so that the Taos Pueblo will receive the land that they deserve.

24TH ANNUAL ADIRONDACK BALLOON FESTIVAL

HON. GERALD B. SOLOMON

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Wednesday, October 2, 1996

Mr. SOLOMON. Mr. Speaker, I would like to call the Nation's attention to one of the world's most important outdoor events. I am extremely proud to announce that the 24th Annual Adirondack Balloon Festival was again held this autumn in my hometown, beautiful Glens Falls, NY. It is the largest, best-known event of its kind in the entire United States.

Originally held in Queensbury, for the past 20 years the festival's home has been the industrial park adjacent to the Warren County airport. As they have for the past quarter century, balloonists from all over the globe will participate in this world-class event.

The Adirondack Balloon Festival was the brainchild of public relations man Walter W. Grishkot of Glens Falls. He wanted to attract visitors to the scenic region in upstate New York. It was a stroke of brilliance: Each year, over 100,000 spectators flock to the region to see the balloons and a variety of other entertainment. Mr. Grishkot has provided a fall getaway to the historic Adirondack region for millions of folks over the years and in doing so has spurred the tourist industry for his friends and neighbors in the community.

Mr. Speaker, I would like to commend Walt Grishkot for his great idea and welcome everyone to come up to Glens Falls, NY, for the Adirondack Balloon Festival, which still does not charge admission.

THE PRODUCTION FLEXIBILITY CONTRACT IN THE AGRICULTURAL MARKET TRANSITION (FREEDOM TO FARM) ACT IS A BINDING GUARANTEE ON THE PART OF THE UNITED STATES

HON. PAT ROBERTS

OF KANSAS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, October 2, 1996

Mr. ROBERTS. Mr. Speaker, as the 104th Congress nears adjournment today, it is a proper time to review the changes that have been made in farm programs under the Agricultural Market Transition Act [AMTA]—I refer to it as freedom to farm—and what farmers and producers can expect, during the 1996 through 2002 period, in the way of guaranteed fixed, albeit declining, payments on their production flexibility contracts with the Federal Government—the Commodity Credit Corporation.

Nearly all U.S. farmers and producers have signed up for the production flexibility contract with the U.S.D.A. Consolidated Farm Service Agency, and from all reports I believe it is widely endorsed by farmers, consumers, rural communities, and rural credit providers, and many others. It reverses 60 years of over-regulation of farmers and producers by the Federal Government and gives them the flexibility to apply good financial management practices and good environmental management practices on their farms.

The reason that I make this statement today is to provide some legislative history and background for those farmers who have signed a contract with the U.S.D.A. Commodity Credit Corporation and may be aware that President Clinton released a statement on April 4, 1996, when he signed the Federal Agriculture Improvement and Reform [FAIR] Act of 1996 (Public Law 104–127) claiming he planned to submit legislation in 1997 to amend the FAIR Act.

I will review the provisions of the enactment of the Freedom to Farm Act (Public Law 104–127), its legislative history, and analyze a recent and relevant Supreme Court decision that sets forth standards for Federal Government liability under similar contracts.

Title I of the Agricultural Market Transition Act (Public Law 104–127, 110 Stat. 896, April 4, 1996) states in section 101(b), as noted in pertinent part below, part of the purpose of the act:

(b) PURPOSE.—It is the purposes of this title—

(1) to authorize the use of binding production flexibility contracts between the United States and agricultural producers to support farming certainty and flexibility while ensuring continued compliance with farm conservation and wetland protection requirements;

The conference report (H. Rept. 104–494, dated March 25, 1996) explains the origin of the language in section 101(b) quoted above and adoption of the House provision by the conferees:

SUBTITLE A—PURPOSE AND DEFINITIONS

''(2) Purpose

The House bill states that it is the purpose of this title to authorize the use of binding production flexibility contracts between the United States and producers; to make recourse marketing assistance loans; to improve the operation of the peanut and sugar programs and; to terminate price support authority under the Agricultural Act of 1949. (Section 101)

The Senate amendment has no comparable provision.

The Conference substitute adopts the House provision with an amendment deleting the reference to the Agriculture Act of 1949 and adding a reference to the establishment of the Commission on 21st Century Production Agriculture. (Section 101).

When the farm bill (later to become Public Law 104–127) was debated on the House floor an inquiry was made about the contractual aspects of production flexibility contract. (See 142 CONGRESSIONAL RECORD, H1539 daily ed. Feb. 29, 1996, (statement of Rep. ROBERTS)):

Let me first say that it is clearly the intent of Congress that the market transition payment provided by the 7-year production flexibility contract is an express and unmistakable contract between the United States and the owner and operator of farmland. Because the market transition payment is based on the 7-year contract it is the intent of the legislation that the payment is guaranteed.

When the conference report was taken up on the House floor, the production flexibility contract was explained as follows (See 142 CONGRESSIONAL RECORD, H3141 daily ed. Mar. 28, 1996, (statement of Rep. ROBERTS)):

The guarantee of a fixed (albeit declining) payment for seven years will provide the predictability that farmers have wanted and provide certainty to creditors as a basis for lending. The current situation in wheat, corn and cotton under which prices are very high, but large numbers of producers have lost their crops to weather or pests would be corrected by FFA. Those producers last year could not access the high prices without crops, and instead of getting help when they need it most, the old system cuts off their deficiency payments and even demands that they repay advance deficiency payments. FFA insures that whatever government financial assistance is available will be delivered, regardless of the circumstances, because the producer signs a binding contract with the Federal government for the next seven years.

The debate of title I of the conference report on the FAIR bill in the House and in the Senate is replete with references to ''contract,'' ''guarantee,'' ''binding contract'' and similar references. The Production Flexibility Contract (U.S.D.A.–CCC Form 478) speaks in terms of contract acreage, contract crop, and the ability of CCC representatives to enter onto the producer's farm to determine ''compliance with the contract.''

The fact that the production flexibility contracts were intended to carry with them a guarantee of payment barring failure of the producer to comply with certain statutorily express conditions for compliance is clearly illustrated. Given that, it should follow that these production flexibility contracts represent vested legal rights in owners or producers that could be altered by subsequent enactment, except that those legal rights could be enforceable against the Government for damages if for some reason funding were not made available during the 7-year period of the contract contemplated in the AMT Act.

The ruling of the Supreme Court in the case of United States versus Winstar Corp. et al., U.S. , No. 95–865 slip op. (July 1, 1996) should serve as a precedent and should apply in the event there is an amendment to the Agricultural Market Transition Act prior to 2002 that could have the effect of breaching the contractual obligations of the Government to fulfill the provisions of the Production Flexibility Contract.

The Winstar case held that Federal bank regulations that implemented the 1989 Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) (Public Law 101–73, see particularly 12 U.S.C. 1464(t)) imposed new capital requirements on savings and loan associations in derogation of promises made in pre-1989 agreements that allowed financial institutions willing to take over failing institutions to use certain accounting devices to satisfy capital requirements and this constituted a breach of contract for which the Government was liable for damages.

The Untied States in the Winstar case raised the unmistakability defense to the effect that a public or general sovereign act such as FIRREA's alteration of capital reserve requirements (that reversed the earlier permission of certain savings and loan institutions to use certain accounting devices) could not trigger contractual liability for the Government.

However, the unmistakability defense or doctrine states that ''sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'' Merrion versus Jicarilla Apache Tribe, 455

U.S. 130, 148 (1982). The application of this doctrine turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government. United States versus Winstar Corp. et al., U.S. , No. 95–865 slip op. at 39 (July 1, 1996).

As opposed to attempts to bind Congress from enacting regulatory measures inconsistent with the contracts, the contracts in Winstar allocate or shift the risks incurred by the parties. The plaintiff Winstar did not assert that the Government could not change the capitalization requirements applicable to the plaintiff, but that the Government assumed the risk that where subsequent changes prevented the plaintiff from performing under the agreement that the Government would be held liable for financial damages. So long as such contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it. Id. at 41.

Under the production flexibility contract, risks are allocated among the parties. As opposed to prior farm programs, the producers agree to accept the risk of fixed payments unrelated to national supply or established target prices in exchange for the Government's acceptance of the risk of less control over supplies of various types of agricultural commodities. As in Winstar, the issue does not turn on whether the Government can subsequently change the rules under which producers operate if they elect to participate in a program, the issue is whether enforcing the risks shifted among the parties will infringe upon the sovereign jurisdiction of the United States. Where changes in the production flexibility contract by the Government result in a financial liability to the producer, the Government is liable to the producer for a breach of contract and damages. This liability does not infringe on the Government's sovereignty and does not violate the unmistakability doctrine.

The Government in Winstar, supra, also asserted that under the sovereign acts doctrine, ''whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.'' The Court in the Winstar case held that the sovereign acts doctrine:

> * * * balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor. If the answer is no, the Government's defense to liability depends on the answer to the further question, whether that act would otherwise release the Government from liability under ordinary principles of contract law. Id. at 57.

In answering the first question, the Court looked at whether the action by the Government having an impact on the public contract was merely incidental to the accomplishment of a broader governmental objective. The greater the Government's self-interest, the more suspect the claim that the private contractor bear the financial burden of the Government's action. Id. at 60. In Winstar, the Court found that a substantial purpose of the Government's action was to eliminate the very accounting formula that the acquiring thrifts had been promised. Thus, the Government's self-interest was so substantial that the statute was not a ''public and general'' act for purposes of the sovereign acts defense. Id. at 61.

Any changes to the statutory authority for production flexibility contracts would no doubt follow the same analysis as that relied upon by the Court in Winstar. To the extent that the farm programs would be altered, it would be likely that the Government would have substantial self-interest in any relief it might obtain from risks allocated it under the contract. Most likely this would result in some legislative change to reduce the amount of money paid to producers. While such change would likely be for the ''public and general'' benefit, it would undercut the allocation of risks between the parties to the contract and as such, would substantially be in the Government's self-interest.

Finally, the Government in Winstar asserted the defense of impossibility. To invoke the defense of impossibility, the Government would have to show that the nonoccurrence of regulatory amendment was a basic assumption of the contracts. That is the parties assumed that the statute on capitalization requirements would not change. As the Court notes, a change was both foreseeable and likely in that case. Id at 67.

The production flexibility contract states in the appendix to Form CCC–478 (the production flexibility contract) that if the statute on which the contract is based is materially changed during the period of the contract, CCC may require the producer to elect between modifications of the contract consistent with the new provisions and termination of the contract. This statement itself is an acknowledgment that the Congress very well may change the Agriculture Market Transition Act prior to its expiration in 2002. Further, if Congress changes the program, it is reasonable and expected that the contracts would be modified accordingly. However, as was true with the plaintiff in Winstar case, producers have no desire to assert that Congress cannot change the underlying statute, but instead, may pursue a claim for breach of contract and damages where any legislative change results in changes to the contract and producers incur financial damages. The acknowledgement of possible legislative change to the production flexibility contract should only serve to weaken any further Government defense of impossibility.

PROVIDING FOR CONSIDERATION OF CONFERENCE REPORT ON H.R. 3610, DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 1997, AND PASSAGE OF H.R. 4278, OMNIBUS CONSOLIDATED APPROPRIATION ACT, 1997

SPEECH OF

HON. SUSAN MOLINARI

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Saturday, September 28, 1996

Ms. MOLINARI. Mr. Speaker, section 120 of the omnibus funding bill, H.R. 3610, contains an amendment to the effective date provision for rules 413 through 415 of the Federal Rules of Evidence. This amendment will overcome the harmful effects of the Tenth Circuit Court of Appeals' restrictive interpretation of the effective date language in United States versus Hollis Earl Roberts.

My explanation of this amendment was printed on page H12104 of the September 28 daily edition of the CONGRESSIONAL RECORD, but with a number of typographic errors. To provide an accurate text, the following corrections are required to the text of my statement as printed on page H12104 of the September 28 daily edition:

In the first paragraph of the statement, in the second sentence, ''supervision'' should be ''suppression''.

In the second paragraph of the statement, in the second sentence, the word ''the'' should not appear before ''other occasions''. Also, in the penultimate sentence of the second paragraph, ''3000'' should be ''300''.

In the third paragraph of the statement, in the first sentence, ''the date'' should be ''that date''. Also, the second sentence in the third paragraph should actually be two sentences reading as follows: ''Some judges have properly interpreted the effective date provision to make the rules apply in all cases in which the relevant proceeding—the trial—commences on or after the effective date of July 10, 1995. Other judges, however, have refused to apply the rules in cases where the indictment was filed before July 10, 1995, even though the case would be tried after that date.''

In the penultimate paragraph of the statement, in the first sentence, ''indicated'' should be ''indicted''.

CONDEMNING THE ATTACK ON THE ECUMENICAL PATRIARCHATE IN ISTANBUL, TURKEY

HON. RICHARD A. GEPHARDT

OF MISSOURI

IN THE HOUSE OF REPRESENTATIVES

Wednesday, October 2, 1996

Mr. GEPHARDT. Mr. Speaker, I rise to condemn the recent attack on the ecumenical patriarchate in Istanbul, Turkey.

On September 30, a hand grenade and machinegun fire were directed at the ecumenical patriarchate in Istanbul. The home of Ecumenical Patriarch Bartholomew, this site serves as the headquarters of Orthodox Christianity for over 300 million worshipers worldwide. The damage from this attack is reported to have been extensive, having blown out windows of the Patriarchal Cathedral of St. George and the sleeping quarters of His All Holiness and others in the compound.

Terrorist attacks such as this should be condemned by all, and must be tolerated by none. The targeting of a religious compound serves as a disturbing reminder of the extent to which the practitioners of terror will go to achieve their aims, and should cause us to redouble our efforts against those who seek gains through destruction and violence against innocent individuals.

I urge the Turkish authorities to investigate and seek justice against the perpetrators of this deplorable act. I extend my support to Patriarch Bartholomew and Orthodox Christians throughout the world as you seek to restore the ecumenical patriarchate and continue to express your faith in peace.