricultural production by changes in temperature and the resulting changes in rainfall.

It ought to make us realize how many of the major decisions we have made in the last decade—and are making today—how many of the largest investments of our resources are based on projected weather patterns.

That is true of where we plant our crops, of how many powerplants we build and how big we build them. Global warming of one degree could also undermine the decisions we make today on irrigation, hydropower, forest management, coastal planning, the structural design of much of our infrastructure of roads, bridges, and buildings. I could go on and on.

What have we done about it—in the 10 years or so that this problem has loomed before us as a serious prospect? The answer is that we have more methane, nitrous gases, ozone and chlorofluorocarbons—all pollutants that contribute to the heating effect—in the atmosphere than ever before. The principal culprit; carbon emissions, have increased by 100 million tons a year.

The bill that I rise in support of is only the beginning of a comprehensive approach to this greenhouse effect and the many other challenges we face in terms of our energy use.

This legislation addresses both ends of the global warming problem—which is caused both by what we produce and also by what we destroy.

This bill calls for a comprehensive plan to meet our energy needs, taking into account the need to reduce air pollution from energy production. We already know how to develop many energy sources that do not have these negative environmental consequences—if we have the will to do it. This legislation incorporates the bill I introduced last year to foster research and development in conservation, which still, of course, is the cheapest way to meet energy demands, and renewable energy technologies which offer the safest and most reliable ways to produce energy.

Our legislation also recognizes that we must protect our forests—because trees, which convert carbon dioxide back into oxygen, are the greatest natural buffer against the carbon dioxide buildup that is responsible for the greenhouse effect.

This legislation calls for better management of our own forests. The Tongass National Forest in Alaska is a fine case in point. Many of our national forests are being destroyed, through the incentive of Government subsidies, at a net economic loss to the taxpayers. This is bad fiscal policy. It is bad forestry policy. It is bad environmental policy.

And our environment does not recognize political boundaries. That is why we must attempt to influence forestry policy in other countries, especially in tropical forests where the greatest carbon fixing occurs. Edward Goldsmith of the Ecologist has long led the fight for public awareness that all nations rely on these tropical regions not only to maintain our atmosphere but also to maintain our health.

But in the last decade we have seen millions of acres of tropical forest cleared for farms whose soil deteriorates rapidly and can support cultivation for only a few years. Land that was cleared in this way 10 years ago is already exhausted.

Yet forests in Latin America, the Amazon and Zaire Basins and Southeast Asia have been diminished by almost half their original range. Some forests in Central America, Southeast Asia, and West Africa have been cut back by over 90 percent.

This bill addresses the crying need for international cooperation in preserving the world's forests—which is necessary to prevent potentially disastrous changes in climate, and of course for many other reasons.

Inevitably some will say that we need to wait and study this warming problem. But let me tell you the scientists who have been studying it for years have already made it clear that the greatest risk comes from our doing nothing, and that the danger cannot be diverted by acting alone. We are not used to hearing that in this country, but it is not in the power of the United States of America alone to reverse the trend toward increased fossil fuel emissions and global warming. We do have to have a clear national consensus of our own before we can move on to increased international cooperation.

This is where the United States should assert its world leadership—for the good of all nations. Better than anything else, that sense of responsibility defines America.

I compliment Senator WIRTH and Senator JOHNSTON especially on this initiative. It represents the first step toward living up to that high goal we have set for ourselves as a leader of nations.

I urge the rest of my colleagues here in the Senate to support this comprehensive solution, which will start us on the path to a sound energy policy and will help rescue our future from the grim prospects of global warming and the greenhouse effect if we continue to do nothing.

I thank the President and my colleagues and yield back the remainder of my time.

WHAT'S THE REAL STORY ABOUT HUNGER IN AMERICA?

Mr. HELMS. Mr. President, in reflecting upon last week's Senate approval of the Hunger Prevention Act of 1988, it occurs to me that I should make clear why I felt obliged to vote against this legislation.

No one enjoys the risk of appearing to oppose efforts to help the truly needy of our society. However, there comes a time when a line must be drawn between truth and the "hunger reports" that use hit-and-run techniques, making outlandish claims of widespread hunger without documented foundation for the rhetoric.

Mr. President, this is the political season, a time when so many refer to a new "War on Hunger" brought about by "drastic cuts in Federal nutrition assistance under the Reagan administration." This is cruel nonsense when the truth is that spending for USDA food assistance programs has risen from $14 billion in 1980 to over $20 billion in 1988. An increase of 44 percent since 1980, Mr. President—hardly a "drastic cut."

This one statistic alone unmasks the distortion claiming that there has been a reduction in the commitment to the needy. One of the most often proclaimed signs of "overwhelming hunger" is the skyrocketing growth of food banks. These food banks distribute surplus Government commodities, along with other foods donated from supermarkets. However, the truth is that there is only a contrived correlation between the increasing number of food banks in our country and "increased hunger." The food is free. And while a lot of people like to receive free food, it doesn't mean that they are necessarily hungry. To the contrary, it means that when something is free—be it food or anything else—there'll always be a booming market for it.

In addition, many advocates of increased welfare spending are reluctant to consider the problems which cause poverty—problems such as drug use, the erosion of family principles and responsibilities, out-of-wedlock pregnancies, and long-term welfare dependency. These are the areas which must ultimately be addressed if there is ever to be any hope of achieving true changes, by helping the needy to help themselves. There is the impression that being poor means going to bed hungry every night, an impression that simply is not accurate.

Mr. President, I believe Congress is launching a dangerous trend by continually enacting the kind of legislation that merely throws more money at welfare programs instead of trying to get to the root of the problem. Of course there are professional welfare lobbyists who constantly demand more and more tax money for existing pro-

grams, instead of seeking solutions to the deeper and often-ignored problems that are the root cause of poverty.

Mr. President, I have read many of the so-called "hunger reports." But I have also read reports which dispute the claims of rampant hunger in our Nation. In particular, I found an article by Carolyn Lochhead, which appeared this past June in Insight magazine, to be of particular relevance. Those reading the article may wonder how a sociologist, posing as a homeless man, can gain 4 pounds in 5 days by going to charitable feeding sites—in areas labeled as some of the "hungriest" in America.

Americans have demonstrated time and time again that they are sensitive to the plight of the less fortunate and that they are willing to lend a helping hand. Isn't it time for Congress to focus its attention on efforts to streamline our present programs, and, thereby get the most out of the money we are spending?

Mr. President, I ask unanimous consent that the article by Carolyn Lochhead be printed in the RECORD at the conclusion of my remarks.

There being no objection, the article was ordered printed in the RECORD, as follows:

HOW HUNGRY? HOW MANY?

(By Carolyn Lochhead)

(Summary: In what seems a strange ebb and flow, the hunger that gripped the nation in the Sixties, but was pronounced satisfied in the Seventies, has returned. So says a vocal group of academicians and activists, who point to soup kitchens and other growing evidence. Their detractors caution that the danger is in hunger's definition, which should be closely examined, barring a rush to ill-conceived policies.)

The declaration came in 1979. Hunger had been conquered in America, said the Field Foundation, whose reports of widespread hunger in the 1960s had inspired not only a blossoming of the federal food stamp program but dozens of other nutrition efforts—from Meals on Wheels for the elderly to the federal supplemental food program for poor women, infants and children.

Nine years later, another message is heard. It comes from network newscasts and television docudramas, from Washington activists and Harvard professors, from senators and representatives, from testimony in hearings on Capitol Hill: Hunger in America is back, with a vengeance.

Hunger, it is said, is epidemic—widespread, chronic and growing. Robert Fersh, executive director of the Food Research and Action Center, a hunger activist group, told the House Select Committee on Hunger that there are "unconscionable levels of hunger in our country today" and that its "continuing growth" is "irrefutable."

The Food and Nutrition Service, the arm of the Department of Agriculture that administers the food stamp program, is under attack. Activists lay the blame for this hunger epidemic squarely on the Reagan administration, charging that the White House has slashed spending on food programs and ripped apart the safety net, forcing hungry people off the food stamp rolls and into lines at soup kitchens.

Larry Brown, who heads a group called the Physician Task Force on Hunger in America, based at the Harvard University School of Public Health, has said he has "uncovered overwhelming evidence that this hunger [is] a man-made epidemic created and spread by government policies." Emotions run high as reports of empty refrigerators and stunted children stream into Washington. Patrick J. Leahy, chairman of the Senate Agriculture, Nutrition and Forestry Committee, likens conditions in parts of the United States to those in parts of the Third World.

That such a shocking turnabout in nutritional status has occurred, however, is very much a matter of dispute. Many medical experts point to evidence of improving nutrition in the United States and say that raising a hunger alarm could seriously misguide public health policies. "A lot of what the activists are calling hunger is just absolute rubbish," says George Graham, professor of nutrition and pediatrics at Johns Hopkins University. Many of the hunger lobbyists, he says, "are irresponsible people making irresponsible claims."

Others accuse activists of seeking a rationale for higher spending on existing federal welfare programs, thus avoiding difficult decisions on such pressing problems as drug use, out-of-wedlock births, illiteracy and welfare dependency. "To focus on hunger leads us away from what to me are the really serious needs of the poor today," says Dan McMurry, a sociology professor at Middle Tennessee State University, who says his research has turned up scant evidence of unmet food needs.

By common consent among activists and their critics, the leading source of the new attention on hunger is Brown, the best known of the hunger activists. HIs estimate of 20 million hungry people in the United States is frequently cited. A professor of nutrition policy, Brown has written prolifically, including a 1987 book called "Living Hungry in America." He also produced a widely publicized 1986 document listing the nation's 150 "hungriest counties," those where Brown says hunger is most severe.

Yet much of his work has come under attack for its purported methodological weakness. The General Accounting Office, which reviewed the report on hunger in the counties, found problems "sufficient to vitiate the overall integrity and credibility of the report." The study reached its results by finding the proportion of poor people in each county who were not using food stamps. These people, the report concluded, were hungry. Eureka County, Nev., came out as the hungriest county in the nation, largely because there are 2,000 people living there and only two of them used food stamps, even though incomes are generally low.

"They just drew their conclusions from statistics," says Jackie Cheney, the local head of eligibility and payments for the Nevada State Welfare Division. One of the county's main industries is ranching, she says; while incomes are low, the ranchers often raise their own food. They also provide room and board to their hired hands.

Moreover, Cheney says the mentality of county residents "is such that they'd rather die than accept any kind of welfare at all. Any programs we've tried to administer—not only state welfare but weatherization, fuel assistance and all that—if they think it's associated with welfare at all, they don't want anything to do with it. They take care of their own. That's the way they think."

The Physician Task Force stands by its claim. Research director Deborah Allen suggests that the welfare office may be ignoring need in the county. "Perhaps they haven't looked," she says. "It doesn't seem to me that there's no need." County Commissioner LeRoy Etchegaray insists, "Nobody seems hungry here. We're all fine."

Under fire and concerned about whether it was missing cases of hunger, the welfare staff examined its outreach efforts, including "itinerate runs" made by social workers—long drives over county back roads to find isolated families in need. Cheney says the staff concluded that everyone who wanted food stamps was getting them.

Brown's estimate of 20 million hungry Americans—one in 12 persons—is no less controversial. Critics call it grossly exaggerated. Again, nonparticipation in the food stamp program by eligible people serves as the standard for determining hunger. John Bode, assistant secretary of agriculture for food and consumer services, says the figure is "groundless." Even some hunger activists concede privately that the number may be overblown. Bode says such calculations would also yield 18 million hungry people in the late 1970s, when Brown says hunger was eliminated.

Nonetheless, as Brown often stresses in his book, the figure was broadcast on all the major network news programs, and Brown himself appeared frequently on television. His figure continues to be cited widely, as is his other work. He consulted with NBC on a prime-time drama last year called "A Place at the Table," which showed children giving brown-bag lunches to hungry classmates. NBC provided information supplements—drawn largely from activist literature—for public schools, encouraging teachers and parents to take action against hunger. But the special, critics say, did not mention the $3.7 billion National School Lunch Program, which feeds 24 million children in 95 percent of the nation's schools. An NBC spokesman said it was not "germane" to the issue.

Brown's research also inspired Hands Across America, a May 1986 charity event that netted $15 million to feed hungry Americans, once organizers paid $14 million in costs. The event was sponsored by USA for Africa, the celebrity group that raised money for famine relief in Ethiopia.

Aside from Brown's work, activists cite other reports as evidence of epidemic hunger. One is a U.S. Conference of Mayors survey showing an 18 percent rise in emergency food demand last year. "Unfortunately, the data presented are of unknown and suspect quality," wrote Peter Rossi, a University of Massachusetts demographer. "The prudent assessor must simply set aside the report as a credible document."

Roundly criticized as well was a study released by Congress' Joint Economic Committee, purportedly showing that most new jobs pay poverty wages. It is often cited as evidence of growing hunger.

Activists defend their numbers. "I don't think anyone really knows exactly how many people are hungry," says Fersh. "The bottom line is that there clearly are millions of people hungry in America. . . . Sophisticated academics can always attach methodologies, but as you get close to the reality, there's a unanimity of opinion as to what's real. Sometimes if it looks and feels like hunger, it really is."

The crux of the debate, in the view of those conducting it, boils down to a matter

of definition. Everyone experiences hunger; it is an extremely subjective, and now highly politicized, term. Dr. Daniel Miller, a medical epidemiologist in the Nutrition Division at the Centers for Disease Control, says the definitional problem poses a real barrier to getting a fix on hunger's extent. "It's difficult to talk about trends when you're not even necessarily talking about the same thing over time," says Miller.

"We've grappled with the hunger issue for several years," he says. "How do you quantify it? What's a valid method of objectifying it, so that we can measure it and compare communities over time?"

At one end of the spectrum are those who see hunger as undernutrition, which yields such measurable evidence as thinness. Closer to the middle are those whose measure is the adequacy of the number of calories consumed over some period of time. Others define a hungry person as "someone who says they're hungry," says Miller. "There are groups that say that is a legitimate enough defnition of hunger."

Another frequently used definition is someone who, simply, is poor. By this description poverty is hunger. "The outward appearance to the world is that everything is rosy," says Philip Warth Jr., president of Second Harvest, one of the nation's largest food banks. "But the reality is that if you simply look at the income figures, you see that they cannot possibly afford food, clothing and shelter for themselves."

Activists often point to the growth of soup kitchens and food banks as clear indication of widespread hunger. "The preponderance of evidence is quite strong," says Robert Greenstein, director of the Center on Budget and Policy Priorities and chief of the Food and Nutrition Service during the Carter presidency. "There are so many studies showing increased requests for emergency food aid . . . that it is very hard to look at all that and not become persuaded that the problem has grown worse."

No one disputes that there are people in America who experience hunger. The debate is over hunger's frequency, its extent, its causes and, most important, whether the massive federal safety net—particularly the food stamp program—has been so damaged that it no longer meets the most basic of human needs.

Data Eat Away at Reports of Widespread Hunger

(Summary: Activists claim that the problem of hunger in America is getting worse, but nutrition statistics tell another story. The figures show that anemia among children is declining and that more poor children are obese than are underweight. Meanwhile, the activists point to the growth of food banks as evidence that more are hungry than ever before. Most elusive is agreement on defining hunger)

Activist Larry Brown of the Physician Task Force on Hunger in America tells in a recent book of his extensive and highly publicized travels around the country, during which he opened the refrigerators of the poor and asked them what they ate, whether they went to bed hungry or went without food so that their children could eat. Brown's conclusion was that hunger is epidemic: And he went much further. He said he "verified reports of Americans suffering from severe malnutrition, . . . adults and children literally dying from starvation [and] suffering severe wasting."

No measures of hunger exist. But the health statistic commonly connected with nutrition—anemia, underweight and infant mortality, for example—do not seem to support his claims.

Since 1973, the Nutrition Division of the Centers for Disease Control in Atlanta has operated the Pediatric Nutrition Surveillance System, which collects data on participants in the Women, Infants and Children federal food program. By following participants, the system tracks those at highest risk of malnutrition, although analysts caution that it is missing poor children who do not get into the WIC program. Nonetheless, by general agreement it is the best continuous survey available.

The most striking result from the data over the past 10 years is the steady, sharp decline in child anemia, one of the health statistics most closely related to nutrition. Dr. Ray Yip, a medical epidemiologist at the Centers for Disease Control, says that among poor children, anemia is down 50 percent, although its prevalence is still twice as high as among wealthy children. Moreover, anemia rates among children visiting WIC clinics for the first time, whose health would not have been affected by the program, showed similar declines, although their anemia rates were higher than among the food program participants.

While poor children's anemia problems remain quite serious, says Yip, "there's something happening to the iron nutrition in the U.S. that's making things better, at least for low-income children."

The WIC data also track children's weight in relation to their height, and from this it is possible to compare the incidence of underweight or obesity with that in the population as a whole. To make the comparison, the general population is broken down according to percentiles. If a person is in the 5th percentile, his weight relative to height is lower than 95 percent of the population's; this weight-to-height ratio is defined as the cutoff point describing those who are seriously underweight. Likewise, if one is in the 95th percentile, only 5 percent of people are heavier relative to their height, and this is the cutoff point for those who are described as seriously obese. Ratios for children in the Women, Infants and Children program are then compared against these standards.

The data show that the incidence of obesity is almost twice as high as the incidence of underweight among children in the federal food program, and that underweight is actually less common among these poor children than in the population as a whole. The percentage of poor children considered underweight has fallen from 4.2 percent in 1974 to 3.9 percent in 1987, a possibly insignificant decline but nonetheless below the rate for the population as a whole. Broken down by race, 3 percent of white children in the federal program are below the 5th percentile, while 4.1 percent of blacks and 6.5 percent of Hispanics are below that level.

Obesity rates of children in the federal food program, by contrast, are well above normal distribution: 6.8 percent of whites, 9.2 percent of blacks and 10.7 of Hispanics come in above the 95th percentile. "Obesity is becoming a shattering problem in this country," says George Graham, professor of human nutrition and pediatrics at Johns Hopkins University. Obesity is extremely prevalent among poor women. The cause, says Graham, is not higher caloric intake; middle-class women do eat better, but they also exercise more. Furthermore, insufficient protein consumption does not, as is commonly believed, cause obesity, says Graham. "If you're not getting enough protein, you do not [necessarily] get obese. It's a terrible fraud to let these people believe that that's their problem."

Hunger activists often suggest that diet is the main influence on the nation's health statistics. Robert Greenstein, director of the Center on Budget and Policy Priorities, cites hospital reports showing increasing numbers of children with nutritional problems. Brown, referring to health statistics in his book, says, "What it all comes down to is food."

Others think the matter is more complicated. The Centers for Disease Control list four categories of risk that can lead to the failure of a child to achieve or maintain normal growth: organic disease, such as heart disease; prenatal factors influenced by behavior, such as intrauterine growth retardation that may result from maternal cigarette smoking or alcohol use; home and environmental factors, such as maternal inexperience or a "disturbed mother-child interaction", and program participation factors. Examples of the latter "that have been suggested but as yet have to be confirmed," according to the centers, include inadequate coverage of high-risk people by programs such as WIC or food stamps.

"We've seen a lot of children with fetal alcohol syndrome that just never grow up after birth," says Dr. Daniel Miller, a Centers for Disease Control medical epidemiologist. Some malnourished children are victims of unwitting teenage mothers, others of child abuse and neglect. Miller says causes also include "a whole group of chronic illnesses that would predispose a child to not growing well to begin with."

As activists say, some children are admitted to American hospitals with undernutrition. "There's no question about that," says Dr. Fern Hauck, also a medical epidemiologist at CDC. "But again, what is the cause? A lot of the kids that get admitted to the hospital are not admitted necessarily because of lack of food."

Research under way at the centers may soon shed more light on malnutrition and answer many questions about its causes. "We want to be able to separate out people truly lacking food from those undernourished for other reasons," says Hauck.

"You can't look at trends if you don't know what you're comparing, and that's been the difficulty with a lot of the previous surveys," she says. "Questions such as, 'Do you send your child to bed hungry at night?' That's a difficult question. It's certainly more emotional and poignant, but it doesn't really tell the whole story. What does that mean? Maybe they're hungry because they got 2,500 calories when they're used to getting 3,000. It doesn't necessarily mean they're undernourished. It could mean that. That's why we want to use an outcome that's measurable, as opposed to saying 25 percent said they were hungry. Is that valid? You just don't know."

Infant mortality rates are probably the most troubling of the health indicators. Brown calls them "a ghastly manifestation of an epidemic of hunger." The United States ranks 18th among industrialized countries in infant mortality, and the rate of infant death among blacks is almost double that of whites, the component that makes the United States rank so poorly overall. Furthermore, the rate of decline in U.S. infant mortality has slowed sharply in recent years. Both facts, activists contend, are proof of growing hunger.

Again, however, interpretation of the statistics is a subject of dispute. Advances in

medicine's ability to save infants of extremely low birth weight were primarily responsible for the rapid decline in infant mortality during the 1970s, according to Joel C. Kleinman, director of the Division of Analysis at the National Center for Health Statistics. In the 1980s, that ability may be approaching its limits. Hunger activists reply that were it not for medical advances, the infant mortality rate would probably be rising, given rampant hunger. "We think the progress is being slowed by the fact that there are increasing numbers of mothers and kids who don't get the nutrition they need," says Robert Fersh of the Food Research and Action Center, one of the leading hunger activist lobbies.

The leading cause of infant mortality in the United States is low birth weight, which maternal nutrition can influence. But during the rapid decline in infant mortality in the 1970s and its slowdown in the 1980s, there was very little change in the proportion of infants of low birth weight. This makes it unlikely, says Kleinman, that food had much to do with either the 1970s decline or the 1980s slowdown.

As with other health problems, many other factors influence low birth weight—maternal smoking, for example. Single mothers, for reasons that are unclear are more likely to deliver underweight babies. Kleinman finds little convincing evidence that maternal nutrition is strongly related to the incidence of very low birth weight in the United States. While malnutrition is the leading cause of low birth weight in poor nations, adds Graham, premature birth is primarily to blame in the United States, and it has little to do with food.

In analyzing health data, experts caution that rates of decline inevitably slow as they approach zero, a statistical truism unrelated to nutrition. Furthermore, the inclusion of disproportionate shares of recent immigrants, who often do show signs of malnutrition, skews many health surveys.

Perhaps most important, Graham warns that using the terms "stunting" and "wasting," as Brown and others frequently have, to refer to American children who fall below the 5th percentile in height for age and weight for height is "totally inappropriate." Stunting and wasting commonly refer to the effects of severe malnutrition in very poor nations, instances of which are extremely rare in the United States. Moreover, by definition, 5 percent of all children fall below the 5th percentile. By the activists' use of the term, Asians are the most stunted group in the United States.

In his book, Brown describes widespread hunger in El Paso, Texas. Upon hearing of Brown's work, Dr. Laurance N. Nickey, director of the El Paso City/County Health District, polled all the pediatricians in El Paso, including those at R.E. Thomason General Hospital, which cares for indigents, to see if they had found cases of undernutrition. He says none of the pediatricians could recall ever having seen an undernourished child, except as an effect of chronic disease.

Dr. William J. Nelson, president of the El Paso County Medical Society and a professor at Texas Tech University, which runs Thomason General, says that while some recent illegal immigrants may be experiencing undernutrition, it is usually temporary.

If there are chronically hungry people in El Paso, "they've escaped the system totally, and where they are, I don't know," says Nickey. "I'd lke to find out." He says El Paso has a plethora of public and private health and welfare agencies that offer aid and are staffed with dozens of social workers. "If there are people that are going hungry in this community, we would like to know who they are so that we can extent our help," he says. "It's as simple as that. And we will extend it, period. Now we do have some problems with water and sewage out this way, and if they'd like to lobby for that, we'd be happy to have them send some money down this way."

Private charities such as food banks, says Nickey, are part of the system that ensures that the needy will not go hungry. Yet it is the spectacular growth of food banks and soup kitchens since 1981 that hunger activists point to as hunger's clearest symptom, overwhelming medical evidence. Food bank growth has skyrocketed, beginning with the 1981-82 recession and continuing ever since. "It's no accident," says Fersh. "It's not just some unrelated event that we have reports of tremendous increases of people going to soup kitchens and food pantries throughout this country. One has to be, I think, obtuse or frankly into complete denial not to see that there's some correlation."

Food banks distribute surplus government and supermarket food to the poor. Supermarkets donate tons of food annually—dented canned goods, for example, or produce and dairy products that are close to their pull dates. The federal government has donated the equivalent of 20 percent of all processed cheese sales in the nation. Second Harvest, one of the nation's largest food banks, now distributes 387 million pounds of food a year.

No serious studies of the food banks' clientele have been undertaken that would prove or disprove a link between food bank growth and hunger. Richard Freeman, a Harvard economist affiliated with the National Bureau of Economic Research, says looking at the growth in food banks would lead one to believe hunger has grown. The problem, he says, is that this is not a real measure of hunger, because these people are obviously getting some food.

As people grow poorer, they economize. If state welfare benefits have not kept up with the cost of living, for example, recipients may turn to private charities to supplement their food budgets. The catch, says Freeman, is that if a food bank "has a lot of food to provide that's free, and people are getting poorer, they will go and make use of it. That doesn't mean they're really hungry. It means they're poor. If I announce that we're going to have free cheese tomorrow, a lot of people will stand in line and get free cheese. They may not be hungry people, they may just be poor people, for whom that cheese will save them money that they otherwise would use in the store, and permit them to live their lives a little bit better."

Unclear too is whether demand alone has sparked food bank growth. Tax code changes affecting food donations, as well as the growing popularity of volunteer work and a reawakening of private charity in general, may have had some influence. Moreover, say critics of the hunger lobbies, private charity is not inherently inferior to government programs. Fersh disagrees. He says the food bank system "is really inefficient. The whole thing could be eliminated if the food stamp program were adequate."

Dan McMurry, a Middle Tennessee State University sociology professor, has roamed the country investigating hunger, often posing as a homeless man. He found that in Nashville, charitable organizations serve 41 groups meals each day. "I gained 4 pounds in five days just wandering around trying to find out what services were available," McMurry says. "There's a world of food out there."

He found many problems other than hunger, such as illiteracy and skill obsolescence. "But that's a different agenda," he says. "That's not hunger. So we need to talk about that. To continue calling these individuals hungry after they are sufficiently fed is to ignore their other pressing and much more important needs."

Trying To Digest the Full Impact of Food Stamps

(Summary: One in seven Americans gets food stamps. As the nation's main defense against hunger, they are available to anyone who is poor. But many people in need are not getting them, according to some hunger activities and congressmen, who say that cuts by the Reagan administration have led to widespread hunger. The White House and many experts deny that federal changes have had such an effect)

The food stamp program, the largest of 13 federal nutrition efforts that this year will cost more than $20 billion, is the first line of defense against hunger in the United States. Food stamps reach one in seven Americans during the course of a year. They are available to anyone who is poor, one does not have to be a parent, or old, or unemployed to get them. They are pegged to food costs, and unlike most welfare programs, the benefit is entirely federally funded.

Hunger has breached that defense, propelled by a Reagan administration onslaught, say activists—and increasingly, congressmen. "We discovered an epidemic born out of political ideology and government policy," writes Larry Brown, a leading hunger activist, "a man-made disease caused by leaders who . . . purposely dismantled programs that had been successful at preventing widespread hunger in our nation for years. . . . Families who had been living on the economic margins fell through the tattered safety net and landed in the soup kitchens of America."

Brown and others contend that the administration slashed spending on food programs and continues to erect roadblocks to cut the poor off from food stamps and other programs. The administration vehemently denies these charges.

In 1981 and 1982 the White House did spearhead changes in food programs that resulted in a drop in food stamp spending—from $10.3 billion in 1981 to $10.1 billion in 1982. In 1983, spending rose to $11.8 billion as a result of the recession. Today, food spending after adjusting for inflation is up 8.5 percent since 1982, the first fiscal year influenced by the Reagan administration.

The White House denies that these changes had much effect on most food stamp recipients, and many experts agree. For example, the administration limited eligibility for food stamps to people with gross incomes at or below 130 percent of the official poverty line. In the past, people with higher gross incomes could use large expense deductions to make themselves eligibile on the basis of net income. The Food and Nutrition Service at the Department of Agriculture, which runs the programs, maintains that the change helped target food stamps to the poorest households.

An Urban Institute study of the 1981 and 1982 food stamp changes found that their effect on recipients was much smaller than

had been thought. It said its findings were "in direct conflict with other analyses that have implied a far more dramatic and negative effect on food stamp recipients."

Maurice MacDonald, a food stamp expert affiliated with the Institute for Research on Poverty, a leading poverty research group at the University of Wisconsin, sees no basis for claims that the food stamp program was slashed. Such claims, he says, use as their basis projected spending increases by the Carter administration, which had also wanted to expand several of the child nutrition programs. The Reagan administration halted that expansion.

The administration did sharply reduce food subsidies under the National School Lunch Program to children from upper- and middle-income homes, most of whom must now pay the full cost of their school meals. The federal government still spends about $500 million a year subsidizing school lunches for children whose family income is above 185 percent of the poverty level, or about $20,000 for a family of four. And it continues to fully or partly subsidize lunches for poor children.

These two changes, limiting eligibility in the food stamp and school lunch programs, constitute the substance of the cuts in 1981–82. Other programs have expanded sharply, particularly the nutrition program called Women, Infants and Children. Annual spending is up from some $948 million in 1982 to nearly $1.7 billion this year. The program serves one out of four babies born in the United States.

In 1981, the Reagan administration also began giving away to the poor and to charitable groups the government's mountainous stocks of surplus farm products, particularly cheese. These stocks had accumulated as a result of subsidizing producers and were costing millions to store. The move sparked sharp attacks. Many contended that the giveaways were Ronald Reagan's equivalent of Marie-Antoinette's legendary statement, "Let them eat cake."

Critics also complained that cheese is high in fat. Yet the giveaways became so popular that in 1983 Congress decided to require them. Now the stocks have run low, and some activists say the giveaways are one of the most important bulwarks against hunger and that the government should start buying commodities to distribute.

The main quarrel, however, is with the food stamp program. Activists say participation is too low. Robert Fersh, executive director of the Food Research and Action Center, says the administration has erected bureaucratic barriers that deny food stamps to eligible people, causing them to go hungry. Yet food stamp participation has remained stable since the late 1970s. Sixty percent of eligible households and 67 percent of eligible individuals get food stamps—much higher than the approximately 50 percent participation of the mid-1970s. The jump followed a Carter administration rule change making participation easier.

Still, asks Philip Warth Jr., presidnet of Second Harvest, a large food bank network, "Who's doing anything to see that the other 35 percent is being served?" For example, most agree that, like other government paperwork, food stamp forms are long, complex and difficult to understand. Applicants can get help filing them out, but the Reagan administration has come under heavy fire for ending a national program that required states to try to get more people to enroll. Nonetheless, when the program ended, participation rates held steady. Many experts believe that the food stamp program is widely available and very well-known—in fact, probably the best-known of all welfare programs.

Activists point out, however, that the government penalizes states that issue food stamps to ineligible people but does not penalize states for underissuing stamps. The result, Fersh says, is that when in doubt about eligibility, states play it safe, delaying or denying benefits to people for fear of sanctions by the federal government if they grant them erroneously.

John Bode, chief of the Food and Nutrition Service, calls the charge a red herring and says states with the highest rates of overissuance also have the highest rates of underissuance. The underpayment error rate is about 8.1 percent, says Bode. Overpayment costs are about $900 million annually, he says.

Full participation is in any event unlikely. Some people feel stigmatized using food stamps. More significant, because benefits decline as a person's income rises toward the eligibility cutoff, the more income a person has, the less likely he is to go to the trouble of obtaining the stamps. For example, someone entitled to $100 a month in food stamps in far more likely to participate in the program than someone entitled to just $10 a month.

Moreover, some people do not report all their income or assets and so appear eligible even though they are not. Sometimes looking at income figures underestimates assets; an elderly person with little income may have a large savings account, for example. Activists argue that these asset limits should be raised.

They also sharply criticize what they say is a woefully inadequate level of benefits, a level that permits people to go hungry. Food bank operators confirm widespread complaints that stamps do not last through the end of the month, when demand for food bank assistance rises sharply. But food stamps have never, since their inception, been intended to pay for an entire month's food, except for those households that have no other income. Poor households have always been expected to spend 30 percent of their own income on food.

Still, activists argue, the benefits are too low. Since the 1970s, benefits have been based on the Thrifty Food Plan, a model food budget that the administration argues is adequate. "My feeling is that the benefit levels are not adequate, but that's a judgment call," Robert Greenstein, a Carter administration chief of the Food and Nutrition Service and now director of the Center on Budget and Policy Priorities.

Adds Fersh of the Food and Research and Action Center. "I am not one of those people who will tell you that food stamps should last throughout the month for everybody. There is a misconception about that among the public. But that alone does not argue [food stamp benefits are] sufficient, given the demands on people's income. When you look at income levels, one would understand very easily that people living at those levels would be at risk of hunger."

Benefits from many cash welfare programs, such as Aid to Families with Dependent Children and unemployment insurance, in which benefits are set and funded in part by the states, have fallen sharply since the mid-1970s.

Housing costs for the poor in many parts of the country have risen. The number of poor Americans increased sharply during the 1982–83 recession, and while the poverty rate has been falling ever since, its decline has been slower than in past recoveries.

All of these things combined have "squeezed the amount of income that low-income families have available for food purchases," says Greenstein. Looked at this way, hunger is part of the broader question of how to address poverty.

Food stamps are essentially an income transfer. They allow poor people to use money they would normally spend on food for other needs. Some social policy analysts argue for converting the food stamp program to cash assistance, so that the poor could decide for themselves how to spend their money. The idea so far has little political appeal; however paternalistic, giving food to the poor is far more attractive, in the eyes of many, than giving cash, even if the effect is the same.

Food stamps are, therefore, part of the wider and more perplexing question of how the federal government can best address poverty. The debate under way is over whether to increase spending on that system or to change it and, if so, how.

For now, the views of the activists on expanding the food stamp program in order to combat poverty are finding a receptive audience in political circles. Sen. Patrick J. Leahy, the Vermont Democrat who heads the Agriculture, Nutrition and Forestry Committee, says he intends "to begin an effort, not just for this year but into the next Congress and the next", to "focus attention on the hunger in America. We have a moral obligation to find the solutions." The House and Senate budget conference recently agreed to a $1.4 billion increase in federal food programs over the next three years.

But targeting the programs for increases on grounds of widespread hunger amounts to a failure to address more difficult questions on overall welfare policy, in the view of some. Says Sheldon Danziger, director of the Institute of Research on Poverty, "What we've learned is that even with a healthy economy there are a variety of groups that are quite vulnerable and that a whole range of policies needs to be considered if we're going to significantly reduce their poverty rates.

"It's a very different thing to talk about what to do for children living in female headed families, for whom you have to talk about welfare reform, workfare reform, child support reform, education reform, family planning," for example, than it is to decide how to help the elderly or the working poor. "I do not believe," he says, "that the answer is to be found in expanding a single existing program."

THE SUPERCONDUCTING SUPER COLLIDER IN ILLINOIS

Mr. DIXON. Mr. President, for a long time here in the Congress, there have been discussions about investing a substantial amount of money in a new superconducting super collider, a thing that many of us believe would be a very fine investment by the United States in the future of this country's progress, in space, in science, in medical care, and in many other important undertakings.

I am pleased to note, Mr. President, first of all, that my State, the State of

Illinois, is one of seven finalist States under consideration by the Department of Energy in connection with the establishment of a superconducting super collider in one of the States in this great country, and I think it entirely appropriate, Mr. President, not only that we be one of seven finalists, but because of the presence of Fermilab in the State of Illionis, Mr. President, I think it is entirely appropriate and in the interests of this country that the superconducting super collider be located at Fermilab in my State.

I want to call the attention, Mr. President, of my colleagues in the Congress and particularly those in the U.S. Senate, to a very fine article that appeared today in the Chicago Tribune. This acticle was written by Mr. Jon Van, the science writer for the Chicago Tribune. It is entitled "In Making Beams, Fermilab Shines; Proton Creation Puts Facility Ahead in International Horse Race."

Mr. President, I would like to read from this article. It says:

Physicists at Fermilab have pulled into first place in an international scientific race of subatomic dimensions by producing the world's brightest beam of protons racing around a 4-mile track.

The Tevatron physics machine at the laboratory near west suburban Batavia established itself as the world's most powerful atom smasher, jubilant scientists said. It beat the old record, held by Europeans at a physics center near Geneva, by 25 percent on Friday and eventually could produce proton beams up to twice as bright as anything physicists have seen.

Mr. President, I ask unanimous consent that the article be reproduced in the CONGRESSIONAL RECORD in full.

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

IN MAKING BEAMS, FERMILAB SHINES—PROTON CERATION PUTS FACILITY AHEAD IN "INTERNATIONAL HORSE RACE"

(By Jon Van)

Physicists at Fermilab have pulled into first place in an international scientific race of subatomic dimensions by producing the world's brightest beam of protons racing around a 4-mile track.

The Tevatron physics machine at the laboratory near west suburban Batavia established itself as the world's most powerful atom smasher, jubilant scienists said. It beat the old record, held by Europeans at a physics center near Geneva, by 25 percent on Friday and eventually could produce proton beams up to twice as bright as anything physicists have seen.

"It's a real international horse race, and we're really pulling ahead," said David Finley, head of Tevatron at Fermilab.

Brightness in this context means that the scientists are able to pack protons, the key components from the nucleus of an atom, into a dense and extremely narrow beam. They also do this with negatively charged protons of antimatter—a tricky process because antimatter protons disintegrate at once if they touch any sort of regular matter.

The two beams are spun in opposite directions around Fermilab's 4-mile Tevatron track 55,000 times a second, suspended within a strong magnetic field until they are smashed into each other. The collisions break the protons and antiprotons into even smaller elementary components, providing clues as to what particles actually make up atomic components.

Extremely powerful magnets are used to concentrate the protons and antiprotons. Keeping them within a space less than one two-thousandths of an inch across as they hurl around the ring is an exquisitely difficult feat.

"If anything goes wrong, it just shuts down and you have to start all over again," Finley said.

A lot of things can go wrong. The magnets operate about 4 degrees above absolute zero and require an elaborate cooling system using liquid nitrogen and liquid helium.

"If one water pump fails or the air conditioning breaks or someone just bumps one component while this is operating, it can cause a shutdown," said Finley.

By packing the beams with more and more protons and antiprotons, scientists increase the chances that experimental colisions will produce the rare events that give them fresh insights into elementary particles.

Scientists theorize that all of nature is built with just a few kinds of particles they call hadrons and leptons. Of specific interest now are a class of hadrons called quarks. Physicists think there are six kinds of quarks, but they have been able to identify only five. Part of the international competition is to be first to find the sixth.

Another aspect of this contest is to better understand the forces of nature such as gravity, electromagnetism, the weak force governing radioactivity and the strong force that holds atoms together. Looking for evidence of particles that moderate these forces is another goal of the work at Fermilab and at CERN, the European center for nuclear research in Geneva.

The atom smasher in Geneva is being upgraded to produce brighter and better beams to try to keep pace with Fermilab, Finley said. "So for the next six months, we really are faced with very vigorous competition to stay No. 1."

The Geneva center has led the world in this competition for most of this decade, in large part because equipment at Fermilab was not working while scientists tried to make it more powerful.

Friday's achievement was a key step in proving that Tevatron can operate as designed, making the long downtime for improvements seem worthwhile to researchers.

Mr. DIXON. I simply want to say in conclusion, Mr. President, that I have had the distinct privilege over a period of years of inviting colleagues of mine in the U.S. Senate to tour Fermilab and my distinguished colleague on the House side, Representative LYNN MARTIN, the distinguished Congressperson from Rockford, IL, who is, as you know, a Republican leader in the House, has also had the privilege of bringing Members from the House out to Illinois to look at Fermilab.

It is a tremendous institution, Mr. President. Out in the middle of a rural area, in close proximity to Chicago, IL, which as you know has two great airports, all the fine universities and scientific personnel that we have in the area; and so, Mr. President, Fermilab is especially well suited to be the site for the superconducting super collider. And, Mr. President, as the Secretary of Energy and this administration are beginning to take the final look at the location for the superconducting super collider, I would recommend, Mr. President, to the attention of the Secretary of Energy and others in the administration and those in the Congress in both Houses who will make those final important decisions, the examination of this article which shows that Fermilab, today, leads in the world, Mr. President. Fermilab, today, has all the land, all of the necessary equipment, all of the proximity to a great urban center and universities and the transportation facilities and other important considerations that make it the appropriate home for the superconducting super collider.

NEW JERSEY BLUEBERRIES

Mr. LAUTENBERG. Mr. President, today Senator BRADLEY and I are pleased to be able to share a tray of freshly picked New Jersey blueberries with each of our Senate colleagues.

We in New Jersey are proud of our blueberries. Our State's blueberry farmers produce about 40 million pounds of these berries annually, which generate over $30 million for the State's economy. And blueberry producers do it all on their own—without the benefit of Government subsidies.

Blueberries offer a combination of great taste, nutrition, and versatility. They can be eaten at any time of day: alone, on cereals and ice cream, and in muffins, waffles, pies, and cobblers.

They also have quite a history. The wild blueberry has existed for over 13,000 years and has been used not only for food, but as medicine.

The wild blueberry plant, though, was tamed and cultivated in the Garden State—New Jersey—in 1906. Through breeding and crossbreeding the best of the New Jersey's berries, Elizabeth White and Frederick Coville developed berries that were large, sweet and hardy. Their work led to the first commercial harvesting of what is now New Jersey's second most profitable fruit crop. New Jersey is now first in the Nation in the production of fresh cultivated blueberries.

One reason for New Jersey's success in the blueberry market is the research conducted by the Rutgers University Center for Cranberry and Blueberry Research. Research performed at the center has helped improve efficiency in blueberry production, and also enhanced the quality of the berries themselves.

I have been working hard to provide adequate funding for the Rutgers

Center and last year succeeding in increasing funding from $90,000 to $260,000. This year, I am hopeful that Congress will approve a further increase of almost $500,000. With these additional resources, the facility should become a truly national center.

I would like to thank the New Jersey Blueberry Association and the Jersey Fresh Program for their assistance in organizing this promotion.

PROF. HERBERT ROSS BROWN

Mr. COHEN. Mr. President, I would like to take this opportunity to honor Prof. Herbert Ross Brown, a resident of Brunswick, ME, and distinguished member of the faculty at my alma mater, Bowdoin College, who passed away on July 26. Professor Brown was a legend on the Bowdoin campus, revered as a teacher and respected as a leading member of the Brunswick community. All of us who have ever been associated with Bowdoin College will miss him dearly.

As an author, editor, and literary historian, Herbert Ross Brown was honored on countless occasions. He received the Bowdoin Alumni Council's Award for special service and devotion to the college, and was awarded honorary degrees by Bowdoin, Lafayette College, Bucknell University, and the University of Maine. He authored a variety of works and served for 40 years as the managing editor of New England Quarterly, a prestigious review of New England life and letters.

Professor Brown was widely known for the active role he played in both town and State affairs. The Maine Senate passed a resolution in 1965 commending him for his "outstanding contribution to welfare and progress in the State." In 1971 he was named "Citizen of the Year" by the Brunswick Area Chamber of Commerce, and he was later honored by the Maine State Commission on the Arts and Humanities for his outstanding cultural contributions.

Professor Brown was a man who rarely missed a class during his long career at Bowdoin. In 1971, with casts on both legs, he delivered his Shakespeare lectures from the living room of his house. Impressed and delighted by his enthusiastic approach to teaching, the campus newspaper, the Bowdoin Orient, commented, "we've never known a finer man, a more dedicated teacher."

My friend, A. Leroy Greason, Bowdoin's very capable president, has described Professor Brown's special presence at the college:

> In the course of his long career at Bowdoin, there were few roles that Herbert Ross Brown did not fill—and fill with distinction. He was not only a scholar and teacher of considerable fame, but on all great occasions he was the voice and the pen of the college. No one has served Bowdoin better.

Herbert Ross Brown was a tireless educator, a model citizen and an inspiration to all of those who were fortunate enough to work with him. While we are saddened that he is no longer with us, we are confident that his influence on the college and community will be felt for years to come.

Mr. BRADLEY. Mr. President, blueberry season is upon us once again in New Jersey. Over the next few weeks, people across the country will begin to enjoy these plump, tasty morsels, which will be used to complement pies and muffins, or will just be eaten by the handful. And while today bueberries are grown around the country—Michigan, North Carolina, Florida, Oregon, and elsewhere—I remind my colleagues that it was in New Jersey that the cultivated blueberry was first developed.

The year was 1906 when Elizabeth White pioneered the cultivation of blueberries in the heart of the New Jersey pinelands. She turned to local farmers and woodsmen to locate the best wild blueberry cuttings, and she honored their efforts by naming many of the cultivated hybrids after the New Jerseyans who discovered them. According to Miss White, the keystone of the cultivated blueberry was the Rubel, named for Rube Leek of Chatsworth, NJ.

Today's blueberries, which are so enjoyed by all Americans, developed through the crossbreeding of these original varieties. It is with great pride that I hold up the cultivated blueberry as a true fruit of New Jersey industry and initiative.

Mr. President, Senator LAUTENBERG and I will be sending around to our colleagues today some of these fine New Jersey blueberries. I wish them good eating.

UNITED STATES-INDO RELATIONSHIP IN THE COMING YEARS

Mr. HATFIELD. Mr. President, shortly before our last recess, the Senate passed the foreign operations appropriations bill, H.R. 4637.

Today I want to introduce into the RECORD a letter which I received from Ambassador Kaul, the Ambassador of India, which represents his Government's viewpoint on some of the committee's report language which accompanied the foreign operations bill. In addition, I want to bring to the attention of my colleagues an important speech which Prime Minister, Rajiv Gandhi delivered June 9, 1988, on the subject of nuclear disarmament and nonproliferation. I feel the Ambassador's letter, and Prime Minister Gandhi's speech shed valuable light on the political dynamics of South Asia, on the nuclear and security questions involved in that region, on India's relationship with Pakistan, and most important, this material allows each Senator the opportunity to evaluate India's positions on these important subjects as he or she evaluates United States foreign policy in that area of the world.

India's 800 million people and its government are major players in the global effort to bring and maintain world peace without such a peace being built on the shaky and completely untrustworthy foundation of nuclear weapons, and the United States must respect that fact.

The United States-Indo relationship will take on greater and greater significance in the coming years, and I am hopeful the next administration and the 101st Congress will give it the attention it deserves. I ask unanimous consent that both the letter and the speech to which I referred appear in the RECORD at this time.

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

AMBASSADOR OF INDIA,
Washington, DC, July 12, 1988.

Hon. MARK O. HATFIELD,
U.S. Senate, Washington, DC.

MY DEAR SENATOR HATFIELD: I have seen the references to India in the Committee Report accompanying the Senate Foreign Operations Export Financing and Related Program Approriations Bill for FY 89, No. HR 4637, which passed the Senate on 7th July, 1988. It is unfortunate that these references were made, as they do convey a one-sided and inaccurate view of India's policies. I am aware of your interest both in India and in promoting better Indo-US relations, and therefore would like to place our views on these references before you for your information:

(i) India has never believed that nuclear weapons proliferation can be ensured by adopting a regional approach. Proponents of the "regional" approach for South Asia ignore the threat created by the presence of nuclear weapons on our northern borders, particularly the fact that these are subject to *no* restraints whatsoever. No nuclear weapon has yet been invented which observes strict national or even regional boundaries while detonating. Therefore, we believe in a comprehensive approach to this problem.

As an indication of the seriousness with which we view the issue of nuclear weapons proliferation, our Prime Minister recently proposed at the United Nations a broad and attainable action plan with the objective of creating a nuclear weapons-free world by 2010 AD. This plan endeavours to address the concerns that both our countries have on this important subject, as well as on other disarmament issues. It is our hope that this proposal will be studied seriously, so that there is some forward movement in our respective efforts to attain a common objective. I enclose the proposal for your ready reference.

India's bonafides on nuclear proliferation, which have been questioned in the Committee's report, are impeccable. We were one of the original sponsors of the NPT, which we did not sign because it did not devolve equal responsibility for non proliferation on nuclear weapon States. Since its inception, we have cooperated actively with other coun-

tries in the IAEE. In fact, we are on the Board of Governors of the IAEA.

Our commitment to a global approach made us join like-minded countries from five continents in the Six Nation Initiative for Disarmament, the first Summit meeting of which was held in India in 1985. Any desire to make us now adopt a piecemeal approach to this issue is therefore unrealistic. Our position is based on the principle of recognizing the equal responsibility of all countries in confronting nuclear weapons proliferation—be these nuclear-weapon or nuclear-threshold or completely non nuclear States.

In the case of India, specifically, since our peaceful nuclear explosion in 1974, we have not conducted another such experiment. This speaks louder than words of our commitment to restraint. Such demonstrated restraint should be compared with the behaviour of the only other nuclear capable country in our region, Pakistan, which has been indicted by courts in your country of conscious violations of your Export Control Laws in its quest for a nuclear weapon. Further, it is a fact that while India's nuclear programme is open and managed by civilians, who are accountable to our Parliament, there is no such accountability on the part of Pakistan's nuclear programme, which is both clandestine and run by its military.

(ii) You may like to glance at the following table with reference to the Committee's concern on "the continuing military backup in India":

	Defence budget/ central budget (percent)	Foreign aid/ central budget (percent)	Military expenditure/ GNP (percent)	Per capita military expenditure
	(a)	(b)	(c)	(d)
India	15.6	7.0	3.81 (59)	$9 (111)
Pakistan	33.6	16.7	6.36 (36)	23 (84)

(a=CIA World Fact book pages 114, 191).
(b=Current estimates of national budget statistics).
(c=ACDA 1987 World Military Expenditure Arms Transfers).
(Figures in parentheses are world ranking by each variable).

Any expression of concern on India's defence expenditure should have taken into account the following facts:

That this expenditure is for the defence of a democracy of 800 million people; that it seeks to cater to India's legitimate defence needs through a long-standing programme of self-reliance; that geographically, India is the largest country in South Asia; and that foreign aid accounts for only 7 percent of India's budget resource mobilization. What is important is not the quantum of expenditure, but the percentage of national resources being spent on defence.

Further, India does not have any hegemonistic designs on her neighbors in South Asia. In 1985, at the First Summit of the South Asian Association of Regional Cooperation, our Prime Minister declared our commitment to the sovereignty and equality of our neighbours. However, you will appreciate that our Government has to assess our defence needs against the background of the wars our country has been forced to fight since we attained Independence in 1947, of the long land and sea borders we possess with as many as seven neighbours, of the security requirements of our far-flung island territories, of the extensive economic zone off our shores. These are legitimate inputs into defence planning, and voters in India expect their elected Government to defend these interests.

(iii) The reference to the introduction of "nuclear submarines" into our navy is factually misleading. What we have done is *lease* one nuclear powered submarine from the USSR into our Navy, which will be returned to the Soviet Union on completion of its 4 year lease. This training submarine does not carry nuclear weapons. Under the NPT, to which the USSR is a signatory, the transfer of nuclear propulsion technology is not banned to a non-NPT signatory. Any proliferation concerns have been met by sealing the reactor unit, and transporting the spent fuel back to the USSR under safeguards. The rationale for our going in for nuclear propulsion technology is the same as that advanced by other countries with extremely long coastlines—after all, we have island territories and a coastline of 7,000 kms to patrol and defend.

(iv) Similarly, we have given assurances that the surface to surface missile we recently testified is not for carrying nuclear warheads as we do not possess the same. The test should be seen against the background of our longstanding space and missile programme, which has been built indigenously by our large pool of skilled scientists—a pool surpassed only by your country and the USSR. This programme is open, and does not pose a threat to any of our neighbours.

I look forward to hearing from you.

Yours sincerely,

P.K. KAUL.

PRIME MINISTER RAJIV GANDHI'S ADDRESS TO THE THIRD SPECIAL SESSION ON DISARMAMENT OF THE UNITED NATIONS GENERAL ASSEMBLY

Mr. President, May I begin by extending to you our warmest felicitations of your election as President of this vitally important Special Session of the General Assembly? Our deliberations will benefit greatly from the wealth of your experience and your deep understanding of the issues before us.

2. We are approaching the close of the twentieth century. It has been the most bloodstained century in history. Fifty eight million perished in two World Wars. Forty million more have died in other conflicts. In the last nine decades, the ravenous machines of war have devoured nearly one hundred million people. The appetite of these monstrous machines grows on what they feed. Nuclear war will not mean the death of a hundred million people. Or even a thousand million people. It will mean the extinction of four thousand million, the end of life as we know it on our planet Earth. We come to the United Nations to seek your support. We seek your support to put a stop to this madness.

3. Humanity is at a crossroads. One road will take us like lemmings to our own suicide. That is the path indicated by doctrines of nuclear deterrence, deriving from traditional concepts of the balance of power. The other road will give us another chance. That is the path signposted by the doctrine of peaceful coexistence, deriving from the imperative values of nonviolence, tolerance and compassion.

4. In consequence of doctrines of deterrence, international relations have been gravely militarized. Astronomical sums are being invested in ways of dealing death. Ever new means of destruction continue to be invented. The best of our scientific talent and the bulk of our technological resources are devoted to maintaining and upgrading this threats and violence have become pervasive.

5. For a hundred years after the Congress of Vienna, Europe knew an uncertain peace based on a balance of power. When the balance was tilted—or, more accurately, when the balance was perceived to have tilted—Europe was plunged into an orgy of destruction, the like of which had never been known before and which spread to engulf much of the world. The unsettled disputes of the First World War led to the Second.

6. Humankind survived because, by today's standards, the power to destroy which was then available was a limited power. We now have what we did not then have: the power to ensure the genocide of the human race. Technology has now rendered obsolete the calculations of war and peace on which were constructed the always dubious theories of the balance of power.

7. It is a dangerous delusion to believe that nuclear weapons have brought us peace. it is true that, in the past four decades, parts of the world have experienced an absence of war. But a mere absence of war is not a durable peace. The balance of nuclear terror rests on the retention and augmentation of nuclear armouries. There can be no ironclad guarantee against the use of weapons of mass destruction. They have been used in the past. They could be used in the future. And, in this nuclear age, the insane logic of mutually assured destruction will ensure that nothing survives, that none lives to tell the tale, that there is no one left to understand what went wrong and why. Peace which rests on the search for a parity of power is a precarious peace. If we can understand what went wrong with such attempts in the past, we may yet be able to escape the catastrophe presaged by doctrines of nuclear deterrence.

8. There is a further problem with deterrence. The doctrine is based on the assumption that international relations are frozen on a permanently hostile basis. Deterrence needs an enemy, even if one has to be invented. Nuclear deterrence is the ultimate expression of the philosophy of terrorism: holding humanity hostage to the presumed security needs of the few.

9. There are those who argue that since the consequences of nuclear war are widely known and well understood, nuclear war just cannot happen. Neither experience nor logic can sustain such dangerous complacency. History is full of miscalculations. Perception are often totally at variance with reality. A madman's fantasy could unleash the end. An accident could trigger a chain reaction which inexorably leads to doom. Indeed, the advance of technology has so reduced the time for decisions that, once activated, computers programmed for Armageddon, pre-empt human intervention and all hope of survival. There is, therefore, no comfort in the claim of the proponents of nuclear deterrence that everyone can be saved by ensuring that in the event of conflict, everyone will surely die.

10. The champions of nuclear deterrence argue that nuclear weapons have been invented and, therefore, cannot be eliminated. We do not agree. We have an international convention eliminating biological weapons by prohibiting their use in war. We are working on similarly eliminating chemical weapons. There is no reason in principle why nuclear weapons too cannot be so eliminated. All it requires is the affirmation of certain basic moral values and the assertion of the required practical will, underpinned

by treaties and institutions which insure against nuclear delinquency.

11. The past few years have seen the emergence of a new danger: the extension of the nuclear arms race into outer space. The ambition of creating impenetrable defences against nuclear weapons has merely escalated the arms race and complicated the process of disarmament. This has happened in spite of the grave doubts expressed by leading scientists about its very feasibility. Even the attempt to build a partial shield against nuclear missiles increases the risk of nuclear war. History shows that there is no shield that has not been penetrated by a superior weapon, not any weapon for which a superior shield has not been found. Societies get caught in a multiple helix of escalation in chasing this chimera, expending vast resources for an illusory security while increasing the risk of certain extinction.

12. The new weapons being developed for defence against nuclear weapons are part of a much wider qualitative arms race. The development of the so-called "third generation nuclear weapons" has opened up ominous prospects of their being used for selective and discriminate military operations. There is nothing more dangerous than the illusion of limited nuclear war. It desensitizes inhibitions about the use of nuclear weapons. That could lead, in next to no time, to the outbreak of full-fledged nuclear war.

13. There are no technological solutions to the problems of world security. Security can only come from our asserting effective political control over this self-propelled technological arms race.

14. We cannot accept the logic that a few nations have the right to pursue their security by threatening the survival of humankind. It is not only those who live by the nuclear sword who, by design or default, shall one day perish by it. All humanity will perish.

15. Nor is it acceptable that those who possess nuclear weapons are freed of all controls while those without nuclear weapons are policed against their production. History is full of such prejudices paraded as iron laws: that men are superior to women; that the white races are superior to the coloured: that colonialism is a civilising mission; that those who possess nuclear weapons are responsible powers and those who do not are not.

16. Alas, nuclear weapons are not the only weapons of mass destruction. New knowledge is being generated in the life sciences. Military applications of these developments could rapidly undermine the existing convention against the military use of biological weapons. The ambit of our concern must extend to all means of mass annihilation.

17. New technologies have also dramatically expanded the scope and intensity of conventional warfare. The physical destruction which can be carried out by full-scale conventional war would be enormous, far exceeding anything known in the past. Even if humankind is spared the agony of a nuclear winter, civilisation and civil life as we know it would be irretrievably disrupted. The range, precision and lethality of conventional weapons is being vastly increased. Some of these weapons are moving from being "smart" to becoming "intelligent". Such diabolical technologies generate their own pressures for early use, thus increasing the risk of the outbreak of war. Most of these technologies are at the command of the military blocs. This immensely increases their capacity for interference, intervention and coercive diplomacy.

18. Those who do not belong to the military blocs would much rather stay out of the race. We do not want to accumulate arms. We do not want to augment our capacity to kill. But the system, like a whirlpool, sucks us into its vortex. We are compelled to divert resources from development to defence to respond to the arsenals which are constructed as a sideshow to great power rivalries. As the nature and sophistication of threats to our security increase, we are forced to incur huge expenditure on raising the threshold of our defences.

19. There is another danger that is even worse. Left to ourselves, we would not want to touch nuclear weapons. But when tactical considerations, in the passing play of great power rivalries, are allowed to take precedence over the imperatives of nuclear non-proliferation, with what leeway are we left?

20. Even the mightiest military powers realise that they cannot continue the present arms race without inviting economic calamity. The continuing arms race has imposed a great burden on national economies and the global economy. It is no longer only the developing countries who are urging disarmament to channel resources to development. Even the richest are beginning to realise that they cannot afford the current levels of the military burden they have imposed upon themselves. A genuine process of disarmament, leading to a substantial reduction in military expenditure, is bound to promote the prosperity of all nations of the globe. Disarmament accompanied by coexistence will open up opportunities for all countries, whatever their socio-economic systems, whatever their levels of development.

21. The technological revolutions of our century have created unparalleled wealth. They have endowed the fortunate with high levels of mass consumption and widespread social welfare. In fact, there is plenty for everyone, provided distribution is made more equitable. Yet, the possibility of fulfilling the basic needs of nutrition and shelter, education and health remains beyond the reach of vast millions of people in the developing world because resources which could give fulfillment in life are pre-empted for death.

22. The root causes of global insecurity reach far below the calculus of military parity. They are related to the instability spawned by widespread poverty, squalor, hunger, disease and illiteracy. They are connected to the degradation of the environment. They are enmeshed in the inequity and injustice of the present world order. The effort to promote security for all must be underpinned by the effort to promote opportunity for all and equitable access to achievement. Comprehensive global security must rest on a new, more just more honourable world order.

23. When the General Assembly met here last in Special Session to consider questions of disarmament, the outlook was grim. The new cold war had been revived with full force. A new programme of nuclear armament had been set in motion. As a result, during the years that followed, fear and suspicion cast a long shadow over all disarmament negotiations. Humankind was approaching the precipice of nuclear disaster.

24. Today, there is a new hope for survival and for peace. There is a perceptible movement away from the precipice. Dialogue has been resumed. Trust is in the air.

25. How has this transformation occurred? We pay tribute to the sagacity of the American and Soviet leaderships. They have seen the folly of nuclear escalation. They have started tracing the outlines of a pattern of disarmament. At the same time, we must recognise the role of countless men and women all over the world, citizens of the non-nuclear weapon States as much as of the nuclear weapon States. With courage, dedication and perseverance they kept the candle burning in the enveloping darkness. The Six-Nation Initiative voiced the hopes and aspirations of these many millions. At a time when relations between the two major nuclear weapon States dipped to their nadir, the Six Nations—Argentina, Greece, India, Mexico, Sweden and Tanzania—refocussed world attention on the imperative of nuclear disarmament. The Appeal of May 1984, issued by Indira Gandhi, Olof Palme and their colleagues, struck a responsive chord. Negotiations stalled for years begain inching forward. The process begun in Geneva has led to Reykjavik, Washington and Moscow.

26. We have all welcomed the ratification of the INF Treaty concluded between General Secretary Gorbachev and President Reagan. It is an important step in the right direction. Its great value lies in its bold departure from nuclear arms limitation to nuclear disarmament. We hope there will be agreement soon to reduce strategic nuclear arsenals by 50 percent. The process would be carried forward to the total elimination of nuclear weapons. Only then will we be able to look back and say that the INF Treaty was a truly historic beginning.

27. India believes it is possible for the human race to survive the second millenium. India believes it is also possible to ensure peace, security and survival into the third millenium and beyond. The way lies through concerted action. We urge the international community to immediately undertake negotiations with a view to adopting a time-bound Action Plan to usher in a world order free of nuclear weapons and rooted in nonviolance.

28. We have submitted such an Action Plan to this Special Session on Disarmament of the United Nations General Assembly. Our Plan calls upon the international community to negotiate a binding commitment to general and complete disarmament. This commitment must be total. It must be without reservation.

29. The heart of our Action Plan is the elimination of all nuclear weapons, in three stages, over the next twenty-two years, beginning now. We put this plan to the United Nations as a programme to be launched at once.

30. While nuclear disarmament constitutes the centrepiece of each stage of the Plan, this is buttressed by collateral and other measures to further the process of disarmament. We have made proposals for banning other weapons of mass destruction. We have suggested steps for precluding the development of new weapons sysems based on emerging technologies. We have addressed ourselves to the task of reducing conventional arms of forces to the minimum levels required for defensive purposes. We have outlined ideas for the conduct of international relations in a world free of nuclear weapons.

31. The essential features of the Action Plan are:

First, there should be a binding commitment by all nations to eliminating nuclear weapons, in stages, by the year 2010 at the latest.

Second, all nuclear weapon States must participate in the process of nuclear disar-

mament. All other countries must also be part of the process.

Third, to demonstrate good faith and build the required confidence, there must be tangible progress at each stage towards the common goal.

Fourth, changes are required in doctrines, policies and institutions to sustain a world free of nuclear weapons. Negotiations should be undertaken to establish a Comprehensive Global Security System under the aegis of the United Nations.

32. We propose simultaneous negotiations on a series of integrally related measures. But we do recognize the need for flexibility in the staging of some of these measures.

33. In Stage-1, the INF Treaty must be followed by a fifty percent cut in Soviet and U.S. strategic arsenals. All production of nuclear weapons and weapons grade fissionable material must cease immediately. A moratorium on the testing of nuclear weapons must be undertaken with immediate effect to set the stage for negotiations on a Comprehensive Test Ban Treaty.

34. It is already widely accepted that a nuclear war cannot be won and must not be fought. Yet, the right is reserved to resort to nuclear war. This is incompatible with a binding commitment to the elimination of nuclear weapons. Therefore, we propose that all nuclear weapons be leached of legitimacy by negotiating an international convention which outlaws the threat of use of such weapons. Such a convention will reinforce the process of nuclear disarmament.

35. Corresponding to such a commitment by the nuclear weapon States, those nations which are capable of crossing the nuclear threshold must solemnly undertake to restrain themselves. This must be accomplished by strict measures to end all covert and overt assistance to those seeking to acquire nuclear weapons.

36. We propose that negotiations must commence in the first stage itself for a new Treaty to replace the NPT, which expires in 1995. This new Treaty should give legal effect to the binding commitment of nuclear weapon States to eliminate all nuclear weapons by the year 2010, and of all non-nuclear weapon States to not cross the nuclear weapons threshold.

37. International law already bans the use of biological weapons. Similar action must be taken to ban chemical and radiological weapons.

38. The international community has unanimously recognized outer space as the common heritage of mankind. We must expand international cooperation in the peaceful uses of outer space. The essential pre-requisite for this is that outer space be kept free of all weapons. Instead, there are plans for developing, testing, and deploying space weapons systems. The nuclear arms race cannot be ended and reversed without a moratorium on such activity. It should be followed by an agreement to forestall the militarisation of outer space. This is also an indispensable condition for attaining the goal of comprehensive global security based on a nonviolent world order free of nuclear weapons.

39. The very momentum of developments in military technology is dragging the arms race out of political control. The race cannot be restrained without restraining the development of such technology. We need a system which fosters technological development but interdicts its application to military purposes. The arms control approach has focused on the quantitative growth of arsenals. The disarmament approach must devise arrangements for controlling the continuous qualitative upgradation of nuclear and conventional weapons. To achieve this purpose, the essential requirement is increased transparency in research and development in frontier technologies with potential military applications. This requires a systematic monitoring of such developments, as assessment of their implication for international security, and widespread dissemination of the information obtained. There is also need for greater international cooperation in research into new and emerging technologies for these technologies to open on new vistas of human achievement. Here let us recall the vision of an open world voiced by one of the most remarkable scientists of our time, Niels Bohr. In his Open Letter to the United Nations on 9 June 1950, thirty eight years ago today, he said:

"The very fact that knowledge itself is a basis for civilisation points directly to openness as the way to overcome the present crisis."

40. By the closing years of the century there must be a single integrated multilateral verification system to ensure that no new nuclear weapons are produced anywhere in the world. Such a system would also help in verifying compliance with the collateral and other disarmament measures envisaged by the Action Plan. It would serve as an early warning system to guard against violations of solemn international treaties and conventions.

41. Beyond a point, nuclear disarmament itself would depend upon progress in the reduction of conventional armaments and forces. Therefore, a key task before the international community is to ensure security at lower levels of conventional defence. Reductions must, of course, begin in areas where the bulk of the world's conventional arms and forces are concentrated. However, other countries should also join the process without much delay. This requires a basic restructuring of armed forces to serve defence purposes only. Our objective should be nothing less than a general reduction of conventional arms across the globe to levels dictated by minimum needs of defence. The process would require a substantial reduction in offensive military capabilities as well as confidence-building measures to preclude surprise attacks. The United Nations needs to evolve by consensus a new strategic doctrine of non-provocative defense.

42. The plan for radical and comprehensive disarmament must be pursued along with efforts to create a new system of comprehensive global security. The components of such a system must be mutually supportive. Participation in it must be universal.

43. The structure of such a system should be firmly based on nonviolence. When we eliminate nuclear weapons and reduce conventional forces to minimum defensive levels, the establishment of a non-violent world order is the only way of not relapsing into the irrationalities of the past. It is the only way of precluding the recommencement of an armaments spiral. Nonviolence in international relations cannot be considered a Utopian goal. It is the only available basis for civilised survival, for the maintenance of peace through peaceful coexistence, for a new, just, equitable and democratic world order. As Mahatma Gandhi said in the aftermath of the first use of nuclear weapons:

"The moral to be legitimately drawn from the supreme tragedy of the bomb is that it will not be destroyed by counterbombs, even as violence cannot be destroyed by counterviolence. Mankind has to get out of violence only through nonviolence."

44. The new structure of international relations must be based on respect for various ideologies, on the right to pursue different socio-economic systems, and the celebration of diversity. Happily, this is already beginning to happen. Post-War bipolarity is giving way to a growing realization of the need for coexistence. The high rhetoric of the system of military alliances is gradually yielding to the viewpoint of the Nonaligned Movement.

45. Nonalignment is founded on the desire of nations for freedom of action. It stands for national independence and self-reliance. Nonalignment is a refusal to be drawn into the barren rivalries and dangerous confrontations of others. It is an affirmation of the need for self-confident cooperation among all countries, irrespective of differences in social and economic systems. Nonalignment is synonymous with peaceful coexistence. As Jawaharlal Neru said:

"The alternative to co-existence is co-destruction."

46. Therefore, the new structure of international relations to sustain a world beyond nuclear weapons will have to be based on the principles of coexistence, the non-use of force, non-intervention in the internal affairs of other countries, and the right of every State to pursue its own path of development. These principles are enshrined in the Charter of the United Nations, but they have been frequently violated. We must apply our minds to bringing about the institutional changes required to ensure their observance. The strengthening of the United Nations system is essential for comprehensive global security. We must resurrect the original vision of the United Nations. We must bring the United Nations Organization in line with the requirements of the new world order.

47. The battle for peace, disarmament and development must be waged both within this Assembly and outside by the people of the world. This battle should be waged in cooperation with scientists, strategic thinkers and leaders of peace movements who have repeatedly demonstrated their commitment to these ideals. We, therefore, seek their cooperation in securing the commitment of all nations and all people to the goal of a nonviolent world order free of nuclear weapons.

48. The ultimate power to bring about change rests with the people. It is not the power of weapons or economic strength which will determine the shape of the world beyond nuclear weapons. That will be determined in the minds and hearts of thinking men and women around the world. For, as the Dhammapada of the Buddha teaches us:

"Our life is shaped by our mind; We become what we think.

"Suffering follows an evil thought As the wheels of a cart follow the oxen that draw it.

"Joy follows an evil thought Like a shadow that never leaves.

"For hatred can never put an end to hatred; Love alone can.

"This is the unalterable law."

Thank You.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. The time for morning business has now expired.

FAIR HOUSING AMENDMENTS ACT

The PRESIDING OFFICER. Under the previous order, the Senate will now proceed to the consideration of H.R. 1158 which the clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 1158) to amend title VIII of the Act commonly called the Civil Rights Act of 1968, to revise the procedures for the enforcement of fair housing, and for other purposes.

The Senate proceeded to consider the bill.

Mr. THURMOND. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. KENNEDY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

AMENDMENT NO. 2777

Mr. KENNEDY. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Massachusetts [Mr. KENNEDY] for himself, Mr. SPECTER, and Mr. HATCH, proposes an amendment numbered 2777.

Mr. KENNEDY. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

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

(The text of the amendment is printed in today's RECORD under Amendments Submitted.)

Mr. KENNEDY. Mr. President, I want to commend the majority leader for bringing before the Senate today this landmark civil rights legislation.

Twenty years ago, in the wake of the assassination of Dr. Martin Luther King, Congress enacted into law the promise of fair housing for all Americans. But the Fair Housing Act we passed in 1968 has proved to be an empty promise because the legislation lacked an effective enforcement mechanism. For two decades, fair housing in America has been a right without a remedy.

Housing discrimination exists in America today, and it exists in epidemic proportions. The Department of Housing and Urban Development estimates that nearly 2 million incidents of racial discrimination alone occur each year. One HUD survey found that a black American can expect to encounter discrimination 72 percent of the time in seeking rental housing and 48 percent of the time when seeking to buy a home.

Other studies confirm that residential segregation continues to exist throughout the United States.

In some respects, housing discrimination is the most invidious form of bigotry. It isolates racial and ethnic minorities and perpetuates the ignorance that is the core of bigotry. And discrimination in housing hampers progress to achieve equality in other vital areas as well.

Residential segregation is the primary obstacle to meaningful school integration. And as businesses move away from the urban core, housing discrimination prevents its victims from following jobs to the suburbs, impeding efforts to reduce minority unemployment.

The existing fair housing law is a toothless tiger. It recognizes a fundamental right; but it fails to provide a meaningful remedy.

Under existing law, HUD may respond to complaints of housing discrimination only by "conference, conciliation and persuasion." But because HUD lacks real power to enforce the law, would-be violators have little incentive to obey it.

The Fair Housing Amendments Act of 1988 will put real teeth into the fair housing laws by giving HUD real enforcement authority.

HUD would be empowered to investigate complaints of housing discrimination, and to attempt to effect voluntary conciliation of the parties. Where a complaint is found to have merit, HUD is required to initiate proceedings to obtain full redress for the victims.

In the key compromise in this legislation, the complainant and the parties to an enforcement proceeding could elect to have it heard in Federal Court. If no election is made, the case will be heard by an administrative law judge in the Department of Housing and Urban Development, who can award actual damages, injunctive and equitable relief, attorneys' fees, and civil penalties of up to $50,000 for repeat offenders.

HUD's decision in such a case would be subject to review by the Federal court of appeals. Similar remedies, as well as punitive damages, are available if the Government's enforcement proceeding is heard in Federal Court.

The provisions in existing law relating to private fair housing enforcement actions are also strengthened.

The statute of limitations for housing discrimination cases is lengthened to 2 years, and the limit on punitive damages is removed.

The bill continues the feature of existing law that places reliance on State and local fair housing agencies which provide rights and remedies substantially equivalent to those provided under Federal law.

When HUD receives a complaint within the jurisdiction of such an agency, it is required to refer it to the State or local agency. The bill provides a 40-month transition period, which may be lengthened by the Secretary for an additional 8 months in exceptional circumstances, for agencies to bring their laws and procedures into line with the strengthened measures in the bill.

Housing discrimination also harms two other groups in our society whose interests were not recognized by the 1968 law: persons with handicaps and families with children.

More than 30 million Americans have disabilities of some kind. They face prejudice in housing, both because of the unenlightened attitude of some toward those with disabilities, and because of unwillingness to permit handicapped persons to make reasonable modifications in dwellings to meet their special needs. As a result, they are often prevented from being fully integrated into our society.

The Fair Housing Amendments Act of 1988 will ban housing discrimination against the handicapped. It recognizes that discrimination can take many forms, including a failure to permit handicapped persons to make modifications to housing to enable them to have full enjoyment of the premises, and a failure to make reasonable accommodations to meet the needs of the handicapped.

Similarly, because it is often far less expensive to provide for accessible and adaptable housing before the housing is built, the bill creates minimal requirements for the construction of new dwellings.

Families with children also face serious discrimination in housing. A HUD-funded study found that one-fourth of the rental units in the country barred families with children.

By reducing the availability of housing for families, this discrimination drives up its cost and imposes a heavy burden on those least able to afford it.

The bill would ban this form of discrimination, while protecting the legitimate interest of older Americans to live in retirement-type communities.

A broad coalition of groups, including the American Association of Retired Persons, the Children's Defense Fund, and the United States Catholic Conference have endorsed this bill, and have been particularly helpful in formulating these provisions.

On behalf of myself, and Senator SPECTER, and Senator HATCH I have just sent up an amendment in the nature of a substitute, which makes a few modest changes in H.R. 1158.

I ask unanimous consent that a memorandum describing the Kennedy-

Specter substitute be printed in the RECORD.

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

U.S. SENATE,
Washington, DC, August 1, 1988.

DEAR COLLEAGUE: Today, when the Senate takes up H.R. 1158, the Fair Housing Amendments Act of 1988, we will offer an amendment in the nature of a substitute which makes certain modest modifications to the bill that passed the House last month by a vote of 376-23. A summary and a memorandum describing the changes are enclosed.

The fair housing bill is surely one of the most significant civil rights measures of the past twenty years. It will dramatically strengthen the enforcement remedies for housing discrimination, and it will extend coverage to the handicapped and to families with children.

We believe that H.R. 1158, as amended by the substitute, will command broad bipartisan support within the Senate. We are advised that this morning, President Reagan and Department of Housing and Urban Development Secretary Samuel R. Pierce, Jr. will issue unequivocal endorsement of the bill with the changes made by the substitute amendment, and that they will express opposition to other amendments.

If you have any questions about the substitute, or if you wish to cosponsor it, please let us know, or have your staff call Jeff Blattner (4-7878) of Senator Kennedy's staff or Steve Hilton of Senator Specter's staff (4-6791).

Thanks for your consideration.

With kind regards.

Sincerely,

TED KENNEDY.
ARLEN SPECTER.

SUMMARY OF CHANGES MADE BY THE KENNEDY-SPECTER SUBSTITUTE

The amendments made by the substitute are in eight areas:

(1) The provision regarding restoring modifications made by handicapped persons is clarified;

(2) Language is added to the section on adaptability and accessibility requirements for certain new multifamily dwellings to encourage state and local governments to review for compliance with these requirements when they review and approve building plans and construction;

(3) A technical amendment is made to the bill's language providing for a transition period for state and local fair housing agencies to make it clear that agencies given interim certifications of HUD are covered by the provision;

(4) The authority to litigate fair housing cases is consolidated in the Justice Department, while it is made clear that the Department is required to bring cases authorized by the Secretary under the bill's provisions regarding prompt judicial action and regarding federal court enforcement of cases in which a party to an administrative proceeding elects to have the charge heard in federal court;

(5) Technical amendments are made to the bill's provisions giving parties to administrative proceedings the right to have charges arising out of those proceedings heard in federal court;

(6) The exemption for housing for older persons from the bill's provisions banning discrimination on the basis of familial status are modified;

(7) A provision is added to the housing for older persons exemption to make it clear that occupants of housing that currently excludes children will not be taken into account in applying the requirements for the exemption, so long as future occupants meet the requirements; and

(8) The bill's provision regarding familial status is clarified to confirm that pregnant women and persons adopting minor children and covered by the provision.

MEMORANDUM OF SENATORS KENNEDY AND SPECTER REGARDING THEIR SUBSTITUTE AMENDMENT

The amendment in the nature of a substitute (the "Substitute") is identical to H.R. 1158 as passed by the House of Representatives on June 29, 1988 by a vote of 376-23, with the exception of certain modest changes discussed in this Memorandum. These modifications are set forth below.

CLARIFICATION TO PROVISION REGARDING RESTORING MODIFICATIONS

The Substitute modifies language adopted on the House floor to make it clear, that, under section 810(f)(3)(A), discrimination on the basis of handicap includes a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises, except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted. This change is being made to make it clear that a landlord may not condition permission for a modification on the renter agreeing to restore the interior of the premises to its prior condition (reasonable wear and tear excepted), where it is unreasonable to do so.

ENFORCEMENT BY STATE AND LOCAL AGENCIES OF THE ACCESSIBILITY AND ADAPTABILITY REQUIREMENTS FOR CERTAIN NEW MULTIFAMILY DWELLINGS

The Substitute incorporates a series of provisions designed to encourage enforcement by the States and local governments of the provisions of the bill regarding adaptability and accessibility requirements for new housing. It provides that where a State or locality incorporates the new construction requirements into its laws, compliance with those laws suffices for the purpose of compliance with those provisions of the Fair Housing Act.

And States and localities are encouraged, but not required, to incorporate into their existing procedures for reviewing and approving new construction, procedures for determining whether the new construction requirements are met. The Secretary is required to provide technical assistance to States and localities, and to private individuals, to assist them in interpreting the new construction requirements.

The Substitute also makes it clear that the bill is not requiring any kind of "Federal Building Code." HUD may not require prior review or approval of the design, plans or construction of covered dwellings. The bill simply imposes certain minimal requirements for covered dwellings.

Nothing in the Substitute will affect or limit the authority or responsibility of the Secretary or of a State or local fair housing agency to perform any enforcement activity under the Act.

Determinations by a State or local government under sections 804(f)(5) (A) and (B) are not to be treated as conclusive in enforcement proceedings under the Act.

TRANSITION PERIOD FOR STATE AND LOCAL AGENCIES WITH INTERIM CERTIFICATIONS

HUD's regulations for the recognition of State and local fair housing laws provide for the referral of complaints to agencies in two situations. In the first, States and localities are formally recognized as substantially equivalent. In the second, States and localities are recognized for interim referral of complaints. (28 CFR 115.11). The second category permits HUD to refer cases to States and localities with strong fair housing laws, pending a formal review of the State or local agency's enforcement performance.

Under the language of H.R. 1158, States and local agencies certified by the Secretary would be grandfathered in to the referral process under the amendments for up to 48 months. However, it appears based on the use of the word "certified" and the language in the House Report on the number of agencies that interim agencies would not be considered "certified". As a result, two states (Ohio and Georgia) and two localities (St. Joseph, Missouri and Albany, New York) would not be eligible to process cases or receive assistance.

The technical amendment incorporated into the Substitute would assure that these four agencies would not lose their status with enactment of the Fair Housing Amendment of 1988, provided that they are not later denied recognition under 28 CFR 115.7.

LITIGATION AUTHORITY

The Substitute consolidates in the Justice Department the authority to represent the federal government in each of the enforcement actions contemplated under the Act. Under section 810(e)(1) of the Substitute, if the Secretary concludes at any time following the filing of an administrative complaint that prompt judicial action is necessary to carry out the purposes of the title, the Secretary may authorize a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint under this section. Upon receipt of such an authorization, the Attorney General is required to promptly commence and maintain such an action.

Section 810(g)(1) of the Substitute makes clear that the Secretary's determination whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur must be based on the facts of the case.

Section 812(o) of the Substitute provides that when an election is made under section 812(a) to have the Secretary's charge litigated in federal court, the Secretary is required to authorize, and not later than 30 days after the election is made the Attorney General is required to commence and maintain, a civil action in federal court.

TECHNICAL AMENDMENTS TO THE ADMINISTRATIVE ENFORCEMENT PROVISIONS

The Substitute contains four technical changes to the provisions in the bill relating to the administrative enforcement of the Fair Housing Act and permitting persons in the administrative process to elect to have the Secretary's claims against a respondent litigated in federal court.

These changes have been agreed to by all parties to the original agreement that gave rise to the Fish-Edwards amendment in the

House, including the National Association of Realtors.

The first change modifies Section 812(a) to make it clear that only those aggrieved persons on whose behalf the complaint was filed, as well as a complainant and a respondent, may make the election provided for in that section.

The second change makes it clear that the effect of the election is to have the claims asserted in the Secretary's charge litigated in federal court. The election itself does not operate to preclude or terminate federal court litigation brought by private parties raising the same issues.

The third change clarifies that, when the Secretary issues a charge under section 810, section 810(h) requires that notice be given to each respondent named in the charge, and to each aggrieved person on whose behalf the complaint was filed.

The fourth change confirms that if the Secretary fails to complete the review of the administrative law judge's finding, conclusion or order within the 30 days provided in section 812(h), the finding, conclusion, or order becomes final.

MODIFICATIONS TO THE PROVISIONS REGARDING DISCRIMINATION AGAINST FAMILIES WITH CHILDREN

Housing for older persons

The Substitute provides that the provisions regarding discrimination on the basis of familial status do not apply with respect to "housing for older persons."

"Housing for older persons" is defined as housing that falls into any of the following three categories:

First, housing provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program). This means, for example, that federally assisted housing for the elderly need not admit families with children.

Second, housing intended for, and solely occupied by, persons 62 years of age or older. If all of the persons occupying the housing in question are 62 or older, then the housing in question is not covered by the families-with-children provision, regardless of what other features the housing may have.

And third, housing intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at least the following three factors:

"(i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and

"(ii) that at least 80% of the units are occupied by at least one person 55 years of age or older per unit; and

"(iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

This third exemption is for housing communities intended and operated for occupancy by at least one person 55 or older per unit. The Secretary is required, within 180 days of enactment of the Act, to issue regulations, which require at least three conditions to be met in determining whether housing qualifies under this exemption.

The first of these three factors requires that the housing in question provide significant facilities and services specifically designed to meet the physical or social needs of older persons. The Secretary may provide in the regulations, however, that where it is impracticable to provide such facilities and services, the exemption may nevertheless may be available in those unusual circumstances where housing without such facilities and services provides important housing opportunities for older persons.

The second factor requires that at least 80% of the units are occupied by at least one person 55 years of age or older per unit.

And the third factor requires the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older. In essence, this means that the housing in question must, in its marketing to the public and in its internal operations, hold itself out as housing for persons aged 55 or older.

Transition rule

The Substitute contains a transition provision to ensure that the interests of current residents of housing that excludes children will not be unduly disturbed by passage of the bill. It provides that housing shall not fail to meet the requirements for housing for older persons under the bill by reason either of (1) persons residing in such housing as of the date of enactment of this Act who do not meet the age requirements of subsections 807(b)(2) (B) or (C), provided that new occupants of such housing meet the age requirements of the bill; or (2) unoccupied units, provided that such units are reserved for occupancy by persons who meet the age requirements of the bill.

In essence, this means that current residents whose presence in a community would otherwise cause the community to fall outside the exemptions provided in the Substitute are not counted in calculating whether these exemptions apply, if the community applies the age requirements to all persons moving in after the passage of the Act. So communities with age restrictions of less than 55 (or 62) will not be placed to the choice of either forcing out persons below those ages, or taking families with children, so long as future occupants meet the age requirements.

Similarly, vacant units need not be counted, so long as they are reserved for occupancy by persons who meet the age requirements of the bill.

Coverage for pregnant women and adopting parents

The Substitute provides that "The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years."

The Substitute thus confirms that the protections against discrimination on the basis of familial status afforded by the bill apply to pregnant women. In addition, the Substitute makes clear that these protections also apply to persons who are in the process of adopting a minor child.

Because concerns were raised that the Act, as written, does not explicitly protect pregnant women from discrimination in housing, and does not protect individuals in the process of adopting a child, we have included language to make it perfectly clear that under the Fair Housing Act, discrimination against pregnant women and persons in the process of adopting a child is prohibited.

The Fair Housing Act prohibits discrimination on the basis of sex, and Congress has repeatedly made clear that sex discrimination includes discrimination on the basis of pregnancy. For example, both Titles VII and Title IX prohibit discrimination on the basis of pregnancy, as an aspect of prohibited sex discrimination. And, therefore, the Fair Housing Act currently forbids discrimination on the basis of pregnancy.

However, to eliminate any question that the Fair Housing Act contains protections against discrimination on the grounds that familial status will be achieved, through the birth of a child or through adoption, explicit language has been added which provides that the protections against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any child under the age of eighteen.

Mr. KENNEDY. The changes in the substitute are the result of negotiations between supporters of the bill and the Department of Housing and Urban Development. I am advised that President Reagan and HUD Secretary Samuel Pierce, Jr., are endorsing the substitute today, and I am pleased to have their support for this landmark civil rights measure.

I also want to express my thanks to enlightened elements of the business community, including the National Association of Realtors, the National Association of Home Builders, and the American Institute of Architects, for their support for the bill, and for the constructive approach they have taken in our efforts to enact this vital legislation.

I want also to pay special tribute to the civil rights community for their tireless efforts for the bill, and for their ability to work with all interested persons to develop the strongest, best fair housing legislation possible.

Eight years ago, the Senate fell six votes short of ending a filibuster that blocked fair housing legislation. That inpasse has continued ever since, but now the logjam is breaking and we are about to enact meaningful fair housing legislation into law.

Make no mistake about it—this is the most comprehensive civil rights legislation the Congress has considered in 20 years. I urge my colleagues to support it.

I ask unanimous consent as well that the letter from Mr. Samuel R. Pierce, Jr., Secretary of HUD, in support of the legislation be printed in the RECORD.

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

THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Washington, DC, August 1, 1988.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, DC.

DEAR SENATOR KENNEDY: During my confirmation hearing on January 13, 1981, I pledged to work with the Senate to strengthen Federal Fair Housing law. I re-

peated that pledge in testimony on S. 558 before you and Senator Specter on March 31 of last year. Throughout the past seven and one half years it has been gratifying to work with you in my efforts to keep that pledge. President Reagan and Vice President Bush have shared in that pledge and supported the struggle for this essential Civil Rights legislation. I am pleased at the rapid response to the Presidents' call for new civil rights legislation to strengthen the Fair Housing Act in his Legislative Message at the beginning of this session of Congress. The Administration has submitted legislation to accomplish this goal in the 98th, 99th and 100th Congresses.

Today, the Senate begins debate on the Fair Housing Amendments Act of 1988: historic legislation crowning a ten year effort. In the last few weeks, I have worked happily with you, other Senators, The Vice President, the Department of Justice and major civil rights organizations to strengthen the bill.

The product of this effort is your substitute to HR 1158 which clearly protects the proper role of the Executive branch in commencing enforcement proceedings, provides a broad range of housing choices for older Americans, encourages cooperation among local, state and federal governments in guaranteeing housing usable by the handicapped, and centralizes fair housing litigation at the Department of Justice.

Your substitute has the full support of the Administration. Prompt passage without the offering of amendments not agreed to by the Administration and the sponsors is essential. I encourage all Senators to join as cosponsors and to support final passage. The substitute to be offered by Senator Kennedy, Senator Specter and others is critical to putting the federal government on the offensive against discrimination in housing.

Very sincerely yours,

SAMUEL R. PIERCE, Jr.

Mr. THURMOND. Mr. President, I want to say, in the beginning, that this is a very important piece of legislation. It is a rather complex piece of legislation and that, as ranking member on the Judiciary Committee, I felt it should go to the Judiciary Committee. I so made the request to the majority leader and the minority leader of the Senate and stated in my letters to them that the Judiciary Committee should be allowed to consider it for a few days, and then let it automatically come back to the Senate so there would be no delay.

That was not done and today, when we consider this matter, the Senate will not have the benefit of the recommendations and consideration of the Judiciary Committee.

I think that is bad for two reasons. The first is this bill deserves the consideration of the Judiciary Committee, and its thinking. The second is to establish a precedent for a very important piece of legislation to be put right on the calendar without going to the appropriate committee is a great mistake.

This gives an excuse to many other Senators to take up anything they want to without having it considered by the Judiciary Committee.

Since the bill was not sent to the Judiciary Committee, then we are going to do the best we can to handle it on the floor.

The distinguished Senator from Massachusetts is handling the bill on the floor, and he has handed to us a very thick substitute which we will study. But after the opening statements, we might have to take some time to complete the study of that substitute before we can go forward.

I wanted to make that statement in the beginning so if there is any delay, it is not an intentional delay but a necessary delay for us to get acquainted with this thick substitute that has been handed to us by the distinguished Senator from Massachusetts, the manager of the bill.

Mr. President, today, we begin consideration of the Fair Housing Amendments Act of 1988 as recently passed by the House.

It is our declared national policy that housing be available to all persons regardless of their race, color, religion, sex or national origin. The Federal Fair Housing Laws should indeed protect all Americans from discrimination in housing practices and should not favor any one person or group of persons over another person or group on the basis of race, color, religion, sex, or national origin.

Currently, the Department of Housing and Urban Development has broad authority in conducting investigations of a complaint alleging injury from a discriminating housing practice. A substantial number of complaints are referred to a State or local fair housing enforcement agency with jurisdiction over the area where the discriminatory act is alleged to have occurred. This referral is done where HUD has recognized the State or local agency as administering a law which is substantially equivalent to the Federal Fair Housing Law.

For example, in fiscal year 1987, HUD received 4,699 housing discrimination complaints. Of that number, 3,388 complaints—more than 72 percent of the number received—were referred to State and local fair housing agencies. The State and local agencies were quite successful in closing complaints, reaching conciliation agreements and obtaining monetary relief for victims of discrimination.

Of those complaints retained by HUD, the investigators have power to subpoena the appearance of persons and evidentiary materials as may be reasonably necessary to further the investigation. Also, the investigators may issue interrogatories to a respondent.

If a complaint has merit, HUD attempts to resolve the discriminatory housing practice by informal methods of conference, conciliation and persuasion.

Additionally, HUD may presently refer any case to the Attorney General for court action which involves a "pattern and practice" of housing discrimination or denies fair housing rights to a group of persons.

Mr. President, the legislation now before us establishes an administrative procedure for the adjudication of complaints which are not resolved by the Secretary of HUD. A similar legislative proposal has been introduced here in the Senate which would allow administrative law judges to adjudicate fair housing complaints.

I expressed my deep concern that the Administrative Law Judge procedures established in this bill were conspicuously structured and probably would not survive constitutional scrutiny based on the seventh amendment right to a jury trial. The Office of Legal Counsel at the Department of Justice supported this view and stated in a memorandum that such procedure "is and would likely be declared unconstitutional on article III and seventh amendment grounds."

I was pleased to learn that the House reached what appears to be a workable compromise in addressing this serious constitutional issue. Litigants involved in alleged fair housing complaints would, under this proposal, have the right to elect a jury trial once HUD makes a discrimination "charge."

And on that right, Mr. President, I might state that I conferred with the ranking member of the Judiciary Committee in the House and urged that this action be taken to provide that one could have a jury trial, if desired.

Although this compromise creates a new bureaucratic system of administrative law judges, the legislation no longer denies claimants or respondents their seventh amendment right to trial by jury.

Mr. President, it is illegal to practice housing discrimination based on race, color, religion, sex, or national origin. The Congress is now attempting to strengthen the ban against discriminatory housing practices and I support these efforts. Federal fair housing laws should protect all Americans from discrimination in housing.

While I share the objectives of my colleagues to prohibit discrimination in housing, there are provisions of this legislation as passed by the House which should be addressed here in the Senate.

The Senate should carefully consider the addition of "familial status" as a protected class under the Fair Housing Act and its impact on retirement communities as well as adult housing communities.

There is language in this proposal which requires that, 30 months after enactment, all units in certain multifamily buildings must comply with a

wide variety of structural and design requirements. There have been no hearings on this provision in the House or the Senate and we should determine if there is a demonstrated need for such sweeping regulation of all new multifamily housing construction.

Mr. President, we have an opportunity to provide for effective enforcement provisions under the Fair Housing Act. However, we have an obligation here in the Senate to address serious concerns in this legislation as passed by the House.

I look forward to the debate on this measure and amendments to clarify its scope.

Mr. SPECTER addressed the Chair.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, I am pleased to join with the distinguished Senator from Massachusetts, Senator KENNEDY, in pressing for legislation on housing and the substitute which is offered today.

Mr. President, this legislation advances two important goals in our society—housing and equality. The three key material components for sharing in the American dream are a good education, a good job, and decent housing.

The legislation on fair housing was adopted as a fundamental civil right back in 1968, but this legislation, Mr. President, provides an effective remedy. Without an effective remedy, a right is relatively meaningless. It is fine to have a right on the books and to be articulated in the law, but unless there is an effective remedy, the right is relatively meaningless. This legislation today provides for an effective remedy.

Mr. President, there has been a longstanding Federal commitment to adequate housing. Legislation on the National Housing Act, first passed in 1934, and amended in 1948, and extensive Federal funding has been granted for housing in this country because of its great importance.

I recall the vast sums of money which were put into the city of Philadelphia in the 1960's when I was district attorney there and the investigations which we conducted to try to root out fraud and corruption to make sure that the extensive Federal funding was adequately used. I recall the funding for rehabilitation of housing for new walls where stucco was placed over the old walls and where massive efforts were made to root out that type of corruption so that the Federal funding could be utilized to provide decent housing.

Mr. President, the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were landmark legislative achievements to provide for civil rights in this country.

In the 2 years following 1965, major efforts were made to have the Civil Rights Act applied to housing. It was only the assassination of Dr. Martin Luther King in April of 1968 that impetus was given for a Fair Housing Act, but regrettably, Mr. President, the right which was established at that time did not have a remedy which could lead to the effectuation of that right. Senator KENNEDY has already noted the legislative efforts which followed in 1979 and 1980, and the reference to the report of the Fair Housing Amendments Act of 1980 noted at page 10 that "The committee, referring to the Judiciary Committee," believes that the present remedies available under title VIII of the Fair Housing Act have been shown to be inadequate and insufficient to provide the American people with an efficient, open fair housing policy.

That legislation was defeated, Mr. President, in 1980. After the election of 1980, a lameduck session was held and there was not sufficient support to pass that legislation.

Mr. President, the underlying evidence of discriminatory practices has been established in a study of the greater Washington area in 1986 conducted by the Regional Fair Housing Consortium. There were black and white testers sent to 266 rental properties in the area having a black population of 20-percent less than the overall city population, and the study found that 53 percent of the time white individuals were treated more favorably.

Testimony presented on January 27 of this year in hearings before the Banking, Housing, and Urban Affairs Subcommittee on housing and urban affairs presented by Mr. Douglas S. Massey, director of the Population Research Center from the University of Chicago, found that "in 60 American metropolitan areas black segregation was highest in the larger metropolitan areas containing a high concentration of blacks," and the study found that "the process of black suburbanization appears retarded when compared with other minority groups as the average percentage of blacks living in the examined suburbs was 28 percent as opposed to 48 percent of Hispanics and 58 percent of Asians." The study went on to point out that" even when segregation levels were measured directly against categories of income, education, and occupation, black segregation remained high across all levels of socio-economic status."

Mr. President, I ask unanimous consent that at the conclusion of my statement the summary of findings of four fair-housing studies appear.

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

(See exhibit 1.)

Mr. SPECTER. I believe that is a summary statement of the evidentiary base to show that discrimination does exist, although I think none would deny that as a matter of fact.

Mr. President, there have been extensive hearings on this legislation although not the precise substitute which is to be offered today, but hearings were held in the Judiciary Committee on March 31, April 2, April 7, April 9, June 9, and July 1, 1987. My distinguished colleague from South Carolina, the ranking member of the Judiciary Committee, has made the comment about the desirability or necessity for such hearings. I concur with that as an appropriate course, but I would point out that we have had extensive hearings on this subject generally, although again, as I say, not on the specific substitute which is being offered today. But those hearings were close enough, Mr. President, to give an adequate opportunity for comments to be expressed on this subject. There have been extensive discussions among interested parties, and I join Senator KENNEDY in complimenting the National Association of Realtors, the National Association of Home Builders, and the National Association of Architects for lending their support to this substitute legislation, along with many interested Senators and the civil rights groups as well as the Department of Housing and Urban Development and the Vice President of the United States.

Mr. President, I was handed a copy of a letter a few moments ago from the Honorable Samuel Pierce, Jr., Secretary of Housing and Urban Development. At the conclusion of my statement, Mr. President, I ask unanimous consent that the full text of this letter appear.

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

(See exhibit 2.)

Mr. SPECTER. Mr. President, the sense of this letter points out that "in the last few weeks I"—referring to Secretary Pierce—"Have worked happily with you and other Senators, the Vice President, the Department of Justice, and major civil rights organizations to strengthen the bill."

The letter from Secretary Pierce further points out, "The substitute to be offered by Senator KENNEDY, Senator SPECTER, and others is critical to putting the Federal Government on the offensive against discrimination in housing."

And finally, Secretary Pierce states, "Your substitute has the full support of the administration."

I think it is very important to know that the administration is fully behind this legislation.

Mr. President, I think it appropriate to know that there were extensive discussions over the course of the past weekend, and I join Senator KENNEDY in thanking the majority leader and the Republican leader in pressing this

legislation to the floor. Senator DOLE has been an active supporter of this legislative package throughout the entire process, although I have not had the opportunity to discuss with him yet today the specific provisions of this substitute bill. But after the majority leader announced Friday afternoon that this measure would be on the floor today, that activated and intensified the discussions over the course of the past weekend.

I think it appropriate to note, Mr. President, that Vice President BUSH was influential in the final package which was arrived at and that his representatives were a key part of the negotiating process, bringing all parties together. I think there will be credit enough if this legislation is enacted to go all around.

It is a very important bill, Mr. President. It comes 20 years after the initial legislation on fair housing, on establishing a right to housing as a civil right without regard to race, color, creed or national origin, and for the past 20 years that civil right has languished in the absence of an effective remedy.

This legislation will provide such an effective remedy, and I think it worthwhile to focus for just a moment or two on the differences between the current legislation on civil rights for housing and what this bill will do.

At the present time, an aggrieved party may file a complaint with the Secretary of Housing and Urban Development setting forth a discriminatory housing practice. Then there are conciliation efforts. HUD has no authority under existing law to initiate a complaint on its own or to issue a cease and desist order. Its role is simply to conciliate between prospective renters and buyers or landlords and sellers. The conciliation agreements are entirely voluntary. If the conciliation process fails, HUD has no statutory recourse and then only the aggrieved party may file a suit.

That is hardly a remedy at all, Mr. President, because the aggrieved party in such matters does not have the financial resources to go to court to enforce their civil rights. The Attorney General is limited on the institution of a civil action only where there is reasonable cause to believe that a person or group of persons is engaged in a pattern of practice of resistance to the provisions of the act.

So it is apparent, Mr. President, that under existing law there is no effective remedy.

Under the provision advanced today there is an expeditious enforcement proceeding. First, HUD is required to investigate each complaint and make a reasonable causal determination as to whether housing discrimination has occurred or is about to occur within a period of 110 days. Then, there may be conciliation, and the Secretary may in the interim authorize the Justice Department to maintain an injunctive action. But if no conciliation has occurred, and reasonable cause is found, the Secretary is obligated to issue a charge. The complainant, respondent, or aggrieved persons may then elect to have the Secretary's charge litigated by the Justice Department in Federal court.

As the distinguished Senator from South Carolina has already noted the rights to jury trial are reserved under the seventh amendment because either the complainant or the respondant may require that the matter go forward, and a jury trial right would be preserved as guaranteed under the seventh amendment to the U.S. Constitution. But the critical part is that the injured party who has been discriminated against once the charge has been filed by HUD has the absolute right to have the Justice Department proceed to litigate the issue in Federal court.

If that election is not made, there are then substitute provisions for action through an administrative law judge. But as noted, the remedy is present once HUD has found reasonable cause to charge. Then there is enforcement of the charge by the Attorney General in the Federal Court. That Mr. President, will realistically enshrine the right which was created two decades ago finally bringing to bear an effective remedy.

I thank the Chair. I yield the floor.

EXHIBIT 1

SUMMARY OF FINDINGS OF FOUR FAIR HOUSING STUDIES

Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey, April 1979. Division of Evaluation, Department of Housing and Urban Development.

In the Spring of 1977, within 40 metropolitan areas across the country, approximately 300 whites and 300 blacks, in matched pairs, shopped for housing advertised in metropolitan newspapers. A systematic comparison of the relative treatments accorded black housing seekers and white housing seekers showed that blacks were systematically treated less favorably with regard to housing availability, were treated less courteously, and were asked for more information than were whites. For the most important of the discrimination measures reported—housing availability—discrimination occurred in the rental market 27 percent of the time, and in the sales market 15 percent of the time. Since the typical housing seeker is likely to visit more than one rental agent or complex, the chance of encountering discrimination in a search involving several agents can be very high. For example, if 27 percent of rental agents discriminate and a search involves visits to four agents, the probability of encountering at least one instance of discrimination is 72 percent.

A study of How Restrictive Rental Practices Affect Families with Children, 1980. Jane G. Greene, Glenda P. Blake for Office of Policy Development and Research, Department of Housing and Urban Development.

In order to reach families who experienced problems because of restrictive rental policies, National Neighbors ran public service announcements in six metropolitan areas, inviting persons who had difficulty finding rental housing because they had children to call a toll-free number and tell of their experiences. Interviews were completed with 554 respondents. The sample shows that restrictive rental policies against children affect a very diverse group of families: small and large, middle class and poor, white, black and Hispanic, married couples and single heads-of-households. For the total number of respondents who told of difficulty in finding housing, the median search period was nine to ten weeks. Respondents said that usually they were refused because they had too many children or their children did not fit the age guidelines of a complex. Forty seven percent of the sample said they lived in substandard housing in the past year with 35.6 percent living in substandard housing. Because they could not find rental housing which would accept children, 19.2 percent of the respondents said their family had had to live separately during the past year, and 39.1 percent had lived in overcrowded conditions. Associated problems mentioned by respondents included difficulties with jobs, school/day care, transportation, emotional stress, and finances.

Race Discrimination in the Rental Housing Market: A Study of the Greater Washington Area, 1986. Regional Fair Housing Consortium.

Black and white testers were sent to 266 rental properties in areas having a black population of 20 percent less than the overall city population. The study found that 53 percent of the time, white individuals were treated more favorably. The study concludes that black homeseekers in the tri-state area experience multi-faceted discrimination; often they either are told that apartments are not available, or they are discouraged from establishing residency in those available. It is noted that in 1986, black homeseekers had at least a fifty percent chance of experiencing discrimination.

Statement of Douglas S. Massey, "Issues Relating to Fair Housing." Hearings before the Banking, Finance, and Urban Affairs Subcommittee on Housing and Community Development. January 27, 1988.

Douglas Massey used census data to analyze patterns of residential segregation in sixty American metropolitan areas. He found that black segregation was highest in large metropolitan areas containing a high concentration of blacks, especially in the Northeast and Midwest. Noted declines in segregation took place mainly in smaller metropolitan areas in the South and West. The study finds that the process of black suburbanization appears retarded when compared to other minority groups, as the average percentage of blacks living in the examined suburbs was 28 percent as opposed to 48 percent of Hispanics and 58 percent of Asians. Once living within a suburban environment, blacks still tend to experience an unusually high level of segregation. In addition, the investigation concluded that the process of black suburbanization is unrelated to black socio-economic status. Even when segregation levels were measured directly against categories of income, education and occupation, black segregation remained high across all levels of socio-economic status. Massey found that due to residential segregation, middle class blacks are not free to live where they choose or where

their income allows. They are forced to live in a disadvantaged environment, subject to higher crime rates, less healthy surroundings and inferior school systems.

EXHIBIT 2

THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Washington, DC, August 1, 1988.

Hon. ARLEN SPECTER,
U.S. Senate, Washington, D.C.

DEAR SENATOR SPECTER: During my confirmation hearing on January 13, 1981, I pledged to work with the Senate to strengthen federal Fair Housing law. I repeated that pledge in testimony on S. 558 before you on March 31 of last year. Throughout the past seven and one half years it has been gratifying to work with you in my efforts to keep that pledge. President Reagan and Vice President Bush have shared in that pledge and supported the struggle for this essential Civil Rights legislation. I am pleased at the rapid response to the President's call for new civil rights legislation to strengthen the Fair Housing Act in his Legislative Message at the beginning of this session of Congress. The Administration has submitted legislation to accomplish this goal in the 98th, 99th and 100th Congresses.

Today, the Senate begins debate on the Fair Housing Amendments Act of 1988: historic legislation crowning a ten year effort. In the last few weeks, I have worked happily with you, other Senators, the Vice President, the Department of Justice and major civil rights organizations to strengthen the bill.

The product of this effort is your substitute to HR 1158 which clearly protects the proper role of the Executive Branch in commencing enforcement proceedings, provides a broad range of housing choices for older Americans, encourages cooperation among local, state and federal governments in guaranteeing housing usable by the handicapped, and centralizes fair housing litigation at the Department of Justice.

Your substitute has the full support of the Administration. Prompt passage without the offering of amendments not agreed to by the Administration and the sponsors is essential. I encourage all Senators to join as cosponsors and to support final passage. The substitute to be offered by Senator Kennedy, Senator Specter and others is critical to putting the federal government on the offensive against discrimination in housing.

Very sincerely yours,
SAMUEL R. PIERCE, Jr.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, today, we are moving forward on the Fair Housing Amendments Act. As I stated during the subcommittee hearings, I have always been in favor of the basic objectives of this legislative effort. Ever since my arrival in the Senate, I have been aware of the need to reinvigorate the 1968 Open Housing Act. While that act took the necessary first steps toward the provision of equal opportunities in housing, its provisions have never had any real bite. Simply put, the enforcement mechanism has never been adequate.

Over the years, many of my colleagues have recognized this problem and have sponsored several pieces of legislation to improve the law. I have also introduced various bills, for purposes of debate, so that we might have several ideas on the table in order to fashion an effective piece of legislation.

During the spring and summer of 1987, while the Constitution Subcommittee was holding hearings on the need for fair housing amendments, I raised several areas of concern with the companion measure to this bill in the hope that the committee members might improve and strengthen the legislation. Although they have been slow in coming, several of my suggestions are now in place.

One of my greatest concerns with this legislation when it was introduced involved the proposed administrative process, which would have placed all claims before an administrative law judge, without the possibility of de novo Federal district court review, thereby denying the parties their constitutionally protected right to a jury trial. As a result of this concern, the chairman of the subcommittee was kind enough to devote 2 days of hearings on this one issue. From the testimony delivered during those hearings, it became clearer to me that there were constitutional problems with this part of the bill.

As originally worded, the Fair Housing Amendments Act posed a significant question with respect to the seventh amendement of our Constitution. The seventh amendment guarantees that, "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved." It is probably safe to say that the failure to include the preservation of jury trial rights was one of the major objections to this bill, and it was certainly one of the major objections to the Constitution during its ratification. If the seventh amendment had not been subsequently included in the Bill of Rights, the Constitution itself may have become too controversial to survive. That is how important that particular amendment is.

In the words of the Supreme Court, "The thrust of the amendment was to preserve the right of jury trial as it existed in 1791." *Curtis* v. *Loether*, 415 U.S. 189 (1974). The Curtis case also held that statutory rights created after 1791 are obviously covered by the seventh amendment. In fact, the Curtis case specifically upheld jury trial rights in a title 8 fair housing case.

The importance of the seventh amendment, as it impacts this bill, resurfaced in the early part of 1987 when the Supreme Court held that an EPA enforcement action in a Federal district court must be accorded full jury trial rights. *Tull* v. *United States*, 107 S. Ct. 1831 (1987). Some scholars noted that a footnote in that case supported the case of *Atlas Roofing* v. *OSHA*, 430 U.S. 442 (1977). They cite that case for the proposition that Congress can assign cases to administrative law judges without regard for the seventh amendment. In Atlas, the Court held that an action by the Government to enforce safety regulations, a public right, could be adjudicated in administrative courts.

Atlas, others have contended, only purports to permit "factfinding and initial adjudication" to be assigned to an administrative tribunal. As the Tull case established, the final enforcement of a damages action—or an action in debt—must be accorded full seventh amendment jury trial rights. In other words, Tull and Atlas may be fully consistent. Atlas' endorsement of administrative adjudication may be limited to initial factfinding proceedings in cases dealing with private common law actions.

If Atlas were read broadly to eliminate jury trials any time Congress creates an administrative alternative, it would mean that Congress would have the power to write the seventh amendment out of the Constitution by statute. Stated another way, Congress would be able to engage in random "court-stripping" under the guise of creating new administrative actions.

In 1978, the Carter Justice Department seemed to reach a similar conclusion. They stated, "In response to questions about the ALJ mechanism found in an earlier version of the fair housing bill, that:"

> Plainly, the seventh amendment question here is a close and difficult one. Were we to opine one way or the other, our conclusion would probably favor a finding that [the ALJ provision] is unconstitutional.

I did not always agree with the Carter Justice Department, but this conclusion makes sense. At the Virginia ratifying convention in 1788, Patrick Henry, who was primarily responsible for securing jury trial rights in the Bill of Rights, attacked the Constitution because, in his words, "We are to part with that trial by jury which our ancestors secured their lives and property with, and we are to build castles in the air and substitute visionary modes of decision for that noble palladium. * * * Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off." Elliot's Debates 3, 544-545.

In light of this history and jurisprudence, and the large amount of testimony we received during the hearings on this issue, I am convinced that claims under this section of the bill remain private in nature. The participation of the Secretary of HUD does not transform them into something public which would allow Congress to strip away the right to a jury trial.

This section of the bill was also of serious concern to the Members of the House. During their consideration of the bill, they adopted a simple compromise which allows any party in a fair housing action to request that the matter be removed to a Federal district court. This simple solution not only preserves the less costly and less formal administrative forum for resolving the dispute, but also provides the parties with an opportunity to appear before a jury of their peers if any party feels that a particular case merits such consideration. I applaud the Members of the House, the civil rights community, the National Realtors Association, and others involved in arriving at this workable solution.

Another concern I had with this legislation, which, interestingly enough, arose out of the compromise I just mentioned, was the transfer of some of the litigating authority from the Department of Justice to the Department of Housing and Urban Development. The Department of Justice is the litigating arm of the executive branch. Over the years since the 1968 act was first placed into effect, the Department of Justice has always had litigating authority in fair housing cases and has developed the expertise necessary to pursue these matters. The House compromise would have fragmented the Federal litigating authority and thereby promoted interference and confusion.

Fortunately, in the intervening time since this bill was sent over by the House, the issue has received consideration and this bill will now vest all litigating authority in the Department of Justice, as is properly the case.

These changes in the enforcement provisions of the bill are important and they were primarily responsible in obtaining the broad support that this measure now enjoys, including my own.

I want to congratulate the sponsors of this bill for agreeing to these and other changes which were agreed to during the negotiating process on this legislation, which began at the subcommittee level and extended until just this morning. The bill is better and deserving of broad support, and I would encourage all of my colleagues to support its passage.

I would also like to warn my colleagues that we should not be quick to sit back and declare our work over. Although the bill is now improved, it is by no means perfect. The bill correctly extends fair housing protections to two new classes of citizens, the handicapped and families with children, but I am afraid that it will also have large negative impact on the Nation's elderly.

Part of the negotiation process with this bill has involved the inclusion of exemptions for housing for older persons since such housing will be directly affected by the familial status protections. The sponsors of this bill have carefully considered these concerns as I raised them during the subcommittee review of this bill and some exemptions have been adopted, but they may be too narrow.

I want to raise this caveat at this time because I am concerned about our senior citizens in this country. I suspect that the majority of the elderly population is unaware of what we are doing in this bill. Some of the organizations which represent the concerns of these citizens endorsed this bill early on, and I fear that their individual members have not been fully appraised of the impact that this bill will have on adults only housing. Only now are some beginning to understand that this bill may permit families with children to move into their housing.

I am also still bothered by the effect that this bill will have on the conciliation process in fair housing cases. It seems to me that reconciliation of a housing dispute prior to bringing the case before an administrative law judge or a Federal district court is still the most desired procedure. The conciliation process is by far the quickest and least costly process from an administrative point of view. However, this bill will require that each conciliation agreement be made public. Only where both parties and the Secretary of HUD agree will such an agreement remain private.

This fact may have a negative impact and actually discourage parties from seriously entering into the conciliation process. From a landlord or real estate agent's point of view, the publication of an agreement is likely to encourage others to file complaints against them regardless of the merits. From a buyer or renter's point of view, publication of the fact that he or she was involved in such a complaint may encourage future landlords or agents to find spurious reasons to avoid dealing with that buyer or renter.

While there are undoubtedly some benefits from the publication a conciliation results. I believe the negative aspects far outweigh the positives.

Another concern that I have with this legislation is our failure to define housing discrimination in a manner sufficient to preclude practices such as integration maintenance. In Brooklyn, for instance, a large housing complex with approximately 17,000 tenants was operated pursuant to a quota which limited the percentage of apartments rented to minorities to 30 percent. In New York City, a housing project was operated with a quota which allocated 75 percent of the apartments to whites, 20 percent to Hispanics, and 5 percent to blacks. This kind of program, even if undertaken to achieve someone's notion of appropriate racial balance, is discriminatory. A black family that arrives after the quota for blacks is filled will be denied a housing opportunity solely on the basis of race. We ought to correct this discrimination, this obstacle to equal housing opportunity. We ought to take steps to ensure that no one is excluded from housing opportunities solely because someone decides that their racial class is already adequately represented in the neighborhood.

Mr. President, I have mentioned a few points in the bill that I still view as in need of further refinement. Without question, there will be others. It is amazing how the legal community effectively comes up with new ways of bringing action. It has always been clear that legislative changes were necessary for the fair housing laws, and this bill will fulfill that destiny.

After an appropriate period of time and experience with the implementation of these provisions, if it is found that this bill is harsher on senior citizens—as I am afraid it will be—than we intend or it was intended as we have this bill evolve, or if the conciliation process is not being adequately utilized, or if any citizen continues to be turned away from available housing, then I would hope that the sponsors and supporters of this bill will join with me and make such changes as will be necessary.

I am in hopes that perhaps good reason will prevail and that none of these issues will arise in the litigation process under our fair housing laws. Unfortunately, I am afraid they will arise, and this could cause some problems and difficulties for this bill. If it does, we should change it immediately.

I want to thank the sponsors and supporters of this bill for making some of the changes that I felt were necessary before final passage. In particular, I thank the distinguished Senator from Massachusetts, because he and I have worked long and hard to try to come up with a fair housing bill I could support. He has been a leader in these areas, and I wish to acknowledge that and acknowledge his kindness and efforts in working with me.

I also praise the distinguished ranking minority member of the Judiciary Committee. He is one of the pillars of the Senate, one of the truly greatest men who has ever sat in the U.S. Senate. He is a person without bias. He is a person who tries to do what is right every day of his life. I love and admire him. In large measure, it has been because of his work and his efforts through the years that this bill is coming out as well as it is, by the time we get the substitute amendment to it or we substitute for this bill today.

There are others who deserve a lot of credit on this bill, but suffice it to say, they know who they are, and I will be happy to thank them personally.

While I have my stated reservations with some sections of the bill, on the whole, it is a good piece of legislation and deserves affirmative consideration.

It is a far cry from what it was back in 1979 and 1980 when that particular matter was fought and I had to lead the fight against that bill, something I felt very badly about but something I felt very sure the right thing to do at the time.

I was committed as I am today about civil rights and fair housing. Sometimes it seems to me we should write these bills better than we do. This one is a much better bill.

The extension of fair housing protections to the handicapped and families with children and the strengthening of the enforcement provisions are welcomed and supported by this Senator.

I think it is a good bill. I recommend my fellow Senators support it, and I want to say with all honesty that I am proud to be a cosponsor of this bill. As of today, I am proud to be a named cosponsor on the substitute which will become the major bill before we pass it through the Senator floor, hopefully today or within the relatively short future.

I again express appreciation to all concerned and I lend my name and my support to this good piece of civil rights legislation.

Mr. President, I yield the floor.

Mr. THURMOND. Mr. President, if the Senator will yield, I wish to express my appreciation to the able Senator from Utah for his kind remarks. I want to say it has been a great pleasure serving with him here in the Senate. The State of Utah is indeed fortunate to have such an able, dedicated Senator here representing them on the floor of the Senate as Senator HATCH.

Mr. HATCH. I thank my colleague for his kind remarks.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I point out just for the record at the start of this debate the consideration which the Senate Judiciary Committee and the full Senate has given to this issue. I think points were made about the unusual procedures that were followed, although not unprecedented clearly, in bringing this matter up to the floor of the Senate at this time. The procedures which were followed with this legislation are similar to the procedures that were followed with our Civil Rights Act of 1964, the Voting Rights Amendments of 1970, the Voting Rights Amendments of 1975, the extension of the Civil Rights Commission in 1978, the Martin Luther King holiday bill, and the extension of the Civil Rights Commission in 1983.

So this has not been a new procedure and given the time in this session, it is certainly a procedure which I support. I think it is important for the membership to understand that the Judiciary Committee, in 1979, held 6 days of hearings on similar fair housing legislation. Actually, the Committee reported a fair housing bill in August of 1980. We had 9 days of debate during 1980. We fell six votes short of cutting off a filibuster as the Congress drew to a close. This was after the election, the post-election session.

But, nonetheless, we had a very good debate on that measure. In this Congress, the Constitution Subcommittee of the Senate held 6 days of hearings on the fair housing bill.

Then really as a result of those hearings, Senator SPECTER and I made revisions in the bill to respond to some of the questions in those hearings. They were incorporated in the Kennedy-Specter substitute which was supported by the Constitution Subcommittee in June 1987, and this is very similar to the legislation that we are debating and discussing now, and that we have had in one form or another, therefore, for at least 1½ years.

That bill included the extension of coverage to the handicapped. It also provided protections for families with children.

As the House report indicated, the legislation which eventually passed the House was generally very similar to the measure that we had reported to the full committee.

The measure now which we are talking and debating has been approved by 367 to 23 in the House of Representatives.

So, there is very broad and wide support. On the particular compromise amendment that was worked out by Mr. FISH and Mr. EDWARDS, which probably did as much as anything to really unlock the very strong movement on this measure, it actually passed the House 401 to 0.

The President supported this measure. The Vice President is supporting the measure. The minority leader, the Secretary of Housing and Urban Development, all express their support for this measure.

We have had extensive negotiations with the administration and the various interested groups, as I have mentioned earlier. We are very much in their debt for all of the work that all of the groups have done in coming together to support this particular proposal.

This issue, in effect, has been before the Senate for some 10 years. Ten years of delay is long enough, and the Senate ought to move forward.

Finally, I think all of us are mindful again of the necessary absence of our dear colleague, the Senator from Delaware, Senator BIDEN, the chairman of the Judiciary Committee, he has been a long-time advocate, strongly committed to this measure, he has worked both as the chairman of the committee and as a member of the committee for this type of legislation. I know if he were here today, he would be speaking in strong support of this measure and although he is absent, I know that certainly the members of the Judiciary Committee know about the work that was done to advance this measure by the Senator from Delaware.

Finally, I would say those of us supporting this measure are also mindful and we really stand on the shoulders of many of our former colleagues. The Senator from Indiana, Senator Bayh, was one of the strong supporters of this measure when he was on the Senate Judiciary Committee. The Senator from Maryland, Senator Mathias, was a leader on this measure as well in previous times.

So, we are grateful for all of the work that has been done by a number of our colleagues on both sides of the aisle in previous Congresses, and we have a better bill because of their work and their efforts, and we acknowledge the important contribution that they have made.

I see my colleague from Iowa on the floor. As chairman of the Handicapped Subcommittee, he has been instrumental in working and fashioning the particular provisions of this legislation that prohibit the discrimination against the handicapped and I think all of those 33 or 34 million Americans who have some mental or physical challenges know the strong work that the Senator from Iowa has done in this measure, and all of us are grateful to him for his leadership.

I yield the floor.

The PRESIDING OFFICER. To the Senator from Iowa.

Mr. HARKIN. Mr. President, I rise in support of the Fair Housing Amendments Act of 1988, and I thank my distinguished chairman of the committee for his very kind remarks on my behalf. It has indeed been a pleasure to work with him on these issues as the chairman of the handicapped subcommittee, on the committee on which Senator KENNEDY chairs.

I just want to compliment both Senator KENNEDY and Senator SPECTER for their leadership in guiding this bipartisan substitute bill to the floor. It is to their credit that the bill has been endorsed by the national organizations representing the homebuilders, the realtors, children, older Americans, church groups, and civil rights groups, including groups representing racial, ethnic, and religious minorities, women and persons with handicaps. It is also to Senator KENNEDY's credit and Senator SPECTER's credit that this

bill now has the endorsement of the White House.

I believe the goals of nondiscrimination that Congress sought to achieve in the Fair Housing Act of 1968 will finally be realized with the passage of these amendments. Not only does this bill contain enforcement provisions which are sorely needed; it expands protections to two classes of Americans that experience housing discrimination on a daily basis—families with children and individuals with disabilities.

Today, in my capacity as chairman of the Subcommittee on the Handicapped, I wish to focus the remainder of my remarks on the critical problem of housing discrimination that Americans with disabilities face and the provisions of the bill which will go a long way toward eliminating this problem as a matter of public policy.

The National Council on the Handicapped, an independent Federal agency comprised of 15 members appointed by the President and confirmed by the Senate, in two recent publications, "Toward Independence" and "On the Threshold of Independence," documents the magnitude of discrimination faced by persons with disabilities in such areas as housing, employment, public accommodations, transportation, communications, and public services. The Council's conclusion is that discrimination in these areas is still "substantial and pervasive."

Discrimination in housing on the basis of handicap takes many forms. One form of discrimination is the segregation of an individual with a handicap in specified units in a multifamily dwelling. A second form of discrimination is the refusal—the outright refusal—to rent or sell a dwelling to an individual with a handicap and this is based basically on ignorance, stereotypes, misperceptions, and unfounded beliefs. Marca Bristo, president of Access Living, a center for independent living in Chicago in testimony before our subcommittee presented on behalf of over 40 national disability organizations to the Subcommittee on the Constitution, Committee on the Judiciary described examples of this form of discrimination:

> The woman who is deaf and was not even allowed to complete an application for an apartment because the rental agent assumed she was not competent; only because she was deaf.
>
> The young man with mild mental retardation in D.C. who was told there were no units left after he was observed getting assistance in reading his application. His previous rental history was impeccable and his income was more than sufficient. The units were readvertised the following weekend.
>
> The young woman, head-injured as a result of an accident, whose communication difficulties lead the apartment manager to reject her application on the grounds that she is too disabled to live by herself; and
>
> The man who uses attendant care and is barred from renting an apartment because the landlord assumed that the applicant was unable to live independently just because he needs an attendant to meet personal care needs.

The report of the President's Commission on the Human Immunodeficiency Virus Epidemic, June 1988, states that:

> One of the primary causes of discriminatory responses to an individual with HIV infection is fear, based on ignorance or misinformation about the transmission of the virus. We cannot afford to let such ignorance and misinformation persist.

The Commission concludes that discrimination against persons with HIV infection in housing, among other areas, is unwarranted because it has no public health basis. And yet Mr. President, there is great discrimination against those individuals.

A third form of discrimination results from thoughtlessness and indifference. Policies or acts that have the effect of causing discrimination can be just as devastating as other forms of discrimination. For example, a person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by a policy that provides "no wheeled vehicles may be used on carpets" or by the design and construction of a dwelling that results in a lack of access into a unit because the door ways are too narrow. These policies are tantamount to a landlord posting a sign that reads: "handicapped persons are not welcome." In *Alexander* v. *Choate*, 469 U.S. 287 (1985), the U.S. Supreme Court observed that discrimination on the basis of handicap is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect" and mentioned "architectural barriers" as one factor that can have a discriminatory effect.

Ending discrimination on the basis of handicap is not only morally right but it is also an economically prudent public policy. The national council concludes that "the costs of providing appropriate housing options for disabled people are well worth the investment because of the significant savings that may be engendered by enabling disabled people to live in the community, get jobs, and pay taxes." That is pointed out in Toward Independence at page 37, which was put out by the national council.

Housing is a fundamental requirement for living independently and economic self-sufficiency. Employment opportunities are greatly restricted by the lack of housing options in reasonable proximity to potential jobsites and transportation systems. For many, the alternative to a lack of accessible housing is institutionalization. One out of every six Americans is now disabled. As the population ages and as medical technology continues to prolong life, accessible housing will become increasingly more critical.

Depending on geographic location, the national council reports that it currently costs between $30,000 to $100,000 per year for each individual who is elderly or disabled to be housed in a federally funded facility. Without a Federal policy that enables people with disabilities to live in the community, these expenses will only accelerate.

In addressing discrimination on the basis of handicap, the bill sends a clear message to persons with disabilities and to those engaged in the sale and rental of dwellings and other transactions covered by the bill that the arbitrary exclusion or segregation of persons with disabilities from housing will no longer be tolerated. It repudiates the use of stereotypes and ignorance and mandates instead that persons with handicaps be considered as individuals. Generalized perceptions about individuals with disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion. The bill also requires reasonable adjustments to policies and services that have the effect of denying opportunity for individuals with disabilities and repudiates exclusions resulting from architectural barriers by establishing reasonable and modest requirements of accessibility and adaptability.

The provisions in the Fair Housing Amendment Act of 1988 are substantially the same as the provisions of a draft bill pertaining to housing discrimination developed by the national council—see "On the Threshold of Independence." It is important to note that all of the current members of the national council were appointed by President Reagan.

I would like to focus the remainder of my remarks on three provisions in the Fair Housing Amendments Act of 1988. First, the bill includes a definition of the term "handicap" that is substantially similar to the definition under the primary Federal law prohibiting discrimination on the basis of handicap, the Rehabilitation Act of 1973—which is under the jurisdiction of the Subcommittee on the Handicapped, which I chair.

The standards and interpretations of the term "handicap" in the Rehabilitation Act—as recently amended by the Civil Rights Restoration Act; current regulations—see for example, 45 CFR 84 and 34 CFR 104 and the appendices attached thereto; and the interpretations by the Supreme Court in *School Board of Nassau* v. *Arline*, 107 S. Ct. 1123 (1987) apply to the definition included in the bill. For example, AIDS and infection with the human immunodeficiency virus are covered under this act. Several courts have correctly found such coverage under

section 504 of the Rehabilitation Act. See for example, *DOE* v. *Centinela Hospital*, No. CV 87-2514 (par) (C.D. Cal. 1988); *Local 1812 AFGE* v. *Dept. of State*, 662 F. Supp. 50 (1987).

Second, I would like to comment on the provision in the bill which states that

> Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

The formulation of this provision parallels the provision added to the Civil Rights Restoration Act with regard to individuals with contagious diseases and infections—a provision Congress added in order to reaffirm the Arline decision. An explanation of the provision is included in the March 2, 1988, CONGRESSIONAL RECORD at page 1738. In Arline, the Supreme Court held that:

> [A] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.

While Arline dealt with employment in the context of section 504 of the Rehabilitation Act of 1973, the same standard applies in the context of housing under this act. I have reviewed the House report accompanying H.R. 1158 (pages 28-30) and agree with the statements on this matter contained therein. I have also reviewed the CONGRESSIONAL RECORD and agree with Congressman FRANK's explanation of his amendment (H 4679) that added the phrase "or whose tenancy would result in substantial physical damage to the property of others" and Chairman EDWARDS explanation (H 4932).

This phrase is intended to be read in conjunction with the other provisions in the act providing access for persons in wheelchairs. Thus, this provision should not be construed to permit a landlord to exclude a person in a wheelchair because of a fear that the wheelchair may damage the carpets or chip the paint off the walls. These and other similar typical effects of using a wheelchair do not constitute "substantial physical damage." Similarly, the fact that a person might damage some minor piece of property would also not allow this provision to take effect. In addition, because the provision requires "substantial physical damage," any concern—whether unfounded or not—regarding possible reduction in property value stemming from stereotypes and misperceptions about individuals with handicaps of the landlord or others is clearly not included.

The "direct threat" provision was included in the bill for the same reason it was included in 1978 in the Rehabilitation Act and in the Civil Rights Restoration Act. While it is not foreseeable that the tenancy of any individual with handicaps would pose any risk, much less a significant risk, to the health or safety of others or result in substantial physical damage to the property of others by the status of being handicapped, the provision was added to allay the fear of those who believe that the nondiscrimination provisions of this act could force landlords and owners to rent or sell to individuals whose tenancies could pose such a risk. It does not change in any way the principles enunciated by the court in Arline.

The third provision I would like to comment on ensures the nondiscriminatory design and construction of covered multifamily dwellings for "new construction," that is, first occupancy after the date that is 30 months after the date of enactment of this act. The bill provides that discrimination includes the failure to design and construct such dwellings in such a manner that:

First, the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

Second, all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

Third, all premises within such dwellings contain the following features of adaptive design: an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; reinforcements in bathroom walls to allow later installation of grab bars; and usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

These provisions are the result of lengthy negotiations between the disability community and architects, builders, and managers to achieve a reasonable balance between meeting the intent of the bill, to assure equal opportunity in housing for individuals with handicaps, while minimizing both construction costs and potential issues of marketability.

The cost of compliance with certain of these requirements is zero and minimal for other requirements. Ron Mace, a well-known architect who specializes in the design of buildings for use by disabled and nondisabled people, in testimony before the Subcommittee on the Constitution stated:

> For example, a prohibition in all housing against the narrow, 24 inch bathroom door would eliminate the most frequently needed modifications in the future, and it would not increase costs because the wall left out to install the wider door costs more than the door itself.

Mr. Mace then added:

> Because of advances in technology, design standards, and better products, we can now build most new housing that can be used by everyone without increasing its costs.

We also included a provision in the substitute bill, which is not in the House bill, that is designed to clarify the relationship between these civil rights requirements and State and local policies, practices, and procedures. The new provision includes several points. First, if a State or unit of general local government has incorporated into its laws the requirements for new construction contained in the bill, compliance with such laws will be considered to satisfy the requirements in the bill.

Second, regardless of whether or not a State or unit of general local government incorporates into its laws these requirements, such governmental unit may review and approve newly constructed dwellings for the purpose of making determinations of whether the design and construction requirements are being met. Third, the Secretary of HUD shall encourage, but may not require, such governmental units to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with the requirements for new construction in the bill, and must provide technical assistance to such governmental units and other persons to implement the requirements applicable to new construction.

Fourth, the bill reaffirms what the sponsors of the bill have been saying all along; namely nothing in the act should be construed to require the Secretary to review or approve the plans, designs, or construction of all covered multifamily dwellings to determine compliance with the new construction requirements in the act. The final point makes it clear that HUD and the State enforcement agencies retain the obligation to receive and process complaints or otherwise engage in enforcement activities under the act. Further, determinations by such State or units or local general government will not be conclusive in enforcement proceedings under the act.

For example, HUD may determine that the policies developed by the governmental unit are inconsistent with the requirements in the act. Similarly, HUD could determine that the requirements in the State law were adequate but a person's designs were inconsistent with the requirements in the applicable State law. Further, HUD could determine that the designs were consistent with the law, but the construction was not carried out in accordance with the designs.

Twenty years ago, Congress established a national policy that it is unac-

ceptable to discriminate in housing practices against racial, ethnic, and religious minorities; subsequent amendments extended these protections to women. We must now act to eliminate housing discrimination against persons with disabilities, our largest minority. Individuals with disabilities have the right to be protected from discrimination in housing and have the same recourse through the same legal avenues that are now available to other minorities to protest discriminatory actions.

I urge my colleagues to join me in support of this legislation so that we can send a long overdue message to all Americans with disabilities that they have the right to live wherever they choose.

Mr. President, I will close by saying that this legislation is for all Americans with disabilities. A vote for the disability provisions in this bill, without amendment, is a vote for our brothers and sisters who were disabled in the Vietnam war and other wars and to the young infants and children born with disabilities or who, because of injury or disease, become disabled.

It is my hope that this legislation will enable Americans with disabilities to live in communities free from attitudinal and physical barriers. Every American deserves the opportunity to live with or close to his or her family, rather than to live in an institution or segregated housing. Every American deserves the right to be able to visit his friends and neighbors without worry that physical barriers would get in the way.

So, Mr. President, again, this bill is for all Americans with disabilities. I am hopeful that any amendments that are offered that would lessen the thrust of this bill to provide the access that is needed will be voted down by the Senate. I am hopeful that the bill, with amendments as proposed, will be passed in its entirety.

Again, Mr. President, I wish to give my personal thanks and the thanks, I am sure, on behalf of of all of those disabled groups that have testified before my Subcommittee on the Handicapped to the distinguished Senator from Massachusetts for bringing this measure to the floor in the form that it is now in.

FAIR HOUSING AMENDMENTS ACT

Mr. KARNES. Mr. President, I am pleased to be a cosponsor of the Fair Housing Amendments Act, H.R. 1158, as amended. This legislation is designed to strengthen the substantive protections and the enforcement mechanisms of the Fair Housing Act. I strongly support that objective.

The Fair Housing Act protects individuals against discrimination based on race, color, religion, sex or national origin.

In his legislative message to the Congress on January 25, 1988, the President stated:

> The 20th anniversary of the Fair Housing Act of 1968 is an appropriate time to strengthen the statute by increasing the penalties of those convicted of housing discrimination and by extending the protections of the Act to handicapped persons.

I heartily agree with the President. I am pleased that, to the protections already provided under existing law, this legislation adds prohibitions on discrimination against individuals based on handicap and familial status. These changes are long overdue.

President Reagan and Housing and Urban Development Secretary Pierce have consistently and vigorously supported efforts to strengthen and expand Federal fair housing enforcement under title VIII of the Civil Rights Act of 1968. In every State of the Union message since 1981 the President has called for Congress to enact legislation to amend the fair housing laws. Secretary Pierce has submitted legislation in behalf of the administration in 1983, 1985, 1986, and 1988. The most recent administration bill had many basic features in common with H.R. 1158, which is now before us.

Mr. President, my commitment to available, affordable and accessible housing for all our citizens has developed over many years of personal experience and hands-on involvement in numerous community-based programs in my home town of Omaha, NE, all designed to increase housing opportunities.

Moreover, as a White House fellow in 1981 and 1982 I served as a special assistant to Secretary of Housing and Urban Development Samuel R. Pierce, so I speak from a close, personal vantage point when I say how important fair housing is and has been to Secretary Pierce and this administration and to the future of our country and our people.

Mr. President, I want to applaud Secretary Pierce and this administration for their commitment to extending the guarantees and the protection of the civil rights laws to the handicapped and to families with children in housing matters and to their leadership and efforts in making fair housing a reality for all Americans.

As a supporter of fair housing and civil rights for all Americans, I am pleased that we now have an opportunity to enact landmark legislation which:

Empowers the Federal Government to initiate enforcement actions involving individual acts of discrimination; increases penalties for fair housing violations authorizes the Secretary of Housing and Urban Development to initiate investigations without a formal complaint; and adds the handicapped and familiar status to those classes protected by title VIII of the Civil Rights Act of 1968.

Also this act strengthens enforcement of the Fair Housing Act, this legislation which:

Authorizes the Department of Justice to bring lawsuits on behalf of an individual based on a single occurrence of housing discrimination, rather than requiring a pattern or practice of discrimination, as under current law; authorizes awards of compensatory damages to individuals aggrieved by housing discrimination in lawsuits brought by the Department of Justice; authorizes substantial civil penalties that a court may impose for housing discrimination in a lawsuit brought by the Department of Justice; and increases substantially the punitive damages a court may award in a lawsuit brought by an individual aggrieved by housing discrimination.

Mr. President, I wish to touch on several provisions in the bipartisan substitute to H.R. 1158 which we are now considering that clear up several problems contained in the House-passed bill. These amendments are clear evidence of the spirit of compromise and determination of those who have worked so tirelessly to produce an effective, workable fair housing bill. I refer to provisions on familial status, handicapped accessibility and litigation authority.

One of the most contentious provisions of this legislation concerns familial status. For the first time, familial status—defined as one or more children under 18 living with a parent or guardian—is added by H.R. 1158 to the classes protected by title VIII of the Civil Rights Act.

Originally the administration was concerned that there had not been sufficient consideration to the effects that the housing restrictions would have on the housing choices of the elderly and adults without children. It believed that the bill needed amending to preserve the housing choices for the elderly and adults without children.

Fortunately the bipartisan substitute has amended the familial status language so that it is now workable and will effectively protect families from discrimination in housing without unfairly limiting housing choices for the elderly or causing problems for elderly communities.

H.R. 1158 exempts some adult-only buildings consisting solely of efficiency and one-bedroom units. Elderly housing is also exempted from the requirement to admit families with children if no one in the building is under 62 years of age, or if 90 percent of the residents are over 55 years of age and the owner provides significant facilities and services designed to meet the physical or social needs of older persons.

The bipartisan substitute removes the requirement that every building owner wishing to serve older persons

must either deny admission to everyone under 61 years of age or provide dining, social or recreational facilities and services, such as emergency and preventive health care, continuing education, welfare information and counseling, housekeeping and transportation. The costs of these facilities and services threatened to restrict elderly-only housing to the relatively expensive retirement communities such as Leisure World or Sun City in Arizona.

It also increases from 10 to 20 percent the maximum percentage of units in exempted elderly buildings which may be occupied by nonelderly persons, elderly households with an adult child, or a couple in which one spouse is under 55 years of age. Moreover, the factors required to maintain an exemption for buildings serving older persons will be established by regulation. This will allow HUD some latitude to react to experience and the changing housing needs of the elderly.

The results of compromise are evident. As a result, the bipartisan substitute to H.R. 1158 provides increased flexibility, reduced potential for increased cost of elderly housing, and better protection for a broader range of elderly housing arrangements.

Let me mention another area where compromise has improved the legislation. As passed by the House, H.R. 1158 requires that all covered multifamily new construction dwellings be constructed so that all doors into and within the premises are wide enough for persons with wheelchairs and all public and common areas are readily accessible to and usable by the handicapped. Further, units in covered multifamily new construction must provide: First, an accessible route into and through the dwelling for handicapped persons; second, light switches and thermostats at an appropriate level; third, bathroom walls reinforced for later installation of grab bars at a tenant's expense; and fourth, kitchens and bathrooms in which a wheelchair can maneuver.

The bipartisan substitute relieves HUD of any obligation to develop or enforce a Federal building code or to generally review and approve the plans, designs, and construction of covered multifamily dwellings. It encourages States and localities to adopt and implement their own laws. It authorizes State and local agencies to inspect construction and certify compliance with the bill's requirements. It does not reduce the coverage of the legislation or alter the features negotiated by the sponsors, the National Association of Home Builders, and the civil rights and disability groups.

As a result of compromise, the substitute bill strengthens the antidiscrimination provisions protecting the handicapped and at the same time defers to and encourages State and local enforcement. Thus it avoids Federal monitoring of the more than 400,000 multifamily units constructed in our country each year.

Finally. I wish to mention two principal features of the substitute which are the results of compromise and effectively resolve the constitutional concerns over separation of powers arising out of the sharing of litigating authority which, in the House-passed version, was divided among HUD and the Justice Department.

H.R. 1158, as passed by the House, authorizes the Secretary of Housing and Urban Development to seek prompt judicial relief—including restraining orders and injunctions—during the course of an investigation if immediate action is necessary to carry out the purposes of fair housing, such as protecting the rights of a complaining party. The Secretary is also authorized to maintain actions in Federal district court on behalf of aggrieved persons when one party chooses to remove a case from the jurisdiction of administrative law judges. These are changes to current law, which authorizes the Attorney General to file cases only to halt a pattern or practice of housing discrimination or in matters of general public importance.

Parallel overlapping enforcement authority in two agencies in an action arising out of a single fact situation will hinder—not advance—effective administration of the law. The authority to litigate has resided in the Justice Department under the Fair Housing Act since its passage in 1968 and as it has developed the necessary knowledge and expertise in litigating claims of housing discrimination. Fragmenting this authority would not be an efficient use of Government law enforcement resources.

The bipartisan substitute consolidates the conduct of all Federal fair housing litigation at the Department of Justice. This will ensure that enforcement actions brought by the Government under the Fair Housing law will have the benefit of the superior nationwide resources and expertise of the Justice Department, including local U.S. attorneys.

The substitute assures that the Secretary of HUD has both the authority to seek appropriate judicial action to halt acts of housing discrimination and access to the legal resources possessed by Justice.

The House-passed bill also failed to provide clearly authority for the executive branch to exercise law enforcement discretion required by the separation of powers doctrine. There was no opportunity to resolve this problem during House consideration of H.R. 1158. The bipartisan substitute resolves this problem by clarifying that the Secretary of Housing and Urban Development has the discretion to initiate formal enforcement proceedings based on the facts developed in an investigation.

Mr. President, enactment of this landmark legislation is at last possible because of the spirit of compromise that has pervaded the negotiations surrounding the bipartisan substitute we are discussing today and hopefully voting on tomorrow. As a consequence, H.R. 1158, as amended, represents a reasonable consensus among all parties. I am happy to acknowledge that the President and Vice President both have indicated their support for the bipartisan substitute. The housing industry, in particular, the National Association of Home Builders and the National Association of Realtors support the compromise. And various elderly coalition groups and the civil rights and community organizations are pleased with the compromise.

In my opinion, this substitute—the Kennedy-Specter substitute—is an excellent, tough, reasonable compromise. If enacted, it promises to strenghten and expand our civil rights laws so that we can now be assured that the rights of the handicapped and young families with children in housing will be adequately protected in our Nation. It reconfirms our Nation's commitment to fairness and equality for all Americans in housing.

This reform is long overdue. I am satisfied that these improvements will not in any way have a negative impact on rural housing, but will, in fact, protect families with children and handicapped citizens residing in rural Nebraska and guarantee them equal access to housing in rural areas throughout this country.

Mr. President, I am proud to support this legislation, and I hope it will be strongly supported by my colleagues.

With the passage of this legislation, all Americans—in particular, the handicapped and families with children—will have achieved a great deal more than a window of opportunity in housing. Indeed, the door to opportunity, fairness, and equality will have swung wide open. And if this Senator has anything to do with it, this door will never be allowed to close again on any American regardless of race, creed, sex, age, disability, or familiail status.

Mr. President, I encourage all of my colleagues to voice their strong support in favor of this legislation in a vote that I hope will occur tomorrow.

With those remarks, I thank the Chair and yield the floor.

Mr. SPECTER. Mr. President, I ask unanimous consent that Senator HEINZ, Senator PACKWOOD, and Senator DANFORTH be added as cosponsors.

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

Mr. SPECTER. I thank the Chair, yield the floor, and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. DOLE. Mr. President, two decades ago Congress passed the first fair housing law with the hope that discrimination in housing would be ended once and for all.

Congress did not believe in 1968 that the right to buy or rent a house should be determined by a person's race, color, religion, sex or national origin.

We still do not believe it is right to discriminate in housing. It is unfair, it is wrong, and, thanks to the action of the Congress, it is illegal.

Now, some 20 years after passage of the fair housing law, we find that the job is still not complete.

The rights of persons with disabilities, and families with children, have never been protected under the fair housing law. And too many of those Americans already covered by the law have waited far too long for it to become truly effective.

We, too, in this body—and I would say to my friends in the other body—have waited long enough. The years of debate here and our long experience with the fair housing law have taught us its strengths and its weaknesses. It is time now to act.

NEED FOR STRONGER ENFORCEMENT

The Department of Housing and Urban Development, which administers the fair housing law, estimates that more than 2 million acts of housing discrimination occur every year—2 million. Yet, HUD receives only 4,000 to 5,000 complaints each year. Something is wrong here.

Here are some possible reasons for the low number of complaints: Some victims may not even know they have been discriminated against because information about the availability of housing is withheld.

Another reason for the low number of complaints may be frustration. Frustration due to the even lower number of housing units actually obtained for the victims of discrimination.

It is a simple fact of life that if you do not deliver the goods, sooner or later, people simply stop coming to you for help.

In my view, a major reason the fair housing law has not been more effective is that it relies on voluntary conciliation and persuasion. In other words, a law without its teeth. It does not have the clout necessary to stop discrimination as it occurs and to assure that housing is still there when a complaint is finally resolved.

The Secretary of HUD, in testimony last year before the Judiciary Committee, cited a study indicating that a black person seeking to purchase a home had a 48-percent chance of encountering discrimination. A black person seeking to rent had a 72-percent chance of being discriminated against.

This is unacceptable—especially 20 years after passage of the fair housing law. This Nation should not rest until fair housing is more than a slogan. It should be a reality.

PROTECTION FOR HANDICAPPED

In addition to testimony in favor of strengthening the enforcement of the fair housing law, both HUD and Justice have testified in favor of expanding the fair housing law to include persons with disabilities as a protected class. I strongly support such an expansion and urge my colleagues to do the same.

Disabled Americans want to be a part of the mainstream; and I can think of no more fundamental first step toward mainstream living than fairness in housing.

BIPARTISAN LEADERSHIP

I would just like to commend the bipartisan spirit that has marked this year's significant breakthrough on the fair housing front.

Senators SPECTER and KENNEDY along with other Senators on both sides of the aisle who have worked long and hard to reach agreement on fair housing are to be congratulated.

I would say that many of my colleagues in the House, again on both sides of the aisle, I will name just one, Congressman HAMILTON FISH. It was his effort, along with efforts of others but primarily his effort, that provided the breakthrough on the House side that brought all the parties together: The realtors and the home builders and others who have had some real questions about interpretation of some of the aspects of the fair housing legislation.

So we have a bipartisan effort and the efforts have demonstrated that civil rights is and always has been a bipartisan concern. The leadership Conference on Civil Rights and the National Realtors Association have also demonstrated real leadership on this issue. And I am proud to say that the president of the National Realtors Association is a Kansan, Nestor Weigand, who is a realtor in Wichita, KS, and he was there at the press conference on the House side a few weeks ago to indicate the National Realtors Association's strong support of the bill.

So I say to all those who have been participants, we have been able to forge an agreement acceptable to so many diverse groups. It was not an easy task, but it has been done.

Mr. President, the time has come to complete the job. I hope we can complete action on this bill not later than tomorrow. Maybe tomorrow after the policy luncheons will be a good time for a vote. There will be some debate. There still are some reservations with reference to the elderly.

I know my distinguished colleague, Senator THURMOND, who has been battling for equality for years, has some serious questions about certain aspects. There may be some questions about building codes, as far as the handicapped are concerned, but by and large, in my view, most of the problems surrounding this bill early on have been dealt with through the efforts of many of my colleagues in both the House and Senate and, again, on both sides of the aisle.

I would be very pleased to cosponsor, and I ask unanimous consent that I may be added as a cosponsor of the substitute.

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

Mr. DOLE. I urge my colleagues to support the substitute, knowing some will support the substitute but still have reservations about certain provisions.

I also would like to have printed in the RECORD a statement by President Reagan just issued by the White House, indicating his full support of the bill:

Today I received a welcome report from Secretary of Housing and Urban Development Sam Pierce and Attorney General Ed Meese that a package of amendments with broad support has been fashioned to further improve the bill that the House of Representatives passed in June. The package ensures appropriate roles for Federal, State and local government in protecting the housing rights of persons with handicaps, improves arrangements for the conduct of lawsuits by the Federal Government to enforce the act, and protect the rights of older Americans.

I urge the Senate and then the House to pass the bill swiftly, to advance the day when I will receive from the Congress the landmark civil rights bill for which we have worked so long and hard.

I commend the President. I ask unanimous consent that the statement be printed in the RECORD.

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

THE WHITE HOUSE,
August 1, 1988.

STATEMENT BY THE PRESIDENT

The Senate is scheduled to consider shortly legislation we have long sought to strengthen the Fair Housing Act. That Act prohibits discrimination in housing based on race, color, religion, sex or national origin.

I am extremely pleased at the swift congressional response to the call in my Legislative Message at the beginning of this session of Congress for the enactment of new civil rights legislation to strengthen the Fair Housing Act. Among other things, the legislation extends the protection of the Act

to prohibit housing discrimination against those with handicaps—one of my key legislative goals.

Today I received a welcome report from Secretary of Housing and Urban Development Sam Pierce and Attorney General Ed Meese that a package of amendments with broad support has been fashioned to further improve the bill that the House of Representatives passed in June. The package ensures appropriate roles for Federal, State and local government in protecting the housing rights of persons with handicaps, improves arrangements for the conduct of lawsuits by the Federal Government to enforce the Act, and protects the rights of older Americans.

I urge the Senate and then the House to pass the bill swiftly, to advance the day when I will receive from the Congress the landmark civil rights bill for which we have worked so long and hard.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.0

Mr. GRASSLEY. Mr. President, I rise in support of H.R. 1158, the Fair Housing Act Amendments of 1988, which will protect the rights of all Americans to seek and obtain housing.

This is—quite appropriately—a fair bill based upon a desent compromise.

Among those individuals and groups that deserve recognition for their work on this bill, I would like to mention HUD Secretary Samuel R. Pierce, and his role in helping to achieve this compromise.

I know Sam Pierce. He has been to my State many times to listen to the housing concerns of Iowans.

While I have not agreed with Secretary Pierce on every issue, I have always respected his sincerity. Where Secretary Pierce and I have never differed, however, is in the area of fair housing.

Together with the President, Secretary Pierce has asked for stronger fair housing enforcement legislation every year since taking over at his Department.

This most important legislative objective—to put teeth into the Federal fair housing law—is being realized with the passage of this compromise legislation.

Mr. President, with the passage of H.R. 1158, all of the parties to this compromise will be rewarded for assuming some significant political risks. Policymakers at HUD, the White House, the Justice Department, and housing interests in the private sector are to be congratulated.

Last month, after an important compromise was achieved to protect the rights of individuals to seek jury trials, H.R. 1158 passed the other body by a wide margin. However, administrative and enforcement problems remained in the bill. Negotiations amongst the interested parties ensued.

Finally, following further extensive discussions with the White House, the Vice President, HUD, and the Justice Department, an agreement was reached.

After many years of false starts and frustrations, it now appears that enforcement of the Fair Housing Act can be sustained because the Federal Government will have a mechanism in place to prosecute cases of housing discrimination.

As is usually the case in American politics, the debate over H.R. 1158 boiled down to the means of achieving a worthy goal.

The basic understanding—never questioned by any party to the negotiations over this legislation—is that it is in everyone's interest to promote equal access to affordable housing.

Again, I congratulate all who were involved in this compromise and I urge my colleagues to support this measure.

Mr. President, I ask unanimous consent that I be added as a cosponsor of the compromise amendment.

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

Mr. KENNEDY. Mr. President, I ask unanimous consent that the Senator from Ohio [Mr. METZENBAUM] be included as a cosponsor and the Senator from Vermont, Senator LEAHY.

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

Mr. KENNEDY. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. SPECTER. Mr. President, I ask unanimous consent that Senator BOSCHWITZ, Senator COHEN, Senator MCCONNELL, Senator CHAFEE, and Senator KARNES be added as cosponsors.

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

Mr. SPECTER. We seem to be gaining some momentum on this side of the aisle, I say to the Senator from Massachusetts. We better put out a call for some more cosponsors generally. We may be out of space here.

Mr. KENNEDY. They can demonstrate that further support by not offering any amendments from that side, too, and we will be able to get this whole bill expedited.

Mr. SPECTER. I think all these cosponsors will not add any amendments.

Mr. KENNEDY. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. SPECTER. Mr. President, I ask unanimous consent that Senator WARNER be added as a cosponsor.

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

Mr. SPECTER. I thank the Chair.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. KENNEDY. Mr. President, I ask unanimous consent that further proceedings under the quorum call be rescinded.

The PRESIDING OFFICER (Mr. WIRTH). Without objection, it is so ordered.

Mr. KENNEDY. Mr. President, I ask unanimous consent that Senators ADAMS, STEVENS, HATFIELD, MATSUNAGA, and SIMON be added as cosponsors of the substitute.

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

Mr. KENNEDY. I suggest the absence of a quorum.

The PRESIDING OFFICER. the clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. THURMOND. Mr. President, I ask unanimous consent that further proceedings under the quorum be dispensed with.

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

AMENDMENT NO. 1778 TO AMENDMENT NO. 2777

Mr. THURMOND. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from South Carolina [Mr. THURMOND] proposes an amendment numbered 2778 to amendment No. 2777:

On page 10, line 16 strike "two or" and on page 10, line 17, strike "more times".

Mr. THURMOND. Mr. President, this substitute pending before the Senate provides protection for individuals convicted of certain drug offenses. The substitute states that nothing in this title prohibits conduct against a person because such person has been convicted two or more times by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance.

The thrust of this provision is that an individual convicted of the manufacture or distribution of narcotics who is denied housing by a landlord should bring a lawsuit for this denial and recover damages. This makes no sense. A landlord should be allowed to protect other tenants from a dope dealer.

There is no rational reason to wait until an individual is convicted twice of a drug offense. One conviction is

sufficient. My amendment simply says that one conviction is sufficient for a landlord to refuse to rent to a drug dealer. It is that simple. I urge my colleagues to vote for this amendment. Failure to do so makes the rights of law-abiding citizens meaningless. Drug dealers deserve no Federal protection.

The PRESIDING OFFICER. Is there further discussion of the amendment?

Mr. KENNEDY. Mr. President, a similar amendment was adopted in the House of Representatives. It was agreeable to Congressman EDWARDS and others. I have no objection. I support the amendment.

What we are basically talking about is the manufacture and distribution of substances which are prohibited in other Federal statutes. I inquire of the Senator from South Carolina, as I read the Senator's language, if an individual is discriminated against because he is a member of some other protected class under the bill, for example, because he is black or Hispanic and not because he was convicted of drug offenses, then, of course, that individual would remain within the protection of the act; am I correct?

Mr. THURMOND. Mr. President, in response to the distinguished manager of the bill, my amendment is colorblind in its application with regard to a conviction.

Mr. KENNEDY. The fact remains we are identifying those who have violated the law and not extending it to those who violate the law. They would be prohibited from any protections. It would be based upon a conviction, is that correct, in a court of law?

Mr. THURMOND. That is correct.

Mr. KENNEDY. Any conviction against those particular items apply to anyone; is that correct?

Mr. THURMOND. That is correct.

Mr. KENNEDY. I have no objection to the amendment.

Mr. THURMOND. Mr. President, I ask for a rollcall on the amendment.

The PRESIDING OFFICER. Is there a sufficient second?

Mr. KENNEDY. We are agreed to take the amendment.

Mr. THURMOND. Mr. President, as I understand, the Senator is willing to accept the amendment?

Mr. KENNEDY. Yes.

Mr. THURMOND. We will not ask for a rollcall then, Mr. President.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 2778) was agreed to.

Mr. THURMOND. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. KENNEDY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. KENNEDY. Mr. President, if Senators have amendments, I hope they will bring them to the floor so that we could begin to dispose of those amendments. We have been prepared to debate these measures now through the course of the afternoon. We are glad to try to accommodate Senators. We also think that the membership is entitled to express itself on these different items. So I urge our colleagues who do have amendments to bring them to us. We have increasing support, bipartisan support, support by the President, the Vice President, the minority leader, and many others. We are impressed by that range of support. We want people who do have amendments to propound them, but we also hope to move along on the Senate's business. So I hope any of our colleagues with amendments will come to the floor so we can dispose of those amendments.

Mr. THURMOND. Mr. President, I send an amendment to the desk and ask unanimous consent it be printed in the RECORD.

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

Strike all of page 9a, and insert in lieu thereof the following:

Nor does any provision in this title regarding familial status apply with respect to housing for older persons.

"(2) As used in this section. "Housing for Older Persons" means—

"(A) any building, mobile home or trailer park, or any group of buildings on a contiguous parcel owned by the same person or entity, intended for, and at least 80 percent occupied by, at least one person 55 years of age or older per unit;

"(B) one-third of the units in any building, mobile home or trailer park, or in any group of buildings on a contiguous parcel owned by the same person or entity, provided that the housing provider maintains and displays, in the rental or sales office, a written declaration designating the exempt units; or

"(C) the size of units or number of bedrooms per unit in any building or group of buildings.

(D) Provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program).

"Notwithstanding any other provision of this title, only injunctive relief shall be available as a remedy against a housing provider in any action under this title based solely on a violation of the requirement to have such a written declaration as provided in subparagraph (B).".

"(3) Housing shall not fail to meet the requirements for housing for older persons by reason of:

"(A) persons residing in such housing as of the date of enactment of this Act who do not meet the age requirements of subsections 2(A), provided that new occupants of such housing meet the age requirements of subsections (2)(A); or

"(B) unoccupied units, provided that such units are reserved for occupancy by persons who meet the age requirements of subsections (2)(A).

Mr. THURMOND. Mr. President, I had intended to offer this amendment because I was concerned about the impact on our Nation's elderly citizens. Specifically, my concerns focused on how these new requirements their affect on the cost of retirement housing. Would this discriminate against those persons retiring on fixed incomes and not able to afford housing which provides significant facilities and services?

Mr. President, the administration is very concerned about these matters. They conferred with my staff about these matters. However, now the administration has sent a letter down in effect saying they do not approve of any amendments. I feel under the circumstances after talking with the manager of the bill and Secretary Pierce that the Secretary of HUD may have enough flexibility to handle this situation without this amendment. I would be very pleased to hear from the distinguished manager of the bill on that point.

Mr. KENNEDY. Mr. President, I welcome the opportunity to give those assurances to the Senator from South Carolina and indicate to him that the legislation provides for that kind of flexibility. It gives that kind of discretion to the Secretary of HUD and it is certainly the desire of those that have fashioned the legislation to permit this kind of flexibility.

What we are basically providing is that in areas that are going to be senior citizen retirement communities, those that are going to be the age of 62 or older, none of these particular services are going to have to be required. But when we were talking about younger ages, 55 and older and under the formula in the legislation, it spells out the percentage. Eighty percent of those units have to have individuals 55 or older. If that particular housing is going to be a place for retirees, particularly in some sections of our country—there has been concern in Arizona, Florida, and other communities—we want to make sure they are going to be really a place where seniors are going to retire. At least this requirement is an additional indication they are going to be for seniors, they will be providing the facilities which seniors basically enjoy and want. But it was never intended to be a requirement that additional kinds of services would be necessary in order to enjoy the provisions and protections of the act.

So we have granted the Secretary the ability to issue the kind of regulations that would take that into consideration. Specifically, the Secretary may provide in the regulations that it is impractical to provide facilities and services, and the exemption may nevertheless be available in those unusual circumstances where housing without

such facilities and services will provide important housing opportunities for older persons.

So I welcome the chance to give those assurances to the Senator from South Carolina. I think it provides the kind of flexibility which is necessary, and it also does not do violence to the basic thrust of the legislation, and the provisions in here to protect families with children.

Mr. THURMOND. Mr. President, in view of those assurances and action of the administration, I will not offer this amendment at this time. I want to say, however, I retain my right to offer this amendment at a later date if it proves to be needed to protect our Nation's senior citizens.

Mr. KENNEDY. Mr. President, I also give the assurance that the various associations of senior citizens are very familiar with these particular provisions, and they have given support for the language which we have included in the RECORD. That ought to at least give some additional assurances to some of the Members that might be concerned about that issue. The American Association of Retired Persons supports the way this language has been drafted as well.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HELMS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SANFORD). Without objection, it is so ordered.

Mr. HELMS. Mr. President, the bill is open to amendment?

The PRESIDING OFFICER. The Senator is correct.

AMENDMENT NO. 2779

(Purpose: To Clarify the Definition of Handicapped)

Mr. HELMS. Mr. President, I send an amendment to the desk and ask that it be stated.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from North Carolina [Mr. HELMS] proposes an amendment numbered 2779:

At the appropriate place in the substitute, add the following: "For the purposes of this Act as well as Chapter 16 of Title 29 of the U.S. Code, neither the term "individual with handicaps" nor the term "handicap" shall apply to an individual solely because that individual is a transvestite.".

Mr. HELMS. Mr. President, this amendment should not be controversial. It does two things: First, it clarifies what I am confident was congressional intent in passing the Rehabilitation Act of 1973 and the various amendments thereto through the years; it clarifies that the term "handicapped individual" does not include transvestites. Second, it clarifies the term "handicap" as used in this bill to ensure that it will not be construed to include transvestites.

The need for this amendment arises because of a 1986 decision by the U.S. District Court for the District of Columbia in the Case of *Blackwell* v. *United States Department of the Treasury*, 639 F. Supp. 289 (D.D.C. 1986).

Mr. President, in the Blackwell case, the plaintiff was an admitted homosexual and transvestite. He had previously worked at the Treasury Department but had lost his job through a reduction in force [RIF]. He applied and interviewed for a subsequent opening at the Treasury Department under their priority placement program for rehiring those who had been "RIF'd."

According to the district court judge, the plaintiff "attended the interview dressed as a woman, the same type of dress he had worn during his previous 8 years of employment with the Department of Treasury." The judge also pointed out that the plaintiff "had foam implanted in his breasts, and has effected other changes in his physical appearance."

Rather than hire the plaintiff, the Treasury Department abolished the position. The plaintiff sued the Department on the grounds that they had discriminated against him based on his handicap of being a transvestite.

The district court opinion at 656 F. Supp. 713 states that:

As a matter of statutory analysis, while homosexuals are not handicapped it is clear that transvestites are, because many experience strong social rejection in the work place as a result of their mental ailment made blatantly apparent by their cross-dressing life-style.

Mr. President, fortunately, the Treasury Department won that case in the district court on a technicality: The court found that the plaintiff had failed to inform his prospective employer of his so-called handicap, a prerequisite for protection under the Rehabilitation Act according to the court, since the "handicap" was not "automatically apparent."

The opinion was later vacated by the court of appeals, but only because the appeals court disagreed with the district court's conclusion that relief under the Rehabilitation Act is dependent on a person's giving a prospective employee notice of a handicap that is not "automatically apparent." The appeals court did not even address the district court's conclusion that a transvestite is protected from discrimination under the act.

Mr. President, if someone can show me a decision that makes it clear that transvestites are not covered by the Rehabilitation Act, I will be more than glad to withdraw the amendment. However, to the best of my knowledge—and we have researched it carefully—there is no case or precedent preventing the same judge who decided the Blackwell case, or any other Federal court judge, from interpreting the term "handicap" to include individuals because they are transvestites.

I have lived long enough that I find it difficult to be surprised about anything, Mr. President. Therefore, I have no doubt that sometime, somewhere, another Federal court will be asked to revisit that issue—if not under the Rehabilitation Act, perhaps under the Fair Housing Act. When that happens, it should be clear to the courts that Congress does not intend for transvestites to receive the benefits and protections that is provided for handicapped individuals.

Mr. President, this is not the first time Congress has had to clarify the meaning of "handicapped." In the 1978 amendments to the Rehabilitation Act, Congress amended the act to specify that alcoholics and drug abusers were not included in the term "handicapped."

Mr. President, in his statement before the Subcommittee on Select Education, Congressman HENRY HYDE explained that:

The Congress needs to give thoughtful and wide-ranging consideration to the needs of the handicapped person, balanced against the realities of public safety, economics and commonsense [sic].

Mr. President, I could not agree more. My amendment is an attempt to put a little common sense back into the equation.

Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is not a sufficient second.

Mr. HELMS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. KENNEDY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. KENNEDY. Mr. President, the definition that was used in this legislation under fair housing is the definition that came under the Rehabilitation Act, and it is not my desire to be commenting on pending various Federal court decisions.

I do not have any objection to this amendment. If the Senator from North Carolina wants to have the yeas and nays, I have no objection to that as well, although we are prepared to accept that now, and that is the reasonable way to proceed. Then we can

move on to other matters. But I will be guided by his desire.

Mr. HELMS. Mr. President, I thank the Senator.

I want to look at the amendment one more time, if I may.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HELMS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. HELMS. Mr. President, I ask for the yeas and nays on the amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

EXCLUSION OF CERTAIN MENTAL DISORDERS FROM COVERAGE UNDER FAIR HOUSING ACT

Mr. CRANSTON, Mr. President, I rise in strong opposition to the pending amendment that would exclude from coverage under the Fair Housing Act a particular mental disorder, in this case transvestitism.

Mr. President, this amendment is not about whether or not this Senator or particular Senators approve of the conduct involved here. Rather, as a principal author of section 504, I see this amendment as a direct attack on the heart and soul of antidiscrimination laws, which protect individuals against discrimination based on stereotypes.

In 1973 when section 504 was enacted, Congress recognized that a great deal of the discrimination facing disabled individuals is not the inevitable result of their handicapping condition, but, rather, arises out of the false perceptions and prejudices that others hold about individuals who have those conditions. The clear congressional intent was to sweep broadly—to change attitudinal barriers which had served so unfairly to deprive disabled persons of the rights and opportunities afforded to other Americans.

Mr. President, the premise of section 504 is straightforward—individuals should be judged on their abilities, not on their disabilities. If a disabled person can do the job and does not pose a significant health or safety risk to others, there is absolutely no justification for denying him or her a job. If he or she is otherwise qualified for an educational or other program receiving Federal financial assistance, the opportunity should not be denied.

Likewise, an individual should not be denied housing on irrelevant grounds.

Mr. President, in this case the Senator from North Carolina has singled out for exclusion a disability that is considered by the American Psychiatric Association to be a mental disorder. Despite our efforts over the years to eliminate the stigma of mental illnesses, persons with mental illness are still frequently the subject of discrimination because some individuals have irrational fears about them and are made uncomfortable by them. Although section 504 has been very successful in helping individuals with physical handicaps to be much more widely accepted and integrated into society, the same degree of success has, unfortunately, not yet been achieved for individuals with mental disorders. This amendment would single out one category of individuals who are already being discriminated against and say to them, "Sorry you now have no protections. Congress has decided that it no longer cares whether or not you are cast out of our society."

Mr. President, it is ironic that nothing demonstrates quite as convincingly the continuing need for and the merits of section 504 and the Fair Housing Act as this amendment. It is an appeal to our worst instincts—saying that we shouldn't have to associate with individuals who are different from ourselves because of the way they dress or their emotional problems. That is precisely why various antidiscrimination laws were enacted—to protect disabled persons from irrational judgments and prejudices.

Mr. President, this amendment forsakes the basic principles of fair play, reason, and justice. If we were to start excluding one category of individuals from coverage, we would be threatening to undermine the very essence of antidiscrimination laws.

This amendment could open the door to any number of attempts to exclude other disabilities from this and other antidiscrimination laws. I would stress again that the whole purpose of the Fair Housing Act and other antidiscrimination laws is to provide across-the-board, evenhanded protection, not to pick and choose disabilities we approve of and exclude the ones we don't. If we remove protections from one form of disability, who will be next?

Mr. President, the enactment of section 504 and of other important civil rights measures were proud moments in the history of the U.S. Congress. In passing those measures we were united in spirit with the Founding Fathers in moving forward to ensure that all Americans have the opportunity for the "pursuit of happiness" and to secure for many of our citizens the "blessings of liberty."

In stark contrast, this amendment, by proposing to close for some the doors of opportunity we opened years ago promises a retreat from the historic principles embodied in our Constitution and in our civil rights laws. I will not and can not sanction denying to some American citizens, those who may need them most, rights to fair treatment and to opportunities to prove themselves and to improve their lives.

Mr. President, the Fair Housing Act is designed to serve a very basic purpose—to protect individuals with disabilities from discrimination that arises out of ignorance and fear about individuals who are different from the rest of us. We should maintain the letter and spirit of that principle and oppose this amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from North Carolina. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Louisiana [Mr. BREAUX], the Senator from Connecticut [Mr. DODD], the Senator from Alabama [Mr. HEFLIN], the Senator from Nevada [Mr. REID], the Senator from Tennessee [Mr. SASSER], and the Senator from Illinois [Mr. SIMON] are necessarily absent.

I also announce that the Senator from Delaware [Mr. BIDEN] is absent because of illness.

I further announce that, if present and voting, the Senator from Tennessee [Mr. SASSER] would vote "yea."

Mr. SIMPSON. I announce that the Senator from the New York [Mr. D'AMATO] and the Senator from Utah [Mr. GARN] are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 89, nays 2, as follows:

[Rollcall Vote No. 279 Leg.]

YEAS—89

Adams	Graham	Moynihan
Armstrong	Gramm	Murkowski
Baucus	Grassley	Nickles
Bentsen	Harkin	Nunn
Bingaman	Hatch	Packwood
Bond	Hatfield	Pell
Boren	Hecht	Pressler
Boschwitz	Heinz	Proxmire
Bradley	Helms	Pryor
Bumpers	Hollings	Quayle
Burdick	Humphrey	Riegle
Byrd	Inouye	Rockefeller
Chafee	Johnston	Roth
Chiles	Karnes	Rudman
Cochran	Kassebaum	Sanford
Cohen	Kasten	Sarbanes
Conrad	Kennedy	Shelby
Danforth	Kerry	Simpson
Daschle	Lautenberg	Specter
DeConcini	Leahy	Stafford
Dixon	Levin	Stennis
Dole	Lugar	Stevens
Domenici	Matsunaga	Symms
Durenberger	McCain	Thurmond
Evans	McClure	Trible
Exon	McConnell	Wallop
Ford	Melcher	Warner
Fowler	Metzenbaum	Wilson
Glenn	Mikulski	Wirth
Gore	Mitchell	

NAYS—2

Cranston	Weicker

NOT VOTING—9

Biden	Dodd	Reid
Breaux	Garn	Sasser
D'Amato	Heflin	Simon

So the amendment (No. 2779) was agreed to.

Mr. HEFLIN. Mr. President, while I was attending the dedication of the Mobile Homeport in Mobile, AL, earlier today with the Secretary of the Navy and other members of the Alabama delegation, I regret that I missed the vote which occurred on the Helms amendment No. 2779 to the fair housing bill, in which the Senate agreed to exclude transvestites from the protections afforded to handicapped individuals under the Fair Housing Act.

Had I been in Washington at the time of the vote, I would have supported the amendment offered by the Senator from North Carolina.

The PRESIDING OFFICER. The Senate will please be in order. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, we have been on this bill now for some 4 hours. We welcome the opportunity to come to grips with any of the amendments of any of the Members. I have not been notified of other amendments. We are prepared to deal with them. It is an enormously important bill and we want to be sure that Senators are satisfied, either one way or the other, with the terms of the provisions of the legislation. But we would also like to move forward.

So, we are prepared to deal with these measures and would like to continue to go along and deal with them and would ask all of the membership if they do have amendments that they come over so that we can dispose of them.

I ask unanimous consent that the Senator from Illinois [Mr. DIXON] be added as a cosponsor; the Senator from Georgia [Mr. NUNN] be added as a cosponsor; and I believe the Senator from Iowa [Mr. HARKIN] already is a cosponsor.

The PRESIDING OFFICER. It is so ordered.

The Senator from North Carolina.

Mr. HELMS. Mr. President, I will have an amendment. If no other Senator has an amendment to offer at this time, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. THURMOND. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. THURMOND. Mr. President, this is the opportunity for Senators, if they want to make statements on this bill, opening statements or otherwise. We are waiting on the Senator to get an amendment ready, and this is a good chance for anyone who wants to make a statement on the bill.

Mr. LEAHY. Mr. President, I might ask the distinguished ranking member, if nobody has any statements or amendments, would it be a good time to go to third reading?

Mr. THURMOND. Well, it suits me, but I think someone reserved a little time. They will be here in a few minutes.

Mr. LEAHY. I understand. It is just always good to keep the legislative wheels spinning as quickly as possible.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. SPECTER. Mr. President, I ask unanimous consent that additional cosponsors be added: Senator BOND, Senator STEVENS, and Senator HATFIELD.

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

Mr. SPECTER. I thank the Chair. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HELMS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

AMENDMENT NO. 2780

(Purpose: To restore the right of voluntary prayer in public schools and to promote the separation of powers)

Mr. HELMS. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from North Carolina (Mr. HELMS) proposes an amendment numbered 2780.

Mr. HELMS. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

Mr. LEAHY. Mr. President, if my distinguished friend will withhold that request, I think for those people watching it on the monitor, it might be simpler if they hear the whole amendment.

The PRESIDING OFFICER. There is objection. The clerk will continue reading.

The amendment is as follows:

At the appropriate place in the substitute insert the following:

SEC. . (a) This section may be cited as the "Voluntary School Prayer Act".

(b)(1) Chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§1260. Appellate jurisdiction: limitations

"(a) Notwithstanding the provisions of sections 1253, 1254, and 1257 of this chapter and in accordance with section 2 of Article III of the Constitution, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, practice, or any part thereof, or arising out of any act interpreting, applying, enforcing, or effecting any State statute, ordinance, rule, regulation, or practice, which relates to voluntary prayer, Bible reading, or religious meetings in public schools or public buildings.

"(b) For purposes of this section, the term 'voluntary' means an activity in which a student is not required to participate by school authorities.".

(2) The section analysis of chapter 81 of title 28 is amended by adding at the end thereof the following new item:

"1260. Appellate jurisdiction: limitations.".

(c)(1) Chapter 85 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§1367. Limitations on jurisdiction

"Notwithstanding any other provision of law and in accordance with section 2 of Article III of the Constitution, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1260 of this title.".

(2) The section analysis at the beginning of chapter 85 of title 28 is amended by adding at the end thereof the following new item:

"1367. Limitations on jurisdiction.".

(d) The amendments made by this section shall take effect one day after the date of enactment, except that such amendments shall not apply to any case which, on such date of enactment, was pending in any court of the United States.

Mr. HELMS. Mr. President, I ask for the yeas and nays on the amendment.

The PRESIDING OFFICER. If the Senator will withhold, we have not finished reading.

Mr. HELMS. I am sorry.

The PRESIDING OFFICER. The clerk will continue reading.

Mr. HELMS. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with. I thought he had finished.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. LEAHY. Mr. President, I suggest the absent of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SYMMS. Mr. President, I ask unanimous consent that the order for the quorum call be suspended.

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

AMENDMENT NO. 2781 TO AMENDMENT NO. 2780

(Purpose: To restore the right of voluntary prayer in public schools and to promote the separation of powers)

Mr. SYMMS. Mr. President, I send a second-degree amendment to the desk and ask that it be reported.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Idaho [Mr. SYMMS] proposes an amendment numbered 2781 to amendment numbered 2780.

Mr. SYMMS. Mr. President, I ask unanimous consent that further reading of the amendment be suspended.

The PRESIDING OFFICER. Is there objection?

Mr. KENNEDY. Objection.

The PRESIDING OFFICER. Objection is noted.

The assistant legislative clerk resumed reading as follows:

SEC. . (a) This section may be cited as the "Voluntary School Prayer Act".

(b)(1) Chapter 81 of title 28, United States Code is amended by adding at the end thereof the following new section:

"§1260. Appellate jurisdiction: limitations

"(a) Notwithstanding the provisions of sections 1253, 1254, and 1257 of this chapter and in accordance with section 2 of Article III of the Constitution, the Supreme Court shall not have jurisdiction to review by appeal, writ of certiorari, or otherwise any case arising out of any State statute, ordinance, rule, regulation, practice or any part thereof, or arising out of any act interpreting, applying, enforcing, or effecting any State statute, ordinance, rule, regulation, or practice, which relates to voluntary prayer, Bible reading, or religious meetings in public schools or public buildings.

"(b) For purpose of this section the term 'voluntary' means an activity in which a student is not required to participate by school authorities.".

(2) The section analysis of chapter 81 of title 28 is amended by adding at the end thereof the following new item:

"1260. Appellate jurisdiction: limitations.".

(c)(1) Chapter 85 of title 28, United States Code is amended by adding at the end thereof the following new section:

"§1367. Limitations on jurisdiction

"Notwithstanding any other provision of law and in accordance with section 2 of Article III of the Constitution the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1260 of this title.".

(2) The section analysis at the beginning of chapter 85 of title 28 is amended by adding at the end thereof the following new item:

"1367. Limitations on jurisdiction.".

(d) The amendments made by this section shall take effect on the date of enactment except that such amendments shall not apply to any case which on such date of enactment was pending in any court of the United States.

Mr. BYRD. Mr. President, I suggest the absent of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

UNANIMOUS CONSENT AGREEMENT

Mr. BYRD. Mr. President, I have discussed this request with Mr. HELMS and Mr. KENNEDY. It is the following. Mr. KENNEDY wishes to move to the table the amendment which can be done at any time. Mr. HELMS is agreeable to having 15 minutes for himself and 15 minutes for this side. There will be 30 minutes equally divided, 15 to Mr. HELMS and 15 under the control of the manager, Mr. KENNEDY. At the conclusion of the 30 minutes there will be a vote on the motion to table.

The PRESIDING OFFICER. Is there objection?

Mr. BYRD. And this would be the motion to table the underlying amendment which would carry with it both amendments.

It is understood that, if tabling should fail, there is no time limit on the amendment itself.

Mr. KARNES has 3 minutes under his control.

Mr. President, 30 minutes equally divided.

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

Who yields time?

Mr. HELMS. Mr. President, the time is to be equally divided.

The PRESIDING OFFICER. That is correct.

Mr. HELMS. No other Senators are involved. Senator KENNEDY controls his time.

The PRESIDING OFFICER. Yes.

Mr. HELMS. Mr. President, I yield myself such time as I may require.

Mr. President, the pending amendment would restore to America's schoolchildren the right of voluntary prayer. It would accomplish this by restoring freedom to the States, freedom that the U.S. Supreme Court wrongfully and unconstitutionally took away from them, so that the traditional and honorable practice of voluntary school prayer can be restored.

Mr. President, the text of both amendments, now pending is identical to S. 2001, which has been on the Senate calendar since January 26 of this year, and identical to S. 213, which was referred to the Senate Judiciary Committee in January 1987. And the amendment pending is also practically identical to legislation that the U.S. Senate has approved on two occasions—in 1979 and again in 1982—and which the Senate last considered in 1985.

Mr. President, proponents of H.R. 1158 may argue that this bill is designed to restore equity and civil rights.

However, Mr. President, I must say that I can think of no greater unfairness or inequity visited on all Americans than the fact that our children, by Supreme Court edict, are no longer permitted to pray, even if they wish to, in the public schools.

If enacted, Mr. President, the pending amendments would eliminate this egregious attack on religious freedom.

Mr. President, I remind Senators that our governmental framework was built on ideals of individual liberty and democracy embodied in the Judeo-Christian ethic handed down to us from forefathers willing to brave a new world in search of religious liberty. We have grossly deviated from the course and vision they set for America and—because we have abandoned our spiritual moorings—we are plagued with indecision in the midst of our increasing difficulties.

It should be obvious, Mr. President, that unless and until we return to the paths of the Almighty, we cannot and will not solve the problems within and without our Nation. The best place to start in putting America back on the intended course of her Framers is to restore the right of our children to pray in school.

The public agrees with me on this issue, Mr. President. The New York Times published a poll June 12, 1988, showing 70 percent of Americans support permitting prayer in public schools. They support school prayer whether they are rich or poor, old or young, religious or nonreligious, Democrat or Republican. The poll proves that Americans appreciate the value of prayer and that they want their elected representatives to support it.

Americans understand that religious liberty is fundamental to our democracy, Mr. President. From this country's very inception, our Founding Fathers recognized this fact. The majority leader this past December recalled Benjamin Franklin's counsel over 200 years ago in Philadelphia. We all know the story: The time was the Constitutional Convention of 1787. It was sweltering hot. Our Founding Fathers had been wrangling for days over the details of the document which would set the destiny of our new Nation. For a time, it looked like everything would fall apart. Benjamin Franklin took the floor to counsel his colleagues. He expressed his belief in the sacred writings which say: "Except the Lord build the house they labor in vain that build it." At that point, our Founding Fathers kneeled to God invoking His help in what seemed to be an insurmountable task.

Mr. President, this tradition—holding a morning prayer in the Senate—continues today. We invoke God's blessings in our daily decisions which affect so many Americans.

Clearly, Mr. President, our Founding Fathers intended this Nation to be a God-fearing nation, not the anti-God nation so many would like for it to become.

Yet, that is the road down which we are heading, Mr. President. In a series of decisions since 1962, the Supreme Court has barred our children this basic right.

Mr. President, this Senator is not alone in believing that this was not what our Founding Fathers intended. Prof. Edward Corwin, a distinguished constitutional scholar declares:

The historical record shows beyond peradventure that the core idea of an "establishment of religion" comprises the idea of preference; and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the bar of that phrase.

Prof. Charles Rice of Notre Dame Law School explains that it has been—

incorrectly asserted, by the Supreme Court and others, that the establishment clause ordained a Government abstention from all matters of religion, a neutrality between those who believe in God and those who do not. An examination of the history of the clause, however, will not sustain that analysis. Its end was neutrality, but only of a sort. It commanded impartiality on the part of Government as among the various sects of theistic religions, that is, religions that profess a belief in God. But as between theistic religions and those nontheistic creeds that do not acknowledge God, the precept of neutrality under the establishment did not obtain. Government, under the establishment clause, could generate an affirmative atmosphere of hospitality toward theistic religion, so long as no substantial partiality was shown toward any particular theistic sect or combination of sects.

Mr. President, our Founding Fathers' sole intent in the Constitution's establishment clause was to prohibit the establishment of a national church; all remaining issues concerning church-state relations were left strictly with the States. My legislation will restore the original intent of the framers in this regard.

Mr. President, the Congress need not yield to any Justice of the Supreme Court in its respect for the words of the first amendment or for the principles or history behind them. Neither must Congress yield in its responsibility under the Constitution to ensure that the freedoms protected by the first amendment are not undermined by actions of other institutions. There are few more pressing duties facing Congress than to restore the true spirit of the first amendment.

Mr. President, we are going to hear a lot about Court stripping and that sort of thing, which is ridiculous. I invite Senators to examine the U.S. Constitution, article III, section 2 which reads:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

On countless occasions in the history of this country, Mr. President, Congress has made exceptions. The late Sam Ervin told me that he had counted 57 different occasions when Congress had stipulated exceptions which, in effect, took away from the Court jurisdiction, and that is all we are talking about today. I am trying to nullify, frankly, that infamous decision by the Supreme Court years ago.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. Seven minutes and twenty-one seconds.

Mr. HELMS. I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, we have 15 minutes?

The PRESIDING OFFICER. That is correct.

Mr. KENNEDY. I yield myself 2 minutes.

Mr. President, I hope the Senate will reject this amendment. We have visited this issue not many years ago, in 1985. It was decisively rejected at that time, 62 to 36.

It is irrelevant, it is nongermane, it is probably unconstitutional, and it has no business being on this particular piece of legislation. This is an issue that has been debated and discussed many hours, many times in the past. We are basically talking about a major constitutional change in terms of the protections of the first amendment and threats to the establishment clause. It has absolutely no place on this legislation, and I hope the Senate will reject it at the appropriate time.

Mr. President, I yield 3 minutes to the Senator from Pennsylvania.

Mr. SPECTER. I thank the distinguished Senator from Massachusetts.

Mr. President, I strongly oppose this amendment. The essence of the amendment would destroy the jurisdiction of the Supreme Court of the United States, and run contrary to the basic tenets of constitutional review established under Marbury versus Madison.

There is one case, ex parte McCardle, handed down shortly after the Civil War, which casts some doubt on this issue. But it has been a matter where, dealing with first amendment rights, all agree that the jurisdiction of the Supreme Court of the United States is inviolate. If the Court can be stripped or jurisdiction can be taken from the Court on issues involving first amendment freedoms of religion, then no right in the Constitution of the United States is sacrosanct.

This issue was discussed at some length during the confirmation proceedings of Justice Rehnquist for the position of Chief Justice. Justice Rehnquist had some reservations and did not wish to express any opinion prematurely on matters which might come before the Court on limitation of jurisdiction of the Supreme Court of the United States. However, on the one issue where it was a first amendment issue, Justice Rehnquist was emphatic and was in fact willing to so state in confirmation hearings, where Supreme Court nominees are very reluctant to say much, if anything. Justice Rehnquist, in his confirmation proceedings for Chief Justice, said that there could be no divestiture of jurisdiction of the Supreme Court of the United States when it came to first amendment issues.

This is as fundamental as anything in our system of government. We are a Nation of laws. We are a constitutional government of unique statute in the history of the world, and the one provision of the Constitution which stands out above all others is the first amendment. Perhaps along with freedom of speech, freedom of religion is rockbed in this country, and this amendment ought to be defeated. It ought to be decisively tabled.

I thank the Chair and I yield the floor.

Mr. KENNEDY. I yield 3 minutes to the Senator from Montana.

Mr. BAUCUS. Mr. President, the amendment before us should not only be defeated soundly, it should be defeated unanimously. This amendment guts the Constitution. The amendment guts the Constitution of the United States of America.

This amendment says that the Congress shall not have jurisdiction over this particular Supreme Court issue. If the amendment passes, if it becomes law, and if it were the law of the land, then a similar amendment could be offered to any bill that affects any other core constitutional issue. Free speech, gun control, the right of due process, all of the individual civil liberties and other constitutional provisions that protect Americans, would be not only at risk, they would be obliterated. They would be gone. This Congress would have eliminated Supreme Court jurisdiction over any of those issues.

This amendment has that potential. If we go down this road, then every other single constitutional provision is at risk, every one. We no longer have a Constitution and this country is run by the tyranny of majority and whims of the moment. That is what will happen.

Many people who believe that there should be school prayer also understand this provision and know that this is not the way to establish school prayer.

One is the former Senator from Arizona, Senator Goldwater. Senator Goldwater has stood on this floor and

he has stated he is for school prayer but he is equally, foursquare, against this kind of approach, because if we go down this road then any other single constitutional provision could also be eliminated from the Supreme Court's jurisdiction.

The Senator from North Carolina mentions the exceptions clause in the Constitution as the logical basis upon which he thinks that the Congress can limit Supreme Court jurisdiction.

There are so many arguments against that argument that we have not the time to go into them. One is that it is inherently inconsistent. How could our Founding Fathers provide that the U.S. Congress could eliminate, could except, certain core constitutional provisions and yet still have a Constitution and still have a Supreme Court? It could not happen.

Second, if you look at the constitutional history, that is, the proceedings of our Founding Fathers when they wrote the Constitution, it is clear that they did not intend the exceptions clause to have this effect. First of all, the major draft did not say this. I do not have time to go into specifics, but there was a committee of detail which rewrote this draft and the revised version, containing the exceptions clause, was adopted without debate. It could not have the consequence that the Senator from North Carolina says it does.

So, however you cut it, however you slice it, this amendment does make sense.

One of the final arguments against it is that, if it passes, we have 50 different States interpreting the U.S. Constitution 50 different ways. I do not think we want that either.

I think this amendment should be resoundingly defeated.

I understand there is going to be a tabling motion. I think for the sake of the country and Congress we should adopt that motion forthwith.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. KENNEDY. Mr. President, I yield 3 minutes to the Senator from Connecticut.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. WEICKER. Mr. President, I rise to oppose the amendment. I have tracked this type of shenanigans ever since I came to the U.S. Senate. The last time we debated, it was the rights of black schoolchildren, and we were going to go ahead and deny to the courts the remedies necessary to assure that they had equality of educational opportunity.

Now we want to go ahead and strip the courts of their ability to assure religious freedom to all Americans.

Please do not be beguiled by the term "school prayer." What is being discussed here is government prayer, government-organized prayer, and if government can organize silent prayer, it can organize vocal prayer; if it can organize vocal prayer, it can organize the words that are said in that vocal prayer.

We are a diverse nation of many beliefs. I do not want the U.S. Government interfering in religion of mine or anybody else's children. We want to worship vigorously for what we believe in, not for what is dictated from the floor of the U.S. Senate.

But the point of issue before us here today is that once the courts are stripped of their ability to protect our constitutional rights, they are forever stripped.

At one time it was unpopular to be a black school child in America. Maybe it will be unpopular to be old. Maybe it will be unpopular to be handicapped.

The fact is that regardless of the politics or the philosophies of the times, the courts stand there to protect us all, to make sure that we can flower and grow within this great democracy of ours as we choose.

Once you strip the courts of the authority to protect in this narrow instance, then you have taken away from that branch of government its capacity to remedy forever.

I understand the popular buzzwords of the time. I understand that it would be nice, in other words, if you vote to table this amendment, to say, "Well, such and such a Senator is against prayer in school" or "such and such a Senator is for busing."

That is not the issue. That is not the issue.

The PRESIDING OFFICER. The Senator used the 3 minutes.

Mr. WEICKER. In just 30 seconds I shall conclude.

The issue is whether you want to stand up for the three separate but equal branches of government that have been given to us a realization of ideals unequaled in the history of the world, because the ideals were reborn from within each American rather than from a government as a whole.

I would hope that the amendment would not just be narrowly defeated but overwhelmingly so, and that we do away with this nonsense and reaffirm a Constitution that works.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. I yield a minute to the Senator from Illinois.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DIXON. Mr. President, I rise in opposition to this amendment to H.R. 1158, the Fair Housing Amendments Act of 1988.

I support voluntary school prayer. However, I support a constitutional amendment to provide for silent prayer in our schools.

In fact, Mr. President, I favor allowing periods of prayer or meditation in our schools if they could be provided without violating our country's strong tradition of separation of church and state.

This amendment, I believe, would impede on the independence of the Federal judiciary.

As I have stated in the past, since 1969, in my own State of Illinois, classroom teachers and students have been authorized by law to observe a brief period of silence each day. According to the State prayer law, the period "shall be an opportunity for silent prayer or silent reflection." The Illinois statute, therefore, avoids the thicket of problems we face if our public schools have to choose among creeds.

While I realize the difficulties involved in setting public policy with regard to a matter as deeply involved as religious belief, I believe that provisions of this amendment are unconstitutional.

Additionally, I believe that this approach is inappropriate for the Senate to take on a very serious moral issue as important as prayer in our schools.0

Mr. KENNEDY. I yield 2½ minutes to the Senator from Utah.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I think my reputation in this body is well-known as one of the strongest supporters for a voluntary school prayer amendment that we could have, but an amendment to the Constitution.

I led the fight for the school prayer amendment here a couple of years ago for the administration. We only had 56 votes on this floor.

The fact of the matter is I fought all my lifetime for it. But this is a court-stripping amendment.

I am not saying that under article III, section 2, of the Constitution that the Congress of the Untied States absolutely cannot strip jurisdiction away from the U.S. Supreme Court. The fact of the matter is that it probably can under certain circumstances.

The question is should it? If you go back to Marberry versus Madison, we established the principle of judicial review. The Supreme Court in this case in the case of school prayer, Engle versus Fatellie outlawed school prayer.

The Supreme Court made that decision. It exercised its power of judicial review.

What my colleagues, and they are my closest friends, are trying to do here is they are trying to say the Supreme Court no longer has any jurisdiction with regard to school prayer.

It is a court-stripping bill. I would state that the Supreme Court should not have jurisdiction to review any case which relates to school prayer, Bible readings, or religious meetings.

This is not an appropriate constitutional way to go.

As the distinguished Senator from Pennsylvania said the ex parte McCardle case did seem to allow court stripping, and we certainly have done that in the times past. In the Norris-La Guardia Act we took away the right to have injunctions in labor matters, and I can name a few others, where literally the Congress has exercised its right to strip.

The question is, Is it right to do it? If we are going to do it here just because some of us want a school prayer bill, then it means we can do it in any other way and limit the jurisdiction of the Supreme Court of the United States of America. And that it would be bad for this country. It would be bad for the Constitution. It would allow the Congress of the United States total preeminence in these separation of power areas and frankly it would be wrong.

So, I have to stand up and tell my colleagues that as much as I would like to see the right to pray in schools restored, the appropriate way to do it is through a constitutional amendment straight up and do it the right way, not by trying to take away the jurisdiction of the court through a mere statutory 51 vote means, and that is wrong.

So, I am going to recommend to my colleagues that we move to table this, and I personally will make the motion. I hope that they will vote to table this and not put it on this particular weighty and important civil rights bill.

Mr. KENNEDY. Mr. President, I understand there is about 1 minute left. I yield 10 seconds to the Senator from New York and the remaining time to the Senator from Maine.

The PRESIDING OFFICER. The Senator from New York.

Mr. MOYNIHAN. Mr. President, I rise in opposition to Senator HELMS' amendment to strip the Federal courts of their jurisdiction to hear cases relating to school prayer. Seven years ago, as the 97th Congress was convening, the then-president of the American Bar Association, David Brink, testified before the Judiciary Committees of Congress about the impact of court-stripping legislation. He said:

> We confront, at this very moment, the greatest constitutional crisis since the Civil War.

The difficulty here is that while, indeed, we may face a constitutional crisis, we may be getting there by a route many would argue is constitutionally permissible.

Let us consider the possibility of such a constitutional oxymoron. Article III, section 2, of the Constitution, states in relevant part:

> The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Since the vast majority of the Supreme Court's work obviously is appellate in nature, the meaning of this phrase is of some criminal moment.

There are those who claim that under the "exceptions" clause, Congress may pass laws setting the boundaries for the Supreme Court's appellate jurisdiction wherever it chooses—or should we say, wherever it deems proper. Those who take the view that Congress can restrict the Court's jurisdiction rely, in the main, on a case decided by the Supreme Court 119 years ago, Ex Parte McCardle.

I will not review McCardle. It is enough, in any event, to cite the views of Justice Owen J. Roberts, in an address to the association of the bar of the city of New York in 1948, after he had retired from the Court.

"Now Is the Time" his title declared, for "Fortifying the Supreme Court's Independence." He proposed four amendments. The first would set the size of the Court at nine persons. James Bryce had noted the problem almost a century ago. What, Roberts asked "would prevent there being 20 if Congress so legislates." He would require retirement at 75, and prohibit anyone once a Justice to be eligible to the Office of President or Vice President.

But by far his most important proposal, in his view, addressed the question of what we have come to call court-stripping. Mr. Justice Roberts was a conservative judge, properly construed. He was not much for amending the Constitution:

> I am all for the view that it ought to be a document stating great principles and not attempting the meticulousness of a regulatory statute. Every time you suggest an amendment you violate, to some extent, that great principle.

Even so, he thought it essential and even urgent to amend the Judiciary Article to "give the Supreme Court appellate jurisdiction in all cases under the Constitution * * *." Given several decisions by Marshall, and given McCardle, he asked:

> What is there to prevent Congress taking away, bit by bit, all the appellate jurisdiction of the Supreme Court of the United States, not doing it by direct attack but by that sort of indirect attack? I see nothing. I do not see any reason why Congress cannot, if it elects to do so, take away entirely the appellate jurisdiction of the Supreme Court of the United States over state supreme court decisions. The jurisdiction is exercised now under the terms of the Judiciary Act. Suppose Congress should decide to let the decisions of state courts of appeal be final on constitutional questions. How could the Supreme Court assert a power to take those questions, notwithstanding the act of Congress.

Here is the record: 12 votes to strip the Court of some jurisdiction or other. None of the measures have become law either because we have been able to avoid a final vote by extended debate or the House has demurred. Still a Senate majority has been prepared throughout. To wit:

April 5, 1979, Senate votes 44 to 43 not to kill amendment to eliminate jurisdiction of Federal courts, including the Supreme Court, in cases relating to voluntary prayer.

April 5, 1979, Senate votes 47 to 37 in favor of amendment to eliminate Federal courts' (including Supreme Court) jurisdiction in voluntary prayer cases.

April 9, 1979, Senate votes 51 to 40 for amendment to eliminate jurisdiction of Supreme Court and other Federal courts in voluntary prayer cases.

April 9, 1979, S. 450, bill to eliminate all mandatory jurisdiction of Supreme Court passes 61 to 30. This bill includes amendment eliminating Federal courts' (including Supreme Court) jurisdiction to hear voluntary prayer cases.

February 4, 1982, amendment to prevent Justice Department from bringing cases that could lead to court-ordered busing and barring the Federal courts from ordering busing as a remedy adopted 58 to 38.

September 15, 1982, Senate votes 50 to 44 in favor of amendment to ban abortion (which was amendment to amendment stripping Federal courts, including Supreme Court, of jurisdiction in voluntary prayer cases.)

September 20, 1982, Senate votes 50 to 39 in favor of amendment eliminating jurisdiction of Federal courts (including Supreme Court) in voluntary prayer cases.

September 21, 1982, Senate votes 53 to 47 in favor of same amendment involving voluntary prayer.

September 22, 1982, Senate votes 54 to 46 in favor of amendment on voluntary prayer.

September 23, 1982, Senate votes 53 to 45 in favor of voluntary prayer amendment.

October 1, 1984, Senate by a vote of 56 to 41 endorses amendment restricting rights of Federal courts to order busing to achieve desegregation.

June 3, 1986, Senate votes 50 to 45 in favor of amendment limiting power of Federal courts to order school busing for desegregation.

On September 20, 1982 when we prevented cloture on school prayer, I said:

> If you can strip from the Supreme Court the right to hear one question, you can strip from it the right to hear any question. There is no right in the Constitution that would not be placed in jeopardy. The great fear of the founding fathers was that we should have a tyranny of the majority. They spoke over and over again of a tyranny of the majority and they devised the Court as the institution in which minority rights would be protected. Those rights are embodied in the Constitution and the right of the Supreme Court in the end to say, as Justice Marshall said, it is emphatically the province of the Court to declare what the law is. It is not for us to do so. We may have our views, we make the laws, but we make them in the context of a high law, the Constitution, and the Court compares.

No less a person than President Reagan's former Attorney General, William French Smith, said in 1982:

> Congress may not . . . consistent with the Constitution, make "exceptions" to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.

It all comes down to this. For a generation or more—for a century or more—we have been taking the chance that something that could happen to our constitutional arrangement won't happen. Mr. Justice Roberts put it well, when he described this school of thought thus: "Don't touch the Constitution * * * It has a great big hole in it. Nobody has run through the hole yet, and let's take a chance that nobody ever will."

Mr. DURENBERGER. Mr. President, I rise as a cosponsor and strong supporter of the Fair Housing Amendments Act before us, and to speak in opposition to the pending Helms and Symms amendments.

The Senators from North Carolina and Idaho have chosen to raise two highly controversial amendments in order to delay or derail the legislation before us. As sweeping as the issues of prayer in schools and school desegregation are, the mechanism utilized by the amendments are even more inflammatory. The amendments are a frontal assault on the jurisdiction of the Supreme Court: the Court is stripped of its opportunity to protect the rights of individuals in any case which deals with prayer or busing. We cannot abide a system where courts pick and choose, at the Congress' bidding, which rights to protect.

It is the Constitution, Mr. President, which is at stake in this vote today. I urge my colleagues to join in voting to affirm the balance of powers among the three branches, by voting down the Helms and Symms amendments.

Mr. MITCHELL. Mr. President, this amendment has nothing to do with school prayer. It has everything to do with the structure of our form of Government.

Once allowed to succeed, this tactic will be used indiscriminately and will, I predict, come back to haunt those who propose it here today. It is a very unwise, dangerous proposal that should be overwhelmingly rejected regardless of one's views on the issue of school prayer. This is just not the right way to get the job done.

The PRESIDING OFFICER. All time of the Senator from Massachusetts has expired.

Mr. HATCH. Mr. President, has the time of the proponent of the amendment expired?

The PRESIDING OFFICER. The Senator from North Carolina has 7 minutes and 14 seconds remaining.

Mr. HELMS. Mr. President, the problem with the arguments of my good friends in the Senate is that they do not make sense. Their argument is with this amendment. Their argument is certainly not with this Senator. Their argument is against the Constitution itself.

Now, Mr. President, I hope that all staff members listening on the squawk boxes in their offices and Senators who may be listening, before they come over here to vote, will get out the Constitution and look at article III, section 2, where it says clearly that "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." That is the King's English.

All of this argument that we hear every time about court stripping is just as specious now as it was in previous times.

Mr. HATCH. Will my colleague yield for a question?

Mr. HELMS. No, I will not.

Mr. HATCH. Just one question.

Mr. HELMS. No, I will not. I am sorry. The Senator used his time, and the Senator is absolutely 200-percent wrong in his position on this thing.

Furthermore, Mr. President, the distinguished Senator from Pennsylvania referred to the McCardle case. And I wish he had gone into detail on the McCardle case, because it would have rendered nugatory everything that the distinguished Senator from Pennsylvania said. Chief Justice Chase explained in that case, "We are not at liberty to inquire into the motives of the legislature."—meaning Congress. "We can only examine into its power under the Constitution, and the power to make exceptions to the appellate jurisdiction of this court is given by expressed words in the Constitution of the United States."

Nobody can argue with that, Mr. President. Anybody who wants to drag in the McCardle case, let them quote the Chief Justice in that case.

Mr. President, in 1980, I went to Texas to make a speech. And after it was over, I went over to the hotel to get some dinner. It was then about 9:30. I ran into a young man who introduced himself to me as Bill Murray.

Mr. President, I did not know who Bill Murray was, but we began talking. And then I realized that he is the son of Madalyn Murray O'Hair, an atheist, who caused all of this trouble in the first place.

Mr. President, Bill Murray today is going around this country apologizing for what his mother did to this country in prompting the Supreme Court decision. He regrets it. He still loves his mother, but he recalled for me, as he had recalled on countless occasions, how Communist functionaries came to his mother's house and advised her as to how to proceed in terms of getting this thing before the Supreme Court. That is how school prayer was banned in the United States of America.

Now, we can either put up or shut up, Mr. President. I have heard on this floor, "I'm for school prayer, but * * *" No, you are not, Senator. If you do not vote to do what you can under the Constitution as stated in article III, section 2, then you are not for school prayer.

Now, I know Senators would like to be on both sides of this thing, but they cannot do it, Mr. President. They cannot get that straddle-legged. Either you are for it or against it.

Mr. President, this argument about court stripping is absolute nonsense.

Now, Mr. President, where do Senators get off with the kind of arguments that I hear every time I bring up this issue? Where do they get off saying this is court stripping or this is interfering with religious freedom? Absolutely to the contrary, it is the restoration of religious freedom to those schoolchildren—millions of them across the land—whose parents want them to engage in prayer.

And, by the way, Mr. President, what was so wrong with this country before the Supreme Court banned school prayer from the United States?

How much time do I have remaining, Mr. President.

The PRESIDING OFFICER. Two minutes and four seconds.

Mr. HELMS. Mr. President, let me give you just a few examples of how the Supreme Court's decision has curtailed religious freedom:

In the State of Florida, a school principal felt personally compelled to remove pictures of the bible club from the high school annual. He took the annual after it was already printed, each copy of it, and clipped out the pictures of the students in the Bible club.

How absurd can you get, Mr. President?

A teacher in North Carolina was denied her right to read her Bible at lunchtime.

Students have been prohibited from merely carrying their personal Bibles on school premises.

Students have been prohibited all over this country from praying in their cars on school premises.

Students have been prohibited all over this country from praying in their cars on school property.

Mr. President, three separate studies noted that textbooks in the public schools systematically shun the role of religion in molding the Nation and motivating our leaders because publishers feel that Supreme Court decisions require such censorship.

Now, where is the religious freedom there, Mr. President? It is not there, and that is the point. Senators cannot

straddle-leg this issue, Mr. President. They are either for it or they are against it. They can vote for the motion to table if they wish, but let the RECORD be clear that what we are talking about is whether Senators are in favor of the restoration of school prayer.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. HELMS. Mr. President, I ask unanimous consent that a William & Mary law review article entitled, "Congress, the Constitution and the Appellate Jurisdiction of the Supreme Court: the Letter and the Spirit of the Exceptions Clause" and an article entitled "Limiting Federal Court Jurisdiction. The Constitutional Basis for the Proposals in Congress Today," which appeared in the October 1981 edition of Judicature be printed in the RECORD at this point.

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

CONGRESS, THE CONSTITUTION, AND THE APPELLATE JURISDICTION OF THE SUPREME COURT: THE LETTER AND THE SPIRIT OF THE EXCEPTIONS CLAUSE

Ralph A. Rossum*

I. INTRODUCTION

Writing in a 1979 issue of *The Public Interest*, Senator Daniel Patrick Moynihan puzzled over the question, "What do you do when the Supreme Court is wrong?"[1] Short of impeachment, the only responses he could identify were "debate, litigate, legislate."[2] He never so much as acknowledged the existence, much less the possible employment, of Congress' power to curtail the appellate jurisdiction of the Court.[3] Events, however, have passed Senator Moynihan by. Over a score of bills were introduced in the Ninety-Seventh Congress to deprive the Supreme Court of appellate jurisdiction either to hear cases involving such issues as abortion rights and voluntary prayer in the public schools or to order school busing to achieve racial balance. Many of these same proposals were reintroduced in the Ninety-Eighth Congress.[4] These measures have in turn prompted considerable scholarly attention and controversy. Symposia in *Judicature*,[5] the *Villanova Law Review*,[6] and the *Harvard Journal of Law and Public Policy*,[7] seminars sponsored by the American Enterprise Institute[8] and the Free Congress Research and Education Foundation,[9] hearings before the Subcommittee on the Constitution of the Senate Judiciary Committee,[10] and the foreword to the *Harvard Law Review's* analysis of the 1980 Term of the United States Supreme Court[11] all have been devoted to the questions of whether and to what extent Congress can or should strip the Court of appellate subject matter jurisdiction.

On the surface, these measures would appear to be wholly within the constitutional authority of Congress.[12] After all, article III, section 2 of the United States Constitution provides that:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make.[13]

For many students of constitutional law, the simple reading of these words ends the matter.[14] The language is clear and, for them, conclusive. As Justice Noah Swayne observed in *United States* v. *Hartwell*[15] over a century ago: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."[16]

This understanding of Congress' power to curtail the appellate jurisdiction of the Supreme Court is reinforced by *Ex Parte McCardle*,[17] the only Supreme Court decision that has directly addressed this issue. In this post-Civil War case, the Court unanimously upheld a law that stripped the Court of authority to hear appeals from persons imprisoned during the Civil War who sought release from custody under an 1867 habeas corpus statute. Republican leaders in Congress feared that the Supreme Court, which had already indicated hostility toward the Reconstruction program, would use *McCardle* to hold much of that program unconstitutional. Consequently, Congress repealed the 1867 act on which McCardle's appeal was founded. This was an obvious attempt by Congress to use the exceptions clause to deprive the Court of its appellate power to review the substantive constitutionality of congressional acts. Moreover, the repealing act was not passed until after the case already had been argued before the Supreme Court. Nonetheless, the Court at once dismissed the case for want of jurisdiction. As Chief Justice Chase explained:

We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing Act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.[18]

For many scholars, then, the constitutional text, supplemented by the Court's reflections on it in *McCardle*, answers any questions concerning the constitutionality of measures restricting the jurisdiction of the Court. As they see it, the only real question raised by congressional initiatives diminishing the Court's appellate jurisdiction is "the wisdom of doing so."[19]

Not everyone, however, is willing to concede that these measures raise only policy questions.[20] Opinion on the constitutionality of congressional curtailment of the Court's appellate jurisdiction is divided, for there are those who argue that such a power could destroy the Court's power of judicial review and, ultimately, undermine our constitutional system of separation of powers.[21] They fear that if Congress had the power to deprive the Supreme Court of its appellate jurisdiction, Congress could constitutionally "deny litigants Supreme Court review in cases involving bills of attainder, ex post facto laws, freedom of speech, press and religion, unreasonable search and seizure, equal protection of the laws, right to counsel, and compulsory self-incrimination."[22] This parade of imaginary horrors convinces some commentators that Congress can no longer claim with good conscience the authority to curtail the Court's appellate jurisdiction,[23] and should Congress nevertheless proceed to exercise this authority, the Supreme Court ought not to tolerate it,[24] but rather ought to invalidate the offending measure.[25]

Those who argue against Congress' power to make exceptions to the Court's appellate jurisdiction find themselves in a most uncomfortable bind. They are forced to deny an explicit power of Congress, expressly granted by the Constitution, in order to protect the Court's implicit power of judicial review, a power which has no textual basis.[26] To extricate themselves from this bind, they commonly advance an argument that has much in common with the argument advanced by the Court in *United Steelworkers of America* v. *Weber*.[27] In that case, Justice Brennan observed that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit. . . ."[28] Similarly, those who would limit Congress' power to curtail the Court's appellate jurisdiction argue that congressional power to make exceptions may be within the letter of article III and yet not constitutional, because not compatible with the spirit of judicial review.[29] Justice Rehnquist, dissenting in *Weber*, remarked that Justice Brennan's line of argument was worthy "not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini. . . ."[30] The same criticism is appropriate with regard to the interpretation of the exceptions clause, and perhaps even more so. At least in *Weber*, if the court were mistaken in preferring the statute's spirit over its letter, the mistake could be easily rectified, because "Congress may set a different [statutory] course if it so chooses."[31] A mistaken interpretation of the exceptions clause would be difficult to rectify, however, because a different course can be set only by constitutional amendment.

The debate over Congress' power to make exceptions has been curious. One side cites the letter of article III and concludes that Congress' power over the Court's appellate jurisdiction is absolute: "The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated . . . . In short, the clause is complete exactly as it stands."[32] The opposition in this debate invokes the spirit of judicial review and insists that "the long accepted power of ultimate resolution of constitutional questions by the Supreme Court" must not be disturbed.[33] Given the nature of this debate, neither side can win, because each is talking past the other.[34] There is, however, a clear loser—the Constitution, which is presented as a fatally flawed document that neither says what it means nor means what it says. This Article asserts that the Constitution is not flawed in this respect and that the spirit of judicial review is altogether consistent with the letter of Congress' powers under article III. This Aricle will examine the arguments on behalf of Congress' power to make exceptions to the Court's appellate jurisdiction and systematically challenge the spirited objections of those who seek to protect the Court's power to interpret the Constitution by ignoring the Constitution.

II. THE ARGUMENT FOR PLENARY CONGRESSIONAL POWER

Those who argue that Congress has plenary power over the Court's appellate jurisdiction present a straightfoward case based on three kinds of evidence: the text of the Con-

stitution; the intention of the framers; and the firm, consistent, and unwavering understanding of the Supreme Court. Although further consideration of the clear and conclusive words of article III is unnecessary, an examination of what the framers meant when they used those words and how the Supreme Court has interpreted them is in order.

A. The Intent of the Framers

No evidence in the records either of the Federal Convention of 1787 or of the various state ratifying conventions would indicate that Alexander Hamilton's words in *The Federalist, No. 80* were not representative of the understanding of virtually the entire founding generation. In that essay, Hamilton reviewed in detail the powers of the federal judiciary and observed that "[i]f some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniences."[35]

The Federal Convention spent very little time debating the jurisdiction of the federal judiciary.[36] On July 24, nearly two months after the Convention began, the delegates agreed to submit the various resolutions they had approved to the Committee of Detail, so that it might "report a Constitution comfortable to the Resolutions passed by the Convention."[37] Their submission concerning the federal judiciary was most rudimentary: "[T]he jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony."[38] Nevertheless, the Committee of Detail transformed this vague resolution into language that is almost identical to article III, section 2. After defining the Supreme Court's original jurisdiction, the committee provided that "in all the other cases before mentioned, it [jurisdiction] shall be appellate, with such exceptions and under such regulations as the Legislature shall make."[39]

Although the Report of the Committee of Detail was presented to the Convention on August 6, 1787, the judicial article was not taken up for consideration until August 27. On that date, Dr. Samuel Johnson of Connecticut suggested that the power of the judiciary ought to extend to equity as well as law—and moved to insert the words "both in law and equity" after the words U.S.[40] This proposal was adopted. After an intervening discussion, "Mr. Governeur Morris [of Pennsylvania] wished to know what was meant by the words 'In all the cases beforementioned it (jurisdiction) shall be appellate with such exceptions &c,' whether it extended to matters of fact as well as law—and to cases of Common law as well as Civil law."[41] James Wilson, the principal architect of the draft reported by the Committee of Detail, answered that the committee meant "facts as well as law & Common as well as Civil law."[42] No comments were forthcoming from other members of the Committee, presumably indicating their agreement with Wilson's answer. To remove all doubt, however, Mr. Dickinson of Delaware moved to add the words "both as to law & fact" after the word "appellate," which was agreed to by unanimous consent.[43]

Acceptance of this addition concluded the discussion.[44] No questions were raised concerning Congress' plenary power to make exceptions. The conclusion is inescapable: both the words chosen by the delegates and the discussion surrounding their choices of these words suggest an unlimited congressional power over the Court's appellate jurisdiction. John Marshall accurately summarized the delegates' intentions when he declared in the Virginia Ratifying Convention that "Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people."[45]

B. The Court's Consistent Support for Plenary Congressional Power

Although "the ultimate touchstone of constitutionality is the Constitution itself and not what [the judges] have said about it,"[46] it is nevertheless significant to observe that the Supreme Court's holdings concerning the exceptions clause are altogether consistent with both the express words of article III, section 2, and the manifest intention of the framers.[47] The Court, of course, had addressed directly an actual congressional contraction of its appellate jurisdiction only once.[48] Nevertheless, it has on numerous occasions taken the opportunity to reflect more generally on the nature and extent of Congress' article III powers. A brief consideration of these reflections reveals the Court's firm and unwavering understanding from the opening days of the republic to the present.

In the first of the relevant cases, *Wiscart* v. *Dauchy,*[49] Chief Justice Oliver Ellsworth acknowledged that "even the [Court's] appellate jurisdiction is . . . qualified; inasmuch as it is given 'with such exceptions, and under such regulations, as Congress shall make.'"[50] He then drew what he considered to be the necessary conclusion from the Court's qualified jurisdiction: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."[51] Ellsworth's opinion is especially weighty, as he had been a delegate to the Federal Convention and had served on the Committee of Detail that drafted the exceptions clause.

Ellsworth's conception of the Court's jurisdiction continued in an unwavering line through five consecutive chief justices.[52] Thus, Chief Justice John Marshall in *United States* v. *More*[53] argued that an affirmative grant of certain appellate power by Congress is an implied denial of all appellate power not mentioned: "[A]s the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its power must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described."[54] Marshall elaborated upon this argument in *Durosseau* v. *United States.*[55]

> The appellate powers of this court are not given by the judicial act. They are given by the Constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject. When the first legislature of the Union proceeded to carry the third article of the Constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court.[56]

Marshall's successor, Chief Justice Taney, likewise acknowledged the utter dependency of the Court's appellate jurisdiction upon acts of Congress: "By the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes."[57]

Chief Justice Chase's statements in *McCardle* concerning the letter of article III, section 2 have already been considered.[58] Chase not only recognized Congress' power over the Court's appellate jurisdiction, but also made an important contribution to our understanding of the role of the Court: "[J]udicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."[59]

Finally, in *The "Francis Wright,"*[60] Chief Justice Waite affirmed and extended what his predecessors had argued:

> What [the appellate powers of the Supreme Court] shall be, and to what extent they shall be exercised, are and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.[61]

In the same opinion, Waite also referred to "the rule, which has always been acted on since, that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe."[62]

Not all judicial support for the opinion that the letter of article III, section 2 is clear and conclusive comes from eighteenth and nineteenth century jurists. For example, while dissenting on other issues in *Yakus* v. *United States,*[63] Justice Wiley Rutledge unequivocally affirmed that "Congress has plenary power to confer or withhold appellate jurisdiction."[64] Similarly, in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.,*[65] Justice Frankfurter noted that:

> Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice, Ex parte McCardle. . . .*[66]

For many, then, the words of the Constitution, the intention of the founding generation, and the unwavering opinion of the Supreme Court all clearly, consistently, and unequivocally reveal a constitutional plan for the courts:

> [That plan is] quite simply that the Congress could decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as "the supreme law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[67]

III. ARGUMENTS AGAINST ABSOLUTE CONGRESSIONAL POWER OVER THE COURT'S APPELLATE JURISDICTION

Those who place the spirit of judicial review over the letter of article III and who

insist that Congress' power under the exceptions clause is either limited or nonexistent make a variety of arguments that can be reduced to seven general headings.[68] One contention is that those who rely on the letter of article III have misconstrued the language of that article. A second contention insists that *Ex Parte McCardle*[69] is a very narrow holding with little or no application beyond its facts. A third argument asserts that the power Congress originally possessed under article III, section 2 has been effectively repealed by the passage of time. A fourth argument contends that Congress cannot make exceptions that would destroy the essential role of the Supreme Court. A fifth and related contention maintains that Congress' power to curtail the Court's jurisdiction is qualified by the constitutional principles of separation of powers and federalism. A sixth claim argues that Congress is limited in its ability to make exceptions by other constitutional provisions, such as those found in the Bill of Rights and the fourteenth amendment. Finally, a seventh argument contends that congressional contraction of the Court's appellate jurisdiction cannot be unconstitutionally motivated, that is to say Congress cannot have as its goal or objective the displacement of a disfavored judicial precedent.

What animates those who make these arguments is their conviction that the spirit of judicial review is jeopardized by the letter of article III. Because those who contend that Congress has plenary power over the Court's appellate jurisdiction generally have been content to rely simply on the letter of the Constitution and have felt no particular obligation or rebut these arguments, these general claims have gone largely unchallenged.[70] Little effort has been made to show that the traditional concept of judicial review[71] is wholly consonant with the letter of article III. In the following analysis of these arguments, such an effort will be made.

A. The Argument from Textual Construction

The first of the arguments against Congress' plenary powers under the exceptions clause is that those who rely on the letter of article III have misconstrued the meaning of its words. Variations of this argument exist, with Leonard Ratner focusing on how the word "exceptions" was commonly used at the time of the Federal Convention,[72] and with such scholars as Irving Brant,[73] Henry Merry,[74] and Raoul Berger[75] concerning themselves with the meaning of the phrase "both as to Law and Fact."

From a survey of dictionaries existing at the time of the Federal Convention, Ratner finds that an exception was generally defined "as an exclusion from the application of a general rule or description."[76] This definition indicates that "an exception cannot destroy the essential characteristics of the subject to which it applies."[77] On this basis, Ratner argues that Congress' power to make exceptions to the Court's appellate jurisdiction is not plenary; any exceptions it makes must be narrower in application than the description of the Court's entire appellate jurisdiction.[78] This ostensible limitation on Congress' power, however, is essentially meaningless. If an exception implies some residuum of jurisdiction, Congress can meet this test by excluding everything but, for example, patent cases. As one of the interlocutors in Henry Hart's famous dialogue remarks: "This is so absurd, and it is so impossible to lay down any measure of a necessary reservation, that it seems to me the language of the Constitution must be taken as vesting plenary control in Congress."[79]

A more ingenious, if ultimately no more successful variation of this argument against Congress' plenary power under article III, section 2 focuses on the meaning of the phrase, "both as to Law and Fact." Those who make this argument refuse to concede that the framers of the Constitution intended to vest Congress with the power to effect the wholesale destruction of judicial review. Rather, they insist, the "sole purpose of the exceptions clause was to permit Congress to limit appellate jurisdiction over questions of fact in cases at law."[80] Irving Brant, a noted historian, provides the most recent and sophisticated version of this argument. He contends that as a result of an unfortunate placement of commas in the phrase, "Jurisdiction, both as to Law and Fact," the words "both as to Law and Fact" appear to be a parenthetical, and the modifying clause beginning "with such Exceptions" seems to attach to "Jurisdiction," when, in fact, what the entire exceptions clause was meant to modify is simply appellate jurisdiction of questions of fact.[81]

At the time of the Federal Convention, considerable diversity in legal practice existed among the states, both with respect to cases in common and civil law and particularly with respect to cases in equity and maritime jurisdiction. Re-examination of factual issues was permitted in some states, but was not permitted in others. Under its appellate jurisdiction, the Supreme Court inevitably would be called upon to review cases where questions of fact were central and at issue. This prospect, however, raised the spectre of the Supreme Court having the power to overturn a jury's findings of fact in a criminal case. According to Brant, the problem faced by the Convention was to draft a provision that would permit the Court to review questions of fact in civil, equity, and maritime cases, but that would prevent it from abusing this power by retrying facts found by juries in criminal cases. Given the tremendous diversity among the states, drafting a constitutional clause to resolve this problem was all but impossible. Therefore, Brant argues, the framers took the easy way out and drafted language (albeit, Brant concedes, poorly punctuated language) that left the whole issue for handling by the Congress through the medium of the exceptions clause. The exceptions clause thus was "fashioned to meet the principal criticism of the appellate jurisdiction, its inclusion of matters in 'fact.'"[82]

Despite Brant's ingenuity, and that of Merry and Berger as well, this interpretation of the exceptions clause ultimately fails. This interpretation cannot be reconciled with the actual words and punctuation of the Constitution. Had the framers intended what Brant alleges they intended, they obviously were possessed of the necessary skills to have conveyed clearly that intention.[83] Similarly, Brant's interpretation cannot be squared with the proceedings of the Convention. What the Committee of Detail presented to the Convention in no way suggested that Congress' power to make exceptions to the Court's appellate jurisdiction was limited to the treatment of factual issues. Quite the contrary, the only discussion in the Convention relating to the exceptions clause centered on whether the Court was to have power to review questions of fact, not whether Congress' power to curtail the Court's jurisdiction was limited to such question.[84]

Nor can Brant's interpretation survive exposure to the post-Convention statements of Edmund Randolph and Alexander Hamilton. When the exceptions clause was before the Virginia State Ratifying Convention, Randolph, who had participated in the Federal Convention, Randolph, who had participated in the Federal Convention, declared that "[i]t would be proper to refer here to *any* thing that could be understood in the federal court. [Congress] may except generally both as to law and fact, or they may except as to law only, or fact only."[85] Alexander Hamilton also stressed that Congress' power to make exceptions applied to law as well as to facts: "The supreme court will possess and appellate jurisdiction, both as to law and fact, in all the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought advisable."[86] Hamilton remarked that the propriety of Congress' power to except matters of law from the Supreme Court's appeliate jurisdiction "has scarcely been called into question."[87] [C]lamors have been loud," he noted, only with respect to granting the Court any appellate jurisdiction over matters of fact.[88] In an effort to quiet the fear of those alarmed by the prospect of any appellate retrial of facts found by a jury, Hamilton declared, again clearly contrary to Brant's contention, that "the Supreme Court shall possess appellate jurisdiction, both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulation as the national legislature may prescribe."[89] All of this merely reaffirms Hamilton's assurance that if any "inconveniences" should arise from the powers the Constitution grants to the federal judiciary, Congress will have authority to make such exceptions and to prescribe such regulations as it believes necessary "to obviate or remove these inconveniences."[90]

Finally, Brant's interpretation is fundamentally at odds with an unwavering line of judicial opinion beginning with Chief Justice Ellsworth, himself a delegate to the Federal Convention and a member of the Committee of Detail, and extending to the present.[91]

B. Reliance on Ex Parte McCardle

A second major argument against Congress' claim to plenary power under article III, section 2 centers on the meaning of *Ex Parte McCardle*.[92] Rather than supporting Congress' claim as is commonly maintained, several scholars contend that *McCardle* concedes nothing to Congress.[93] They note that in *McCardle* the Court carefully pointed out that the repealing act of 1868[94] did not affect judicial authority to issue writs of habeas corpus under section 14 of the Judiciary Act of 1789:

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole apellate power of the court, in cases of *habeas corpus* is denied. But this is an error. The [repealing] act of 1868 does not except from that jurisdiction any cases but appeals from the Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.[95]

These scholars further note that this statement was reaffirmed a few months later in *Ex Parte Yerger*.[96] In *Yerger*, on a petition for habeas corpus, the Court reviewed a circuit court decision denying the writ to a civilian awaiting trial by a military commission for violating the Reconstruction Acts. Without the slightest hesitation, the Supreme Court unanimously sustained its jurisdiction and held that the repealing act

of 1868 did not affect its authority under the Judiciary Act of 1789 to issue the writ.[97] Thus, these scholars argue, *McCardle* does not sanction congressional impairment of the Court's jurisdiction:

The [repealing] statute did not deprive the Court of jurisdiction to decide McCardle's case; he could still petition the Supreme Court for a writ of habeas corpus to test the constitutionality of his confinement. The legislation did no more than eliminate one procedure for Supreme Court review of decisions denying habeas corpus relief while leaving another equally efficacious one available.[98]

These scholars also look to *United States* v. *Klein*,[99] decided two years after *Yerger*, in which the Court held that Congress could not enact legislation to eliminate an area of jurisdiction in order to control the results in a particular case. Klein sued in the Court of Claims under an 1863 statute that allowed the recovery of land captured or abandoned during the Civil War if the claimant could prove he had not assisted in the rebellion.[100] Relying on an earlier Supreme Court decision[101] that a presidential pardon proved conclusively that the recipient of the pardon had not aided the rebellion, Klein prevailed in the Court of Claims. While the government's appeal to the Supreme Court was pending, Congress passed a statute providing that a presidential pardon would not support a claim for captured property, and that acceptance of a pardon for participation in the rebellion, without a disclaimer of the facts recited, was conclusive evidence that the claimant had aided the enemy.[102] Furthermore, the statute provided that no proof of such pardon and acceptance, which could be heard summarily, the jurisdiction of the federal judiciary in the case should cease, and the Court of Claims should forthwith dismiss the suit such claimant.[103] As Chief Justice Chase remarked: "The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it both in the Court of Claims and in this court on appeal."[104] The Supreme Court held the act to be unconstitutional because it subverted the judicial process by prescribing "a rule for the decision of a cause in a particular way,"[105] and it also infringed upon the constitutional power of the executive by impairing the effect of a pardon.[106]

These efforts to construe *McCardle* narrowly and to employ *Yerger* and *Klein* to protect the spirit of judicial review from the letter of article III, section 2, however, are unsuccessful. Neither *McCardle* nor *Yerger* in any way suggests that the Court would have been justified in invalidating the act of 1868 if the act had excepted from the Supreme Court's appellate jurisdiction cases arising under section 14 of the Judiciary Act of 1789. Quite the contrary, as Chief Justice Chase noted in *McCardle*, judicial duty entails the refusal to exercise ungranted jurisdiction as well as the obligation to exercise jurisdiction when it is conferred by the Constitution or by law.[107] *McCardle* and *Yerger* are wholly faithful to Justice Chase's understanding. In *McCardle*, the Court declined to exercise jurisdiction that had been positively excepted by the repealing act of 1868. In *Yerger*, the Court firmly exercised jurisdiction that the Judiciary Act of 1789 conferred and which the repealing act in no way limited. Thus, the Court on both occasions acted consistently with Chief Justice Marshall's observation in *Cohens* v. *Virginia*.[108] "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."[109]

Similarly, reliance on *Klein* is misplaced. *Klein* involved a congressional attempt to forbid the Court from giving the effect to evidence which, in the Court's judgment, such evidence should have, and directed the Court to give the evidence an effect precisely contrary.[110] In *Klein*, Congress sought to curtail the appellate jurisdiction of the Supreme Court to obtain a particular result in a specific case; by so doing, Congress "inadvertently passed the limit which separates the legislative from the judicial power."[111] Congress' action in *Klein* is altogether different from congressional contractions of the Court's jurisdiction that seek merely to shift the determination of any result, whatever that result might be, to the lower federal or state courts, both of which are also bound by the Constitution as the supreme law of the land.[112] Shifting jurisdiction to lower federal or state courts is wholly permissible, and the Court in *Klein* declared as much, acknowledging that "if this Act did nothing more . . . [than] simply deny the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient."[113]

C. The Contraction of Congress' Power Due to the Passage of Time

A third argument against the letter of article III operates from the perspective of what Justice Rehnquist has called the "living Constitution with a vengeance."[114] This argument is based on the premise that congressional "control over the Court's appellate jurisdiction has in effect now been repealed by the passage of time and by the recognition that exercise of such power would be in the truest sense subversive of the American tradition of an independent judiciary."[115] C. Herman Pritchett, who is closely identified with this position, argues that while the language of article III, section 2 may have seemed reasonable in 1787, so, too, did choosing a President by indirect election.[116] Originally, the Supreme Court was just a few words in an unadopted document; today, however, it is the most respected judicial body in the world and has the authority to determine the constitutionality of acts of Congress.[117] Given these changes in conditions, "Congress can no longer claim with good conscience the authority granted by article III, section 2."[118]

The assertion that new conditions can amend the clear language and intent of the exceptions clause is subject to considerable doubt. Changing circumstances[119] and the passage of time may be considered in the interpretation and adaptation of such broadly phrased constitutional provisions as the due process and commerce clauses. These clauses were drafted expansively to allow evolving interpretations as time might require. Neither the language of the exceptions clause nor the debates of the Convention, however, indicate that the framers intended such broad adaptations of article III. Changing circumstances can neither alter nor amend the meaning of clear and unequivocal language in the Constitution.[120] Even Pritchett recognizes this, at least with respect to the other constitutional feature he regards as anachronistic—indirect election of the President. Thus, rather than contending that the Electoral College has been repealed by history, Pritchett served on and supported the policies of an American Bar Association blue ribbon commission that proposed a constitutional amendment formally abolishing the Electoral College and substituting in its place direct election of the President.[121]

Many provisions of the Constitution, of course, are phrased broadly, thus permitting flexible interpretations that adapt the document to changing circumstances. Nonetheless, even when such broad phrasing exists, the goal must be "adaptation *within* the Constitution rather than adaptation *of* the Constitution."[122] The terms of article III, however, are not phrased so broadly and no doubt exists as to the framers' intent. Unless the Court is to be permitted to disregard the outer rational limits of constitutional language—all to protect its role as principal interpretor of that language—the "passage of time theory" cannot be legitimately employed to amend the letter of the exceptions clause.

D. The "Essential Functions" Argument

A fourth argument against Congress' power to curtail the appellate jurisdiction of the Supreme Court is that Congress cannot constitutionally make any exceptions that will destroy what is variously described as the Court's essential role or function.[123] "[T]he [exceptions] clause means 'With such exceptions and under such regulations as Congress may make, not inconsistent with the essential function of the Supreme Court under this Constitution.'"[124] This argument, however, is also fraught with difficulties. It makes the Court itself the final arbiter of the extent of its powers. The argument contends not only that the essential functions of the Court cannot be limited, but also that the Court exclusively, and not the Congress, is to determine what functions are, in fact, essential. This interpretation of the exceptions clause cannot be sustained:

It is hardly in keeping with the spirit of checks and balances to read such a virtually unlimited power into the Constitution. If the Framers intended so to permit the Supreme Court to define its own jurisdiction even against the will of Congress, it is fair to say that they would have made that intention explicit.[125]

Nothing in the text of the exceptions clause or in any Supreme Court opinion addressing this subject suggests that Congress' power under article III, section 2 is limited to making "'inessential' exceptions."[126] The distinction between the "essential" and "inessential" functions of the Court is, of course, wholly extraconstitutional. Consequently, those who draw this distinction on the Court's behalf are not limited by the letter of the Constitution but, rather, are free to define the Court and its essential role and functions as they see fit. Not surprisingly, given the absence of any constitutional restrictions (or, more precisely, given their refusal to recognize and abide by any constitutional restrictions), proponents of this interpretation advance and defend a wide variety of definitions. Thus, Henry Hart, who first propounded this argument, defines the essential role of the Supreme Court as serving as a check on the coordinate branches of government to keep them from destroying the Constitution.[127] Leonard Ratner offers a slightly different view, stressing the Court's "essential constitutional functions of maintaining the uniformity and supremacy of federal law."[128] In contrast, Archibald Cox asserts that the "chief

function of the Supreme Court is to protect human rights."[129] Even more expansively, Paul Brest accords a special role for the Court in promoting "individual rights and decision making through democratic processes."[130]

Although considerable variety exists among these definitions of the Court and its essential role, they share one common element. Central to all formulations of this argument is an activist view of the judiciary. Only through frequent recourse to judicial review will the Court be able to perform the essential functions judicial activists assign to it. Quite naturally, proponents of the essential functions argument see Congress' plenary powers under article III, section 2 as a threat to judicial activism.[131] These proponents, therefore, strive to distort or obscure the letter of the exceptions clause, thereby rendering secure the spirit of judicial review that animates their judicial activism.[132]

The incompatibility that proponents of the essential functions argument perceive between the letter of article III and the spirit of judicial review is almost exclusively attributable to the way in which they have defined the essential role and function of the Supreme Court. Their expansive view of what the Court should do obviously is threatened by language that gives to Congress the power to except from the Court's appellate jurisdiction the cases necessary to sustain the Court's activist role.[133] This perceived incompatibility, however, can be avoided entirely if the Court's essential role is defined more modestly:

Federal Courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land.[134]

This more limited conception of the role of the Court is consistent not only with the actual provisions of the Constitution, but also with Hamilton's original defense of judicial review in *The Federalist, No. 78*[135] and Chief Justice Marshall's establishment of judicial review in *Marbury* v. *Madison*.[136] Moreover, because this interpretation regards the Court's power of judicial review as extending no further than to cases otherwise within its jurisdiction, which jurisdiction is subject to such exceptions as Congress shall make, this interpretation reflects the compatibility of the letter of article III and the spirit of judicial review.[137]

E. The Separation of Powers/Federalism Argument

A fifth contention closely related to the essential functions arguments is that Congress' power under the exceptions clause is limited by the constitutional principles of separation of powers and federalism.[138]

If Congress also has plenary control over the appellate jurisdiction of the Supreme Court, then . . . Congress [could] by statute profoundly alter the structure of American government. It [could] all but destroy the coordinate judicial branch and thus upset the delicately poised constitutional system of checks and balances. It [could] distort the nature of the federal union by permitting each state to decide for itself the scope of its authority under the Constitution. It [could] reduce the supreme law of the land as defined in article VI to a hodgepodge of inconsistent decisions by making fifty state courts and eleven federal courts of appeal the final judges of the meaning and application of the Constitution, laws, and treaties of the United States.[139]

This contention, too, is flawed, because it rests on a superficial understanding of the political principles of the Constitution.

Those who would limit Congress' power under article III, section 2 stress that use of the exceptions clause constitutes an attack on the status and independence of the Court and thereby jeopardizes the principle of separation of powers.[140] These criticisms are groundless. In our constitutional system, the judiciary is not supposed to be entirely independent; neither is the legislative nor executive branch. Separation of powers does not entail complete independence. The framers did not intend the branches of government to be wholly unconnected with each other,[141] rather, the framers sought to create a government in which the branches would be so connected and blended, as to give to each a constitutional control over the others.[142] The framers accomplished this blending "by so contriving the interior structure of the government . . . that its several constituent parts, . . . [are] by their mutual relations, the means of keeping each other in their proper places."[143] The result is a government consisting of three coordinate and equal branches, each performing a blend of functions, thereby balancing, as opposed to merely separating, powers.[144]

The term separation of powers is, in fact, a misnomer. The framers created not so much a government of separated powers as one of "separated institutions sharing powers."[145] This sharing of powers allows the branches to have a "mutual influence and operation on one another. Each part acts and is acted upon, supports and is supported, regulates and is regulated by the rest."[146] Thus, the three branches, including the judiciary, are intended to move "in a line of direction somewhat different from that, which each acting by itself, would have taken; but, at the same time, in a line partaking the natural direction of each, and formed out of the natural direction of the whole—the true line of public liberty and happiness."[147]

The framers recognized that power is, by nature, encroaching, whether it be legislative, executive, or judicial.[148] They solved the problem of "the encroaching spirit of power"[149] by balancing the powers assigned to each of the three branches so that each branch could effectively check, but not control, the other two. Furthermore, the framers did not give any one branch the authority to decide whether its powers encroached on the others. "[N]one of [the three branches], it is evident, can pretend to an exclusive or superior right of setting the boundaries between their respected powers."[150]

The framers did not consider the judiciary exempt from the operation of these principles, although they did not consider the judiciary to be the least dangerous of the three branches because they had given the judiciary the least amount of power.

Whoever, attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in its capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[151]

Although the framers regarded the judiciary as having the least capacity, because of the very nature of its functions, to be dangerous, the framers recognized that judicial power could be arbitrary and oppressive. The framers expected that the arbitrary discretion of the courts could be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[152] Additionally, the framers provided the other branches with powers to check judicial encroachments. Thus, the framers provided for congressional appropriation of money for the judicial branch, presidential appointment and senatorial confirmation of judges, and congressional power to define entirely the jurisdiction of the inferior federal courts. The framers also provided for the impeachment of judges by the House of Representatives and the trial of impeached judges by the Senate—what *The Federalist* called "a complete security" against "the danger of judiciary encroachments on the legislative authority."[153] Finally, the framers of the Constitution provided the legislative branch with ample authority under article III, section 2, so that if "some partial inconveniences" were to arise as a result of the judicial branch's exercise of its powers, Congress could make such exceptions and prescribe such regulations "as will be calculated to obviate or remove these inconveniences."[154]

Thus, the framers never intended for judicial power to be absolute or for the judiciary to be completely independent. Just as they provided checks upon the legislative and executive branches, so too the framers included mechanisms to restrain the judiciary. The exceptions clause was one such mechanism.

Those who contend that Congress' power under the exceptions clause is limited by the constitutional principle of federalism betray an equally superficial understanding of the political principles of the Constitution. They contend with Leonard Sager, that Congress cannot restrict Supreme Court supervision of state conduct if such supervision is necessary to insure uniform judicial interpretation and state compliance with federal constitutional norms.[155] If the Supreme Court were restricted by Congress in such a manner, such restriction would, they fear, reduce the supremacy clause to a virtual nullity, Sager goes so far as to argue that if the states were not answerable to the Supreme Court, the Constitution would have "little to recommend it over the Articles of Confederation."[156] This view is deficient in a number of particulars.

This view reflects a common misperception concerning the nature of American federalism. The framers relied on federalism, as they also relied on separation of powers and the multiplicity of interests in an extended republic, to achieve their constitutional objectives—the creation and operation of an efficient and powerful guarantor of rights and liberties organized around the principle of qualitative majority rule.[157] The framers sought a "Republican remedy

for the disease most incident to the Republican Government."[158] That disease was the tension between majority tyranny and democratic ineptitude.[159] The framers saw the federalism they were creating as contributing to that Republican remedy. Their federalism, however, was not merely a division of power between the national government and the state governments; it was also a blending of federal elements into the structure and procedures of the central government itself.[160] An obvious example of this blending is the mixture into the Senate of the federal principle of equal representation of all the states.[161] The framers recognized that this principle, when joined with bicameralism and separation of powers, could contribute directly to qualitative majority rule. For a measure to become law, for example a measure controlling the appellate jurisdiction of the Supreme Court, it would have to pass the Senate where, because of the federal principle of equal representation, the presence of a nationally distributed majority and the moderating tendencies associated therewith would be guaranteed.

To the framers, federalism also meant that the same relationship that existed between the citizen and the individual state also would exist, at least with regard to those functions specified in article I, section 8, between the citizen and the centralized national government. This is a crucial difference between between the Constitution and the Articles of Confederation, and one which Professor Sager apparently overlooks.[162] Under the Constitution, the national government need not gain the cooperation of a state to regulate the behavior of the state's citizens, for they are also citizens of the United States. In fact, even if a state actively attempted to frustrate the wishes of the national government, the national government, through either legislative or judicial action, could reach the citizenry and hold them personally accountable for their actions. This is a significant difference between the Constitution and the Articles of Confederation: the national government can govern the individual directly and need not rely on the good will or cooperation of state intermediaries.

Similarly, if the Congress, moderated in its judgments by the nationally distributed majorities that are assured by the federal principle of equal representation of all states in the Senate, restricts the appellate jurisdiction of the Supreme Court in a certain subject matter area because Congress has concluded that the Court's decisions in that area have unduly limited the states, Congress' action can hardly be described as placing the supremacy clauses in jeopardy. Rather, Congress is simply exercising its power under the exceptions clause to obviate those inconveniences that have arisen as a result of the judiciary's interventions and, in a manner that is wholly consistent with the constitutional principle of separation of powers, is determining for the national government what the states may or may not do.

The view that the Congress can limit the appellate jurisdiction of the Supreme Court without jeopardizing federalism is compatible not only with the framers' understanding but also with the actions taken by both Congress and the federal judiciary until well into the twentieth century. Thus, in the Judiciary Act of 1789, Congress did not provide for Supreme Court review of cases in which state courts invalidated state conduct on federal grounds, even if those cases invalidated state conduct under an overly broad reading of federal laws that in turn defeated other federal rights.[163] In the same Act, Congress also subjected Supreme Court review of civil cases to a jurisdictional amount,[164] a requirement that was not eliminated for all cases involving constitutional issues until 1891[165] and was not abolished with respect to Supreme Court review of all federal questions until 1925.[166] Congress did not provide for Supreme Court review of federal criminal cases until 1802, and then only for review of decisions in which an inferior federal court had divided on a question of law.[167] Congress did not grant general power to the Court to review major federal criminal cases until 1891.[168] Obviously, the opponents of Congress' exercise of its powers under the exceptions clause have placed a premium on the uniformity of constitutional interpretation and Supreme Court supervision of state conduct that has not been shared by either Congress or the Court.

F. Limits on Congressional Power: The Bill of Rights and Other Constitutional Provisions

A sixth argument made against Congress' power under the exceptions clause is that this power is limited by the constitutional requirements of article I, section 9 and the Bill of Rights and is fully subject to review under these and any other constitutional provisions uniformly applicable to all acts of Congress.[169] Those who make this argument draw a parallel between Congress' plenary power under the commerce clause and its plenary power under article III, section 2. For example, just as Congress' power to regulate commerce among the several states is subject to the requirements of the first and fifth amendments,[170] so also is Congress' power to make exceptions. The due process clause of the fifth amendment plays an especially prominent role in this argument. Advocates of this argument view the fifth amendment as guaranteeing litigants an independent judicial hearing of all constitutional claims, thereby limiting Congress' power to make exceptions that will deprive litigants of this hearing and, hence, of the opportunity to petition for the remedies they seek.

Like the other arguments against Congress' power to make exceptions, this argument also is deficient. Those who make this argument are correct, of course, in pointing out that the congressional power at issue is subject to the due process clause and all other constitutional provisions uniformly applicable to acts of Congress. What they fail to consider, however, is that the independent judicial hearing they insist upon need not occur at the Supreme Court level. The requirements of the due process clause can be satisfied fully in the state and lower federal courts, even if Congress were to strip the Supreme Court of its entire appellate jurisdiction. Moreover, because the Supreme Court noted in *Cary* v. *Curtis*[171] that "the judicial power of the United States . . . is . . . dependent for its distribution . . . entirely upon the action of Congress, who possess the sole power . . . of investing [the inferior courts] with jurisdiction . . . in the exact degree and character which to Congress may seem proper for the public good,"[172] it would be constitutionally permissible under the due process clause for Congress to deny jurisdiction as well to all lower federal courts, provided that state courts retained jurisdiction to hear these matters.[173] State courts, after all, are bound by the Constitution as the supreme law of the land.[174] Moreover, "[i]n the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."[175] Thus, apparently nothing less than the total denial of any state judicial form would be subject to successful challenge as a violation of procedural due process.[176]

G. The Prohibition on Unconstitutionally Motivated Withdrawals of Jurisdiction

Finally, a seventh argument against Congress' use of the exceptions clause to curtail the Court's appellate jurisdiction is that congressional actions in this regard cannot be unconstitutionally motivated:

When Congress manipulates jurisdiction in an effort to deny recognition and judicial enforcement of constitutional rights, it has deliberately set itself against the Constitution as the Court understands that document. Comparable behavior on the part of a mayor or police chief would constitute "bad faith," and so here. Legislative bad faith is a constitutionally impermissible motive, and it offers an independent ground for doubting the constitutionality of jurisdictional legislation.[177]

The claim that congressional use of the exceptions clause to displace a disfavored judicial precedent is unconstitutional can be sustained only by embracing the view that the Constitution is merely what the Court says it is. Sager embraces this view,[178] and he fears that "[i]f Congress enacts a selective jurisdictional limitation for cases that concern state conduct, it will be issuing an open, unambiguous invitation to state and local officials to engage in conduct that the Supreme Court has explicitly held unconstitutional."[179] Appalled by the prospect of such a strategem, he repeatedly labels it as "tawdry" and lewd"[180] and as seducing the state judiciary to "malfeasance."[181]

This willingness to treat the Constitution as identical with its judicial gloss, however, is problematic. The mere reference to such notorious cases as *Dred Scott* v. *Sandford*,[182] *Plessy* v. *Ferguson*,[183] and *Lochner* v. *New York*[184] is sufficient to highlight the difficulty. If the Court was correct in its interpretations of the Constitution in these cases, then efforts to overturn these decisions by constitutional amendment, remedial legislation, or subsequent litigation were unconstitutionally motivated. If, however, the Court was mistaken in its interpretations of the Constitution in these cases, then the Constitution is not simply what the Court says it is, and some constitutional means must be available by which to rectify judicial errors.[185] Without such a means, the fate described by Abraham Lincoln in his First Inaugural Address cannot be avoided:

If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal[186]

Actually, various constitutional means do exist to correct Court misinterpretations; the exceptions clause is but one means of correction.

IV. PRACTICAL LIMITATIONS ON THE WITHDRAWAL OF JURISDICTION

At this juncture, it should be apparent that the various arguments advanced against the exceptions clause are inadequate to accomplish the formidable task of dis-

placing the clear and express words of article III, section 2. Although they are ingeniously cast and earnestly argued, these arguments can be rebutted, and Congress' power to make exceptions to the Court's appellate jurisdiction remains plenary. This conclusion, however, is unacceptable to some constitutional scholars. Irving Brant may be more graphic than most, but he is no more alarmed than many when he writes: "The mind is staggered by the thought of what would result if Congress should pass, and the Supreme Court should bow to, a law prohibiting the review of state court decisions, or cases involving the first or fourteenth amendments."[187] For Brant, the exceptions clause has "become a dagger sharpened by social conflict and pointed at the heart of the Bill of Rights. Time and again Congress has raised this dagger. Only once has it descended, but the menace continues to mount."[188] These misgivings, however, are unfounded, both because of the practical difficulties that would attend congressional contraction of federal jurisdiction and because of the moderating tendencies of a Constitution structured so that the popular branches can seldom act "on any other principles than those of justice and the general good."[189]

The practical difficulties that would accompany withdrawal of jurisdiction are considerable. First, federal courts are essential to the administration of federal law and the enforcement of coercive sanctions and private remedies. If Congress were to withdraw all jurisdiction from the federal courts, save only the Supreme Court's original jurisdiction, the final resolution of virtually all questions of federal law, constitutional and otherwise, would rest with the highest courts of the fifty states. The potential for inconsistency in their resolution of federal question is so great, and the practical costs of such inconsistency are so high, that Congress is not likely to withdraw all federal jurisdiction, even though it is authorized by article III, section 2 to do so. If, in recognition of these constraints, the Congress decided to curtail only the Supreme Court's appellate jurisdiction, it would find that it had succeeded only in reducing, but by no means eliminating, the potential for national inconsistency. The final resolution of all constitutional questions would then be left to the twelve federal courts of appeal and the probability of inconsistency in their decisions would still remain great."[190] Finally, if the Congress were to exercise its exceptions powers even more exactingly and were selectively to deprive the Supreme Court of jurisdiction to review only particular classes of cases such as busing, school prayer, or abortion, the tradition of stare decisis could lead the lower federal and state courts to follow the Supreme Court decisions that originally promoted the congressional contraction:

[The courts] would still be faced with the decisions of the Supreme Court as precedents—decisions which that Court would now be quite unable to reverse or modify or even to explain. The jurisdictional withdrawal thus might work to freeze the very doctrines that had prompted its enactment, placing an intolerable moral burden on the lower courts.[191]

All of this is likely to convince Congress that "the federal system needs federal courts and the judicial institution needs an organ of supreme authority."[192]

These practical difficulties, however, are not great enough either to reassure those fearful of Congress' power under the exceptions clause or to discourage those who would have Congress exercise this power. Sager regards contractions of Supreme Court jurisdiction as "lewd winks" cast by the Congress in the state courts' direction, and he worries that state courts will be seduced to "dishonor federal precedent and refuse to recognize disfavored rights."[193] Professor Rice inquires: "What will be the practical effect of withdrawing jurisdiction from the Supreme Court and the lower federal courts?"[194] His answer, which employs the school prayer issue as an example, is hardly comforting to Sager:

Unlike a constitutional amendment, such a withdrawal would not reverse the Supreme Court's rulings on school prayer. Presumably, at least some state courts would strictly follow those decisions as the last authoritative Supreme Court pronouncement on the subject. But a new law would ensure that the Court received no opportunity to further extend its errors.

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It may be expected, however, that some state courts would openly disregard the Supreme Court precedents and decide in favor of school prayer once the prospect of reversal by the Supreme Court had been removed. But that result would not be such a terrible thing. . . . [because state courts merely would be reversing]. . . Supreme Court decisions which . . . would appear so erroneous as to be virtually usurpations.

[B]ecause a statute rather than a constitutional amendment is involved, the Court's jurisdiction could readily be restored should the need for it become apparent.[195]

Although the practical difficulties attending jurisdictional contractions may or may not prove reassuring, those fearful of Congress' power to make exceptions should take considerable comfort in the fact that the Constitution is so designed and constructed as to render remote the prospect that Congress will exercise this expressly granted power either frequently or fully. Congress has only once succeeded in passing legislation excising a portion of the court's appellate jurisdiction,[196] and this occurred in the post-Civil War period against a Court whose last exercise of judicial review was in the notorious *Dred Scott* v. *Sandford*[197] decision and whose membership included several justices who were on public record as believing that the Reconstruction program was unconstitutional.[198] Moreover, this excision was carried out neither with a meat-ax nor even with Brant's "dagger,"[199] but with a scalpel; Congress eliminated only one procedure for Supreme Court review of the questions at issue, but left an alternate review procedure untouched. Congress historically has acted quite responsibly toward the Court. It has abused neither its ability to make exceptions nor its other powers to curb the Court.[200] Such historical respect for the functions of the Court is hardly accidental.

V. CONCLUSION

The framers of the Constitution recognized that a dependence on the people and on their representative institutions was essential in a democractic republic. They nevertheless were aware of the need for precautions to ensure that the people not only ruled, but that they ruled well.[201] One of the precautions upon which they relied was an independent judiciary exercising the traditional form of judicial review as articulated in *The Federalist, No. 78*[202] and as instituted in *Marbury* v. *Madison*,[203] thereby keeping the representative branches "within the limits assigned to their authority."[204]

The framers were well aware, however, that this precaution posed a potential threat to the political rights of the Constitution. In this regard, the Court was the least dangerous of the three branches, but it too could annoy and injure the rights and liberties of the people.[205] The Court also had to be restrained, even as it was used to restrain others. One means by which the framers sought to restrain the Court was by granting to Congress the power to make exceptions to the Court's appellate jurisdiction. The framers did not fear that Congress would abuse this power, unrestrained as it was by judicial review, for they had set in place against the tyranical tendencies of the Congress a variety of auxiliary precautions, including separation of powers, checks and balances, bicameralism, staggered elections, federalism, and the moderating effect of a multiplicity of interests present in an extended republic.

For nearly two centuries, these precautions have worked exceedingly well. The Congress has acted responsibly, and the Court, ever mindful of the consequences that might be visited upon it if it were to attempt to substitute its pleasure for that of the legislative body,[206] generally has resisted the temptation to act as "a bevy of Platonic Guardians."[207] There is every reason to believe that these precautions will continue to work well, provided only that the letter of the Constitution—which is, after all, the very source of these precautions—remains central and governing in the minds of those who study and practice the law, and is not subordinated by them to the activist view which distills the very essence of the judicial role and constitutional legitimacy from the spirit of judicial review.

FOOTNOTES

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[1]Moynihan, *What Do You Do When the Supreme Court Is Wrong?* 57 PUB. INTEREST 3 (1979).

[2]*Id.* at 8.

[3]Proposals to employ art. III, §2 of the United States Constitution to limit the appellate jurisdiction of the Supreme Court have been debated throughout our constitutional history. *See* R. BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969); W. MURPHY, CONGRESS AND THE COURT (1962); Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965).

A subsidiary question concerns Congress' power to curb the jurisdiction of the lower federal courts, leaving issues to be decided solely in the state courts. It is generally conceded that Congress could substantially reduce the authority of these courts or even abolish them altogether. *See* Palmore v. United States, 411 U.S. 389, 400-02 (1973); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical View and New Synthesis*, 124 U. PA. L. REV. 45 (1975); Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839 (1976); Sager, *Foreword; Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). This Article addresses Congress' power to limit the jurisdiction of the lower federal courts only in relation to the central question under consideration. *See infra* note 173.

[4]*See* S. 26, 98th Cong., 1st Sess. (1983), which would deprive lower federal courts of jurisdiction in cases involving state or local abortion law. *See also* H.R. 618, 98th Cong., 1st Sess. (1983). Similarly, the following bills would deprive the federal courts, including the Supreme Court, of jurisdiction in cases involving voluntary prayer in public schools. S. 88, 98th Cong., 1st Sess. (1983); H.R. 525, 98th Cong., 1st Sess. (1983); H.R. 253, 98th Cong., 1st Sess. (1983). A final group of bills would, in varying de-

grees, limit the jurisdiction of all federal courts to order school desegregation through mandatory busing. H.R. 798, 98th Cong., 1st Sess. (1983); H.R. 153, 98th Cong., 1st Sess. (1983).

[5]*Limiting Federal Court Jurisdiction*, 65 JUDICATURE 177 (1981).

[6]*Congressional Limits on Federal Court Jurisdiction*, 27 VILL. L. REV. 893 (1982).

[7]6 HARV. J. L. & PUB. POL'Y (Special Issue 1983).

[8]On October 1 and 2, 1981, the American Enterprise Institute held a seminar in Washington, D.C., the topic of which was "Judicial Power in the United States: What Are the Appropriate Constraints?"

[9]The title of the Foundation's seminar, held in Washington, D.C. on June 14, 1982, was A Conference on Judicial Reform."

[10]*Constitutional Restraints Upon the Judiciary: Hearings before the Subcomm. on the Constitution of the Senate Judiciary Comm. to Define the Scope of the Senate's Authority Under Article III of the Constitution to Regulate the Jurisdiction of the Federal Courts*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings*].

[11]Sager, *supra* note 3.

[12]This Article does not consider whether these specific measures are properly drafted and technically correct. It considers only whether Congress has the power constitutionally to pass such measures. *See infra* note 19.

[13]U.S. CONST. art. III, §2, cl. 2.

[14]*See* E. CORWIN & J. PELTASON, UNDERSTANDING THE CONSTITUTION 109 (6th ed. 1979); E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 179 (1974); BERGER, *Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801; Roberts. *Now is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1 (1949); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965). *See also* 39 CONG. Q. WEEKLY REP. 947-51 (May 30, 1981) (statements of Professors Martin H. Redish, Paul Bator, and John T. Noonan).

[15]74 U.S. (6 Wall.) 385 (1868).

[16]*Id.* at 396. *See also* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JOURNAL REVIEW 16 (1980) ("The most important datum bearing on what was intended is the constitutional language itself.").

[17]74 U.S. (7 Wall.) 506 (1868).

[18]74 U.S. (7 Wall.) at 514.

[19]E. CORWIN & J. PELTASON, *supra* note 14, at 179. This Article does not address the "wisdom" of the bills discussed *supra* note 4, nor does it explore the policy questions they raise. Rather, it is limited exclusively to a consideration of Congress' constitutional power to enact such measures.

[20]*See, e.g.*, S. REP. NO. 1097, 90th Cong., 2d Sess. 155-57 (1968); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 53-54 (1980); C. PRITCHETT, CONGRESS VERSUS THE SUPREME COURT (1961); O. STEPHENS & G. RATHJEN, THE SUPREME COURT AND THE ALLOCATION OF CONSTITUTIONAL POWER 40 (1980); Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 ORE. L. REV. 3 (1973); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U PA. L. REV. 157 (1960); Sager, *supra* note 3. Even John Hart Ely, who writes that the constitutional language itself is "the most important datum" bearing upon what the Constitution means, nonetheless concludes the "Congress' theoretical power to withdraw the Court's jurisdiction over certain classes of cases is . . . fraught with constitutional doubt." ELY, *supra* note 16, at 46.

[21]*See, e.g.*, C. PRITCHETT, *supra* note 20, at 122; Brant, *supra* note 20, at 21. Even among those who deny that Congress has the power to curtail the Court's appellate jurisdiction, opinion is divided over whether "any legislation of this sort [is] unconstitutional as a violation of the separation of powers and as an attack on the status and independence of the nation's highest judicial tribunal," C. PRITCHETT, THE FEDERAL SYSTEM IN CONSTITUTIONAL LAW 15 (1978), or whether legislation is unconstitutional only if it deprives the Supreme Court of its essential role of interpreting the Constitution and resolving conflicts between federal laws and between state and federal laws. *See* Hart, *supra* note 20, at 1365; Ratner, *supra* note 20, at 160-61.

[22]Brant, *supra* note 20, at 5. *See also* Ratner, *supra* note 20, at 158.

[23]C. PRITCHETT, *supra* note 20, at 122.

[24]Slonim, *Law Scope: Say Dormant Prayer Bill Has Broad Implications*, 66 A.B.A.J. 437 (1980) (quoting Lawrence Tribe).

[25]Brant, *supra* note 20, at 28.

[26]Raoul Berger acknowledges this bind: "The distressing fact is that Congress' power to make 'exceptions' to the Supreme Court's appellate jurisdiction is expressly conferred whereas judicial review . . . is derived from questionable implications and debatable history." R. BERGER, *supra* note 3, at 4.

[27]443 U.S. 193 (1979).

[28]*Id.* at 201.

[29]Jesse Choper adopts this position: "The theoretical underpinnings for a wide legislative power to curtail the appellate jurisdiction . . . are hardly as firm as the literal phrasing of Article III and the quite sweeping judicial language would suggest." J. CHOPER, *supra* note 20, at 53.

[30]443 U.S. at 222 (Rehnquist, J., dissenting).

[31]*Id.* at 216 (Blackmun, J., concurring).

[32]Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229, 260 1973). *See also* Roberts, *supra* note 14. "What is there to prevent Congress taking away, bit by bit, all the appellate jurisdiction of the Supreme Court of the United States . . .? I see nothing, I do not see any reason why Congress cannot, if it elects to do so, take away entirely the appellate jurisdiction of the Supreme Court . . . ." *Id.* at 4. For this reason, former Justice Roberts favored a constitutional amendment that would have stripped the Congress of its art. III powers. *Id. See also Hearings*, *supra* note 10 (testimony of Thomas R. Ascik, Paul M. Bator, Jules Gerard, Martin H. Redish, and Charles E. Rice); A. KELLY & W. HARRISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 483 (4th ed. 1970); A. MASON & BEANEY, AMERICAN CONSTITUTIONAL LAW 3, 24 (6th ed. 1978); Burton, *Two Significant Decisions:* Ex Parte Milligan *and* Ex Parte McCardle, 41 A.B.A.J. 124, 176 (1955).

[33]COMM. ON THE JUDICIARY, MINORITY REPORT ON THE OMNIBUS CRIMINAL CONTROL AND SAFE STREETS ACT OF 1967, S. REP. No. 1097, 90th Cong., 2d Sess. 156 (1968) [hereinafter cited as MINORITY REPORT]. *See also Hearings*, *supra* note 10 (testimony of George J. Alexander, Edward I. Cutler, Lloyd M. Cutler, Leonard G. Ratner, and Telford Taylor).

[34]For an exception to this generalization, see Van Alstyne, *supra* note 32.

[35]THE FEDERALIST, No. 80, at 541 (A. Hamilton) (J. Cooke ed. 1961).

[36]*See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 22, 46 (rev. ed. 1937).

[37]*Id.* at 106.

[38]*Id.* at 132-33.

[39]*Id.* at 173.

[40]*Id.* at 428.

[41]*Id.* at 431.

[42]*Id.*

[43]*Id.*

[44]*But see* Brant, *supra* note 20, at 7. Brant correctly points out that subsequent to Dickinson's motion, an unidentified delegate moved to insert the following substitute for the clause on appellate jurisdiction: "In all the other cases before mentioned the Judicial power shall be exercised in such a manner as the Legislature shall direct." 2 M. FARRAND, *supra* note 36, at 431. This motion was defeated, six states to two. Brant argues that this proposed clause "would have given Congress the extensive power it claims it possesses under the authority to make exceptions from the Court's appellate jurisdiction. It is hardly conceivable that such a motion would have been offered if the delegates believed that they had just voted to confer substantially the same power under a different wording." Brant, *supra* note 20, at 7. *See also* Merry, *supra* note 20, at 59; Sager, *supra* note 20, at 49-50 n.95. Brant argues that Congress is authorized under art. III, §2 to make exceptions only to the Court's review of matters of fact. *See generally infra* notes 80-91 and accompanying text. Brant's argument fails, however, because he is mistaken in his assertion that the power to determine how the judicial power shall be exercised is substantially the same as the power to make exceptions to the Court's appellate jurisdiction. The former power, in fact, is much greater, and the delegates understood this. Brant does not appreciate that it is one thing for Congress to have power to determine what cases the Supreme Court shall hear in its appellate jurisdiction, but quite another for Congress to have power to determine what the outcome of those cases shall be.

[45]3 DEBATES ON THE FEDERAL CONSTITUTION 560 (J. Elliot 2d ed. 1888).

[46]Graves v. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring). *See also infra* notes 178-86 and accompanying text.

[47]"The government body most ready to assert the power of Congress to deprive the Court of its appellate jurisdiction has been the Court itself." Comment, *Removal of Supreme Court Appellate Jurisdiction: A Weapon Against Obscenity?*" 1969 DUKE L.J. 291, 297 n.37. In fact, no justice has ever denied Congress' broad powers under art. III. Although Justice Douglas did declare in his dissent in Glidden Co. v. Zdanok, 370 U.S. 530, 605 n.11 (1962), that "[t]here is a serious question whether the *McCardle* case could command a majority today," and although this passage frequently is cited in writings that suggest that the contemporary Supreme Court would not accept congressional restrictions of its appellate jurisdiction equivalent to those upheld in *McCardle*, the context of Justice Douglas' dictum suggests something quite different; namely, if Congress were to attempt to deprive the Supreme Court of jurisdiction over a case that is already under judicial consideration, then it is questionable whether *McCardle* would be followed today. Douglas subsequently expressed his understanding of the broader question of Congress' power over the appellate jurisdiction of the Supreme Court in his concurrence in Flast v. Cohen, 392 U.S. 83 (1968): "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of §2, art. III. See *Ex Parte* McCardle . . . ." *Id.* at 109.

[48]*Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868). For a discussion of *McCardle*, see supra notes 17-18 and accompanying text.

[49]3 U.S. (3 Dall.) 321 (1796).

[50]*Id.* at 327.

[51]*Id.*

[52]To the extent that differences of opinion arose among them, such differences were only over the question of whether the Court's appellate jurisdiction was originally granted by the Constitution or by the Congress. Three different answers were given. The first maintained that any withdrawal of the Court's appellate jurisdiction requires Congress to make a positive exception. All constitutionally granted jurisdiction not positively excepted by Congress is retained by the Court. This was the view of Justice James Wilson in his opinion in Wiscart v. Dauchy, 3 U.S. (3 Dall.) at 326. The second approach was that the Court possesses no appellate jurisdiction unless positively granted by Congress. The Court's appellate jurisdiction is viewed as congressionally granted rather than as constitutionally authorized. This was the view of Chief Justice Ellsworth in *Wiscart*, *see supra* text accompanying note 50, and of Chief Justice Taney in Barry v. Mercein, 46 U.S. (5 How.) 103, 119-20 (1847), *see infra* text accompanying note 57. The third approach combined features of the first two. Like the first, it based the Court's appellate jurisdiction on the Constitution. However, once Congress had acted to grant the Court appellate jurisdiction, this approach followed the second approach and implicitly denied all jurisdiction not positively granted. This was the view of Chief Justice Marshall in Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810). *See infra* text accompanying note 56. *See also* Comment, *supra* note 47, at 297-300.

[53]7 U.S. (3 Cranch) 159 (1805).

[54]*Id.* at 173.

[55]10 U.S. (6 Cranch) 307 (1810).

[56]*Id.* at 313-14. *See also* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 453 (1833)) "It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public might, from time to time, require.").

[57]Barry v. Mercein, 46 U.S. (5 How.) 103, 119-20 (1847).

[58]*See supra* text accompanying note 18. Chief Justice Chase's opinion in *McCardle* echoed, for the most part, Justice Swayne's opinion for an equally unanimous Court in Daniels v. Rock Island R.R., 70 U.S. (3 Wall.) 250 (1854): The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects, it is wholly the creature of legislation. *Id.* at 254.

[59]*Ex Parte* McCardle, 74 U.S. (7 Wall.) 506, 515 (1868).

[60]105 U.S. 381 (1881).

[61]*Id.* at 386.

[62]*Id.* at 385.

[63]321 U.S. 414 (1944).

[64]*Id.* at 472-73.

[65]337 U.S. 582 (1949).

[66]*Id.* at 655 (Frankfurter, J., dissenting). *See also* Glidden Co. v. Zdanok, 370 U.S. 530, 567 (1962); Burton, *supra* note 32, at 176; Roberts, *supra* 14, at 4.

[67]Wechsler, *supra* note, at 1905-06. Under this plan, "Congress has the power by enactment of a statute to strike at what it deems judicial excess," *Id.*

[68]Not everyone who would limit Congress' power under art. III, §2 relies on all seven of these arguments. Some of these arguments contradict each other.

[69]74 U.S. (7 Wall.) 596 (1868).

[70]Intelligent exceptions to this generalization are Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190 (1981); Van Alstyne, *supra* note 32.

[71]*See, e.g.*, Marbury v. Madison, 5 U.S. (1 Crunch) 137 (1803). On the difference between the traditional and modern forms of judicial review, see Wolfe, *A Theory of U.S. Constitutional History*, 43 J. Pot. 292. (1981).

[72]Ratner, *supra* note 20, at 168-71.

[73]Brant, *supra* note 20.

[74]Merry, *supra* note 20.

[75]R. BERGER, *supra* note 3. Berger, however, subsequently qualified his position. *See* Berger, *supra* note 14.

[76]Ratner, *supra* note 20, at 168.

[77]*Id.* at 170.

[78]"Sager agrees with Ratner's interpretation: An "exception" implies a minor deviation from a surviving norm; it is a nibble not a bite. And there is reason to think that this sense of the term, was, if anything, clearer at the time the Constitution was drafted than now, The language of Article III from which Congress draws its authority to limit the jurisdiction of the Supreme Court, thus contains only a bounded power to make exceptions: Sager, *supra* note 3, at 44.

[79] Hart, *supra* note 20, at 1364. Ratner recognizes this and concedes ultimately that "general usage . . . cannot provide a definitive interpretation," whereupon he launches into an "essential role of the Court" argument of the kind discussed *infra* notes 123-32 and accompanying text. Ratner, *supra* note 20, at 171. Sager likewise acknowledges the difficulty of textual interpretation: "To be sure, there is nothing self-evident about the precise limits of Congress' authority in such an amorphous grant, but this lack of an obvious answer invites an application of the tools of constitutional interpretation." Sager, *supra* note 3, at 44. If Sager's methodology for constitutional interpretation included some appreciation of the work of the constitutional framers and their understanding of separation of powers and federalism, his invitation to join him in applying this methodology would be more warmly received. *See infra notes 138-61 and accompanying text.*

[80] Brant, *supra* note 20, at 11.

[81] *Id.* at 5.

[82] R. BERGER, *supra* note 3, at 307. *See also* Berger, *supra* note 14: "[T]he founders merely intended by that clause to prevent the Court from revising the findings of a jury." *Id.* at 806.

[83] As Chief Justice Marshall wrote in Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), "[the framers] would have declared this purpose in plain and intelligible language." *Id.* at 249. For example, they could have declared: "In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, but with appellate Jurisdiction as to Fact subject to such Exceptions and under such Regulations as the Congress shall make."

[84] *See supra* notes 40-43 and accompanying text. Brant likewise fails to appreciate that all the controversy present in the state ratifying conventions concerning whether the Supreme Court ought even to have power to review questions of fact in its appellate jurisdiction, a controversy that Brant cites as evidence supporting his general argument, is simply not germane to the question of whether Congress has power to contract the appellate jurisdiction of the Supreme Court with respect to substantive questions of law. For similar citation of and reliance on wholly irrelevant evidence, see Merry, *supra* note 20, at 59-62.

[85] 3 J. ELLIOTT *supra* note 45, at 572. Randolph was echoing John Marshall's comments from the previous day: "What is the meaning of the term exceptions? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court." *Id.* at 560.

[86] THE FEDERALIST, No. 81, at 552 (A. Hamilton) (J. Cooke ed. 1961).

[87] *Id.* at 549-50.

[88] *Id.* at 550.

[89] *Id.* at 552. Hamilton also observed that separating law and fact in certain issues was impossible. *Id.* at 551.

[90] THE FEDERALIST, No. 80, at 541 (A. Hamilton) (J. Cooke ed. 1961). Although Brant quotes from THE FEDERALIST No. 80, he engages in a form of academic gerrymandering and conveniently overlooks this passage. *See* Brant, *supra* note 20, at 9. Brant focuses his attention instead on a passage from THE FEDERALIST No. 81: To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature shall prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

Id., No. 81, at 552. *See also* Merry, *supra* note 20, at 309 (also ignoring THE FEDERALIST No. 80). This passage, of course is irrelevant to the issue of whether Congress' power under the exceptions clause is limited simply to curtailing the appellate jurisdiction of the Supreme Court in cases raising questions of fact. To prove that Congress' power extends to regulating the treatment of facts does not prove that its power is limited to such regulation. *See supra* note 84.

Despite all of this evidence, Sager maintains the following position: (I)f the Framers of Article III had had the bad sense to believe the control of jurisdiction was a workable way to give Congress a substantive check on the federal judiciary, we might as well have to live with that fact and with its implications for the constitutional shortcuts that Congress would be entitled to take. But there is no evidence that they held this belief . . . . Sager, *supra* note 3, at 42.

[91] *See supra* notes 49-67 and accompanying text.

[92]74 U.S. (7 Wall.) 506 (1868).

[93]*See* R. BERGER, *Supra* note 3, at 2-3; Hart, *supra* note 20, at 1365; Ratner, supra note 20, at 178-81. *See also* Rotunda, *Supra* note 3, at 849-51.

[94]Act of Mar. 27, 1868, ch. 34, 15 Stat. 44. The Judiciary Act of 1789 provided all federal judges with the power to issue writs of habeas corpus, Judiciary Act of 1789, ch. 20, §14, 1 Stat. 73, 81

[95]74 U.S. (7 Wall.) at 515.

[96]75 U.S. (8 Wall.) 85 (1869).

[97]*Id.* at 96-98.

[98]Ratner, *supra* note 20, at 180.

[99]80 U.S. (13 Wall.) 128 (1871).

[100]*Id.* at 131. The statute at issue was the Act of Mar. 12, 1863, ch. 120, 12 Stat. 820.

[101]United States v. Padelford, 76 U.S. (9 Wall.) 531 (1869).

[102]Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

[103]*Id.*

[104]80 U.S. (13 Wall.) at 144.

[105]*Id.* at 146. The Court continued: Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the Court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself. *Id.* at 147.

[106]*Id.* at 147-48.

To the executive alone is entrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons, that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority, and directs the court to be instrumental to that end.

[107]*See* 74 U.S. (7 Wall.) at 515.

[108]19 U.S. (6 Wheat.) 264 (1821).

[109]*Id.* at 404.

[110]80 U.S. (13 Wall.) at 147. *See also* Vaughn, *Congressional Power to Eliminate Busing in School Desegregation Cases*, 31 ARK. L. REV. 231, 244 (1977).

[111]80 U.S. (13 Wall.) at 147.

[112]This Article in no way condones Congress' use of power to determine the outcome of any particular judicial proceeding. As James Madison recognized, such a power would clearly make the legislators "advocates and parties to the causes which they determine." THE FEDERALIST, No. 10, at 59 (J. Madison) (J. Cooke ed. 1961).

[113]80 U.S. (13 Wall.) at 145. *See also* Rice, *supra* note 70, at 193-94.

[114]Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 695 (1976).

[115]C. PRITCHETT, *supra* note 20, at 122. *See also* C. PRITCHETT, THE AMERICAN CONSTITUTION 35-36 (3d ed. 1977); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 501-13 (1974).

[116]C. PRITCHETT, *supra* note 20, at 122.

[117]*Id.*

[118]*Id.*

[119]Eisenberg, *supra* note 115, at 504.

[120]*See* Redish & Woods, *supra* note 3:

The seventh amendment, for example, provides that in all cases where the "value in controversy" exceeds twenty dollars, the right to a jury trial at common law must be preserved. It might be argued that use of a twenty dollar floor does not today accomplish the framers' goal of precluding a jury trial in minor civil cases, for twenty dollars at the time of the drafting of the seventh amendment meant something quite different from twenty dollars today. But despite such an argument, we could not read an inflationary spiral into the terms of the seventh amendment. The seventh amendment is strict and unbending in its dictates on this matter. If we are to alter it, even in order to accomplish the framers' goal, we must do so through the amendment process. Similarly, the language and history of article III are so clear that any alteration, even to accomplish the framers' purposes, must come by amendment and not by interpretation in light of "changing circumstances."

Id. at 74.

[121]*See* N. PEIRCE, THE PEOPLE'S PRESIDENT 161 (1968).

[122]Wolfe, *supra* note 71, at 301.

[123] *See, e.g.*, MINORITY REPORT, *supra* note 33, at 156; Brant, *supra* note 19, at 24; Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 594 (1975); Hart, *supra* note 19, at 1365; Ratner, *supra* note 19, at 160-61; Rotunda, *supra* note 3, at 845; Sager, *supra* note 3, at 42-68; White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the "Lessons" of History*, 63 JUDICATURE 162, 170 (1979).

[124]Ratner, *supra* note 19, at 172. Interestingly, those who make this argument point out that none of the cases cited in support of Congress' powers under the exceptions clause, including *McCardle*, involves what they would consider an "essential function" of the Supreme Court. *Id.* at 173-81. This fact, however, may attest more to the sense of sound congressional opinion against the wisdom of making such exceptions than to any notion that Congress lacks the power to do so. *See* Van Alstyne, *supra* note 31, at 257.

[125]Rice, *supra* note 70, at 195. For a futher discussion of the exceptions clause and its relation to separation of powers and checks and balances, see *infra* notes 140-54 and accompanying text.

[126]Van Alstyne, *supra* note 32, at 257.

[127]Hart, *supra* note 20, at 1365, *See also* Brant, *supra* note 20, in which Brant argues that the Court's critical function is to prevent "the destruction or infringement of any of the mandatory requirements of the Constitution." *id.* at 24. Hart and Brant appear to believe that only the Supreme Court, through its employment of judicial review, is able to provide protection against the Constitution's destruction. This view ignores the operation of such constitutional mechanisms as separation of

powers, bicameralism, staggered elections, federalism, and the multiplicity of interest present in an extended republic. *See* R. Rossum & G. McDowell, The American Founding: Politics, Statesmanship, and the Constitution 6-11 (1981). *See also infra* notes 140-61 and accompanying text. Moreover, even if these other constitutional features were absent, Hart's and Brant's reliance on the judiciary still would be misplaced. As Learned Hand observed: [T]his much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nature of that spirit, that spirit in the end will perish. I Hand, The Spirit of Liberty 125 (1959).

[126]Ratner, *supra* note 20, at 201. *See also* Sager, *supra* note 3, at 43, 45.

[129]Cox, *The Role of Congress in Constitutional Determinations*, 10 U. Cin. L. Rev. 199, 253 (1971). *See also* White, *supra* note 118, White insists that the Court's chief role is serving "as the principal elite institution protecting the people's rights." *Id.* at 170. White goes so far as to argue that the Court should "acknowledge that the source of newly invented rights is not the Constitution but the enhanced seriousness of certain values in our society." *Id.* at 168.

[130]Brest, *supra* note 123, at 594, *See also* J. Choper, *supra* note 19; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204, 226 (1980); Ely *supra* note 16, at 87.

[131]*See* Brant, *supra* note 20, at 27-28.

[132]*See* Van Alstyne, *supra* note 32. It does appear to be more than a passing strange argument to suggest that because the full evolution of substantive constitutional review may itself have been exogenous to the Constitution, the power of Congress to make exceptions of any appellate jurisdiction described in article III therefore does not extend to such review; as though the power to make exceptions applies to any appellate jurisdiction granted by article III, but not to that judicial power which the Supreme Court simply evolved in the fullness of time. *Id.* at 262.63.

[133]Their expansive view of the Court's essential role also is threatened by, and in turn threatens, other express constitutional provisions, including the prescribed means for amending the Constitution found in art. V, the delegations of powers to Congress found in art. I, §8, and the enforcement sections of the post-Civil War amendments.

[134]Wechsler, *supra* note 14, at 1006. "It is not that the judges are appointed arbiters, and to determine as it were upon application, whether the Assembly have or have not violated the Constitution; but when an action is necessarily brought in judgmment before them, they must, unavoidably, determine one way or another." Letter from James Iredell to Richard Spaight (Aug. 26, 1787), *quoted in* R. Berger, *supra* note 3, at 82-83. *See also* Rice, *supra* note 70: "Whatever the cogency of [the] 'essential role' test would be to a wholesale withdrawal of jurisdiction, if it were ever attempted by Congress, [this] test cannot properly be applied to narrowly drawn withdrawals of jurisdiction over particular types of cases." *Id.* at 195.

[135]The Federalist, No. 78, (A Hamilton) (J. Cooke ed. 1961).

[136]5 U.S. (1 Cranch) 137 (1803).

[137]*See* Chief Justice Chase's comment in *Ex Parte* McCardle, 74 U.S. (7 Wall.) 515 (1868), *supra* text accompanying note 59. *See also* Muskrat v. United States, 219 U.S. 346 (1911): The exercise of [judical review], the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power of the legislative branch of the government. *Id.*, at 361.

[138]Sager describes the separation of powers/federalism argument as a "particular version of the essential function claim." According to this version, the Constitution "contemplates federal judicial supervision of state conduct to ensure state compliance with federal constitutional norms." Sager, *supra* note 3, at 43, 45.

[139]Ratner, *supra* note 20, at 157-58. *See also Hearings*, *supra* note 10, at 14 (statement of Leonard G. Ratner).

[140]*See, e.g., Hearings*, *supra* note 10, 226-34 (testimony of Edward I. Cutler); C. Pritchett, *supra* note 20, at 15; Brant, *supra* note 20, at 28-29; Ratner, *supra* note 20, at 158.

[141]The Federalist, No. 48, at 332 (J. Madison) (J. Cooke ed. 1961).

[142]*Id.*

[143]The Federalist, No. 51, at 347-48 (J. Madison) (J. Cooke ed. 1961).

[144]As James Wilson declared in the Federal Convention: "The separation of the departments does not require that they should have separate objects but that they should act separately though on the same objects." 2 M. Farrand, *supra* note 36, at 78. *See also* R. Rossum & G. McDowell, *supra* note 127, at 6-11; R. Scigliano, The Supreme Court and the Presidency 2-7 (1971).

[145]R. Neustadt, Presidential Power 33 (1960).

[146]The Works of James Wilson 300 (R. McCloskey ed. 1967).

[147]*Id.*

[148]The Federalist, No. 48, at 332 (J. Madison) (J. Cooke ed 1961).

[149]*Id.* at 333.

[150]The Federalist, No. 49, at 339 (J Madison) (J. Cooke ed. 1961).

[151]The Federalist, No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961).

[152]*Id.* at 529. *See also* The Federalist, No. 48, at 334 (J. Madison) (J. Cooke ed. 1961).

[153]The Federalist, No. 81, at 545-46 (A. Hamilton) (J. Cooke ed. 1961).

[154]The Federalist, No. 80, at 541 (A. Hamilton) (J. Cooke ed. 1961).

[155]Sager, *supra* note 3, at 43. *See also* Kay, *Limiting Federal Court Jurisdiction: The Unforeseen Impact on Courts and Congress*, 65 Judicature 188 (1981); Ratner, *supra* note 20, at 158-61.

[156]Sager, *supra* note 3, at 48.

[157]The principle of qualitative majority rule considers not only the degree of support that a policy receives, but also the quality of the policy itself. *See generally* R. Rossum & G. Tarr, American Constitution: Cases and Interpretation (1983).

[158]The Federalist, No. 10, at 65 (J. Madison) (J. Cooke ed. 1961).

[159]The rival defects of majority tyranny and democratic ineptitude posed seemingly unsurmountable obstacles for constitution-makers, for the more they attempted to covercome majority tyranny by withholding the power to tyrannize, the more they rendered the government inept and powerless, and vice versa.

[160]*See* Diamond, The Federalist *on Federalism*, 86 Yale L.J. 1273, 1278-85 (1977).

[161]*See* The Federalist, No. 22 (A. Hamilton) (J. Cooke ed. 1961). In this essay, Hamilton discussed federalism as it was understood until the time of the Federal Convention and described it as characterized by three operative principles:

1. The authority of the central federal government was restricted to the individual state governments and did not reach the individual citizens composing the states. Even this authority, however, was limited; the resolutions of the federal authority amounted to little more than mere recommendations, which the states opted to observe or disregard.

2. The central federal government had no authority over the internal problems of the individual states. Its rule was limited primarily to certain external tasks of mutual interest to the member states.

3. Each individual member had an exact equality of suffrage. This equal vote was derived from the equality of sovereignty possessed by each member state.

[162]*See generally* Sager, *supra* note 3, at 45-57.

[163]Congress did not authorize the Supreme Court to review cases that invalidated state conduct on federal grounds until 1914. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

[164]*See* Judiciary Act of 1789, ch. 20 §22, 1 Stat. 84.

[165]Act of Mar. 3, 1891, ch. 517, §5, 26 Stat. 826, 827-28.

[166]Act of Feb. 13, 1925, ch. 229, §240(a), 43 Stat. 936, 938-39.

[167]Act of Apr. 29, 1802, ch. 31, §6, 2 Stat. 156, 159-61.

[168]Act of Mar. 3, 1891, ch. 517, §5, 26 Stat. 826, 827.

[169]*See* L. Tribe, American Constitutional Law 39 (1978); Hart, *supra* note 20, at 1373; Van Alstyne, *supra* note 70, at 263-64.

[170]Since National League of Cities v. Usery, 426 U.S. 833 (1976), it appears that Congress' power under the commerce clause is also subject to the dictates of the tenth amendment.

[171]44 U.S. (3 How.) 236 (1845).

[172]*Id.* at 245. *See also* Lockerty v. Phillips, 319 U.S. 182 (1943); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); Vaughn, *supra* note 110, at 237-41.

[173]*See* Berger, *supra* note 14, at 804; Wechsler, *supra* note 13, at 1005. *See also* Redish & Woods, *supra* note 3. Redish and Woods argue that Congress' power to deny original jurisdiction to the federal courts and to vest it instead in the state courts is limited by Tarble's Case, 80 U.S. (13 Wall.) 397 (1871), in which the Supreme Court overturned a habeas corpus order by a Wisconsin state court to a federal offical ordering the release of an allegedly under-age soldier from the United States Army. The Court reasoned that a state court had no power to interfere with the operations of federal officials. Redish and Woods infer from *Tarble's Case* that state courts lack jurisdiction to entertain any case that seeks to direct the conduct of federal officials through the use not only of habeas corpus but also of mandamus and injunctive powers. They later admit, however, that "Congress can probably circumvent the difficulties created by *Tarble's Case* by explicitly authorizing state court jurisdiction over the acts of federal officials." Redish & Woods, *supra* note 3, at 106. Thus, if Congress wants to preclude all lower federal court jurisdiction, it can do so without raising questions of due process, provided only it clearly authorizes state court review of those cases. *See* Sager, *supra* note 3, at 80-84.

[174]*See* Wechsler, *supra* note 14, at 1005.

[176]Hart, *supra* note 20, at 1401. *See also* Kay, *supra* note 148, at 186; Taylor, *Limiting Federal Court Jurisdiction: The Unconstitutionality of Current Legislative Proposals*, 65 Judicature 199, 201 (1981).

[176]Van Alstyne, *supra* note 32, at 269.

[177]Sager, *supra* note 3, at 76-77. Sager also writes: "Harm to constitutionally protected interests occurs whenever controversial rights are singled out for exclusion from federal jurisdiction. Where the specific circumstances surrounding Congress' deliberations conspire to send an apparent message of Congressional disapproval of federal judicial doctrine, the harm is exaggerated." *Id.* at 75. *See also* Brest, *supra*, note 123, at 589-94; Taylor, *supra* note 175, at 202-204.

[178]*See* Sager, *supra* note 3, at 41, 68-69, 72-73, 80, 87.

[179]*Id.* at 69.

[180]*Id.* at 41, 74, 89.

[181]*Id.* at 80. On other occasions, Sager describes the seduction as "bullying." *Id.* at 26, 64.

[182]60 U.S. (19 How.) 393 (1857).

[183]163 U.S. 537 (1896).

[184]198 U.S. 45 (1905).

[185]Ironically, whereas Sager and his like-minded colleagues generally argue that the Constitution is what the Court says it is, they implicitly insist on one exception to this rule: the Constitution, or at least art. III, §2, is not what the Court says it is, at least in *Ex Parte* McCardle, 74 U.S. (7 Wall.) 505 (1868).

[186]7 J. Richardson, Messages and Papers of the Presidents 13206, 3210 (1897).

[187]Brant, *supra* note 20, at 28, *See also* Merry, *supra* note 20, at 69; Ratner, *supra* note 20, at 158.

[188]Brant, *supra* note 20, at 28. The sole "descent" of this congressional "dagger" was the Act of March 27, 1868, ch. 34, 15 Stat. 44, which excised a portion of the Court's appellate jurisdiction.

[189]The Federalist, No. 51, at 353 (J. Madison) (J. Cooke ed. 1961).

[190]Wechsler, *supra* note 14, at 1006. It must be remembered, however, that if lack of uniformity among fifty states or twelve circuits concerning constitutional interpretation were to become a problem, congressional withdrawal of jurisdiction could easily be repealed by statute.

[191]*Id.*

[192]*Id.* at 1007. *See also* J. Choper, *supra* note 20, at 54.

[193]Sager, *supra* note 3, at 41, 68.

[194]Rice, *supra* note 70, at 197.

[195]*Id.*

[196]Act of March 27, 1868, ch. 34, 15 Stat. 44.

[197] 60 U.S. (19 How.) 393 (1857).

[198]*See* Van Alstyne, *supra* note 32, at 233-44. *See also* 3 C. Warren, The Supreme Court in United States History 193 n.1 (1922).

[199]*See supra* text accompanying note 188.

[200]The exceptions clause is not the only means by which Congress can attempt to curb the Court. For example, Congress also has power to impeach the justices; to destroy the Court's effectiveness by substantially increasing or reducing the size of its

membership; to limit tenure either through constitutional amendment or statutory inducements; to reduce or eliminate staff support for the Court; to refuse salary increases for the justices in inflationary times; to require extraordinary majorities to invalidate statutes; and to require that the justices file seriatim opinions in all cases. *See* W. MURPHY, CONGRESS AND THE COURT 63 (1962). *See also* R. STEAMER, THE SUPREME COURT IN CRISIS: A HISTORY OF CONFLICT (1971).

[201]THE FEDERALIST, No. 51, at 349 (J. Madison) (J. Cooke ed. 1961). These precautions would help to insure that the government would always reflect "the permanent and aggregate interests of the community." THE FEDERALIST, No. 10, at 57 (J. Madison) (J. Cooke ed. 1961).

[202]THE FEDERALIST, No. 78 (A. Hamilton) (J. Cooke ed. 1961).

[203]5 U.S. (1 Cranch) 137 (1803). *See generally* Wolfe, *supra* note 122, at 293-99.

[204]THE FEDERALIST, No. 78, at 525 (A. Hamilton) (J. Cooke ed. 1961).

[205]*Id.* at 522.

[206]*Id.* at 526.

[207]L. HAND, THE BILL OF RIGHTS 73 (1965).

LIMITING FEDERAL COURT JURISDICTION: THE CONSTITUTIONAL BASIS FOR THE PROPOSALS IN CONGRESS TODAY

(By Charles E. Rice)

The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.—The Constitution, Article III, Sec. 1.

The Constitution itself did not create the lower federal courts. Instead it left to Congress the decision whether to create such courts and, if Congress chose to create them, how much of the jurisdiction encompassed within the federal judicial power it ought to confer upon them. Congress need not have created such courts at all. Having created them, it need not vest in them jurisdiction to decide the full range of cases within the federal judicial power.

For instance, until 1875, the lower federal courts had no general jurisdiction in cases arising under the Constitution or laws of the United States.[1] Today, the jurisdiction of the lower federal courts is limited in some respects by the requirement of jurisdictional amount and in other respects as to the classes of cases in which they are empowered to exercise jurisdiction. The Norris-La Guardia Act, for example, withdrew from the lower federal courts jurisdiction to issue injunctions in labor disputes. The constitutionality of that act was sustained by the Supreme Court in *Lauf* v. *E. G. Shinner and Co.*[2]

More recently, in an extensive dictum in *Palmore* v. *U.S.*[3] the Supreme Court summarized the status of the lower federal courts under Article III:

"The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art III courts to hear and decide cases within the judicial power of the United States, including those criminal cases arising under the laws of the United States. Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art III."

The Court then quoted extensively from the 1845 case of *Cary* v. *Curtis*[4] in a decision which said:

"[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Surpeme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."

The *Palmore* court added a footnote,[5] and then concluded.

"Congress plainly understood this, for until 1875 Congress refrained from providing the lower federal courts with general federal-question jurisdiction. Until that time, the state courts provided the only forum for vindicating many important federal claims. Even then, with exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount, and for the most part retained concurrent jurisdiction of federal claims properly within the jurisdiction of the lower federal courts."[6]

While various theories have been advanced to argue for restrictions on Congress' power over the jurisdiction of the lower federal courts, none of them is supported by the Supreme Court. Not only does the greater discretion to create, or not, the federal courts themselves include the lesser power to define their jurisdiction, the evident intent of the framers was to vest in the Congress the capacity to make the prudential judgment as to which courts, state or federal, should decide constitutional cases on the lower and intermediate levels.

Insofar as the bills pending before Congress today withdraw a particular class of cases from the lower federal courts or forbid those courts to issue specified types of orders, those bills are clearly within the constitutional power of Congress to enact. Moreover, those bills represent a very appropriate means by which to correct recent decisions of the federal courts that a great majority of the people cannot endorse and to restore to the states and the people the right to decide such issues in the future with finality.

THE COURT'S APPELLATE JURISDICTION

The Exceptions Clause of Article III, Section 2, which provides that "the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make" was intended, according to Alexander Hamilton, to give "the national legislature . . . ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove" the "inconveniences" which might arise from the powers given in the Constitution to the federal judiciary.[7]

There was evidently concern in the Constitutional Convention and in some of the ratifying conventions that the Supreme Court would exercise appellate power to reverse jury verdicts on issues of fact. Nevertheless, the language of Article III, Section 2, explicitly gives the Supreme Court "appellate Jurisdiction, both as to Law and Fact." And it is evident that the power of Congress to make exceptions to that appellate jurisdiction extends to the Court's power to review questions of law as well as questions of fact. As Alexander Hamilton observed in the Federalist, No. 81.[8]

"The Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all cases referred to them, both subject to any exceptions and regulations which may be thought advisable."

This power of Congress was so broadly interpreted that a specific authorization by Congress of appellate jurisdiction was construed by the Supreme Court to imply that such jurisdiction was excluded in all other cases. This "negative pregnant" doctrine was enunciated by Justice John Marshall in *U.S.* v. *More,* in which the Court held that it had no criminal appellate jurisdiction because none had been expressly stated by Congress, Marshall, speaking for the Court, said ". . . an affirmative description of its powers must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described."[9]

It is interesting to note that no criminal cases were appealable to the Supreme Court until 1891, simply because until then Congress had not specified that they could be so appealed. The only way a criminal case could be brought to the Supreme Court was "by certificate of division of opinion" in the Circuit Court "upon specific questions of law."[10]

In 1810, in *Durousseau* v. *U.S,*[11] Chief Justice Marshall emphasized that the Court is bound even by implied exceptions to its appellate jurisdiction, so that, in effect, it can exercise it only where expressly granted by Congress." The Congress, he said, "have not declared, that the appellate power of the Court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative in the exercise of such appellate power as is not comprehended within it."

When Chief Justice Taney spoke to the issue in *Barry* v. *Mercein,* he said

"By the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes."[12]

Prior to 1868, the Supreme Court never had to decide the validity of an act of Congress making a specific exception to its appellate jurisdiction. But when McCardle, a Mississippi editor, was imprisoned by the federal reconstruction authorities on account of statements he had made, he sought a writ of habeas corpus from the federal circuit court, asking that court to rule that his detention was invalid. This petition denied, he appealed to the Supreme Court under a statute specifically permitting such appeals.

After the Supreme Court heard arguments on the case and while the Court was deliberating, Congress enacted a statute repealing that part of the law which had given the Supreme Court jurisdiction to hear such appeals from the circuit court. The Court, in confronting for the first time the issue of the positive congressional exception to the appellate jurisdiction, dismissed the petition for want of jurisdiction, even though the case had already been argued and was before the Court. Said the Court:

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words . . . without jurisdiction the court cannot proceed at all in any case. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case. And this is not less clear upon authority than upon principle."[13]

It is true that the 1868 statute upheld in *McCardle* did not bar the Supreme Court from reviewing all habeas corpus cases, but

only review sought under the 1867 statute which provided review of such cases from the circuit court. The Supreme Court retained the habeas corpus review power which had been given it by the Judiciary Act of 1789 and which Congress had chosen not to withdraw.

Later in 1868, the Court applied this distinction in *Ex parte Yerger*,[14] where the Court held that the 1868 statute left untouched the Supreme Court's power to issue its own writ of habeas corpus to a lower court as provided in the Judiciary Act of 1789. But neither in *McCardle* nor in *Yerger* is there any indication whatever that the Court would not have upheld an act withdrawing appellate jurisdiction in all habeas corpus cases from the Court.

ONE IMPORTANT LIMITATION

Four years later, in *U.S.* v. *Klein*[15] the Court spelled out one important limitation of the Exceptions Clause in the only Supreme Court decision ever to strike down a statute enacted under that clause. The claimant in *Klein*, who had been a Confederate, sued in the Court of Claims to recover the proceeds from the sale of his property, which had been seized and sold by the Union forces. He had received a full presidential pardon for his Confederate activities, and the Court of Claims ruled in his favor for that reason. (If he had not received a pardon, the governing statute would have prevented his recovery.)

While the appeal of his case was pending before the Supreme Court, a statute was enacted which provided that, whenever it appeared that a judgment of the Court of Claims had been founded on such a pardon, without other proof of loyalty, the Supreme Court would have no further jurisdiction of the case. The statute further declared that every pardon granted to a suitor in the Court of Claims which recited that he has been guilty of any act of rebellion or disloyalty, would, if accepted by him in writing without disclaimer of those recitals, be taken as conclusive evidence of rebellion or disloyalty and his suit would be dismissed.

While declaring the statute unconstitutional, the Supreme Court expressly reiterated that Congress does have the power to deny appellate jurisdiction "in a particular class of cases";

"Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right to appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient."[16]

The statute in *Klein* was declared unconstitutional because, under the guise of limiting jurisdiction, it attempted to dictate to the Court how and by what processes it should decide the outcome of a particular class of cases. The Court lost jurisdiction only when the Court of Claims judgment was founded on a particular type of evidence, that is, a pardon. And the statute further prescribed that the effect of the pardon would be such that the recitals in the pardon of acts of rebellion and disloyalty would be conclusive proof of those acts. "What is this," said the Court, "but to prescribe a rule for the decision of a cause in a particular way?"[17]

It is difficult to imagine a more flagrant intrusion upon the judicial process than this effort to dictate the rules to be used in deciding cases. Moreover, the statute in *Klein* intruded upon the President's pardoning power by attempting "to deny to pardons granted by the President the effect which this court had adjudged them to have."[18] In these major respects the statute involved in *Klein* was wholly different from a statute simply withdrawing appellate jurisdiction over a certain class of cases.

Since *Klein*, the Supreme Court has not had occasion to define further any limits to the Exceptions Clause. In the *Francis Wright* case,[19] the Court said that what the "appellate powers" of the Supreme Court "shall be" and "to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes be kept out of the jurisdiction altogether, but particular classes of questions may be subject to re-examination and review, while others are not."

Chief Justice Waite, in his opinion for the Court in *Francis Wright*, referred to "the rule, which has always been acted on since, that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe."[20]

Several statements of individual justices in the intervening years reinforce this conclusion. Thus, Justice Frankfurter, in his dissenting opinion in *National Insurance Co.* v. *Tidewater Co.*[21] noted that "Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while the case is sub judice. Ex parte McCardle, 7 Wall. 506"[22]

In summary, the holdings of the Supreme Court and the statements of various individual justices compel the conclusion that Congress clearly has power under the Exceptions Clause to withdraw appellate jurisdiction from the Supreme Court in particular classes of cases. Indeed, this power is so strong that an exception will be implied in cases where Congress has not specifically "granted" appellate jurisdiction to the Court.

ATTACKS ON USE OF THE EXCEPTION POWER

It will be useful here to mention some arguments that have been advanced against the use of the exception power by Congress. None of them will withstand careful scrutiny, since they each reflect a misunderstanding of our history or the essence of our constitutional system.

Essential roles.—It has been urged, as Professor Henry Hart put it, that the exceptions "must not be such as to destroy the essential role of the Supreme Court in the constitutional plan."[23] In addition to the difficulty of determining what is the Supreme Court's "essential role" that test would make the Court itself the final arbiter as to the extent of its powers. Despite the clear grant of power to Congress in the Exceptions Clause, no statute could deprive the Court of its "essential role" but that role would be whatever the Court said it was.

It is hardly in keeping with the spirit of checks and balances to read such a virtually unlimited power into the Constitution. If the Framers intended so to permit the Supreme Court to define its own jurisdiction even against the will of Congress, it is fair to say that they would have made that intention explicit.

Furthermore, the "essential role" test was advanced by Professor Hart in response to the suggestion that Congress could satisfy the Exceptions Clause by removing all but a "residuum of jurisdiction," for example, by withdrawing appellate jurisdiction in "everything but patent cases." Whatever the cogency of Professor Hart's "essential role" test would be to a wholesale withdrawal of jurisdiction, if it were ever attempted by Congress, his test cannot properly be applied to narrowly drawn withdrawals of jurisdiction over particular types of cases.

It could hardly be argued, for example, that the "essential role" of the Supreme Court depends on its exercising appellate jurisdiction in every type of case involving constitutional rights. Such a contention would be contrary to the clear language of the Exceptions Clause and to the consistent indications given by the Supreme Court itself.

Uniformity and Supremacy.—A related but more substantial argument against the exercise of Congress' Exceptions Clause power is that Supreme Court review of cases involving important constitutional rights is necessary to ensure uniformity of interpretation and the supremacy of federal statutes over state laws.

The argument that fundamental rights should not be allowed to vary from state to state begs the question of whether there is a fundamental right to uniformity of interpretation by the Supreme Court on every issue involving fundamental rights. The argument overlooks the fact that the Exceptions Clause is itself part of the Constitution. As Alexander Hamilton wrote in No. 80 of the Federalist, the Exceptions Clause is a salutary means "to obviate and remove" the "inconveniences" resulting from the exercise of the federal judicial power.

Judging from what the Supreme Court has said about it over the years, the clause is not only an important element of the system of checks and balances, but one which grants a wide discretion to Congress in its exercise. There is, in short, a fundamental right to have the system of checks and balances maintained in working order. Without that system, the more dramatic personal rights, such as speech, privacy, free exercise of religion, would quickly be reduced to nullities. This right to a preservation of the system of checks and balances is itself one of our most important constitutional rights.

Fundamental rights.—If it be contended that the Exceptions Clause cannot be used to deprive the Supreme Court of appellate jurisdiction in cases involving fundamental constitutional rights, it must be replied that such a limitation can be found neither in the language of the clause nor in its explications by the Supreme Court. Indeed, the Supreme Court's conclusion, prior to 1891, that there was no general right of appeal to that Court in criminal cases surely involved the denial of the right to appeal in cases involving constitutional rights. For what constitutional right is more fundamental than the Fifth Amendment right not to be deprived of life or liberty without due process of law?

The specious character of the argument that Congress cannot exercise its Exceptions Clause power in cases involving fundamental rights is shown, for example, in the school prayer matter. The Establishment

Clause of the First Amendment was intended to reserve the issue of establishment of religion for decision by the states without federal interference. The constitutional right protected by the Establishment Clause is the right to have issues such as prayer in public school decided on a state-by-state basis.[24]

Moreover, it is only through an historically indefensible interpretation of the Fourteenth Amendment that the Supreme Court has decreed that the states are strictly bound by the provisions of the Bill of Rights.[25] Until the adoption of the Fourteenth Amendment in 1869, it was clear that the protections of the Bill of Rights bound only the federal government.[26]

The school prayer issue arises out of one judicial fiction piled upon another. The Fourteenth Amendment is interpreted, contrary to the intent of its framers, so as to bind the states strictly by the Supreme Court's conceptions of the First Amendment, and then the First Amendment itself is interpreted in a manner that would shock its framers in the First Congress. Other areas, including abortion, legislative apportionment and certain aspects of criminal procedure, similarly involve "fundamental" rights which were beyond the imagination of the framers of the Constitution and the 14th Amendment and which owe their recognition only to the more fertile imaginations of the justices of the Supreme Court.

Rights which the Court created.—The argument that the Supreme Court cannot be deprived of jurisdiction to hear appeals when they involve rights which the Court has itself created, is an exercise in bootstrap jurisprudence. It would make the Supreme Court not only supreme but absolute in some of the most sensitive areas of our constitutional life. Clearly, the Exceptions Clause was designed specifically to prevent such a result.

DRAFTING LEGISLATION

An acceptable format for a bill limiting the Court's jurisdiction can already be found in several of the bills (e.g., H.R. 72 and H.R. 865) in which a section withdrawing the subject from Supreme Court jurisdiction is followed by one providing that the district courts shall not have jurisdiction in any case which the Supreme Court does not have jurisdiction to review under the foregoing section. Congress, however, could withdraw jurisdiction from the lower courts without withdrawing appellate jurisdiction from the Supreme Court, and vice versa. The Congressional powers involved are distinct and there is no constitutional necessity for them to be exercised together.

It should be noted, however, that Congress could not withdraw from the lower federal courts or from the appellate jurisdiction of the Supreme Court, jurisdiction, for example, "in any case where a Baptist shall be" plaintiff or appellant. This would be unconstitutional, not because the Exceptions Clause power is limited, but because of a specific prohibition elsewhere in the Constitution. The religion of the appellant has nothing to do with the authentic nature of the case. The fact that Congress is forbidden by the First Amendment to prohibit appeals by Baptists, Jews, etc., does not mean that there is any restriction on Congress' power to exclude classes of cases, as determined by the nature of the case, from the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court.

A separate issue is raised by the brief language of three of the pending bills:

"That no court of the United States shall have jurisdiction to require the attendance at a particular school of any student because of race, color, creed, or sex." [H.R. 1079, H.R. 1180]

"That, pursuant to Article III, sections 1 & 2, of the United States Constitution, no court of the United States shall have the jurisdiction to make any decision, or issue any order, which would have the effect of requiring any individual to attend any particular school." [H.R. 761]

These provisions do not expressly apply to the appellate jurisdiction of the Supreme Court. If they are intended to apply only to the lower federal courts, it would be preferable to have that intent expressed. If they are intended as well to withdraw jurisdiction from the Supreme Court, they may run afoul of the principle of *United States* v. *Klein*[27] that Article III, Section 2, does not permit Congress to tell the Supreme Court how to decide a case, as opposed to Congress' clear power to withdraw a class of cases from the Court's appellate jurisdiction.

The exercise of congressional power under Article III, Section 2, should be even-handed. These three bills, if they are intended to apply to the Supreme Court, seem merely to forbid the Court to decide a case in a particular way. A preferable technique is that employed by H.R. 869: "the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise any case arising out of any State statute, ordinance, rule, regulation, or any parts thereof, or arising out of any act interpreting, applying or enforcing a State statute, ordinance, rule, or regulation, which relates to assigning or requiring any public school student to attend a particular school because of his race, creed, color, or sex."

What will be the practical effect of withdrawing jurisdiction from the Supreme Court and the lower federal courts? The school prayer issue will serve as an example. Unlike constitutional amendment, such a withdrawal would not reverse the Supreme Court's ruling on school prayer. Presumably, at least some state courts would strictly follow those decisions as the last authoritative Supreme Court pronouncement on the subject. But a new law would ensure that the Court received no opportunity to further extend its errors. And in cases where supporters of the school prayer decisions sought to extend them, for example, to outlawing voluntary prayer meetings by public school students outside of class time, those state courts would be apt to show a greater measure of prudence than the Supreme Court has sometimes shown on the subject.

It may be expected, however, that some state courts would openly disregard the Supreme Court precedents and decide in favor of school prayer once the prospect of reversal by the Supreme Court had been removed. But that result would not be such a terrible thing. It must be remembered that we are talking about Supreme Court decisions which, in the judgment of the elected representatives of the people and the President (or of two-thirds of the Congress overriding his veto), would appear so erroneous as to be virtually usurpations.

It would be a healthful corrective of those decisions for the people to trust for a time in the state courts upon which the framers of the Constitution primarily relied and to be protected against further excesses in that area on the part of the Court. In the process, the Court might learn a salutary lesson so that it would avoid future excursions beyond its proper bounds. Finally, because a statute rather than a constitutional amendment is involved, the Court's jurisdiction could readily be restored should the need for it become apparent.

In his First Inaugural Address, President Abraham Lincoln warned that "the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of the eminent tribunal."

Supreme Court decisions in several areas are distortions of the constitutional intent in matters of substantial importance. It is within the power—and it is the duty—of Congress, to remedy this wrong.

The withdrawal of jurisdiction would be a measured and appropriate response. It would be preferable to a constitutional amendment in that it would have no permanent impact on the Constitution. If experience showed it to be unwise, it could be readily repealed by a statute. But it would restore the balance of governmental powers and help undo some of the unfortunate consequences of judicial excess.

FOOTNOTES

[1]Hart and Wechsler, The Federal Courts and the Federal System 727-33 (St. Paul: West, 1953).

[2]303 U.S. 323, 330 (1938).

[3]All U.S. 389. 400-402 (1973).

[4]3 How. 236, 245. 11 L. Ed. 576 (1845).

[5]Said the Court in its footnote: "This was the view of the Court prior to Martin v. Hunter's Lessee. I Wheat. 304, 4 L. Ed. 97 (1816). Turner v. Bank of N. America, 4 Dall. 8.1 L. Ed. 718 (1799); United States v. Hudson, 7 Cranch 32.3 L. Ed. 259 (1812). And the contrary statements in Hunter's Lessee, supra, at 327-339, did not survive later cases. See, for example, in addition to Cary v. Curtis, 3 How. 236 11 L. Ed. 576 (1815), quoted in the text, Rhode Island v. Massachusetts, 12 Pet. 657, 721-722, 91., Ed. 1233 (1838); Sheldon v. Sill, 8 How. 441, 12 L. Ed. 1147 (1850); Case of the Sewing Machine Companies, 18 Wall, 553, 577-578. 21 L. Ed. 914 (1874); Kline v. Burke Constr. Co. 260 U.S. 226, 233-234, 67 L. Ed. 226, 43 S Ct 79, 24 ALR 1077 (1922)."

[6]411 U.S. 389, 400-402 (1973).

[7]The Federalist, No. 80 (emphasis in original).

[8]The Federalist, No. 81 (emphasis in original).

[9]7 U.S., 3 Cranch 159, 172 (1805).

[10]United States v. Sanges 144 U.S. 310, 319 (1892); see also United States v. Cross, 145 U.S. 571 (1892) Ex parte Bigelow, 113 U.S. 328, 329 (1885).

[11]10 U.S., 6 Cranch 307, 313 (1810).

[12]46 U.S., 5 How. 103, 119 (1847).

[13]Ex parte McCardle, 74 U.S., 7 Wall. 506, 513-514 (1868).

[14]75 U.S., 8 Wall. 85 (1868).

[15]80 U.S., 13 Wall. 128, 145-46 (1872).

[16]Id., emphasis added.

[17]Id.

[18]Id.

[19]105 U.S. 381, 386 (1881).

[20]Id., at 385 (emphasis added).

[21]337 U.S. 582, 655 (1949).

[22]See also the opinion of Justice Harlan in Glidden v. Zdanok, 370 U.S. 567-68 (1962); and see the concurring opinion of Justice Douglas in Flast v. Cohen 392 U.S. 83, 109 (1968), stating that "As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of Section 2, Art. III. See Ex parte McCardle, 7 Wall. 506."

[23]Hart, *The Power of Congress to Limit the Jurisdition of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953).

[24]See generally, Griswold, *Absolute Is In the Dark*, 8 Utah L. Rev. 167 (1963); and Rice, The Supreme Court and Public Prayer (Bronx, New York: Fordham University Press, 1964).

[25]See Berger, Government by Judiciary (Cambridge: Harvard University Press, 1977) ch. 8.
[26]Barron v. Baltimore, 32 U.S., 7 Pet. 243 (1833).
[27]Supra n. 15.

Mr. HATCH. Mr. President, on behalf of the principle authors of the substitute bill, Senators KENNEDY, SPECTER, and myself, I move to table this amendment and I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Utah [Mr. HATCH] to table the amendment of the Senator from North Carolina [Mr. HELMS]. The yeas and nays have been ordered and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Louisiana [Mr. BREAUX], the Senator from Connecticut [Mr. DODD], the Senator from Nevada [Mr. REID], the Senator from Indiana [Mr. SASSER], and the Senator from Illinois [Mr. SIMON] are necessarily absent.

I also announce that the Senator from Delaware [Mr. BIDEN] is absent because of illness.

I further announce that, if present and voting, the Senator from Tennessee [Mr. SASSER] would vote "nay."

Mr. SIMPSON. I announced that the Senator from New York [Mr. D'AMATO], the Senator from Utah [Mr. GARN], and the Senator from Delaware [Mr. ROTH] are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 71, nays 20, as follows:

[Rollcall Vote No. 280 Leg.]

YEAS—71

Adams	Fowler	Mikulski
Baucus	Glenn	Mitchell
Bentsen	Gore	Moynihan
Bingaman	Graham	Murkowski
Bond	Grassley	Nunn
Boren	Harkin	Packwood
Boschwitz	Hatch	Pell
Bradley	Hatfield	Proxmire
Bumpers	Heinz	Pryor
Burdick	Hollings	Quayle
Chafee	Inouye	Riegle
Chiles	Johnston	Rockefeller
Cochran	Karnes	Rudman
Cohen	Kassebaum	Sanford
Conrad	Kennedy	Sarbanes
Cranston	Kerry	Simpson
Danforth	Lautenberg	Specter
Daschle	Leahy	Stafford
DeConcini	Levin	Stennis
Dixon	Lugar	Stevens
Dole	Matsunaga	Weicker
Domenici	McCain	Wilson
Durenberger	Melcher	Wirth
Evans	Metzenbaum	

NAYS—20

Armstrong	Helms	Shelby
Byrd	Humphrey	Symms
Exon	Kasten	Thurmond
Ford	McClure	Trible
Gramm	McConnell	Wallop
Hecht	Nickles	Warner
Heflin	Pressler	

NOT VOTING—9

Biden	Dodd	Roth
Breaux	Garn	Sasser
D'Amato	Reid	Simon

So the motion to lay on the table Amendment No. 2780 was agreed to.

Mr. KENNEDY. Mr. President, I move to reconsider the vote by which the motion was agreed to.

Mr. STAFFORD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. I ask unanimous consent that the Senator from Vermont, Senator STAFFORD, and the Senator from Arizona, Senator DECONCINI, be added as cosponsors to the substitute.

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

Mr. RIEGLE. Mr. President, I rise today to express my support for H.R. 1158, the Fair Housing Amendments of 1988, and to urge my colleagues to support this legislation that will add new force and meaning to our civil rights laws.

Mr. President, in 1968, we in Congress made a commitment to eliminate discrimination in housing by passing the landmark Fair Housing Act. Yet today, 20 years later, discrimination in housing is still a powerful reality for millions of Americans.

According to surveys by the Department of Housing and Urban Development [HUD], at least 2 million incidences of discrimination occur annually. Seventy-two percent of the black families seeking rental housing today stand the chance of experiencing discrimination. These figures are due, in large part, to the fact that existing fair housing law lacks tough enforcement mechanisms.

The Fair Housing Amendments of 1988 will change that. Under this legislation, the Secretary of HUD would be given the power to back up the initial investigation and conciliation process. If a dispute has not been resolved within 100 days and the Secretary has found reasonable cause to believe that discrimination has or is about to occur, the Secretary could now issue a formal charge against the respondent.

At this point, any party to the dispute has the right to elect to have a trial by jury in a U.S. district court. In those instances, HUD would represent the interest of the plaintiff. If no party elects to go to court, however, within 120 days there would be a hearing before an independent administrative law judge [ALJ] at HUD.

It is the ALJ process that is the major innovation of H.R. 1158. If the ALJ finds that the respondent has or is about to engage in a discriminatory housing practice, he or she has the authority to issue an injunction, to assess actual damages, and to levy a fine. This procedure, already in use in many other Federal agencies, is fair, inexpensive, and effective.

After years of contentious debate on this issue, Mr. President, we finally have a strong fair housing bill. The House of Representatives has already passed this legislation by an overwhelming majority. This outcome is the direct result of a historic alliance between the civil rights community and the National Association of Realtors. Recognizing the need to put teeth in our fair housing laws, both groups worked together with leading Members of Congress to craft a bipartisan compromise.

Mr. President, H.R. 1158 is also important in that it provides new protection to two groups in our society who all too often suffer housing discrimination—the handicapped and families with children. Naturally, the bill takes into account circumstances where certain limitations on housing are valid. Elderly communities, for example, are exempted from the provisions regarding discrimination against children. Our Nation's seniors should not and will not lose the advantages of specialized elderly housing. Nevertheless, the bill makes clear that families and the handicapped have a right to live in the housing of their choice.

I am very pleased that we will have the opportunity to pass this landmark legislation during the 100th Congress. In 1968, we made an important statement that discrimination in housing must be abolished. Statements, however, are not enough. Today, we take another step in showing that America is devoted to living out the promise of its principles.

As an original cosponsor of the Fair Housing Amendments in the Senate, I urge my colleagues to vote for H.R. 1158.

Mr. CHAFEE. Mr. President, the Senate will soon consider a landmark piece of legislation, the Fair Housing Amendments of 1988. I was an original cosponsor of S. 558, the legislation that gave rise to this historic compromise, and I urge the Senate to take up and adopt it without delay.

With this measure, we will complete a process we began in 1968, with passage of the Fair Housing Act. The Fair Housing Act banned discrimination on the basis of race, color, or religion. However, its effectiveness has been seriously limited by its lack of an enforcement mechanism.

This has left the more than 2 million Americans that are the targets of illegal housing discrimination each year with little recourse except to file a time-consuming and costly suit at their own expense. Too often, the fair housing law is only a paper tiger.

The bill now before us would change that by giving the Department of Housing and Urban Development

[HUD] the tools to enforce the law. Under current law, its role is limited to conciliation and arbitration; it has no power to enforce discrimination complaints. The Department of Justice may file suit, but only if a "Pattern and Practice" of discrimination is found. Otherwise, a person encountering housing discrimination has only one option—to file suit at his or her own expense. In most cases, this is prohibitively costly and time consuming—particularly for someone whose immediate concern is finding housing.

This bill would change that by providing HUD with sound and reasonable enforcement mechanisms, similar to those used for many years by other Federal agencies. Under this bill, HUD will initiate enforcement proceedings in cases where it finds "reasonable cause" to believe housing discrimination has occurred, after first trying to reconcile the parties. Cases will then be referred to an administrative law judge, or, at the request of either of the parties, to a U.S. district court. Proceedings must begin within 120 days, and reach a conclusion within 60 days. The court may award damages or levy fines—of between $10,000 and $50,000.

The bill also strengthens the fair housing laws by extending their coverage to the disabled and to families with children. The need for these provisions is great, as recent surveys of the housing landscape make abundantly clear.

For example, a 1980 HUD survey found that 50 percent of all rental units have restrictions on rentals to families with children, and that another 25 percent do not allow children at all. I want to point out that the ban on discrimination would not apply to Federal housing for the elderly, to retirement communities, or to other developments specifically designed for older Americans.

Finally, passage of this legislation will be a real boon to the 36 million disabled Americans who are not covered by existing fair housing laws.

Mr. President, last April marked the 20th anniversary of the Fair Housing Act. The Fair Housing Act is truly a landmark, but for too long it has been an unfinished landmark. The legislation before us today is an appropriate and long-overdue capstone—without which our job can hardly be considered complete.

By putting real teeth into the Nation's fair housing laws, this bill will go a long way toward helping the millions of Americans that encounter discrimination in their search for shelter. Its provisions are long overdue, and I urge the Senate to adopt them without further delay.

Mr. SIMON. Mr. President, I rise in strong support of the fair housing bill, which I have cosponsored, and commend the Senator from Massachusetts and the Senator from Pennsylvania for their leadership and hard work in putting together the substitute before this body.

As chairman of the Constitution Subcommittee, I made the fair housing bill my highest priority. Early in the 100th Congress, I convened 6 days of hearings and took testimony from 41 witnesses. The subcommittee then reported favorably an amendment in the nature of a substitute that closely resembles the legislation before us today.

When my subcommittee held hearings on this bill we looked at the Senate's earlier hearings on the issue of fair housing, which occurred in 1979. We found that the Judiciary Committee's findings 8 years ago are as true today as they were then—no enforcement provisions exist in current law to combat continuing housing discrimination. As a result, the law that was supposed to wipe out housing discrimination from our country is not working.

Recent studies have shown unacceptable rates of discrimination against blacks, Hispanic Americans, disabled people, families with children, women, and Asian Americans. The most recent HUD sponsored study found that blacks looking to buy a home have a 48-percent chance of encountering discrimination; their chances of being discriminated against in the rental market are 72 percent. Another study in Dallas found that dark-skinned Hispanic Americans were likely to be discriminated against in 96 cases out of 100 when looking for housing.

Disabled people are also locked out of many housing opportunities by physical barriers and the barrier of ignorance.

A 1980 HUD survey noted that 26 percent of our Nation's rental housing market bans rental to families with children; another 50 percent sets limits on ages and numbers of children allowed. That means more than three-fourths of the housing market has restrictions on families.

Few problems hit Americans where they live as harshly as discrimination when they enter the marketplace to rent or buy a home. Today there is wide agreement after nearly two decades of experience that the Fair Housing Act has not been invested with adequate enforcement remedies. Discrimination in housing is still a reality for millions of Americans.

A promise was made nearly two decades ago with insufficient resources to back it up. Now is the time to make good on that promise.

The bill before this body amends the Federal Fair Housing Law, title VIII of the Civil Rights Act of 1968. It is sponsored by a bipartisan group of Senators and has the support of the administration and all the Presidential candidates. It is similar to the bill that passed the House on June 29, 376 to 23.

Mr. President, I particularly want to note that I strongly support the inclusion of individuals with handicaps as a newly protected class under the fair housing statute.

The reality is that millions of Americans are being excluded from full participation in the life of this Nation by an inaccessible, unavailable, and inappropriate housing stock. Part of the housing problem is a result of simple prejudice—the same kind of prejudice we made illegal on the basis of race in 1968. But there is another serious problem: physical exclusion because of barriers in architecture. These architectural barriers, which need not be costly to eliminate, are like "Keep Out" signs to a substantial part of our populations.

This means that for the Americans who already have the most barriers to overcome, housing is the hardest to find. Some social service agencies report that for every wheelchair-accessible apartment available, there are 50 clients in need. In some places, a wait of 2 to 4 years for usable housing is common.

Another dimension of this problem comes at the other end of the cycle: not in finding the housing, but in being forced to leave. This problem especially hurts our elderly citizens with disabilities. When the disability worsens, and they can no longer negotiate the steps or fit the new wheelchair into the bathroom, they are forced to move out of their homes.

There is an enormous human cost when elderly persons are uprooted from their home communities and placed in other, often more institutionalized, settings. They lose their relationship with the corner grocer, the local church, neighbors, and friends. This is unnecessary isolation, and it becomes ghettoization as well when the only choice is a 100-unit building for the elderly.

It is not only the elderly who are affected. As Marca Bristo, the director of Access Living in Chicago, testified last year before the Subcommittee on the Constitution, too many people with disabilities unnecessarily fill the beds in the only accessible housing in town—the nursing home. In Cook County, IL, over 10,000 nonelderly disabled people live in nursing homes.

The provisions of the fair housing amendments included in the Kennedy-Specter substitute address two areas of discriminatory practices related to physical access in housing. Discrimination under the act will include refusal to permit, at the expense of the individual with the disability, reasonable modifications of the premises. In the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on

the renter agreeing to restore the interior of the premises to the condition that existed before the modification, with reasonable wear and tear excepted.

The provisions also require that all future multifamily housing of four or more units will have to meet minimal access guidelines. In the case of nonelevator buildings, only the groundfloor units must meet these guidelines. These provisions have been developed in consultation with the National Association of Home Builders and the American Institute of Architects, and these organizations support this bill. With clarifications on the primary role of States and local governments in carrying out enforcement of these requirements, the disability provisions have the full support of the White House, the Department of Housing and Urban Development, and the Justice Department.

The discrimination against individuals with handicaps that is based on prejudice and stereotype is also addressed through provisions in this legislation. By including individuals with handicaps as a protected class, the bill provides the same general prohibitions against activities related to the sale or rental of a dwelling as are currently in place for the existing protected classes.

The provisions of the substitute include the definition of handicap found in section 504 of the Rehabilitation Act of 1973, as amended. During action on the Civil Rights Restoration Act, the Congress reaffirmed the inclusion of individuals with contagious diseases and infections in the definition of handicap, and codified the Supreme Court's Arline decision. The language of this substitute states that these provisions do not require a dwelling to be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. This is wholly consistent with the definition of handicap in section 504 and the Civil Rights Restoration Act.

Mr. President, the provisions of this legislation for persons with disabilities are an equitable approach to ending housing discrimination and making a large part of our housing stock available to this substantial part of our citizenry.

I also want to express my strong support for extending the protection of the Fair Housing Act to families with children.

Many families with children face economic difficulties in finding housing. To add discrimination to that is unconscionable. Children are our country's future. To deny a family the right to buy or rent because they have children, or a certain number of children, or children of certain ages, prevents many American families from realizing a central element of the American dream—a safe and affordable place to live and raise their children.

Nationwide, huge portions of the housing market are legally closed to families with children. Signs reading "No Children" are commonplace. An extensive national study conducted by the Department of Housing and Urban Developement found that 75 percent of the rental units surveyed either restricted or barred children.

The fair housing amendments prohibit discrimination on the basis of familial status, as existing fair housing law now prohibits such discrimination on the basis of sex, religion, national origin, color, and race. At the same time, it protects the rights of landlords and senior citizens.

This legislation does not pit one generation against another. It protects the rights of seniors to live in retirement communities and buildings to serve their special needs, and to exclude children if they so desire.

Mr. President, I am proud to have played a significant role in the development of this landmark civil rights legislation, and urge its speedy passage.

Mr. BYRD. Could we find out how many amendments remain, hopefully, to get an agreement which would limit the amendments to those we can identify and then include a time for vote on final passage tomorrow? I yield to the Republican leader.

Mr. DOLE. Mr. President, we have checked on this side. As far as I know—I can find out quickly—there could be an additional amendment by Senator HELMS on the definition of handicapped and two amendments by Senator HUMPHREY, on building code costs for houses and building code costs for rental properties.

I hope that we might get an agreement that these would be the only amendments in order. I am not certain they will agree to a time agreement, but I think there might be a willingness to agree they are the only amendments in order. I do not know if Senator HUMPHREY is prepared to proceed tonight or is prepared to do it in the morning.

Mr. BYRD. Mr. President, I yield to Mr. HUMPRHEY.

Mr. HUMPHREY. I am prepared to do whatever the leadership wishes. Some Members have pressing engagements tonight. Certainly I want to be accommodating in that respect.

With respect to the unanimous-consent request, may I ask, is it the majority leader's intent for the Senate to go out sometime soon?

Mr. BYRD. That will depend upon whether or not we can get the agreement. If we get the agreement limiting the number of amendments so that we know there will be no more, then we can talk about what time the Senate will go out. Otherwise, we are constrained to press on.

Mr. President, I ask unanimous consent that the only remaining amendments be the two amendments identified by the Republican leader as being offered by Mr. HUMPHREY and the one possible amendment that was identified by the Republican leader as being possibly offered by Mr. HELMS.

Mr. DOLE. I am now advised there may be a second amendment by Senator HELMS.

Mr. BYRD. Mr. President, I ask unanimous consent that the remaining amendments to the bill be limited to the following: An amendment by Mr. HELMS to clarify the definition of handicapped, an amendment by Mr. HUMPHREY dealing with building code costs for houses, an amendment by Mr. HUMPHREY dealing with building costs for rentals, an unidentified amendment by Mr. HELMS, and an unidentified amendment to the Helms amendment by either Mr. KENNEDY or Mr. BYRD, that no motion to recommit with instructions/without instructions be in order.

The PRESIDING OFFICER. Is there objection?

Mr. STEVENS. Reserving the right to object, Mr. President, would my distinguished friend tell me what that means for the balance of the evening?

Mr. BYRD. For the balance of the evening, if Mr. HUMPHREY wishes to call up his amendment and debate it for a while, that would be fine, Mr. KENNEDY may wish to debate it. We have agreed that a vote would occur tomorrow morning at 11 o'clock.

Mr. STEVENS. I thank the Senator very much.

Mr. BYRD. And that tomorrow morning, if there is time and other amendments on the list are called up and they are debated, rollcall votes ordered, they could be stacked in behind the 11 o'clock vote.

Mr. STEVENS. I thank my friend.

Mr. BYRD. I thank the Senator.

The PRESIDING OFFICER. Is there objection?

Mr. HUMPHREY. Mr. President, will the majority leader yield?

The PRESIDING OFFICER. Yes.

Mr. HUMPHREY. The unanimous consent request does not include what the Senator just said about the Senator from New Hampshire laying down his amendment tonight and debating it tonight, does it?

Mr. DOLE. The Senator identified the amendment. He is not required to lay the amendment down?

Mr. BYRD. Not required to.

Mr. HUMPHREY. It is such a wonderful amendment, I would like it to come in close proximity to the debate and not be separated by a night's sleep. In other words, I would not really care to lay the amendment

down and debate it tonight with a vote tomorrow after everyone has forgotten the merits of the case.

Mr. BYRD. May I say to the distinguished Senator whatever he wishes is fine. If he wishes to lay it down tonight, not debate it or debate it, whichever he wishes, and if we could agree for a vote in relation to that amendment at 11 o'clock tomorrow morning.

The PRESIDING OFFICER (Mr. PRYOR). Is there objection to the request? If there is none, the request is so ordered.

Mr. BYRD. Did the distinguished Senator from New Hampshire hear the last part, to wit, that a vote would occur in relation to the amendment at 11 o'clock.

Mr. DOLE. I think it depends on when we start. What would the Senator want, 30 minutes on a side?

Mr. HUMPHREY. Thirty minutes total.

Mr. DOLE. Thirty minutes total. We can work that out.

Mr. BYRD. Thirty minutes equally divided?

Mr. DOLE. Thirty minutes total.

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

Mr. BYRD. May I inquire of the distinguished Senator from New Hampshire whether or not on the disposition of his amendment, which I assume he will lay down tonight, upon the disposition of that amendment at 11 o'clock tomorrow, will he be willing to lay down his next amendment so that the Senate could proceed thereon?

Mr. HUMPHREY. Yes. However, I want to add a caveat to that. I am not determined to offer that second amendment. I might offer the second amendment or I might not.

Mr. BYRD. Very well. Mr. President, I yield the floor.

Mr. KENNEDY. Mr. President, that being the case, I think that would conclude at least the debate on this measure for this evening. Again, I am very grateful to all of those who have been a part of the discussion, and I am very hopeful that we will be able to reach a final conclusion on this sometime in the very early afternoon tomorrow.

I thank the majority leader and minority leader and my cosponsors for their efforts during the course of the debate. I yield the floor.

Mr. THURMOND. Mr. President, I think we have made considerable progress today. We know what amendments are remaining so we should be able to finish the bill tomorrow as I see it. I commend all those who have cooperated in this matter and enabled us to go forward as we have.

AMENDMENT TO INCREASE FUNDING FOR THE STATE DEPENDENT CARE GRANT PROGRAM

Mr. BINGAMAN. Mr. President, I rise today to invite the attention of my colleagues to one of the many important programs funded under the Senate's Department of Labor, HHS and education appropriations bill.

I was proud to cosponsor an amendment offered by my friend and distinguished colleague, Senator RIEGLE, to provide much needed funding for programs authorized under the State Dependent Care Development Grants Act. With passage of this amendment, the Senate helped to ensure that a greater, but still inadequate, number of young school children can have quality, supervised care before and after school.

Senator RIEGLE is the Senate's true advocate and leader for school-age child care. In 1983, he proposed using public schools and other existing community facilities for before- and after-school care for our school-age children. Recognizing the need for such care, the Congress incorporated elements of his legislation into the State Dependent Care Development Grants Act. Senator RIEGLE has worked diligently year after year to fund this important, but often overlooked, child care program.

We can no longer overlook this problem. And fortunately, we are making some progress, albeit in small steps. In March, I chaired a hearing on child care under the auspices of the Joint Economic Committee in my home State of New Mexico. The Joint Economic Committee is largely concerned with such issues as international trade and U.S. competitiveness. But we know from that hearing and others held in the Senate that there is a direct and vital link between our children's current well-being and our Nation's future economic well being.

Children are our Nation's future. They are our future workers, leaders, educators, and taxpayers. So it makes sense that unless our Nation begins seriously to invest in our children today, we will not have the skilled, healthy, and productive work force that we must have in the future to compete successfully in the global economy and to ensure our Nation's social and economic security.

We must be concerned for the future, and we also must deal with the problems of the present. In recent years, U.S. demographics have begun to change. Our children's world is not the same world we knew as children. More and more often, two-parent families find that both parents work to keep their families afloat financially, and more and more children are growing up in single-parent homes. Often it is the mother who must assume the primary responsibility for nurturing the children—emotionally, intellectually, and financially. The economic strain on many parents today is tremendous, and finding safe, affordable care for their children—regardless of age—is of critical importance.

But finding child care that is safe and affordable has become a major challenge for parents today. For the parents of school-age children, the challenge of finding supervised care can be especially difficult. For parents with limited income, the problem is even more acute.

So it is no surprise that the estimates of the number of children left alone after school each day range from 2 to 7 million. Some can probably manage independently, but many face frightening, lonely, or unsafe time alone during the school year, on school holidays and during summer vacations. We know that the potential number of children facing these circumstances increases every day, yet an adequate response fails to happen.

A major factor in the escalating number of children in self-care is cost. In 1983, more than 30 million American children between the ages of 5 and 17 were living below the poverty level. A 1986 children's defense fund study of school-age care found that the cost of care ranged from $20 to $45 a week, far above what low-income families can afford and a significant outlay for moderate income families.

The need for an increased investment in school-age child care has been sounded by teachers, principals, parents, businesses, public safety officers and children. A 1987 Louis Harris and Associates poll of teachers across the country found that teachers cited children being "left alone after school" as the No. 1 cause of difficulty in school. Of principals surveyed in 1988, 86 percent said that communities need after-school care and 84 percent believed their own communities needed after-school care.

Parents share these same concerns, and several studies have concluded that lack of supervised care may lead to alcohol and drug abuse, combativeness, and other gang-related activities. Younger siblings under the supervision of older children are often abused, and accidents have become the leading cause of death among children.

As Amy Tyler-Wilkins of the children's defense fund testified during our hearing in New Mexico:

> The question is not whether or not we need more school-age child care. It is not that we do not know the elements that should be included in a school-age child care program. The question is why have we not made a national commitment to expanding the availability of school-age care? It is long past time to make that commitment.

Indeed, a serious commitment to the Dependent Care State Grant Program is long overdue. This program, estab-

lished in 1984, is the only Federal program that provides funds to establish and expand school-age child care programs. Sixty percent of the funds are available for school-age child care programs and 40 percent for developing resource and referral programs. We know that this program works. Nearly all 50 States depend on these funds for their child car programs.

We must make a commitment to child care, and we must make it now. Every day the child care dilemma worsens. It is critical that we act now. More child care legislation than ever has been introduced in this Congress, but it will take time to fully debate and pass legislation. Meanwhile, we in the Federal Government can and must do more to help. The tools we need are already available. The Dependent Care State Grant Program can provide a strong foundation for this Nation to build upon once some form of comprehensive child care legislation is enacted.

By accepting the measure proposed by Senator RIEGLE and myself, the Senate made a small but wise investment in our children. It is an investment that will pay off in stronger families, increased productivity in the workplace, a healthier local, national, and international economy, and, most importantly, happier, safer children.

THE FISCAL YEAR 1989 DEFENSE AUTHORIZATION ACT

Mr. NUNN. Mr. President, on July 14 both the House and the Senate passed the conference report on the Fiscal Year 1989 Defense Authorization Act. The enrolled bill was transmitted to the President on July 25. Under the Constitution, President Reagan has until August 5—this coming Friday—to decide whether to sign this bill, veto it, or allow it to become law without his signature.

Some on Capitol Hill and in other circles around town are clamoring for the President to veto this bill. In fact, some Republican Members of Congress have been quoted in the press as saying it would be good politics to veto this bill. I think that would be a serious mistake. Politics should not guide nor be the basis for national security decisions. This bill is extremely important to our national security. It provides for many improvements in defense capability and the management of the Pentagon. In fact, the senior national security advisers to the President and many in Congress in bipartisan leadership roles on the committees of jurisdiction have strongly recommended against a Presidential veto.

Mr. President, the security of the Nation is too important to have it take a back seat to election year politics.

Today I want to take a few moments to outline why I think the fiscal year 1989 defense authorization bill is a good bill—one that will definitely strengthen our national security. Over the next several days, I will also address in more detail some of the specific objections of those who are urging President Reagan to veto this bill.

KEY PROVISIONS OF THE FISCAL YEAR 1989 DEFENSE AUTHORIZATION BILL

The annual defense authorization bill has become a major vehicle by which the Congress debates and acts on the President's annual budget request for the national defense function. This year was no exception. The fiscal year 1989 defense authorization bill authorizes funding for all of the major activities of the Department of Defense, the national security programs of the Department of Energy, and civil defense.

This year's defense authorization bill is noteworthy because it authorizes the full amount—$299.5 billion—requested by the President for national defense for fiscal year 1989. This is the first time since fiscal year 1982 that Congress has authorized full funding of the President's defense request. In a year when the Congress and the President have reached a consensus on the level of defense spending, it would be damaging to national security to shred this consensus with a veto. This bill gives the President the level of funding he requested for defense for the first time in 7 years. Why weren't there calls for a veto of the defense authorization bill during the past 7 years when it cut the President's defense budget by as much as $20 to $25 billion?

One of the most difficult issues in this year's bill was the Defense Department's role in the war on drugs. Under the conference agreement, Mr. President, the Armed Forces will concentrate on the detection and monitoring of air and sea traffic, which are traditional military missions. The bill designates the Department of Defense as the single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States. The bill also requires that the command, control, and communications and technical intelligence assets of the United States that are dedicated to drug interdiction be integrated by the Department of Defense into an effective network.

The bill on President Reagan's desk enhances the Defense Department's role in fighting illegal drugs in a responsible and effective way. It took a major effort to resolve this issue in the defense authorization bill rather than in the upcoming omnibus drug bill. A Presidential veto of the defense authorization bill would not only reopen this controversial issue, but postpone the Department's new and enhanced role. A veto would say: "The war on drugs can take a back seat to election year politics."

In the area of strategic programs, the defense authorization bill continues the ongoing modernization of strategic weapons systems and strategic command, control, and communications programs. The bill provides $752 million for the rail-garrison MX and small ICBM programs and $4 billion for SDI; fully funds the requested levels for the Trident submarine and Trident II missile programs; and provides almost all of the funds requested for the B-2 advanced technology bomber and the advanced cruise missile programs.

I understand that the conference agreement on some of these strategic programs—particularly the ICBM modernization program and SDI—upsets some of the people on the other side of the aisle and in the White House. I will have more to say on these two programs over the next 2 days. Let me just say at this point that the compromise on ICB modernization keeps both the rail-garrison MX and small ICBM programs alive for the next administration to make a decision by providing a total of $750 million for ICBM modernization. The Secretary of the Air Force stated to Strategic Subcommittee chairman Senator EXON that he could accept the compromise. On the funding level for SDI, the $4 billion authorized in the bill is an increase over last year and splits the difference between the levels provided in the House and Senate versions of the bill. I think this is a reasonable outcome, particularly since an amendment to reduce the Senate-approved level by $700 million failed by only two votes on the Senate floor.

In the area of conventional weapons programs, the fiscal year 1989 defense authorization bill authorizes $38.3 billion, with major enhancements in several key areas not included in the original budget request. The bill includes $300 million for a major initiative developed with the Army to reverse the deteriorating armor-antiarmor balance between NATO and the Warsaw Pact. The bill also increases the production rates of several major conventional programs—M-1 tanks, Hellfire missile; EA-6B jammer aircraft; F-18 fighter; F-14D fighter—so we buy more capability at less cost.

The Navy's shipbuilding program was approved as requested, with the exceptions of the addition of one DDG-51 destroyer and the deletion of an oceanographic survey ship which the Navy indicated could not be expected due to design problems. We have approved programs designed to help our sailors in the Persian Gulf.

The bill contains a number of provisions which are absolutely essential to meeting our defense manpower needs and supporting our men and women in uniform and their families. The conference agreement includes a compre-

hensive series of modifications to the joint officer management policies of the Goldwater-Nichols DOD Reorganization Act of 1986 that will facilitate the management of military officers serving in joint duty assignments. These provisions are very high on the priority list of the Joint Chiefs of Staff. The conference agreement also repeals the reductions in the DOD officer corps that would otherwise go into effect.

In the area of compensation and benefits, the conference agreement provides for a 4.1-percent increase to military basic pay and basic allowance for subsistence, and a 7 percent increase to basic allowance for quarters. The 4.1 percent increase exceeds the comparable increases expected in the private sector for the first time since 1981 and begins to close the current pay gap of approximately 11 percent between private sector and military pay. The 7 percent increase in basic allowance for quarters will help to correct deficiencies in the reimbursement to military members for housing.

The conference agreement also provides two major retention incentives—one to counteract retention problems in Navy and Air Force aviator inventories and the other to counteract retention problems in medical officer inventories of all services. In addition, the conference agreement provides for a affiliation bonus test program aimed at improving the recruitment of medical personnel to fill critical shortages in the reserve forces.

Mr. President, as I review the major provisions of the fiscal year 1989 defense authorization bill, it is difficult to understand the calls from some people for a veto of this measure. This bill conforms more closely to the defense program requested by the administration for the fiscal year 1989 than any defense authorization bill passed by the Congress in the last 6 years.

COMPARISON TO THE HOUSE BILL

One of the arguments made when the Senate passed the conference report on this bill was that the Senate passed a good bill, but the House prevailed on all the major issues in conference, creating an unacceptable bill.

The primary source of information for this point of view seems to be a press release by the House Armed Services Committee. This press release claims, for example, that the conference report "takes the stars out of star wars" and leans toward the arms control provisions contained in the House bill.

In my view, these and other statements in this press release are misleading and inaccurate. If President Reagan can figure out a way to veto this press release, I will certainly vote to sustain that veto.

I am not interested in creating a scorecard of the major conference issues between the House and Senate bills to try and determine who came out ahead in the conference. Both the House and Senate conferees were trying to come up with a bill that met the national security needs of the country. But I want to mention briefly some of the major issues in the House-passed bill which the administration opposed and the action taken on these issues by the conferees.

The administration strongly objected to the SDI funding level of $3.5 billion in the House bill, a reduction of $1.4 billion from the fiscal year 1989 budget request of $4.9 billion. The Senate bill provided $4 billion by only a two vote margin, and the conference agreement of $4 billion is the midpoint between the two bills. In addition, Mr. President, this outcome is the most favorable to SDI in terms of the percent of the program approved since 1985. I ask the question—can anyone really believe that providing $4 billion for SDI is gutting the program?

The House bill contained a provision restricting no more than 40 percent of SDI funding to phase 1 activities. The administration adamantly opposed this House provision and it was dropped in the conference report.

The House bill contained a provision requiring U.S. compliance with the central numerical sublimits of the unratified SALT II Treaty. The administration adamantly opposed this provision, and it was dropped from the conference report. In its place the conferees agreed to deactivate a few weeks early two aging Poseidon submarines—thus continuing a practice of early Poseidon retirements which this administration itself has repeatedly undertaken in the past for budgetary reasons.

The House bill contained a 1-year moratorium on tests of all nuclear devices above 1 kiloton. The administration strongly * * * conference report. The conferees directed the Department of Energy to begin technical preparations for maintaining the reliability and effectiveness of our nuclear deterrent in a low- or zero-threshold testing regime. Since the Reagan administration has agreed with the Soviet Union on a step-by-step negotiating approach leading in time to a total test ban, this conference provision is entirely consistent with the administration's own policy in this area—unless the administration's own policy is a sham.

The House bill contained amendments to the Davis-Bacon legislation which the administration strongly opposed. The conferees did not include any changes to the Davis-Bacon Act in the conference report. The Senate's unwillingness to yield on this issue held up the conference for 2 weeks.

The House bill contained a provision repealing the exemption for DOD from the provisions of the Monroney amendment, which would have required DOD to go outside of a local wage area to collect wage data for certain types of Federal blue-collar jobs. The Defense Department opposed this provision, and it was dropped in the conference report.

The House bill contained a provision that would have prevented all contracting out of certain types of maintenance functions. The Defense Department strongly opposed this provision, and it was dropped in the conference report.

The House bill contained a provision prohibiting the Army from converting its antiquated heating facilities in Europe to district heat. The Army strongly opposed this provision, and it was dropped in the conference report.

Mr. President, I could go on, but I think the point is clear: The House did not prevail on every major issue of concern to the administration in the conference on this bill.

I am not saying that I agree with every provision in the conference report sent to the President. The very nature of a conference and the legislative process requires compromises. But in my view, the Senate took a good, solid bill to conference. We brought a good, solid bill back from conference. And we have sent the President a good, solid Defense authorization bill for fiscal year 1989 that will improve the national security of the country.

CONCLUSION

Mr. President, my opinion that the fiscal year 1989 Defense authorization bill is a good bill and that it should not be vetoed is shared by President Reagan's senior national security advisers.

I have to ask two questions: If the people responsible for advising the President on national security policy do not want to see this bill vetoed, then who does? Why is there talk of a veto on this bill, which authorizes the full amount requested by the President for fiscal year 1989, when there was no talk of a veto for 7 straight years when the Defense budget was being cut by as much as $20 to $25 billion each year?

The only conclusion I can come to is that some people believe that there is some political advantage to be gained from vetoing the Defense authorization bill. I reject this argument, and I hope President Reagan will reject this argument. It will be very unfortunate if this bill is vetoed for election year, political reasons which have nothing to do with the national security interests of the country.

MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent there be a period for morning business for 10 minutes, that Senators may speak therein for not to exceed 5 minutes each.

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

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The Senator from Kansas.

TAX CONVENTION WITH FRANCE

Mr. DOLE. Mr. President, as in executive session, I ask unanimous consent that the injunction of secrecy be removed from the protocol to the 1967 Tax Convention with France (Treaty Document No. 100-21), transmitted to the Senate today by the President; and ask that the protocol be considered as having been read the first time; that it be referred, with accompanying papers, to the Committee on Foreign Relations and ordered to be printed; and that the President's message be printed in the RECORD.

The message from the President is as follows:

To the Senate of the United States:

I transmit herewith, for Senate advice and consent to ratification, the Protocol to the Convention between the United States of America and the French Republic with respect to Taxes on Income and Property of July 28, 1967, as amended by the Protocols of October 12, 1970, November 24, 1978, and January 17, 1984, which Protocol and related exchange of notes were signed at Paris on June 16, 1988. I also transmit for the information of the Senate the report of the Department of State with respect thereto.

The main purpose of the Protocol is to modify the Convention to take into account the provisions of the Tax Reform Act of 1986. In addition, the Protocol will permit France to exempt U.S. citizens resident in France from French tax on their U.S.-source investment income.

It is most desirable that this Protocol, together with the related exchange of notes, be considered by the Senate as soon as possible and that the Senate give advice and consent to ratification.

RONALD REAGAN.

THE WHITE HOUSE, *Aug. 1, 1988.*

THE SIOUX NATION BLACK HILLS CONTROVERSY: NEED FOR RESOLUTION

Mr. PRESSLER. Mr. President, the Sioux Black Hills claim has been one of the lengthiest Indian land claim disputes in U.S. history, and remains unresolved to this day. Initially, filed in 1923, the Sioux Nation of Indians sought additional compensation for the amount paid to the Sioux for the Black Hills by the U.S. Government in 1877.

At the request of the Sioux tribal leaders, Congress passed legislation in 1978 waiving res judicata so that the Sioux Nation of Indians could press its claim for monetary damages in the court system. In 1980, they won their court case and were awarded the additional compensation they sought. However, the tribal leaders refuse to accept the U.S. Supreme Court's award of $106 million. With accumulated interest, this judgment award has grown to $202 million this year.

Many individual Sioux Indians have urged that the judgment be distributed. It is important for us to finally resolve this deadlock. In the near future, I plan to introduce legislation to allow the Sioux Indians to vote on this issue. My proposed legislation would direct the Department of Interior to hold an election among the Sioux who would be eligible to receive portions of the Supreme Court judgment fund. If a majority of the Sioux voted to accept a per capita settlement, the money then would be distributed and the land claim would be extinguished. Allowing the Sioux Indians to vote on this issue is in keeping with the democratic principle of majority rule on which our government is based.

In order to understand the rationale of my proposed legislation, it is important to discuss the historical background of the Sioux claim to the Black Hills, the thorough judicial review given to this land claim dispute, and the current attempt to override the 1980 Supreme Court decision through S. 705, the Sioux Nation Black Hills Act.

HISTORICAL BACKGROUND OF THE SIOUX CLAIM TO THE BLACK HILLS

Since the early 1970's, American Indian tribes have become more active in their attempts to regain lost lands through the Federal courts. Too often, moral assertions become emotional issues and often overshadow the legal and historical facts of the Indian land claims. This is especially true in the case of the Sioux Nation's claim to the Black Hills of South Dakota.

Senator BILL BRADLEY introduced S. 705, the Sioux Nation Black Hills Act, on March 10, 1987. This bill, known informally as the Bradley bill, would transfer 1.3 million acres of unused Federal land in the Black Hills to the Sioux Nation. It would authorize the payment of $200 million for 6 million acres (a total of 7.3 million acres of land was deeded to the Sioux by the Treaty of Fort Laramie of 1868) and $450,000 in royalties for the $18 billion in gold an silver mined from the land since 1877.

I believe that the Bradley bill is based upon inaccurate historical assertions concerning the origin of the Sioux and the Fort Laramie Treaty of 1868. Rex Alan Smith, prominent historian and author of "Moon of Popping Trees," has written a detailed historical review that is relevant to this bill. Many of the events surrounding the U.S. Government's relationship with the Sioux Indians of South Dakota are still shrouded in misconceptions and half-truths. Smith's impartial scholarly work goes a long way toward setting the historical facts straight.

The Sioux did not cross the Missouri River to settle around the Black Hills of South Dakota until 1750. Thus, the Sioux are considered by many to be latecomers to the Black Hills area. The Cheyenne and Kiowa were pushed out of the Black Hills region by the Sioux in the mid-1800's.

In order to protect white settlers traveling to the gold fields of California, Utah, and the newly established State of Oregon, the Treaty of Horse Creek was signed in 1851.

Under that treaty, the U.S. Government offered protection to the Sioux and other tribes against encroachment by white settlers. In exchange, the Indians were to receive $50,000 in gifts. They promised not to attack each other or white settlers traveling on the Overland Trail. Unfortunately, a minor incident involving the killing of a cow owned by a pioneer on the Overland Trail, sparked renewed fighting between the Sioux and settlers.

The hysteria by a Sioux massacre of 80 soldiers in 1866 and the belief that Chief Red Cloud and his Sioux warriors could not be defeated easily, led the U.S. Government to negotiate the Fort Laramie Treaty in 1868 with the Sioux. This treaty gave the Sioux possession of 60 million acres of land in North Dakota, South Dakota, Nebraska, Wyoming, Montana, and Colorado. In addition, the Government agreed to provide food rations, clothing, seed and farming tools to help them become farmers. No settlers would be allowed either to settle on or travel across the reservation. None of the lands in the newly created Sioux reservation could be taken away without the signed consent of three-fourths of the adult male Sioux. In return, the Sioux were supposed to stay within their reservation boundaries, refrain from attacking whites, and compel their children to attend school on the reservations.

Those who support the enactment of the Bradley bill fail to recognize the fact that both the Sioux and the U.S. Government broke the Fort Laramie Treaty of 1868. Watson Parker, a nationally prominent historian from South Dakota has identified several instances in which the Sioux broke the treaty. Parker observes that the Sioux left their reservation to fight the Crow and the Pawnee. He also notes that the 1882 Record of Engagements of the U.S. Army recorded numerous robberies, rapes, thefts and murders committed by the Sioux in areas outside their reservation. In 1876, U.S. Representative Jefferson P. Kidder of South Dakota told his fellow Congressmen that more than

200 civilians had been killed by the Sioux outside reservation land after the signing of the treaty.

In 1874, gold was discovered in the Black Hills. At first the U.S. cavalry kept out prospectors to enforce the provisions of the treaty. This action became difficult both politically and logistically. The peace brought about by the Fort Laramie Treaty of 1868 was short-lived because of the failure of the Sioux and the U.S. Government to uphold the provisions of the treaty.

In 1876, a Commission on Indian Affairs, traveled to the Black Hills with a proposed treaty which provided that the Sioux would relinquish their rights to the Black Hills and other lands, as well as their rights to hunt in territories off the reservation, in exchange for rations. Now dependent on rations and beaten militarily, the Sioux accepted the Government's new treaty demands. The treaty presented to the Sioux chiefs was signed by only 10 percent of the adult male Sioux population—below the 75 percent required by the 1868 treaty. Congress codified the provisions of the 1878 treaty through the Black Hills Act of 1877.

As I have described elsewhere, there is no historical basis for the Sioux claim that the Black Hills have been sacred to them since time immemorial. As I mentioned, the Sioux did not arrive in the lands surrounding the Black Hills until 1750.

A close review of the proceedings of the 1876 Commission, which purchased the Black Hills from the Sioux, reveals that the Indians knew that the white men wanted gold. They were willing to transfer the land if an appropriate price were offered. The proceedings do not record Indian opposition to selling the Black Hills based on the claim that they were sacred. In fact, the primary point of disagreement was over the amount of compensation.

Historians have documented that Bear Butte near the edge of the Northern Black Hills has long been sacred to the Cheyenne. It is the place where their Sweet Medicine legend originated and where they received their Four Sacred Arrows. The tribe has made annual pilgrimages to Bear Butte. When the State of South Dakota put surplus lands up for sale around it, the Cheyenne—and not the Sioux—bought the lands.

Although the supporters of the Bradley bill stress that the Black Hills always have been sacred, it is interesting to note that the original attorney for the Sioux filed for monetary damages rather than for the return of their "sacred" land.

JUSTICE THROUGH THE COURTS

Since the signing of the 1876 treaty, the Sioux have viewed it as a breach of our Nation's duty to reserve lands in North Dakota, South Dakota, Nebraska, Montana, Wyoming, and Colorado for their occupation. Although the Sioux Nation pressed its claims against the U.S. Government for the wrongful taking of land almost immediately after the Black Hills Act of 1877, the courts consistently refused to hear the case for want of proper jurisdiction.

In 1920, the Sioux persuaded Congress to pass a special jurisdiction act that provided them with a forum for adjudication of all claims against the United States "under any treaties, agreements, or laws of Congress, or for the misappropriations of any of the funds or lands."

The Special Jurisdiction Act of 1920 enabled the Sioux in 1923 to file a petition with the Court of Claims. The petition alleged that the U.S. Government had taken the Black Hills without the just compensation required under the fifth amendment to the U.S. Constitution.

In 1942, the Court of Claims dismissed the 1923 petition, stating that the act of 1920 did not authorize it to determine the issue of the adequacy of compensation awarded for the Black Hills. The court concluded this to be a moral issue outside its jurisdiction.

In response to this decision, Congress passed legislation in 1946 to create an Indian Claims Commission. This Commission was established to hear and resolve all tribal grievances.

In 1950, the Sioux filed a claim with the Indian Claims Commission. The Commission dismissed the case in 1954, affirming the 1942 Court of Claims decision.

In 1956, the Court of Claims affirmed dismissal and replacement of the Sioux legal counsel. In 1958, the Indian Claims Commission reopened the case and heard new evidence on the fifth amendment just compensation claim.

In 1974, the Indian Claims Commission ruled that the 1942 Court of Claims decision did not bar the present fifth amendment claim by virtue of res judicata (a legal term which refers to the fact that once one has litigated a case and accepted a final judgment, one cannot come back into court again to seek relief.) The Commission ruled the 1877 act was a fifth amendment "taking" without "just compensation.".

In 1975, the Indian Claims Commission held that the Sioux were entitled to the $17.1 million fair market value of the land taken plus $450,000 for the unmined value of the gold taken from the land. However, the Court of Claims reversed the Commission's decision on the grounds that the claim was barred by the res judicata effect of the 1942 decision.

In 1978, Congress enacted legislation that allowed the Court of Claims to review the Indian Claims Commission judgment without regard to res judicata. In addition, this legislation authorized a new review by the Court of Claims on the merits of the case. At great political risk, I worked closely with Sioux tribal leaders to support enactment of this legislation.

In 1979, the Court of Claims affirmed the Indian Claims Commission's ruling that the 1877 act was a fifth amendment "taking" and ordered just compensation in the amount of $105 million—$17.1 million fair market value for the Black Hills in 1877, plus 5 percent simple interest. The U.S. Government appealed this decision to the U.S. Supreme Court. During its 1979 term, the Supreme Court reviewed the Sioux Nation's claim. The opinion of the Supreme Court traced the history of all the treaties and agreements as well as all previous claims and legislative actions, including references to my comments on the floor of the House of Representatives regarding the waiver of res judicata.

In a 1980 opinion, the U.S. Supreme Court affirmed the Court of Claims ruling in favor of the Sioux, However, the Sioux leaders have refused to accept the $105 million settlement. This judgment award has grown to more than $200 million with interest.

I consider the 1980 Supreme Court decision to be the final settlement of this issue. The Sioux have had their day in court and won a substantial monetary settlement.

OPPOSITION TO THE BRADLEY BILL

The Sioux, organized into eight tribes, continue to refuse to accept the judgment award. Many Sioux have expressed support for the distribution of the settlement on a per capita basis. This would give each eligible member of the tribes $2,800.

The Black Hills Steering Committee, representing the Sioux who refuse to accept the judgment award, supports the passage of the Bradley bill, S. 705. This legislation would return 1.3 million acres of land in western South Dakota to the Sioux.

It is important to note that the Bradley bill singles out South Dakota, while the disputed lands involve six States. This blatant political maneuver was intended to reduce opposition in Congress to the legislation. Singling out South Dakota reduces the legitimacy of the Bradley bill.

Many South Dakotans believe that the passage of this legislation would make it more difficult to bring new business to western South Dakota. Many realtors claim that the bill itself currently is depressing the value of private property in the Black Hills, making it impossible to sell at reasonable prices.

Supporting the sentiment of its citizens, the South Dakota House of Representatives has agreed to H. Con. Res. 1026 urging Congress to reject the Sioux Nation's claims to the Black

Hills. Many cities, counties, and business organizations have passed similar resolutions.

In my debates on national television and statements made on the floor of the Senate, as well as in newspapers across the Nation, I have strongly opposed the Bradley bill. Its supporters have misstated much of the factual history involved in this dispute.

I disagree with those who say that the only way the Sioux can practice their religion is to own the Black Hills. These individuals imply that they are not able to practice their religion. In fact, the Indian Religious Freedom Act of 1978 guarantees the right of American Indians to practice their religious ceremonies on Federal lands. Many Sioux freely have practiced their religion at Bear Butte, located near the northern Black Hills.

The wisdom of taking such a large block of public land out of Federal ownership bears special scrutiny. The legislation would convey 1.3 million acres, including entire national forests and parks, to the Sioux. The following seven counties or major portions of counties would be included within the boundaries of the Great South Dakota Reservation: Harding, Butte, Lawrence, Pennington, Meade, Custer and Fall River. Ellsworth Air Force Base, one of the Nation's most important military installations, also would be within the boundaries of the reservation.

The Bradley bill has serious technical flaws. For instance, it is contrary to traditional Western water law to claim all Federal water rights for the Sioux. Under Western water law, an individual may not hold the right to water for which he does not have a use. Even Indian tribes which benefit from this precedent, set by Winters versus United States, 207 U.S. 564 (1908), are not entitled to a water allocation beyond an amount necesary for the purpose for which the reservation was created. The bill gives the Sioux tribes sole and exclusive jurisdiction over all water in the area (less existing State-created rights), thus going beyond previous acts of Congress and judicial precedent.

Enactment of the Bradley bill also would result in the establishment of a huge reservation which would create a checkerboard jurisdiction. This would greatly increase law enforcement difficulties. An offender in one jurisdiction could easily flee to the jurisdiction of the other. This situation already exists in South Dakota, creating serious problems for tribal, State, and local police. The bill would make this problem even worse.

Because the cost of managing the lands would be much higher than the revenues generated from the lands, the bill would require the Federal Government to assume the financial burden ongoing maintenance of the land. In addition to the 1.3 million acres of South Dakota land, the bill also requires the disbursement of the $202 million court judgment, which was intended to be awarded in lieu of the land.

Under the Bradley bill, both Federal and State Governments are precluded from any taxation authority over the lands or activities within the jurisdiction of the proposed reservation. The Sioux Nation could impose property, local income and sales taxes on non-Indians within the reservation. It is important to recognize that the bill would prohibit a non-Indian from voting in tribal elections or holding tribal office. Many non-Indians residing in the seven counties that would be ceded to the Sioux Nation under the provisions of the Bradley bill are concerned about the issue of taxation without representation. These individuals would pay taxes to the Sioux Nation but could not vote in tribal elections or run for tribal office.

Vast holdings of public lands throughout the Nation were acquired from American Indians. As pointed out in a 1985 Congressional Research Service legal analysis of the bill, "transferring such a large portion of land may influence other tribes to seek the return of lands that they have transferred to the United States, for which they have been compensated for either originally or through the Indian claims process.

This bill would be costly to the Federal Government and the State of South Dakota. The loss of revenues from taxes and mineral leasing fees would be substantial. It is estimated that the loss of school and public lands would reduce State and local tax revenues by $133.9 million. School districts located within the seven counties would lose another $603,000 in Federal mineral and grazing funds.

There are technical flaws in the Bradley bill and little thought has been given to its practical consequences. I recently received a letter from Interior Secretary Donald Hodel stating that the administration is opposed to the Bradley bill. As a member of the Platform Committee of the Republican Party, I have asked my party to oppose land claim legislation initiatives of this type which would give control of Federal land to others.

Mr. President, throughout our history as a nation, the U.S. Government has made 370 treaties with American Indians. Although, the Fort Laramie Treaty of 1868 was broken by both the U.S. Government and the Sioux, the U.S. Supreme Court has rendered final judgment on this land claim dispute.

Although General George (Gray Fox) Crook fought against the Sioux, he was considered a friend and supporter of Indian rights. The statement he made to Indians 100 years ago is still appropriate today: "Instead of complaining of the past they had better think of the future."

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Saunders, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session, the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations and a treaty, which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

PETITIONS AND MEMORIALS

The following petitions and memorials were laid before the Senate and were referred or ordered to lie on the table as indicated:

POM-601. A concurrent resolution adopted by the Legislature of the State of Hawaii; ordered to lie on the table.

"SENATE CONCURRENT RESOLUTION 192

"Whereas, the United States's and Canada's executive departments have completed negotiations of a comprehensive Free Trade Agreement; and

"Whereas, the agreement between the world's largest trading partners would relax or eliminate most trade restrictions and encourage further cultural and goodwill exchanges between the two nations; and

"Whereas, the agreement would demonstrate to other nations the benefits of eliminating trade barriers and emulate the essence of the free market system; and

"Whereas, the non-inclusion of the American affiliated Pacific states—the Federated States of Micronesia, American Samoa, Commonwealth of the Northern Marianas, Guam, and the Republics of the Marshall Islands and Palau—is an oversight that should be corrected before final approval; and

"Whereas, by urging support of the agreement and the inclusion of the American affiliated Pacific states, the State of Hawaii joins a growing number of states in favor of free trade between Canada and the entire United States; and

"Whereas, the agreement would further enhance and encourage the State of Hawaii's trade with Canada; now, therefore, be it

"Resolved by the Senate of the Fourteenth Legislature of the State of Hawaii, Regular Session of 1988, the House of Representatives concurring, That the United States Congress is respectfully urged to support the United States-Canada Free Trade Agreement; and be it further

"Resolved, That the Congress of the United States is urged to include the American affiliated Pacific states in the agreement; and be it further

"Resolved, That certified copies of this Concurrent Resolution be transmitted to the President of the United States; the

President of the United States Senate; the Speaker of the United States House of Representatives; Hawaii's Congressional delegation; the Consultant to the Senate of Hawaii in Washington, D.C.; and the Governors of the Federated States of Micronesia, American Samoa, Commonwealth of Northern Marianas, Guam and the Republics of the Marshall Islands, and Palau."

POM-602. A resolution from the Commonwealth of Pennsylvania; to the Committee on Appropriations:

"RESOLUTION

"Whereas, A United States Senate Appropriations subcommittee has proposed a level of funding at $1,087,000,000 which is $380,000,000, or 24% less than the level approved by the United States House of Representatives and 22.5% less than the 1988 funding level; and

"Whereas, This reduction would mean a $23,000,000, loss for Low Income Home Energy Asssistance Program (LIHEAP) funds for the Commonwealth of Pennsylvania; and

"Whereas, Low income citizens pay, on the average, 15% of their income for energy, contrasted with 5% paid by the average American family; and

"Whereas, Any further reduction in LIHEAP funding will create undue hardship for those it is designed to assist by reducing the level of benefits or by reducing eligibility requirements for Pennsylvania households from the present 150% of poverty to a level closer to 110%; and

"Whereas, The oil overcharge moneys presently being used to supplement Federal LIHEAP dollars in Pennsylvania are insufficient to meet the continuing needs of the program; therefore be it

"Resolved, That the Senate of the Commonwealth of Pennsylvania memorialize the Congress of the United States to appropriate funds for the Low Income Energy Assistance Block Grant for the fiscal year 1989 at a level of not less than $1,567,000,000; and be it further

"Resolved, That copies of this resolution be transmitted to the presiding officers of each house of Congress and to each member of Congress from Pennsylvania.

POM-603. A joint resolution adopted by the Legislature of the State of California; to the Committee on Armed Services:

"ASSEMBLY JOINT RESOLUTION No. 77—

"Whereas, The recent announcement by the Air Force Logistics Command at Wright Patterson Air Force Base, Ohio, that civilian employees of the Sacramento Air Logistics Center at McClellan Air Force Base will be given a 4-day furlough is of great concern to the people of California; and

"Whereas, Some 13,000 employees who are scheduled for furlough will be devastated by this unexpected lost income; and

"Whereas, The wages lost because of the furlough will have a rippling effect on the economy of communities around Sacramento and elsewhere in northern California; and

"Whereas, Sacramento and other communities depend on the stability of McClellan Air Force Base, a major employer in northern California; and

"Whereas, the citizens of Sacramento and other Californians have appreciated McClellan Air Force Base civilian employees for their productivity, for their participation in the communities in which they live, and for their valuable contribution to the defense of our nation; now, therefore, be it

"Resolved by the Assembly and Senate of the State of California, jointly, That the Legislature of the State of California supports the civilian employees at McClellan Air Force Base and also supports the California congressional delegation's efforts to seek equity in the disbursement of national defense funds and in the reduction of budget expenditures; and be it further

"Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, to each Senator and Representative from California in the Congress of the United States, and to representatives of McClellan Air Force Base employees affected by the anticipated furlough."

POM-604. A resolution adopted by the Senate of the State of Hawaii; to the Committee on Banking, Housing, and Urban Affairs:

"SENATE RESOLUTION 153

"Whereas, in Hawaii there are a large number of resort-condominium projects which contain apartments used in rental pool and other resort rental operations; and

"Whereas, those apartments have traditionally been resold by their owners solely as real estate through properly licensed real estate brokers and salespersons; and

"Whereas, the laws of this State governing the resale of real estate provide ample protection to purchasers who believe that there has been a misrepresentation or fraud in the resale of a condominium apartment to them; and

"Whereas, the United States Securities and Exchange Commission addressed its Release No. 33-5347, dated January 4, 1973, to developers of condominium and other real properties sold with rental arrangement, but did not address such Release to apartment owners reselling their condominium apartments; and

"Whereas, the United States Court of Appeals for the Ninth Circuit, in deciding the case of *Hocking* v. *Dubois* on February 10, 1988, held that the resale of any apartment in a condominium project which has a rental pool involved the sale of a security; and

"Whereas, the effect of the decision in *Hocking* v. *Dubois* is the application of the whole body of securities law to situations in which the securities laws have not heretofore been applied, creating severe problems for condominium apartment owners, real estate brokers and salespersons, financial institutions which make mortgage loans secured by condominium apartments, and associations of owners; and

"Whereas, the laws governing resale of real estate need to be clarified to avoid this confused result of applying federal and state securities laws to such resales; now, therefore, be it

"Resolved by the Senate of the Fourteenth Legislature of the State of Hawaii, Regular Session of 1988, That this Legislature of the State of Hawaii request the Congress and the Securities and Exchange Commission of the United States of America to pass amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934, and to promulgate rules thereunder, respectively, clarifying the exclusion from the definition of the word "security" any resale of a condominium apartment or other real estate and any rental or other arrangement; and, be it further

Resolved, That a certified copy of this Resolution be transmitted to the Congress of the United States, each member of the delegation of the State of Hawaii to Congress, to the Chairman of the United States Securities and Exchange Commission, the Governor of the State of Hawaii, the Director of the Department of Commerce and Consumer Affairs, the President of the Hawaii Association of Realtors and the President of the National Association of Realtors."

POM-605. A concurrent resolution adopted by the Legislature of the State of Louisiana; to the Committee on Finance:

"SENATE CONCURRENT RESOLUTION No. 95

"Whereas, the issue of mandated social security and related programs for state and local public employees is being considered by the Congress of the United States; and

"Whereas, traditionally, and as felt to be constitutionally required, inclusion of these public employees within the coverage of these programs has been a matter of discretionary decision by state and local governments; and

"Whereas, relying upon the voluntary nature of participation, the government of the state of Louisiana and that of a majority of its local governmental units chose to provide their public employees with excellent state and local pension and other benefit plans which are superior to the federal programs, both in terms of benefits to the participants and their beneficiaries and in terms of the actuarial and financial soundness of the programs; and

"Whereas, to include these employees within the coverage of these inferior programs at this stage, if such inclusion withstands court challenge, will not only substitute their excellent and secure retirement and other plans with inadequate and unsound ones due to the financial inability of the employees and of the governments to participate in both local and federal programs, but will cause the local programs to undergo financial and actuarial disaster due to the accompanying reduction in participation and contributions; therefore, be it

"Resolved, That the Legislature of Louisiana memorializes the Congress of the United States not to mandate social security and related programs for state and local public employees; be further

"Resolved, That a copy of this Resolution be transmitted to the secretary of the United States Senate and the clerk of the United States House of Representatives and to each member of the Louisiana congressional delegation."

POM-606. A concurrent resolution adopted by the Legislature of the State of Louisiana; to the Committee on Finance:

"SENATE CONCURRENT RESOLUTION No. 224

"Whereas, the Supreme Court of the United States reaffirmed in its *South Carolina* v. *Baker* decision that state sovereignty is not protected by the Tenth Amendment of the Constitution of the United States of America, which reserves to the states and to the people powers not delegated to the federal government; and

"Whereas, recent initiatives by Congress of the United States suggest that the Supreme Court was wrong in its view that the federal government would "partake sufficiently of the spirit [of the states], to be disinclined to invade the rights of the individual states or the prerogatives of their governments"; and

"Whereas, Congress has created unfunded mandates and shifted fiscal responsibility for its policies to the states; and

"Whereas, Congress has expanded the breadth of its power over the sovereign states imposing sweeping conditions upon grants, which conditions cannot be supported independently by any provision of the Constitution other than the Spending Clause; and

"Whereas, Congress has interfered increasingly with state fiscal policy by eliminating the deductibility of state and local sales taxes, and increasing the cost of providing state and local services by imposing an alternative minimum tax on supposedly tax-exempt bonds and by otherwise restricting the availability of tax-exempt financing for public purposes; and

"Whereas, Congress increasingly has derogated the states to the role of either private parties or administrative arms of the federal government; and

"Whereas, the Court has held that there is no constitutional protection from having taxes imposed on the interest on state and local bonds, but Congress has until now acknowledged that tax exemptions for state and local general obligation bonds are a legitimate and important method of insuring the soundness of the nation's infrastructure and the availability of essential services; and

"Whereas, Justice O'Connor correctly asserts in her dissent in *South Carolina* v. *Baker*, "If Congress may tax the interest paid on state and local bonds, it may strike at the very heart of state and local government activities"; therefore, be it

"Resolved, That the Legislature of Louisiana memorializes the Congress of the United States to respect the fiscal integrity of state and local governments and to reject the invitation of the Supreme Court to tax state and local bonds, and urge Congress to resolve to reject this potential intrusion into the sovereignty of the states; be it further

"Resolved, That a copy of this Resolution be transmitted to the Secretary of the United States Senate and the Clerk of the United States House of Representatives and to each member of the Louisiana congressional delegation."

POM-607. A joint resolution adopted by the Legislature of the State of Ohio; to the Committee on the Judiciary:

"JOINT RESOLUTION No. 17

"Be it resolved by the General Assembly of the State of Ohio:

"Whereas, Since state regulation of insurance has been and continues to be responsive to the needs and desires of the citizens of the several states and state legislatures; and

"Whereas, The McCarran-Ferguson Act leaves the regulation of the insurance business to the several states under the continuing oversight of Congress; and

"Whereas, Under state regulation, insurance companies have been able to test new products prior to national use; and

"Whereas, Individual states have been able to address particular problems and fashion appropriate responses such as the creation of market assistance programs and joint underwriting associations; and

"Whereas, The different states, due to their size economy, and generally dissimilar needs, require individualized regulation that cannot be met by federal regulation and such federal regulation may be inappropriate, inapplicable, or detrimental to the interests of various states individually; and

"Whereas, Insurance problems often necessitate immediate responses that the states are better equipped to handle; and

"Whereas, Repeal of the McCarran-Ferguson Act could result in an inability of insurance companies to share vital information, and thereby, could force smaller insurance companies from the marketplace; and

"Whereas, Repeal of the McCarran-Ferguson Act would lead to a loss of authority by the states to regulate the insurance business as well as protections afforded to respective citizens; and

"Whereas, The several states independently regulate the insurance industry with the assistance of organizations such as the National Conference of Insurance Legislators, the National Association of Insurance Commissioners, and the Council of State Governments to address common needs and problems; and

"Whereas, The regulation and taxation of the business of insurance is being effectively administered by the states; now therefore be it

"Resolved, That the Ohio General Assembly supports the continuation of state regulation of insurance and urges Congress to reject repeal or amendment of the McCarran-Ferguson Act and any further attempts at federal preemption; and be it further

"Resolved, That the Legislative Clerk of the Ohio House of Representatives transmit duly authenticated copies of this Resolution to the President Pro Tempore of the United States, the Speaker of the United States House of Representatives, the two United States Senators from Ohio, each member of the United States House of Representatives from Ohio, and the President of the United States."

POM-608. A resolution adopted by the Senate of the State of Hawaii to the Committee on Labor and Human Resources.

"SENATE RESOLUTION No. 170

"Whereas, the National Network of Runaway and Youth Services is a national organization, the purpose of which is to develop the nation's capacity to increase, insure, and promote the personal, social, economic, educational, and legal options, and resources available to runaway and homeless youth and other at-risk youth, their families, and their communities; and

"Whereas, at its 1987 Symposium in Washington, D.C., the Network adopted a resolution expressing its commitment to work toward the development of a National Youth Policy and the enactment of a Young Americans Act by the year 1990, both of which are being spearheaded by the National Collaboration for Youth and the National Youth Policy Steering Committee; and

"Whereas, there are currently two bills in the United States Congress, H.R. 1003 and S. 476, which embody the Young Americans Act as supported by the aforementioned national youth organizations; and

"Whereas, these bills would provide assistance in the development of new or improved programs to help young persons through grants to the states for community planning, services, and training; establish within the United States Department of Health and Human Services an operating agency to be designated the Administration on Children, Youth, and Families; and provide for a White House Conference on Young Americans; and

"Whereas, the children and youth of America are the nation's most valuable resource and it is the joint and several duty and responsibility of the federal government and the states and their political subdivisions to provide assistance to ensure that their basic needs are met; now, therefore; be it

"Resolved by the Senate of the Fourteenth Legislature of the State of Hawaii, Regular Session of 1988, That Hawaii's congressional delegation is urged to actively support H.R. 1003 and S. 476 as these measures are considered in the respective houses; and, be it further

"Resolved, That the Congress of the United States is respectfully urged to enact the Younger Americans Act of 1987 as embodied in either H.R. 1003 or S. 476; and, be it further

"Resolved, That certified copies of this Resolution be transmitted to each member of Hawaii's Congressional Delegation, the President of the United States Senate, and the Speaker of the United States House of Representatives."

POM-609. A resolution adopted by the Christian Life Commission of the Southern Baptist Convention favoring child care legislation; to the Committee on Labor and Human Resources.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. CRANSTON, from the Committee on Veterans' Affairs, with an amendment in the nature of a substitute and an amendment to the title:

S. 2011. A bill to increase the rate of Veterans' Administration compensation for veterans with service-connected disabilities and dependency and indemnity compensation for the survivors of certain disabled veterans (Rept. 100-439).

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. PRYOR:

S. 2674. A bill to improve contracting procedures for procurements of advisory and assistance services by the Federal Government; to improve public access to information concerning such contracts and other contracts, and for other purposes; to the Committee on Governmental Affairs.

By Mr. DASCHLE (for himself, Mr. KERRY, Mr. CHAFEE, Mr. WIRTH, Mr. HARKIN, Mr. PRESSLER, and Mr. BRADLEY):

S. 2675. A bill to amend title 38, United States Code, to provide certain service-connected presumptions in the case of veterans who performed active service in Vietnam during Vietnam era; to make improvements in the composition of the Advisory Committee on Special Studies Relating to the Possible Long-term Health effects on Phenoxy Herbicides and Contaminants and the procedures used by such advisory committee, and for other purposes; to the Committee on Veterans' Affairs.

By Mr. MURKOWSKI (for himself and Mr. FOWLER):

S. 2676. A bill to improve management of lands on Admiralty Island, AK; to the Committee on Energy and Natural Resources.

By Mr. HELMS (for himself and Mr. HEFLIN):

S.J. Res. 354. A joint resolution to designate November 6 through 12, 1988, as "National Farm Broadcasters Week"; to the Committee on the Judiciary.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. PRYOR:

S. 2674. A bill to improve contracting procedures for procurements of advisory and assistance services by the Federal Government; to improve public access to information concerning such contracts and other contracts, and for other purposes; to the Committee on Governmental Affairs.

CONSULTANT REGISTRATION AND REFORM ACT

Mr. PRYOR. Mr. President, today I am introducing a bill which some of my colleagues may recognize: the Consultant Registration and Reform Act of 1988. I introduced a very similar piece of legislation 7 years ago. Unfortunately, that bill did not reach the Senate floor. However, I believe that the time has come for us to reexamine this issue and look very carefully at the Government's use of consultants and the lack of controls over their use.

The Federal Services Subcommittee has held two hearings this year on Government consultants. At the first hearing, the Office of Management and Budget [OMB] testified that they do not know exactly how much money the Government spends on consulting services or what services consultants are providing the Government.

At the second hearing, we concentrated on the consultants used by the Department of Defense [DOD]. We heard testimony from witnesses who had participated in the DOD procurement system and had valuable insights into the problems and strengths of the system. We also heard from the DOD deputy inspector general and the Director of the Defense Contract Audit Agency who described their abilities or inabilities to monitor the use and costs of consultants.

These hearings have painted a vivid picture of the way consultants operate. As has been clearly demonstrated by the current so-called defense scandal, consultants work not just directly for agencies, but for prime Government contractors as well. In addition, they often work for private companies who have various relationships with our Government, as well as foreign nations.

This is not just true of the Defense Department. In 1980, in the course of an investigation into the use of consultants by the Department of Energy, we discovered a consultant who was helping the Department plan their long-term oil reserve strategy. At the very same time, this same consultant was working on the other side of the street for OPEC, the group which brought us the energy crisis. The most outrageous part of that discovery was that the Department of Energy was not even aware of this dual role until we informed them.

That was not an isolated incident and my hearings have shown that nothing has changed since then. These concerns have led me to draft the legislation I am introducing today. This bill is a sunshine bill. Its purpose is not to stop agencies' use of consultants but to ensure that there is full disclosure so that agencies are not surprised by a consultant's other clients and to protect the Government from possible conflicts of interest.

Mr. President, my bill draws from OMB's Circular A-120 which regulates the Government's use of consultants and the President's Cabinet Council on Management and Administration study on consultants. Consulting services are defined as "advisory and assistance services" which includes management and professional services; the conduct and preparation of studies, analyses, and evaluation; and engineering and technical services.

The legislation introduced today would: First, require requests for proposals for those contracts worth $25,000 or more to be published in the "Commerce Business Daily" at least 30 days prior to the award of the contract;

Second, create monitoring requirements on consulting contracts. For example, before the award of a consulting contract worth more than $25,000 which is based on an unsolicited proposal, the contracting official must transmit a written notice of the proposed contract and the justification for that contract to the agency's Inspector General. An unsolicited proposal is an idea for a contract or work which comes directly from the consultant. The agency has not requested it, yet the consultant thinks that it is such a good idea that he sends it right to the agency. If an agency decides to take the consultant up on his idea, I think it is imperative that the agency justify why it needs that contract, since it didn't seem important enough to the agency to put out a "Request for Proposals;"

Third, require that each report submitted to an agency by a consultant, and each agency report which is substantially based on a consultant report, be labeled as a consultant report. I believe that it is very important for this information to be readily available and for people to realize when an agency report is actually a consultant report. This point was driven home during our second consultant hearing. The DOD directive which regulates agency use of consultants is in large part lifted verbatim from a report written by a consultant for the Navy. Now, I think that the DOD directive is well written, however, if it were not for some investigating on my subcommittee's part, we would not have known that a consultant was responsible for writing a large part of the directive which governs DOD consultant use;

Fourth, require the agency to prepare an evaluation of the contractor's performance which would include: an assessment of the performance judged against the terms of the contract, a description of any differences between the actual cost and time for completion of the contract and the estimated cost and time for completion of the contract, and the purposes for which the consultant service was procured. The contractor will have an opportunity to respond to the agency evaluation;

Fifth, require that both agency budget submissions and the President's budget contain itemized statements regarding the amounts that each agency is requesting for consulting services. It also amends section 1114, title 31, to require that agency heads provide the Federal procurement data system with information on consulting contract costs which are embedded in larger procurement contracts. This will allow us for the first time to get a complete picture of the Government's consultant spending;

Sixth, require that agencies compile, and make available to the public, a list of all the contracts which they had entered into for the previous fiscal year; and

Seventh, create a registration requirement for any consultant doing work directly for the Government or doing work for a contractor who is working for the Government. A contract for consulting services could not be awarded unless the consultant complies with the registration requirement and the agency's general counsel determines that the consultant does not have a conflict of interest that could be prejudicial to the interests of the United States. A consultant would be required to provide the following information: Name and business address; and description of the services provided by the consultant; a list of all public and private clients, both foreign and domestic; a description of the services furnished to each client; a statement as to whether the consultant has ever been convicted of a felony or whether the consultant is under indictment; and a statement as to whether the consultant is currently suspended or debarred by the Government.

I believe that this package of disclosure and registration requirements will ensure that the Office of Management and Budget will no longer have to come before a Senate committee and tell Congress that they do not know how much is being spent on consultants. The bill will also guarantee that the Deputy Inspector General of DOD will not have to come before Congress

and say that a convicted felon could be working on a defense contract and the IG would have no way of knowing.

As I said before, this bill is not intended to be burdensome or eliminate the use of consultants. The Federal Government should be able to use the best and the brightest talent available in performing its duties. However, when that talent is also working for the private sector, we should know about it. This bill is intended to shed some sunshine on the all too often shadowy world of consultants.

Mr. President, I urge my colleagues to look favorably upon this legislation and hope that we will have some support from our colleagues, and certainly a host of cosponsors who want to require sunshine to be placed into the shadowy world of consultants used by the Federal Government.

Mr. President, I ask unanimous consent that the legislation that I am introducing today be printed in the RECORD.

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

S. 2674

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 "Consultant Registration and Reform Act of 1988".

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) Federal procurement officials have not consistently complied with procurement laws, regulations, and management guidelines in awarding contracts for the procurement of advisory and assistance services.

(2) Procurement practices relating to the procurement of advisory and assistance services do not (A) adequately provide for full and open competition, (B) adequately prevent conflicts of interest, or (C) adequately provide for public disclosure of the use and role of contractors who provide such services and studies.

(3) Information regarding the Federal Government's use of advisory and assistance services is not maintained in a manner that results in helpful or meaningful information being available to Congress, the executive branch, or the public.

(4) Federal Government agencies have not consistently complied with the requirement in section 1114 of title 31, United States Code, to include in budget justifications submitted to Congress the amounts requested for consulting services, and the Inspector General (and comparable officials) of such agencies have not consistently complied with the requirement in such section to submit to Congress certain evaluations relating to contracts for consulting services.

(5) Full and open competition in the Federal procurement process is consistent with the basis of the free enterprise system and enables the Federal Government to obtain maximum value for Federal procurement expenditures.

(6) The costs of performing governmental functions are borne by the taxpayer regardless of whether the functions are performed in the private or public sector.

(7) The integrity of the governmental process, especially when advisory and assistance services are used in the performance of governmental functions, requires full public disclosure of the use and role of contractors who perform such functions.

(8) Legislation and oversight is necessary in order to establish and implement consistent policies and practices needed for procurement of advisory and assistance services.

SEC. 3. POLICY.

It is the policy of the United States that—

(1) Federal Government policymaking and decisionmaking functions should be performed by accountable Federal Government officials;

(2) the procurement of advisory and assistance services should be carried out in compliance with applicable procurement laws and regulations; and

(3) Federal Government functions should be performed using the most economical means available while recognizing the inherently governmental nature of certain activities.

SEC. 4. DEFINITIONS.

In this Act:

(1) The term "agency" has the same meaning as is provided in section 552(f) of title 5, United States Code.

(2) The term "contract" means (A) any agreement, including any amendment to or modification of an agreement, entered into by the Federal Government for the procurement of property or services, and (B) any letter authorizing the provisions of property or services to the United States prior to a specification of the compensation for the provision of such property or services.

(3) The term "contractor" means any person, including, in the case of a business organization, any affiliate of such organization and including any consultant and any organization of consultants, which is a party to a contract with the Federal Government.

(4) The term "report" means a written study, plan, evaluation, analysis, manual, or similar document, in draft or final form, which is prepared by a contractor pursuant to a contract with an agency and which is submitted to such agency or is submitted on behalf of such agency to any other agency. Such term does not include a billing document, invoice, or other routine business transmittal made with respect to the contract.

(5)(A) The term "advisory and assistance services" means those services acquired by an agency from any nongovernmental source, by contract, to support or improve agency policy development, decisionmaking, management, and administration, or to support or improve the operation of management systems.

(B) Such term includes—

(i) management and professional services;

(ii) the conduct and preparation of studies, analyses, and evaluations; and

(iii) engineering and technical services.

(6) The term "management and professional services" means professional services relating to the management and control of programs, including—

(A) management data collection services;

(B) policy review and development services;

(C) program evaluation services;

(D) program management support services;

(E) program review and development services;

(F) systems engineering services; and

(G) other management and professional services of a similar nature which are not related to any specific program.

(7) The term "studies, analyses, and evaluations" includes the following:

(A) Any analysis or other examination of a subject which—

(i) is undertaken to provide greater understanding of relevant issues and alternatives regarding organizations, policies, procedures, systems, programs, and resources; and

(ii) leads to conclusions or recommendations with respect to planning, programming, budgeting, decisionmaking, or policy development.

(B) With respect to a program of an agency, any study initiated by or for the program management office of the agency.

(C) A cost-benefit analysis, a data analysis (other than a scientific analysis), an economic study or analysis, an environmental assessment or impact study, a legal or litigation study, a legislative study, a regulatory study, a socioeconomic study, and a feasibility study which does not relate to construction.

(D) A geological study, a natural resource study, a scientific data study, a soil study, a water quality study, a wildlife study, and a general health study.

(E) Any similar study or analysis.

(8) The term "engineering and technical services" means the furnishing of advice or training to personnel in order to ensure the efficient and effective operation or maintenance of equipment and associated software by such personnel.

SEC. 5. PUBLIC NOTICE OF CONTRACTS FOR ADVISORY AND ASSISTANCE SERVICES.

(a) IN GENERAL.—An agency may not award a contract for advisory and assistance services estimated to cost more than $25,000 unless a notice describing such contract is published in the Commerce Business Daily at least 30 days before the award.

(b) EXCEPTION.—The head of an agency is not required by this subsection to transmit to the Secretary of Commerce a notice with respect to a contract for advisory and assistance services if the agency's need for such services is of such an unusual and compelling urgency that the United States would be seriously injured as a result of delaying the award of the contract until such a notice has been published.

(c) INAPPLICABILITY OF OTHER NOTICE EXCEPTIONS.—No exception to a contract notice requirement provided in any other provision of law shall apply to a notice required under subsection (a).

SEC. 6. MONITORING PROCUREMENTS OF ADVISORY AND ASSISTANCE SERVICES.

(a) CONTRACT AWARDS.—(1) Before an employee of an agency awards a contract for advisory and assistance services for an amount of $25,000 or more on the basis of an unsolicited proposal, such employee shall transmit to the Inspector General of such agency or a comparable official, or in the case of an agency which does not have an Inspector General or a comparable official, the head of the agency or his designee, a written notice of the proposed contract award. The notice shall include a description of the contract and the justification for the contract.

(2) Not later than 30 days after the date on which an employee of an agency awards a contract for advisory and assistance services for an amount of $25,000 or more, such employee shall transmit to the Inspector General of such agency or a comparable official of the agency, or in the case of an agency which does not have an Inspector General or a comparable official, the head

of the agency or his designee, a justification for the award of such contract.

(b) CONTRACT MODIFICATIONS.—Whenever an employee of an agency modifies a contract for advisory and assistance services and the modification of such contract increases the amount of the contract by at least $25,000, such employee shall transmit to the Inspector General of such agency or a comparable official of the agency, or in the case of an agency which does not have an Inspector General or a comparable official, the head of the agency or his designee, a written notice of the modification. The notice shall include—

(A) a description of the original contract;

(B) a description of the modification; and

(C) the justification for the modification.

SEC. 7 IDENTIFICATION OF REPORTS PREPARED BY CONTRACTORS.

Each report submitted to an agency by a contractor, and each agency report which is substantially derived from or includes substantial portions of any such contractor report, shall include the following information:

(1) The name and business address of the contractor.

(2) The total amount of the contract.

(3) A statement of whether the contract was awarded using competitive or noncompetitive procedures.

(4) The name of the office which authorized the award of the contract.

(5) In any case in which a contractor uses a subcontractor to prepare any portion of the report submitted by the contractor, the name and business address of the subcontractor and the amount paid to the subcontractor for preparation of the report.

(6) The names of all employees of the contractor, and any subcontractor, who substantially contributed to the preparation of the report submitted by the contractor.

SEC. 8. EVALUATION OF CONTRACTOR PERFORMANCE.

(a) EVALUATION.—Within 90 days after the completion of the performance of a contract for advisory and assistance services, the head of the agency that awarded the contract shall prepare a written evaluation of the contractor's performance. An evaluation is not required under this subsection in the case of a contract that does not exceed $25,000.

(b) CONTENT OF EVALUATION.—An evaluation of contractor performance under subsection (a) shall include the following information:

(1) A summary description of the performance of the contractor.

(2) An assessment of the performance of the contractor based on the terms and specifications of the contract performed.

(3) Any differences between the cost of the contract and the time for completion of the contract as provided in or estimated for such contract at the time of contract award and the actual cost of the contract and the actual time for completion of the contract, respectively, and a statement of the reasons for any such difference.

(4) The purposes for which and the manner in which the services procured and any reports received under such contract are used by the agency.

(c) RECORD OF EVALUATION.—The head of an agency shall include each evaluation required by subsection (a) in the records maintained by the agency in connection with the contract to which the evaluation relates, and shall maintain copies of all such evaluations in one location in the agency that is readily accessible to the public.

(d) CONTRACTOR'S RIGHTS.—After preparing an evaluation of contractor performance under this section, the head of an agency shall promptly transmit to the contractor a copy of the evaluation together with a notice stating that the contractor may, within 10 days after receiving such copy, transmit comments to the agency concerning such evaluation. Any such comments shall be made a part of the evaluation as a supplement.

SEC. 9. BUDGET INFORMATION.

(a) AGENCY SUBMISSIONS.—The head of each agency shall include with the request for regular appropriations for each fiscal year submitted to the President pursuant to section 1108 of title 31, United States Code, an itemized statement of the amounts requested by the agency for procurement of advisory and assistance services in such fiscal year. The statement shall identify such amounts according to the same subfunctional categories to be used by the President in the submission of the budget for such fiscal year pursuant to section 1105 of title 31, United States Code, and, within each such category, shall identify such amounts according to classifications for procurement of—

(1) management and professional services;

(2) studies, analyses, and evaluations;

(3) engineering and technical service; and

(4) other advisory and assistance servcies.

(b) BUDGET SUBMISSIONS.—The budget submitted by the President to Congress for each fiscal year under section 1105 of title 31, United States Code—

(1) shall set forth separately, within each subfunctional category used in such budget, requests for new budget authority for, and estimates of outlays by, each agency for procurement of advisory and assistance services; and

(2) within each such category, shall identify such requests and estimates according to classifications for procurment of—

(A) Management and professional servcies;

(B) studies, analyses, and evaluations;

(C) engineering and technical service; and

(D) other advisory and assistance servcies.

(c) JUSTIFICATIONS FOR REVISIONS OF BUDGET REQUESTS.—Within 60 days after the President transmits to Congress a revision of any request for new budget authority or of any estimate of outlays included in the budget for any fiscal year pursuant to subsection (b), the head of the agency affected by such revision shall prepare and transmit to Congress an analysis of such revised request or of such revised estimate, as the case may be, and a statement justifying the need for such revised request or such revised estimate.

SEC. 10. FEDERAL PROCUREMENT DATA SYSTEM.

Section 1114 of title 31, United States Code, is amended by adding at the end the following:

"(c)(1) The head of each agency shall provide the Federal Procurement Data System timely, complete, and accurate information on (A) contracts awarded by such agency primarily for the procurement of consulting services, and (B) all procurements of consulting services under contracts awarded by such agency not primarily for the procurement of consulting services.

"(2) The information provided under paragraph (1) shall include the amounts expended for the procurement of consulting services specified separately for contracts described in clause (A) of such paragraph and for procurements described in clause (B) of such paragraph.

"(3) This subsection shall not apply to a contract for consulting service, or any data, reports, or other material pertaining to such services, if the contract—

"(A) involves sensitive foreign intelligence or foreign counterintelligence activities;

"(B) involves sensitive law enforcement investigations; or

"(C) is classified under the national security classification system.

"(d) In this section:

"(1) The term 'consulting services' includes advisory and assistance services.

"(2)(A) The term 'advisory and assistance services' means those services acquired by an agency from any nongovernmental source, by contract, to support or improve agency policy development, decisionmaking, management, and administration, or to support or improve the operation of management systems.

"(B) Such term includes—

"(i) management and professional services;

"(ii) the conduct and preparation of studies, analyses, and evaluations; and

"(iii) engineering and technical services.

"(3) The term 'management and professional services' means professional services relating to the management and control of programs, including—

(A) management data collection services;

(B) policy review and development services;

(C) program evaluation services;

(D) program management support services;

(E) program review and development services;

(F) systems engineering services; and

(G) other management and professional services of a similar nature which are not related to any specific program.

"(4) The term 'studies, analyses, and evaluations' includes the following:

"(A) Any analysis or other examination of a subject which—

"(i) is undertaken to provide greater understanding of relevant issues and alternatives regarding organizations, policies, procedures, systems, programs, and resources; and

"(ii) leads to conclusions or recommendations with respect to planning, programming, budgeting, decisionmaking, or policy development.

"(B) With respect to a program of an agency, any study initiated by or for the program management office of the agency.

"(C) A cost-benefit analysis, a data analysis (other than a scientific analysis), an economic study or analysis, an environmental assessment or impact study, a legal or litigation study, a legislative study, a regulatory study, a socio-economic study, and a feasibility study which does not relate to construction.

"(D) A geological study, a natural resource study, a scientific data study, a soil study, a water quality study, a wildlife study, and a general health study.

"(E) Any similar study or analysis.

"(5) The term 'engineering and technical services' means the furnishing of advice or training to personnel in order to ensure the efficient and effective operation or maintenance of equipment and associated software by such personnel.".

SEC. 11. PUBLIC AVAILABILITY OF INFORMATION ON CONTRACTS.

(a) LISTS AND JUSTIFICATION.—(1)(A) Not later than November 1, 1989, the head of each agency shall compile a list of all con-

tracts awarded by the agency during fiscal year 1988 and a separate list of all contracts entered into by the agency for which performance has not been completed at the time of the preparation of such list. Each list shall be updated, on a quarterly basis, with information on contracts awarded since the list was prepared.

(B) Each list of contracts compiled and updated by the head of an agency under subparagraph (A) shall include, for each such contract, the following information:

(i) The contract identification number assigned by the agency.

(ii) The contractor's name.

(iii) The date of award and the estimated completion date.

(iv) The original and current amounts to be paid by the agency under the contract.

(v) A brief description of the work to be performed.

(2) The head of each agency shall maintain a written justification for each contract awarded by the agency.

(3) The head of each agency shall permit the public to inspect and make copies of the list prepared and updated under paragraph (1) and the justifications maintained under paragraph (2). The agency may impose a reasonable charge for the costs of making such copies.

(b) OTHER INFORMATION.—Except as otherwise provided by law, the following information shall be available to the public upon request:

(1) Copies of contracts awarded by an agency.

(2) In the case of a contract for advisory and assistance services, the name and qualifications of each person designated in such contract to perform such contract.

(3) In the case of a contract for advisory and assistance services awarded on a sole source basis, the justification for awarding such contract on a sole source basis.

SEC. 12. PROHIBITIONS AND REQUIREMENTS RELATING TO REGISTRATION OF CONSULTANTS.

(a) PROHIBITED CONTRACT AWARDS INVOLVING CONSULTANTS.—(1) The head of an agency may not award a contract for the procurement of advisory and assistance services to a consultant unless—

(A) such consultant complies with the registration requirements of this section; and

(B) the General Counsel of the agency has reviewed the information registered by such consultant and such other information as may be available to the head of the agency and determined that, with respect to such contract, the consultant does not have a conflict of interest that could be prejudicial to the interests of the United States.

(2) The head of an agency may not award a contract to any person submitting an offer to such agency unless the offeror certifies that each consultant that has furnished advice, information, direction, or assistance to the offeror in support of the preparation or submission of the offer has complied with the registration requirements of this section.

(b) REGISTRATION REQUIREMENTS.—(1) A consultant submitting an offer for a contract referred to in subsection (a)(1) shall register with an officer or employee designated by the head of the agency awarding such contract. The consultant shall register within such time after submitting the offer as the head of that agency shall prescribe in regulations.

(2) A consultant retained by a person in connection with the preparation or submission of an offer for a Federal Government contract shall register with an officer or employee designated by the head of the agency awarding such contract. The consultant shall register within such time after the retention of such consultant as the head of that agency shall prescribe in regulations.

(3) A consultant who is registered with an agency under this subsection with respect to one contract shall update the registered information whenever the consultant submits an offer for another contract of such agency (if such contract is for the procurement of advisory and assistance services) and whenever the consultant is retained by a person in connection with the preparation or submission of an offer for another contract of such agency. The consultant shall update such information within such time as the head of that agency shall prescribe in regulations.

(c) INFORMATION REQUIRED.—A person registering as a consultant under this section shall furnish the following information:

(1) The name and address of the consultant.

(2) A description of the nature of the services furnished by the consultant in the normal course of the consultant's business.

(3) A list of all public and private clients for which the consultant has furnished advisory and assistance services, including foreign and domestic clients.

(4) A description of the services furnished each such client by the consultant.

(5) A statement of whether the consultant has ever been convicted of a felony and whether, at the time of the registration, there is pending any indictment or information charging the consultant with a felony.

(6) A statement of whether, at the time of the registration, the consultant is ineligible, by reason of suspension or debarment, to be awarded a contract by the Federal Government.

(7) A certification that, at the time of the registration, the consultant and all employees of the consultant are not in violation of any applicable requirement set out in, and are not engaged in any conduct prohibited by, sections 2397, 2397a, 2397b, and 2397c of title 10, United States Code, any similar provision of law, and any contract term required by such section 2397c (or any similar provision of law).

(d) The Inspector General of each agency or, in the case of an agency that does not have an Inspector General, the head of such agency shall monitor the compliance of consultants with the registration requirements of this section and shall submit to Congress an annual report containing a discussion of the extent of such compliance. The first report of each agency shall be submitted not later than one year after the date of the enactment of this Act.

(e) Suspension and debarment proceedings shall be initiated in the case of each consultant who fails to comply with the registration requirements of this section.

(f) In this section, the term "consultant" means any person (including, in the case of a business organization, any affiliate of such organization) that—

(1) furnishes or offers to furnish advisory and assistance services; or

(2) furnishes advice, information, direction, or assistance to any other person in support of the preparation or submission of an offer for a Federal Government contract by such other person.

SEC. 13. EXCEPTIONS.

Sections 5, 6, 7, 8, 9, and 11 shall not apply to a contract for advisory and assistance services, or any data, reports, or other material pertaining to such services, if the contract—

(1) involves sensitive foreign intelligence or foreign counterintelligence activities;

(2) involves sensitive law enforcement investigations; or

(3) is classified under the national security classification system.

SEC. 14. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect 180 days after the date of the enactment of this Act.

Mr. DASCHLE (for himself, Mr. KERRY, Mr. CHAFEE, Mr. WIRTH, Mr. HARKIN, Mr. PRESSLER, and Mr. BRADLEY)

S. 2675. A bill to amend title 38, United States Code, to provide certain service-connection presumptions in the case of veterans who performed active service in Vietnam during the Vietnam era; to make improvements in the composition of the Advisory Committee on Special Studies Relating to the Possible Long-term Health Effects of Phenoxy Herbicides and Contaminants and the procedures used by such advisory committee, and for other purposes; to the Committee on Veterans' Affairs.

VETERANS' AGENT ORANGE AND SERVICE DISABILITIES ACT

Mr. DASCHLE. Mr. President, today Senator JOHN KERRY and I are introducing the Veterans' Agent Orange and Vietnam Service Disabilities Act of 1988. This legislation establishes a presumption of service connection for Vietnam veterans suffering from non-Hodgkin's lymphoma and soft-tissue sarcoma, enabling them to receive disability compensation from the Veterans' Administration. The bill also establishes a nonpolitical procedure for adding other agent orange-related diseases to the list of those to be compensated when, warranted by the scientific evidence, and ensure that the Veterans' Administration will continue to study Vietnam service-related disabilities and provide outreach services for veterans affected by their exposure to agent orange.

Our bill addresses concerns raised by veterans and groups representing veterans, by scientists, researchers, and physicians, and by our colleagues in the Senate.

We have consulted those in the scientific community, who have given us an understanding of the state of knowledge about the effect of toxic herbicides and their contaminants, as well as educating us about the utility—and limitations—of epidemiology.

We have consulted veterans and veterans' groups, who have informed us of the problems affecting Vietnam veterans throughout the country, and who have made us aware of the need for continued study of the Vietnam experience and its human cost.

We have consulted many of our colleagues in the Congress, whose views

ranged from those who feel that the Government of the United States needs to do much more to show its gratitude for the sacrifices of those who served in Vietnam, to those who argue that our support for veterans is already generous and should be expanded only after the presentation of definitive evidence of unmet veterans' needs.

As a result of these extensive discussions, we have made several changes in our original bill. For example, we removed provisions of the bill that were objectionable to some of those with whom we consulted in cases where their logic was sound and their arguments persuasive.

We added provisions when those with whom we consulted made cogent and convincing arguments that our bill did not go far enough, as when the veterans' groups pointed out the need for dependable outreach services from the Veterans' Administration for those suffering disorders related to their Vietnam service. These groups also made it clear that research about the effects of the Vietnam experience must not cease, and our bill reflects those concerns.

We made the bill flexible, when the scientific community told us that suggestive evidence about the link between Vietnam service and agent orange and a number of other illnesses. For example, the association between lung cancer, immune suppression disorders, and birth defects and exposure of agent orange has not been as widely discussed or researched as the link between non-Hodgkin's lymphoma and soft-tissue sarcoma and agent orange. The bill thus creates a procedure for allowing additions to the list of compensable disorders if, on the recommendation of independent scientific authorities, the record becomes more complete and justifies a presumption of service connection and compensation from the Veterans' Administration.

After considering this diverse set of views, we wrote a bill that is comprehensive, compassionate, consistent with available scientific evidence, and flexible. It is a carefully developed compromise and a reasonable approach to an important problem affecting millions of America's Vietnam veterans. It is also a bill which I'm proud to note has received endorsements from the American Legion, Veterans of Foreign Wars, and Vietnam Veterans of America.

Senator KERRY and I plan to offer this bill in the form of an amendment in the future. This bill should augment the provisions offered by the Senate Veterans' Affairs Committee in S. 2011, the veterans' compensation bill.

I want to acknowledge with gratitude the efforts of the Veterans' Affairs Committee, for S. 2011 is a step in the right direction and an important recognition of the need to move forward on the agent orange issue. However, S. 2011 provides only temporary disability compensation for non-Hodgkin's lymphoma, and no compensation for soft-tissue sarcoma. Disability payments for non-Hodgkin's lymphoma could be suspended arbitrarily by the Veterans' Administration—the same Veterans' Administration that has refused to grant compensation to any agent orange victims—6 months after the release of the selected cancers study now being conducted by the Centers for Disease Control. The bill also does not create a procedure for adding diseases to the list of compensable disabilities and is silent on the question of additional study of disorders associated with the Vietnam experience. In short, the committee bill is an excellent start, but is simply too limited to deal with the broad range of legitimate concerns raised by Vietnam veterans about agent orange and their Vietnam experience.

Approximately 25 years have passed since American soldiers in Vietnam were first exposed to agent orange. The evidence of the damaging effects of the herbicide has accumulated gradually, but convincingly. And while the accumulation of evidence has not ended, it is clear that the time for compensating veterans damaged by agent orange and the Vietnam experience has arrived. Our bill recognizes this fact, and, at the same time, recognizes the complexity of the issue and the ambiguities existent in the agent orange record. Our need for additional knowledge dictates that we continue our search for knowledge of Vietnam's impact, and our compassion, and our debt to veterans dictates that we offer tangible recognition of their sacrifices.

Mr. President, I ask unanimous consent that letters of support from the American Legion, Veterans of Foreign Wars, and Vietnam Veterans of America, as well as the full text of the Veterans Agent Orange and Vietnam Service Disabilities Act of 1988, be printed in the RECORD at this point.

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

S. 2675

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 "Veterans' Agent Orange and Vietnam Service Disabilities Act of 1988".

TITLE I—AGENT ORANGE PRESUMPTIONS, RESEARCH, AND OUTREACH MATTERS

SEC. 101. FINDINGS.

Congress makes the following findings:

(1) There is sufficient scientific evidence and experience to warrant a presumption that certain diseases suffered by veterans of service in the Republic of Vietnam during the Vietnam era are connected to such service.

(2) There is sufficient scientific evidence to warrant a presumption that exposure to dioxin or other toxic agents in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era causes a range of significant adverse health effects associated with carcinogenicity, reproductive toxicity, and immunotoxicity in humans.

(3) The Administrator of Veterans' Affairs has determined that it is reasonable to presume that any veteran who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era was exposed to dioxin and other toxic agents in herbicides during such service.

(4) It is also reasonable to presume that any veteran who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era was exposed, during such service, to other causes of disease.

SEC. 102. PRESUMPTION RELATING TO CERTAIN DISEASES.

(a) PRESUMPTION OF SERVICE CONNECTION.—Section 312 of title 38, United States Code, is amended by adding at the end the following new subsections:

"(c) For the purposes of section 310 of this title, in the case of any veteran who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era, the following diseases shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service:

"(1) Non-Hodgkin's lymphoma.

"(2) Soft-tissue sarcoma.

"(d)(1) For the purposes of section 310 of this title, in the case of any veteran who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era and who, during such service, was exposed to dioxin or any other toxic agent in an herbicide used in support of United States and allied military operations in the Republic of Vietnam, each disease described in paragraph (2) of this subsection shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service.

"(2) A disease referred to in paragraph (1) of this subsection is any disease that—

"(A) is determined by the Administrator to be reasonably associated with the known biological effects of exposure to dioxin or any other toxic agent referred to in such paragraph; and

"(B) is listed in regulations which the Administrator shall prescribe for the purpose of this subsection.

"(3)(A) For the purpose of this subsection, a veteran who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era and who has a disease referred to in paragraph (1) of this subsection shall be presumed to have been exposed during such service to dioxin or another toxic agent referred to in such paragraph, unless—

"(i) the results of credible and reliable laboratory tests indicate that the level of dioxin or other toxic agent in the veteran's serum or adipose tissue is within or below the range of serum or adipose dioxin or other toxic agent levels considered normal for veterans who performed active military, naval, or air service during the Vietnam era but did not perform any such service in the Republic of Vietnam; and

"(ii) the service records of such veteran indicate that the veteran did not participate extensively in tactical operations in Vietnam.

"(B) Notwithstanding section 313 of this title, the presumption provided in subparagraph (A) of this paragraph may not be rebutted except as provided in such subparagraph. The Veterans' Administration shall have the burden of proof (including the burden of nonpersuasion) for rebutting such presumption.

"(C) The Administrator may require a veteran to submit to a blood test in order to determine the level of dioxin or other toxic agent in the veteran's serum or adipose tissue for the purpose of this paragraph.

"(4)(A) The Administrator shall enter into an agreement with the National Academy of Sciences or, if the National Academy of Sciences does not enter into such an agreement, with another appropriate nonprofit private scientific organization to determine, for the purpose of paragraph (3)(A) of this subsection, the normal range of serum or adipose dioxin or other toxic agent levels referred to in such paragraph.

"(B) In determining the normal range of serum or adipose dioxin or other toxic agents for the purpose of paragraph (3)(A) of this subsection, the National Academy of Sciences or other organization referred to in subparagraph (A) of this paragraph, as the case may be, shall consider—

"(i) the results of scientific tests that reasonably relate the chemical composition of dioxin or other toxic agent in serum or adipose tissue to the chemical composition of dioxin or other toxic agents in herbicides referred to in paragraph (1) of this subsection;

"(ii) the half-life of dioxin and such other toxic agents; and

"(iii) variations in the susceptibility of individuals to absorption of dioxin and such other toxic agents.

"(5) The Administrator may extend the applicability of paragraph (1) of this subsection to the case of any veteran who, during the performance of active military, naval, or air service outside the Republic of Vietnam during the Vietnam era, was exposed to dioxin or any other toxic agent referred to in such subsection.".

(b) APPLICABILITY OF PRESUMPTION.—If, in the case of any veteran, compensation under chapter 11 or disability and indemnity compensation under chapter 13 of title 38, United States Code, is awarded to any person on the basis of a presumption provided in subsection (c) or (d) of section 312 of such title (as added by subsection (a)), such award shall take effect on the date (whether before, on, or after the date of the enactment of this Act) on which the Veterans' Administration first received an application in which such person claimed entitlement to such compensation on the basis of the disability or death of such veteran resulting from a disease referred to in such subsection (c) or (d).

SEC. 103. DISEASES ASSOCIATED WITH EFFECTS OF EXPOSURE TO CERTAIN TOXIC AGENTS.

(a) IN GENERAL.—(1) Subchapter II of chapter 11 of title 38, United States Code, is amended by inserting after section 312 the following new section:

"§312A. Procedures for determining diseases associated with effects of exposure to certain toxic agents

"(a)(1) Subject to subsection (c) of this section, the Administrator shall enter into an agreement with an appropriate nonprofit private scientific organization that requires such organization—

"(A) to conduct, with the assistance of and subject to the review of a peer review panel of recognized experts in toxicology, medicine, epidemiology, and related fields, a survey of all completed and ongoing scientific studies of the effects that dioxin and other known toxic agents in the herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era have on humans or other animals that have been exposed to dioxin or such an agent; and

"(B) to determine on the basis of such studies, in the case of dioxin and each such other toxic agent, which diseases (if any) are reasonably associated with the known biological effects of exposure to dioxin or such other agent on humans and appropriate animal models, including those effects involving porphyrin synthesis, lung cancer, other cancers, nervous system function, immune function, reproduction, and birth defects.

"(2) The scientific organization conducting the survey referred to in paragraph (1)(A) of this subsection shall transmit to the Administrator and the Committees on Veterans' Affairs of the Senate and the House of Representatives a report, in writing, containing—

"(A) the name of each disease determined as provided in paragraph (1)(B) of this subsection to be reasonably associated with the known biological effects of exposure to dioxin and the other toxic agents referred to in such paragraph; and

"(B) a discussion of the biological basis for the association of such disease with such effects and the strength of such association.

"(3) Not later than 90 days after the date on which the Administrator and the Committees on Veterans' Affairs receive the report under by paragraph (2) of this subsection, the Administrator shall—

"(A) determine, on the basis of such report, which diseases (if any) are reasonably associated with the known biological effects of exposure to dioxin or other known toxic agents referred to in paragraph (1) of this subsection; and

"(B) prescribe regulations for the purpose of section 312(d)(2) of this title that lists each such disease.

"(b)(1) The Administrator shall provide for a periodic (but not less often than annual) survey of all studies described in subsection (a)(1)(A) of this subsection that have been published or otherwise become available since the last survey under this section. Subject to subsection (c) of this section, the Administrator shall enter into an agreement with a private nonprofit private scientific organization—

"(A) to conduct the survey; and

"(B) to determine, taking into consideration the results of all surveys under this subsection and subsection (a) of this section, whether—

"(i) there is warranted on a scientific basis any modification of the determinations previously made under this section with respect to diseases reasonably associated with the known biological effects of exposure to dioxin or any other toxic agent referred to in subsection (a)(1)(A) of this section; and

"(ii) any disease should be added to the list of diseases contained in the regulations prescribed under section 312(d)(2)(B) of this title.

"(2) After each survey under paragraph (1) of this subsection the organization conducting the survey under such paragraph shall submit to the Administrator a report on the survey and on the determinations of such organization.

"(3) Upon receiving a report under paragraph (2) of this subsection, the Administrator shall—

"(A) determine, on the basis of such report and all previous reports received under this subsection and subsection (a) of this section, whether any disease should be added to the list of diseases contained in the regulations prescribed under section 312(d)(2)(B) of this title; and

"(B) transmit to the Committees on Veterans' Affairs of the Senate and the House of Representatives—

"(i) a report containing the Administrator's determinations under subparagraph (A) of this paragraph and the scientific basis for his determinations; and

"(ii) a copy of the report received under paragraph (2) of this subsection.

"(4) After transmitting a report to the Committees on Veterans' Affairs under paragraph (3)(B)(i) of this subsection, the Administrator shall amend the regulations referred to in section 312(d)(2)(B) of this title as may be necessary to reflect the Administrator's determinations included in that report. The amended regulations shall take effect 90 days after the date on which the committees receive that report.

"(c) The nonprofit private scientific organization referred to in subsections (a)(1) and (b)(1) shall be the National Academy of Sciences, except that the Administrator may enter into an agreement with any other appropriate nonprofit private scientific organization for the purposes of either subsection if—

"(1) the National Academy of Sciences does not enter into an agreement with the Administrator under such subsection;

"(2) the Administrator has transmitted to the Committees on Veterans' Affairs of the Senate and the House of Representatives a notification, in writing, containing the name of the other organization; and

"(3) ninety days have elapsed since the date on which the Committees on Veterans' Affairs received the notification.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 312 the following new item:

"312A. Procedures for determining diseases associated with effects of exposure to certain toxic agents.".

(b) DEADLINE FOR INITIAL REPORT.—The report under section 312A(a)(2) of title 38, United States Code (as added by subsection (a)), shall be submitted not later than one year after the date of the enactment of this Act.

SEC. 104. RESULTS OF EXAMINATIONS AND TREATMENT OF VETERANS FOR DISABILITIES RELATED TO EXPOSURE TO CERTAIN HERBICIDES.

(a) IN GENERAL.—(1) Subchapter III of chapter 17 of title 38, United States Code, is amended by inserting after section 624 the following new section:

"§625. Reports on health care relating to exposure to certain toxic substances

"(a) The Administrator shall compile and analyze, on a continuing basis, all clinical data obtained by the Veterans' Administration in connection with physical examinations and treatment furnished by the Veterans' Administration after November 3, 1981, to veterans who are eligible to receive such examinations or treatment by reason of having been exposed to dioxin or any other

toxic substance referred to in section 610(e)(1)(A) of this title.

"(b) The Administrator shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a semiannual report containing—

"(1) the information compiled in accordance with subsection (a) of this section;

"(2) the Administrator's analysis of such information;

"(3) a discussion of the disabilities identified or treated by the Veterans' Administration in the case of veterans referred to in subsection (a) of this section;

"(4) the Administrator's explanation for the incidence of such disabilities; and

"(5) other explanations for the incidence of such disabilities considered reasonable by the Administrator.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 624 the following new item:

"625. Reports on health care relating to exposure to certain toxic substances.".

(b) FIRST REPORT.— The first report under section 625 of title 38, United States Code (as added by subsection (a)), shall be submitted one year after the date of the enactment of this Act.

SEC. 105. TISSUE ARCHIVING SYSTEM.

(a) ESTABLISHMENT OF SYSTEM.—In order to facilitate future scientific research on the effects of exposure of veterans to dioxin and other toxic agents in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era, the Administrator of Veterans' Affairs shall establish and maintain a system for the collection and frozen storage of voluntarily contributed samples of blood and tissue of veterans who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era. The system may be administered by the Veterans' Administration or under a contract awarded by the Administrator, whichever is more cost-effective.

(b) SECURITY OF SPECIMENS.—The Administrator shall ensure that the tissue is collected and stored under physically secure conditions and that the tissue is maintained in a condition that is useful for research referred to in subsection (a).

(c) AUTHORIZED USE OF SPECIMENS.—The Administrator may make tissue available from the system for research referred to in subsection (a).

SEC. 106. FEASIBILITY STUDIES.

(a) STUDIES.—The Administrator of Veterans' Affairs shall award contracts or furnish financial assistance to non-Government entities to carry out studies of the feasibility of conducting additional scientific research on—

(1) health hazards resulting from exposure to dioxin and other toxic agents in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era; and

(2) health hazards resulting from active military, naval, or air service in the Republic of Vietnam during the Vietnam era.

(b) REPORT.—The Administrator shall report the results of such studies to the veterans' committees.

(c) ACTION OF CONGRESSIONAL COMMITTEES.—The veterans' committees shall consider each report of the Administrator under such subsection, consult with the Office of Technology Assessment and the National Academy of Sciences (or any other appropriate nonprofit private scientific organization), and determine whether to report proposed legislation providing for additional studies and research on health hazards referred to in subsection (a).

SEC. 107. OUTREACH SERVICES.

The Administrator of Veterans' Affairs shall—

(1) conduct an active, continuous outreach program for furnishing to veterans of active military, naval, or air service in the Republic of Vietnam during the Vietnam era services and information relating to the health risks resulting from exposure during such service to dioxin or any other toxic agent in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era, including furnishing updated literature and other information on such health risks to such veterans at least twice each year;

(2) update the information on veterans contained in the Veterans' Administration Agent Orange Registry; and

(3) organize the information contained in such registry in a manner that enables the Administrator promptly to notify a veteran of any increased health risk for such veteran resulting from exposure of such veteran to dioxin or any other toxic agent referred to in clause (1) during Vietnam era service in the Republic of Vietnam whenever the Administrator determines, on the basis of physical examination or other pertinent information, that such veteran is subject to such increased health risk.

SEC. 108. REPORT RELATING TO RESEARCH ON TREATMENTS FOR EXPOSURE TO DIOXIN AND OTHER TOXIC AGENTS.

Not later than 180 days after the date of the enactment of this Act, the Secretary of Health and Human Services shall submit to the veterans' committees a report containing a discussion of the research being conducted to identify and develop treatments for physiological absorption of dioxin and other toxic agents similar to the toxic agents in herbicides used in support of United States and allied operations in the Republic of Vietnam during the Vietnam era, including research relating exposure to dioxin and other toxic agents outside the Republic of Vietnam.

SEC. 109. AVAILABILITY OF FUNDS.

(a) IN GENERAL.—The unobligated balance of any funds appropriated or otherwise available for the use of the Centers for Disease Control for the conduct of a study of the effects of exposure of ground troops to dioxin and other toxic agents in herbicides used in support of United States and allied operations in the Republic of Vietnam during the Vietnam era shall be available to carry out section 312A of title 38, United States Code (as added by section 103 of this Act), and sections 105 and 106 of this Act. Funds made available under this subsection shall be in addition to any other funds that are available to carry out such sections.

(b) DEFINITION.—In this section, the term "unobligated balance" includes the amount of any funds that are deobligated on or after the date of the enactment of this Act.

SEC. 110. DEFINITIONS.

In this title:

(1) The term "veterans' committees" means the Committees on Veterans' Affairs of the Senate and the House of Representatives.

(2) The terms "Administrator", "veteran", and "Vietnam era" shall have the meanings given those terms in section 101 of title 38, United States Code.

TITLE II—ADVISORY COMMITTEE ON SPECIAL STUDIES RELATING TO THE POSSIBLE LONG-TERM HEALTH EFFECTS OF PHENOXY HERBICIDES AND CONTAMINANTS

SEC. 201. FINDING.

Congress finds that an advisory committee known as the "Advisory Committee on Special Studies Relating to the Possible Long-term Health Effects of Phenoxy Herbicides and Contaminants" (hereafter in this tile referred to as the "Advisory Committee") has been established to monitor the conduct, by Department of the Air Force scientists, of a special study relating to the possible long-term effects of phenoxy herbicides and contaminants on the health of human beings (known as the "Ranch Hand study").

SEC. 202. ADVISORY COMMITTEE PERSONNEL.

(a) COMPOSITION.—Not less than one-third of the total number of members of the Advisory Committee shall be individuals selected by the Secretary of Health and Human Services from among scientists recommended by veterans' organizations.

(b) CHAIRMAN.—The Chairman of the Advisory Committee may not be an officer or employee of the Federal Government (other than by reason of his service as a member of the Advisory Committee).

SEC. 203. ADVISORY RELATIONSHIP.

The Advisory Committee may directly consult with and provide information and recommendations to the Department of the Air Force scientists referred to in section 201, and such scientists may directly consult with and provide information and recommendations to the Advisory Committee. No officer or employee of the Federal Government may intervene in or impair direct communication between the Advisory Committee and such scientists under this section except as may be necessary to prevent an inappropriate disclosure of classified information.

SEC. 204. REPORTS.

(a) SCHEDULE OF REPORTS.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall transmit to the Committees on Veterans' Affairs and on Armed Services of the Senate and the House of Representatives a schedule of reports on the Ranch Hand study and on any other studies conducted by the Department of Defense in order to determine the possible long-term effects of phenoxy herbicides and contaminants on the health of human beings. The schedule shall provide for the preparation of at least two progress reports each year and a final report.

(b) CONTENT OF PROGRESS REPORTS.—(1) Each progress report shall contain the following matters:

(A) A discussion of the progress made in the studies referred to in subsection (a) during the period covered by the report, including a discussion of any progress made in improving administrative support of the conduct of such studies.

(B) A summary of the scientific activities conducted during such period and the findings resulting from such activities.

(2) A progress report need not contain a discussion of progress discussed in another progress report under this section or a scientific summary included in another such report unless such discussion or summary needs to be modified in order to be complete, accurate, and current.

(c) TRANSMITTAL OF REPORTS.—The Secretary of Defense shall transmit to the com-

mittees referred to in subsection (a) a copy of each report prepared under such subsection.

SEC. 205. EFFECTIVE DATE.

This title shall take effect on the date of the enactment of this Act, except that section 202 shall take effect 30 days after such date.

THE AMERICAN LEGION,
Washington, DC, July 27, 1988.

Hon. THOMAS DASCHLE,
U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR SENATOR DASCHLE: The Amercian Legion has reviewed your proposed legislation, the "Veterans Agent Orange and Vietnam Service Disabilities Act of 1988". We feel that the measure seeks a resonable approach toward resolving the Agent Orange dilamma. We hope that, if enacted, this bill will offer reassurance to most veterans who believe they suffer the residuals of dioxin exposure.

In our opinion, the presumption of service connection for two disabilities and the creation of presumptive mechanisms for other disabilities are certainly appropriate. Your proposal clearly recognizes the need for more aggressive research, more cooperation among research groups, more substantive actions to be taken by the Veterans' Administration, greater outreach and information sharing, and regular reporting of research developments to Congress. We agree that all of these undertakings are essential.

Senator, as an organization whose membership consists of almost one million Vietnam Era veterans, The American Legion wishes to express its deep appreciation to you for your continuing leadership on this issue. We also appreciate your willingness, in developing this measure, the accommodate the views of other veterans advocates, both in Congress and in the veterans community.

Sincerely,

E. PHILIP RIGGIN,
Director,
National Legistative Commission.

VETERANS OF FOREIGN
WARS OF THE UNITED STATES,
Washington, DC, July 29, 1988.

Hon. TOM DASCHLE,
U.S. Senate, Washington, DC.

DEAR SENATOR DASCHLE: This is written to express the support of the Veterans of Foreign Wars of the United States for the draft legislation which you are about to introduce entitled, "Veterans' Agent Orange and Vietnam Service Disabilities Act of 1988."

Our review of this draft legislation has shown it to be, at least in our estimation, a very carefully considered and sincere effort to assist those long neglected Vietnam veterans who are suffering from disabilities as a result of their demonstrated exposure to dioxin or other toxic agents in the herbicides used in Vietnam. We also commend this bill's provision of a rebuttable presumption of service connection for two diseases which are demonstrably associated with Vietnam service in general.

It also bears mentioning at this time that I appreciate your not only having asked for our views in the development of this legislation, but also for heeding them as well. In light of the VFW's long-standing mandate to justly answer the needs of those veterans who are actually suffering from herbicide exposure, we are gratified with the manner in which this legislation has been developed and with the role we have played in it. With your bill, veterans suffering from Agent Orange exposure may at last be afforded the recognition and assistance they deserve.

Sincerely,

COOPER T. HOLT,
Executive Director.

VIETNAM VETERANS OF AMERICA, INC.,
Washington, DC, July 22, 1988.

Hon. THOMAS A. DASCHLE,
Hart Senate Office Building, Washington, DC.

DEAR SENATOR DASCHLE: The Vietnam Veterans of America, Inc. (VVA) takes this opportunity to express its full support for the amendatory legislation you plan to introduce concerning Agent Orange disabilities sustained by veterans having served in Vietnam. While we continue to support legislation that you and Senator Kerry introduced last autumn, S. 1787, this latest initiative represents a balanced and prudent compromise agreeable to most parties with a direct interest in this issue.

Naturally, we were as disappointed as you that the Senate Veterans' Affairs Committee failed to go farther than it did in addressing this critical issue when on June 29 it added only cursory Agent Orange provisions to S. 2011, the Veterans Benefits and Programs Improvement Act of 1988. We are convinced, as you are, that even in the presence of scientific evidence that lacks unanimity on the specific health effects of dioxin exposure that enough evidence exists to begin compensating veterans for those diseases strongly implicated by the existing scientific evidence.

In this connection, your amendatory legislation is careful to limit those diseases for which compenation is to be provided to non-Hodgkin's lymphoma and soft tissue sarcoma. Each of these diseases has been repeatedly shown to be more likely evidenced in individuals exposed to dioxin than in individuals who were not.

Importantly, this legislation also establishes an independent review mechanism for evaluating the scientific evidence related to the health effects of dioxin exposure in Southeast Asia with a directed focus on diseases involving porphyrin synthesis, nervous and immune system functions and reproductive problems, as well as cancers including lung cancer and birth defects. The need for an independent review of the scientific studies is needed because the VA's Committee on Environmental Hazards which was charged with similar responsibilities has apparently adopted the operational view that no disease should be compensable in the absence of scientific evidence showing an absolute cause and effect relationship between exposure and disease. It should be noted, in this regard, that no veteran has yet to be compensated for a single Agent Orange claim.

In closing, Senator Daschle, we appreciate your consistent attention to this particular issue. For over 10 years the matter of Agent Orange has served as one of the most unsettling causes of fear and anxiety among Vietnam veterans and their families. It is as important as it is pressing that the Congress begin to resolve this issue. Your amendments would constitute an important first step.

Sincerely,

MARY R. STOUT,
President.

Mr. KERRY. Mr. President, I am very pleased to join with Senator TOM DASCHLE in introducing the Veterans' Agent Orange and Vietnam Service Disabilities Act of 1988. This is an important piece of legislation for Vietnam veterans because it would finally begin the process of providing compensation of Vietnam veterans who are suffering from diseases related to their Vietnam service which may have been caused by agent orange.

This bill has been carefully crafted in consultation with major veterans groups. It has the support of Vietnam Veterans of America, the American Legion, and the Veterans of Foreign Wars. This bill builds upon our earlier legislation, S. 1787, and on other efforts to address this issue.

We have now finally, after 40 years, said that it is time to compensate the "atomic veterans" who are victims of radiation. Let us not make the victims of agent orange wait 40 years until they, too, can finally receive compensation.

The Supreme Court has now recognized that it is time to compensate Vietnam veterans for diseases which may have been caused by exposure to agent orange. The Supreme Court's recent decision upholding the settlement in the agent orange lawsuit means that funds from the chemical companies can now be distributed to veterans. Unfortunately, only a relatively small number of veterans will qualify for the funds, and they will only get a small amount of money. It is estimated that veterans who are 100-percent disabled will receive an average of about $5,700, if they can show they were exposed to dioxin. Death benefits of about $1,800 will go to survivors.

The Supreme Court's decision is important because it is an authoritative statement that the time has come to end this controversy, and to compensate Vietnam veterans. However, it should be emphasized that no Government funds are involved in the agent orange lawsuit, and that all the money will come from the chemical companies which manufactured agent orange. This settlement does not in any way mean that the Federal Government has met its obligation to Vietnam veterans who are victims of agent orange. That decision is up to the Congress.

Our bill would state the finding of Congress that there is now sufficient evidence and experience to warrant presumptions that certain diseases are associated with both Vietnam service in general, and exposure to dioxin and other toxic agents in herbicides such as agent orange. The bill would create a presumption of service-connection for two diseases, non-Hodgkins lymphoma and soft-tissue sarcoma.

The bill would also set up a system for independent review of scientific evidence relating to agent orange by the National Academy of Sciences. It

would require the VA to gather and analyze on a continuing basis all clinical data from the health records of veterans examined or treated for disabilities related to dioxin or other toxic herbicides. It would require the VA to set up an archive of frozen blood and tissue samples from Vietnam veterans for possible use in further research. It also requires the VA to award contracts for independent pilot studies relating to agent orange, and to conduct an active, continuous outreach program to furnish information and services to veterans.

The bill also requires the Secretary of HHS to report on research being conducted to identify and develop treatments for exposure to dioxin and other toxic herbicides. The bill specifies that remaining funds from the CDC's aborted agent orange study may be made available to carry out the provisions of this legislation. The bill would also restructure the Advisory Committee on Special Studies Relating to the Possible Long Term Health Effects of Phenoxy Herbicides and Contaminants, also known as the Air Force ranch hand study.

It is important to note that this bill differs from our earlier legislation, S. 1787, in two significant ways. The presumption of service connection in this bill is rebuttable, unlike the previous bill. The presumption can be rebutted by evidence of a blood test showing that the veteran was not exposed to significant amounts of dioxin, or to the type of dioxin used in agent orange. The presumption of service connection for lung cancer, which was in S. 1787, has also been dropped. We recognize that there are those who believe that this issue needs further study. Accordingly, the bill provides that the National Academy of Sciences should examine and direct special attention to the evidence regarding lung cancer.

As time goes on, the evidence on agent orange continues to get stronger. Recent studies, including the Air Force ranch hand study and the CDC Vietnam experience study, have shown increased evidence linking agent orange with non-Hodgkins lymphoma and other diseases. The evidence regarding soft tissue sarcoma is also becoming stronger and clearer. I ask that the test of a study entitled "Soft Tissue Sarcoma Mortality Among Vietnam Veterans in Massachusetts, 1972 to 1983," which was published in the International Journal of Epidemiology in 1988, be printed in the RECORD at the conclusion of my remarks. The study found that "the highly significant excess of this rare malignancy in Vietnam veterans is important information."

In summary, we believe that this bill is a fair and reasonable approach to the difficult issue of agent orange, one which can finally lay to rest the controversy over this issue. It is time that we put the divisions and controversy of the Vietnam war behind us, and heal the wounds of Vietnam veterans. This legislation will help in that process.

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

SOFT TISSUE SARCOMA MORTALITY AMONG VIETNAM VETERANS IN MASSACHUSETTS, 1972 TO 1983

(By Michael D. Kogan and Richard W. Clapp)

[Kogan MD (Massachusetts Department of Public Health, Cancer Registry, 150 Tremont Street, Boston, MA 02111, USA) and Clapp R.W. Soft tissue sarcoma mortality among Vietnam veterans in Massachusetts, 1972 to 1983. *Internal Journal of Epidemiology* 1988, 17: 39–43. Information from death certificates and veterans' bonuses identified 840 Vietnam veterans and 2615 Vietnam-era veterans who died in Massachusetts during 1972–1983. Causes of death among Vietnam veterans were compared to Vietnam-era veterans and other male decedents. Standardized PMRs and MORs were both elevated for soft tissue sarcoma compared to Vietnam-era veterans [sPMR = 880, sMOR = 5.16, 95% CI = (2.4, 11.1)]; as well as non-veteran males.]

The Agent Orange Program in the Office of the Commissioner of Veterans Services (OCVS) requested that a mortality study be conducted comparing the causes of death occurring in 1972-83 among Massachusetts residents who were Vietnam veterans. Vietnam-era veterans who did not serve in Vietnam, and non-veteran males. The Agent Orange Program was established by the Massachusetts Legislature in 1983 for the purpose of supporting studies of possible health effects among Massachusetts Vietnam veterans. It has a Medical/Scientific Advisory Board, comprised of medical and behavioural scientists, who recommend and oversee the research activities supported by Program funds. The mortality study was motivated primarily by a concern that Vietnam veterans may be at increased risk of dying from violent, preventable causes such as motor vehicle accidents, homicide, and suicide.[1] Secondarily, other causes of mortality were investigated.

Because of the age distribution of Vietnam veterans, it was unlikely that diseases of old age or causes of death such as certain cancers would have occurred in sufficient numbers to analyse. In order to focus on relatively stable findings, only specific causes of death for which there were at least seven Vietnam veteran decedents were summarized. In the process of the investigation, two rare causes were estimated to be excessive among Vietnam veterans relative to veterans who had never served in Vietnam. Noteworthy among these was connective tissue cancer. This report examines the evidence for the association between location of military service and mortality due to several types of cancer. The findings concerning the relationship between violent preventable deaths and military service are discussed elsewhere.[2]

METHODS

In August 1984, the study was initiated using the computerized file of Massachusetts mortality data available from the Division of Health Statistics and Research of the Massachusetts Department of Public Health (MDPH). The mortality data for honourably discharged Massachusetts Vietnam and non-Vietnam veterans were obtained by linking the statewide computerized mortality files with the computerized list of veterans who applied for a military service bonus, available from the Massachusetts OCVS. It has been estimated that 90–95% of all eligible Massachusetts veterans received the bonus after presenting proof of military service of at least six months during the time period 1958 to 1973. (Personal Communication, Robert Feeney, Massachusetts Military Archivist, 1985.)

The mortality and veterans files were linked by matching social security numbers for the years 1972–76 and 1980–83. For the years 1977–79, social security numbers were not entered on the MDPH computerized files, although they continued to be recorded on death certificates. For these three years, the computer files were linked by matching names. The resulting output was then verified by hand-checking social security numbers on death certificates with the numbers from the veterans file.

The computer linkage provided information on age at death, sex, race, cause of death, year of death, and service in Vietnam. Underlying cause of death was classified according to the appropriate revisions of the International Classification of Diseases and converted to the Ninth Revision codes.[3]

Because white males accounted for about 98% of the veterans decedents, and the nonwhite male population of Massachusetts was about 2% in 1970, cause of death data for non-white or female veterans was very sparse. This report, therefore, is restricted to an analysis of white male mortality patterns, although information on other groups should be pursued in further studies.

The number of observed deaths from specific causes among Vietnam veterans was compared with the expected number of deaths based upon the actual mortality experience of both non-Vietnam veterans and all other males in Massachusetts. Veteran deaths were not included in the Massachusetts white male comparison group. The expected numbers were derived from calculations of age-time-cause-specific proportionate mortality within ten-year age groups. The rations of observed to expected numbers of deaths were summarized using the standardized proportionate mortality ratio (sPMR).[5] This method was chosen because it is familiar to many and appears often in the occupational health literature. The statistical significance of the differences was assessed using the Mantel-Haenszel Chi-square test with one degree of freedom. Confidence intervals of the sPMR were based on the results of the Chi-square tests.

For causes of death for which the sPMR was statistically significant, the standardized mortality odds ratio (sMOR) was also calculated according to the method described by Miettinen.[6] The sMOR was used to confirm the results of, and as an adjunct too the sPMR method. The sMOR compares the odds for the exposed population—the number of deaths from the cause of interest compared with the number of deaths from selected reference (auxiliary) causes—with the expected odds derived from a comparison (non-exposed) population. The sMOR approach is essentially equivalent to the case-control approach, in which cases are all deaths from the disease of interest, controls

Footnotes at end of article.

are all deaths from the auxiliary causes, and the exposure of interest is service in Vietnam. The sMOR was also adjusted for age and year of death.

The sMOR has certain advantages relative to the sPMR. When the auxiliary cause(s) of death is unrelated to the exposure, the mortality odds ratio is interpretable as the observed-to-expected ratio. When standardized for age and time, the mortality odds ratio becomes the standardized mortality odds ratio and the observed-to-expected ratio becomes the standardized mortality ratio. In contrast, the sPMR can be quantitatively interpreted as the standardized mortality ratio only when the sum of the mortality rate(s) of interest and the rate for auxiliary cause(s) of death is the same for both the exposed and non-exposed.

The sMOR analysis was carried out using all circulatory disease (including cerebrovascular disease), except rheumatic heart disease (ICDA 390–459), as the auxiliary cause. All circulatory disease was chosen on the assumption that it was unrelated to the exposure of interest (service in Vietnam). Comparing Vietnam and non-Vietnam veterans to other males for circulatory disease, we calculated as sPMR of 93 and 95 respectively; this was not significantly lower than expected. Rheumatic heart disease is related to the exposure of interest because young men with the disease would presumably fail to pass their military induction physical exam.

RESULTS

Table 1 presents the results of the sPMR analysis, comparing Vietnam veterans to non-Vietnam veterans and to all other non-veteran Massachusetts males for specified causes of death. The sPMRs and their 95% confidence intervals are included in the table. Uncommon causes of death for Vietnam veterans are not presented because statistically stable comparisons could not be made. A minimum of seven observed Vietnam veteran deaths was used as a criterion for calculating an sPMR. Two methods of accounting for suicide deaths are used. The first method includes only those deaths that were recorded as suicides on death certificates. It has been estimated, however, that the actual suicide rate is three times the reported rate.[7] Therefore, a second calculation, known as an "estimated suicide rate," was carried out which includes all poisonings (ICDA codes E850–E869, E980–E982), recorded suicides (ICDA codes E950–E958), and unknown causes of deaths (ICDA code 799.9).[8] The analyses presented were carried out on 766 deaths from specific causes out of the total 810 deaths in the Vietnam veterans group.

The sMOR was computed for each cause of death for which the sPMR was statistically significant in either of the two comparison groups. The sMOR findings differed from the sPMR findings in only two instances: Homicide was not found to be significantly lower for Vietnam veterans compared to the state's non-veteran males (sMOR=0.82), and motor vehicle accidents were elevated for Vietnam veterans compared to non-Vietnam veterans only in the sMOR analysis (sMOR=1.50).

DISCUSSION

Since this is a death certificate study, which utilized record-linkage techniques to assemble the study group, there are a number of potential limitations which should be taken into account when considering the findings. Among them are the following:

The accuracy of cause of death information on death certificates has been about 90% overall and as low as 50% for certain malignancies compared to autopsy findings.[9]

There is no information on death certificates concerning potential confounding factors such as smoking habits of socioeconomic status.

Computer file-linking may miss potential cases due to erroneous recording of information on the variable that is matched on, such as social security number or date of birth.[10]

Only honourably discharged veterans were used in the study, which limits the generalizability to that group. The percentage of Massachusetts veterans not honourably discharged is unknown but is probably less than 10%.

The standardized proportionate mortality ratio is less easily interpretable for more common causes of death, such as circulatory system diseases.[4]

Age-adjusted death rates could not be calculated because the ages of all the living veterans could not be obtained from the computer files.

The findings of this study are unlikely to result from the above limitations. There is no reason to suspect that Vietnam veterans were misclassified differentially from the other two groups. This applies both to misclassification of the file-linking information and the cause of death information. The bonus response rate for honourably discharged veterans was high (90–95%), thus limiting non-response as a possible cause of significant bias. The percent of Massachusetts veterans not honourably discharged is unknown. It is possible that they may have differed significantly from the honourably discharged group. Missing information on potential confounders, on the other hand, might have caused a detectable effect, although not large enough to account for the observed differences for some findings. Given what is known about risk factors for connective and other soft-tissue cancer, it is unlikely that factors not examined accounted for all the excess in Vietnam veterans.[11]

In the interpretation of the findings, it is necessary to keep two other considerations in mind. First, the study group of Vietnam veterans was assembled from a list of Massachusetts residents who received a bonus after they had presented proof of service in Vietnam and honorable discharge. No information about length of service (beyond the six-month required minimum), precise location of service, or specific exposures to toxic substances, such as Agent Orange, was available for these records. Furthermore, no correction was made for possible social class differences between the Vietnam veterans and the two comparison groups. However, the Vietnam veterans findings for three causes of death which are highly correlated with social class—lung cancer, colorectal cancer, and cirrhosis of the liver—did not, in this instance, differ significantly from those of the comparison groups.

No significant differences were found between Vietnam veterans and the two comparison groups with respect to death due to malignant neoplasms as a whole. The significant elevation of malignancies of connective and other soft tissue (ICD 171) was based on only nine deaths; all of these were sarcomas of five different types. Pathological confirmation was obtained from hospital records or the physician in eight of these cases. Table 3 lists the nine cases by years of service, year of death and histological type. Occupational exposure as inferred from the limited information on the death certificate did not seem to be significant.

Two case-control studies from Sweden reported that soft-tissue sarcomas were associated with occupational exposure to phenoxyacetic acids such as 2,4-D and 2,4,5,-T, the components of Agent Orange.[12,13] One ongoing study of Air Force personnel engaged in spraying Agent Orange (Operation Ranch Hand) has found no deaths from soft tissue cancer; however, this study is focused on 1241 men who flew spraying missions between 1962 and 1971 and only 39 deaths have occurred which were summarized in a 1983 report.[14] A New York State Department of Health study reported no excess of soft tissue sarcomas after service in Vietnam. This study looked at both incidence and mortality for this cancer in New York (excluding New York City) diagnosed from 1962 through 1980.[15] It suffers from the fact that the latency period for the development of most cancers may be longer than the observation period of the New York study. The deaths observed in the Massachusetts study included three more years of follow-up and had a mean interval between the start of military service and death due to soft tissue sarcoma of over eleven years.

An Australian study of soft tissue sarcoma in Vietnam veterans from that country reported no excess. It is not clear, however, whether the soldiers or support personnel whose mortality experience was analysed were likely to have been exposed to Agent Orange.[16] Two other similar mortality studies were done in West Virginia[17] and Wisconsin[18] using records that differentiated between veterans who receive bonuses for service in Vietnam or were otherwise determined to have been in-country and those who were not. Their results were quite similar to those in the present study; in addition a comparison between Wisconsin Vietnam-era veterans and the general population showed increased mortality due to soft tissue sarcomas. A study of soft tissue sarcomas identified in Veterans' Administration Patient Treatment Files[19] reported no association with military service in Vietnam. This study excluded 38% of cases originally identified from patient files and raises questions of selection bias in both cases and controls. In the Massachusetts mortality data, only two of nine soft tissue sarcoma decedents were reported to have been patients at VA hospitals.

The present study was not based on either adequate numbers of deaths or adequate exposure information to help resolve this important aetiological issue. Nevertheless, the highly significant excess of this rare malignancy in Vietnam veterans is important information. The latency period for soft-tissue sarcoma in adults is probably sufficiently long that several more years of observation will be necessary before any conclusive findings can be made.

FOOTNOTES

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[19]Kang, H., Weatherboc, L., Breslin, P., Lee, Y., Shepard, B. Soft tissue sarcomas and military service in Vietnam: a case comparison group analysis of hospital patients. *J Occup Med* 1986: 28: 1215–8.

TABLE 1.—STANDARDIZED PROPORTIONAL MORTALITY RATES FOR SELECTED CASES OF DEATH FOR VIETNAM VETERANS COMPARED WITH EITHER NON-VIETNAM VETERANS OR NONVETERAN MALES

ICD No.[1]	Cause of death	Observed Vietnam veteran deaths	Comparison group			
			Non-Vietnam veterans		Nonveteran males	
			PMR	95 percent CI	PMR	95 percent CI
140–234	All causes	840				
153–154	All neoplasms	129	95	(78,115)	112	(94,134)
162	Colorectal	8	113	(56,228)	85	(42,172)
171	Lung bronchus	25	98	(66,146)	102	(72,145)
189	Connective and other soft tissue	9	880	(513,151)	473	(262,855)
390–429	Kidney	9	183	(96,348)	363	(191,651)
439–459	Circulatory system (except cerebrovascular)	139	88	(75,103)	87	(74,102)
430–438	Cerebrovascluar disease	28	111	(77,160)	138	(96,199)
571	Cirrhosis of the liver	29	94	(65,136)	90	(61,132)
E800–E999	All external causes	428	108	(98,119)	113	(103,124)
E810–E825	Motor vehicle accidents	169	110	(95,127)	127	(106,152)
E950–E958	Recorded suicides	102	93	(77,112)	118	(98,143)
(799.9, E850–E864, E950–E958, E980–E982)	Estimated suicides[2]	163	113	(96,132)	140	(120,163)
E960–E969	Homicides	31	80	(56,114)	66	(46,94)

[1]International Classification of Diseases, 9th Revision, code number.
[2]See reference 8 for discussion of this category. Note that there were 13 deaths in the category 799.9.

TABLE 2.—MORTALITY ODDS RATIOS FOR SELECTED CAUSES OF DEATH FOR VIETNAM VETERANS COMPARED WITH EITHER NON-VIETNAM VETERANS OR NONVETERAN MALES

Cause of death	Comparison group			
	Non-Vietnam veterans		Nonveteran males	
	Mortality odds ratio	95 percent CI	Mortality odds ratio	95 percent CI
Connective and other soft tissue cancer	5.16	(2.39,11.14)	5.87	(2.92,11.78)
Kidney cancer	1.34	(0.99,1.80)	4.04	(2.12,7.67)
External causes	1.14	(0.95,1.37)	1.44	(1.08,1.91)
Motor vehicle accidents	1.50	(1.20,1.87)	1.65	(1.28,2.12)
Recorded suicides	1.24	(0.98,1.56)	1.46	(1.02,2.08)
Estimated suicides	1.46	(0.89,2.37)	1.73	(1.22,2.44)
Homicide	.76	(0.24,2.39)	.82	(0.64,1.04)

TABLE 3.—CASE-SPECIFIC INFORMATION FOR CONNECTIVE TISSUE CANCER DEATHS AMONG VIETNAM VETERANS BY HISTOLOGICAL TYPE AND OCCUPATION

Case	Age at death	Year inducted	Year discharged	Year of death	Histological type	Occupation on death certificate
1	30	1969	1971	1975	Fibrosarcoma	Data processing.
2	28	1967	1970	1976	Synovial sarcoma	Manager.
3	30	1965	1967	1976	Liposarcoma	Mental health assistant.
4	32	1967	1972	1977	Fibrosarcoma	Manager.
5	30	1964	1967	1977	Fibrosarcoma	Engineer's aide.
6	32	1970	1971	1978	Fibrosarcoma	Civil engineer.
7	32	1970	1971	1982	Epithelioid sarcoma	Graphics.
8	29	1971	1974	1982	Sarcoma, nos	Firefighter.
9	39	1961	1966	1983	Hemangiopericytonia	Picker (optical).

By Mr. MURKOWSKI (for himself and Mr. FOWLER):

S. 2676. A bill to improve Federal management of lands on Admiralty Island, AK; to the Committee on Energy and Natural Resources.

IMPROVED MANAGEMENT OF FEDERAL LANDS ON ADMIRALTY ISLAND, AK

● Mr. MURKOWSKI. Mr. President, I rise today to introduce a bill to improve Federal management of Admiralty Island National Monument in Alaska and to improve the use of private lands in the Tongass National Forest through consolidation.

Mr. President, 95 percent of the land in southeast Alaska is in Federal ownership and most of this Federal land is in the Nation's largest forest. The Tongass National Forest is comprised of a little more than 17 million acres of spectacular glaciers, fjords, and some of our country's most productive forest lands. In fact, the forest is larger than the combined States of Massachusetts, New Jersey, Connecticut, Delaware, and Rhode Island. And if it were a State by itself, it would be bigger than West Vriginia and right behind South Carolina.

In the Tongass National Forest we have a strong commitment to environmental protection and to national natural resource preservation. Over 5½ million acres of the Tongass, an area larger than Massachusetts, are set aside in perpetuity in the National Wilderness Preservation System. No roads will be graded and no trees will be cut in one-third of the commercial forest lands of the Tongass. Nearly 2 million acreas of valuable timber re-

sources have been locked up forever to protect their old growth qualities.

But the Tongass is more than an ecological museum. It is a place where many Alaskans make their living. Whether engaged in logging, fishing, tourism, or some other resource-based industry, a majority of the people living in southeast Alaska critically depend on the forest for their livelihood. And this is why a spirit of cooperation and a working partnership between the local people who depend on the forest and the U.S. Forest Service is so important.

Mr. President, it is in furtherance of such a spirit of cooperation that I introduce this bill today. A very similar bill H.R. 2596, has passed the House of Representatives. I have worked closely with the U.S. Forest Service and the local people interested in this legislation to address objections raised to the House passed bill. The bill I introduced today represents a compromise which I believe is acceptable to all parties.

This legislation is relatively straightforward. It encourages the Secretary of Agriculture to negotiate with Kootznoowoo Inc., an Alaska Native village corporation, for voluntary land exchanges and acquisitions in order to consolidate Kootznoowoo inholdings in the Tongass National Forest. This should improve Forest Service management of the Admiralty Island National Monument where many of these inholdings are located and should enable the village corporation to make better use of its land resources. The Forest Service is required to report back to Congress on its progress in this regard. It is important to note that this legislation grants no new exchange or acquisition authority to the Secretary of Agriculture. All exchanges or acquisitions must be made at the Secretary's discretion pursuant to his existing authority.

This legislation also clarifies the intent of section 506(a) of the Alaska National Interest Lands Conservation Act by making it clear that the date on which Kootznoowoo, Inc. accepted the Admiralty Island Land Exchange, under which the corporation received their Alaska Native Claims Settlement Act land entitlements, as the conveyance date for administrative purposes. This will eliminate the possibility of additional accounting, appraisal, and other expenses, and the duplication of effort that would result if section 506 were interpreted to require the corporation to account for its land and timber using the numerous and separate dates on which land has been conveyed to Kootznoowoo pursuant to the land exchange agreement.

Finally, Mr. President, this legislation changes the name of the designated wilderness within Admiralty Island National Monument from the "Admiralty Island National Monument Wilderness" to the "Kootznoowoo Wilderness." The English translation of "Kootznoowoo" is "fortress of the bears" or "bear's fort." This is the name which the Tlingit residents of Admiralty Island have traditionally given to this area and is therefore a proper name for this beautiful and expansive wilderness.●

By Mr. HELMS (for himself and Mr. HEFLIN):

S.J. Res. 354. Joint resolution to designate November 6 through 12, 1988, as "National Farm Broadcasters Week"; to the Committee on the Judiciary.

NATIONAL FARM BROADCASTERS WEEK

Mr. HELMS. Mr. President, I consider them to be unsung heroes, and Senator HEFLIN and I feel that both Congress and the President ought to get about the business of singing their praises.

I am talking about the farm broadcasters of America whom I know personally to be as dedicated, hard working and creative as anybody in the broadcasting business, past and present.

That is why the able Senator from Alabama [Mr. HEFLIN] and I are today offering a joint resolution to designate November 6 to 12, 1988, as "National Farm Broadcasters Week"—and we invite all Senators to join in cosponsorship of this joint resolution. I am satisfied that once we get this joint resolution to the White House, President Reagan will reach for his pen to sign it because he knows a thing or two about the enormous service rendered by the farm broadcasters of this Nation. Early in his varied career, Ronald Reagan worked for a radio station noted for its service to farmers. Whether Mr. Reagan, during his radio days, ever did any farm broadcasts, I do not know—but I suspect he did.

In any event, Mr. President, I feel it entirely appropriate that we pay our respects to these fine men and women across America. Normally, Mr. President, Senators ask unanimous consent that the text of their bills, amendments and resolutions be printed in the RECORD at the conclusion of our remarks. But because Senator HEFLIN's and my resolution is drafted to speak for itself, I shall momentarily ask consent that it be printed at this point in the RECORD. Then I shall have a few more comments.

Now, Mr. President, I ask unanimous consent that the joint resolution be printed in the RECORD at this point.

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

S.J. RES. 354

Whereas farm broadcasting has been one of the most important means of distributing information to farmers and ranchers across the Nation since the earliest days of radio;

Whereas agriculture, the largest industry in the Nation, contributes billions of dollars to the economy of the United States;

Whereas farm broadcasters provide a vital service to agricultural producers in their farm and ranch operations as well as to the consumers of agricultural products; and

Whereas only about 225 farm broadcasters serve the entire Nation through more than 2500 radio and television stations across the Nation: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the week of November 6 through 12, 1988, is designated as "National Farm Broadcasters Week". The President is authorized and requested to issue a proclamation calling on all Americans to commemorate this week through appropriate ceremonies and activities.

Mr. HELMS. Mr. President, there is not a State in the Nation that is not in fact a "farm State." Therefore, no Senator can be regarded as a "city slicker" in terms of his or her constituency. If we don't look after our farmers, along with all of the other things we do, we aren't doing our duty. Farmers are the bedrock of America, and the farm broadcasters of America are a mainstay in supporting the farmers.

So, I reiterate that Senator HEFLIN and I hope that all Senators will join in the cosponsorship of this joint resolution.

Mr. President, before I came to the Senate in January 1973, having been elected the previous November, I participated in the management of a broadcasting company. That company owns and operates a television station, several radio stations, and a number of regional radio networks. On all of the company's stations and networks great emphasis is placed on farm news.

The fine publication, Television/Radio Age, carried an excellent article in its July issue, headed "Farm Broadcasters to the Rescue." It's an interesting review of the important role played by farm broadcasters all across the Nation. Many leaders in farm broadcasting are discussed.

Mr. President, I ask unanimous consent that this informative article, be printed in the RECORD.

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

FARM BROADCAST TO THE RESCUE—DIVERSIFICATION, MARKETING PUSH RECOMMENDED

When the weather gets bad—and it certainly has in 1988—the farm sector's "need-to-know" intensifies, requiring more information from meteorologists, commodity trading centers, farm extension offices, from transportation and marketing hubs, from every level of government.

This year as crop-parching, feedkilling weather persists through vital segments of the growing season, and over huge sections of the country, farm demand for nonstop agricultural and economic updating grows more critical with every new day of drought.

Radio and television stations and specialized farm networks—those with a genuine commitment to their unique audiences—are answering that demand not only with dol-

lars but with programming and people dedicated to "living" their listeners business, not just talking about it.

Members of the National Association of Farm Broadcasters are the professionals who staff the stations and farm networks sharing this commitment. So, RV/RADIO AGE takes its annual look at America's farm situation again this year, through the eyes of the national and regional officers of the NAFB.

IN THE SOUTHEAST

From his post in North Carolina, this year's NAFB president, Dix Harper, director of agricultural productions for WRAL-TV Raleigh-Durham and for the TRN Farm News Network, shares some comments from the Agriculture Commissioners of North Carolina and Georgia, and a look at some new alternatives in agriculture.

North Carolina's Commissioner of Agriculture, James A. Graham, told the NAFB president one of the recent positive developments on the farm front in his state is the success of the "Goodness Grows in North Carolina" marketing program. Under the brand-identity licensing program, in which 90 firms are now involved, farm businesses gain the right to use the slogan, in labeling their product/or products, assuring the buyer it's a locally-produced quality farm product.

"We've been working for 15 or 20 years," Graham told Harper, to diversify our farm products, so that we aren't forced to obtain income only from our major crop which is still tobacco. Now, we're number one in turkeys, number one in sweet potatoes and number two in cucumbers."

"As we continue our diversification effort," said the North Carolina Commissioner, "we're working to increase our turkey exports and develop new turkey products. And our hog production industry continues to grow. Of the eight largest hog operations in all America, four of them," reported Graham, "are here in North Carolina."

Harper, a 40-year member of the NAFB, is, himself, a leader in encouraging diversification and marketing expansion in the southeast. Continuing to emphasize the positive he sees in new approaches to agriculture. Harper shares interviews from a meeting in Iowa, where he discussed two interesting new ventures growing successfully in the south.

The watchword in setting up these new agricultural opportunities, Harper emphasizes, is to "find your market first." The farm broadcaster from Raleigh talked first to Mrs. Winnie Hawthorne, of Sumter, S.C. She now harvests crayfish in her farm ponds, with a yield of 1,000 pounds per acre. Prices range from $1.50 a pound, to $2.00 for the larger size.

In her interview with Harper, she admitted she didn't research the market before setting up her operation but feels that the possibility of success is much greater if the market is targeted before creating any type of new farm business.

That was done by extension agent Larry McPheeters of Halifax County, Va. as he worked with frustrated tobacco farmers, to organize the Southside Virginia Producers Cooperative.

Looking for a supplementary product to the flue-cured tobacco produced in the region, McPheeters and farm producers completed research showing that produce production had potential, since the area was within 500 miles of much of the national population. Operating for only about three years, the cooperative now markets six different produce items, and involves 135 producers from a 17-county area.

IN FLORIDA

Moving further southward into one of the top 10 farm states in the country, the NAFB's regional vice president for the southeast, Cindy Zimmerman interviewed both the chairman of the Cattlemen's Beef Promotion and Research Board and Florida's Commissoner of Agriculture for this year's round of regional reports.

Zimmerman, of the Independent Florida Agrinet, based in Ocala, is farm director of the first independent radio farm broadcasting system in the state. In operation since 1985, Agrinet now delivers a half-dozen programs a day via satellite to 37 stations around the state. Specialized programming focuses on both the northern and southern Florida farm regions, on the citrus and livestock industries, on agribusiness developments, and, of course, on weather.

Suffering somewhat less from the intense drought earlier this year, its apparent—in these reports from the southeastern United States—that farm producers throughout the region are engaged in a push to better market the commodities they produce directly to the consumer and to new markets overseas. At the same time, diversification efforts are also moving higher on the action priority list.

Jo Ann Smith, a Florida cattle producer and chairman of the Cattlemen's Beef Promotion and Research Board, made this clear as she outlined reaction to the national beef "checkoff" program.

"I think," she told Zimmerman, "that the agricultural community has more or less awakened, and is now playing catch-up, after only recently beginning to realize the need for promotion and research in marketing their commodities."

"Like the dairy industry," added Smith, "beef producers are faced with the same kind of consumer concern about cholesterol and fat. It's up to us in production to supply consumers with the type of product they want. Our current, 'Beef: Real Food for Real People,' campaign will continue; and, now with long-term funding, we can certainly expand our research. We'll continue to listen and respond to both the producer and the consumer."

Florida's Agriculture Commissioner Doyle Conner told the NAFB's southeastern vice president, "If we continue to do the things we've done traditionally, we're not going to be able to pay back the banks. So, we're looking at new marketing alternatives, ways to develop value-added crops, expansion of international markets for our products."

"Because of our growing population in Florida," said Commissioner Conner, "there's a growing domestic market for us to tap right here at home. We've set up a new farmer's market at the intersection of some of our interstate highways where producers can transfer their products directly to truckers, for quick transfer to nearby markets. And we're enthusiastic about that type of farm marketing approach."

FROM LOUISIANA

Swinging westward across the southern tier of farm states, the south central regional vice president for the NAFB, Ray Forcier, contributes interviews updating financial and drought developments in his area—one of those hit hardest by the lengthening drought.

From his post as farm news director of 50,000-watt clear channel KWKH in Shreveport, Forcier directs a heavy schedule of daily farm broadcasts to a primary coverage area of more than 71 counties throughout Louisiana, east Texas and Arkansas.

In a conversation with Darrell Jans, vice president of the Federal Land Bank office in Shreveport, Forcier provides some follow-up on developments since shutdown of the Federal Land Bank serving the area, in Jackson, Mississippi. Jans told the NAFB regional vice president, "During the weekend following the May 20 closing, inventory was taken for the receiver at the 80 offices of the bank in Alabama, Louisiana and Mississippi."

"At the start of the following week," he continued, "we were able to resume serving our customers pretty much as we had prior to the closing. Since then—with the exception of new loans, which we hadn't been making for some time, anyway—basically, it's been just about business as usual."

Forcier discussed crop prospects for TV/Radio Age with Marion Faris, county agent for Louisiana's Caddo Parrish. "Our cotton crop," said Faris, "is already suffering from dry weather, and—if we don't get some additional rain on down the line—there'll be additional serious damage. Because of the dry weather, though, we don't see as much of the usual problems from pests like the boll weevil."

FROM ILLINOIS

Moving north, along the low-water, barge-clogged Mississippi into the Corn Belt, Marla Behrends—NAFB regional vice president for the north central area, shares a look at how drought-produced economic pressure is spreading to other businesses in a farm-based economy.

Behrends, farm director of WKAN in Kankakee, Ill., near the Indiana border, talked to nursery and landscaping businesswoman Nancy Tholen, who reports that late last month, her firm was forced to invest in irrigating equipment in an emergency effort to save a new crop of yews (evergreen trees), planted on recently-purchased acreage.

"Not only are concerned about recovering the cost of the new land," Tholen told Behrends, "but now we've added the additional cost of irrigation and equipment. We've also cut back considerably on our sod-laying and landscaping operations, and customer traffic is way down because no one is buying our type of products in the middle of a drought like this."

"Already," Tholen told the NAFB vice president, "we've swallowed quite a bit, and—since plantings this year won't be ready for market for three more years—what we lose now will affect our business three years down the road."

WKAN's farm director also reports that the area's corn crop was hit by an unusual frost on June 8—still another weather negative in a disaster year.

FROM MINNESOTA

Further north, in Minnesota, another big farm state hit hard by the drought, the 1988 national vice president of the NAFB—Lynn Ketelsen, farm services director of the Linder Farm Network in Willmar, Minn.—highlights some positives for those farm producers who are able to survive the drought.

Ketelsen interviewed national Ethanol Commission spokesman, Larry Johnson, who reports that new uses for corn-based ethanol should spur the growth of a new domestic market for the state's farmers. A 10-million gallon ethanol production facility, operated by Minnesota Corn Processors, is

expected to provide a base for new products like biodegradable palstics and a de-icer that eliminates the damage of salt-based de-icing materials.

Johnson, who's been dubbed the ethanol "answer man," told the NAFB vice president, "We're working to create a new industry right in the rural areas where the crop is, replacing oil-derived products with products made from corn."

In another report, Ketelsen learned details concerning a new printing ink make from soybean oil that's now being used by a number of major farm magazines and newspapers in Minnesota. "We're also finding new uses for soybean oil," said Jim Palmer, exective director of the Minnesota Soybean Association, "finding it efficient as a carrier in pesticides and as a dust-reducing element in hog feed."

"We're working," he adds, "to become not only providers of food to the nation but providers of renewable resources for new products in other industries.

FROM KANSAS

Dropping down into the big wheat and livestock state of Kansas, the next president of the NAFB, Mark Vail, farm director of the Topeka-based Kansas Agricultural Network, provides this report, as he and his staff monitor the drought for farm listeners, in broadcasts via satellite, to 35 stations in the central and southern Plains.

The situation in late June, Vail indicated to TV/Radio Age, seemed to be less critical because harvesting of winter wheat—the big crop in the state—was speeding up, a drought conditions intensified. "Our situation," reports Vail, "was helped by the fact that many sections of the state had some very late winter blizzards that dumped from 10-14 inches of snow, giving those areas a little better moisture base earlier in the year."

He adds, however, that "we're going to have a somewhat smaller wheat crop than was expected in the middle of May; not only because of increasingly dry conditions, but because of disease problems and fewer acres planted."

In conversation with Todd Domer, of the Kansas Livestock Association, Vail discussed the outlook for the state's cattle producers, in light of the marketing effort created by the beef checkoff program. Reported Domer, "A lot of consumers have seen the advertising and reports of the less serious health impact of cholesterol in beef. This past year, beef competed effectively against record supplies of cheap poultry and pork, indicating some change in consumer demand."

Both, however, see grim days ahead because of drought-produced shortages and high prices for feed.

FROM NEBRASKA

To the north, in areas hit even harder by the lengthening drought, the NAFB's regional vice president for the north central states, Mike Hansen, farm director of WOW Omaha, discusses a worsening outlook with specialists at universities in both Nebraska and Iowa. One of four stations of Wichita-headquartered Great Empire Broadcasting reaching farm audiences from Springfield, Mo. and Shreveport, La., as well as Wichita and Omaha, WOW farm broadcasting covers a 200-county area in six states.

William Edwards, an economist at Iowa State University, told the WOW farm director; "Less grain to sell and higher feed expenses for livestock producers will bring increasingly serious problems as the drought intensifies."

"Deficiency payments," he said, "of course, will be lower. But diversion payments won't be affected by lower yields." One positive factor, though, notes Edwards, is the fact that more farmers have been protecting themselves with federal multiperil crop insurance. "Nearly 40 percent of the crop in Iowa," he told Hansen, "is now covered by this type of insurance."

In Nebraska, many farmers started 1988 with continuing debt problems, and Larry Bitney, a farm management specialist at the state's university in Lincoln, pointed out, in an interview with Hansen, that they'll be hardest hit, as a result of the drought.

"Some 10 to 15 percent of our farm producers in Nebraska," said Bitney, "are still burdened by a lot of debt, and carryover problems from the recent farm debt crisis."

FROM MONTANA

In the last of this 1988 series of regional reports provided by officers of the National Association of Farm Broadcasters, the group's regional vice president for the west, Taylor Brown, adds a final perspective from his post as president and farm director of the Northern Ag Network, headquartered in Billings, Mont.

In addition to the drought, Brown says, crop producers throughout his area have been forced to cope with other adversities—outbreaks of problems such as wheat streak mosaic and the Russian wheat aphid. And, he adds, "this is another bad year for grasshoppers." Discussing the reaction of agribusinessmen in his area to the grim months ahead, Brown passes on these comments from regional executives in the feed and ag chemical industries.

Both Don Carter, regional manager for Loomis Feed Supplements, based in California, and Harold Schultz, vice president and general manager for West Chem Ag Chemicals, emphasized the need to improve contact with their customers, strengthening the ability to share information honestly and with credibility.

Said Carter, "we must clearly define changing needs, particularly in bad times like this. If we give enough of our customers exactly what they need and want, we'll end up getting what we want." Reporting this to be "the most difficult year for his company since 1970," Schultz adds that "if a grower has practiced chem fallow to some degree in this toughest of years, he's going to end up with a better crop than his neighbor who hasn't.

ADDITIONAL COSPONSORS

S. 123

At the request of Mr. INOUYE, the name of the Senator from Ohio [Mr. METZENBAUM] was added as a cosponsor of S. 123, a bill to amend title XVIII of the Social Security Act to provide that psychologist services are covered under part B of Medicare.

S. 166

At the request of Mr. INOUYE, the name of the Senator from Hawaii [Mr. MATSUNAGA] was added as a cosponsor of S. 166, a bill to amend section 1086 of title 10, United States Code, to provide for payment under the CHAMPUS Program of certain health care expenses incurred by certain members and former members of the uniformed services and their dependents to the extent that such expenses are not payable under Medicare, and for other purposes.

S. 684

At the request of Mr. HEINZ, the name of the Senator from New York [Mr. D'AMATO] was added as a cosponsor of S. 684, a bill to amend the Internal Revenue Code of 1986 to make permanent the targeted jobs credit.

S. 1081

At the request of Mr. BINGAMAN, the name of the Senator from Florida [Mr. GRAHAM] was added as a cosponsor of S. 1081, A bill to establish a coordinated National Nutrition Monitoring and Related Research program, and a comprehensive plan for the assessment of the nutritional and dietary status of the United States population and the nutritional quality of the United States food supply, with provision for the conduct of scientific research and development in support of such program and plan.

S. 1288

At the request of Mr. DOMENICI, his name was added as a cosponsor of S. 1288, a bill to designate July 20 of each year as "Space Exploration Day."

S. 1522

At the request of Mr. RIEGLE, the name of the Senator from Wyoming [Mr. SIMPSON] was added as a cosponsor of S. 1522, a bill to amend the Internal Revenue Code of 1986 to extend through 1992 the period during which qualified mortgage bonds and mortgage certificates may be issued.

S. 1673

At the request of Mr. CHAFEE, the name of the Senator from Washington [Mr. ADAMS] was added as a cosponsor of S. 1673, a bill to amend title XIX of the Social Security Act to assist individuals with a severe disability in attaining or maintaining their maximum potential for independence and capacity to participate in community and family life, and for other purposes.

S. 1738

At the request of Mr. WILSON, the name of the Senator from Pennsylvania [Mr. HEINZ] was added as a cosponsor of S. 1738, a bill to make long-term care insurance available to civilian Federal employees, and for other purposes.

S. 2098

At the request of Mr. HOLLINGS, the name of the Senator from Washington [Mr. ADAMS] was added as a cosponsor of S. 2098, a bill to amend the Federal Aviation Act of 1958 to prohibit discrimination against blind individuals in air travel.

S. 2115

At the request of Mr. DANFORTH, the name of the Senator from Arizona [Mr. MCCAIN] was added as a cosponsor of S. 2115, a bill to amend the Internal Revenue Code of 1986 to eliminate tax credits from the passive activ-

ity rules, to modify the business credit limitation provisions, and for other purposes.

S. 2330

At the request of Ms. MIKULSKI, the name of the Senator from Alaska [Mr. STEVENS] was added as a cosponsor of S. 2330, a bill to promote the integration of women in the development process in developing countries.

S. 2345

At the request of Mr. WEICKER, the name of the Senator from Minnesota [Mr. DURENBERGER] was added as a cosponsor of S. 2345, a bill to establish a clear and comprehensive prohibition of discrimination on the basis of handicap.

S. 2379

At the request of Mr. SASSER, the name of the Senator from Colorado [Mr. WIRTH] was added as a cosponsor of S. 2379, a bill to authorize the insurance of certain mortgages for first-time homebuyers, and for other purposes.

S. 2488

At the request of Mr. DODD, the name of the Senator from Pennsylvania [Mr. SPECTER] was added as a cosponsor of S. 2488, a bill to grant employees parental and temporary medical leave under certain circumstances, and for other purposes.

S. 2495

At the request of Mr. BOND, the name of the Senator from Tennessee [Mr. GORE] was added as a cosponsor of S. 2495, a bill to amend the Agricultural Act of 1949 to permit producers to plant supplemental and alternative income-producing crops on acreage considered to be planted to a program crop.

S. 2501

At the request of Mr. WILSON, the name of the Senator from Idaho [Mr. SYMMS] was added as a cosponsor of S. 2501, a bill to amend the Internal Revenue Code of 1986 to allow periods of out-of-residence care to qualify for the principal residence use requirements of the one-time capital gain exclusion for taxpayers who have attained age 55.

S. 2626

At the request of Mr. MOYNIHAN, the name of the Senator from Massachusetts [Mr. KENNEDY] was added as a cosponsor of S. 2626, a bill to amend section 530 of the Revenue Act of 1978 to clarify the Federal income and employment tax treatment of providers of technical services through third party arrangements, and for other purposes.

S. 2630

At the request of Mr. WILSON, the name of the Senator from Idaho [Mr. SYMMS] was added as a cosponsor of S. 2630, a bill to correct the unfair treatment by the tax laws of the United States of citizens performing jury duty.

S. 2636

At the request of Mr. DURENBERGER, the name of the Senator from Wyoming [Mr. SIMPSON] was added as a cosponsor of S. 2636, a bill to amend title XVIII of the Social Security Act to establish a program of voluntary certification of long-term care insurance policies and to protect Medicare beneficiaries from making practices related to such policies, and for other purposes.

S. 2664

At the request of Mr. MOYNIHAN, the names of the Senator from Minnesota [Mr. DURENBERGER], the Senator from Massachusetts [Mr. KENNEDY], and the Senator from Tennessee [Mr. GORE] were added as cosponsors of S. 2664, a bill to amend the Internal Revenue Code of 1986 to exempt from the capitalization rules certain expenses of producers of creative property.

SENATE JOINT RESOLUTION 278

At the request of Mr. GLENN, the names of the Senator from North Dakota [Mr. CONRAD] and the Senator from Utah [Mr. HATCH] were added as cosponsors of Senate Joint Resolution 278, a joint resolution designating November 20-26, 1988, as "National Family Caregivers Week."

SENATE JOINT RESOLUTION 309

At the request of Mr. WILSON, the names of the Senator from North Dakota [Mr. CONRAD], the Senator from California [Mr. CRANSTON], the Senator from Illinois [Mr. DIXON], the Senator from Kansas [Mr. DOLE], the Senator from Utah [Mr. GARN], the Senator from North Carolina [Mr. HELMS], the Senator from Hawaii [Mr. INOUYE], the Senator from Michigan [Mr. LEVIN], the Senator from Arkansas [Mr. PRYOR], the Senator from Michigan [Mr. RIEGLE], the Senator from Maryland [Mr. SARBANES], the Senator from Mississippi [Mr. STENNIS], the Senator from Alaska [Mr. STEVENS], and the Senator from Virginia [Mr. WARNER] were added as cosponsors of Senate Joint Resolution 309, a joint resolution designating the month of May as "National Asparagus Month."

SENATE JOINT RESOLUTION 346

At the request of Mr. LAUTENBERG, the name of the Senator from Texas [Mr. BENTSEN] was added as a cosponsor of Senate Joint Resolution 346, a joint resolution to designate March 25, 1989, as "Greek Independence Day: A National Day of Celebration of Greek and American Democracy."

SENATE JOINT RESOLUTION 350

At the request of Mr. SIMON, the name of the Senator from Rhode Island [Mr. CHAFEE] was added as a cosponsor of Senate Joint Resolution 350, a joint resolution designating Labor Day Weekend, September 3-5, 1988, as "National Drive for Life Weekend."

SENATE CONCURRENT RESOLUTION 122

At the request of Mr. HATFIELD, the name of the Senator from Alaska [Mr. MURKOWSKI] was added as a cosponsor of Senate Concurrent Resolution 122, a concurrent resolution expressing the sense of Congress regarding the urgent need for food assistance by civilians in Vietnam.

AMENDMENTS SUBMITTED

FAIR HOUSING AMENDMENTS ACT

KENNEDY (AND OTHERS) AMENDMENT NO. 2777

Mr. KENNEDY (for himself, Mr. SPECTER, Mr. HATCH, Mr. HEINZ, Mr. PACKWOOD, Mr. DANFORTH, Mr. METZENBAUM, Mr. LEAHY, Mr. WARNER, Mr. DOLE, Mr. GRASSLEY, Mr. DODD, Mr. STEVENS, Mr. HATFIELD, Mr. MATSUNAGA, Mr. SIMON, Mr. ADAMS, Mr. BENTSEN, Mr. BOND, Mr. DIXON, Mr. NUNN, Mr. HARKIN, Mr. THURMOND, Mr. STAFFORD, Mr. DECONCINI, Mr. CRANSTON, AND Mr. WEICKER) submitted an amendment to the bill (H.R. 1158) to amend title VIII of the act commonly called the Civil Rights Act of 1968, to revise the procedures for the enforcement of fair housing, and for other purposes; as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Housing Amendments Act of 1988".

SEC. 2. SHORT TITLE FOR 1968 ACT.

The Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes" (Public Law 90-284, approved April 11, 1968) is amended by inserting after the comma at the end of the enacting clause, the following: "That this Act may be cited as the 'Civil Rights Act of 1968'.".

SEC. 3. REFERENCES TO 1968 ACT.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or provision, the reference shall be considered to be made to a section or other provision of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes" (Public Law 90-284, approved April 11, 1968).

SEC. 4. SHORT TITLE FOR TITLE VIII.

Title VIII is amended by inserting after the title's heading the following new section:

"SHORT TITLE

"SEC. 800. This title may be cited as the 'Fair Housing Act'.".

SEC. 5. AMENDMENTS TO DEFINITIONS SECTION.

(a) MODIFICATION OF DEFINITION OF DISCRIMINATORY HOUSING PRACTICE.—Section 802(f) is amended by striking out "or 806" and inserting in lieu thereof "806, or 818".

(b) ADDITIONAL DEFINITIONS.—Section 802 is amended by adding at the end the following:

"(h) 'Handicap' means, with respect to a person—

"(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

"(2) a record of having such an impairment, or

"(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

"(i) 'Aggrieved person' includes any person who—

"(1) claims to have been injured by a discriminatory housing practice; or

"(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

"(j) 'Complainant' means the person (including the Secretary) who files a complaint under section 810.

"(k) 'Familial status' means one or more individuals' (who have not attained the age of 18 years) being domiciled with—

"(1) a parent or another person having legal custody of such individual or individuals; or

"(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

"(l) 'Conciliation' means the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary.

"(m) 'Conciliation agreement' means a written agreement setting forth the resolution of the issues in conciliation.

"(n) 'Respondent' means—

"(1) the person or other entity accused in a complaint of an unfair housing practice; and

"(2) any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under section 810(a).

"(o) 'Prevailing party' has the same meaning as such term has in section 722 of the Revised Statutes of the United States (42 U.S.C. 1988).".

SEC. 6. DISCRIMINATORY HOUSING PRACTICE AMENDMENTS.

(a) ADDITIONAL DISCRIMINATORY HOUSING PRACTICES.—Section 804 is amended by adding at the end the following:

"(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

"(A) that buyer or renter,

"(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

"(C) any person associated with that buyer or renter.

"(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

"(A) that person; or

"(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

"(C) any person associated with that person.

"(3) For purposes of this subsection, discrimination includes—

"(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises;

"(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

"(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after the date of enactment of the Fair Housing Amendments Act of 1988, a failure to design and construct those dwellings in such a manner that—

"(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

"(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

"(iii) all premises within such dwellings contain the following features of adaptive design:

"(I) an accessible route into and through the dwelling;

"(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

"(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

"(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as 'ANSI A117.1') suffices to satisfy the requirements of paragraph (3)(C)(iii).

"(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

"(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

"(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

"(D) Nothing in this Title shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

"(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 810(f)(3) of this Act to receive and process complaints or otherwise engage in enforcement activities under this Title.

"(B) Determinations by a State or a unit of general local government under paragraphs (5) (A) and (B) shall not be conclusive in enforcement proceedings under this Title.

"(7) As used in this subsection, the term 'covered multifamily dwellings' means—

"(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

"(B) ground floor units in other buildings consisting of 4 or more units.

"(8) Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this title shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this title.

"(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(b) ADDITIONAL PROTECTED CLASSES.—(1) Section 806 and subsections (c), (d), and (e) of section 804, are each amended by inserting "handicap, familial status," immediately after "sex," each place it appears.

(2) Subsections (a) and (b) of section 804 are each amended by inserting "familial status," after "sex," each place it appears.

(c) DISCRIMINATION IN RESIDENTIAL REAL ESTATE-RELATED TRANSACTIONS.—Section 805 is amended to read as follows:

"DISCRIMINATION IN RESIDENTIAL REAL ESTATE-RELATED TRANSACTIONS

"SEC. 805. (a) IN GENERAL.—It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

"(b) DEFINITION.—As used in this section, the term 'residential real estate-related transaction' means any of the following:

"(1) The making or purchasing of loans or providing other financial assistance—

"(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

"(B) secured by residential real estate.

"(2) The selling, brokering, or appraising of residential real property.

"(c) APPRAISAL EXEMPTION.—Nothing in this title prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.".

(d) ADDITIONAL EXEMPTION.—Section 807 is amended—

(1) by inserting "(a)" after "SEC. 807."; and

(2) by adding at the end of such section the following:

"(b)(1) Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this title

regarding familial status apply with respect to housing for older persons.

"(2) As used in this section, 'housing for older persons' means housing—

"(A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or

"(B) intended for, and solely occupied by, persons 62 years of age or older; or

"(C) intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at least the following factors:

"(i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and

"(ii) that at least 80% of the units are occupied by at least one person 55 years of age or older per unit; and

"(iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

"(3) Housing shall not fail to meet the requirements for housing for older persons by reason of:

"(A) persons residing in such housing as of the date of enactment of this Act who do not meet the age requirements of subsections 2 (B) or (C), provided that new occupants of such housing meet the age requirements of subsections (2) (B) or (C); or

"(B) unoccupied units, provided that such units are reserved for occupancy by persons who meet the age requirements of subsections (2) (B) or (C).

"(4) Nothing in this title prohibits conduct against a person because such person has been convicted two or more times by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).".

(e) CLERICAL AMENDMENT.—The heading of section 804 is amended by adding at the end the following: "AND OTHER PROHIBITED PRACTICES".

SEC. 7. ADDITIONAL ADMINISTRATIVE AUTHORITY.

(a) COOPERATION WITH SECRETARY.—Section 808(d) is amended by inserting "(including any Federal agency having regulatory or supervisory authority over financial institutions)" after "urban development".

(b) ADDITIONAL FUNCTIONS OF SECRETARY.—(1) Section 808(e) is amended—

(A) in paragraph (2), by inserting before the semicolon at the end, the following: ", including an annual report to the Congress—

"(A) specifying the nature and extent of progress made nationally in eliminating discriminatory housing practices and furthering the purposes of this title, obstacles remaining to achieving equal housing opportunity, and recommendations for further legislative or executive action; and

"(B) containing tabulations of the number of instances (and the reasons therefor) in the preceding year in which—

"(i) investigations are not completed as required by section 810(a)(1)(B);

"(ii) determinations are not made within the time specified in section 810(g); and

"(iii) hearings are not commenced or findings and conclusions are not made as required by section 812(g)";

(B) by striking out "; and" at the end of paragraph (4);

(C) by striking out the period at the end of paragraph (5) and inserting in lieu thereof "; and"; and

(D) by adding at the end, the following:

"(6) annually report to the Congress, and make available to the public, data on the race, color, religion, sex, national origin, age, handicap, and family characteristics of persons and households who are applicants for, participants in, or beneficiaries or potential beneficiaries of, programs administered by the Department to the extent such characteristics are within the coverage of the provisions of law and Executive orders referred to in subsection (f) which apply to such programs (and in order to develop the data to be included and made available to the public under this subsection, the Secretary shall, without regard to any other provision of law, collect such information relating to those characteristics as the Secretary determines to be necessary or appropriate).".

(2) Section 808 is amended by adding at the end the following:

"(f) The provisions of law and Executive orders to which subsection (e)(6) applies are—

"(1) title VI of the Civil Rights Act of 1964;

"(2) title VIII of the Civil Rights Act of 1968;

"(3) section 504 of the Rehabilitation Act of 1973;

"(4) the Age Discrimination Act of 1975;

"(5) the Equal Credit Opportunity Act;

"(6) section 1978 of the Revised Statutes (42 U.S.C. 1982);

"(7) section 8(a) of the Small Business Act;

"(8) section 527 of the National Housing Act;

"(9) section 109 of the Housing and Community Development Act of 1974;

"(10) section 3 of the Housing and Urban Development Act of 1968;

"(11) Executive Orders 11063, 11246, 11625, 12250, 12259, and 12432; and

"(12) any other provision of law which the Secretary specifies by publication in the Federal Register for the purpose of this subsection.".

SEC. 8. ENFORCEMENT CHANGES.

Title VIII is amended—

(1) by redesignating sections 815 through 819 as sections 816 through 820, respectively; and

(2) by striking out sections 810 through 813 and inserting in lieu thereof the following:

"ADMINISTRATIVE ENFORCEMENT; PRELIMINARY MATTERS

"SEC. 810. (a) COMPLAINTS AND ANSWERS.—(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

"(ii) Such complaints shall be in writing and shall contain such information and be in such form as the Secretary requires.

"(iii) The Secretary may also investigate housing practices to determine whether a complaint should be brought under this section.

"(B) Upon the filing of such a complaint—

"(i) the Secretary shall serve notice upon the aggrieved person acknowledging such filing and advising the aggrieved person of the time limits and choice of forums provided under this title;

"(ii) the Secretary shall, not later than 10 days after such filing or the identification of an additional respondent under paragraph (2), serve on the respondent a notice identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under this title, together with a copy of the original complaint;

"(iii) each respondent may file, not later than 10 days after receipt of notice from the Secretary, an answer to such complaint; and

"(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days after the commencement of such further action), unless it is impracticable to do so.

"(C) If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

"(D) Complaints and answers shall be under oath or affirmation, and may be reasonably and fairly amended at any time.

"(2)(A) A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice, under paragraph (1), to such person, from the Secretary.

"(B) Such notice, in addition to meeting the requirements of paragraph (1), shall explain the basis for the Secretary's belief that the person to whom the notice is addressed is properly joined as a respondent.

"(b) INVESTIGATIVE REPORT AND CONCILIATION.—(1) During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint.

"(2) A conciliation agreement arising out of such conciliation shall be an agreement between the respondent and the complainant, and shall be subject to approval by the Secretary.

"(3) A conciliation agreement may provide for binding arbitration of the dispute arising from the complaint. Any such arbitration that results from a conciliation agreement may award appropriate relief, including monetary relief.

"(4) Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the Secretary determines that disclosure is not required to further the purposes of this title.

"(5)(A) At the end of each investigation under this section, the Secretary shall prepare a final investigative report containing—

"(i) the names and dates of contacts with witnesses;

"(ii) a summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;

"(iii) a summary description of other pertinent records;

"(iv) a summary of witness statements; and

"(v) answers to interrogatories.

"(B) A final report under this paragraph may be amended if additional evidence is later discovered.

"(c) FAILURE TO COMPLY WITH CONCILIATION AGREEMENT.—Whenever the Secretary has reasonable cause to believe that a respondent has breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed under section 814 for the enforcement of such agreement.

"(d) PROHIBITIONS AND REQUIREMENTS WITH RESPECT TO DISCLOSURE OF INFORMATION.—(1) Nothing said or done in the course of conciliation under this title may be made public or used as evidence in a subsequent proceeding under this title without the written consent of the persons concerned.

"(2) Notwithstanding paragraph (1), the Secretary shall make available to the aggrieved person and the respondent, at any time, upon request following completion of the Secretary's investigation, information derived from an investigation and any final investigative report relating to that investigation.

"(e) PROMPT JUDICIAL ACTION.—(1) If the Secretary concludes at any time following the filing of a complaint that prompt judicial action is necessary to carry out the purposes of this title, the Secretary may authorize a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint under this section. Upon receipt of such an authorization, the Attorney General shall promptly commence and maintain such an action. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with the Federal Rules of Civil Procedure. The commencement of a civil action under this subsection does not affect the initiation or continuation of administrative proceedings under this section and section 812 of this title.

"(2) Whenever the Secretary has reason to believe that a basis may exist for the commencement of proceedings against any respondent under sections 814(a) and 814(c) or for proceedings by any governmental licensing or supervisory authorities, the Secretary shall transmit the information upon which such belief is based to the Attorney General, or to such authorities, as the case may be.

"(f) REFERRAL FOR STATE OR LOCAL PROCEEDINGS.—(1) Whenever a complaint alleges a discriminatory housing practice—

"(A) within the jurisdiction of a State or local public agency; and

"(B) as to which such agency has been certified by the Secretary under this subsection;

the Secretary shall refer such complaint to that certified agency before taking any action with respect to such complaint.

"(2) Except with the consent of such certified agency, the Secretary, after that referral is made, shall take no further action with respect to such complaint unless—

"(A) the certified agency has failed to commence proceedings with respect to the complaint before the end of the 30th day after the date of such referral;

"(B) the certified agency, having so commenced such proceedings, fails to carry forward such proceedings with reasonable promptness; or

"(C) the Secretary determines that the certified agency no longer qualifies for certification under this subsection with respect to the relevant jurisdiction.

"(3)(A) The Secretary may certify an agency under this subsection only if the Secretary determines that—

"(i) the substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made;

"(ii) the procedures followed by such agency;

"(iii) the remedies available to such agency; and

"(iv) the availability of judicial review of such agency's action;

are substantially equivalent to those created by and under this title.

"(B) Before making such certification, the Secretary shall take into account the current practices and past performance, if any, of such agency.

"(4) During the period which begins on the date of the enactment of the Fair Housing Amendments Act of 1988 and ends 40 months after such date, each agency certified (including an agency certified for interim referrals pursuant to 24 CFR 115.11, unless such agency is subsequently denied recognition under 24 CFR 115.7) for the purposes of this title on the day before such date shall for the purposes of this subsection be considered certified under this subsection with respect to those matters for which such agency was certified on that date. If the Secretary determines in an individual case that an agency has not been able to meet the certification requirements within this 40-month period due to exceptional circumstances, such as the infrequency of legislative sessions in that jurisdiction, the Secretary may extend such period by not more than 8 months.

"(5) Not less frequently than every 5 years, the Secretary shall determine whether each agency certified under this subsection continues to qualify for certification. The Secretary shall take appropriate action with respect to any agency not so qualifying.

"(g) REASONABLE CAUSE DETERMINATION AND EFFECT.—(1) The Secretary shall, within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days after the commencement of such further action), determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to make the determination within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

"(2)(A) If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall, except as provided in subparagraph (C), immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 812.

"(B) Such charge—

"(i) shall consist of a short and plain statement of the facts upon which the Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

"(ii) shall be based on the final investigative report; and

"(iii) need not be limited to the facts or grounds alleged in the complaint filed under section 810(a).

"(C) If the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance, the Secretary shall immediately refer the matter to the Attorney General for appropriate action under section 814, instead of issuing such charge.

"(3) If the Secretary determines that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall promptly dismiss the complaint. The Secretary shall make public disclosure of each such dismissal.

"(4) The Secretary may not issue a charge under this section regarding an alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

"(h) SERVICE OF COPIES OF CHARGE.—After the Secretary issues a charge under this section, the Secretary shall cause a copy thereof, together with information as to how to make an election under section 812(a) and the effect of such an election, to be served—

"(1) on each respondent named in such charge, together with a notice of opportunity for a hearing at a time and place specified in the notice, unless that election is made; and

"(2) on each aggrieved person on whose behalf the complaint was filed.

"SUBPOENAS; GIVING OF EVIDENCE

"SEC. 811. (a) IN GENERAL.—The Secretary may, in accordance with this subsection, issue subpoenas and order discovery in aid of investigations and hearings under this title. Such subpoenas and discovery may be ordered to the same extent and subject to the same limitations as would apply if the subpoenas or discovery were ordered or served in aid of a civil action in the United States district court for the district in which the investigation is taking place.

"(b) WITNESS FEES.—Witnesses summoned by a subpoena under this title shall be entitled to the same witness and mileage fees as witnesses in proceedings in United States district courts. Fees payable to a witness summoned by a subpoena issued at the request of a party shall be paid by that party or, where a party is unable to pay the fees, by the Secretary.

"(c) CRIMINAL PENALTIES.—(1) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents, or other evidence, if it is in such person's power to do so, in obedience to the subpoena or other lawful order under subsection (a), shall be fined not more than $100,000 or imprisoned not more than one year, or both.

"(2) Any person who, with intent thereby to mislead another person in any proceeding under this title—

"(A) makes or causes to be made any false entry or statement of fact in any report, account, record, or other document produced pursuant to subpoena or other lawful order under subsection (a);

"(B) willfully neglects or fails to make or to cause to be made full, true, and correct

entries in such reports, accounts, records, or other documents; or

"(C) willfully mutilates, alters, or by any other means falsifies any documentary evidence;

shall be fined not more than $100,000 or imprisoned not more than one year, or both.

"ENFORCEMENT BY SECRETARY

"SEC. 812. (a) ELECTION OF JUDICIAL DETERMINATION.—When a charge is filed under section 810, a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (o) in lieu of a hearing under subsection (b). The election must be made not later than 20 days after the receipt by the electing person of service under section 810(h) or, in the case of the Secretary, not later than 20 days after such service. The person making such election shall give notice of doing so to the Secretary and to all other complainants and respondents to whom the charge relates.

"(b) ADMINISTRATIVE LAW JUDGE HEARING IN ABSENCE OF ELECTION.—If an election is not made under subsection (a) with respect to a charge filed under section 810, the Secretary shall provide an opportunity for a hearing on the record with respect to a charge issued under section 810. The Secretary shall delegate the conduct of a hearing under this section to an administrative law judge appointed under section 3105 of title 5, United States Code. The administrative law judge shall conduct the hearing at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur.

"(c) RIGHTS OF PARTIES.—At a hearing under this section, each party may appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas under section 811. Any aggrieved person may intervene as a party in the proceeding. The Federal Rules of Evidence apply to the presentation of evidence in such hearing as they would in a civil action in a United States district court.

"(d) EXPEDITED DISCOVERY AND HEARING.—(1) Discovery in administrative proceedings under this section shall be conducted as expeditiously and inexpensively as possible, consistent with the need of all parties to obtain relevant evidence.

"(2) A hearing under this section shall be conducted as expeditiously and inexpensively as possible, consistent with the needs and rights of the parties to obtain a fair hearing and a complete record.

"(3) The Secretary shall, not later than 180 days after the date of enactment of this subsection, issue rules to implement this subsection.

"(e) RESOLUTION OF CHARGE.—Any resolution of a charge before a final order under this section shall require the consent of the aggrieved person on whose behalf the charge is issued.

"(f) EFFECT OF TRIAL OF CIVIL ACTION ON ADMINISTRATIVE PROCEEDINGS.—An administrative law judge may not continue administrative proceedings under this section regarding any alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

"(g) HEARINGS, FINDINGS AND CONCLUSIONS, AND ORDER.—(1) The administrative law judge shall commence the hearing under this section no later than 120 days following the issuance of the charge, unless it is impracticable to do so. If the administrative law judge is unable to commence the hearing within 120 days after the issuance of the charge, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

"(2) The administrative law judge shall make findings of fact and conclusions of law within 60 days after the end of the hearing under this section, unless it is impracticable to do so. If the administrative law judge is unable to make findings of fact and conclusions of law within such period, or any succeeding 60-day period thereafter, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

"(3) If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent—

"(A) in an amount not exceeding $10,000 if the respondent has not been adjudged to have committed any prior discriminatory housing practice;

"(B) in an amount not exceeding $25,000 if the respondent has been adjudged to have committed one other discriminatory housing practice during the 5-year period ending on the date of the filing of this charge; and

"(C) in an amount not exceeding $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory housing practices during the 7-year period ending on the date of the filing of this charge;

except that if the acts constituting the discriminatory housing practice that is the object of the charge are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory housing practice, then the civil penalties set forth in subparagraphs (B) and (C) may be imposed without regard to the period of time within which any subsequent discriminatory housing practice occurred.

"(4) No such order shall affect any contract, sale, encumbrance, or lease consummated before the issuance of such order and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the charge filed under this title.

"(5) In the case of an order with respect to a discriminatory housing practice that occurred in the course of a business subject to a licensing or regulation by a governmental agency, the Secretary shall, not later than 30 days after the date of the issuance of such order (or, if such order is judicially reviewed, 30 days after such order is in substance affirmed upon such review)—

"(A) send copies of the findings of fact, conclusions of law, and the order, to that governmental agency; and

"(B) recommend to that governmental agency appropriate disciplinary action (including, where appropriate, the suspension or revocation of the license of the respondent).

"(6) In the case of an order against a respondent against whom another order was issued within the preceding 5 years under this section, the Secretary shall send a copy of each such order to the Attorney General.

"(7) If the administrative law judge finds that the respondent has not engaged or is not about to engage in a discriminatory housing practice, as the case may be, such administrative law judge shall enter an order dismissing the charge. The Secretary shall make public disclosure of each such dismissal.

"(h) REVIEW BY SECRETARY; SERVICE OF FINAL ORDER.—(1) The Secretary may review any finding, conclusion, or order issued under subsection (g). Such review shall be completed not later than 30 days after the finding, conclusion, or order is so issued; otherwise the finding, conclusion, or order becomes final.

"(2) The Secretary shall cause the findings of fact and conclusions of law made with respect to any final order for relief under this section, together with a copy of such order, to be served on each aggrieved person and each respondent in the proceeding.

"(i) JUDICIAL REVIEW.—(1) Any party aggrieved by a final order for relief under this section granting or denying in whole or in part the relief sought may obtain a review of such order under chapter 158 of title 28, United States Code.

"(2) Notwithstanding such chapter, venue of the proceeding shall be in the judicial circuit in which the discriminatory housing practice is alleged to have occurred, and filing of the petition for review shall be not later than 30 days after the order is entered.

"(j) COURT ENFORCEMENT OF ADMINISTRATIVE ORDER UPON PETITION BY SECRETARY.—(1) The Secretary may petition any United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred or in which any respondent resides or transacts business for the enforcement of the order of the administrative law judge and for appropriate temporary relief or restraining order, by filing in such court a written petition praying that such order be enforced and for appropriate temporary relief or restraining order.

"(2) The Secretary shall file in court with the petition the record in the proceeding. A copy of such petition shall be forthwith transmitted by the clerk of the court to the parties to the proceeding before the administrative law judge.

"(k) RELIEF WHICH MAY BE GRANTED.—(1) Upon the filing of a petition under subsection (i) or (j), the court may—

"(A) grant to the petitioner, or any other party, such temporary relief, restraining order, or other order as the court deems just and proper;

"(B) affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings; and

"(C) enforce such order to the extent that such order is affirmed or modified.

"(2) Any party to the proceeding before the administrative law judge may intervene in the court of appeals.

"(3) No objection not made before the administrative law judge shall be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

"(l) ENFORCEMENT DECREE IN ABSENCE OF PETITION FOR REVIEW.—If no petition for review is filed under subsection (i) before the expiration of 45 days after the date the administrative law judge's order is entered, the administrative law judge's findings of fact and order shall be conclusive in connection with any petition for enforcement—

"(1) which is filed by the Secretary under subsection (j) after the end of such day; or

"(2) under subsection (m).

"(m) COURT ENFORCEMENT OF ADMINISTRATIVE ORDER UPON PETITION OF ANY PERSON ENTITLED TO RELIEF.—If before the expiration of 60 days after the date the administrative law judge's order is entered, no petition for review has been filed under subsection (i), and the Secretary has not sought enforcement of the order under subsection (j), any person entitled to relief under the order may petition for a decree enforcing the order in the United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred.

"(n) ENTRY OF DECREE.—The clerk of the court of appeals in which a petition for enforcement is filed under subsection (l) or (m) shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary, the respondent named in the petition, and to any other parties to the proceeding before the administrative law judge.

"(o) CIVIL ACTION FOR ENFORCEMENT WHEN ELECTION IS MADE FOR SUCH CIVIL ACTION.—(1) If an election is made under subsection (a), the Secretary shall authorize, and not later than 30 days after the election is made, the Attorney General shall commence and maintain, a civil action on behalf of the aggrieved person in a United States district court seeking relief under this subsection. Venue for such civil action shall be determined under chapter 87 of title 28, United States Code. The Secretary shall promptly notify the Attorney General of the filing of any action under this subsection.

"(2) Any aggrieved person with respect to the issues to be determined in a civil action under this subsection may intervene as of right in that civil action.

"(3) In a civil action under this subsection, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may grant as relief any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section 813. Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under section 813 shall also accrue to that aggrieved person in a civil action under this subsection. If monetary relief is sought for the benefit of an aggrieved person who does not intervene in the civil action, the court shall not award such relief if that aggrieved person has not complied with discovery orders entered by the court.

"(p) ATTORNEY'S FEES.—In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under section 812, the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section 504 of title 5, United States Code, or by section 2412 of title 28, United States Code.

"ENFORCEMENT BY PRIVATE PERSONS

"SEC. 813. (a) CIVIL ACTION.—(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this title, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

"(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this title was pending with respect to a complaint or charge under this title based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

"(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 810(a) and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

"(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this title with respect to such charge.

"(b) APPOINTMENT OF ATTORNEY BY COURT.—Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may—

"(1) appoint an attorney for such person; or

"(2) authorize the commencement or continuation of a civil action under subsection (a) without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

"(c) RELIEF WHICH MAY BE GRANTED.—(1) In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

"(2) In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

"(d) EFFECT ON CERTAIN SALES, ENCUMBRANCES, AND RENTALS.—Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this title.

"(e) INTERVENTION BY ATTORNEY GENERAL.—Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 814(e) in a civil action to which such section applies.

"ENFORCEMENT BY THE ATTORNEY GENERAL

"SEC. 814. (a) PATTERN OR PRACTICE CASES.—Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by this title and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

"(b) ON REFERRAL OF DISCRIMINATORY HOUSING PRACTICE OR CONCILIATION AGREEMENT FOR ENFORCEMENT.—(1)(A) The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to a discriminatory housing practice referred to the Attorney General by the Secretary under section 810(g).

"(B) A civil action under this paragraph may be commenced not later than the expiration of 18 months after the date of the occurrence or the termination of the alleged discriminatory housing practice.

"(2)(A) The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to breach of a conciliation agreement referred to the Attorney General by the Secretary under section 810(c).

"(B) A civil action may be commenced under this paragraph not later than the expiration of 90 days after the referral of the alleged breach under section 810(c).

"(c) ENFORCEMENT OF SUBPOENAS.—The Attorney General, on behalf of the Secretary, or other party at whose request a subpoena is issued, under this title, may enforce such subpoena in appropriate proceedings in the United States district court for the district in which the person to whom the subpoena was addressed resides, was served, or transacts business.

"(d) RELIEF WHICH MAY BE GRANTED IN CIVIL ACTIONS UNDER SUBSECTIONS (a) AND (b).—(1) In a civil action under subsection (a) or (b), the court—

"(A) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this title as is necessary to assure the full enjoyment of the rights granted by this title;

"(B) may award such other relief as the court deems appropriate, including monetary damages to persons aggrieved; and

"(C) may, to vindicate the public interest, assess a civil penalty against the respondent—

"(i) in an amount not exceeding $50,000, for a first violation; and

"(ii) in an amount not exceeding $100,000, for any subsequent violation.

"(2) In a civil action under this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section 2412 of title 28, United States Code.

"(e) INTERVENTION IN CIVIL ACTIONS.—Upon timely application, any person may intervene in a civil action commenced by the Attorney General under subsection (a) or (b) which involves an alleged discriminatory housing practice with respect to which such

person is an aggrieved person or a conciliation agreement to which such person is a party. The court may grant such appropriate relief to any such intervening party as is authorized to be granted to a plaintiff in a civil action under section 813.

"RULES TO IMPLEMENT TITLE

"SEC. 815. The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this title. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.".

SEC. 9. CONFORMING AMENDMENT TO TITLE IX.

Section 901 is amended by inserting ", handicap (as such term is defined in section 802 of this Act), familial status (as such term is defined in section 802 of this Act)," after "sex" each place it appears.

SEC. 10. TECHNICAL AMENDMENT RELATING TO CIVIL ACTION.

Section 818 (as so redesignated by section 8 of this Act) is amended by striking out the last sentence thereof.

SEC. 11. CONFORMING AMENDMENTS TO TITLE 28, UNITED STATES CODE.

(a) JURISDICTION.—Section 2342 of title 28, United States Code, is amended—

SEC. 13. EFFECTIVE DATE AND INITIAL RULEMAKING.

(a) EFFECTIVE DATE.—This Act and the amendments made by this Act shall take effect on the 180th day beginning after the date of the enactment of this Act.

(b) INITIAL RULEMAKING.—In consultation with other appropriate Federal agencies, the Secretary shall, not later than the 180th day after the date of the enactment of this Act, issue rules to implement title VIII as amended by this Act. The Secretary shall give public notice and opportunity for comment with respect to such rules.

SEC 14. SEPARABILITY OF PROVISIONS.

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

SEC. 15. MODIFICATION OF RENTAL HOUSING BY HANDICAPPED PERSONS.

Section 804 (as amended by section 6 of this Act) is further amended by striking out the period at the end of subsection (f)(3)(A) and inserting in lieu thereof "except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted".

THURMOND AMENDMENT NO. 2778

Mr. THURMOND proposed an amendment to amendment No. 2777 proposed by Mr. KENNEDY (and others) to the bill H.R. 1158, supra; as follows:

On page 10, line 16 strike "two or" and on page 10, line 17, strike "more times".

HELMS AMENDMENT NO. 2779

Mr. HELMS proposed an amendment to amendment No. 2777 proposed by Mr. KENNEDY (and others) to the bill H.R. 1158, supra; as follows:

At the appropriate place in the substitute, add the following: "For the purposes of this Act as well as Chapter 16 of Title 29 of the U.S. Code, neither the term "individual with handicaps" nor the term "handicap" shall apply to an individual solely because that individual is a transvestite.".

HELMS AMENDMENT NO. 2780

Mr. HELMS proposed an amendment to amendment No. 2777 proposed by Mr. KENNEDY (and others) to the bill H.R. 1158, supra; as follows:

At the appropriate place in the substitute insert the following:

SEC. . (a) This section may be cited as the "Voluntary School Prayer Act".

(b)(1) Chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§1260. Appellate jurisdiction: limitations

"(a) Notwithstanding the provisions of section 1253, 1254, and 1257 of this chapter and in accordance with section 2 of Article III of the Constitution, the Supreme Court shall not have jurisdiction to review by appeal, writ of certiorari or otherwise, any case arising out of any State statute, ordinance, rule, regulation, practice, or any part thereof, or arising out of any act interpreting, applying, enforcing, or effecting any State statute, ordinance, rule, regulation, or practice, which relates to voluntary prayer, Bible reading or religious meetings in public schools or public buildings.

"(b) For purposes of this section, the term 'voluntary' means an activity in which a student is not required to participate by school authorities.".

(2) The section analysis of chapter 81 of title 28 is amended by adding at the end thereof the following new item:

"1260. Appellate jurisdiction: limitations.".

(c)(1) Chapter 85 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§1367. Limitations on jurisdiction

"Notwithstanding any other provision of law and in accordance with section 2 of Article III of the Constitution, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1260 of this title.".

(2) The section analysis at the beginning of chapter 85 of title 28 is amended by adding at the end thereof the following new item:

"1367. Limitations on jurisdiction.".

(d) The amendments made by this section shall take effect one day after the date of enactment, except that such amendments shall not apply to any case which, on such date of enactment, was pending in any court of the United States.

SYMMS AMENDMENT NO. 2781

Mr. SYMMS proposed an amendment to amendment No. 2780 proposed by Mr. HELMS to amendment No. 2777 proposed by Mr. KENNEDY (and others) to the bill H.R. 1158, supra; as follows:

In lieu of the matter proposed to be inserted, insert the following:

SEC. . (a) This section may be cited as the "Voluntary School Prayer Act".

(b)(1) Chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§1260. Appellate jurisdiction: limitations

"(a) Notwithstanding the provisions of sections 1253, 1254, and 1257 of this chapter and in accordance with section 2 of Article III of the Constitution, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, practice, or any part thereof, or arising out of any act interpreting, applying, enforcing, or effecting any State statute, ordinance, rule, regulation, or practice, which relates to voluntary prayer, Bible reading, or religious meetings in public schools or public buildings.

"(b) For purposes of this section, the term 'voluntary' means an activity in which a student is not required to participate by school authorities."

(2) The section analysis of chapter 81 of title 28 is amended by adding at the end thereof the following new item:

"1260. Appellate jurisdiction: limitations.".

(c)(1) Chapter 85 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§1367. Limitations on jurisdiction

"Notwithstanding any other provision of law and in accordance with section 2 of Article III of the Constitution, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1260 of this title.".

(2) The section analysis at the beginning of chapter 85 of title 28 is amended by adding at the end thereof the following new item:

"§ 1367. Limitations on jurisdiction.".

(d) The amendments made by this section shall take effect on the date of enactment, except that such amendments shall not apply to any case which, on such date of enactment, was pending in any court of the United States.

ADDITIONAL STATEMENTS

SPACE EXPLORATION DAY

● Mr. DOMENICI. Mr. President, I would like to add my name to the list of those supporting S. 1288 which would designate July 20 of each year as "Space Exploration Day."

The United States' spectacular accomplishments in space exploration during the last 30 years are an example of the success Americans strive to achieve. When project Mercury was initiated in November 1958 it beckoned the dreams of a generation that saw Alan Shepard become the first American in space and our colleague, JOHN GLENN, circle the Earth. Images of Mars were broadcast from *Viking 1* to the television screens of millions of American viewers. As the keystone of our success in space, almost 20 years ago, Neil Armstrong became the first man to walk on the Moon.

But along with the successes of Neil Armstrong, Alan Shepard and our former colleague from New Mexico, Jack Schmitt, we have seen tragedies that will be especially remembered on Space Exploration Day. On January

27, 1967, Virgil Grissom, Edward White, and Roger Chaffee were killed during a full launch rehearsal aboard *Apollo I.*

Nineteen years later the *Challenger* was destroyed 73 seconds into flight with its seven crew members: Francis "Dick" Scobee, Michael Smith, Judith Resnik, Ronald McNair, Ellison Onizuka, Gregory Jarvis, and S. Christa McAuliffe. The loss of these 10 astronauts is felt in the hearts of all Americans. They gave their lives while pursuing greatness, but however tragic their mission, their spirit of adventure, their dedication to the exploration of space, their dreams will always be on board as mankind ventures farther into space.

Our quest for knowledge about space has also increased our knowledge about our planet. All across the country, those dedicated to the dreams of space are working diligently to expand our resources, to broaden our understanding, and contribute to our effort in space. The fruits of that labor have become part of the commercial sector, where these advances are now integrated into the American economy.

Space Exploration Day will be received with special pride in New Mexico, a State that has been particularly close to the development of America's space systems. For half a century New Mexico has been contributing technology that makes our space programs possible. It is a great illustration of our success that on March 30, 1982, I, and hundreds of other New Mexicans, were able to watch the space shuttle *Columbia* land at the White Sands Missile Range where Dr. Goddard performed some of the first tests on American rockets only 50 years ago.

It is with great pride that I join my colleagues in support of S. 1288. Space Exploration Day would help bring Americans together to recognize the value of our space programs. The day would honor all the people who, in the pursuit of space, struggled toward their dreams, especially those who give their lives to see those dreams fulfilled.

The success of our space programs has been due to personal values that Americans exhalt as admirable and brave. It is only fitting that Space Exploration Day be created to honor the people, the ideals, and the desires that have propelled us and our spacecraft from dreams to reality.●

LET'S MAKE THE TARGETED JOBS TAX CREDIT PERMANMENT

● Mr. D'AMATO. Mr. President, I am pleased to join my colleague, Senator HEINZ, in sponsoring S. 684, legislation to make the targeted jobs tax credit permanent. This program has provided a powerful incentive to employers to hire the disadvantaged and give them the help to help themselves.

The State of New York has been the Nation's leader in using TJTC to create new jobs for economically disadvantaged individuals. During fiscal year 1987 alone, the program generated employment opportunities for 35,731 persons.

Workers who found their jobs through TJTC included minorities, disadvantaged youth, public assistance recipients, handicapped people, Vietnam veterans, and ex-offenders. I find it impressive, and well worth noting, that one-fourth of all TJTC workers in New Yorks had been receiving welfare. These people are now working; TJTC helped give them an opportunity they otherwise may not have found.

As well as changing opportunities, TJTC has helped change hearts and minds. TJTC changed the attitudes of employers toward hiring individuals in these targeted groups. Employers have had a chance to see how hard working, productive, and loyal these employees can be.

TJTC has proved both cost effective and socially beneficial. The estimated annual payroll of New Yorkers hired under the program was $350 to $400 million in 1987. The ripple effect of economic activity generated by this program added approximately $1 billion to the State's economy.

It is clear this program accomplishes exactly what Congress intended it to. Can we afford not to make this Nation's most successful job creation program permanent? I am proud to add my support.●

SOVIET RESPONSES TO SDI

● Mr. BUMPERS. Mr. President, recently the defense publication Jane's Defense Weekly published an interview in their July 16, 1988, issue they conducted with Soviet Air Force Maj. Gen. Boris Surikov, whom Jane's described as the Soviets' expert on space-based weapons.

All those who are interested in the star wars debate should read this interview. General Surikov describes in quite some detail the kinds of countermeasures that the Soviets have available to them to defeat a star wars system. He refers to a whole host of countermeasures to the strategic defense initiative [SDI], including high-acceleration missiles, which are also called fast-burn boosters. The Soviets' ICBM force will become faster burning over time as they continue to replace their slower burning liquid fueled missiles with faster burning solid ones, even without SDI. Under pressure from SDI, the Soviets could achieve dramatic reductions in the burn times of their ICBM boosters, greatly complicating the already difficult challenge facing SDI. General Surikov also mentions other countermeasures including depressed trajectory SLBM's, direct ascent nuclear antisatellite missiles, decoys, and space mines.

These countermeasures that General Surikov refers to are not pie-in-the-sky, and neither are they terribly expensive. They have been referred to in recent U.S. reports on SDI and are quite feasible. They pose a serious challenge to SDI and seriously call into question its cost-effectiveness.

In the past the Pentagon has spoken of how the Soviets have wasted many billions of dollars on their air defense system, funds that they otherwise would have spent on offense. Despite the Soviets' vast efforts, our bombers will still largely be able to penetrate the Soviet air defense network. It seems to me that this same argument works both ways. SDI would force us to waste many hundreds of billions of dollars, dollars better spent on real defense efforts, in a vain attempt to shield ourselves from Soviet missiles. Let's not duplicate the Soviets' multihundred billion dollar mistake. Let's keep star wars to a basic research effort level only.

I commend this article to my colleagues' attention and hope they will read it to gain a better understanding of the many ways in which the SDI space shield could be punctured.

I ask that the summary article, and the full text of the interview with General Surikov, from Jane's Defense Weekly, be placed in the RECORD at this point.

SOVIET GENERAL'S SDI WARNING

(By Geoffrey Manners)

Soviet Air Force Major General Boris Surikov, a member of the SALT I negotiating team and the Soviet government's expert on space-based weapons has warned the USA that his country could use nuclear weapons in space to counter the USA's SDI programme.

"The Soviet Union has, today, at its disposal every means to respond effectively to the 'Star Wars' programme with both offensive and defensive countermeasures. We will not allow the US to tilt the established military-strategic balance in its favour".

The General, giving an exclusive interview to Jane's Defence Weekly, outlined some of the measures his country could take against SDI.

"A significant threat can be created by space mines, either nuclear or conventionally armed.

"Clouds of heavy or lightweight obstacles like metal balls, sawdust, or sand can also be put in the way of combat or sensor platforms.

"The West must be aware that the Soviet Union has a technological basis to develop high-acceleration strategic missiles, and can introduce sufficiently simple imitation and anti-imitation devices in future missile weapons to effectively camouflage the real nuclear warheads among various decoys which would saturate the sensor and combat systems of an ABM defence.

"We could also use heavy-weight decoys and preventive high-altitude nuclear explosives to jam ground-based ABM radars, to

complicate the task of targeting ABMs at incoming warheads."

The General also warned about the amount of "rubbish" floating about in space.

"Outer space is filled with a huge quantity of man-made objects" he said, adding that if they collided with sensor and ABM combat platforms it could be misinterpreted as a pre-emptive attack which would, in turn, lead to the use of strategic missiles.

SURIKOV: HOW WE'LL COUNTER SDI

One of the Soviet Union's leading authorities on the Strategic Defence Intiative has been talking exclusively to *JDW* about Soviet anti-ballistic missile (ABM) research and development, space mines, and space war.

Air Force Maj. Gen. Boris Surikov, a member of the SALT I negotiating team and his government's expert on new types and systems of space-based weapons, also discussed chemical lasers, United States interceptors for use against satellites and the Soviets means of response to President Reagan's Star Wars (SDI) programme.

"The President has long asserted that the USSR was going to deploy a territorial ABM system banned by the ABM Treaty. He raised this matter as early as July 1986 in his traditional radio address to the nation when he also said that the Soviet Union has the only deployed ABM system in the world." said Maj. Gen. Surikov.

"But he has not taken the trouble to explain that he means a cluster of ABM systems commissioned in the early 1970s in strict compliance with the terms of the ABM Treaty for the defence of Moscow.

"It is true that the Soviet Union is engaged in R&D to further improve the limited ABM system of the national capital. It would be useful to note that upgrading or replacing the ABM system or its components is fully in line with Article VII of the ABM Treaty.

"The ABM efforts under way in the USSR are not aimed at changing the limited qualitative and quantitative characteristics of this system allowed by the Treaty.

"The USSR also conducts research and testing of ABM systems, based on new physical principles as applied to the limited ABM area with a radius of 150 km allowed to each side by Article II of the Treaty. The terms of the ABM Treaty, including Statement D, allow testing of both ABM systems and their components in fixed ground-based mode.

"This also covers ABM systems and their components based on new physical principles—the existing ones as well as those that can be developed in future.

"Experts in the West know very well that the existing air defence surface-to-air missiles can be sufficiently effective only against manned and unmanned aircraft but are quite useless as part of strategic ABM systems.

"The reason is that surface-to-air missiles have limited altitude of intercept, limited speed of flight and limited capability to resist longitudinal and lateral load factors. The tactical and technical characteristics of those weapons are suited for effective intercept of modern airborne targets but are insufficient for attacking strategic ballistic missile warheads in mid-course and terminal phases.

"So any surface-to-air missiles—including the ones that are called SA-5, SA-10 and SA-12 in the West—are quite useless as components of an ABM system of the country or its regions."

General Surikov also spoke of "traditional" air defence radars, saying that they too are useless in terms of ABM discussions.

"The U.S. and Soviet negotiators at the SALT I talks agreed the minimal capacities of ABM radars. In their initial statements, the heads of U.S. and Soviet delegations agreed to allow deployment of phased-array radars having a potential (average emitting power in Watts x array area in m.) of not more than 3 million, except for cases expressly prohibited by the ABM Treaty.

"All Soviet radars have lower potentials and cannot detect or track ballistic missiles automatically or with the necessary accuracy.

"The Soviet Union indeed has a deployed air-defence system that has nothing to do with the notorious Red Shield—a mythical territorial ABM system—for the existing one is designed solely for attacking manned and unmanned aircraft.

"Air-defence clusters are deployed in the USSR to protect key governmental and industrial centres as well as vital military facilities. Effective interception of cruise missiles and aircraft flying at minimal, low, medium or high altitudes can be effected either by surface-to-air missiles or by high-speed fighter-interceptors armed with air-to-air missiles."

Referring to the USA's SDI programme the General said that deployment of numerous ABM battle stations in outer space could be extremely dangerous for all.

"The essence of this all too real threat: the outer space around the Earth is filled with a huge quantity of man-made objects. According to NASA data, in June 1987 there were 1,702 artificial earth satellites and 5,130 major fragments in orbits, including components of upper booster stages and rocket head shrouds.

"Most of those man-made objects travel round the Earth at altitudes of 500-2000 km and inclinations of 10-100°. Some fragments fly at altitudes below 500 km. About 1,000 space objects fly in near-geosynchronous and geosynchronous orbits at altitudes of 33,000 to 41,000 km.

"The orbits of ABM components in space can cross orbits of non-operational objects. Besides, in such cases automatic sensors can sound false alarms which cannot be disregarded. As the number of sensor and combat ABM platforms increases, the probability of the their collision with man-made objects, natural meteors or interplanetary dust will grow as well.

"Failure of an ABM component in space could be misinterpreted as a pre-emptive attack of the opposing side, but such a mistake could, in its turn, provoke the use of strategic missiles.

"The essence of the SDI threat for the Soviet Union is that the United States needs this programme primarily to support on unpunished first disarming strike—that is to destroy Soviet missiles that could survive a first strike and be launched in retaliation to that strike."

The space-based echelon of the U.S. ABM system could also have a powerful offensive capacity said General Surikov.

"Besides limited defensive responsibilities, strike weapons in space can, in the foreseeable future, be used to destroy strategically important targets on earth and in space. Their high degree of readiness would not leave the side under attack much time for protective actions.

"The current technology also gives an opportunity to start covert development of space-to-earth strike weapons even now.

"Some of the anti-missile munitions of battle stations could be covertly replaced by space-to-earth strike weapons.

"Independently of the actual armaments of the U.S. ABM battle stations, the Soviet Union would assume that they are armed with weapons able to destroy vital ground targets within 5 minutes of a decision to mount a nuclear attack from space."

General Surikov also said he is aware that the U.S.A. already has technology applicable in development of space-to-space weapons. In the foreseeable future, the results of HOE (homing overlay experiment to kill remote vehicles above the atmosphere) and ASAT (anti-satellite) programmes can be used for the development of space-based weapons for effective combat in space and destruction of satellites, he said.

"It is known that the United States is engaged in vigorous preparations for development of MKV (mini-kill vehicle, a U.S. Army project) interceptors to be used against satellites. It is much simpler to attack a satellite than to destroy an ICBM warhead when countermeasures are used or to destroy the ICBM itself at the boost-phase.

"The chemical laser is considered to be another potential space-based ASAT weapon. Low-power space-based lasers are able to temporarily or permanently disable optical sensors aboard satellites. More powerful lasers can be used to destroy satellites by heating their surface and disabling the instruments inside.

"As satellites are much easier to detect and destroy after forecasting their trajectory than ICBMs or their warheads, ASAT laser weapons can be developed much earlier than laser systems for a space-based ABM defense.

"If USA experts succeed in developing lightweight space-based accelerators of limited power, we cannot exclude in principle their use primarily as ASAT. A neutron beam used against the electronic components of a satellite can disable it.

"Thus, covertly developed attack space weapons, distinguished as SDI, if deployed in orbit and being manoeuvrable, can regularly appear over the territory of any state in short intervals threatening its security. Having a high degree of readiness for nearly instant use, they would leave no warning time.

"Hence it is clear that a broad-scale U.S. ABM system with space-based components, be it deployed on earth or in space, would constitute a major part of strategic first-strike forces—not as a shield covering the strategic offensive arms but rather as a multi-purpose strategic system having an independent powerful attack capacity in space."

The general described to JDW the options open to the Soviet Union to counter the U.S.'s SDI programme and said there would be a possible build-up of the Soviet strategic offensive forces.

"Countermeasures can include development of systems designed to neutralise or destroy ABM components as well as a build-up of offensive nuclear arms.

"We cannot exclude in principle emergence of cheap ICBM decoys having a simplified homing system and deprived of warheads which would greatly overburden the first space layer of the ABM defence when used in combination with strategic missile in a retaliatory strike, and will make most of the defense fire upon decoys at the most important boost and post-boost phases of flight.

"The West must be aware that the USSR has a technological basis to develop high-acceleration strategic missiles as well as nearly unlimited opportunities to introduce sufficiently simple imitation and anti-imitation devices in future missile weapons to effectively camouflage the real nuclear warheads among various decoys which would oversaturate the sensor and combat systems of an ABM defense.

"We could also use heavy-weight decoys and preventive high-altitude nuclear explosives to jam ground-based ABM radars, to complicate the task of targeting.

"It is also possible to build up weapons for which there are no interceptors at present, such as submarine-launched ballistic missiles flying at low altitudes. Yet another measure to reduce the effectiveness of a multilayer ABM system can be found in massive deployment of variously-based cruise missiles.

Small ground-based (sea-launched), air-and-space-based anti-satellites armed with missiles or nuclear weapons can provide another means to destroy ABM combat platforms in space.

"The ABM combat platforms can be effectively disabled by relatively small anti-satellites with a speed of 5–6 km/sec after the post-boost stages of trajectory. "Such anti-satellites must have sufficient thrust to shorten the post-boost phase, and be protected against laser weapons.

"Warheads of such anti-satellites can be armed with IR-guided homing warheads similar to those used in the U.S. ASAT system.

"A significant threat to ABM battle stations can be created by non-expensive space mines—specially designed anti-ABM spacecraft armed with nuclear or conventional charges and put into orbits close to those of the ABM space components. Clouds of heavy or lightweight obstacles (like metal balls, sawdust, sand, etc.) can also be put in the way of combat or sensor platforms."

SOVIET SCIENTIST SAYS MUST DISCUSS SLCM

A soviet military scientist has underlined Moscow's view that it would be too difficult to reach agreement on a reduction in strategic nuclear weapons if sea-launched cruise missiles (SLCMs) are left out of the negotiations

Col. Vladimir Nazarenko said: "The problem of the sea-based cruise missiles has become one of the main obstacles in the way of completing the work for an agreement on a 50 percent cut in Strategic offensive armaments".

He added "the simplest and most radical solution" would be a "ban on their production, testing and deployment" including the nuclear version and dual-purpose cruise missiles.

He suggested another measure would be "to limit the patrol zones" of ships carrying SLCMs, or at least to set a minimal distance at which they approach the shores of another country. Furthermore, they should allow the deployment of the cruise missiles only on certain types of ships and set the maximum number of cruise missiles for search of these types.

The Colonel emphasised the U.S.S.R.'s desire for "the strictes possible control" over SLCMs, using "national technical means" of verification and on-site inspection, and called on Washington to enter into agreement "as soon as possible" to cut back, what he termed, this "powerful destabilising weapon".●

SOUTHEAST REGIONAL WINNERS, INVENT AMERICA!

● Mr. CHILES. Mr. President, I am delighted to report to the Senate that three of my young constituents were named Southeast regional winners in the Invent America competition sponsored by the U.S. Patent Model Foundation. Of these three, one was named a national finalist during Invent America Week activities held here in Washington last week.

David Foster is a first grade student at Cheney Elementary School in Orlando, FL. With the help of his teacher, Millicent Kopman, Ryan invented the skateboard holder and took Southeast regional honors for first graders. His parents are Mr. and Mrs. Harold Foster of Orlando.

Ryan Mullins, a second grader at Coral Park Elementary School in Coral Springs, FL, invented the multidirectional flashlight which earned him honors as the Southeast regional winner for the second grade level. Ryan's parents are Lynda and John Zelisko from Coral Springs. His teacher at Coral Park is Catherine Collins.

I am especially pleased to announce that Andy Hardaker, a fifth grader at John Stockton Elementary School in Jacksonville, FL, is the Invent America national winner for the fifth grade level. Andy received $1,000 in U.S. savings bonds for inventing the underwater jungle gym. His proud parents are Paul and Joy Hardaker of Jacksonville. His teacher at John Stockton is Deborah Martin Floyd.

Mr. President, as my colleagues in the Senate know, two national priorities of ours in recent years have been to upgarde the quality of our educational system at home and to regain our status as strong competitors in the international arena. I believe the Invent America program is conducted in the spirit of these goals as it contributes to a revitalized interest in American ingenuity. In addition, it encourages our youngest students to develop and apply their creative and analytical skills which will be crucial to their success as they grow older.

David, Ryan, and Andy, along with their parents and teachers, were in Washington last week to take part in Invent America Week festivities. Each student received prizes in the form of U.S. savings bonds while their teachers and schools received grant awards. I understand it is unusual to have three winners from one State, but I am not surprised. I extend my congratulations to them for their individual successes and for the honors they have brought to the State of Florida and its schools.●

TRIBUTE TO AN OUTSTANDING ALABAMIAN: WILLIAM D. KOIKOS

● Mr. SHELBY. Mr. President, I rise today to pay tribute to a man who, although born half a world a way, was an Alabamian through and through. William D. Koikos, or "Mister Bill" to those who had come to love his Bright Star Restaurant, came to this country from his birthplace in Teleta, Greece, in 1920. Through hard work and determination—the kind that has come to symbolize an immigrant's fight to make it in a new country, Bill Koikos arrived in Bessemer, AL, on May 20, 1920.

May 21, 1920, found Bill Koikos employed as a bus boy at Bessemer's Bright Star Restaurant. And the rest, as they say, is history.

Within 5 years, Bill was a part owner of the Bright Star Restaurant. Over the next 63 years, his hard work and commitment, ingrained in him through his struggle to not only survive, but to make it in his adopted country, helped him to establish the Bright Star as one of Alabama's preeminent restaurants.

Bill's commitment was not solely to his business. A dedicated family man, Bill married his wife Anastasia, also a Greek immigrant, in 1936. Their three children, Jimmy, Nicholas, and Helen are a tribute to their wonderful parents. Bill was also blessed with three lovely granddaughters.

Never allowing the ties that bound him to his heritage to sever, Bill helped to support his mother, six brothers and four sisters back in Greece. Carefully cultivating his new ties to Alabama, Bill Koikos became a leading member of the Bessemer community.

On July 21, 1988, Alabama lost a favored son. The passing of Bill Koikos is a loss not only to his family, but to all those Alabamians who were privileged enough to learn from his example of hard work and determination, to enjoy a meal in his fine restaurant, or simply to know him and call him a friend.

Bill Koikos's legacy is his gift to all of us. Through his eyes we learned to appreciate, respect and not take for granted this great country. We learned that the "American Dream" is still possible for those courageous and dedicated enough to dream.

Mr. President, this is a tribute to Bill, his wife, children and grandchildren—theirs is a loss shared by all Alabamians.●

ORDERS FOR TUESDAY

RECESS UNTIL 10 A.M.

Mr. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business today, it

stand in recess until 10 o'clock tomorrow morning.

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

MORNING BUSINESS—RESUME CONSIDERATION OF H.R. 1158

Mr. BYRD. That following the two leaders under the standing order there be a period for morning business not to extend beyond 10:30 a.m.; that Senators may speak during that period for morning business; that at the hour of 10:30, the Senate resume consideration of the pending measure. The pending question at that time will be on adoption of the Humphrey amendment.

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

Mr. BYRD. And the question could arise on a tabling motion. I ask unanimous consent that there be 30 minutes for debate to be equally divided between Mr. HUMPHREY and Mr. KENNEDY and that at the conclusion of the 30 minutes or videlicet 11 o'clock a.m., the vote occur.

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

Mr. BYRD. Mr. President, does the distinguished Republican leader have any further business he would like to transact or any statement he would wish to make.

Mr. DOLE. No further business; I think we have had a good day.

Mr. BYRD. I thank the Senator. I agree.

RECESS UNTIL 10 A.M. TOMORROW

Mr. BYRD. Mr. President, I move that the Senate stand in recess under the order, previously entered.

The motion was agreed to; and, at 6:17 p.m., the Senate recessed until Tuesday, August 2, 1988, at 10 a.m.

NOMINATIONS

Executive nominations received by the Senate August 1, 1988:

DEPARTMENT OF STATE

SONIA LANDAU, OF NEW YORK, TO BE COORDINATOR FOR INTERNATIONAL COMMUNICATIONS AND INFORMATION POLICY, WITH THE RANK OF AMBASSADOR, VICE DIANA LADY DOUGAN, RESIGNED.

JAMES E. GOODBY, OF NEW HAMPSHIRE, A CAREER MEMBER OF THE SENIOR FOREIGN SERVICE, CLASS OF CAREER MINISTER, TO BE AMBASSADOR EXTRAORDINARY AND PLENIPOTENTIARY OF THE UNITED STATES OF AMERICA TO GREECE.

IN THE NAVY

THE FOLLOWING-NAMED OFFICER TO BE PLACED ON THE RETIRED LIST IN THE GRADE INDICATED UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTION 1370.

To be admiral

ADM. LEE BAGGETT, JR., xxx-xx-xxxx/1110, U.S. NAVY.

THE FOLLOWING-NAMED OFFICER TO BE PLACED ON RETIRED LIST IN THE GRADE INDICATED UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTION 1370.

To be admiral

ADM. KINNAIRD R. MCKEE, xxx-xx-xxxx/1120, U.S. NAVY.

THE FOLLOWING-NAMED OFFICER TO BE PLACED ON THE RETIRED LIST IN THE GRADE INDICATED UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTION 1370.

To be vice admiral

VICE ADM. NILS R. THUNMAN, xxx-xx-xxxx/1120 U.S. NAVY.

THE FOLLOWING-NAMED OFFICER, UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTION 601, TO BE ASSIGNED TO A POSITION OF IMPORTANCE AND RESPONSIBILITY DESIGNED BY THE PRESIDENT UNDER TITLE 10, UNITED STATES CODE, SECTION 601:

To be vice admiral

VICE ADM. DANIEL L. COOPER, xxx-xx-xxxx/1120, U.S. NAVY.

THE FOLLOWING-NAMED REAR ADMIRAL (LOWER HALF) IN THE STAFF CORPS OF THE U.S. NAVY FOR PROMOTION TO THE PERMANENT GRADE OF REAR ADMIRAL, PURSUANT TO TITLE 10, UNITED STATES CODE, SECTION 624, SUBJECT TO QUALIFICATIONS THEREFOR AS PROVIDED BY LAW:

CIVIL ENGINEER CORPS (5104)

DAVID ELLIOTT BOTTORFF.

IN THE AIR FORCE

THE FOLLOWING OFFICERS FOR APPOINTMENT IN THE REGULAR AIR FORCE UNDER THE PROVISIONS OF SECTION 531, TITLE 10, UNITED STATES CODE, PROVIDED THAT IN NO CASE SHALL ANY OF THE FOLLOWING OFFICERS BE APPOINTED IN A GRADE HIGHER THAN MAJOR.

LINE OF THE AIR FORCE

WILLIAM P. BAGLEY, xxx-xx-xxxx
STEPHEN BALDWIN, xxx-xx-xxxx
HAROLD R. BANKS, xxx-xx-xxxx
FREEMAN H. BELL, xxx-xx-xxxx
JAMES STEVEN BILLINGS, xxx-xx-xxxx
CHARLES W. BOGGS, III, xxx-xx-xxxx
JAMES W. BROWN, xxx-xx-xxxx
WILLIAM BUCKINGHAM, JR., xxx-xx-xxxx
VICTOR H. BURKE, xxx-xx-xxxx
MONTGOMERY L. CLASON, xxx-xx-xxxx
EDWARD N. COPPOLA, xxx-xx-xxxx
MARCIA E. DANIELS, xxx-xx-xxxx
MICHAEL C. DANTZER, xxx-xx-xxxx
JOHN F. DARGIN, III, xxx-xx-xxxx
RONALD C. DECKER, xxx-xx-xxxx
CHARLES R. DORSEY, xxx-xx-xxxx
HARRY E. DROTTZ, xxx-xx-xxxx
RICHARD G. ERKES, xxx-xx-xxxx
GARY L. FRASER, xxx-xx-xxxx
R. GAYLE FULTS, xxx-xx-xxxx
MICHAEL R. GODBEY, xxx-xx-xxxx
DENNIS W. GREER, xxx-xx-xxxx
GEORGE V. HANSON, JR., xxx-xx-xxxx
ILENE M. B. HAWKES, xxx-xx-xxxx
DAVID V. KRAMER, xxx-xx-xxxx
TOMMY M. KRAMER, xxx-xx-xxxx
EMILY A. LIEOU, xxx-xx-xxxx
GAIL M. LOFDAHL, xxx-xx-xxxx
PETE N. MARQUEZ, JR., xxx-xx-xxxx
RANDY S. MCMULLEN, xxx-xx-xxxx
ROBERT C. MELLERSKI, xxx-xx-xxxx
FREDERICK G. MILLNIK, xxx-xx-xxxx
CLIFFORD MINER, JR., xxx-xx-xxxx
JOAN H. MORGAN, xxx-xx-xxxx
DORIS J. MURRAY, xxx-xx-xxxx
EDWIN L. NEGRON, xxx-xx-xxxx
RICHARD E. NIELSEN, xxx-xx-xxxx
WILLIAM T. PALFREY, xxx-xx-xxxx
RICHARD L. PILIBOSIAN, xxx-xx-xxxx
RICHARD D. REDMON, xxx-xx-xxxx
RICHARD E. REW, JR., xxx-xx-xxxx
PETER M. RICARD, xxx-xx-xxxx
HUGH H. RILEY, xxx-xx-xxxx
THOMAS LEROY SCOGGIN, xxx-xx-xxxx
WILLIAM M. SEATON, xxx-xx-xxxx
DAVID L. SIMPSON, xxx-xx-xxxx
ALLEN L. SMITH, xxx-xx-xxxx
JAMES A. SMITH, xxx-xx-xxxx
VOYSEL SMITH, xxx-xx-xxxx
RANDALL REA TANKSLEY, xxx-xx-xxxx
ROBERT E. TORN, xxx-xx-xxxx
ANDREW L. TRAYWICK, xxx-xx-xxxx
ALLEN N. VICKREY, xxx-xx-xxxx
KIM M. WALKER, xxx-xx-xxxx
GEORGE A. WARD, xxx-xx-xxxx
DANA F. WHITE, xxx-xx-xxxx
BRENDA S. WHITMER, xxx-xx-xxxx
LAN R. YONEDA, xxx-xx-xxxx

THE FOLLOWING OFFICERS FOR APPOINTMENT IN THE REGULAR AIR FORCE UNDER THE PROVISIONS OF SECTION 531, TITLE 10, UNITED STATES CODE, WITH A VIEW TO DESIGNATION UNDER THE PROVISIONS OF SECTION 8067, TITLE 10, UNITED STATES CODE, TO PERFORM THE DUTIES INDICATED, PROVIDED THAT IN NO CASE SHALL ANY OF THE FOLLOWING OFFICERS BE APPOINTED IN A GRADE HIGHER THAN MAJOR.

CHAPLAINS

RICHARD L. BLANTON, xxx-xx-xxxx
KENT E. BRYANT, xxx-xx-xxxx
JAMES W. BYINGTON, xxx-xx-xxxx
RICHARD J. DAVIS, xxx-xx-xxxx
FANNALOU GUGGISBERG, xxx-xx-xxxx
JOE F. JOHNSTON, xxx-xx-xxxx
WAYNE R. KNUTSON, JR., xxx-xx-xxxx
BENNIE R. LIGGINS, xxx-xx-xxxx
JAMES A. MARTINEZ, xxx-xx-xxxx
LESLIE G. NORTH, xxx-xx-xxxx
JEREMIAH C. ORIORDAN, xxx-xx-xxxx
MACK R. PAINTER, JR., xxx-xx-xxxx
DANNY C. RIGGS, xxx-xx-xxxx
JACK D. RITSEMA, xxx-xx-xxxx
FROILAN A. SALUTA, xxx-xx-xxxx
JAMES CHARLES SEAMAN, xxx-xx-xxxx
BILLY EARL WAYNE SIMMONS, xxx-xx-xxxx
LAWRENCE E. WALLING, xxx-xx-xxxx
ROGER S. WINBURG, xxx-xx-xxxx

JUDGE ADVOCATE

JOHN A. AVERETT, xxx-xx-xxxx
JONATHAN A. BASTEN, xxx-xx-xxxx
ROBERT BLEVINS, xxx-xx-xxxx
CAROL L. BRENNECKE, xxx-xx-xxxx
ANNE L. BURMAN, xxx-xx-xxxx
W. WILSON BURR, xxx-xx-xxxx
ALVIN CHASE, xxx-xx-xxxx
TERRENCE P. DERMOTT, xxx-xx-xxxx
MARK B. DEVEREAUX, xxx-xx-xxxx
CHRISTOPHER R. DOOLEY, xxx-xx-xxxx
ROBERT A. FEDERICO, xxx-xx-xxxx
DANIEL B. FINCHER, xxx-xx-xxxx
DWIGHT R. HITT, xxx-xx-xxxx
BRIAN J. HOPKINS, xxx-xx-xxxx
FRANCIS J. LAMIR, xxx-xx-xxxx
BLANE B. LEWIS, xxx-xx-xxxx
DONALD G. MCKINNEY, xxx-xx-xxxx
LARRY T. MCRELL, xxx-xx-xxxx
TONY E. MONTGOMERY, xxx-xx-xxxx
DIXIE A. MORROW, xxx-xx-xxxx
DAVID J. MOUSSETTE, xxx-xx-xxxx
JOHAN M. S. MULLER, xxx-xx-xxxx
SAMUEL C. MULLIN, III, xxx-xx-xxxx
THOMAS J. NIED, xxx-xx-xxxx
WILLIAM E. J. ORR, xxx-xx-xxxx
SUZANNE PETERS, xxx-xx-xxxx
GLEN K. RICHARDSON, xxx-xx-xxxx
ALBERT A. RINGGENBERG, xxx-xx-xxxx
MICHAEL E. SAVAGE, xxx-xx-xxxx
DONALD D. SELF, xxx-xx-xxxx
WILLIAM T. SHEARER, III, xxx-xx-xxxx
CRAIG A. SMITH, xxx-xx-xxxx
ROBERT W. SNIVELY, xxx-xx-xxxx
DAVID E. SPROWLS, xxx-xx-xxxx
ROBERT L. THOMAS, xxx-xx-xxxx
MARC W. TROST, xxx-xx-xxxx
DOUGLAS E. WADE, xxx-xx-xxxx
CARLA S. WALGENBACH, xxx-xx-xxxx
ROBIN D. WALMSLEY, xxx-xx-xxxx
JAMES R. WISE, xxx-xx-xxxx

NURSE CORPS

SANDRA H. ALFORD, xxx-xx-xxxx
JANET M. BARRETT, xxx-xx-xxxx
LINDA A. BLAINE, xxx-xx-xxxx
ELIZABETH L. BOWERS, xxx-xx-xxxx
ELAINE L. BRADEN, xxx-xx-xxxx
MARILYN R. BRANDT, xxx-xx-xxxx
BRENDA S. BROWN, xxx-xx-xxxx
DIANA L. CHRISTIAN, xxx-xx-xxxx
CLETA L. DEMPSEY, xxx-xx-xxxx
SHERRY A. DERDAK, xxx-xx-xxxx
BONNIE L. DUNCAN, xxx-xx-xxxx
KATHLEEN A. FITZGERALD, xxx-xx-xxxx
MARGARET R. FITZGERALD, xxx-xx-xxxx
SUSAN S. FOSTER, xxx-xx-xxxx
ROSALYN V. GARDINER, xxx-xx-xxxx
EUGENIO GOITIA, JR., xxx-xx-xxxx
MARGARET A. GRIFFIN, xxx-xx-xxxx
YVONNE L. GRINER, xxx-xx-xxxx
ELAINE C. HIMES, xxx-xx-xxxx
DONNA M. HOUF, xxx-xx-xxxx
ALBERT S. JONES, JR., xxx-xx-xxxx
JUNE M. JONES, xxx-xx-xxxx
MARGARET A. KAHLER, xxx-xx-xxxx
SUSAN M. LAHAIE, xxx-xx-xxxx
BARBARA C. MARTINEZ, xxx-xx-xxxx
MARY L. MCELROY, xxx-xx-xxxx
MAUREEN A. MCHUGHCASTRO, xxx-xx-xxxx
CYNTHIA A. MCKINNIE, xxx-xx-xxxx
LINDA F. MILLERHAMMONDS, xxx-xx-xxxx
LINDA S. MITCHELL, xxx-xx-xxxx
KAREN M. MUTZ, xxx-xx-xxxx
BARBARA AG NEDERVELT, xxx-xx-xxxx
KENNETH D. OEFINGER, xxx-xx-xxxx
JOE L. PATRICK, xxx-xx-xxxx
NANCY L. PETRASEK, xxx-xx-xxxx
MARY A. PROSYNIUK, xxx-xx-xxxx
SANDRA B. RAUSCH, xxx-xx-xxxx
DAVID A. ROCK, xxx-xx-xxxx
CHARLES R. ROUNTREE, xxx-xx-xxxx
ROGER W. SCHLINDWEIN, xxx-xx-xxxx
MARY J. SNYDER, xxx-xx-xxxx
KATHLEEN M. TAYLOR, xxx-xx-xxxx
LINDA K. TAYLOR, xxx-xx-xxxx
GAIL M. THERRIEN, xxx-xx-xxxx
KEIKO L. TORGERSEN, xxx-xx-xxxx
WENDY C. WALTERS, xxx-xx-xxxx
DEBORAH A. WHITE, xxx-xx-xxxx
GREGORY WILLIS, xxx-xx-xxxx

MEDICAL SERVICE CORPS

THOMAS C. ARDOLINE, xxx-xx-xxxx
REGINALD L. BOND, xxx-xx-xxxx
GEORGE B. DAVIS, xxx-xx-xxxx
ROY B. DEITLE, xxx-xx-xxxx
JOSEPH F. M. ETHIER, xxx-xx-xxxx
HARRY FLEMING, xxx-xx-xxxx

HOWARD D. GOOGINS, xxx-xx-xxxx
WILLIAM T. MACORKINDALE, xxx-xx-xxxx
TERRY M. OAKS, xxx-xx-xxxx
DONALD A. PERRO, xxx-xx-xxxx
GILBERT J. PILKINGTON, JR. xxx-xx-xxxx
DAVID L. QUICK, xxx-xx-xxxx
DAVID A. ROSHIO, xxx-xx-xxxx
GEORGE W. SHERMAN, xxx-xx-xxxx
GEORGE L. SMALL, xxx-xx-xxxx
TIMOTHY Z. SMITH, xxx-xx-xxxx
JACKIE K. TARKINGTON xxx-xx-xxxx

BIOMEDICAL SCIENCES CORPS

FERNANDO BARJA, JR, xxx-xx-xxxx
LAWRENCE D. BARNUM, xxx-xx-xxxx
ELIZABETH A. BERNTSEN, xxx-xx-xxxx
REX S. BRENNAN, xxx-xx-xxxx
ROBIN L. CHERRY xxx-xx-xxxx
HUGH W. CHRISTENSEN, xxx-xx-xxxx
TIMOTHY L. COBB, xxx-xx-xxxx
DONALD A. COERVER, xxx-xx-xxxx
RONALD R. COOPER, xxx-xx-xxxx
CHARLES A. CULVER, xxx-xx-xxxx
MICHAEL K. DOWNEY, xxx-xx-xxxx
ALAN L. EDWARDS, xxx-xx-xxxx
THOMAS G. GIVENS, xxx-xx-xxxx
BRIAN J. HARMS, xxx-xx-xxxx
LARRY L. ISOM, xxx-xx-xxxx
PATRICK N. JOHNSON xxx-xx-xxxx
STEPHANIE F. MCCANN, xxx-xx-xxxx
MICHAEL J. MCNAMARA, xxx-xx-xxxx
THOMAS J. PARRY, xxx-xx-xxxx
DANNY R. PERSON, xxx-xx-xxxx
LAURA L. POOLE, xxx-xx-xxxx
JACKIE D. REEDER, xxx-xx-xxxx
RENALD ROUILLARD, xxx-xx-xxxx
CARI A. SHERRIS, xxx-xx-xxxx
RICHARD F. STEINER, xxx-xx-xxxx
BRENDA D. THOMPSON, xxx-xx-xxxx
JOHN F. WARD, xxx-xx-xxxx
TERRY D. WEAVER, xxx-xx-xxxx
JAY A. WENIG, xxx-xx-xxxx
JAMES F. WILLIAMSON, xxx-xx-xxxx
RICK W. WILSON, xxx-xx-xxxx