10:00 a.m.
Appropriations
Interior Subcommittee
To resume hearings on proposed budget estimates for fiscal year 1980 for the Office of Territorial Affairs.
1224 Dirksen Building

2:00 p.m.
Appropriations
State, Justice, Commerce, the Judiciary Subcommittee
To hold hearings on proposed budget estimates for FY 1980 for the Commission on Security and Cooperation in Europe, Federal Maritime Commission, Marine Mammal Commission, and on supplemental appropriations for FY 79 for the Board for International Broadcasting.
S-146, Capitol

MARCH 22

10:00 a.m.
Appropriaitons
Interior Subcommittee
To resume hearings on proposed budget estimates for fiscal year 1980 for the U.S. Geological Survey.
1224 Dirksen Building

2:00 p.m.
Appropriations
State, Justice, Commerce, the Judiciary Subcommittee
To hold hearings on proposed budget estimates for fiscal year 1980 for the Commission on Civil Rights and the Federal Trade Commission.
S-146, Capitol

MARCH 27

10:00 a.m.
Appropriations
Interior Subcommittee
To resume hearings on proposed budget estimates for fiscal year 1980 for the Bureau of Indian Affairs.
1224 Dirksen Building

2:00 p.m.
Appropriations
State, Justice, Commerce, the Judiciary Subcommittee
To receive testimony from Members of Congress on proposed budget estimates for fiscal year 1980 for the Departments of State, Justice, Commerce, and the Judiciary.
S-146, Capitol

MARCH 29

9:00 a.m.
Commerce, Science, and Transportation
Science, Technology, and Space Subcommittee
To hold hearings on proposed legislation to establish an Earth Data and Information Service which would supply data on the earth's resources and environment.
235 Russell Building

9:30 a.m.
Veterans' Affairs
To hold hearings to receive legislative recommendations for fiscal year 1980 from AMVETS, paralyzed Veterans of America, Veterans of World War I, and blinded veterans.
6226 Dirksen Building

10:00 a.m.
Appropriations
Interior Subcommittee
To resume hearings on proposed budget estimates for fiscal year 1980 for the National Endowment for the Humanities.
1224 Dirksen Building

MARCH 30

9:00 a.m.
Commerce, Science, and Transportation
Science, Technology, and Space Subcommittee
To continue hearings on proposed legislation to establish an Earth Data and Information Service which would supply data on the earth's resources and environment.
235 Russell Building

APRIL 3

10:00 a.m.
Appropriations
Interior Subcommittee
To resume hearings on proposed budget estimates for fiscal year 1980 for the Office of the Secretary and the Office of the Solicitor.
1224 Dirksen Building

APRIL 4

10:00 a.m.
Appropriations
Interior Subcommittee
To resume hearings on proposed budget estimates for fiscal year 1980 for the Heritage Conservation and Recreation Service.
1224 Dirksen Building

APRIL 5

10:00 a.m.
Appropriations
Interior Subcommittee
To continue hearings on proposed budget estimates for fiscal year 1980 for the Heritage Conservation and Recreation Service.
1224 Dirksen Building

APRIL 10

9:30 a.m.
Veterans' Affairs
To hold oversight hearings on the role of the Federal government in providing educational, employment, and counseling benefits to incarcerated veterans.
6226 Dirksen Building

10:00 a.m.
Appropriations
Interior Subcommittee
To resume hearings on proposed budget estimates for fiscal year 1980 for the Fish and Wildlife Service.
1223 Dirksen Building

APRIL 12

10:00 a.m.
Appropriations
Interior Subcommittee
To resume hearings on proposed budget estimates for fiscal year 1980 for the Bureau of Mines.
1223 Dirksen Building

APRIL 24

10:00 a.m.
Appropriations
Interior Subcommittee
To resume hearings on proposed budget estimates for fiscal year 1980 for the Bureau of Land Management.
1223 Dirksen Building

APRIL 25

10:00 a.m.
Appropriations
Interior Subcommittee
To resume hearings on proposed budget estimates for fiscal year 1980 for the Department of the Interior, to hear Congressional Witnesses.
1223 Dirksen Building

APRIL 26

10:00 a.m.
Appropriations
Interior Subcommittee
To continue hearings on proposed budget estimates for fiscal year 1980 for the Office of Surface Mining Reclamation and Enforcement.
1223 Dirksen Building

MAY 1

9:30 a.m.
Human Resources
Child and Human Development Subcommittee
To hold oversight hearings on the implementation of the Older American Volunteer Program Act (P.L. 93-113).
4232 Dirksen Building

SENATE—*Thursday, February 8, 1979*

(Legislative day of Monday, January 15, 1979)

The Senate met at 12 o'clock meridian, on the expiration of the recess, and was called to order by Hon. PAUL S. SARBANES, a Senator from the State of Maryland.

PRAYER

The Chaplain, the Reverend Edward L. R. Elson, D.D., offered the following prayer:

Let us pray:

Almighty God, grant to Thy servants in the service of this Government strength of character, keenness of mind, and soundness of judgment to match the high demands of the day. Mid the collision of forces abroad and the competition of interests at home, help us to remember who we are and whom we serve. Give the President wisdom to propose, the Congress competency to legislate, and the people a healing and helpful response. Keep us all in Thy service and fill our spirits with the quiet confidence of those whose master is the Lord of all life, in whose name we pray. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. MAGNUSON).

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, D.C., February 8, 1979.

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable PAUL S. SARBANES, a Senator from the State of Maryland, to perform the duties of the Chair.

WARREN G. MAGNUSON,
President pro tempore.

Mr. SARBANES thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF LEADERSHIP

The PRESIDING OFFICER (Mr. STEWART). The Senator from West Virginia.

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

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

THE JOURNAL

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

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

SPECIAL ORDER

The PRESIDING OFFICER. Under the previous order, the Senator from Virginia (Mr. HARRY F. BYRD, JR.) is recognized for not to exceed 15 minutes.

Mr. ROBERT C. BYRD. Will the Senator yield?

Mr. HARRY F. BYRD, JR. I yield to the Senator from West Virginia.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the time I consume not be taken out of the time of the distinguished Senator from Virginia.

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

EXECUTIVE SESSION

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent, this request having been cleared with the distinguished minority leader, that the Senate go into executive session to consider the nominations on the Executive Calendar beginning on page 1 and extending throughout the Executive Calendar to the close of page 26, and that those nominations be considered en bloc.

Mr. BAKER. Mr. President, reserving the right to object, and I will not object, the majority leader is, of course, correct. Those items are cleared on our calendar and we are delighted to proceed to their consideration.

I might say parenthetically that I believe this is the biggest Executive Calendar that we have ever had the opportunity to deal with in one bite.

There being no objection, the Senate proceeded to the consideration of executive business.

DEPARTMENT OF STATE

The legislative clerk read the nominations of:

W. Beverly Carter, Jr., of Pennsylvania, to be Ambassador at Large;

Robert H. Pelletreau, Jr., of Connecticut, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the State of Bahrain;

Stephen Warren Bossworth, of Michigan, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Tunisia;

Jonathan Dean, of New York, during the tenure of his service as Representative of the United States of America for Mutual and Balanced Force Reductions Negotiations, Ambassador.

NOMINATION OF W. BEVERLY CARTER, JR.

● Mr. ZORINSKY. Mr. President. I oppose Mr. Carter's appointment. I do not question his qualifications to serve as an Ambassador-at-Large. He is very capable, I am sure.

But I do question whether we need a State Department liaison for State and local governments.

Our States and cities already spend a great deal on representation in Washington. We have a National League of Cities, a U.S. Conference of Mayors, a National Association of Counties, and a National Governors Association. In addition, many States and municipalities employ lobbyists individually. All are paid for by the taxpayers.

Congress itself functions as a lobby for States', cities', and other constituents' interests, pursuing them, where necessary, with executive agencies.

We do not need another voice in the middle, also at taxpayer expense.

I served 4 years as mayor of Omaha before moving to the Senate in 1977. I dealt with the State Department once in connection with an official trip I took, with two other mayors, to Poland. The city also helped individual Omahans, on occasion, with passport applications.

I never had any trouble dealing with State Department officials direct.

My former colleagues in local government tell me that they, too, would find a State Department liaison unhelpful, not only because they would prefer not to have to go through an intermediary, but because they simply have little interest in matters that are within the Department's jurisdiction.

A lobbyist for the cities said his organization has never had to contact the State Department on behalf of a member. A spokesman for several counties told me the same thing.

I could not find anyone in Nebraska State government who has had enough contact with State to be able to discuss with me whether an intermediary would be useful.

I have heard much talk here recently about a new era of fiscal austerity—about balancing the Federal budget. The Federal Government's size and bureaucratic inefficiency are also favorite complaints of those of us in this body.

Yet if we were truly serious about that talk and those criticisms, we would not permit the creation of this new and unnecessary State Department office today.●

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

The legislative clerk read the nominations of:

William Brownlee Welsh, of Virginia, to be an Assistant Secretary of Housing and Urban Development;

Sterling Tucker, of the District of Columbia, to be an Assistant Secretary of Housing and Urban Development.

U.S. AIR FORCE, U.S. ARMY, U.S. NAVY—NOMINATIONS PLACED ON THE SECRETARY'S DESK IN THE AIR FORCE, ARMY, NAVY, AND MARINE CORPS

The legislative clerk proceeded to read sundry nominations in the U.S. Air Force, U.S. Army, U.S. Navy, and nominations placed on the Secretary's desk in the Air Force, Army, Navy, and Marine Corps.

The PRESIDING OFFICER. Without objection, the nominations are considered and confirmed en bloc.

(All nominations considered and confirmed are listed at the conclusion of Senate Proceedings in today's RECORD.)

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that it be in order to move en bloc to reconsider the votes by which all the nominations were confirmed.

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

Mr. ROBERT C. BYRD. I make that motion.

Mr. BAKER. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the President of the United States be immediately notified of the confirmation of the nominations.

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

LEGISLATIVE SESSION

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senate return to legislative session.

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

Mr. ROBERT C. BYRD. Mr. President, I now thank again the distinguished Senator from Virginia for his courtesy.

GEN. GEORGE CATLETT MARSHALL

Mr. HARRY F. BYRD, JR. Mr. President, the life and career of Gen. George Catlett Marshall are a source of inspiration to our Nation. Few Americans of this century can rival his achievements.

On November 11, 1978, Virginia Military Institute paid tribute to General Marshall with the unveiling of a statue—a fitting memorial, indeed, since General Marshall once was a member of the proud cadet corps at VMI.

On the occasion of the unveiling of the statue, the Honorable Mills E. Godwin, Jr., the distinguished former Governor of my State, delivered a moving tribute to General Marshall and a challenge to today's youth to emulate General Marshall's splendid example.

Governor Godwin fittingly described General Marshall as "an outstanding soldier, a farsighted statesman, an uncompromising gentleman, and a former member of this corps."

I ask unanimous consent that full text of Governor Godwin's eloquent address be printed at this point in the RECORD.

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

REMARKS BY THE HONORABLE MILLS E. GODWIN, JR.

General Irby, Distinguished Guests, Cadets of VMI, Ladies and Gentlemen:

It is good to be at Virginia Military Institute where I have so often in the past, shared occasions of a public nature with you. It is especially good to be here on this Founders Day when you pay tribute to a graduate of

this institution who is certainly one of the great Americans of the 20th century.

General Irby has reminded us that it was snowing on November 11, 1839, when VMI first opened its doors to young men of Virginia, and if that first cadet sentinel should be watching over us today, I am certain that he shares with me a distinct pride that VMI's essential mission has not changed over the 139 years since the Institute became the nations' first state-supported military college.

It was the object of the founders to combine the academic work of a full college curriculum with exacting military discipline, and through the years the Institute has hewn true to its citizen-soldier mission, to its belief that education should prepare a man for the "work of his civil life," as the founders phrased it, but also prepare him in the art of military defense, with personal discipline the byproduct of his military training. The Institute was a pioneer in this respect, as was the Commonwealth in establishing a state military college. Today, so many generations later, VMI is an eloquent witness to the demand for graduates disciplined in both mind and strength of character.

I congratulate you on this anniversary occasion and on VMI's illustrious history of service to the Commonwealth and the Nation.

Our stated purpose today is to pay homage, by means of his likeness, to an outstanding soldier, a far-sighted statesman, an uncompromising gentleman, and a former member of this Corps.

His example serves us well in our own time.

His intellect commanded the respect of his associates, high and low.

His personal stature and diplomacy helped to hold together the supreme commanders of America's allies, with vastly different backgrounds and personalities.

His vision enabled this nation to rebuild the countries of its former enemies and transform them into friends.

However skillfully his likeness is presented to us here today, it can hardly do justice to the man.

But it can serve as a constant example to successive generations of his successors here at VMI.

Few of them, perhaps, will be endowed with his many talents.

Few of them, we all pray, will be presented with his opportunities to display them.

But all of them—all of us—can profit from the example of self-discipline in mind and spirit that made their application possible.

But with all due respect, his task was easier than ours.

As a military commander, his decisions in the field were backed by a confident people, solidly committed to a principle, and supported by an unbelievable outpouring of military hardware.

As a Secretary of State, his proposal to channel some of the wealth of the world's wealthiest nation to the cause of world peace and stability was firmly supported by a victorious and a generous people.

Today, the threat to freedom from a foreign ideology is even greater. But after an expedition into Southeast Asia, our people see it through a glass darkly.

The developing nations of the world, to whom America is still the land of freedom and opportunity, chastise us for our use of the world's resources, and at the same time, clamor for a portion of our proceeds thereof.

Our allies against the further spread of collectivism are even less of one mind on how to proceed than they were in Marshall's time.

And yet America is still the world's hope for freedom. Its spirit is still alive, although perhaps in different form.

Here at home, various associations of our people still demand freedom, at least from their own points of view.

Human rights are still paramount to our policy abroad.

The question we whisper among ourselves, the question our enemies are also whispering, is whether we still have the willingness to sacrifice, whether we still have the self-discipline that the times demand of us once more.

If we really cherish the freedom that is ours, the opportunities that are ours as Americans, our answer to ourselves and to the world must be that we do.

The alternative is to resign ourselves, and to commit the world, to a return of the Dark Ages that followed the fall of the Roman Empire.

That decision we must make as a people begins with a decision we must make as individuals.

One of VMI's great dividends has been to give us young men whose unique minds, talents, character and discipline enable them to stand with their heads above the crowd and when necessary to stand against the crowd.

General Marshall was such a man—one touched by the hand of greatness, and may this likeness of him unveiled today keep you always true to the spirit of VMI.

SENATE JOINT RESOLUTION 38—BALANCING THE BUDGET: A CALL TO RESPONSIBILITY

Mr. HARRY F. BYRD, JR. Mr. President, I am today introducing a joint resolution to amend the Constitution of the United States to require a balanced budget.

I wish this action were not necessary. It would be good to be able to report that the people could count on fiscal discipline in Washington.

But there is no fiscal discipline in Washington.

Two hundred such forty-two billion dollars' worth of red ink over the last 5 years, with another $29 billion planned for the next year, is proof that the Federal Government must be bound to fiscal responsibility with the chains of the Constitution.

Accumulated and accelerated deficits have piled up a debt now close to $800 billion, and is projected by the Treasury Department to be $900 billion by September 30 of next year. The Treasury projects a $98 billion increase in the debt during the next 18 months.

The interest on the national debt—just the interest—will cost taxpayers $60 billion this year. That is 22 percent of all individual and corporate income taxes paid into the Treasury.

This endless deficit financing is the chief cause of the chronic high inflation which is eroding the paycheck of every working man and woman, undermining the value of the dollar and threatening the very foundations of our economy.

I want to remind the Senate that the Congress last year passed, and the President signed, legislation I sponsored requiring a balanced Federal budget by fiscal year 1981, which begins in October 1980.

I take great encouragement from the approval of that legislation, but there could be efforts to set it aside or evade it.

Therefore, I feel we must move now to amend the Constitution to make a permanent requirement for a balanced budget.

The mood is right and the time is right to move toward a balanced budget. Twenty-five State legislatures have passed resolutions calling for a constitutional convention to frame a balanced budget amendment.

I think those resolutions represent the voice of the American people. Not only the State resolutions, but also numerous public opinion polls, show that the people want the Federal Government to control spending and balance the budget.

Congress must stop evading its responsibilty, waiting for the States to act. Congress must submit a balanced budget resolution to the States for ratification, just as all our other constitutional amendments have been submitted.

The budgetary policies of the Carter administration illustrate well the need for a balanced budget requirement. In 1977 the new administration pushed through a program of economic stimulus, despite the fact that a strong recovery from recession had been underway for 2 years.

The result was a building of inflationary pressures. These pressures were enhanced by a fiscal year 1979 budget first proposed to be $60 billion in deficit—later whittled down to $37 billion, largely because of tax increases.

Late last year, with inflation touching the double-digit mark, the administration—with much fanfare—declared war on inflation. But now we have in hand the Carter proposal for a so-called anti-inflationary budget for fiscal year 1980: A budget which will increase spending by 9 percent over the level approved by Congress last fall, and with a deficit projected at $29 billion and likely to go significantly higher.

What all of this demonstrates is the inability of politicians to resist the temptation to spend.

Deficit spending is a bonanza for politicians. By approving big-spending programs without raising the taxes to finance them, politicians can please the special-interest groups with handouts while avoiding increases in the official tax rates.

I say "official" tax rates advisedly. For while the tax schedules have been reduced for both individuals and corporations, revenues from both tax sources continue to rise primarily because of the bonus which the Treasury receives from inflation.

But even this "inflation bonus" in Federal revenues has been insufficient to prevent the accumulation of enormous deficits and a resultant piling up of a staggering debt. The national debt more than doubled in the 8-year period from 1970 to 1978, rising from $383 billion to $780 billion.

And the debt in turn forces the ex-

penditure of $60 billion in interest this year. The burden of debt interest has grown to the point where 22 cents of every individual and corporate income tax dollar goes to pay the interest on the debt.

At the same time, the huge amounts which the Federal Government must borrow to finance its debt—$72 billion last year and $67 billion this year are a major drain on the money markets, creating upward pressure on interest rates and tying up funds which otherwise could be used for job-producing expansion in the private sector.

Thus the continued and accelerated deficit spending of the Federal Government fuels the fires of inflation and holds back private economic development.

We need to get the economy of the United States back on a sound basis. If we are to do this, we must follow policies that will inspire confidence in the minds of consumers and businessmen.

Consumers and businessmen cannot have confidence in an economy which is burdened with excessive Government spending and plagued with inflation.

The road to a balanced budget is the only road to permanent recovery for our economy.

Under the amendment which I am proposing today, in the first fiscal year after ratification by the States, the budget would have to be balanced.

Provision is made for incurring a debt in a national emergency declared by vote of two-thirds of both Houses of the Congress. This provision furnishes the flexibility needed to deal with serious and unforeseen problems which the Nation may come to face in the future.

The direction indicated in this proposed amendment to our Constitution is the one we must take if we are to avoid economic calamity and build a base for sound progress in the years ahead.

It is time for our national leadership—specifically, the Congress of the United States—to heed the voice of the people, and to bring our fiscal and economic policies in line with the demands of the future.

Mr. President, in conclusion, in a moment I shall ask unanimous consent to insert in the RECORD the texts of 22 resolutions passed by State legislatures calling for a constitutional convention to frame an amendment to the Constitution requiring a balanced budget.

In that connection, I want to pay tribute to the National Taxpayers Union and the balanced budget committee of that organization for focusing attention on this vitally important problem.

Whether one agrees or disagrees with the concept of a constitutional convention to require a balanced budget, I think that all of us who favor a balanced budget should give credit to the organization which has done so much to focus attention on this vital problem.

I am advised that there has been some confusion as to the number of States which have acted, the wording of the various resolutions and the maintaining of records concerning the actions of the States. Consequently, I hope that by submitting certified copies of 22 State resolutions—which I am about to do—I can in some measure relieve this confusion.

I understand that in addition to the States whose resolutions I am now about to present, four more have acted in the recent past: Arkansas, North Carolina, South Dakota and Utah. Certified copies of these resolutions are not yet available.

Among the 22 resolutions which I am now submitting is one from Nevada, which I understand has been vetoed by the Governor of that State. Nevertheless, the legislature has acted, so I am submitting the resolution at this time. It is expected that Nevada will clear a new resolution this year.

Thus, the actual total of States which have taken undisputed action is 25. The addition of Nevada will bring the total to 26, and more States are expected to follow suit in the weeks ahead.

Since the number of States required to call a constitutional convention is 34, it can be seen that this number may be reached in the not-too-distant future.

As I see it, it is the duty of Congress to act on its own and submit an amendment to the States. I believe that it is prudent for the Congress to follow the one tried-and-true method of submitting an amendment for ratification—the method which has been used for all constitutional amendments since the founding of the Republic.

Mr. President, I send to the desk a joint resolution and ask that it be printed and appropriately referred, and that it be printed in the RECORD.

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

(See exhibit 1.)

Mr. HARRY F. BYRD, JR. Mr. President, I ask unanimous consent that the texts of 22 State legislature resolutions, calling for a constitutional amendment to require a balanced Federal budget, be printed in the RECORD.

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

(See exhibit 2.)

EXHIBIT 1

S.J. RES. 38

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within three years after its submission to the States for ratification:

"ARTICLE —

"SECTION 1. In exercising its powers under article I of the Constitution, and in particular its powers to lay and collect taxes, duties, imposts, and excises and to enact laws making appropriations, the Congress shall assure that the total outlays of the Government during any fiscal year do not exceed the total receipts of the Government during such fiscal year.

"SEC. 2. During the first fiscal year beginning after the ratification of this article, the total outlays of the Government, not including any outlays for the redemption of bonds, notes or other obligations of the United States, shall not exceed total receipts, not including receipts derived from the issuance of bonds, notes or other obligations of the United States.

"SEC. 3. In the case of a national emergency, Congress may determine by a concurrent resolution agreed to by a rollcall vote of two-thirds of all the Members of each House of Congress, that total outlays may exceed total receipts.

"SEC. 4. The Congress shall have power to enforce this article by appropriate legislation.

EXHIBIT 2

HOUSE JOINT RESOLUTION 227

(Alabama)

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is vital to bring the fiscal discipline needed to restore financial responsibility; and

Whereas, there is provision in Article V of the Constitution of the United States for amending the Constitution by the Congress, on the application of the legislatures of two-thirds (⅔) of the several states, calling a convention for proposing amendments which shall be valid to all intents and purposes when ratified by the legislatures of three-fourths (¾) of the several states, or by conventions in three-fourths (¾) thereof, as the one or the other mode of ratification may be proposed by the Congress; now therefore,

Be it resolved by the legislature of Alabama, both houses thereof concurring, That the Legislature of Alabama hereby petitions the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the Alabama Legislature requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

Be it further resolved, That, alternatively the Alabama Legislature makes application and requests that the Congress of the United States call a constitutional convention, pursuant to Article V of the Constitution of the United States, for the specific and exclusive purpose for proposing an amendment to the Federal Constitution requiring in the absence of a national emergency that the total of all federal appropriations made by

the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

Further resolved, That the legislatures of each of the several states comprising the United States are urged to apply to the Congress requesting the enactment of an appropriate amendment to the Federal Constitution; or requiring the Congress to call a constitutional convention for proposing such amendment to the Federal Constitution.

Further Resolved, That the Clerk of the House is directed to send copies of this Joint Resolution to the Secretary of State and presiding officers of both Houses of the Legislatures of each of the other States in the Union, the Clerk of the United States House of Representatives, Washington, D.C., and the Secretary of the United States Senate, Washington, D.C., and to each member of the Alabama Congressional Delegation.

Approved August 18, 1976.

Time: 6:30 P.M.

HOUSE CONCURRENT MEMORIAL 2320

(Arizona)

To the President and the Congress of the United States of America:

Your memorialist respectfully represents:

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, attempts to limit spending, including impoundment of funds by the President of the United States, have resulted in strenuous objections that the responsibility for appropriations is the constitutional duty of the Congress; and

Whereas, the annual federal budget repeatedly demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation; and

Whereas, constitutional restraint is necessary to bring the fiscal disciplines needed to reverse this trend; and

Whereas, under article V of the Constitution of the United States, amendments to the constitution may be proposed by the Congress whenever two-thirds of both houses deem it necessary or on the application of the legislatures of two-thirds of the states the Congress shall call a constitutional convention for the purpose of proposing amendments.

Wherefore, your memorialist, the House of Representatives of the State of Arizona, the Senate concurring, prays:

1. That the Congress of the United States prepare and submit to the several states an amendment to the constitution requiring, in the absence of a national emergency, that the total of all federal appropriations made by the Congress for any fiscal year not exceed the total of the estimated federal revenues, excluding any revenues derived from borrowing, for that fiscal year.

2. That, in the alternative, the Congress of the United States call a constitutional convention to prepare and submit such an amendment to the constitution.

3. That this application continue in effect until the will of the Legislature of Arizona to the contrary is communicated to the Congress of the United States.

4. That the Secretary of State of Arizona transmit certified copies of this memorial to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, to each member of the Arizona delegation to the United States Congress and to the presiding officers of each house of the legislature of each of the other states of the union with the request that it be circulated among leaders in the executive and legislative branches of the state governments.

SENATE JOINT MEMORIAL NO. 1

(Colorado)

Whereas, With each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, The annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, Convinced that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is vital to bring the fiscal discipline needed to restore financial responsibility; and

Whereas, under article V of the constitution of the United States, amendments to the federal constitution may be proposed by the congress whenever two-thirds of both houses deem it necessary or on the application of the legislatures of two-thirds of the several states that the congress shall call a constitutional convention for the purpose of proposing amendments which shall be valid to all intents and purposes when ratified by the legislatures of three-fourths of the several states; now, therefore,

Be It resolved by the Senate of the Fifty-first General Assembly of the State of Colorado, the House of Representatives concurring herein:

That the Congress of the United States is hereby memorialized to call a constitutional convention pursuant to article V of the constitution of the United States for the specific and exclusive purpose of proposing an amendment to the federal constitution prohibiting deficit spending except under conditions specified in such amendment.

Be It Further Resolved, That this application and request be deemed null and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose.

Be It Further Resolved, That copies of this memorial be sent to the secretary of state and presiding officers of both houses of the legislatures of each of the several states in the union, the clerk of the United States house of representatives, the secretary of the United States senate, and to each member of the Colorado congressional delegation.

HOUSE CONCURRENT RESOLUTION NO. 36

(Delaware)

Be it resolved by the House of Representatives of the 128th General Assembly, the Senate concurring therein, that the General Assembly of the State of Delaware hereby, and pursuant to Article V of the Constitution of the United States, makes application to the Congress of the United States to call a convention for the proposing of the following amendment to the Constitution of the United States:

"ARTICLE —

The costs of operating the Federal Government shall not exceed its income during any fiscal year, except in the event of declared war."

Be it further resolved that this application by the General Assembly of the State of Delaware constitutes a continuing application in accordance with Article V of the Constitution of the United States until at method of proposing amendments to the several states have made similar applications pursuant to Article V.

Be it yet further resolved that since this method of proposing amendments to the Constitution has never been completed to the point of calling a convention and no interpretation of the power of the states in the exercise of this right has ever been made by any court or any qualified tribunal, if there be such, and since the exercise of the power is a matter of basic sovereign rights and the interpretation thereof is primarily in the sovereign government making such exercise and, since the power to use such right in full also carries the power to use such right in part, the General Assembly of the State of Delaware interprets Article V to mean that if two-thirds of the states make application for a convention to propose an identical amendment to the Constitution for ratification with a limitation that such amendment be the only matter before it, that such convention would have power only to propose the specified amendment and would be limited to such proposal and would not have power to vary the text thereof nor would it have power to propose other amendments on the same or different propositions.

Be it yet further resolved that a duly attested copy of this resolution be immediately transmitted to the Secretary of the Senate of the United States, the Clerk of the House of Representatives of the United States, to each member of the Congress from this State and to each House of each State Legislature in the United States.

SENATE MEMORIAL NO. 234

(Florida)

A memorial to the Congress of the United States making application to the Congress to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions thereto.

Whereas, it is estimated, as of August, 1975, that the Federal debt at the end of the 1975 fiscal year will be $558.637 billion, and

Whereas, the fiscal year deficit for 1976 will be the largest in our history, between $70 and $80 billion, and

Whereas, the growing debt is a major contributor to inflation, lagging economic investment, excessive interest rates, and the resulting unemployment, and

Whereas, the economic welfare of the United States and its citizens depends on a stable dollar and sound economy, and

Whereas, the National Conference of State Legislatures passed Resolution No. 11 at its Annual Business Meeting on October 10, 1975, urging the Congress to take prompt and affirmative action to limit federal spending, and

Whereas, there is provision in Article V of the Constitution of the United States for amending the Constitution by the Congress,

on the application of the legislatures of two-thirds of the several states, calling a convention for proposing amendments which shall be valid to all intents and purposes when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, now, therefore, be it

Resolved by the Legislature of the State of Florida:

That the Legislature of the State of Florida does hereby make application to the Congress of the United States pursuant to Article V of the Constitution of the United States to call a convention for the sole purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto. Be it further

Resolved that a copy of this memorial be transmitted to the presiding officers of the Senate and the House of Representatives of Congress, the members of the Congressional delegation from the State of Florida and to the presiding officers of each house of the several state legislatures.

A RESOLUTION

(Georgia)

Applying to the Congress of the United States to call a convention for the purpose of proposing an amendment to the Constitution of the United States; and for other purposes.

Be it resolved by the General Assembly of Georgia:

That this body respectfully petitions the Congress of the United States to call a convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto.

Be it further resolved that this application by the General Assembly of the State of Georgia constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this Resolution before January 1, 1977, this petition for a Constitutional Convention shall no longer be of any force or effect.

Be it further resolved that the Clerk of the House of Representatives is hereby authorized and instructed to transmit a duly attested copy of this Resolution to the Secretary of the Senate of the United States Congress, the Clerk of the House of Representatives of the United States Congress, to the Presiding Officer of each House of each State Legislature in the United States, and to each member of the Georgia Congressional Delegation.

SENATE CONCURRENT RESOLUTION NO. 1661

(Kansas)

A CONCURRENT RESOLUTION requesting and applying to the Congress of the United States to propose, or to call a convention for the purpose of proposing, an amendment to the Constitution of the United States which would require that, in the absence of a statutorily defined national emergency, total federal appropriations shall not exceed total estimated federal revenues in a fiscal year.

Whereas, Annually the United States moves more deeply in debt as its expenditures exceed its available revenues and the public debt now exceeds hundreds of billions of dollars; and

Whereas, Annually the federal budget demonstrates the unwillingness or inability of the federal government to spend in conformity with available revenues; and

Whereas, Proper planning, fiscal prudence and plain good sense require that the federal budget be in balance absent national emergency; and

Whereas, A continuously unbalanced federal budget except in a national emergency causes continuous and damaging inflation and consequently a severe threat to the political and economic stability of the United States; and

Whereas, Under Article V of the Constitution of the United States, amendments to the Constitution may be proposed by the Congress whenever two-thirds of both Houses deem it necessary or, on the application of the legislatures of two-thirds of the states, the Congress shall call a constitutional convention for the purpose of proposing amendments: Now, therefore,

Be it resolved by the Legislature of the State of Kansas, two-thirds of the members elected to the Senate and two-thirds of the members elected to the House of Representatives concurring therein: That the Congress of the United States is hereby requested to propose and submit to the states an amendment to the Constitution of the United States which would require that within five years after its ratification by the various states, in the absence of a national emergency, the total of all appropriations made by the Congress for a fiscal year shall not exceed the total of all estimated federal revenues for such fiscal year; and

Be it further resolved: That, alternatively, the Legislature of the State of Kansas hereby makes application to the Congress of the United States to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution of the United States which would require that, in the absence of a national emergency, the total of all appropriations made by the Congress for a fiscal year shall not exceed the total of all estimated federal revenues for such fiscal year. If the Congress shall propose such an amendment to the Constitution, this application shall no longer be of any force or effect; and

Be it further resolved: That the legislature of each of the other states in the Union is hereby urged to request and apply to the Congress to propose, or to call a convention for the sole and exclusive purpose of proposing, such an amendment to the Constitution.

SENATE CONCURRENT RESOLUTION NO. 73

(Louisiana)

A Concurrent Resolution.—To memorialize and apply to the Congress of the United States, petitioning that a convention be called pursuant to Article V of the United States Constitution, to consider amending the same to prohibit the incurrence of national debt except in a state of emergency as declared by a three-fourths vote of the members of both houses of Congress; providing that the purview of such convention be strictly limited to the consideration of this amendment.

Whereas, the United States Government has, over the past three decades, embarked on a course of continuous and ever increasing deficit spending; and

Whereas, the public debt engendered thereby now far exceeds 300 billion dollars, and current budget proposals include provision for a further deficit of 43 billion dollars; and

Whereas, such national debt is, in and of itself, a major contributor to the very inflation to which the United States is committed to eradicating; and

Whereas, this massive national debt is inimical to the public welfare, limiting the amount of credit available to private citizens, thus curtailing opportunities for needed economic growth; and

Whereas, continued fiscal irresponsibility can only result in an eventual financial debacle of the sort recently experienced by New York City; and

Whereas, payment of the massive interest required to service national debt imposes an undue hardship on the citizenry, particularly those on fixed incomes; and

Whereas, the ability of the Federal Government to avoid the difficult budgetary choices posed by zero debt financing has resulted in a lack of objective budgetary analysis, and thus the funding of unnecessary or inefficient programs.

Therefore, be it resolved by the Senate of the Legislature of the state of Louisiana, the House of Representatives thereof concurring, that pursuant to Article V of the Constitution of the United States, the Legislature of the state of Louisiana does hereby apply to the Congress of the United States for a convention to consider the following amendment to the United States Constitution:

Section 1. Except as provided in Section 3, the Congress shall make no appropriation for any fiscal year if the resulting total of appropriations for such fiscal year would exceed the total revenues of the United States for such fiscal year.

Section 2. There shall be no increase in the national debt, and the existing debt, as it exists on the date on which this amendment is ratified, shall be repaid during the one hundred-year period following the date of such ratification. The rate of repayment shall be such that not less than one-tenth of the debt shall be repaid during each ten-year period.

Section 3. In times of national emergency, declared by the concurrent resolution of three-fourths of the membership of both Houses of Congress, the application of Section 1 may be suspended, provided that such suspension shall not be effective past the two-year term of the Congress which passes such resolution. If such a national emergency continues to exist, a suspension of Section 1 may be reenacted pursuant to the provisions of this Section. National debt incurred pursuant to this Section shall be repaid under the provisions of Section 2; provided, however, that the repayment period shall commence upon the expiration of the suspension under which it was incurred.

Section 4. This article shall apply to fiscal years that begin six months after the date on which this article is ratified.

Section 5. Congress shall provide by law for strict compliance with this amendment.

Be it further resolved that the purview of any convention called by the Congress pursuant to this resolution be strictly limited to the consideration of an amendment of the nature as herein proposed.

Be it further resolved that this application by the Legislature of the state of Louisiana constitutes a continuing application pursuant to Article V of the United States Constitution, until such time as two-thirds of the Legislatures of the several states have made similar application, and the convention herein applied for is convened.

Be it further resolved that a duly attested copy of this resolution be immediately transmitted to the President of the United States, to the Secretary of the United States Senate, to the Clerk of the United States House of Representatives, to each member of the

Louisiana delegation to the United States Congress, and to the presiding officer of each house of each state Legislature in the United States.

RESOLUTION No. 77

(Maryland)

Whereas, With each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues so that the public debt now exceeds hundreds of billions of dollars.

Attempts to limit spending, including impoundment of funds by the President of the United States, have resulted in strenuous objections that the responsibility for appropriations is the constitutional duty of the Congress.

The annual Federal budget repeatedly demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues.

The unified budget of 304.4 billion dollars for the current fiscal year does not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit.

As reported by US News and World Report on February 25, 1974, of these nonbudgetary outlays in the amount of 15.6 billion dollars, the sum of 12.9 billion dollars represents funding of essentially private agencies which provide special service to the federal government.

Knowledgeable planning and fiscal prudence require that the budget reflect all Federal spending and that the budget be in balance.

Believing that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal disciplines needed to reverse this trend.

Under Article V of the Constitution of the United States, amendments to the Federal Constitution may be proposed by the Congress whenever two-thirds of both Houses deem it necessary, or on the application of the legislatures of two-thirds of the several states the Congress shall call a constitutional convention for the purpoe of proposing amendments; now, therefore, be it

Resolved by the General Assembly of Maryland, That this Body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article XXVII to the Constitution of the United States, and that the General Assembly of Maryland requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues, excluding any revenues derived from borrowing, for that fiscal year; and be it further

Resolved, That this Body further and alternatively requests that the Congress of the United States call a constitutional convention for the specific *and exclusive* purpose of proposing such an amendment to the Federal Constitution, to be a new article XXVII; and be it further

Resolved, That this Body also proposes that the legislatures of each of the several states comprising the United States apply to the Congress requiring it to call a constitutional convention for proposing such an amendment to the Federal Constitution, to be a new Article XXVII; and be it further

Resolved, That the proposed new Article XXVII (or whatever numeral may then be appropriate) read substantially as follows:

"PROPOSED ARTICLE XXVII

"The total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues for that fiscal year, excluding any revenues derived from borrowing; and this prohibition extends to all Federal appropriations and all estimated Federal revenues, excluding any revenues derived from borrowing. The President in submitting budgetary requests and the Congress in enacting appropriation bills shall comply with this Article. If the President proclaims a national emergency, suspending the requirement that the total of all Federal appropriations not exceed the total estimated Federal revenues for a fiscal year, excluding any revenues derived from borrowing, and two-thirds of all Members elected to each House of the Congress so determine by Joint Resolution, the total of all Federal appropriations may exceed the total estimated Federal revenues for that fiscal year."

and, be it further.

Resolved, That copies of this Resolution under the Great Seal of the State of Maryland, be sent by the Secretary of State to: Honorable Gerald Ford, President of the United States, Washington, D.C.; Honorable Charles McC. Mathias, Old Senate Office Building, Washington, D.C.; Honorable J. Glenn Beall, Jr., Old Senate Office Building, Washington, D.C.; Honorable Carl Albert, Speaker of the House of Representatives, Washington, D.C.; Honorable Robert E. Bauman, Longworth Building, Washington, D.C.; Honorable Clarence D. Long, Rayburn Building, Washington, D.C.; Honorable Paul S. Sarbanes, Cannon Office Building, Washington, D.C.; Honorable Marjorie S. Holt, Longworth Building, Washington, D.C.; Honorable Gladys Spellman, House Office Building, Washington, D.C.; Honorable Goodloe E. Byron, Longworth Building, Washington, D.C.; Honorable Parren J. Mitchell, Cannon Building, Washington, D.C.; and Honorable Gilbert Gude, Cannon House Office Building, Washington, D.C.; and be it further

Resolved, That under the Great Seal of the Senate of Maryland, the Secretary of State is directed to send copies of this Joint Resolution to the Secretary of State and to the presiding officers of both Houses of the Legislature of each of the other States in the Union, with the request that it be circulated among leaders in the Executive and Legislative branches of the several State governments; and with the further request that each of the other States in the Union join in requiring the Congress of the United States to call a constitutional convention for the purpose of initiating a proposal to amend the Constitution of the United States in substantially the form proposed in this Joint Resolution of the General Assembly of Maryland.

HOUSE CONCURRENT RESOLUTION No. 51

(Mississippi)

Whereas, an ever-increasing public debt is inimical to the general welfare of the people of the United States; and

Whereas, the nataional debt is already dangerously high and any further increases will be harmful and costly to the people of the United States; and

Whereas, a continuous program of deficit financing by the Federal Government is one of the greatest factors supporting the inflationary conditions presently existing in this country and therefore has been the chief factor in reducing the value of the American currency; and

Whereas, payment of the increased intest required by the ever-increasing debt would impose an undue hardship on those with fixed incomes and those in lower income brackets; and

Whereas, it is not in the best interest of either this or future generations to continue such a practice of deficit spending particularly since this would possibly deplete our supply of national resources for future generations; and

Whereas, by constantly increasing deficit financing the Federal Government has been allowed to allocate considerable funds to wasteful and in many instances nonbeneficial public programs; and

Whereas, by limiting the Federal Government to spend only the revenues that are estimated will be colected in a given fiscal year, except for certain specified emergencies, this could possibly result in greater selectivity of Federal Government programs for the benefit of the public and which would depend upon the willingness of the public to pay additional taxes to finance such programs, and

Whereas, there is provision in Article V of the Constitution of the United States for amending the Constitution by the Congress, on the application of the legislatures of two-thirds (⅔) of the several states, calling a convention for proposing amendments which shall be valid to all intents and purposes when ratified by the legislatures of three-fourths (¾) of the several states, or by conventions in three-fourths (¾) thereof, as the one or the other mode of ratification may eb proposed by the Congress;

Now Therefore, Be it Resolved by the House of Representatives of the State of Mississippi, the Senate Concurring Therein. That we do hereby, pursuant to Article V of the Constitution of the United States, make application to the Congress of the United States to call a convention of the several states for the proposing of the following amendment to the Constitution of the United States;

"ARTICLE —

Section 1. Except as provided in Section 3, the Congress shall make no appropriation for any fiscal year if the resulting total of appropriations for such fiscal year would exceed the total revenues of the United States for such fiscal year.

Section 2. There shall be no increase in the national debt and such debt, as it exists on the date on which this article is ratified, shall be repaid during the one-hundred-year period beginning with the first fiscal year which begins after the date on which this article is ratified. The rate of repayment shall be such that one-tenth (1/10) of such debt shall be repaid during each ten-year interval of such one-hundred-year period.

Section 3. In time of war or national emergency, as declared by the Congress, the application of Section 1 or Section 2 of this article, or both such sections, may be suspended by a concurrent resolution which has passed the Senate and the House of Representatives by an affirmative vote of three-fourths (3/4) of the authorized membership of each such house. Such suspension shall not be effective past the two-year term of the Congress which passes such resolution, and if war or an emergency continues to exist such suspension must be reenacted in the same manner as provided herein.

Section 4. This article shall apply only with respect to fiscal years' which begin more than six (6) months after the date on which this article is ratified."

Be it Further Resolved, That this application by the Legislature of the State of Mississippi constitutes a continuing application

in accordance with Article V of the Constitution of the United States until at least two-thirds (2/3) of the legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical with that contained in this resolution before January 1, 1976, this application for a convention of the several states shall no longer be of any force or effect.

Be it Further Resolved, That a duly attested copy of this resolution be immediately transmitted to the Secretary of the Senate of the United States, the Clerk of the House of Representatives of the United States; to each member of the Congress from this state; and to each house of each state legislature in the United States.

SENATE JOINT RESOLUTION NO. 22

(Nevada)

Whereas, The national debt now amounts to hundreds of billions of dollars and is increasing enormously each year as federal expenditures grossly exceed federal revenues; and

Whereas, Payment of the increased interest on this ever-expanding debt imposes a tremendous burden on the taxpayers of this country; and

Whereas, Continuous deficit financing by the Federal Government supports inflationary conditions which adversely affect the national economy and all Americans, particularly those persons with fixed or low income; and

Whereas, Constantly increasing use of deficit financing has enabled the Federal Government to allocate considerable sums to programs which in many instances have proved to be wasteful and nonbeneficial to the public; and

Whereas, Limiting federal expenditures in each fiscal year to revenues available in that year, except during national emergencies, will result in greater selectivity of federal programs for the benefit of the public; and

Whereas, The annual federal budgets continually reflect the unwillingness or inability of both the legislative and executive branches of the Federal Government to balance the budget and demonstrate the necessity for a constitutional restraint upon deficit financing; and

Whereas, Under article V of the Constitution of the United States, the Congress is required to call a convention for proposing amendments to the federal Constitution on the application of the legislatures of two-thirds of the several states; now, therefore, be it

Resolved by the Senate and Assembly of the State of Nevada, jointly, That, pursuant to article V of the Constitution of the United States, the legislature of the State of Nevada hereby makes application to the Congress of the United States to call a convention for the purpose of proposing an amendment to the United States Constitution which would require that, in the absence of a national emergency, the total of the appropriation made by the Congress for each fiscal year may not exceed the total of the estimated federal revenues for that year; and be it further

Resolved, That the legislature of the State of Nevada proposes that the legislatures of each of the several states apply to the Congress to call a constitutional convention for the exclusive purpose stated in this resolution; and be it further

Resolved, That this application by the legislature of the State of Nevada constitutes a continuing application in accordance with article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications, but if Congress proposes an amendment to the Constitution similar to that contained in this resolution before January 1, 1981, this application for a convention of the several states shall no longer be of any force; and be it further

Resolved, That a copy of this resolution be immediately transmitted by the legislative counsel to the President of the Senate and the Speaker of the House of Representatives of the United States, to each member of the Nevada congressional delegation and to the presiding officer of each house of the legislatures of the several states; and be it further

Resolved, That this resolution shall become effective upon passage and approval.

LEGISLATIVE RESOLUTION 106

(Nebraska)

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenue, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenue; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

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Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

Whereas, under article V of the Constitution of the United States, amendments to the federal Constitution may be proposed by the Congress whenever two-thirds of both houses deem it necessary, or on the application of the Legislatures of two-thirds of the several states, the Congress shall call a constitutional convention for the purpose of proposing amendments. We believe such action is vital.

Now, Therefore, be it resolved by the members of the eighty-fourth legislature of Nebraska, second session:

1. That this body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the State of Nebraska requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenue for that fiscal year.

2. That, alternatively, this Legislature makes application and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenue for that fiscal year.

3. That this Legislature also proposes that the Legislatures of each of the several states comprising the United States apply to the Congress requesting the enactment of an appropriate amendment to the federal Constitution; or requiring the Congress to call a constitutional convention for proposing such an amendment to the federal Constitution.

4. That the Clerk of the Legislature transmit a copy of this resolution to the President of the Senate of the United States, the Speaker of the House of Representatives of the United States, each member of the Nebraska Congressional delegation, the Secretaries of State and the Legislatures of each of the several states, and the Secretary of State for the State of Nebraska.

Whereupon the President stated: "All provisions of law relative to procedure having been complied with, the question is, 'Shall the resolution pass?' "

SENATE JOINT RESOLUTION

(New Mexico)

Be it resolved by the legislature of the State of New Mexico:

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

Whereas, under article 5 of the constitution of the United States, amendments to the federal constitution may be proposed by the Congress whenever two-thirds of both houses deem it necessary, or on the application of the legislatures of two-thirds of the several states, the Congress shall call a constitutional convention for the purpose of proposing amendments; we believe such action vital;

Now, therefore, be it resolved by the legislature, of the State of New Mexico that this body proposes to the congress of the United States that procedures be instituted in the congress to add a new article to the constitution of the United States, and that the legislature of the state of New Mexico requests the congress to prepare and submit to the several states an amendment to the constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations made by the congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; and

Be it further resolved that, alternatively, this body makes application and requests that the congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the constitution requiring in the absence of a national emergency that the

total of all federal appropriations made by the congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; and

Be it further resolved that this body also proposes that the legislatures of each of the several states comprising the United States apply to the Congress requesting the enactment of an appropriate amendment to the federal constitution; or requiring the congress to call a constitutional convention for proposing such an amendment to the federal constitution; and

Be it further resolved that copies of this resolution be sent by the secretary of state to the members of New Mexico's delegation to the Congress of the United States; and

Be it further resolved that the secretary of state of this state is directed to send copies of this joint resolution to the secretary of state and presiding officers of both houses of the legislature of each of the other states in the union, the clerk of the United States house of representatives, Washington, D. C. and the secretary of the United States Senate, Washington, D. C.

SENATE CONCURRENT RESOLUTION No. 4018

(North Dakota)

Be it resolved by the Senate of the State of North Dakota, the House of Representatives concurring therein:

That we respectfully propose an amendment to the Constitution of the United States and call upon the people of the several states for a convention for such purpose as provided by Article V of the Constitution, the proposed Article providing as follows:

ARTICLE —

Section 1. The president shall submit, at the beginning of each new Congress, an annual budget for the ensuing fiscal year setting forth in detail the total proposed expenditures and the total estimated revenue of the Federal Government from sources other than borrowing. The president may set new revenue estimates from time to time. Expenditures for each two-year period shall not exceed the estimated revenue except in time of war or a national emergency declared by the Congress. The provisions of this Article shall not apply to the refinancing of the national debt; and

Be it further resolved, that copies of this resolution be forwarded by the Secretary of State to the legislatures of the several states.

HOUSE JOINT RESOLUTION No. 1049

(OKLAHOMA)

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars.

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

Section 3. That this Body also proposes that the legislatures of each of the several states comprising the United States apply to the Congress requesting the enactment of an appropriate amendment to the Federal Constitution; or requiring the Congress to call a constitutional convention for proposing such an amendment to the Federal Constitution.

Section 4. That copies of this Resolution shall be sent by the Secretary of State to our members of Congress.

Section 5. That the Secretary of State of this state is directed to send copies of this Joint Resolution to the Secretary of State and presiding officers of both Houses of the Legislature, the Congress and of each of the other States in the Union.

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit.

Whereas, knowledgeable planning, fiscal prudence and plain good sense require that the budget reflect all federal spending and be in balance.

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal dicipline needed to restore financial responsibility.

Whereas, under Article V of the Constitution of the United States, amendments to the Federal Constitution may be proposed by the Congress whenever two-thirds of both Houses deem it necessary, or on the application of the legislatures of two-thirds of the several states that the Congress shall call a constitutional convention for the purpose of proposing amendments. We believe such action vital.

Now, therefore, be it resolved by the House of Representatives and the Senate of the 2nd session of the 35th Oklahoma legislature:

Section 1. That this body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the Legislature of the State of Oklahoma makes application and requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

Section 2. That alternatively, this Body requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution requiring in the absence of a national emergency.

SENATE JOINT MEMORIAL 2

(Oregon)

(1) That this body respectfully petitions the Congress of the United States to call a convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto.

(2) That this application by this body constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this Joint Memorial before January 1, 1979, this petition for a constitutional convention shall no longer be of any force or effect.

(3) That this body propose that the legislative body of each of the several states comprising the United States apply to the Congress of the United States requiring the Congress to call a constitutional convention for proposing an appropriate amendment to the Federal Constitution or requesting the enactment of such an amendment to be submitted to the states for ratification.

(4) That a copy of this memorial shall be transmitted to the President of the United States; to each member of the Oregon Congressional Delegation; to the presiding officers of the Senate and House of Representatives of the United States of America; to each Governor of each state in the United States of America; and to the presiding officer of each legislative body in the United States of America.

RESOLUTION No. 236

(Pennsylvania)

Whereas, Requesting appropriate action by the Congress, either acting by consent of two-thirds of both Houses or, upon the application of the Legislatures of two-thirds of the several states, calling a Constitutional Convention to propose an amendment to the Federal Constitution to require, with certain exceptions, that the total of all Federal appropriations may not exceed the total of all estimated Federal revenues in any fiscal year.

Whereas, With each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, The annual Federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal Government to curtail spending to conform to available revenues; and

Whereas, Unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, Knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all Federal spending and be in balance; and

Whereas, Believing that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

Whereas, Under Article V of the Constitution of the United States, amendments to the Federal Constitution may be proposed by the Congress whenever two-thirds of both Houses deem it necessary, or on the application of the Legislatures of two-thirds of the several states the Congress shall call a Constitutional Convention for the purpose of proposing amendments. We believe some such action vital; therefore be it

Resolved (The Senate concurring), That the General Assembly of the Commonwealth of Pennsylvania proposes to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the General Assembly of the Commonwealth of Pennsylvania requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year; and be it further

Resolved That, alternatively, the General Assembly of the Commonwealth of Pennsylvania makes application and requests that the Congress of the United States call a Constitutional Convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution requiring

in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year; and be it further

Resolved, That the General Assembly of the Commonwealth of Pennsylvania also proposes that the Legislatures of each of the several states comprising the United States apply to the Congress requesting the enactment of an appropriate amendment to the Federal Constitution; or requiring the Congress to call a Constitutional Convention for proposing such an amendment to the Federal Constitution; and be it further

Resolved, That copies of this resolution be sent to the members of the Congress from Pennsylvania; and be it further

Resolved, That the Chief Clerk of the House of Representatives send copies of this joint resolution to the Secretary of State and presiding officers of both Houses of the Legislature of each of the other states in the Union, the Clerk of the United States House of Representatives, Washington, D. C. and the Secretary of the United States Senate, Washington, D. C.

CONCURRENT RESOLUTION No. S. 1024

(South Carolina)

Whereas, with each passing year this Nation becomes more deeply in debt as congressional expenditures grossly and repeatedly exceed available revenues so that the public debt now exceeds a half-trillion dollars; and

Whereas, attempts to limit spending by means of the new congressional budget committee procedures have proved fruitless; and

Whereas, the annual Federal budget repeatedly demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues; and

Whereas, the proposed budget of five hundred billion dollars for fiscal year 1978–1979 does not reflect total spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, believing that fiscal irresponsibility at the Federal level, with the resulting inflation and decline in the Nation's trading position is a growing and corrosive threat to our economy, to the well-being of our people, and to our representative democracy, that constitutional restraint is necessary to bring the fiscal discipline needed to reverse this trend. Now, therefore,

Be it resolved by the Senate, the House of Representatives concurring:

That Congress is requested, pursuant to Article V of the United States Constitution, to call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution.

Be it further resolved that the proposed new amendment read substantially as follows:

"PROPOSED ARTICLE XXVII

The total of all federal appropriations made by the Congress for any fiscal year shall not exceed the total of the estimated federal revenues for that fiscal year, excluding any revenues derived from borrowing, and this prohibition extends to all federal appropriations and all estimated federal revenues, excluding any revenues derived from borrowing. The President in submitting budgetary requests and the Congress in enacting appropriation bills shall comply with this article.

The provisions of this article shall be suspended for one year upon the proclamation by the President of an unlimited national emergency. The suspension may be extended, but not for more than one year at any one time, if two-thirds of the membership of both Houses of Congress so determine by Joint Resolution."

Be it further resolved that copies of this resolution be forwarded to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives and to each member of Congress from South Carolina.

NO. 774

An Act To Authorize The Secretary Of State To Restore The Charter Of Plainview Rural Water Co., Inc.

Be it enacted by the General Assembly of the State of South Carolina:

Section 1. Charter may be restored.—Authority is hereby granted to the Secretary of State to restore the charter of Plainview Rural Water Co., Inc., upon the payment to the South Carolina Tax Commission of such taxes, penalties and interest as the commission shall find to be due. The Secretary of State shall note the reinstatement upon the record of the original charter.

Section 2. Time effective.—This act shall take effect upon approval by the Governor.

Became law without the signature of the Governor.

NO. 775

A Joint Resolution To Request Appropriate Action By The Congress Of The United States, On Its Own Action By Consent Of Two-Thirds Of Both Houses Or On The Application Of The Legislatures Of Two-Thirds Of The Several States, To Propose An Amendment To The Constitution Of The United States To Require That The Total Of All Federal Appropriations May Not Exceed The Total Of All Estimated Federal Revenues In Any Fiscal Year, With Certain Exceptions.

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, attempts to limit spending have resulted in strenuous objections that the responsibility for appropriations is the constitutional duty of the Congress; and

Whereas, the annual federal budget repeatedly demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, the unified budget of over three hundred billion dollars for the current fiscal year does not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning and fiscal prudence require that the budget reflect all federal spending and that the budget be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to reverse this trend; and

Whereas, under Article V of the Constitution of the United States, amendments to the federal constitution may be proposed by the Congress whenever two-thirds of both houses deem it necessary, or on the application of the legislatures of two-thirds of the several states, the Congress shall call a constitutional convention for the purpose of proposing amendments. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

Section 1. Amendment to U.S. Constitution proposed.—The General Assembly of South Carolina proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article XXVII to the Constitution of the United States, and that the Congress prepare and submit to the several states an amendment to the Constitution of the United States requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated federal revenues, excluding any revenues derived from borrowing, for that fiscal year.

The General Assembly further and alternatively requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing such an amendment to the federal constitution, to be a new Article XXVII.

The General Assembly also proposes that the legislatures of each of the several states comprising the United States apply to the Congress requiring it to call a constitutional convention for proposing such an amendment to the federal constitution, to be a new Article XXVII, which shall read substantially as follows:

"ARTICLE XXVII

The total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated federal revenues for that fiscal year, excluding any revenues derived from borrowing, and this prohibition extends to all federal appropriations and all estimated federal revenues, excluding any revenues derived from borrowing. The President in submitting budgetary requests and the Congress in enacting appropriation bills shall comply with this article. If the President proclaims a national emergency, suspending the requirement that the total of all federal appropriations not exceed the total estimated federal revenues for a fiscal year, excluding any revenues derived from borrowing, and two-thirds of all members elected to each house of the Congress so determine by joint resolution, the total of all federal appropriations may exceed the total estimated federal revenues for that fiscal year."

Section 2. Copies to certain persons.—The Secretary of State is directed to forward copies of this resolution bearing the Great Seal of the State to the following persons: The President and Vice President of the United States, the Speaker of the United States House of Representatives and each member of the South Carolina Congressional Delegation in Washington, D.C.

Section 3. Time effective.—This act shall take effect upon approval by the Governor.

HOUSE JOINT RESOLUTION No. 22

(Tennessee)

Whereas, each year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues so that the legal public debt limit has exceeded 437 billion dollars; and

Whereas, attempts to limit spending, including impoundment of funds by the President of the United States, have resulted in strenuous objections that the responsibility for appropriations is the constitutional duty of the Congress; and

Whereas, nonetheless, the annual budget repeatedly demonstrates an unwillingness or inability to curtail spending to conform to available revenues; and

Whereas, the federal budget never reflects actual spending because of the exclusion of special outlays which are neither included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning requires that the budget reflect all federal spending and that the budget be in balance and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that a constitutional restraint is necessary to bring the fiscal disciplines needed to reverse this trend; now, therefore

Be it resolved by the House of Representatives of the Ninetieth General Assembly of the State of Tennessee, the Senate concurring, That pursuant to Article V of the Constitution of the United States, application is hereby made to the United States Congress to call a convention for the purpose of considering and proposing an amendment to the Constitution of the United States to require that, in the absence of a national emergency, the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated federal revenues for that fiscal year, such amendment to read substantially as follows:

The total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated federal revenues for that fiscal year; and this prohibition extends to all federal appropriations and all estimated federal revenues without exception. The President in submitting budgetary requests and the Congress in enacting appropriation bills shall comply with this article. If the President proclaims a national emergency, suspending the requirement that the total of all federal appropriations not exceed the total estimated federal revenues for a fiscal year, and two-thirds (⅔) of all members elected to each house of the Congress so determine by joint resolution, the total of all federal appropriations may exceed the total estimated federal revenues for that fiscal year.

Be it further resolved, That this application shall constitute a continuing application for such convention under Article V of the Constitution of the United States until the legislatures of two-thirds (⅔) of the several states shall have made like applications and such convention shall have been called and held in conformity therewith, unless the Congress itself proposes such amendment within the time and the manner herein provided.

Be it further resolved, That proposal of such amendment by the Congress and its submission for ratification to the legislatures of the several states substantially in the form of the article hereinabove specifically set forth, at any time prior to sixty (60) days after the legislatures of two-thirds (⅔) of the several states shall have made application for such convention, shall render such convention unnecessary and the same shall not be held. Otherwise, such convention shall be called and held in conformity with such applications.

Be it further resolved, That as this application under Article V of the Constitution of the United States is the exercise of a fundamental power of the sovereign states under the Constitution of the United States, it is requested that receipt of this application by the Senate and the House of Representatives of the Congress of the United States be officially noted and duly entered upon their respective records, and that the full context of this resolution be published in the official publication of both the Senate and the House of Representatives of the Congress.

Be it further resolved, That certified copies of this Resolution be transmitted forthwith to the Senate and the House of Representatives of the Congress of the United States, to each Senator and Representative in Congress from this state, and to each house of the legislature and to the Secretary of State of each of the several states.

HOUSE CONCURRENT RESOLUTION NO. 13

(Texas)

Whereas, The overwhelming endorsement by California voters of Proposition 13 has spurred a nationwide taxpayer's revolt against high taxes and excessive government spending; and

Whereas, While numerous local governments and states, including Texas, are sincerely responding to citizen demands for tax limitations coupled with responsible spending, the federal government, where budget restraint is most needed, has reacted to the message of Proposition 13 in a halfhearted and disappointing manner; and

Whereas, The federal budget is increasing at an alarming rate, several times that of inflation, as seen by a 140 percent increase since 1970; and

Whereas, The federal government through many years of deficit spending has incurred a national debt of astronomical and dangerous proportions; the gross national debt is currently estimated to be almost $800 billion, over twice the figure for 1962 and about 40 percent of the nation's gross national product; and

Whereas, Statutorily imposed "permanent" debt ceilings, repeatedly raised by Congress, have proved to be no impediment to the monstrous growth of the national debt; this disgraceful legacy for future generations has swollen by $177 billion over the past three years and has fostered an interest payment of $50 billion for this year; and

Whereas, Persistent deficit financing is a major factor contributing to income-robbing inflation, high interest rates, and an unstable, unpredictable economy, and results in the funding of government programs of questionable benefit and need; and

Whereas, Texas' enviable financial position among state governments is largely due to its "pay-as-you-go" constitutional provision restricting deficit spending by the legislature; and

Whereas, During the 1977 regular session, this legislature adopted House Concurrent Resolution No. 31 memorializing congress to initiate a constitutional amendment that would similarly prevent deficit spending and therefore halt the growth of the national debt, the greatest threat to this nation's future well-being; now, therefore, be it

Resolved by the House of Representatives of the State of Texas, the Senate concurring, That the 65th Legislature, 2nd Called Session, hereby reaffirm the provisions of House Concurrent Resolution No. 31 calling for an amendment to the United States Constitution requiring a balanced annual federal budget and hereby request the Texas congressional delegation to sponsor this vital amendment; and, be it further

Resolved, That this amendment require the achievement of a balanced budget within a reasonable period after adoption and establish a procedure for amortizing the national debt; and, be it further

Resolved, That the Governor of Texas be hereby requested to actively seek the sponsorship of the amendment by the Texas congressional delegation and to use the financial resources of his office to promote support for the amendment; and, be it further

Resolved, That the governor, lieutenant governor, and speaker of the house be hereby requested to contact government leaders of other states to solicit and encourage support for the amendment; and, be it further

Resolved, That the lieutenant governor and speaker of the house be authorized to designate separate or joint committees or individual legislators to represent them and the state in this endeavor and that reasonabe expenses incurred by them or their designees in efforts to initiate the amendment be paid from the contingent expense fund of the appropriate house; and, be it further

Resolved, That official copies of this resolution be prepared and forwarded to the President of the United States, to the President of the Senate and the Speaker of the House of Representatives of the United States Congress, and to all members of the Texas delegation to the congress with the request that this resolution be officially entered in the Congressional Record as a memorial to the Congress of the United States of America.

SENATE JOINT RESOLUTION NO. 36

(Virginia)

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual Federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all Federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

Whereas, under Article V of the Constitution of the United States, amendments to the Federal Constitution may be proposed by the Congress whenever two-thirds of both Houses deem it necessary, or on the application of the legislatures of two-thirds of the several states the Congress shall call a constitutional convention for the purpose of proposing amendments; and

Whereas, we believe such action vital; now, therefore, be it

Resolved by the Senate of Virginia, the House of Delegates concurring, That the General Assembly of Virginia proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that this Body hereby requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year; and, be it

Resolved further, That, alternatively, this Body makes application and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all esti-

mated Federal revenues for that fiscal year; and, be it

Resolved further, That this Body also proposes that the legislature of each of the several states comprising the United States apply to the Congress requesting the enactment of an appropriate amendment to the Federal Constitution; or requiring the Congress to call a constitutional convention for proposing such an amendment to the Federal Constitution; and, be it

Resolved finally, That copies of this resolution be presented forthwith to the President of the Senate and the Speaker of the House of Representatives, to each of the Senators and Representatives from Virginia and to the legislatures of each of the several states, attesting the adoption of this resolution.

ENROLLED JOINT RESOLUTION NO. 1

(Wyoming)

A joint resolution requesting appropriate action by the Congress, on its own by consent of two-thirds of both Houses or on the application of the legislatures of two-thirds of the several states, to propose an amendment to the Federal Constitution to require that the total of all Federal appropriations may not exceed the total of all estimated Federal revenues in any fiscal year, with certain exceptions.

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues so that the public debt now amounts to hundreds of billions of dollars; and

Whereas, attempts to limit spending, including impoundment of funds by the President of the United States, have resulted in strenuous assertions that the responsibility for appropriations is the constitutional duty of the Congress; and

Whereas, the annual Federal budget repeatedly demonstrates the unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues; and

Whereas, the unified budget does not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, the U.S. News and World Report reported on February 25, 1974, that of these nonbudgetary outlays in the amount of $15,600,000,000.00, the sum of $12,900,000,000.00 represents funding of essentially private agencies which provide special services to the Federal government; and

Whereas, knowledgeable planning and fiscal prudence require that the budget reflect all Federal spending and that the budget be in balance; and

Whereas, believing that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal disciplines needed to reverse this trend; and

Whereas, under Article V of the Constitution of the United States, amendments to the Federal Constitution may be proposed by the Congress whenever two-thirds of both Houses deem it necessary, or on the application of the legislatures of two-thirds of the several states the Congress shall call a constitutional convention for the purpose of proposing amendments;

Now, therefore be it resolved by the legislature of the State of Wyoming, a majority of all members of the two Houses, voting separately, concurring herein:

Section 1. That procedures be instituted in the Congress to add a new Article XXVII to the Constitution of the United States, and that Congress prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues, excluding any revenues derived from borrowing, for that fiscal year; or

Section 2. That the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing such an amendment to the Federal Constitution, to be a new Article XXVII.

Section 3. That the legislatures of each of the several states comprising the United States apply to the Congress requiring it to call a constitutional convention for proposing such an amendment to the Federal Constitution, to be a new Article XXVII.

Section 4. That the proposed new Article XXVII (or whatever numeral may then be appropriate) read substantially as follows:

PROPOSED ARTICLE XXVII

"The total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues for that fiscal year, excluding any revenues derived from borrowing; and this prohibition extends to all Federal appropriations and all estimated Federal revenues, excluding any revenues derived from borrowing. The President in submitting budgetary requests and the Congress in enacting appropriations bill shall comply with this Article. If the President proclaims a national emergency, suspending the requirement that the total of all Federal appropriations not exceed the total estimated Federal revenues for a fiscal year, excluding any revenues derived from borrowing, and two-thirds of all Members elected to each House of the Congress concur by Joint Resolution, the total of all Federal appropriations may exceed the total estimated Federal revenues for that fiscal year."

Section 5. That copies of this Resolution be transmitted to the President of the United States, the chairmen of the Judiciary Committees of both the Senate and House of Representatives, the chairman of the Joint Committee on Budget Control of the Congress and to each member of the Wyoming Congressional delegation.

Section 6. That copies of this Joint Resolution be transmitted to the Secretary of State and to the presiding officers of both Houses of the Legislature of each of the other States in the Union, with the request that it be circulated among leaders in the Executive and Legislative branches of the several State governments; and with the further request that each of the other States in the Union join in requiring the Congress of the United States to call a constitutional convention for the purpose of initiating a proposal to amend the Constitution of the United States in substantially the form proposed in this Joint Resolution.

ORDER OF BUSINESS—ROUTINE MORNING BUSINESS

Mr. STEVENS addressed the Chair.

Mr. ROBERT C. BYRD. Mr. President, I hesitate to interrupt the distinguished Senator, but the regular order is that two other Senators be recognized at this time. I know the Senator is not aware of that.

The PRESIDING OFFICER. The Senator is correct.

Mr. ROBERT C. BYRD. Inasmuch as those Senators are not in the Chamber at this time, and in order not to prejudice their orders, and at the same time to allow the distinguished acting Republican leader to proceed, I ask unanimous consent that there now be a period for the transaction of routine morning business, with statements therein limited to 5 minutes, awaiting the arrival of the two Senators for whom the orders previously have been given.

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

Mr. STEVENS. Mr. President, I thank my good friend, and I apologize. I was not aware of those orders.

ENERGY AND THE PUBLIC LANDS

Mr. STEVENS. Mr. President, the United States is facing another energy crisis. The Secretary of Energy has stated that he is considering banning Sunday gas sales as well as restricting commuter parking and imposing emergency heating and cooling restrictions. It is clear that we must take steps to reduce our dependence on foreign oil or live with the continued threat of another Iran, another oil embargo, another catastrophe. Yet, Federal policies are restricting and even prohibiting exploration for much needed mineral potential. These policies are threatening to cripple our Nation.

The Federal Government owns over 760 million acres of land—one-third of the United States. This land contains significant reserves of crude oil, natural gas, and other minerals. It is estimated that the Federal Government is sitting on as much as 135 billion barrels of crude oil and gas liquids and almost 760 trillion cubic feet of natural gas. This is nearly four times the known current reserves of oil and gas in the United States. Yet almost nothing is being done to explore and develop this tremendous potential. In fact, more and more steps are being taken to block any exploration of these lands.

Much of the Federal lands has been withdrawn by the Federal Government and is not available for any mineral potential. Secretary Andrus recently suggested that we terminate a program to gather information on the national strategic petroleum reserve until we "see if it is needed." What does it take before he realizes that it is needed?

We must work toward a national policy to improve our energy supply, not sabotage it.

I ask unanimous consent that a memorandum recently compiled by the Independent Petroleum Association of America on this subject be printed in the RECORD.

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

ENERGY AND THE PUBLIC LANDS

U.S. public lands are the last frontier for domestic oil exploration. They present the most promising opportunities to expand our nation's domestic supplies of crude oil and natural gas. Yet, federal surface management policies are restricting and, in some cases, prohibiting any form of exploration. De facto and de jure withdrawals of public lands from the operation of the Mining Act of 1872, the Mineral Leasing Act of 1920 and the Mining and Minerals Policy Act of 1970 have occurred in haphazard and uncoordinated fashion with little thought given to future economic or energy impact. If there is any denominator for the federal government's actions with regard to public lands over the last decade, it is the exclusive concern for maintaining the works of nature inviolate while disparaging the efforts of man.

MINERALS POTENTIAL IN PUBLIC LANDS

The federal government owns over 760 million acres—one-third of the total land area of this country—as well as the mineral rights to an additional 63 million acres. The largest federal landowners are the Bureau of Land Management (BLM) with 470 million acres (equivalent to Alaska, California, and Massachusetts combined) and the Forest Service with 187 million acres (equivalent to Texas and South Carolina combined). They are followed by the Department of Defense, 31 million acres; Fish and Wildlife Service, 30 million acres; National Park Service, 25 million acres; Bureau of Reclamation, 7.6 million acres; and Bureau of Indian Affairs, 5 million acres. In addition, the federal goverment controls some 559 million acres underlying territorial waters beyond state jurisdiction.

These vast stretches of Federal land contain significant potential reserves of crude oil and natural gas and other critical minerals. Dean William H. Dresher of the University of Arizona College of Mines estimates that publicly owned lands contain 50 percent of all known energy resources including: 40 percent of the coal, 70 percent of the low-sulfur coal; 75 percent of the oil shale; 85 percent of the tar sands; 15 percent of the developed oil reserves; 33 percent of the estimated U.S. oil resource base; and 43 percent of the estimated U.S. natural gas base.

Studies of the U.S. Geological Survey indicate that this country has enough known and potential oil and natural gas resources to continue present levels of production for nearly 50 years. The low estimate suggests that, with improved technology and the right economic climate, the nation may have as many as 135 billion barrels of crude oil and gas liquids, and some 760 trillion cubic feet of natural gas, almost four times the current proved reserves of oil and gas in the U.S.

The Geological Survey and private oil and gas industry sources estimate that much of the nation's undiscovered oil and natural gas reserves lie in Alaska, the Rocky Mountains and on the Outer Continental Shelf (OCS). Ninety-six percent of the lands in Alaska, 46 percent of the Rocky Mountain states (Idaho, Utah, Montana, Wyoming, Colorado, and New Mexico), and all of the OCS beyond state jurisdiction are controlled by the federal government. Thus, the management policies governing access and development of these resources is critical.

In a recent statement before the American Association for the Advancement of Science, Charles O. Masters of the U.S. Geological Survey stated that the U.S.G.S. was raising its estimate of undiscovered crude oil resources in the U.S. by 10 billion barrels, according to a January 6, 1979 Washington Post report. Eight new discoveries in the Western part of the Green River Basin provide data which supports an upward revision of the low estimate from 50 to 60 billion barrels of undiscovered crude oil. These new discoveries highlight the significance of the new frontier on public lands in the Rocky Mountain states as the Green River Basin covers parts of Wyoming, Utah, Montana, and Colorado and is part of the Overthrust Belt. The new discoveries have also raised the 1973 estimates of potential in that basin from 1.5 to 37 billion barrels of oil, adding further support to government and industry claims that the Overthrust Belt may have greater potential than Prudhoe Bay in Alaska.

The Rocky Mountain Oil and Gas Association estimates undiscovered recoverable hydrocarbon resources of Forest Service RARE II tracts overlying the Overthrust Belt in Idaho, Montana, Utah and Wyoming to be from 4.5 to 25.9 billion barrels of crude oil and from 13.2 to 97.3 trillion cubic feet of natural gas. According to RMOGA, "this is equivalent to as much as 4.3 times the oil and gas estimated to be recoverable from the Atlantic Continental Shelf (0–6 billion barrels of oil and 0–22 trillion cubic feet of natural gas), or up to eight times the amount of crude oil imported by the United States in 1977 (3.2 billion barrels)."

Only one hundred nine million acres of public lands are under oil and gas lease at the present time. Of the 559 million offshore acres controlled by the U.S., only a little more than 10 million, or less than 2 percent of the offshore acres has been leased for oil and gas exploration, according to the American Petroleum Institute. Of the 3.2 million wells drilled throughout the world, some 2.4 million have been drilled in the mature producing areas of the U.S. Extrapolate such a drilling density to Alaska, to the western areas where new discoveries have been made recently, and to other promising regions such as those on the public lands and the results could be phenomenal.

However, according to "The Final Report of the Task Force on the Availability of Federally-Owned Mineral Lands" (U.S. Department of Interior, 1977, using 1974 data) 312.5 million acres of federal lands were formally withdrawn and an additional 183 million acres were governed by such severe restrictions as to constitute de facto withdrawals—as much as 73 percent of the U.S. public lands.

CURRENT LAND MANAGEMENT POLICY

The movement to withdraw more and more federal land has come about largely as a result of a latent awareness that U.S. borders are not limitless and her natural resources must be managed in a manner which will respect the natural environment as well as the economic environment of the nation. Thus, land managing agencies are mandated to protect and sustain every aspect of the natural environment under a plethora of piecemeal programs. The result is a collage of conflicting policies and procedures which lack priority identification and national perspective. For example, improving the nation's energy supply situation is a top national priority. At the same time, conservation of public land has also been identified as a top environmental issue. It is this conflict which has seriously limited access to U.S. public lands for energy exploration and development.

The emphasis on wilderness preservation has exacerbated the land withdrawal issue. During the past two years, the Forest Service withdraw sixty-three million acres of national forest land for its RARE II studies; the Bureau of Land Management initiated a 15-year Wilderness Review; 123 million acres were withdrawn from any development in Alaska while Congress debates the Alaska National Interest Lands Act; and countless individual wilderness and other limited access bills have passed in Congress. According to the U.S. Forest Service, the current wilderness situation is as follows:

National wilderness preservation system

Existing wilderness	[1] 19,013,305
Endorsed and pending before Congress	[2] 23,148,041
Under review or estimated under review	[1] 202,842,863
Total acres	245,004,209

[1] Includes National Forests, National Parks, National Wildlife Refuges, and Bureau of Land Management lands.

[2] Includes National Forests, National Parks and National Wildlife Refuges.

All of these 245,004,209 acres are presently managed in a manner that will protect their wilderness characteristics; i.e., they are not available for mineral resource development.

The controversy is obvious in the debate over future use of Alaska lands. In proposed legislation which would limit access to 128 million acres of land in Alaska, all of that acreage would be withdrawn from mineral entry while oil and gas leasing could occur on non-wilderness refuges subject to special procedures. Seventy percent of the lands rated highly favorable for minerals by the U.S. Bureau of Mines and three of the world class mineral discoveries in Alaska identified by the Stanford Research Institute are included in Wilderness areas and would therefore be off-limits to exploration and development or be so restrictively managed as to preclude development. Additionally, the Arctic National Wildlife Range coastal plain would be designated Wilderness and subject to wilderness protection stipulations.

EXISTING STATUTORY PROVISIONS

The conflict between energy development and conservation crystalizes when one examines the statutory provisions for conducting oil and gas operations on designated wilderness areas. The Wilderness Act of 1964 makes special provisions for exploration and development of minerals on "wilderness" areas, recognizing their important place in American productivity. The Act provides in part:

". . . Nothing in this Act shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources, if such activity is carried on in a manner compatible with preservation of the wilderness environment . . .

"Notwithstanding any other provisions of this Act, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to the effective date of this Act, extend to those national forest lands designated by this Act as 'wilderness areas'; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production . . ." (Sec. 4(d)(2) and (3))

Implicit in the language of the Act is a recognition of the fact that mineral exploration and extraction can be conducted in harmony

with the environment. Multiple use is not contrary to preservation of the natural environment. Reasonable requirements for surface protection and restoration provide adequate safeguards and are consistent with the language of the Wilderness Act and the Federal Land Policy and Management Act (FLPMA).

The importance of mineral values in wilderness areas as recognized by Congress in the Wilderness Act was later confirmed by FLPMA (sections 603(a) and 603(c)). Both acts require that minerals surveys be performed by the Geological Survey and Bureau of Mines, the results of such surveys to be reported to the President and Congress. FLPMA goes further by requiring such report to be completed prior to any wilderness designation recommendations. It is significant that both acts which mandate wilderness studies include this recognition of mineral values.

Furthermore, Section 4(d)(3) of the Wilderness Act provides that, with regard to wilderness areas, regulations governing ingress and egress shall be:

". . . consistent with the use of the land for mineral . . . development and exploration, drilling, and production, and use of land for . . . facilities necessary in exploring, drilling, producing, and processing operations, including where essential . . . restoration as *near as practicable* of the surface of the land disturbed. . ." (Emphasis added)

The language is specific. Not only can oil and gas be discovered but produced as well. The legislators recognized not only that land disturbance is a necessary by-product of exploration and production but also, more importantly, that the land can be restored without impairing wilderness suitability. The BLM's NTL-6 provides more than ample reclamation requirements.

Our interpretation is consistent with language in section 603(c) of FLPMA: ". . . the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands. . ." This language makes clear that some degradation of the lands will be necessary; otherwise there would be no need for regulation. Therefore, a "no surface occupancy" stipulation on a lease is an unwarranted and improper application of wilderness protection. Failure to issue new leases, and failure to grant or process applications for drilling permits are equally unacceptable. The pertinent language of section 603(a) of FLPMA reads:

". . . the Secretary shall continue to manage such lands . . . so as not to impair the suitability of such areas for preservation as wilderness, *subject, however, to the continuation of* existing mining and grazing uses and *mineral leasing* in the manner and degree in which the same was being conducted on the date of approval of this Act." (Emphasis added)

IMPLEMENTATION OF STATUTORY AUTHORITY

In spite of the foregoing development provisions, land managing agencies have taken the position that mineral leasing is a use taking place on public lands rather than a legal entitlement by which a party would be allowed to conduct exploration and production operations on the land. To the contrary, a lease is nothing if not a legal entitlement to use the land consistent with the purpose for which it was leased. An oil and gas lease is meaningless without the entitlement to access, drilling, and production.

An example of agency restrictions can be found in the following quote taken from the recently published RARE II Final Environmental Statement:

". . . Oil industry exploration proposals will be examined on a case-by-case, site-specific basis in full compliance with the National Environmental Policy Act. This means before on-the-ground activities are permitted, environmental assessment reports will be made. Where proposed activities, individually or cumulatively, would have major effects on quality of the human environment, environmental impact statements will be prepared with full public involvement. Where environmental impacts are judged unacceptable, the proposed activities will be disapproved."

This process continues the all too familiar scenario to oil and gas lessees: endless delays, litigation by environmentalists, prohibitive operating costs, and increased bureaucratic involvement in private enterprise, not to mention the obvious disincentive posed by no guarantee that production will be allowed once a discovery is made. It also provides a classic example of the conflicts which exist in the mandates of public land managing agencies.

Commercial production of oil and gas and development drilling in National Forest nonwilderness and further planning areas as well as all BLM lands under study for wilderness characteristics will not be approved until land use allocation decisions and/or land management plans have been completed. Under these conditions, it will take years to bring on any of the vast energy potential that lies beneath public lands.

Until very recently, the chief concept which governed the management of public lands was "multiple use". Congress reaffirmed the multiple use philosophy in the Federal Land Policy and Management Act of 1976. However, the Act's definition of "multiple use" has only further clouded the picture:

"The term multiple use means the management of public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustment in use to conform to changing needs and conditions; *the use of some land for less than all of the resources;* a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources; including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources *without permanent impairment of the productivity of the land and the quality of the environment* with consideration being given to the relative values of the resources and *not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.*" (Emphasis added.)

The term is defined in FLPMA is broad enough to cover any wish of federal land managing officials and can mean many things to persons with different backgrounds and interests.

Implied but not stated in the definition of multiple use is the concept of "without conflict". Historically, it has meant simultaneous occurrence of compatible uses or sequential occurrence of conflicting uses. An outstanding example is Avery Island in Louisiana which is simultaneously a bird sanctuary, salt mine, red pepper farm, and a producing oil and gas field.

With perspective, the term "multiple use" as defined in FLPMA can be used to provide for the needs of our society. Without perspective, it can be used to eliminate massive portions of public lands from broad public use. The latter is happening.

CONCLUSION

All current projections indicate that U.S. demand for imported petroleum will continue to increase unless new domestic sources of petroleum are found and developed. Federal lands (both onshore and offshore) are the areas of greatest potential for future domestic petroleum supplies. Our ability to develop those domestic supplies depends upon gaining access to these lands.

Petroleum activities on federal lands—in addition to being necessary to expand domestic production—are in most instances temporary and can be conducted in a manner that is compatible with sensitive environmental areas. Exploration activity (both seismic and test drilling) involves minimal surface disturbance of the land over a fairly short period (a few days or weeks usually—a few years at most). Even in the event of a commercial discovery, the normal life of a field (25 to 30 years) is also a "temporary" intrusion on the land when considered in terms of an average lifetime and the pressing need now for domestic energy supplies.

Petroleum development as a "compatible use" has been fully documented even in the case of the most sensitive competing use—wildlife. Oil and gas activities on the Kenai Moose Range in Alaska and on various wildlife refuges along the coast of the Gulf of Mexico have shown that wildlife management and petroleum production can proceed together. In fact, the Wildlife Refuge Management Act specifically states that oil and gas activities may proceed on wildlife refuges.

The petroleum industry recognizes the need and the responsibility to conduct its operations in a manner that is environmentally sound. IPAA is anxious to work with the Federal government to bring about a process of operations which will satisfy that responsibility so that its members can get on with the business of finding and developing new domestic energy supplies.

SPECIAL ORDER

The PRESIDING OFFICER. Under the previous order, the Senator from Oklahoma (Mr. BELLMON) is recognized for not to exceed 15 minutes.

SENATE RESOLUTION 64—SUBMISSION OF A RESOLUTION RELATING TO THE FUNCTIONING OF MARKET FORCES IN CRUDE OIL PRODUCTION AND CONSERVATION

Mr. BELLMON submitted the following resolution, which was referred to the Committee on Energy and Natural Resources:

S. RES. 64

Be it resolved that it is the Sense of the Senate that:

"The President shall act to allow market forces to function in crude oil production and conservation".

Whereas, Congress finds it in the best in-

terest of all Americans, that U.S. energy resources be valued at their true replacement cost, as established by market forces;

Whereas, the majority of the American people desire to be self-sufficient in production of energy insofar as that is possible;

Whereas, the majority of the American people believe that energy is a non-renewable natural resource which should not be wasted, and should be priced at the world market or true replacement cost;

Whereas, our President has pledged his word, on our behalf, to allow the price of American oil to seek the world market price by 1981;

Resolved, that it is the sense of the Senate that price controls on all categories of domestically produced American crude except crude "lower tier" shall be terminated on June 1, 1979. Further, resolved the President shall systematically remove all remaining controls over the following two years.

Mr. BELLMON. Mr. President, I rise to submit a sense of the Senate resolution dealing with the expiration of EPCA.

Mr. President, I have some good news and some bad news. The good news is that mandatory price controls on American crude oil production are due to expire in May of this year. The bad news is that President Carter has the authority to extend or reimpose these controls and that great political pressures will be exerted on the President to get him to take this action.

That pressure is for a bankrupt policy and one which I believe needs to be allowed to die an early death.

There are those who want to keep these price controls on, but I believe that the majority of Americans do not want the price controls continued and will view the expiration of these controls as a necessary step toward conservation and toward the expansion of production of domestic energy.

In a recent Harris public opinion poll (released on January 8 of this year) 65 percent of all Americans polled said they favored "deregulation of the price of all oil produced in the United States, if this would encourage development of more oil production here at home."

The purpose of my statement this morning is to show that this would logically follow.

There is no doubt that deregulation would encourage development of more oil production. I offer evidence that deregulation would result in more oil production here at home just as it has with natural gas in the intrastate market. The point is so important that I intend to return to it in another later statement, wherein I hope to offer evidence from the real world that price incentives have brought forth increased production for both gas and oil.

Once Congress and the administration is convinced of this fact, it should then be but a short step to the realization that the solution to our energy problems is to get the Government out of the way and let market forces begin to operate.

In testimony this week officials of the Energy Department, Mr. Bardine and also Secretary Schlesinger, have taken the position that we should let the market forces work, and to me this is a healthy sign that the administration has now begun to see the light.

But, Mr. President, let me return to the Harris poll.

There are two points of significance in what 65 percent of all Americans favor. The first is that they favor deregulation of all domestic oil. Not just marginal wells. Not just new oil. Not just oil from enhanced recovery projects. They favor decontrol of all oil. That means that most Americans realize that we need to get more money to those who explore for, who find, and who produce energy in this country. Most Americans realize that we have an economic problem far more than we have a limitation of resource problem.

The second point is that most Americans realize that increased prices will probably result in increased production. In other words, they believe in the law of supply and demand.

Increasingly Americans realize that price controls are a mistake. The present controls on domestic crude production came about as amendments to the Emergency Petroleum Allocation Act (EPAA) of 1973. If that act has any redeeming feature, it is that it has shown a whole generation of Americans the inevitable failure of such controls. Production falls off, wasteful overutilization continues, and the rate of imports rises. When foreign production slumps shortages and sharp price increases follow.

The situation we find ourselves in now, after the 40 months of controls, is worse than the situation we were trying to escape. Not only has domestic oil production declined, but imports have escalated at an even more rapid pace, as is illustrated in a table, which I wish to have printed in the RECORD at this point.

Mr. President, I ask unanimous consent that this table be printed in the RECORD.

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

TABLE I.—IMPORTED AND DOMESTIC CRUDE OIL, 1960–77

[Thousands of barrels per day]

Year	United States	Per barrel[1]	OPEC	Per barrel[2]
1960	7,035	$2.88	1,315	$1.80
1961	7,183	2.89	1,269	1.80
1962	7,332	2.90	1,265	1.80
1963	7,542	2.89	1,284	1.80
1964	7,614	2.88	1,362	1.80
1965	7,804	2.86	1,476	1.80
1966	8,295	2.88	1,472	1.80
1967	8,811	2.92	1,259	1.80
1968	8,660	2.94	1,303	1.80
1969	8,778	3.09	1,334	1.80
1970	9,180	3.18	1,334	1.80
1971	9,032	3.39	1,673	2.29
1972	8,998	3.39	2,063	2.48
1973	8,784	3.89	2,993	5.04
1974	8,375	6.87	3,280	11.25
1975	8,007	7.67	3,601	12.38
1976	7,776	8.19	5,066	11.50
1977	8,217	8.57	6,156	12.70

[1] U.S. domestic average price at wellhead, current dollars.
[2] Posted price of Saudi "marker" crude, current dollars.

Source: Energy Information Agency: Annual Report (1977).

Mr. BELLMON. Mr. President, this table shows that OPEC crude oil imports went from what had been a relatively constant 1.3 million barrels a day prior to 1971 to about 7 million barrels a day by 1977, and they are even higher today. In this same period of time, the OPEC crude oil price had gone up a factor of four.

Since the collapse of oil production in Iran and the announced refusal of the Saudi Arabians to increase their production, Americans realize more than ever the dangerously exposed position of this Nation's oil supply. The politically inspired notion that the United States can have cheap, abundant, and dependable energy is evaporating.

Let me explain the apparent perverseness of a demand for OPEC that rises rapidly in the face of an even more rapid rise in price. The answer lies in the fact that all energy forms that compete with oil in the world market went up in price in concert with OPEC oil. But American oil was not allowed to go up in price, so the average price for oil in this country was substantially less than the nearest alternative energy source. Demand for oil went up. No increased domestic production was forthcoming, so imports took up the slack.

Mr. President, it was interesting to note in Secretary Schlesinger's testimony before the Energy Committee yesterday the charts which he submitted that showed that in real dollars the price of crude oil is less now than it was back in 1974. and the same thing is true with gasoline.

So it is natural under these conditions when crude oil prices are not allowed to go up as the cost of production goes up that there would be less activity and also since gasoline prices have stayed constant that we would be continuing our wasteful overutilization of this product.

It is worthwhile taking a look at how we came to have these controls in the first place. After World War II, what we would now call "OPEC" oil began to be imported into this country. It was cheap oil. OPEC was practically giving it away and it could be sold in this country much cheaper that we could produce our own domestic fields.

By 1955, we had instituted import controls on OPEC oil. The controls were designed to limit the amount of OPEC crude oil that could enter this country. The idea was to preserve a viable U.S. oil industry. It is fortunate for the country that this policy was followed. Otherwise, the United States would now be at the complete mercy of a foreign cartel.

The import quotas worked in the sense that a relative constant volume of 1.3 million barrels a day of OPEC oil was allowed to be imported from the early 1950's up until 1971. That amounted to about 17 percent of domestic production and allowed a price support of about $3 a barrel, in 1955 dollars, for domestic oil.

Then, in 1971, President Nixon imposed wage and price controls on virtually everything. These other price con-

trols were later lifted but the price controls on domestic oil production have never come off.

As late as mid-October 1973, Saudi Arabia "marker" crude, which is to say the sweet light crude oil whose posted price serves as the basis for the price of all OPEC oil, was selling for $2.32 a barrel.

The price of Saudi "marker" crude is posted in dollars, and I want to return later to the significance of that fact. But by the first of the year, the price of "marker" crude had gone from $2.32 a barrel to $10.83 a barrel. Congress quickly passed the Emergency Petroleum Allocation Act late in 1974 and late in 1975 passed, and President Ford reluctantly signed into law, the Energy Policy and Conservation Act, known as EPCA. It was EPCA amending EPAA that gave us the price controls that are to expire in May of this year.

The original price controls imposed by President Nixon on everything in 1971 were to stop inflation. When the EPAA controls on oil were imposed in 1974, inflation was very high, and some economists were afraid the shock of domestic oil going to the world market price would be too much for the economy. Inflation was still too high in 1975 when the EPCA controls were imposed, but the controls were designed to result in a gradual lifting of domestic oil prices to the world market price.

But inflation continued at a high level and the dollar began to drop like a rock as well. It might even be said that because inflation in this country continued at a high rate, the dollar began to drop. In any event, the OPEC price has been raised several times to compensate for the inflation and the fall in the dollar against more stable currencies (such as the Swiss franc).

As I said earlier, the price of market crude is set in dollars, and when the dollar falls, OPEC raises the price.

We, now, import six times the amount of OPEC oil we were importing when President Nixon put the price controls on domestic oil and we are paying six times as much per barrel. We are 36 times worse off when it comes to "balance of payments." When you consider imported crude oil and imported refined products, we import as much as we produce.

The intent of the price controls contained in EPCA was to allow the average price of domestic crude to rise, over a period of 40 months, the world price. The rate of increase was limited to 10 percent per year, unless the President could show that a faster increase would bring forth increased domestic production.

But the OPEC price has been increased over those 40 months by a third because of inflation and the falling dollar. In 1975 the OPEC price was $12 a barrel and 1.9 billion barrels of American crude would have sold at $12 a barrel—instead of $5—if controls had been lifted. Now, the OPEC price is $16 a barrel and 2.25 billion barrels of American crude can be sold, if price controls are lifted now, at $16 a barrel, instead of $9.

So we are no closer to deregulation today than we were when these price controls for phased deregulation were instituted. Now, the impact of this infusion of revenue into energy investment would have been and still will be significant so far as our future energy supplies from domestic resources are concerned.

Those who want price controls extended apparently take comfort from the figures of declining domestic production. If we leave controls on until 1981, they reason, there will not be any domestic production to lift the price controls from.

They may take some comfort. It all causes me much discomfort. The economic jolt is still there to be felt because the OPEC price is higher. Production has declined in the Lower 48 States. Inflation has not been checked. We are importing several times more oil and paying several prices for it. How can anyone plead for more of this torture?

And yet some do. They want to protect the Americn consumer, they say. And that is why the news that President Carter has the authority to extend or reimpose these controls may be bad news. Up to now he has shown far more concern, as President, for the price consumers pay than he has for the energy producers produce or fail to produce. Up to now, he would not acknowledge (much less confront) the real problem, which is lack of incentives for domestic energy production of all sorts. Perhaps the pending emergency from the decline in Iranian production plus changing consumer attitudes will cause a rethinking of the administration's position—at least I hope it will.

President Carter did not impose the present price controls on American oil. Congress imposed them and President Ford reluctantly agreed to them. The price controls were supposed to be a kind of phased deregulation. (The same kind of phased deregulation that we have ill advisedly put on our domestic natural gas, but I will come back to that on another day). A maximum increase of 10 percent per year in the average price of domestic crude oil was allowed. However, the President could increase the price more if he could show that by so doing, it would result in increased production.

It would have been and still is, easy to show that increased price would have resulted in increased domestic crude oil production. I ask unamious counsent to have printed in the RECORD, two tables, which can be used for this purpose.

There being no objection, the tables were ordered to be printed in the RECORD, as follows:

TABLE II.—EXPLORATORY DOMESTIC GAS WELLS

Year	Number of producing wells	Cents per MCF [1]
1950	431	11.2
1955	874	16.2
1960	868	19.8
1961	813	21.1
1962	771	21.3
1963	664	21.5
1964	577	20.6
1965	515	20.3
1966	698	19.8
1967	532	19.6
1968	465	19.1
1969	616	18.7
1970	481	19.2
1971	437	18.4
1972	601	18.0
1973	900	[2] 51.0
1974	1,195	80.0
1975	1,171	129.0
1976	1,402	161.0
1977	1,477	183.0

[1] Price in 1972 dollars.
[2] After 1972, unregulated market weighted average price for new gas.

Source: Energy Information Agency: Annual Report to Congress, 1977.

TABLE III.—INTERSTATE ADDITIONS (VERSUS) INTRASTATE ADDITIONS

[Trillion cubic feet]

Year	Regulated	Unregulated
1966	10.0	4.8
1967	9.9	4.9
1968	6.4	3.4
1969	6.2	3.4
1970	3.5	7.8
1971	2.2	8.9
1972	5.0	5.7
1973	1.7	8.4
1974	2.4	7.3
1975	1.3	8.7
1976		7.5
1977		12.0

Source: "Economics of Gas Deregulation," Natural Gas Supply Committee, 1977.

Mr. BELLMON. In table II, there is a comparison of, what happened in the federally price controlled interstate natural gas market, with what happened in the uncontrolled market. Until 1977, the Federal Power Commission held down the price that interstate pipelines could pay for gas. As a result of the general rise in the price of all energy that began in 1972—except for gas and crude oil under Federal price controls—interstate gas prices for new contracts began to rise. Exploratory footage for gas surpassed oil, and nearly all drilling activity was for the unregulated, intrastate market, as can been seen in table III. American drilling for unregulated gas, and the finding of that gas, quickly tripled. Furthermore, throughout the 1970's, additions to reserves have very nearly equaled production. In other words, the unregulated market is approximately in balance, and prices have recently begun to ease, reflecting that balance.

So, anyone who examines the recent history of exploratory drilling for unregulated gas must conclude that higher prices have resulted in increased domestic production. President Carter could have increased the average price of domestic crude oil much more than the 10-percent per year. And yet, he did not, and there are reports that he feels he must extend or reimpose EPCA price controls so as to further protect the consumer. For him to do so would be adding

the insult of perverse economics to the very real injury we have already suffered from these price controls.

Now that an oil shortage confronts the country all Americans will suffer from these price controls and the reduced domestic production which has resulted.

I ask unanimous consent to have printed in the RECORD a table showing the amounts of domestic crude oil production—as a function of price—for the period of these price controls.

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

TABLE IV.—DOMESTIC[1] CRUDE PRODUCTION UNDER PRICE CONTROLS

Year	Lower tier (old)		Upper tier (new)		Stripper	
	$ Per barrel[2]	Million barrels per year	$ Per barrel[2]	Million barrels per year	$ Per barrel[2]	Million barrels per year
1971	$3.39	3,454				
1972	3.39	3,446				
1973	3.79	2,768	$6.70	369	$6.70	224
1974	5.03	2,035	10.13	793	10.13	375
1975	5.03	1,875	12.03	734	12.03	397
1976	5.13	1,615	11.71	935	12.16	419
1977	5.19	1,371	11.22	1,078	13.59	398
1978	5.45	1,158	12.08	1,100	13.95	437

[1] Alaskan production excluded.
[2] Current dollars.

Source: Data abstracted from DOE/EIA "Monthly Energy Review".

Mr. BELLMON. It can be shown that since 1973, these price controls have cost:

Americans—as producers—$27 billion after taxes, royalty and dividend payments for reinvestment.

Americans—as taxpayers—$30 billion in taxes they should not have had to pay.

That injury does not take into account the greatest injury in the long run; namely, the amount of energy supply that would have been found, or developed, with that $27 billion. There is also the reduction in the deficit that $30 billion in taxes could have made, which in turn, would have slowed inflation. But it is certain that, had no price controls been imposed, more energy would have been produced in this country.

It is difficult to estimate how much. It is sometimes a long interval between the time money is invested in new energy sources and the time production begins. However, if all that $27 billion had been invested in oil exploration and development, and if you can accept the OPEC posted price as being a measure of the true replacement cost of oil in this country, then the revenues denied our producers by these controls could have added more than 4.5 billion barrels of oil to our oil reserves. If you believe, as some do, that the OPEC price is arbitrary and is much higher than the true replacement costs, then much more oil would have been added to our reserves by this reinvestment.

At the current reserve-to-production ratio, we would be producing this year more than 600 million additional barrels of oil. At $15 a barrel, that increase in production would mean we would be handing almost $10 billion less to OPEC this year. Revenues from that oil, coupled with the increased revenue from other decontrolled domestic production would mean that either Americans could pay almost $12 billion less in taxes, or we could reduce the deficit by that amount.

There is one final point I want to make that I have not seen made elsewhere. There is a growing realization in this country about the importance to our system of capital formation. Even the socialist economies now realize that their system cannot survive without capital formation. One of the most important assets many oil companies (and independent producers) have is their proven reserves. It is like money in the bank. They can borrow money on it. I saw the other day where the Securities and Exchange Commission is going to make them publish the value of their oil and gas reserves in their annual report so investors will know how much the company is worth.

Right now, as a result of these price controls, all that oil in the ground that is classified as "old" or "lower tier" is only "worth" $5 a barrel. OPEC thinks that oil is worth more that $15 a barrel. Most of the world is in no position to argued with them. The value of that "old" oil, as an asset, would be tripled if we decontrolled oil prices. The borrowing power of domestic producers would increase enormously. And we have already talked about what oil producers do with any revenue they can lay their hands on. They go out and find more energy.

We have been wasting our oil. It is natural to do that with something the Federal Government says is not worth much. We have got to stop wasting it. We have got to get rid of these price controls. Even the Arabs hate to see us wasting our oil. The rest of the world holds to the view that the U.S. energy policy is irresponsible. The oil consuming nations have pleaded with us to end these controls. President Carter has promised Chancellor Schmidt that American oil would be priced at world market prices by 1981. I propose to express the sense of the Senate that he keep that promise to our allies and friends.

SPECIAL ORDER

The PRESIDING OFFICER (Mr. HARRY F. BYRD, JR.) The Chair recognizes the Senator from Illinois (Mr. PERCY).

REDUCING OIL GLUTTONY: AN AGENDA FOR THE 96TH CONGRESS

Mr. PERCY. Mr. President, I wish to commend my distinguished colleague from Oklahoma for his fine statement. I commend him on his analysis of oil pricing. Oil decontrol is one of the issues which I would like to address.

Mr. President, habits are hard to break, and America's colossal craving for imported oil is no exception. For nearly a decade now, short-term shortages and warnings of imminent depletion have had only minor impact on consumption.

Some experts predict that global demand for oil will outstrip supply by the mid-1980's, with economically debilitating squeezes occurring at several points before then. Other experts show greater optimism, claiming that the aggressive development of non-OPEC oil will forestall the time of reckoning for a few decades.

Even if new supplies of oil are discovered, can the United States reasonably expect to have reliable access to these resources? Recent events in Iran should cause us serious doubt. Political upheaval in that country has brought oil exports to a virtual standstill. With 7.6 percent of our oil imports coming from Iran, the consequences of a prolonged shutdown could be very damaging to the U.S. economy. Secretary of Energy Schlesinger has warned that, if the shutdown persists for 3 months, gas rationing may be necessary. Just yesterday he warned this crisis could be greater than the crisis caused by the embargo of October 1973.

A year ago, we did not anticipate this course of events. Today, we are equally unable to predict with assurance of accuracy what will happen next year in Saudi Arabia or Kuwait. Rapid modernization has caused major social and political turmoil in many oil-producing countries. Is it responsible for the United States to base its economic welfare on such uncertain grounds? I think not.

Sudden disruptions in supply are one source of aggravation to American consumers. Major price hikes are another. OPEC's recent pricing decision will boost American gas prices by at least 2.5 cents per gallon, and will increase overall consumer prices by 0.4 percent in 1979.

In recent years, rising world oil prices have far outstripped the general rate of inflation. The world market price for oil

has grown from $2 per barrel in 1973 to about $13.50 today—nearly a 700-percent leap during a time when the consumer price index has risen less than 50 percent. Energy costs have thus cut deeper and deeper into family budgets.

THE LIMITED PROSPECTS OF NEA

Decisive action is clearly needed to protect the American people from future hardship. We must reduce our inflationary and unstable dependence on imported oil.

The major purpose of the National Energy Act, passed by Congress last fall, was to cut our oil imports. This act, though praiseworthy, is no more than a beginning. As originally conceived, the National Energy Act was expected to stimulate savings of nearly 5 million barrels of oil per day by 1985. Today, the administration estimates that the act as passed will save little more than half that amount.

Even taking NEA-induced savings into account, Secretary Schlesinger has predicted that our 1985 imports will significantly exceed current levels. He estimates that we will require 9 to 10 million barrels of imported oil per day in 1985, compared with today's 8.5 million barrels.

A CALL FOR ACTION

The 96th Congress faces a considerable challenge. In the coming months, we must move ahead swiftly in adopting measures which will reduce oil imports, and not merely hold them near present levels. An ambitious but realistic goal would be to cut imports back to 6 million barrels per day by 1985. A number of measures should be implemented in order to meet this goal.

1. DECONTROL OIL PRICES

An effective program geared toward cutting oil imports should aim at reducing overall demand for oil—domestic as well as imported. This reduction will not occur if domestic crude oil prices continue to be kept artificially low by stringent price controls. "Old" domestic oil today sells at less than half the world market price for oil.

No measure which raises the price of a major commodity such as oil will be readily embraced by the American people. American families today spend 10 to 15 percent of their income on energy, and they understandably wish to avoid yet further energy-related encroachments on their already strained budgets.

I fully appreciate these budgetary concerns. Nevertheless, I strongly believe that allowing domestic oil prices to reflect this commodity's true value will serve our country's long-term interests. Somewhat higher prices today may free American consumers from much greater hardships imposed by oil scarcity tomorrow.

In the next few years, price controls on domestic crude oil should be lifted. This decontrol must occur in a phased manner, to avoid placing a sudden, unfair burden on American family budgets.

Decontrol should be accompanied by a windfall profits tax for a limited period of time. We need decontrol to provide consumers with accurate price signals as to the real value of oil. However, we also must recognize how difficult decontrol is to achieve politically. We need a windfall profits tax as an inducement to win support for decontrol, and as a reassurance to consumers that they will not be taken advantage of.

My hope is that competition inside the energy field and between oil companies will be adequate to assure that we will have fair pricing after a period of readjustment. A windfall profits tax would, therefore, only be needed during this initial period.

In addition to preventing excessive oil company profits, a windfall profits tax would raise much-needed revenues for the development of alternative energy technologies. Revenues from the tax should also provide assistance to lower-income families, who are hardest hit by rising fuel prices.

2. ENCOURAGE CONSERVATION AND RENEWABLE RESOURCES

Raising oil prices will only curb America's oil appetite if we at the same time adopt strong measures to promote renewable resource-based technologies and conservation strategies.

Decades of lopsided subsidies have given oil an undeserved prominance and have crippled the market potential of alternative energy technologies. Since 1918, oil producers and distributors have received a total of $77.2 billion in Federal assistance. This assistance has been provided through depletion allowances, incentives for new oil discovery, stripper well price incentives, subsidies for tankers and pipelines, and other mechanisms.

Renewable resource technologies such as wind, solar, and biomass have quite a different history. Aside from large-scale hydroelectricity, these technologies have received a mere $1.5 billion in Federal support, mostly in the past 3 years. Conservation strategies have encountered similar Federal indifference.

The administration's solar domestic policy review claims that a major Federal commitment to renewable resources could enable these technologies to provide 20 percent of all U.S. energy demand by the year 2000. Other studies predict that conservation measures could cut overall energy demand by 40 percent or more. If the price of oil had not been kept artificially low through subsidies and controls, conservation measures and renewable resource strategies only now being considered would have been implemented years ago.

3. EMPHASIZE SMALL-SCALE TECHNOLOGY

Within the conservation/renewables field, there are two areas which I feel warrant particular Federal action. Small-scale technology development is one area. State and local energy programing is another. The Department of Energy has yet to implement well-coordinated programs in these areas.

Potential applications of small-scale energy technologies abound. Manure from a single dairy farm can produce significant amounts of heat from methane. An array of moderately sized windmills can meet a small community's electrical needs. On a household scale, solar collectors have already begun to provide space and water heat to tens of thousands of American families.

Those who doubt that small-scale technologies can make a meaningful contribution to our Nation's energy needs should take another look. Small-scale hydroelectricity is a good example. America has hundreds of small rivers which cannot support large-scale hydroelectric projects, but would be ideal settings for low-head generators. The Army Corps of Engineers recently calculated that installation of generating equipment at existing dams could save 727,000 barrels of oil per day—nearly one-tenth of our current demand for imported oil.

In addition to yielding enormous amounts of energy, small-scale technologies can be sensitive to the particular social needs, economic conditions, and political factors in individual communities or regions. Often requiring only modest amounts of capital, they enable individual households and communities to build their own energy bases. This self-sufficiency will help to strengthen family budgets, revive local economies, and free our Nation from the economic drain and political strain of foreign oil dependence.

Last spring, I introduced the Small Scale Energy Technology Programs Reorganization Act. This bill instructed the Department of Energy to create an Office of Small Scale Technology, to give these technologies a solid institutional base within the Department of Energy. I am happy to report that this office was established within the Department's Conservation and Solar Applications Division last month.

In the coming weeks, I will be working closely with Assistant Secretary Omi Walden, to insure that the Office of Small Scale Technology will receive broad program authority and high visibility. In addition to supporting R. & D. efforts, the Office should help to develop markets for proven small-scale technologies, and it should push for the removal of institutional barriers to small-scale technology development. The Office should also establish effective linkages with comparable programs in other Federal agencies.

4. STRENGTHEN STATE AND LOCAL PLANNING

State and local planning should be central elements in our national energy policy. Through building regulations, zoning codes, procurement guidelines, transportation policies, loan programs, and educational campaigns, State and local governments can stimulate major energy savings and foster significant new energy production methods.

Davis, Calif., offers a fine example of what can be accomplished through effective energy planning. In October 1975, that city adopted the Nation's first comprehensive energy-conserving building code. Since then, the city has

reduced its residential consumption of electricity by an astonishing 18 percent.

State and local planning efforts also facilitate public participation. This is not only essential to truly democratic government, but tends to make citizens more conscious of energy consumption as it relates to their own daily lives.

For the past 2 years, State governments have been eligible for Federal financial assistance in developing energy conservation plans. Under the Energy Policy and Conservation Act (EPCA) and the Energy Conservation and Production Act (ECPA), $135 million has been channeled into State governments for this purpose. While these programs have helped States to develop conservation strategies, the Federal Government has provided no general funding to States for renewable resources development.

The Carter administration is now drafting a bill which would consolidate the EPCA and ECPA programs into a broader bill geared toward improving States' overall energy-planning capabilities. This bill, the Energy Management Partnership Act, would help States to develop data systems, supply and demand forecasting, facility siting plans, and energy emergency programs. It would also offer some assistance to local-level planning efforts.

One weakness of the bill is its failure to provide planning officials with an adequate means of sharing valuable information and expertise. This problem is especially troublesome at the local level, where a lack of technical expertise often inhibits creative and effective program development. For every success story such as Davis, there are scores of cities which have not made any real progress toward energy conservation and renewables development. I am currently considering ways to stimulate cost-effective information-sharing among State and local planning officials.

Aside from this shortcoming, the Energy Management Partnership Act lays a solid foundation for State and local energy planning. I will give this bill my close attention in the coming months.

5. IMPROVE GOVERNMENT EFFICIENCY

The Small Scale Energy Technology Programs Reorganization Act and the Energy Management Partnership Act share an important strength: Both focus on improving the efficiency of existing energy programs.

Too often Government rushes to create new programs while paying little attention to the proper functioning of those which already exist. We owe it to the American people not to handle their tax dollars with such abandon. Americans are fed up with wasteful Government spending. They want a Federal Government which can account for its actions.

Oversight hearings on the Department of Energy will be held this spring by the Governmental Affairs Committee where I am the ranking minority member. I regard these hearings as a unique opportunity for Congress to examine the Department's programs and priorities. Cost effectiveness will be my No. 1 concern. With this objective in mind, I will focus on ways to strengthen the Department's conservation and renewable resource programs. These areas offer our greatest hope for reliable, cost-effective energy in the future.

6. PROMOTE THE SAFE USE OF COAL AND NUCLEAR POWER

The key to a safe, healthy energy future lies with conservation and renewable resources. Nevertheless, a partial reliance on other energy technologies will be necessary for the next few decades.

America has immense coal resources. By expanding our use of coal, we could sharply cut our demand for petroleum. Expanding coal production will not be easy, however. In the past, a number of factors have caused productivity to decline and the price of coal to double. If those trends continue, coal could lose its competitive edge in the energy marketplace.

Some of the factors contributing to the rising cost of coal have also led to significant improvements in environmental quality as well as worker health and safety. Such gains must not be sacrificed in a panicked rush to increase production.

Last April, President Carter formed the President's Commission on Coal, under the chairmanship of Gov. Jay Rockefeller of West Virginia. The Commission's goal is to prepare a report on the current state and future prospects of the coal industry. I am pleased to be a member of the Commission, and believe that its report can become the basis for a sound Federal coal policy.

Nuclear power is another energy resource which we must consider. The growth of this industry has recently been slowed, partially because of the Federal Government's failure to develop an adequate program for nuclear waste disposal. A great deal of painstaking research still needs to be done before a disposal strategy can be implemented.

Last June, I introduced the Nuclear Waste Management Act of 1978, to strengthen the Federal Government's management and policymaking structure in this field. One of this bill's goals is to set clear guidelines for State and local input into policy and facility-siting decisions. I intend to reintroduce this legislation, along with Senator GLENN. We will be holding hearings on it in the Governmental Affairs Committee this spring.

THE ALLIANCE TO SAVE ENERGY

Raising public awareness of the need to conserve energy must be a major national priority. It is a task to which private groups as well as Government agencies should dedicate themselves.

The Alliance To Save Energy is one nongovernmental group which has already contributed significantly to the energy conservation effort. Five million copies of a useful booklet, "How To Save Money by Saving Energy," are now being distributed by the Boy Scouts of America. We owe the Boy Scouts a great debt of thanks for this important voluntary work.

The alliance has also produced a number of public service radio and TV announcements featuring Gregory Peck. These are presently being aired on stations across the country.

Business leaders, consumer advocates, environmentalists, and public officials are among the alliance's board members. I am pleased to be chairman of the alliance, and am delighted to have the opportunity to work with Senator ALAN CRANSTON as a cochairman. I am also pleased that many of our colleagues in both the Senate and the House have associated their names with the alliance.

CONCLUSION

Self-sufficiency should be the central goal of our energy agenda for the 96th Congress.

On a national scale, we can foster energy self-reliance by promoting fuel conservation and aggressively developing renewable resource-based technologies. Special attention should be given to small-scale technologies, because of their tremendous energy potential and their sensitivity to local resources and social conditions. Improving the safety of coal and nuclear power will also help to expand our domestic energy supply.

Within States and localities, we can build independent energy bases by strengthening the energy-planning capacities of State and local officials. The Energy Management Partnership Act is a good first step.

The message from Iran and the OPEC cartel is clear. We must take steps now to reduce our reliance on foreign oil. Our economic welfare and national security depend on it.

THE 31ST ANNIVERSARY OF SRI LANKA'S INDEPENDENCE AND THE FIRST ANNIVERSARY OF AN EXECUTIVE PRESIDENT FORM OF GOVERNMENT

Mr. PERCY. Mr. President, February 4 was the 31st anniversary of Sri Lanka's independence from colonial rule and the first anniversary of the inauguration of an executive president form of government, currently headed by Mr. Junius Richard Jayewardene. Previously the crown colony of Ceylon, this beautiful land and its people became an independent state on February 4, 1948. In 1972, the country adopted its ancient and venerable name, Sri Lanka, "resplendent land," in lieu of the name given it by the Portuguese in the early 16th century and which later became familiar to us in its English form.

Sri Lanka deserves our admiration for its dedication to democracy, human rights, and social justice. Since independence, Sri Lanka has been a model of democracy in a multiracial and multireligious society.

At the same time, Sri Lanka has shared many of the difficulties that have accompanied the transition to independence in all of the former colonial areas of Asia and Africa. The long period of European dominance exacerbated many of the ten-

sions inherent in any pluralistic society, and the economy has suffered the usual difficulties and disadvantages of an undue dependence on a few tropical exports the value of which has steadily declined relative to the cost of imported manufactured goods.

Sri Lanka remains a poor nation but, in terms of more sophisticated "quality of life" indices, it stands head and shoulders above most of the less-developed countries. Its 85-percent literacy rate is one of the highest in Asia, and its standards of nutrition, health care, and income distribution are among the best in the Third World.

It is a mark of Sri Lanka's commitment to democracy that the government has changed hands peacefully six times since independence. The most recent national elections, in 1977, resulted in the victory of the United National Party under the leadership of Mr. Jayewardene, a distinguished member of the legislature for some 29 years.

President Jayewardene has focused his attention on the need to liberalize the economy and phase out food subsidies and controlled prices. His government has lifted onerous import controls and freed the rupee, the country's currency, to find its own level. In addition, the government has given high priority to several important projects, including the Mahaweli irrigation program, the development of the greater Colombo metropolitan area, including the revitalization of its magnificent port, and the establishment of a free trade zone to generate employment and industrial development.

The United States and Sri Lanka have had a long and happy relationship. We share many of the same values and social and economic goals, and the policies of the present government have brought us closer in respect to the means of achieving those goals. It is my hope and expectation that in the 32d year of Sri Lanka's independence the ties between our countries will be further strengthened.

PROPOSED DEPARTMENT OF INTERNATIONAL TRADE

Mr. PERCY. Mr. President, last September the President announced an export promotion program which will undoubtedly help in our effort to increase exports and reduce the massive trade imbalance. It is not the committed effort many of us had hoped would come out of the White House, however, and there is a good deal more that the Federal Government could do to help small exporters and smooth the way for all businesses that export.

One intriguing idea which has surfaced is that of creating a Department of International Trade. The Japanese, for example, excel in exports partially because of the support their government gives through the Ministry of International Trade and Industry (MITI). Our European competition also seems to be particularly well organized with substantial government assistance.

Senators ROTH and RIBICOFF have just reintroduced their bill to create a new executive department to handle these issues. They should be commended for taking this initiative. However, I have serious reservations about the suggestion that a wholly new department be created for this purpose. Instead, I believe that we should closely examine the possibility of realining the Commerce Department to more adequately deal with domestic and international business issues.

The Governmental Affairs Committee will be considering these proposals along with its other work in the reorganization field over the coming months, and I am confident that we can reach early agreement on a workable approach to strengthen the American export program.

WORLD BANK APPROVES PROGRAM TO EXPAND LENDING FOR OIL EXPLORATION

Mr. PERCY. Mr. President, I was very pleased to learn that the World Bank's executive directors recently approved a proposal to expand substantially the Bank's assistance for oil and natural gas exploration and production in developing countries. Greater World Bank involvement in this area will help to enlarge and diversify world oil supplies, thereby decreasing demand for OPEC oil and relieving upward pressure on world prices. Furthermore, the Bank estimates that the economies of some 60 developing countries, the majority of which depend heavily on imported oil, will benefit from this program.

I have been very interested in and supportive of this Bank initiative for some time. On November 29, 1978, seven of my colleagues on the Senate Foreign Relations Committee and I wrote a letter to President Carter urging that he endorse the Bank's proposal.

I commend the World Bank executive directors for their decision. This program will certainly have a significant catalytic effect on non-OPEC oil exploration.

Mr. President, I ask unanimous consent that the letter to President Carter be printed in the RECORD.

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

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C., November 29, 1978.

The PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: We are writing you to urge you to support a proposal presently being considered by the World Bank to establish a $500 million loan fund for oil exploration in non-OPEC developing countries. We believe that the creation of this fund would be in the best interest of the United States as well as the Third World.

Imported oil will undoubtedly figure prominently in meeting America's energy needs for many years to come. It is to our benefit, therefore, to diversify and increase foreign sources of oil. The creation of this fund would help accomplish this goal.

In addition, the ability of developing nations to continue importing goods and services from the United States—we presently export more to these nations than to all of Europe, the Soviet Union, and China combined—is dependent upon their capacity to procure a reliable supply of affordable energy to spur their development. This World Bank fund would help to assure them the energy they need.

Our support for such a World Bank proposal is entirely consistent with your wishes, and those of the other Summit participants, as expressed in the recent Bonn Declaration. Clause sixteen of the Declaration urges that "the World Bank examine whether new approaches, particularly to financing hydrocarbon exploration, would be useful" as a means of assisting developing countries in the energy field.

We are well aware that U.S. participation would, in all likelihood, require additional funds from the Congress. We are also aware that this request would come at a time when the Congress is cutting back on its funding for international institutions and bilateral aid programs. Nevertheless, as members of the Senate Foreign Relations Committee, we believe that Congress should not shirk its responsibility in this area.

Our support for this World Bank initiative will not inhibit us from critically examining the details of U.S. participation in this program We believe, however, that a World Bank program to finance oil exploration in the Third World is vital to the economic growth and prosperity of both the developing and developed world and merits your support.

We urge you to endorse this initiative and pledge United States support.

We appreciate your time and consideration of this vital issue.

Sincerely,

CHARLES H. PERCY,
GEORGE MCGOVERN,
CLAIBORNE PELL,
JACOB K. JAVITS,
JOHN GLENN,
RICHARD STONE,
FRANK CHURCH,
CLIFFORD P. CASE.

ORDER OF BUSINESS

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. PROXMIRE. Mr. President, I ask unanimous consent that I may proceed for 10 minutes, as if in routine morning business.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

REJECT THE VALUE ADDED TAX

Mr. PROXMIRE. Mr. President, the Secretary of the Treasury, Michael Blumenthal, has been widely quoted this week as saying that he is "not unsympathetic" to the concept of a value added tax and welcomed hearings on it. Further, while not proposing it this year, he has said that perhaps "1981 would be a good year to be serious about it."

This is an ominous note. It indicates that the Carter administration and Mr. Blumenthal have embraced this unfair tax.

The Carter administration has a good record, especially in the areas of tax, fiscal, and human policies. The President and Secretary Blumenthal have proposed modest but important ways to reform the tax laws. The Secretary's appearances before Congress indicate a man of growing ability and composure. The U.S. position in the world has been enhanced by the President's human rights policies. Secretary Blumenthal's strong support of the dollar late last year was a model of thoughtful and correct policies tailored to the specific

problem. So it is not out of any sense of carping or a general negative attitude that I criticize the embrace of the value added tax by two men, President Carter and Secretary Blumenthal, whose judgments and compassion in other areas I greatly respect.

In my judgment the imposition of a value added tax would be a disaster. Here is why:

First, it is a regressive tax. It places the burden most heavily on those least able to pay. It takes a larger proportion of the income of the poor than of the wealthy. It is in effect a Federal sales tax.

Second, it is an inflationary tax. The tax is added at each stage of production. There is thus a pyramiding of the tax, with the tax added to the previous tax which has been added. Each percentage markup is made on a larger base as goods go from raw material to manufacturing to wholesalers and to retailers.

A tax is a price increase. What we need now are fewer and lower taxes rather than more and higher taxes.

Third, it is a hidden tax which is one of the reasons it is a favorite of the tax collectors and the tax writers. Because it is imposed at each new stage of production and hidden from view, it is an open invitation to higher and higher taxes.

As a hidden tax it will be the first to be raised when Government officials are pressed for funds because raising taxes directly or cutting favorite programs will be too unpopular.

This is one reason why its proponents are arguing it should be used as a substitute for social security taxes. At a time when these taxes are getting so high the public is resisting them, this hidden, secret, out of sight tax is proposed in their place.

Finally, it promotes bigger and bigger Government and more and more spending.

Except from the bureaucrats' view, everything is bad about it. It raises taxes when we should be lowering them. It promotes big spending when we should cut spending. It promotes inflation when we should be fighting inflation. And it puts the burden on the little guy at a time when the property tax, State, and local sales taxes, and the Federal income tax which he pays while many high income people can avoid taxes through tax shelters are more than he can take.

For all these reasons, Mr. President, the unfair, regressive, hidden value added tax should not pass.

THE GENOCIDE CONVENTION: A TRULY INTERNATIONAL CONCERN

Mr. PROXMIRE. Mr. President, one of the primary arguments of opponents of ratification of the Genocide Convention runs as follows: Genocide is a domestic, not an international, concern and, therefore, not a proper subject for a treaty.

The argument has a beguiling simplicity.

But, Mr. President, it is wrong.

Dead wrong.

Not only on moral grounds. But legal and historical grounds as well.

First, genocide is indeed a proper subject for an international treaty and, second, genocide is not only a matter of domestic but international concern as well.

IS GENOCIDE A PROPER SUBJECT FOR A TREATY?

Mr. President, what is the proper subject matter for a treaty? What does the Constitution say? What does the Supreme Court say?

Mr. President, the Constitution places no limitation on the subject matter of a treaty. The only limitation placed on treaties is that they must be made by and with the advice and consent of the Senate and that they must be ratified by a two-thirds vote of this body.

What has the Supreme Court said? In Geoffrey against Riggs in 1890, the Supreme Court held that "the treaty power of the United States extends to all proper subjects of negotiation between our Government and the governments of other nations. * * *"

What, then, does the Court mean by "proper subject of negotiation?" And does the subject of protection of man's most fundamental right—the right to live—fall within this category?

Mr. President, neither the Supreme Court nor the Constitution attempt to lay down precise formulas as to what constitutes a "proper subject of negotiation." But treaties previously ratified by the Senate will provide us with a precedent as to what this body has deemed to be appropriate subject matter.

Let us look at the record.

The Senate has approved treaties covering migratory birds, regulations on whaling, prevention of oil pollution of the seas, air hijacking, and narcotic drug traffic, to name just a few.

Mr. President, I ask you: If treaties can be concerned with the protection of whales, may they not also be concerned with the protection of national, racial, ethnical, and religious groups?

But this conclusion is not mine alone.

The special committee of lawyers of the President's Commission for Human Rights Year conducted a thorough study of the treatymaking authority in 1968. Their report clearly concludes that human rights are indeed a proper subject for a treaty.

DOES THE IMPACT OF GENOCIDE GO BEYOND NATIONAL BOUNDARIES?

Mr. President, opponents of the Genocide Convention also claim that genocide is purely a domestic crime. Let us look at this claim.

First of all, does anyone seriously believe this? Is moral outrage to be limited by the boundaries of nations? How can we possibly be neutral about the systematic destruction of 6 million Jews during the Nazi holocaust? Do we wish to promote an attitude of indifference when confronted with such atrocities?

By any standard, the answer to these questions must be no.

Second, what does history tell us about the practice of genocide? Has it been practiced solely on a domestic level, or has it spread beyond national boundaries?

Mr. President, the 6 million victims of the Nazi holocaust were not only German Jews, but Polish, Dutch, Swiss, Czech, and Hungarian as well. Nazi Germany's policy of genocide marched with its army as it poured across Europe. Genocide, if it is likely to be practiced at all, is quite likely to be practiced on an international level, as the holocaust amply demonstrates.

Third, does the world community at large believe genocide to be a crime so serious that it is deemed necessary that the prevention and punishment of this crime be recognized and regulated by international law?

The answer to this question is a resounding "yes." The United Nations has proclaimed genocide to be "a crime under international law," and 83 nations, including all of our major allies, have subscribed to this proposition by their ratification of this treaty. The United States stands conspicuously alone in its refusal to give its consent to this convention.

It is apparent, then, on a variety of grounds—historical, legal, moral, and in the opinion of the world community—that genocide is a matter of international, and not merely domestic, concern. The American Bar Association, which at one time disputed this point, now gives its full approval to the convention. This objection, like every other objection to the convention, has been conclusively rebutted. There is no further reason for delay. The genocide convention must be ratified.

Mr. President, I hope that Senators will seriously and thoughtfully consider the genocide convention, and pass it early this year.

THE NEEDS OF THE NATION'S CITIES

Mr. PROXMIRE. Mr. President, the Asheville Citizen has carried a recent editorial by Mr. Rick Gunter which supports the position that I have taken, that we need to reexamine our approach to helping cities, and that in the past few years we have enormously increased the sums we are pouring into our cities. The result has been most discouraging.

Our cities are getting worse, based on the most objective kind of criteria. This is not my opinion, but this is a study by Dr. Nathan. of the Brookings Institution, who points out that virtually all of the cities in the Northeast and most of the big cities in the country are the cities which have deteriorated in the last 15 years at the same time we have enormously, from $2 million a year to $85 million a year, increased the amount pouring into the cities. The programs have not worked.

Mr. President, I ask unanimous consent that the editorial, dated January 31, 1979, be printed in the RECORD at this point.

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

NATION'S CITIES NEED MORE THAN FEDERAL AID

Two interests are in conflict in the current debate over aid to the nation's cities. One revolves around the fact that ours is an urban civilization. It follows that to remain

vibrant, our civilization needs thriving, sparkling cities. The second interest is financial. During this period of austerity it is difficult to finance urban renewal without going deeper into red ink.

Those competing interests need to be viewed against recent findings. Sen. William Proxmire, D-Wis., said in the Senate last week that in 1957, $1 out of every $100 in the budgets of the nation's cities came from the federal government. In 1978, $50 out of every $100 came from Washington. That is an increase of 50 fold in little more than 20 years!

Has that money put the nation's cities on sound footing? Hardly, according to the respected Brookings Institution last week. The think tank used three criteria to judge urban progress: 1) the fraction of older housing in a city; 2) poverty as measured by per capita income; 3) population—are people staying in the cities?

In spite of the dramatic increase in federal urban aid, the nation's cities, as a group, declined between 1960 and 1975. These cities led the list in distress: Buffalo, St. Louis, Cleveland, Newark, Pittsburgh, Rochester, Boston, Detroit, Philadelphia, Chicago, Cincinnati, Baltimore, and Akron. New York City was not included because of the lack of data.

This is not to brand all federal aid programs as failures. But as a group, they appear to have yielded far less than their architects promised.

The answer is far harder than finding more urban aid. Proxmire put it this way:

"All of us want to help our cities. We must find more effective methods. We must recognize we have not been able to solve that problem by throwing money at the cities. It just has not worked."

New solutions will cost lots of money. But let's hope congressmen are a little surer of new programs' soundness before appropriating monies than was the case in the 1960s and early 1970s.

Many mayors, of course, would be quite content to win a fatter federal check for faulty programs. But that approach will only increase the federal deficit, not improve urban life.

ROUTINE MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that there be a period for the transaction of routine morning business not to extend beyond 30 minutes with statements limited to 15 minutes each.

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

SPECIAL ORDER PROCEDURE

Mr. ROBERT C. BYRD. Mr. President, up until this point we have operated on a sort of a freewheeling basis because of the fact that the ad hoc committees that had been appointed on both sides of the aisle to discuss possible rule changes have been meeting and it was thought they had been making progress. There was not much else to do on the floor except morning business.

I think now that we do have an agreement to proceed on a section of Senate Resolution 9, from now on we will go back to our previous policy, to wit, Senators wishing to get orders to speak up to 15 minutes should get those prior to the day on which they wish to speak. By the word prior, I mean they need to secure the orders on a day when the Senate is in session prior to the day they wish to speak. That has been the policy for the last 12 years during which I have been working in the leadership. In that way, the leadership can provide for their orders and can also program the day, to come in before noon if necessary to accommodate those Senators who wish to speak early, and, at the same time, accurately inform the managers of measures to be called up as to when they should be expected to be on the floor to call up their measures.

The leadership will also provide, as in the past, for periods of transaction of routine morning business on some days, not on every day but on some days, and will try in that way to accommodate Senators, when possible.

I believe it is provident that I make this statement for the record so that Senators who have been, during the past few days, able to come to the floor and speak at reasonable length without prior orders may know that now that we will have a matter on which the Senate can occupy its attention, we will have to go back to the rules of practice. I appreciate the cooperation and understanding of Senators. Unless they are told in advance, however, they will not know that that is going to be the policy. As a courtesy to them, I am making this statement.

Mr. President, I now yield the floor.

THE FOURTH ENERGY CRISIS

Mr. TSONGAS. Mr. President, thank you for the opportunity to speak on the floor of the Senate today. I have chosen energy as the topic of my first Senate speech because I believe the energy crisis is our Nation's greatest threat and greatest test. Our economy and our very democracy rest on how we meet that crisis today.

In this decade, we have faced three energy crises—the oil embargo of 1973, the natural gas shortages of 1976, and the coal strike which followed closely in 1977. We were quickly lulled back from those three periods with little lasting impact.

Today we face the fourth energy crisis of this decade. This summer, you and I will sit in long gas lines and pay still higher gasoline prices. By winter, home heating oil will cost more and severe shortages, particularly in New England, may well be common. A billion-dollar coupon gas rationing program could be imposed at any time. This program will be a bureaucratic nightmare.

Despite cutoffs of oil from Iran adding up to a shortfall of 500,000 barrels a day, we are again in danger of being lulled back into complacency. President Carter ignored the crisis in his state of the Union address. The Government has called the situation "serious but not critical." I believe otherwise.

The Iranian oil crisis is but one manifestation of a deeper, harsher energy reality. To hear the person in charge of the country's emergency energy planning say the Iranian situation is "an unpleasant crisis that hopefully won't last very long" is frightening, I believe. The administration's warning signal is barely audible.

With a shortfall of 500,000 barrels a day, we are dipping into diminishing stocks on a daily basis. Unlike the embargo of 1973, the Iranian cutoffs have worldwide repercussions. The shortfall is 4 percent worldwide, but nations in Europe and Japan have shortfalls from 15 to 20 percent. In an era of international political and economic dependency and responsibility, the consequence for all countries is extremely serious. On March 1, the International Energy Agency will decide if the emergency warrants implementing an international allocation system. In that case, we should share the burden of shortages with other member nations. Our own shortfall could easily double, forcing us to use up more of our stocks.

I might add that I suspect the number of Americans who understand our obligations under this particular agreement probably number in the hundreds.

The situation in Iran indicates how vulnerable our Nation really is. Eighty-two percent of the world's oil reserves are in Arab, Communist, and developing countries. One assassin's bullet in Saudi Arabia could cut off 30 percent of our oil supply. In the light of the religious uprising in Iran, that eventuality in other countries including Saudi Arabia is not farfetched.

Even with the Saudi Government intact, our dependence on Saudi oil is dangerous. In response to the Iranian cutoffs, the Saudis recently began producing at maximum rates. More recently—including, I might add, this morning—they pulled back from maximum production. The acceleration of Saudi oil production has left us without a cushion. And a tight market without the leverage of Saudi Arabia gives hardline Arab States the ability to raise oil prices at will. Spot market prices have already reached $22 a barrel in some places. That, I suspect, will continue.

The Government is predicting gas shortages and higher prices this spring and early summer. I think those predictions have been understated. Here is the near term fallout from the present crisis which I foresee:

Mandatory allocations and controls and mandatory conservation measures by summer, perhaps earlier. Spelled out, those measures mean restrictions of weekend gasoline sales, commuter parking restrictions to encourage car pooling, limits on building temperatures, and advertising lighting curtailments.

Long gasoline lines and higher gasoline prices this summer. This year's 14.5 percent increase is only the beginning.

Severe heating oil shortages and higher prices next winter, particularly in New England. Pressure to produce more gasoline this summer will affect heating oil supplies next winter.

Inflationary spinoffs which may be a serious blow to our economy. Plants could shut down, unemployment could increase, just at a point where the President is indicating the possibility of a balanced budget.

That is the short-term picture. Over the long term—within the next 10 years—gasoline coupon rationing is inevitable unless we change our ways. And

that long-range view could be shortened at any second by another crisis. There is no insurance we can buy to protect against another Iran.

Consider what a bureaucratic nightmare awaits us with coupon rationing:

It will cost nearly $300 million to set up and $1.5 billion a year to run, an estimate I believe is too low.

It will require the mailing of 165 million coupon rationing checks on a quarterly basis to all registered car and truck owners. Our massive social security system mails out only 25 to 30 million checks per month.

It will mean that consumers have to cash ration checks for coupons in order to purchase gas. Each registered vehicle will get the same number of coupons. The potential number of special cases is mind-boggling. There would be no equity under that kind of program.

The Department of Energy says a rationing program would take from 6 to 8 months to get rolling. Can we expect to have a 6-month lead time on such an emergency? The answer obviously is "no."

To find out about our rationing plan, a Senate Energy Subcommittee had to schedule hearings. The Government has yet to produce an energy emergency contingency plan which Congress mandated 2½ years ago. The plan is supposed to arrive on Capitol Hill at the end of this month. I cannot help wonder whether that plan would be forthcoming if the Shah of Iran had not moved to Morrocco.

I think the next 6 months will show that our last 6 years were a dismal failure in terms of Government response to the energy crisis. Where is our sense of urgency right now?

We are still selling and promoting fuel inefficient automobiles. I think they should be prohibited.

I might add, Mr. President, that I had an amendment to that effect on the energy bill 2 years ago and on the House side, that was ruled nongermane.

We have yet to adopt a serious program to develop solar energy and other alternative energy sources such as biomass, low head hydro and wind energy. We must enact and implement an aggressive and comprehensive program.

That, indeed, is not in the President's budget. The President, as you know, is going to receive a domestic policy review recommendation in the next few days. I hope he will opt for the maximum approach.

We have a strategic petroleum reserve that has barely begun to be filled. We must plan for regional product reserves to protect oil dependent areas like New England.

The Secretary of Energy indicated yesterday before the committee that it is unlikely, after the initial buys, that that reserve will continue to be filled.

We have no permanent program for helping low-income families and the elderly cope with shortages and higher prices. We need a large-scale weatherization program for the poor and the elderly.

We need it this winter, but we surely will need it the winter that follows

While the Government prepares to mandate energy conservation measures by consumers, the public education budget for the Department of Energy has been cut. How can the public deal with the crisis without understanding it and participating in energy policymaking? Everyone in our society has the opportunity to make personal decisions which would help buffer them against the inevitable shortages. When coupon rationing is imposed upon the American public most people will wonder if sometime along the way they might have helped to avert the severity of the crisis—or at least lessened its impact on their own lives.

I might add that in 2 weeks, I shall have a statement that will go into recommendations that individuals themselves may pursue to lessen the impact on each one of them.

The Iranian oil cutoffs have moved the energy crisis into our daily lives. The short-term consequences will be uncomfortable. Unlike the other crises of the seventies, however, we will not go back to normal. Iran is a warning signal. If we do not heed the signal now, the gas lines of 1979 will be hardly remembered in the harsh light of what awaits us in the eighties.

SENATOR KENNEDY PRAISES SENATOR TSONGAS' ENERGY SPEECH

● Mr. KENNEDY. Mr. President, earlier today, my distinguished Senate colleague from Massachusetts, Senator PAUL TSONGAS, delivered an excellent maiden address on one of the most critical issues facing the Nation—America's energy policy.

I commend Senator TSONGAS' address to the attention of every Member of the Senate. In it, he sounds a clear alarm about the failures of past Congresses and administrations to deal effectively with our worsening energy crisis. Unless we mend our ways, he foresees an even more serious energy crisis ahead, and he warns us forcefully of the nightmare that a gasoline rationing program would become.

As a new member of the Senate Energy Committee, Senator TSONGAS will be in a central position to help deal with the energy problems we face. As a leading advocate of the drive in the House of Representatives for the development of alternative energy sources, especially solar energy, he has already established a reputation as a leader and innovative thinker in the energy field.

In his tenure as a Congressman, he was also a leader in the development of a more effective energy policy for New England. As chairman of the Energy Task Force of the New England Congressional Caucus, he was a strong supporter of such vital programs as regional oil storage, conservation, and special fuel assistance for the elderly and the poor. His excellent work on alternative sources of energy led to the establishment of the Northeast Solar Energy Committee.

The address by Senator TSONGAS to the Senate today is an auspicious beginning in what I am confident will be an outstanding Senate career. I congratulate him for his insight and commitment, and I look forward to working with him on energy and other issues of vital importance to our Nation's future.●

Mr. ROBERT C. BYRD. Mr. President, at this point 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. ROBERT C. 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.

HOSPITAL COST CONTAINMENT

Mr. ROBERT C. BYRD. Mr. President, it is becoming increasingly difficult for citizens of all income levels to afford basic medical care. The average American now works 1 month each year—one-twelfth of his or her time—just to pay his or her share of the Nation's health care bill.

Health care costs are escalating at the rate of $1 million per hour. Expenditures for hospital care are the largest component—40 percent—of total medical expenditures in this country.

In recent years, hospital costs have risen annually at an average rate of 15 percent. Five years ago, the Nation's hospital bill was $29 billion. Last year, it was over $60 billion. Hospital costs are often called invisible costs since most people pay only a small portion of these costs directly. Nevertheless, the bite out of the paycheck is real. Every employed citizen now pays an average of $15 a week to finance the Nation's hospital bill.

Private health insurance is obtained largely as a fringe benefit of employment. Employers' costs are passed on to employes as consumers of goods and services. Hospital cost inflation increases taxes. Medicare, medicaid, veterans' health benefits, and public hospitals are financed through Federal, State, and local revenues. Twenty-five percent of the social security payroll tax goes toward financing medicare and that money is supplemented by general revenues. The elderly today are paying more out of their own pockets for medical care than they were in 1964, the year medicare was enacted.

At the end of the 95th Congress, by a vote of 64 to 22, the Senate passed its own version of a hospital cost containment bill. I supported that version, which charted a middle course between competing proposals. It was the product of a great deal of study and work on the part of many Senators. Senator TALMADGE, chairman of the Health Subcommittee of the Finance Committee, and Senator LONG, chairman of the Finance Committee, offered a plan which addressed the impact of hospital cost inflation on the medicare and medicaid programs. Senator KENNEDY, chairman of the Health Subcommittee of the Human Resources Committee, and Senator NELSON, a member of that subcommittee pressed the need for an immediate slowdown of hospital inflation in the private as well as the public sector.

While both measures had merit, I believe that the majority of the Senate acted wisely in accepting the "Nelson

compromise." In its recognition of volunteer efforts in the hospital industry, I found it to be a positive and reasonable approach. Mandatory Federal controls would have been imposed only as a last resort—only if hospitals failed to reach their own cost containment goals. I regret that the measure died in the House.

This year, it is estimated that the cost of illness in this country—and I am not speaking here about the cost of human suffering—will exceed more than $250 billion in lost productivity and the cost of care. Human suffering, of course, cannot be measured in dollars and cents.

The cost of hospital care has been rising faster than the overall cost of living, and faster than other medical costs. Adequate care must be as accessible to poor and middle-income citizens as well as to those for whom price is no object. Our tax dollars must be carefully spent.

The hospital industry is one of the most inflationary segments of our economy. Hospital cost inflation results in inequitable and inefficient distribution of scarce health care dollars. It is my hope that hospital cost containment will become law this year.

ORDER FOR EXTENSION OF PERIOD FOR MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, how much time remains for the period for morning business?

The PRESIDING OFFICER. Eleven minutes.

Mr. ROBERT C. BYRD. I thank the Chair.

Mr. President, I ask unanimous consent that that time be extended by not more than 10 minutes.

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

APPOINTMENTS BY THE CHAIR

The PRESIDING OFFICER (Mr. BRADLEY). The Chair, on behalf of the President pro tempore, pursuant to Public Law 92-484, appoints the Senator from Maryland (Mr. MATHIAS) to the Technology Assessment Board, in lieu of the Senator from New Jersey (Mr. Case), retired.

The Chair announces that the following members of the Committee on Finance have been chosen by such committee, pursuant to section 8002 of the Internal Revenue Code of 1954, to serve as members of the Joint Committee on Taxation for the 96th Congress: The Senator from Louisiana (Mr. LONG), the Senator from Georgia (Mr. TALMADGE), the Senator from Connecticut (Mr. RIBICOFF), the Senator from Kansas (Mr. DOLE), and the Senator from Oregon (Mr. PACKWOOD).

Mr. HARRY F. BYRD, JR., addressed the Chair.

The PRESIDING OFFICER. The Senator from Virginia.

RHODESIA AND AMERICAN SECURITY

Mr. HARRY F. BYRD, JR. Mr. President, on January 30, 1979, the predominantly white electorate of Rhodesia voted overwhelmingly for a new constitution to establish majority rule; namely, black rule.

The new Rhodesian constitution mandates elections under a one-man, one-vote balloting process designed to create a new predominantly black government.

The vote in Rhodesia on January 30 was the last step by Rhodesians in fulfilling all requirements of the Anglo-American plan for transition to majority rule as it was outlined by Dr. Kissinger in 1976.

Now, Mr. President, the Carter administration has been careful to attribute its most unpopular foreign policy decisions to the policies of past administrations. It has often characterized its decisions as required by ongoing programs initiated by either President Ford or President Nixon. Both the Panama Canal Treaty and the recognition of mainland China were announced as the culmination of policies and commitments initiated in prior administrations.

Yet, in the case of Rhodesia, Mr. President, the Carter administration has apparently thrown out the window the efforts and commitments made by a prior administration. The Carter administration has preferred to forget and, indeed, to disclaim the agreement reached on September 24, 1976, when then-Prime Minister Ian Smith of the Salisbury government accepted in full the Kissinger or United States-United Kingdom plan for a peaceful Rhodesian settlement.

Mr. President, the Government of Rhodesia has not forgotten the terms of the Kissinger agreement. The Salisbury government has worked diligently to carry each aspect of the agreement into full effect. That goal has now been achieved. Rhodesia has fulfilled all commitments. The United States and Britain have fulfilled none.

The Anglo-American plan contained the following terms and conditions.

First, Rhodesia was to agree to majority rule based on one-man, one-vote elections. That condition was fulfilled on January 30, 1979, by an overwhelming vote for the new Rhodesian constitution.

Second, the Anglo-American plan required representatives of the Salisbury government to meet immediately with African leaders to organize an interim government. That condition also has been fulfilled. The present transitional government in Salisbury meets all criteria of this second requirement of the Anglo-American proposal.

Third, the Anglo-American proposal specifically required that the interim transitional government should incorporate a Council of State, half of whose members would be black and half white. That condition also has been met.

Fourth, the Anglo-American plan provided that the United Kingdom would enact enabling legislation for the process to majority rule. That condition has not been met.

Fifth, the Anglo-American plan provided that, upon the establishment of an interim government, economic sanctions would be lifted and all acts of war, including guerrilla warfare, would cease. Again, that condition has not been met.

Sixth, and finally, the Anglo-American plan promised substantial support to Rhodesia to provide assurance of the economic future of the country under a new majority rule regime. That condition has also been totally ignored by Britain and the United States.

So, Mr. President, in every respect Rhodesia has fulfilled exactly the obligations it undertook when it accepted the Anglo-American plan some 2½ years ago. Yet, without exception, the United States and Great Britain have in every respect failed to fulfill a single commitment they undertook at the same time.

The decision made in 1976 by the Salisbury government and by its Prime Minister Ian Smith to accept the Anglo-American proposal was a decision which required great courage. It was a decision made only after receiving the solemn pledge of the British and American Governments conveyed by the American Secretary of State, Dr. Kissinger.

The Rhodesian Government has now fulfilled its obligations under the Kissinger agreement. It has fulfilled those obligations to the letter. It is now time, indeed, it is past time, that the United States and Great Britain act to make good their word.

I am advised by friends in the British Parliament that Prime Minister Callahan has not the slightest intention of implementing Britain's side of the deal. That is a matter for resolution in the United Kingdom.

But if Britain has decided to be unfaithful to her commitments, then the United States should wait no longer and should take independent action to honor unilaterally its own pledge.

The people of Rhodesia, Mr. President, black and white alike, are fighting desperately to stem the tide of Soviet imperialism in Africa. They are faced with the worst forms of terrorist warfare perpetrated by external forces which are armed, trained, and financed directly by the Soviet Union. In the face of this onslaught, the people of Rhodesia are attempting to establish a new democratic government in which all are eligible to participate.

Now, Mr. President, more is at stake in Rhodesia than the reliability of the United States and Great Britain in fulfilling obligations solemnly undertaken. More is at stake, too, than the lives and freedom of the 9 million people of Rhodesia. These factors alone should be enough to compel action, but obviously they are not.

I ask, therefore, that account is taken of a third consideration. That consideration is purely economic, but it is strategic in its implications.

Current intelligence reports convince me that in the case of four strategic metals—chromite, manganese, vanadium, and platinum—the Soviet Union is destined to become the dominant supplier if South African and Rhodesian sources are cut off from the free world.

The National Research Council, in its study entitled "Contingency Plans for Chromium Utilization," concludes unequivocably that the long-term Western strategic vulnerability in chrome is

greater than in petroleum. We must not forget that initially all of the world's chrome is in three places: Rhodesia, South Africa, and Russia.

Now, Mr. President, because of the repeal of legislation I sponsored, the United States again cannot import Rhodesian chrome. The proponents of that repeal argued in the Senate that high-grade Rhodesian chromite was no longer needed by the United States because of the development of a new argon-oxygen process for utilizing low-grade chromite. They argued that low-grade chromite from South Africa would be sufficient for the U.S. needs and that high-grade Rhodesian chromite would not be needed.

But, Mr. President, the plain fact is that, since the repeal of the Byrd amendment, the United States is once again heavily dependent on chromite. We are back at square 1, relying on our most dangerous potential adversary for our most strategic mineral import.

Once again, Mr. President, U.S. military planners must rely on Soviet chromium imports in preparing and developing American military systems.

No doubt there are those at the Department of State and elsewhere who would assert that this is beneficial interdependence. But, Mr. President, the Senator from Virginia does not favor dependence on the Soviet Union in matters of national security.

If this country were denied chrome and manganese, it would take us a minimum of 5 years to adjust to that cutoff. For platinum group metals, it would take at least 10 years to move to alternatives.

The slightest supply interruption of any of these essential metals would cause staggering increases in the price of steel products and consumer goods. The inflationary effect could, in fact, be far greater than the loss of foreign petroleum supplies.

Western Europe and Japan do not stockpile these minerals. U.S. stockpiles are sufficient only for short-term relief.

Futuristic plans for the collection of manganese nodules from the seabed are not feasible in the foreseeable future. The seabed mining companies acknowledged the need for billion dollar capital investments, far more research and development, and high-cost, energy-intensive refining techniques. Seabed mining does not provide a satisfactory answer.

In short, the free world can expect to require South African and Rhodesian minerals far into the future and, indeed, indefinitely.

Mr. President, for perhaps the first time in the short history of Africa, there is now an opportunity for a white-dominated government to transfer power to a black government without total economic upheaval and the subsequent installation of a repressive new regime. For the first time in the history of Africa, the free world has an opportunity to support an emerging moderate multiracial regime which wishes to gain the advantages of contact with the West and to avoid the tyranny of Soviet domination.

Mr. President, I urge the Carter administration to reverse and correct the disastrous policy it has adopted toward Rhodesia. Its present policy—if successful—will lead to a Soviet-dominated terrorist government.

I close my remarks today by offering to the attention of Senators an editorial which appeared in the Washington Star on Tuesday of this week. This editorial highlights the worst aspects of our irrational policy toward southern Africa, and its thesis is my own.

The editorial describes the inflammatory rhetoric of our Ambassador to the United Nations. His statements on Rhodesia continue to be characteristic of pronouncements of other delegates to the U.N.—those from the worst and most repressive Marxist dictatorships.

But, Mr. President, in the Senate and in the Congress, if not in the U.N. and in the Carter administration, the demands of Western security and our obligations to a friendly people must be made to overcome irresponsible pronouncements of ill-chosen political appointees. I look forward to working to achieve that goal and hope that action will come before it is too late.

Mr. President, I ask unanimous consent that an editorial on Rhodesia published in the Washington Star of Tuesday, February 6, 1979, be printed in the RECORD.

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

"NEO-FASCISM" IN RHODESIA

UN Ambassador Andrew Young recently declared, with even less than his usual regard for the weight of words, that "only neo-fascists in this country would be willing to support the neo-fascism of the Smith regime" in Rhodesia.

No doubt Mr. Young would include, as neo-fascism, last week's successful referendum on a new Rhodesian constitution. The vote, after all, was limited to non-black Rhodesians; and the constitution, under which a black-majority government will be elected this spring, reserves considerable power over a five-year transition period to whites.

If Andrew Young spoke for himself alone, and not for the United States, he would be at liberty to mangle the language as he pleased. But he is, in fact, an American official who pretends to be interested in drawing the Rhodesian government into all-party talks with the guerrilla insurgents on the country's future. If this is more than pretense, he approaches it in a curious fashion.

It is not, of course, as if the new Rhodesian constitution were immune to reasoned criticism. It is, one could say, conservative and cautious; and it is open to the practical objection that it may not fully satisfy even the black partners in Mr. Smith's slow-motion movement from white to majority rule.

Even so, the effort is far from contemptible, and far indeed from being "fascist" in flavor, neo- or otherwise. The advent of a government in Rhodesia-Zimbabwe (as it's to be called) in which blacks will have the predominant place is a milestone. It imposes a certain obligation on the U.S. to approach it, approve or not, with some consideration.

A more considerate and receptive attitude would indeed have been appropriate months ago, when Ian Smith first decided to scrap exclusive white rule and negotiate a settlement with the black majority. The Rhodesians thought then that Mr. Smith and his collaborators had met the "six points" on which Dr. Kissinger, as a Ford administration emissary, had implicitly conditioned some relaxation of diplomatic hostility. Even now, one of Mr. Smith's selling points in inducing the embattled Rhodesian whites to accept a new power-sharing constitution has been the stubborn hope that the U.S. may lift economic sanctions.

That is almost certainly a vain hope as long as Ambassador Young is calling the shots on U.S. policy in Africa. But what is the alternative? What, in other words, is the price of Mr. Young's policy? Now as before, it is that the U.S. may be a bystander, and by inaction a collaborator, in the subversion of an elected government in Rhodesia by Marxist guerrillas, hostile to both form and substance of our political values.

If they succeed there will be many Rhodesians, black and white, who if lucky enough to escape alive will find themselves nostalgic for a bit of what Andrew Young is pleased to call "neo-fascism."

QUORUM CALL

Mr. HARRY F. BYRD, JR. 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. ROBERT C. 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.

ORDER FOR RECESS UNTIL 11 A.M. TOMORROW

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until 11 a.m. tomorrow.

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

Mr. ROBERT C. BYRD. 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. ROBERT C. 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.

CONCLUSION OF MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, is there further morning business?

The PRESIDING OFFICER. If there be no further morning business, morning business is closed.

SENATE RESOLUTION 61—PROPOSED AMENDMENT OF STANDING RULES OF THE SENATE

Mr. ROBERT C. BYRD. Mr. President, what is the pending question before the Senate?

The PRESIDING OFFICER. Senate Resolution 61.

Mr. ROBERT C. BYRD. 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. ROBERT C. 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.

Mr. ROBERT C. BYRD. Mr. President, I am going to offer a perfecting amendment or some perfecting amendments to the resolution today, in the hope that action can be taken at least on some of them. But before doing so, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

Mr. ROBERT C. 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.

Mr. ROBERT C. BYRD. Mr. President, on January 15, the first day of the 96th Congress, I submitted Senate Resolution 9, which remains in the background the pending business of the Senate. However, immediately before the Senate is Senate Resolution 61, which deals only with the postcloture section of Senate Resolution 9.

Throughout the intervening days, including and subsequent to January 15, ad hoc committees on both sides of the aisle have attempted, through discussions—sometimes separately and sometimes together—to determine if there could be found proposals which would be more acceptable to the Senate than the provisions of Senate Resolution 9.

To the great credit of Senator STEVENS, who chairs the ad hoc committee on the Republican side of the aisle, he repeatedly has come forward with proposals. He has spent many hours in attempting to develop new approaches that could be substituted for the provisions of Senate Resolution 9.

To the great credit of Mr. NELSON, on the Democratic side of the aisle, who chairs the ad hoc committee there, he and his committee likewise have met time and time again and have met with Mr. STEVENS, and there have been times when the distinguished minority leader and I have sat down with the chairmen of the two ad hoc committees, Mr. STEVENS and Mr. NELSON.

The efforts to arrive at a consensus availed very little, and time and time again even Members on his own side of the aisle took issue with the proposals that Senator STEVENS had attempted to develop. So the days passed.

On yesterday, after discussing a time agreement with the distinguished minority leader on the evening of the day before yesterday, I attempted to get an agreement which would provide for the allotment and control of time on amendments and debate on just that section of Resolution No. 9 which deals with postcloture. That agreement would have provided for a final vote on that section only, dealing with postcloture, no later than 6 o'clock p.m. on Thursday, February 22. The unanimous-consent agreement, which I had thought was about to be accepted, somehow overnight developed opposition, and there was an objection made by Mr. STEVENS on behalf of certain Senators on his side of the aisle to the unanimous-consent agreement.

Thereupon, it was suggested, and I believe it was suggested by the distinguished minority leader, that we try to get the two ad hoc committees together again and that he and I sit down with them in their totality, as they were originally constituted, and see if together we could not work out a version behind which most of us could march and to which we could lend our support.

So I acceded to that request. We had that meeting in my office, and it readily became apparent that no such consensus was going to be reached.

So finally it was agreed that I would make the effort to separate the postcloture section from Senate Resolution 9 and make it a separate resolution, and try to get a time agreement to the effect that if final disposition of that section was not obtained by no later than 6 o'clock p.m., on Thursday, February 22, the Senate would immediately proceed to the Senate Resolution No. 9; and unanimous consent was given to that request.

So we have today before us Senate Resolution 61, which deals only with the postcloture provisions in Senate Resolution 9.

So Senators may observe that I have done everything I could possibly do to try to bring the Senate to a vote, try to bring the Senate around to acting upon proposals to change the rules that deal with not only the postcloture problem but also precloture matters.

But I have not been one, I have never been one, and I am not today one who feels that I have to have every provision in my Senate Resolution 9 voted up intact with no changes. The Senate will observe that I have never taken the position that any part of Senate Resolution 9 had to be adopted by the Senate. I have only asked that the Senate be allowed to work its will on Senate Resolution 9, adopt such portions of it as in its wisdom it wishes to adopt, reject such portions thereof as in its wisdom it wishes to reject, but at some point vote up or down on the resolution as amended if amended. Vote it up or vote it down; that is all I have asked.

There are those who are unwilling to give a time agreement unless the final form can be pretty much agreed upon beforehand, and it has to be according to their viewpoint. As I have said time and time again, let us take our chances. There is not a single word in my resolution that cannot be improved upon, and all I want is for the Senate to have the opportunity to do that. But there are those who, like Horatius at the bridge, are determined it will not pass unless it is written according to their prescription.

Well, happily at least we did reach the agreement that we would proceed with at least the postcloture section. So, accustomed as the Senate is to seeing me so congenial, amicable, always tolerant and reasonable, and willing to be persuaded, I said, OK, we will strip away everything, just forget old Senate Resolution No. 9 for the time being, and just take that little teensy-weensy portion, that little infinitesimally small part thereof that deals with postcloture, and let us examine that under the scrutiny of the Senate microscope enlarged to its magnitude of 100, and I will bend over backwards and just forget about the rest of the resolution for a little while, and we will take a look at that. If the Senate wants to substitute something for my suggestion that is all right with me, but at least let us take a look a it.

So that is where we are. The Senate finally agreed that maybe that was not such a bad suggestion after all: "Since Senator BYRD is willing to give up for the time being any consideration of the rest of his resolution, we will go along with that."

So here we are. Now we are on Senate Resolution 61.

Mr. President, there actually has been very little debate on the floor on the resolution, Senate Resolution 9, but several newspapers have run editorials in support of a rules change, and I ask unanimous consent that editorials from the New York Times of January 30, 1979, the Tennessean of January 21, 1979, the Rocky Mountain News of January 30, 1979, the Kansas City Star of January 18, 1979, the Danbury Sun-Times of January 21, 1979, the Birmingham Post-Herald of January 29, 1979, the St. Louis Post-Dispatch of January 17, 1979, and the Boston Globe of January 15, 1979 be printed in the RECORD at this point.

There being no objection, the editorials were ordered to be printed in the RECORD, as follows:

[From the New York Times, Jan. 30, 1979]

ONE FILIBUSTER PER ISSUE

By voting against a motion to stop a filibuster, 41 of the 100 members of the Senate can block any legislation. That is not necessarily pernicious and we agree with the Senate majority leader, Robert Byrd, that there is a right to filibuster. But we also agree strongly with him that on any one issue, one filibuster is enough. Still, present rules permit multiple filibusters. Even the threat of a filibuster has become a serious problem, making the Senate, in Mr. Byrd's term, "a spectacle." The time has come to do something about it.

Partly because of the parliamentary virtuosity of the late Senator Allen of Alabama, the Senate has been increasingly subject to multiple filibusters. Unless the leader calls up legislation under special circumstances, his very motion to proceed to consideration of the bill is subject to a filibuster. If the filibuster is then voted down through cloture, another filibuster can be undertaken when the bill becomes the pending business. And even when such a filibuster is defeated, there has been an increasing use of "post-cloture" filibusters in which one or a handful of Senators can tie up business for days with dilatory motions, interminable amendments, quorum calls and roll calls.

Senator Byrd has now offered a resolution to change the rules and ease this "misery." He does not propose, probably wisely, to make filibusters easier to stop. A full 60 votes would still be necessary—but only once. Debate on motions to take up a bill would be limited and filibusters confined to actual consideration of the measure. Post-cloture stalling would be curbed.

Both Republicans and Democrats have named ad hoc committees, ostensibly to consider Senator Byrd's proposal but actually to negotiate both on its terms and on how a vote can be had on a rules change. Conservative members believe that 67 votes are needed to end a filibuster on a motion to change the rules. More liberal members believe a simple

majority can vote to change the rules and cut off debate.

It would appear to be in the interest of Republicans and conservative Democrats to avoid a showdown. A loss would create a precedent that would make future rules changes easier and eventually undermine the rights of the minority. A showdown can be avoided by an agreement to limit debate on the Byrd resolution and to vote at an agreed time. There seems to be fairly widespread bipartisan agreement that something should be done to limit post-cloture filibusters, and there seems to be room for reasonable compromise on other elements of the Byrd proposal as well.

But if meaningful rules changes are not soon forthcoming, Senator Byrd reluctantly will have to force the showdown. Then it will be important that 51 Senators, including liberal and moderate Republicans, back him up. Senator Henry Cabot Lodge Sr. was right when he said many decades ago: "'To vote without debate is perilous, but to debate and never vote is imbecile."

[From the Tennessean, Jan. 21, 1979]

MODEST CHANGES SOUGHT TO CURB THE FILIBUSTER

Senate Majority Leader Robert Byrd has proposed some new curbs on the filibuster that are fairly modest, but likely to set the stage for another battle.

The filibuster is simply prolonged debate by a minority in an attempt to prevent the majority from passing a bill. From the viewpoint of democratic principles, it runs counter to logic. But its defenders argue that it protects the right of the minority and prevents hasty action.

On the question of hasty action there is no quarrel. Past filibusters have left the Senate spinning its wheels in the sands of rhetoric for days on end. And frequently, because of the filibuster and the continued threat of it, measures have been derailed.

In recent years it has not been so much a case of a minority's right as a struggle between contending forces outside the Senate, that between big business and big labor.

Delaying tactics in the last session of the Senate brought the defeat of labor on a fairly modest labor law reform proposal.

The House had passed the bill easily and hopes were rising that it would fare as well in the Senate. But when it finally came to the floor, it was filibustered for five weeks.

Unable to break the opposition after six cloture votes, sponsors of the labor law reform bill finally had to recommit the bill to committee, from which it never returned.

There were a good many reasons why the bill never made it, but the point is that the filibuster was instrumental. It also tied up the Senate at a time when there were pressing problems with which it should have been dealing.

Filibusters or delaying tactics have defeated the creation of a federal agency to speak for consumers in regulatory hearings, and an effort to get public financing for congressional elections.

In the beginning, a filibuster required two-thirds of the senators present and voting to cut off debate. In 1975, the Senate changed the rule to require only 60 votes.

Senator Byrd would continue that number but after cloture there would be a requirement that a final vote would be held within 100 hours.

The majority leader would also change the procedure so that it could be required that all amendments be directly related to the bill in question.

It has been a tactic in the past for opponents of legislation to print up hundreds of amendments and to call them up after cloture is in effect. Often they may bear little resemblance to anything relating to the bill. But voting on these can tie up the Senate as long as a filibuster.

Senator Byrd's proposals are hardly sweeping. The minority is still protected and the business of the Senate would be improved. At some point, the public is going to be so enraged at a Senate doing nothing when great problems are at hand, it may lose patience with both the filibuster and the senators involved.

[From the Rocky Mountain News, Jan. 30, 1979]

SENATE AGONISTES

The time has come when the United States Senate must straighten out its rules of procedure so that it can act responsibly on vital matters of public policy.

High school civics students are taught that a minority of senators can and often do band together in an effort to talk a pending bill to death, to stall a decisive vote through the use of the "filibuster." They are also taught that if 60 of the 100 senators agree that the matter has been thoroughly debated, they may vote "cloture," thus ending the talkathon and setting the stage for a decision.

Alas, this is not so. The late Sen. James B. Allen, D-Ala., as wily and resourceful a parliamentarian as ever walked the floor of the Senate, found ways to force a theoretically unlimited series of procedural votes even after cloture was voted. In short, he found a way to paralyze the Senate.

He also found a way to infuriate the Senate. Fighting chicanery with chicanery, Senate Democratic Leader Robert C. Byrd, W. Va., in trying to break a post-cloture filibuster, set some very troubling parlimentary precedents. He had perfectly proper motions and amendments ruled out of order.

This is no solution. In fact, it's more dangerous than the problem Allen created.

To his credit, Byrd recognizes the danger. He has asked the Senate to set up new rules concerning procedures after the Senate has voted cloture. His proposals are fair. They would provide the minority the opportunity to make a last-ditch stand but would also guarantee that the Senate would resolve the issue in a timely manner.

We make no complaint against the filibuster itself. It is a cherished and time-honored device to protect the minority from being steam-rollered by the majority. But when at least 60 senators vote to end a filibuster, the filibuster should end. The Senate should dispose of the issue and move on to other business.

According to an aide, Sen. William Armstrong, R-Colo., has "no position" on the matter at this time. Sen. Gary Hart, D-Colo., says he is generally sympathetic to filibuster rules by the vote of a simple majority.

We disagree with Hart's position, (and hope Armstrong comes up with one soon). It may be that that the traditional two-thirds majority should be required to change the prescribed number of votes needed to end a filibuster. But Byrd's proposals do not in any way alter the three-fifths requirement to end debate. They seek only to shut off parliamentary tricks which have converted the time-honored filibuster into a tool for any senator bent on obstruction, pure and simple.

The central question in the rules debate, as noted earlier by columnists Jack Germond and Jules Witcover, is whether the members of the Senate are going to live up to their own estimate of their importance—or continue to "behave like cheap shysters trying to find loopholes in the fine print of zoning ordinances." Will Colorado's senators vote with or against the pettifoggers? We're waiting to see.

[From the Kansas City Star, Jan. 18, 1979]

DEBATE AND DELAY IN THE SENATE

As sure as a new Congress convenes, the Senate goes through a biennial debate on its rules which, after 190 years, should be reasonably workable. The ritual began in 1789 with the adoption of 20 rules by the first senators. Those initial guidelines on conduct of the Senate were adopted with more dispatch than the Senate will display this month in another attempt to curb abuse of the filibuster.

The filibuster has become a sacred guarantee that the minority will not suffer a tyranny of the majority. In the House, which prides itself as the truly representative body of the two legislative chambers, the majority tyrannically shuts off its minorities by ending debate through frequent motions to move the previous question. Whether the cause of free debate has been better served in one chamber than another is questionable.

Four years ago the Senate dealt with the filibuster by adopting a new rule permitting 60 senators to invoke cloture, or end a filibuster. The three-fifths rule was of all 100 senators while the previous two-thirds requirement was of senators present and voting. The practical result is that opponents of a filibuster must keep 60 senators on the floor which, because of absenteeism, is not much easier than prevailing on a two-thirds vote (maximum 67) of those present.

The more serious failing of the three-fifths rule is that practitioners of the filibuster have found ways to block a vote after 60 senators have voted in favor of cloture. One new technique is to filibuster by amendment. Other devices for delaying a vote on legislation opposed by a determined minority are frequent time-consuming quorum calls or roll calls on procedural questions.

Even more deadly than the filibuster itself in the final days of a congressional session is the threat of delaying tactics. Senate leaders in the last Congress elected not to call up controversial measures in the final hectic days if a talkathon appeared likely to hold up action on essential legislation such as budget or high-priority legislation of the administration.

In less complex times the filibuster was often little more than a nuisance and was at times an entertaining diversion when employed by flamboyant Southern orators. Senate schedules are now too heavy for such indulgences. As an example of how precious time is consumed, 80 Senate roll calls requiring as many as 30 minutes each were taken last year during debate on Panama Canal treaties when outnumbered opponents filibustered with amendments.

Next was a controversial labor law revision bill which never came to a final vote. A minority, well aware that a majority of senators would pass the bill if given a chance, blocked six efforts to shut off a filibuster over a six-week period. If cloture had been invoked, opponents of the measure were ready to filibuster with nearly 1,000 printed amendments. Opponents of the treaties and labor bill killed chances for a fair hearing on much legislation by throwing the Senate behind schedule in its early months of last year's session.

The staid Senate is not given to draconian rules changes so there is no reason to expect a lowering of the 60 votes required for invoking cloture. But the sheer annoyance of running from Senate office buildings to the Senate floor for time-wasting quorum calls or senseless, delaying roll calls should generate support for limiting post-filibuster debate. If a filibuster is broken, it seems entirely reasonable, as Sen. Robert Byrd, Democratic majority leader, has proposed, that post-filibuster debate be limited to a few hours. It should be no embarrassment to senators to concede that their profundity on a given issue has its limits.

[From the Danbury (Conn.) Sun-Times, Jan. 21, 1979]

SENATE SHOULD CURTAIL FILIBUSTERS

The United States Senate may regard itself as the world's greatest deliberative body, but the general public thinks of it as the world's most inefficient body when one, two or a handful of senators can keep it tied in a filibuster, even though a cloture vote to end debate has been invoked by a substantial majority of the Senate.

The Senate, at the start of its current session, has the opportunity to correct the filibuster problem by adopting changes in Rule 22, such as those proposed by Majority Leader Robert C. Byrd.

In recent sessions of Congress, the Senate has been prevented from voting on major legislation by the dilatory actions of opponents of a measure who offer dozens if not hundreds of amendments, or who insist that the previous day's journal be read in full or who raise and engage in the long arguments about points of order.

On these occasions, the Senate has often showed the public a perception which borders on querulous men engaging in childish games.

It is not a case of conservatives vs. liberals or anything like that. It is a case of getting public business done when it ought to be done.

[From the Birmingham Post-Herald, Jan. 29, 1979]

POST-CLOTURE FILIBUSTERS

The time has come when the United States Senate must straighten out its rules of procedure so that it can act responsibly on vital matters of public policy.

High school civics students are taught that a minority of senators can and often do band together in an effort to talk a pending bill to death, to stall a decisive vote through the use of the "filibuster." The students are also taught that if 60 of the 100 senators agree that the matter has been thoroughly debated, they may vote "cloture," thus ending the talkathon and setting the stage for a decision.

Alas, this is not so. Alabama's late senator, James B. Allen, as wily and resourceful a parliamentarian as ever walked the floor of the Senate, found ways to force a theoretically unlimited series of procedural votes even after cloture was voted. In short, he found a way to paralyze the Senate.

He also found a way to infuriate the Senate. Fighting chicanery with chicanery, Senate Democratic Leader Robert C. Byrd, W. Va., in trying to break a post-cloture filibuster, set some very troubling parliamentary precedents. He had perfectly proper motions and amendments ruled out of order.

This is no solution. In fact, it's more dangerous than the problem Allen created.

To his credit, Majority Leader Byrd recognizes the danger. He has asked the Senate to set up new rules concerning procedures after the Senate has voted cloture. His proposal is fair. It would provide the minority the opportunity to make a last-ditch stand but would also guarantee that the Senate would resolve the issue in a timely manner.

We make no complaint against the filibuster itself. It is a cherished and time-honored device to protect the minority from being steam-rollered by the majority. But when at least 60 senators vote to end filibuster, the filibuster should end. The Senate should dispose of the issue and move on to other business.

We hope the Senate will amend its rules and outlaw the post-cloture filibuster.

[From the St. Louis Post-Dispatch, Jan. 17, 1979]

A RULE TO END SENATE DELAY

As the 96th Congress convened, the Senate was still faced with the prospect of having its legislative machinery sabotaged by strategists of delay—although the Senate since 1975 has been theoretically able to cut off filibusters by a vote of 60 members. Now the parliamentary saboteurs accomplish their end, after the cloture vote, by offering endless amendments to the bill under consideration.

In order to end such legislative wrecking tactics, Senate Majority Leader Robert Byrd has proposed a rule that would require a vote on the measure at issue within 100 hours after the required 60 senators approve a cut-off of debate. That is an excessively generous amount of time, considering that an inordinate period of debate may already have been spent on a bill before a cloture vote is ever called. Yet filibuster sympathizers, including business interests and members of the Republican minority, are still expected to fight the Byrd proposal.

There is talk that the majority leader could win support for an anti-filibuster rule by embracing an easing of the Senate ethics code to permit senators to earn in outside income more than the 15 percent of salary now allowed. Such a blatant surrender to senatorial greed would be inexcusable. At $57,500 a year, senators are paid enough to get by without yielding to the corrupting influence of fat lecture fees from groups with interests in legislation. The rule against intolerable delay should be adopted because it is right, not because senators have been lured by a lowering of ethical standards.

[From the Boston Globe, Jan. 15, 1979]

ON NEW FILIBUSTER RULES

If all goes according to schedule, the U.S. Senate ought to come in like a lion. Its first item of business will be the enactment of its own rules and a time-honored debate over filibusters is almost certain to be rejoined. And well it should be because, as was amply demonstrated in the last session of Congress, the current rules not only protect the minority but give potential obstructionist powers even to any lone and willful senator.

Business interests, headed by the U.S. Chamber of Commerce, are already organized for a major fight against any substantial changes, and groups such as organized labor and Common Cause are sure to be on the other side. The specific form of the confrontation will, however, depend upon Majority Leader Robert Byrd and, presumably to keep the opposition off-guard, he is not saying exactly what he will propose.

The most dramatic change would be a reduction in the number of Senators required to vote for cloture to end a filibuster. In 1972, the number was reduced from 67 to 60, a "constitutional" three-fifths of the full 100-member body. One modest but progressive step would be to change that "constitutional" three-fifths, which means that 60 senators must vote to support cloture, to a simple three-fifths of those present and voting. Cloture could now fail if the vote were 59-to-2.

A change to three-fifths of those present and voting would at least require proponents of a particular filibuster to muster their troops and demonstrate they constitute a committed and significant minority.

Another change, maybe the most important, would be to limit debate on a measure once cloture has been invoked. Now, there is the potential that legislation can be filibustered by amendment. Senators opposed to a particular bill can propose thousands of amendments and demand a time-consuming roll call on each. The time consumed in such voting is not counted against the hour of debate afforded each senator after cloture.

Last session, as time grew short, individual senators were able to use the threat of a direct filibuster or a filibuster-by-amendment to persuade Byrd not to bring popular but controversial issues to the floor. A change to include the time it takes to vote on amendments within a senator's allotted time for debate would cure this problem and preclude post-cloture filibusters.

Even if it is argued that some protections should be afforded a legislative minority, there can be no justification for giving one or two or three legislators veto power. That, however, is what the present Senate rules permit, and that is what the Senate should change when it convenes later this month.

Mr. ROBERT C. BYRD. Mr. President, here is Senate Resolution 61 amending rule XXII of the Standing Rules of the Senate:

Resolved, That the second paragraph of paragraph 2 of rule XXII of the Standing Rules of the Senate is amended by inserting at the end thereof a new paragraph as follows:

"After one hundred hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof to the exclusion of all amendments not then actually pending before the Senate at that time and to the exclusion of all motions, except a motion to table, or to reconsider and one quorum call on demand to establish the presence of a quorum (and motions required to establish a quorum) immediately before the final vote begins. The amount of time specified in the preceding sentence may be increased, or decreased (but to not less than ten hours), by the adoption of a motion, decided without debate, by a three-fifths affirmative vote of the Senators duly chosen and sworn. At any time after ten hours of consideration, any remaining time may be reduced, but to not less than ten hours, by the adoption of a motion, decided without debate, by a three-fifths affirmative vote of the Senators duly chosen and sworn, and any such time thus agreed upon shall be equally divided between and controlled by the Majority and Minority Leaders or their designees. However, only one motion to reduce time and only one motion to extend time specified above, may be made in any one calendar day.".

That is the resolution, Senate Resolution 61, in its entirety.

So, Mr. President, the Senate is now beginning its debate on my proposal to deal with what has become known as the postcloture phenomenon, more commonly referred to as the postcloture filibuster.

We now have precloture filibusters; we have filibusters on motions to proceed; then we can have postcloture filibusters on the motion to proceed; then we have filibusters on the measure precloture, and then we have filibusters on the measure itself; then we have postcloture filibusters on the measure; then we can have filibusters on conference reports; and, of course, we always have the threats of filibusters.

We have minifilibusters, mini-maxi-filibusters, all kinds of filibusters. You name it, we have it, filibusters.

But the only thing we are trying to deal with here is the postcloture filibuster. We have seen that become the most divisive, the most contentious, matter to come before the Senate. In the year before last, cloture was invoked on the natural gas pricing bill. After cloture was invoked, there were 127 rollcalls—I may be off, I may not be accurate, and maybe I have missed by a half dozen one way or the other, but the RECORD will be

corrected if I am incorrect—and so we had all these rollcalls and about 35 quorum calls, after cloture had been invoked.

There is no cure for the postcloture filibuster in the rules. There is no cloture provided for as against the postcloture filibuster in the rules, and by virtue of that fact rule XXII really, insofar as dealing with filibusters is concerned, no longer exists.

I was here in the old days when Senator Richard Russell was recognized as the person in the Senate who knew more about the rules and precedents than any other Member in the body, and those were the days when the southerners—and a few other Senators from time to time would join them—would conduct filibusters in connection with civil rights matters and occasionally in regard to some other issue.

But the filibuster was not a weapon that was often resorted to. It was resorted to by those Senators only when measures came along from time to time that dealt with an issue that was engrained in their culture, and which had been so engrained for generations.

But they used the filibuster—at least Senator Russell and the Senators who worked with him in those days—they used the rules; they did not abuse the rules. They were germane in their speeches. Senator Russell operated with his Southern colleagues in their organized fashion. He was very much like the German general staff. They were organized into teams, and they would use the rules, but never abuse them.

Once cloture was invoked, they recognized that the Senate had indicated that it was its will that the matter be brought to a close. They did not resort to dilatory tactics, dilatory motions, dilatory amendments, endless quorum calls. They simply offered the amendments in good faith, had them voted up or down, and that was the end of the ball game.

Mr. TOWER. Mr. President, will the Senator yield for an observation at that point?

Mr. ROBERT C. BYRD. Yes, I yield without losing my right to the floor.

Mr. TOWER. I appreciate the Senator's recitation of the history of the use of the filibuster.

I might note that in the old days under Russell's leadership—and I was privileged to be a member of the Southern Caucus at that time, as a matter of fact the only Republican member of the Southern Caucus—but as I remember, too, it was more difficult to get cloture in those days, and the postcloture filibuster is a phenomenon of recent occurrence that has resulted from the reduction of the requirement of the two-thirds vote to that of 60 percent of the Senators duly elected and sworn.

I think the conjunction of the two is not fortuitous.

Mr. ROBERT C. BYRD. I thank the distinguished Senator.

It happened that in those days I was also on Senator Russell's side, and I spoke——

Mr. TOWER. And we both learned a lot, I imagine.

Mr. ROBERT C. BYRD. I learned a little bit. I did not learn a lot, but I learned a few things. I did learn, however, that the southerners under Senator Russell's generalship conducted their filibusters in a very dignified manner, and once the Senate registered its will by invoking cloture they did not seek to prolong the agony. They only sought to have the Senate act up or down on their amendments.

Senator Ervin, I think, called up more than 30 amendments one day following the debate on the 1964 Civil Rights Act, and they were voted on that same day. He did not insist on a quorum call in advance of each rollcall vote. He did not insist that the Sergeant at Arms be sent after Senators with requests for attendance, and then require a rollcall vote on that. He did not move to reconsider every vote on every amendment and then have a motion to table that, appeal the ruling of the Chair, and all that business.

They did not engage in that nonsense. They did not engage in that farce. That was to their credit.

As to the change in the number of Senators required to invoke cloture, that is my change, and it is of very recent vintage. It is language I wrote into the rule with the support of the majority of the Senate. I do not seek to change that. I do not seek to make any change in that. I am glad the distinguished Senator mentioned that, because I was about to admit the fact that I do not seek any change in the number of votes required to invoke cloture. The number is now the constitutional three-fifths—60 votes, if 100 Members are serving—and I do not propose to change that. But we have lately seen, in the past 8 or 9 years, not just since that constitutional three-fifths become the rule, but in the last 8 or 9 years, an increasing number of filibusters, and within the last few years we have seen this postcloture filibuster burst into full bloom.

So it is an effort to deal with that postcloture filibuster and to bring out of chaos an orderly procedure whereby the Senate can finally work its will on a measure or matter after cloture has been invoked that I have offered Senate Resolution 9, and offered even to momentarily strip away everything but the postcloture section.

It is unfair to a majority of 60 Senators, who have indicated by their votes that it is time to bring a matter to a close, to continue to drag out and prolong the action of the Senate and prevent it from reaching its final decision up or down on a measure.

It is unfair to the three-fifths majority. In many instances, a part of that three-fifths is made up by Members on the other side of the aisle who join with Members on this side of the aisle to invoke cloture.

It was never meant that the charity of the minority should rule in this place. It was always intended that the minority shall have its just rights and that they should not be trampled upon, and the rules so provide. That is why I support the three-fifths cloture rule. I feel that there should be a supermajority before cloture is invoked.

But even after cloture is invoked debate does not come to an end. The present rules provide that each Senator shall have 1 hour. That was a good rule until it became abused, and the abuse of it is not the monopoly of either side. We have seen it abused by Senators on both sides of the aisle. So it is not a partisan position that I take today in seeking to change that rule so as to prevent what we have lately seen develop, which has made the Senate from time to time a spectacle before the Nation.

So, Mr. President, I am going to send to the desk an amendment, but I will explain it first. I have other amendments.

UP AMENDMENT NO. 2

The first amendment I will send to the desk primarily will strike words from Resolution No. 61. It will strike the words on page 1, line 1, "the second paragraph."

The reason for this amendment is as follows: In looking at rule XXII, on page 23 of the yellow manual which I hold in my hand, there is some disagreement as to just what constitutes paragraph 2. There is a section numbered 2, and that section consists of several paragraphs. I suppose if one wanted to be technical, the first paragraph would end with the question mark after the word "close" on page 24. Another paragraph still under the section designated 2 ends with the preposition "of," almost midway down the page.

Then there is a third paragraph ending with the word "debate." That is before the section numbered 3.

If we say that the second paragraph in paragraph 2 of rule XXII "is amended by inserting at the end thereof," what are we talking about? What is the second paragraph of paragraph 2? Is it the paragraph that ends with the words "all other business until disposed of"? Or is it the paragraph that ends with the words "shall be decided without debate"?

It is an amendment that I think there should be no opposition to. It would simply strike out the words "the second paragraph."

So the resolution would then read as follows:

Resolved, that Rule XXII of the Standing Rules Of The Senate is amended by insetting at the end thereof.

Mr. McCLURE. Will the Senator yield for a question?

Mr. ROBERT C. BYRD. Yes.

Mr. McCLURE. Mr. President, I do not think there would be any objection to that change. I think it does, first of all, two things. Certainly, the proposer of the resolution knows what he has in mind and he ought to be able to say it very clearly for others. Second, I think it does remove the ambiguity to which he has made reference.

It does, however, present one procedural question in regard to amendments some have already prepared and lodged at the desk that make reference to the resolution as it appeared in Senate Resolution 9 and again appears in Senate Resolution 61. I would assume there will

be no difficulty in conforming and perhaps no necessity for resubmitting and having two sets of amendments printed.

Mr. ROBERT C. BYRD. The Senator is correct.

Mr. McCLURE. I thank the Senator.

Mr. ROBERT C. BYRD. Mr. President, I send to the desk the amendment and ask that it be stated by the clerk.

The PRESIDING OFFICER. The amendment will be stated.

The second assistant legislative clerk read as follows:

The Senator from West Virginia (Mr. ROBERT C. BYRD) proposes an unprinted amendment numbered 2:

On page 1, line 1, strike "the second paragraph of".

Mr. McCLURE. Mr. President, I wonder if the Senator from West Virginia might agree that the rekeying of the proposed amendments will be permitted from time to time as they come up as necessary to reflect change, and that after that rekeying they will be treated as original text, as an original amendment.

Mr. ROBERT C. BYRD. The Senator would certainly have my support with respect to rekeying any amendments that might otherwise fall, because they have been keyed to those particular words.

Mr. McCLURE. And that in so rekeying them they will not be treated as an amendment in the second degree?

Mr. ROBERT C. BYRD. Absolutely.

Mr. McCLURE. I thank the Senator. With that understanding, Mr. President, I think there is absolutely no objection to the amendment from this side of the aisle.

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

Without objection, the amendment is agreed to.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

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

The motion to lay on the table was agreed to.

UP AMENDMENT NO. 3

Mr. ROBERT C. BYRD. Mr. President, I move that on page 1 of Senate Resolution 61, line 4, after the word, "after," there be inserted the words, "no more than."

The way the measure now reads is as follows: "After 100 hours of consideration of the measure," et cetera. It might be contended that the Senate, if it adopts the resolution, could proceed to vote on the final disposition of the matter on which cloture has been invoked only after 100 hours of consideration. My amendment would simply insert words to make it read, "After no more than 100 hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof," et cetera.

I have three parts to this amendment. I am content with offering only that portion of the amendment at this time.

Mr. TOWER. Mr. President, will the Senator yield?

Mr. ROBERT C. BYRD. Yes.

Mr. TOWER. I believe there is no objection over here, provided the same understanding elicited from the majority leader by the Senator from Idaho on the first amendment still prevails in terms of conformity of amendments already pending.

Mr. ROBERT C. BYRD. Yes, indeed. Absolutely. If there are amendments which have already been introduced which are keyed to those words as they now exist in the resolution, I would ask unanimous consent that they be so keyed as to conform with the change that would be made by my amendment.

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

Mr. ROBERT C. BYRD. Mr. President, I send the amendment to the desk and ask that it be stated by the clerk.

The PRESIDING OFFICER. The amendment will be stated.

The second assistant legislative clerk read as follows:

The Senator from West Virginia (Mr. ROBERT C. BYRD) proposes an unprinted amendment numbered 3: On page 1, line 4, after the word "after", insert "no more than".

On page 2, beginning on line 2, strike "amount of time specified in the preceding sentence" and insert in lieu thereof "one hundred hours".

Mr. ROBERT C. BYRD. That merely conforms the second portion so that it would not be inconsistent with the first change.

Mr. McCLURE. Will the Senator yield?

Mr. ROBERT C. BYRD. Yes.

Mr. McCLURE. Do I understand correctly that the second change being suggested is on page 2 of Senate Resolution 61, and would strike the words "the amount of time specified in the preceding sentence"?

Mr. ROBERT C. BYRD. It would not strike the article "the". It would strike "amount of time specified in the preceding sentence," and would substitute "100 hours."

Mr. McCLURE. It would then read "The 100 hours may be increased or decreased".

Mr. ROBERT C. BYRD. That is the way it would read: "The 100 hours may be increased or decreased", and so on.

Mr. McCLURE. Mr. President, I think the first change, that which occurs on page 1, line 4, is a clarifying amendment, and under the substitute which the Senator from Alaska has sent to the desk on behalf of the ad hoc committee considering this matter, this would also be a means by which the 100 hours might be decreased. I think that the change that is being suggested by the Senator from West Virginia is consistent with what both sides, all the parties negotiating, have been groping to achieve.

The change which is being suggested on the second page certainly can be read in connection with the change on the first page. I do not believe there is any objection from anybody on this side of the aisle. We accept the amendment as offered.

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

The amendment was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

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

The motion to lay on the table was agreed to.

UP AMENDMENT NO. 4

Mr. ROBERT C. BYRD. Now, Mr. President, I send an amendment to the desk which would do the following: On page 2, line 3, of Senate Resolution 61, beginning with the word, "or", strike all through and including the word, "at", on line 6. It would insert in lieu thereof the words, "or at".

On page 2, line 7, it would strike the word, "any" and the word "reduced", and would substitute for the word "any" the word "the", and for the word "reduced", the word, "decreased".

Let me read the resolution, that portion thereof that is affected, as it now reads in the resolution, having been amended a moment ago:

The 100 hours may be increased, or decreased (but to not less than 10 hours), by the adoption of a motion, decided without debate, by a three-fifths affirmative vote of the Senators duly chosen and sworn. At any time after 10 hours of consideration any remaining time may be reduced, but to not less than 10 hours, by the adoption of a motion,

Et cetera.

I propose to change that by my amendment so it will read as follows:

The 100 hours may be increased, or at any time after 10 hours of consideration, the remaining time may be decreased, but to not less than 10 hours, by the adoption of a motion, decided without debate,

And so on.

Why do I do this? The reason is as follows: As the verbiage now reads, the amount of time—the 100 hours—can be decreased, but to not less than 10 hours.

Then it goes on to say that at any time after 10 hours of consideration, the remaining time may be decreased.

As the language now reads, I think it is possible that the moment cloture is invoked, a motion could be made to decrease the time from 100 to 10 hours, and if that motion is supported by a three-fifths affirmative vote, 10 hours is all there is for debate.

I do not mean to do that. I want at least 10 hours of consideration before that motion can be made.

So that is the purpose of my amendment.

Mr. McCLURE. Will the Senator yield?

Mr. ROBERT C. BYRD. Which would provide that the 100 hours may be increased at any time, but that only after 10 hours of consideration could a motion be made to decrease the remaining time, and then to not less than 10 additional hours.

Mr. SARBANES. Will the majority leader yield on that?

Mr. ROBERT C. BYRD. Yes, I yield.

Mr. SARBANES. I take it this would mean that there would be, in effect, even if this process were invoked, 20 hours as the absolute minimum. In other words, 10 hours as it is now; only then, as I

understand it, it is subject to the interpretation that a motion to decrease could be made immediately, and then there would be 10 hours.

Mr. ROBERT C. BYRD. Yes.

Mr. SARBANES. Then that would be the end of it.

Mr. ROBERT C. BYRD. Yes.

Mr. SARBANES. The change would preclude that motion from being made until 10 hours had expired.

Mr. ROBERT C. BYRD. Exactly.

Mr. SARBANES. And then the motion could only decrease down to an additional 10 hours. So it guarantees 20 hours at a minimum. Is that correct?

Mr. ROBERT C. BYRD. Precisely. The Senator has stated in 60 seconds that which took me 5 minutes to say and it is exactly the intent of the amendment.

Mr. SARBANES. I think that is very considerate on the part of the majority leader in terms of further insuring a significant amount of time postcloture.

This is after cloture?

Mr. ROBERT C. BYRD. Yes.

Mr. SARBANES. Postcloture for the consideration of the measure, because it would insure 20 rather than 10 hours.

Mr. ROBERT C. BYRD. Yes. I thank the Senator.

Mr. McCLURE addressed the Chair.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. McCLURE. Mr. President, certainly, on behalf of the minority, we have no objection to the amendment. However, we would, I think, like to indicate at this time that at this point we may begin to register some objection and we may have further amendments to offer later in addition to the substitute which has been lodged at the desk.

I say now that our acceptance of the amendment should not be implied as an acceptance of the proposition that a three-fifths vote can limit the debate to 20 hours.

There are many of us who feel that that is unduly restrictive and unduly limits the guarantees to individual Members, and whatever the minority group might be, grouping within the Senate, with respect to the right to debate or offer amendments even in a postcloture situation.

But we have no objection to the amendment and, for our part, will accept it with that understanding.

Mr. ROBERT C. BYRD. I thank the distinguished Senator.

Mr. President, I send the amendment to the desk and ask that it be stated so it will be in the RECORD.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from West Virginia (Mr. ROBERT C. BYRD) proposes an unprinted amendment numbered 4.

On page 2, line 3, beginning with the word "or", strike all through and including the word "At" on line 6 and insert the words "or at".

On page 2, line 7, strike "any remaining time may be reduced" and insert in lieu thereof: "the remaining time may be decreased".

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

The amendment (UP No. 4) was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

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

The motion to lay on the table was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I will be glad to yield to any other Senator who has an amendment to offer. I want to demonstrate in every possible way my total fairness, objectivity, reasonableness, and sweetness; so if any Senator wishes to offer an amendment, I will yield.

If not, I think we are making great progress.

I have so many goodies here that I am hard put to determine which should be called up first.

UP AMENDMENT NO. 5

Mr. ROBERT C. BYRD. Mr. President, the next amendment I shall offer is one which will demonstrate beyond any peradventure of a doubt that the majority leader really wants to do the right thing always and be fair to those who oppose a measure on which cloture has been invoked.

It would add at the end of the resolution a new paragraph which would provide for conforming changes to be made to changes ordered prior to the reprinting of a bill, after cloture has been invoked, such conforming changes to be limited to lineation and pagination; and that is just what the distinguished Senator has been talking about here a moment ago.

The Senate might proceed to invoke cloture, as it does from time to time, and after cloture has been invoked amendments which were in order prior to the reprinting of a bill no longer are in order because the pages had been changed, or the numbers of the lines had been changed. In that case, through no fault of his own, a Senator who has dutifully followed the rules and had his amendments at the desk in writing, prior to the invoking of cloture and the announcement of such by the Chair, is automatically ruled out. He cannot call up his amendment.

So I will correct that, if the Senate will adopt this amendment, which I now send to the desk, and I ask that it be stated by the clerk.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from West Virginia (Mr. ROBERT C. BYRD) proposes an unprinted amendment numbered 5:

At the end of the resolution, add a new paragraph as follows:

"If, for any reason, a bill is reprinted after cloture has been invoked, amendments which were in order prior to the reprinting of the bill will continue to be in order and may be conformed and reprinted at the request of the amendment's sponsor. The conforming changes must be limited to lineation and pagination."

Mr. McCLURE. Mr. President, will the Senator from West Virginia yield for a question?

Mr. ROBERT C. BYRD. I yield.

Mr. McCLURE. Mr. President, this tracks very closely what the ad hoc committee had discussed, which is contained also in the substitute offered by the Senator from Alaska, with one difference; and I wonder where the Senator from West Virginia might consider that one difference.

After some discussion, we had deleted the provision that restricts it to pagination and lineation, for the reason that sometimes an amendment or a substitute may change the words, may change the order or structure of a sentence, but not change the meaning, but technically an amendment that might have repeated the original structure or ordering of that sentence would then be out of order.

For that reason, we deleted that reference to lineation and pagination but left in the provision that it can be only a conforming change, a change to conform the amendment to the structure of the bill as it then stands before the Senate.

There are two reasons for this: First of all, if it occurs early, you may have to submit a multiplicity of amendments, trying to anticipate the changes. Second, once cloture has been invoked, you cannot thus amend.

I think it just carries forth the intention the Senator from West Virginia is expressing, without opening it to any kind of mischief.

Mr. ROBERT C. BYRD. I am afraid it would do just that. It would open it up to mischief. It is too ambiguous and too vague, and I think the interpretations and constructions of such an amendment could vary from pole to pole.

We have been going along for years without what I have offered, and Senators simply were just out of luck if the bill were reprinted; and sometimes it was done intentionally so that amendments would be out of order.

By offering this amendment, we correct an obvious inequity. There can be no ambiguity about this. It is clear as to what it does and what it means. I am afraid that to go beyond that, we might open up some other doors. Therefore, I would not want to modify my amendment to include the suggestion offered by the able Senator.

Mr. McCLURE. Mr. President, although I am saddened by the failure of the spirit of comity that had so far enveloped these proceedings this afternoon, to the extent of this modest change I have suggested, it certainly would not be my intention to object to the adoption of the amendment. It goes a long way toward answering one of the serious questions that has been involved, and it is a step in the effort to be fair to all Members in the post-cloture situation.

So I will not object to the amendment. But I do hope that before we have completed the consideration of this matter, the Senate may again—and perhaps, indeed, even the Senator from West Virginia may again—take a look at that proposal, with a view either to finding a way to avoid the mischief which he perceives or to agreeing that it does not have that degree of mischief in it. We will not at this time pursue the matter

further, but we have no objection to the adoption of the amendment.

Mr. ROBERT C. BYRD. I thank the Senator.

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

The amendment was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

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

The motion to lay on the table was agreed to.

Mr. ROBERT C. BYRD. Mr. President, if any Senator wishes to call up an amendment, I will be glad to yield the floor.

For the time being, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. 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.

UP AMENDMENT NO. 6

Mr. ROBERT C. BYRD. Mr. President, the amendment I am about to offer, I think, is a good one which should be accepted.

There are those who say that, in view of the fact that the resolution would put a 100-hour cap on a measure or a motion or other matter on which cloture has been invoked, in view of the fact that time for quorum calls and rollcall votes and so on would come out of the 100 hours, lo and behold, at the end of 100 hours there may be a Senator who has been seeking recognition all of this time and he would be denied recognition because the clock would have run its course, the 100 hours would have passed, the sands in the hourglass would all have dropped into the pyramid, and the poor fellow would be left without recourse, 100 hours are gone. Someone thoughtlessly chewed up part of it with quorum calls and rollcall votes. And here is this poor junior Senator from West Virginia, who has been standing on his feet all this time, all that 100 hours, seeking recognition, and he never could get it because the Chair continued to recognize only members of the majority party or only certain Senators there within the party, or certain Senators on either side of the aisle or on one side.

Theoretically, that is correct. In theory that could happen. But in practice I cannot conceive of its happening. I just cannot conceive of its happening.

I think it was ascertained here recently that the maximum number of Senators ever to seek recognition to seek to use their hour after cloture was invoked was something like 27.

So I cannot conceive of a situation in which, cloture having been invoked on a matter, the 100 Senators would desire to use the hour to which each of the 100 Senators was entitled.

Nor can I conceive of any Presiding Officer who would consistently refuse to recognize a Member of the Senate on either side of the aisle who had not been accorded recognition.

On one occasion I was critical of the Vice President, a member of my own party who sat in the chair, because he did not recognize the minority leader. And I think I unduly criticized him. I thoughtlessly took advantage of the fact that the Vice President could not defend himself without permission of the Senate to do so. And I expressed my regrets later to the Vice President for that fact and said if it ever happened again I would try to get unanimous consent of the Senate for the Vice President to speak to explain his position.

On another occasion the distinguished senior Senator from Louisiana criticized the Vice President of the United States at that time, the late Nelson Rockefeller, because the Vice President declined to recognize the late able Senator from Alabama (Mr. Allen).

So there are those on both sides, certainly, on this side of the aisle. I cannot say that any Member on the other side of the aisle would defend my right to recognition, but I have defended theirs from time to time, and I think that in the spirit of fairness that exists in the Senate, on which really the operation of the Senate basically rests, the spirit of comity and fairness would always guarantee that a Member of the Senate would get recognition.

The Chair has discretion in the recognition of Senators. Although he is required by the rules to recognize the first Senator who shall address the Chair, it is within his discretion to decide who is the first Senator to address the Chair. When several Senators address the Chair simultaneously, the Chair has the discretion, and that discretion cannot be appealed.

But I cannot envision unfairness on the part of the Chair in refusing to recognize a Senator who repeatedly stands on his feet and seeks to get recognized.

Now, conceivably 100 hours could go by and a Senator might have had a few of his amendments acted upon and he might still have an amendment remaining, in which case my resolution provides for an extension of the 100 hours if three-fifths of the Senators, the same number who invoke cloture, vote to extend the time; so there is that escape valve. And if it is noted that the distinguished Senator from Idaho (Mr. McCLURE) has been seeking recognition and he has had one amendment acted upon, he has had two amendments acted upon, he has had a half-dozen acted upon, or he has had none and he has tried to get recognition time and time again and he could not get it, and 100 hours are up, then 60 Senators in this body are going to be fair and they are going to extend that time, if it is only for an hour, so he can call up his amendment, and that provision is in my resolution.

So every Senator is going to get his chance.

I cannot envision a time when the 100 hours would be run and a Senator would not have had an opportunity to call up his legitimate amendments. Now if he has 500 amendments at the desk, or 1,000, and has his staff cranking out 500 more with the promise that after those 500 are produced there will be 500 more, then I can envision 100 hours going by and he will not have an opportunity to call up his 2,000 amendments.

But I do not think there is any rule of equity, justice, and fairness that would require that the Senate have to undergo that kind of trial and tribulation in any event, and that is just what we are trying to get away from here now.

So, to meet that theatrical hypothesis that some Senators have conjured up, I offer the following amendment, which says that no Senator shall call up more than two amendments until every other Senator shall have had the opportunity to do likewise.

This would give every Senator a chance to call up two amendments. He could not call up any more; and if another Senator wanted recognition, that Senator seeking recognition would be able to call up his amendment. And if no other Senator sought recognition, then the same Senator who had just called up two amendments and had them disposed of could call up another one. It at least gives other Senators a chance also to call up their amendments.

So, Mr. President, I send that amendment to the desk and ask that it be stated by the clerk.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from West Virginia (Mr. ROBERT C. BYRD) proposes an unprinted amendment numbered 6.

At the end of the resolution, add a new paragraph as follows:

"No Senator shall call up more than two amendments until every other Senator shall have had the opportunity to do likewise."

Mr. McCLURE. Mr. President, I wonder if the Senator from West Virginia might illustrate what he thinks procedurally will happen, how this provision will be procedurally handled. Would it be the expectation of the Senator from West Virginia that a Member who has had two amendments called up and acted upon, and then seeks recognition, could not be recognized, if there were any other Senator in the Chamber who had not had two amendments offered and acted upon and was then seeking recognition?

Mr. ROBERT C. BYRD. He could not be recognized to call up another amendment at this point.

Mr. McCLURE. Yes. But it would not entail the necessity of some procedural method to determine whether or not some other Senator wished to call up another amendment.

Mr. ROBERT C. BYRD. No.

Mr. McCLURE. It would simply depend upon whether or not there was some Senator in the Chamber——

Mr. ROBERT C. BYRD. Exactly.

Mr. McCLURE. Seeking recognition which would be the qualification.

Mr. ROBERT C. BYRD. Precisely.

If the Senator from Idaho called up two amendments one after the other and they were disposed of, he would not be required, and no one would be required, to put in a quorum call or a call on the cloakroom lines to find out if Senator

RANDOLPH, my senior colleague, or Senator BYRD of West Virginia wants to call up an amendment.

If Senator RANDOLPH wants to call up an amendment or Senator ROBERT C. BYRD wants to call up an amendment, let them be here to call it up.

Mr. McCLURE. If the Senator had two amendments acted upon and was seeking to offer a third amendment, and there was no other Senator seeking recognition for the purpose of calling up an amendment, he could do so without delay?

Mr. ROBERT C. BYRD. Exactly. The other Senators would have slept on their rights. Presumably no other Senator would be on the floor ready to call up an amendment, so the Senator from Idaho, having had two amendments called up and acted upon, and seeking to call up another amendment, could not call up that amendment until Senator MOYNIHAN, who might be seeking recognition, could call up his amendment. Then after that amendment of Senator MOYNIHAN's was acted upon, and he did not have any other amendment and sat down, if no other Senators sought recognition then the Senator from Idaho could seek and gain recognition and call up a third amendment.

It would prevent a Senator from hogging the floor, calling up amendment after amendment after amendment without other Senators having a chance to get their amendments acted upon.

Mr. McCLURE. Mr. President, I will not object to the amendment. I do have one concern in my mind. If the bill is a long bill and if at that time we are still going through the bill section by section, ordinarily if you get to the cloture provision and the bill is open for amendment at any point, my only concern would be if, as a matter of fact, you are still proceeding through the bill sequentially, an individual Member's major concern might be to a section that is late in the bill, and that might be the one he wants to call up first, but he would have to wait until everybody else in the Chamber had had their say on the earlier sections before he could ever offer his amendment.

I suspect that may be nearly academic; that probably in every instance when we are in a cloture condition the Member could pick the amendment regardless of where it lies within the bill, and in that manner be able to choose the amendment in which he is most interested regardless of where it may occur in the bill; and if that latter is the practical method, then I do not think there is any real problem. But I can see where there might be if the other situation were in effect.

Mr. ROBERT C. BYRD. I think it would be the practical situation that would obtain as a general rule, and if the Senate is proceeding section by section I do not think he would be any worse off than he is at the present time.

Mr. McCLURE. He would be worse off from the standpoint that he would not dare offer his less important amendments because he would be subject to the invocation of this rule by the time they got to the section that was of most importance to that individual Member, and it might preclude him from offering other amendments in which he was very much interested, but he had to reserve his time and his rights until we get to the end the bill, and then he would be under very—he would be in a very hard dilemma as to when he might offer what amendments, and in what order, because once having offered two he is subject to a rule that he was not subject to before he offered the two amendments.

As I say, that may be academic. However, I can perceive of a time when it may indeed become restrictive, and it may be that with some thought we could find a way around that in the post-cloture situation.

I certainly, for one, will be trying to consider that in the next few days and before we get back on the 19th to continue the amending of this provision.

Mr. ROBERT C. BYRD. Mr. President, I thank the Senator. I do not envision a problem, but I certainly will continue to also think about it, and if it develops that there seems to be a problem I will certainly give consideration to any suggestions to ameliorate it.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from West Virginia.

Mr. McCLURE. Mr. President, without prolonging the discussion, a couple of things have crossed my mind as to the way in which we could do that. After 50 hours of time have elapsed on the measure, that it would be in order to offer an amendment to any section of the bill even though otherwise we would be proceeding through the bill section by section, or something of that nature, so that if you cannot get down to the very end of the time still going through the bill section by section, still not having arrived at the section in which the Senator is really interested, that might be the remedy. The whole 100 hours could have been consumed without ever having gotten to the section of the bill in which the Senator is most interested.

Mr. ROBERT C. BYRD. Mr. President, I do not see——

The PRESIDING OFFICER. Will the Senator have the kindness to withhold? The Chair, for the edification of the Senator from Idaho, and not to lecture but to make the observation, would like to state that it is not normally the practice of the Senate to proceed sequentially on a bill, section by section, save for committee amendments. To do so otherwise requires unanimous consent, and since the normal practice is to amend where it will in whatever order amendments come forward after the committee amendments have been acted upon, the Chair does not see any problem.

I thank the Senator for his courteous attention to the Chair.

Mr. McCLURE. I thank the Chair for his observation. As I said, it may be academic, and maybe it will not occur.

The PRESIDING OFFICER. The Senator is quite correct; he did say that.

Mr. ROBERT C. BYRD. I was just going to say——

The PRESIDING OFFICER. If the Chair could interrupt the Senator once more, the Parliamentarian wishes to make a point that on treaties as in the Committee of the Whole, the matter is taken up section by section for amendment.

Mr. ROBERT C. BYRD. I was going to say just what the Chair said, although not as well and not as articulately, that normally we do not proceed section by section except in dealing with committee amendments unless by unanimous consent resorted to otherwise. But in the case of treaties, there would be that problem.

May we have a vote on the amendment?

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from West Virginia.

The amendment was agreed to.

Mr. ROBERT C. BYRD. Mr. President, we are making such splendid progress that I am going to run out of amendments at this rate.

The PRESIDING OFFICER. Is the Senator going to move its reconsideration?

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

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

The motion to lay on the table was agreed to.

Mr. ROBERT C. BYRD. Mr. President, I suggest the absence of a quorum for the moment before deciding on whether to call up another amendment.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. 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.

Mr. ROBERT C. BYRD. Mr. President, I had expected such violent opposition to the amendments I have called up, I am really somewhat taken aback by the speed with which the Senate has accepted what I had considered to be excellent amendments.

Mr. McCLURE. Will the Senator yield?

Mr. ROBERT C. BYRD. Yes.

Mr. McCLURE. We are trying to illustrate our good faith and our desire to accommodate, our desire to find a solution. We want to demonstrate that. The Senator from West Virginia has certainly demonstrated his measure of sweetness in his disposition on a matter of this kind.

Mr. ROBERT C. BYRD. Mr. President, I stand at this time helpless and almost speechless.

RECESS FOR 30 MINUTES

Mr. President, I ask unanimous con-

I stand at this time helpless and almost

that the Senate stand in recess for 30 minutes.

There being no objection, the Senate, at 2:57 p.m., recessed until 3:27 p.m.; whereupon the Senate reassembled when called to order by the Presiding Officer (Mr. ROBERT C. BYRD).

COMMUNICATIONS

The ACTING PRESIDENT pro tempore laid before the Senate the following communications, together with accompanying reports, documents, and papers, which were referred as indicated:

EC-500. A confidential communication from the Assistant Secretary of Defense, International Security Affairs, transmitting, pursuant to law, a report on NATO country defense expenditures for 1978, planned expenditures for 1979, and the percent of real change indicated for the 1978-79 period; to the Committee on Armed Services.

EC-501. A secret communication from the Comptroller General of the United States, transmitting, pursuant to law, a report on the major issues of the antisatellite weapon system being developed by the Department of Defense; to the Committee on Armed Services.

EC-502. A communication from the Assistant Secretary of the Army (Manpower and Reserve Affairs), transmitting a draft of proposed legislation to amend title 37, United States Code, to authorize family separation allowances for members in the pay grade of E-4 and below with dependents; to the Committee on Armed Services.

EC-503. A communication from the Secretary of Transportation, transmitting a draft of proposed legislation to improve the protections afforded the public against risks associated with the transportation of hazardous commodities by pipeline; to the Committee on Commerce, Science, and Transportation.

EC-504. A communication from the chairman, Advisory Council on Historic Preservation, transmitting, pursuant to law, a report on the actual and potential effects of surface mining activities on nationally significant natural and historic landmarks; to the Committee on Energy and Natural Resources.

EC-505. A communication from the chairman, United States Nuclear Regulatory Commission, transmitting a draft of proposed legislation to authorize appropriations to the Nuclear Regulatory Commission in accordance with section 261 of the Atomic Energy Act of 1954, as amended, and section 305 of the Energy Reorganization Act of 1974, as amended, and for other purposes; to the Committee on the Environment and Public Works.

EC-506. A communication from the Assistant Legal Adviser for Treaty Affairs, Department of State, transmitting, pursuant to law, international agreements other than treaties entered into by the United States within 60 days after the execution thereof; to the Committee on Foreign Relations.

EC-507. A communication from the Assistant Secretary for Congressional Relations, Department of State, transmitting a draft of proposed legislation to authorize additional appropriations for the Department of State for fiscal year 1979; to the Committee on Foreign Relations.

EC-508. A communication from the Assistant Secretary for Congressional Relations, Department of State, transmitting a draft of proposed legislation to authorize appropriations for the Department of State for the fiscal years 1980 and 1981, and for other purposes; to the Committee on Foreign Relations.

EC-509. A communication from the Principal Deputy Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), transmitting, pursuant to law, a report on civilian positions in the Department allocated or places in grades GS-16, GS-17, and GS-18 during the calendar year 1978, and a report on positions established in the Department to carry out research and development activities requiring the services of specially qualified scientific or professional personnel; to the Committee on Governmental Affairs.

EC-510. A communication from the Governor of the Canal Zone, transmitting, pursuant to law, a report of disposal of foreign excess property (including plant retirements due to age and obsolescence) by the Panama Canal Company and Canal Zone Government for the fiscal year ended September 30, 1978; to the Committee on Governmental Affairs.

EC-511. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "Marine Amphibious Forces: A Look at Their Readiness, Role, and Mission," February 6, 1979; to the Committee on Governmental Affairs.

EC-512. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "Early Childhood and Family Development Programs Improve the Quality of Life for Low-Income Families," February 6, 1979; to the Committee on Human Resources.

EC-513. A communication from the Secretary of Health, Education, and Welfare, transmitting, pursuant to law, the first of four bimonthly reports on the progress of the Influenza Immunization Program; to the Committee on Human Resources.

EC-514. A communication from the chairperson, National Commission on Digestive Diseases, transmitting, pursuant to law, a report on the use and organization of national resources to effectively deal with digestive diseases; to the Committee on Human Resources.

EC-515. A communication from the Comptroller General of the United States, transmitting, pursuant to law, a report entitled "Correctional Institutions Can Do More to Improve the Employability of Offenders," February 6, 1979; to the Committee on the Judiciary.

EC-516. A communication from the Commissioner, Immigration and Naturalization Service, Department of Justice, transmitting, pursuant to law, orders entered in 1,094 cases in which the authority contained in section 212(d)(3) of the Immigration and Nationality Act was exercised in behalf of such aliens; to the Committee on the Judiciary.

PETITIONS

The ACTING PRESIDENT pro tempore laid before the Senate the following petitions and memorials, which were referred as indicated:

POM-39. A joint resolution adopted by the Legislature of the State of California; to the Committee on Foreign Relations:

"ASSEMBLY JOINT RESOLUTION NO. 7

"Whereas, It is a reprehensible policy that would assume that the moral obligation for the mass murder of over 11,000,000 innocent victims of the "Holocaust" can be eliminated by the passage of time; and

"Whereas, The statute of limitations of the German Federal Republic relating to Nazi war criminals is scheduled to expire on December 31, 1979; and

"Whereas, If such statute of limitations does expire, no investigation of murder, including genocide, committed by Nazi war criminals can be initiated after that date; and

"Whereas, If such statute of limitations does expire, thousands of Nazi war criminals who were actively involved in the calculated and brutal mass murder of millions of innocent victims will be rewarded for having evaded justice; and

"Whereas, Crimes of lesser horror than mass murder and genocide are subject to no statute of limitations either in California or in numerous other jurisdictions; and

"Whereas, It is in the interest of all free people that new generations not be allowed to forget the dangers and consequences of the crime of genocide; and

"Whereas, An international campaign to convince the German Federal Republic to eliminate or extend the current statute of limitations has been initiated by a broad base of concerned organizations and individuals; now, therefore, be it

"Resolved by the Assembly and the Senate of the State of California, jointly, That the Government of the United States urge the German Federal Republic and the legislators of that nation to abolish or extend the statute of limitations relating to Nazi war crimes; and be it further

"Resolved, That the Legislature requests that the President and Secretary of State of the United States communicate the contents of this resolution on behalf of the people of California to the following officials of the German Federal Republic: the President, the Chancellor, the Ambassador to the United States, Chief Justice of the Supreme Court, and the national legislators; and be it further

"Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the President of the United States, to the Secretary of State, to the Speaker of the House of Representatives, to the Majority Leader of the Senate, to the Chairman, Senate Foreign Relations Committee, to the National Security Council members, and to each Senator and Representative from California in the Congress of the United States."

REPORTS OF COMMITTEES

The following reports of committees were submitteed:

By Mr. CRANSTON, from the Committee on Veterans' Affairs, without amendment:

S. Res. 66. An original resolution authorizing additional expenditures by the Committee on Veterans' Affairs for inquiries and investigations. Referred to the Committee on Rules and Administration.

FOREIGN CURRENCY REPORTS

In accordance with the appropriate provisions of law, the Secretary of the Senate herewith submits the following reports of standing committees of the Senate, certain joint committees of the Congress, delegations and groups, and select and special committees of the Senate, relating to expenses incurred in the performance of authorized foreign travel:

CONSOLIDATED REPORT OF EXPENDITURE OF FOREIGN CURRENCIES AND APPROPRIATED FUNDS FOR FOREIGN TRAVEL, COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY, EXPENDED BETWEEN JAN. 1 AND DEC. 31, 1978

Name and country	Name of currency	Per diem		Transportation		Miscellaneous		Total	
		Foreign currency	U.S. dollar equivalent or U.S. currency [1]	Foreign currency	U.S. dollar equivalent or U.S. currency [1]	Foreign currency	U.S. dollar equivalent or U.S. currency [1]	Foreign currency	U.S. dollar equivalent or U.S. currency [1]
Senator S. I. Hayakawa: Japan	Yen	148,020	784.00	307,178	1,627.00			455,198	2,411.00
Elvira Orly: Japan	Yen	148,020	784.00	307,178	1,627.00			455,198	2,411.00
Nancy P. Foster: Japan	Yen	148,020	784.00	257,712	1,365.00			405,732	2,149.00
Nelson C. Denlinger: Japan	Yen	143,465	759.87	257,712	1,365.00			401,177	2,124.87
Phillip L. Fraas: Japan	Yen	135,370	717.00	257,712	1,365.00			393,082	2,082.00
Douglas Jackson: Switzerland	German marks	921.05	545.00	1,206.15	713.69			2,127.20	1,258.69
Total			4,373.87		8,062.69				12,436.56

[1] If foreign currency is used, enter U.S. dollar equivalent; if U.S. currency is used, enter amount expended.

HERMAN E. TALMADGE,
Chairman, Committee on Agriculture, Nutrition, and Forestry.

Dec. 29, 1978.

CONSOLIDATED REPORT OF EXPENDITURE OF FOREIGN CURRENCIES AND APPROPRIATED FUNDS FOR FOREIGN TRAVEL, COMMITTEE ON ENERGY AND NATURAL RESOURCES, EXPENDED BETWEEN JAN. 1 AND DEC. 31, 1978

Name and country	Name of currency	Per diem		Transportation		Miscellaneous		Total	
		Foreign currency	U.S. dollar equivalent or U.S. currency [1]	Foreign currency	U.S. dollar equivalent or U.S. currency [1]	Foreign currency	U.S. dollar equivalent or U.S. currency [1]	Foreign currency	U.S. dollar equivalent or U.S. currency [1]
Senator James Abourezk:									
Japan	Yen	18,113	75.00	642	2.66			18,755	77.66
People's Republic of China	Dollar		975.00						975.00
Transportation					[2] 2,897.40				2,897.40
Senator James A. McClure:									
United Kingdom	Pounds	38.26	75.00					38.26	75.00
Libya	Dinars	110.400	375.00					110.400	375.00
Saudi Arabia	Riyals	778.50	225.00					788.50	225.00
Michael D. Hathaway:									
United Kingdom	Pounds	76.13	150.00					76.13	150.00
Libya	Dinars	110.400	375.00					110.400	375.00
Saudi Arabia	Riyals	778.50	225.00					778.50	225.00
Senator Henry M. Jackson:									
Japan	No currency used								
People's Republic of China	Yuan eq	1,014.60	[3] 600.00					1,014.60	600.00
Transportation					1,853.40				1,853.40
Grenville Garside:									
Japan	Yen	11,980	49.97					11,980	49.97
People's Republic of China	Yuan eq	1,014.60	[3] 600.00					1,014.60	600.00
Transportation					1,853.40				1,853.40
Daniel A. Dreyfus:									
Japan	Yen	14,460	60.32					14,460	60.32
People's Republic of China	Yuan eq	1,014.60	[3] 600.00					1,014.60	600.00
Air travel					1,853.40				1,853.40
Winfred O. Craft, Jr.:									
Geneva, Switzerland	Franc	885.05	450.00					885.05	450.00
							27.00		27.00
Air travel					751.00				751.00
D. Michael Harvey:									
Geneva, Switzerland	Franc	737.55	375.00					737.55	375.00
							23.80		23.80
Air travel					751.00				751.00
Grenville Garside:									
England	Pound	224.44	442.16					224.44	442.16
France	Franc	1,891.25	445.00					1,891.25	445.00
Air fare					883.40				883.40
David L. Swanson:									
England	Pound	179.55	353.71					179.55	353.71
France	Franc	2,269.50	534.00					2,269.50	534.00
Germany	Deutsche mark	487.05	255.00					487.05	255.00
Air fare					936.60				936.60
Willis D. Smith:									
England	Pounds	179.55	353.71					179.55	353.71
France	Francs	2,269.50	534.00					2,269.50	534.00
Germany	Deutsche marks	487.05	255.00					487.05	255.00
Air fare					936.60				936.60
Harris N. Miller:									
Egypt	English pounds	210.00	300.00					210.00	300.00
Air fare					[4] 441.00				441.00
Total			8,682.87		13,159.86			50.80	21,893.53

[1] If foreign currency is used, enter U.S. $ equivalent; If U.S. currency is used, enter amount expended.
[2] Via military aircraft, equivalent commercial rate.
[3] Includes travel within People's Republic of China.
[4] All other air fare and per diem paid by outside source.

HENRY M. JACKSON,
Chairman, Committee on Energy and Natural Resources.

Dec. 28, 1978.

CONSOLIDATED REPORT OF EXPENDITURE OF FOREIGN CURRENCIES AND APPROPRIATED FUNDS FOR FOREIGN TRAVEL BY MEMBERS AND EMPLOYEES OF THE U.S. SENATE. COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, EXPENDED BETWEEN NOV. 26 AND DEC. 17, 1978

Name and country	Name of currency	Per diem		Transportation		Miscellaneous		Total	
		Foreign currency	U.S. dollar eq ivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency
Heidi Boucher:									
Belgium	Belgian franc	6,712	222.00					6,712	222.00
Germany	Deutsche mark	712.17	369.00					712.17	369.00
Italy	Lira	255,300	300.00					255,300	300.00
Egypt	LE	262,000	375.00					262,000	375.00
United Kingdom	Pound	214.48	416.00					214.48	416.00
Netherlands	Guilder	347.50	168.00					348.50	168.00
					1,251.00				1,251.00

CONSOLIDATED REPORT OF EXPENDITURE OF FOREIGN CURRENCIES AND APPROPRIATED FUNDS FOR FOREIGN TRAVEL BY MEMBERS AND EMPLOYEES OF THE U.S. SENATE, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, EXPENDED BETWEEN NOV. 26 AND DEC. 17, 1978—Continued

Name and country	Name of currency	Per diem		Transportation		Miscellaneous		Total	
		Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency	Foreign currency	U.S. dollar equivalent or U.S. currency
Senator Mike Gravel:									
Belgium	Belgian franc	6,712	222.00					6,712	222.00
Germany	Deutsche mark	712.17	369.00					712.17	369.00
Saudi Arabia			542.00						542.00
Egypt	LE[1]	105,500	150.00					105,500	150.00
United Kingdom	Pound	155.47	301.00					155.47	301.00
Netherlands	Guilder	173.75	84.00					173.75	84.00
Morocco	Moroccan Dirham	1,800	450.00					1,800	450.00
					[1] 783.15				783.15
Total			3,968.00		2,034.15				6,002.15

[1] Amended report will be filed when State Department determines the balance of travel reimbursement due Senator Gravel.

Jan. 31, 1979.

Signed: JENNINGS RANDOLPH,
Chairman, Committee on Environment and Public Works.

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and the second time by unanimous consent, and referred as indicated:

By Mr. HAYAKAWA:

S. 386. A bill to amend and supplement the Federal reclamation laws relating to the furnishing of water service to nonexcess and excess lands; to the Committee on Energy and Natural Resources.

By Mr. STEVENS:

S. 387. A bill to amend title 5 of the United States Code to provide paid leave for a Federal employee participating in certain athletic activities as an official representative of the United States; to the Committee on Governmental Affairs.

By Mr. STEWART (for himself, Mr. NELSON, Mr. WEICKER, Mr. HATCH, and Mr. PRESSLER):

S. 388. A bill to promote the ownership of small businesses by their employees and to provide a means whereby employees can purchase their companies where the companies would otherwise be closed, liquidated, or relocated, and to assure that firms owned wholly or partly by their employees are eligible for all forms of assistance from the Small Business Administration; to the Select Committee on Small Business.

By Mr. TOWER:

S. 389. A bill to amend the Credit Control Act of 1969; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. METZENBAUM (for himself, Mr. KENNEDY, Mr. BAYH, Mr. LEAHY, Mr. MORGAN, and Mr. BAUCUS):

S. 390. A bill to expedite and reduce the cost of antitrust litigation, and for other purposes; to the Committee on the Judiciary.

By Mr. ROTH:

S. 391. A bill to limit the burden reporting requirements placed on small businesses, to provide for the pilot testing of reporting forms issued or required by the Federal Government, to establish procedures for the reduction of the reporting burden upon small businesses on a continuing basis, and for other purposes; to the Committee on Governmental Affairs.

By Mr. COHEN (for himself and Mr. HATFIELD):

S. 392. A bill to provide that polling and registration places for elections for Federal office be accessible to physically handicapped and elderly individuals, and for other purposes; to the Committee on Rules and Administration.

By Mr. DOMENICI:

S. 393. A bill to amend the Railroad Retirement Act of 1974 with respect to annuities for widows and widowers of certain railroad employees; to the Committee on Human Resources.

By Mr. MOYNIHAN (for himself and Mr. JAVITS):

S. 394. A bill to amend the definition of employee for certain purposes of the Internal Revenue Code; to the Committee on Finance.

By Mr. CHILES (for himself, Mr. DOMENICI, Mr. DOLE, Mr. GLENN, Mr. BRADLEY, Mr. PRYOR, and Mr. COHEN):

S. 395. A bill to require studies and recommendations from the Department of Health, Education, and Welfare with respect to health insurance sold as a supplement to Medicare, to provide penalties for certain sales practices, and for other purposes; to the Committee on Finance.

By Mr. DOLE (for himself and Mr. MCGOVERN):

S. 396. A bill to amend the Internal Revenue Code of 1954 to exempt farm trucks and soil and water conservation trucks from the Highway Use Tax; to the Committee on Finance.

By Mr. MOYNIHAN:

S. 397. A bill to amend the Internal Revenue Code of 1954 to recognize and define theatrical production organizations, to allow cost recovery accounting for theatrical production organizations, to allow the investment tax credit for theatrical production costs, to provide for capital gain treatment upon sale of certain theatrical production rights, to allow for limited nonrecognition of gain realized or income derived by a theatrical production organization, and to provide for capital gain treatment for sales by authors of first theatrical production rights and the initial subsequent sale of ancillary rights; to the Committee on Finance.

By Mr. CHILES (for himself, Mr. STONE, and Mr. BUMPERS):

S. 398. A bill to amend section 8e of the Agricultural Adjustment Act, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, to subject imported tomatoes to restrictions comparable to those applicable to domestic tomatoes; to the Committee on Agriculture, Nutrition, and Forestry.

By Mr. DOLE (for himself, Mr. PRESSLER, Mr. STEWART, Mrs. KASSEBAUM, and Mr. HAYAKAWA):

S. 399. A bill to amend the Federal Crop Insurance Act; to the Committee on Agriculture, Nutrition, and Forestry.

By Mr. SCHWEIKER:

S. 400 A bill to relieve the liability for the repayment of certain erroneously made contributions by the United States; to the Committee on the Judiciary.

By Mr. MOYNIHAN:

S. 401. A bill for the relief of the Manhattan Bowery Corporation, of New York, New York; to the Committee on Finance.

By Mr. RIEGLE:

S. 402. A bill for the relief of Samson Kossivi Kpadenou, M.D.; to the Committee on the Judiciary.

S. 403. A bill for the relief of Anita Tavares Dy; to the Committee on the Judiciary.

S. 404. A bill for the relief of Yaeko Howell; to the Committee on the Judiciary.

S. 405. A bill for the relief of Hun Sik Sanderson; to the Committee on the Judiciary.

S. 406. A bill for the relief of Luzbella Y. Imasa, M.D.; to the Committee on the Judiciary.

S. 407. A bill for the relief of Arnaldo Moreno, M.D.; to the Committee on the Judiciary.

By Mr. HELMS:

S. 408. A bill for the relief of Yasmeen Muredali Gillani and Aneela Gillani; to the Committee on the Judiciary.

S. 409. A bill for the relief of Muradali P. Gillani; to the Committee on the Judiciary.

By Mr. BAYH:

S. 410. A bill amending title 5 of the United States Code to improve agency rulemaking by expanding the opportunities for public participation, by creating procedures for congressional review of agency rules, and by expanding judicial review, and for other purposes; to the Committee on Governmental Affairs.

By Mr. HARRY F. BYRD, JR. (for himself and Mr. HELMS):

S.J. Res. 38. A joint resolution to amend the Constitution of the United States to mandate a balanced budget; to the Committee on the Judiciary.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. HAYAKAWA:

S. 386. A bill to amend and supplement the Federal reclamation law relating to the furnishing of water service to nonexcess lands; to the Committee on Energy and Natural Resources.

FAMILY FARM LIBERATION ACT OF 1979

Mr. HAYAKAWA. Mr. President, today I am introducing the Family Farm Liberation Act of 1979. This bill is intended to free our family farms from the entanglements of Federal intervention.

The main thrust of this bill is to allow American farmers the opportunity to operate their farms without Federal interference. This bill provides a buy-out provision, which may be chosen by individuals or by water districts. Any individual or water district would opt to own land in excess of the acreage limitation. They would agree to pay the full cost of the water. This would include costs of construction, the interest on that construction, and the costs of operation and

maintenance. At the time they agree to pay this unsubsidized cost of water they would be free from all limitations associated with reclamation law. They could own as much land as they wish, in order that these farmers can own and operate economically sound farm units, without the intervention of the Federal bureaucracy.

The Family Farm Liberation Act raises the acreage limitation from 160 acres to 320 acres per person, for those wishing to continue to receive Federal water subsidies. These recipients of the interest-free construction loans would be free from any residency requirement also. I do not think that the Government should have the right to tell people where they can or cannot live simply because they receive Federal moneys for water.

In addition, no person who owns land receiving Federal water subsidies shall be restricted in any way as to how much land they can lease. There has never been any leasing restriction written into any of the Federal reclamation laws currently on the books, and I see no reason to begin now. The Secretary of the Interior, in publishing reclamation regulations in the spring of 1977 took great liberty in including leasing limitations in them. This is a great example of Federal bureaucrats establishing new policy through regulation, policy that was never intended by law. This is why we need a buy-out provision in Federal reclamation law.

This bill I am presenting is very simple—it is intended to liberate our family farms from entanglements with the Federal bureaucracy. I believe that American agriculture is the backbone of this country. Our farms should be able to operate on a free enterprise basis.

Over the last few decades, we have gotten carried away in Washington. Every day the Federal Register publishes many new regulations. Each Federal agency has so many new rules and regulations that it is almost impossible to keep up with them. We need to start heading in a new direction, one of less government. Most bureaucrats are in the habit of keeping themselves in business, promoting new regulations that their agency can enforce. We need to turn this trend around and take control of this regulatory process, which has long been out of hand.

I want to make it clear that under my bill, any individual who wishes to continue owning 320 acres or less is entitled to continue to receive federally subsidized water. That person is free to operate his land in any way he wishes, including in partnership with another farmer or group of farmers. Members of that person's family would also be entitled to 320 acres each of land receiving federally subsidized water.

The equivalency provision in this bill will allow owners to less productive land to make up for that inequity in terms of an increased acreage allotment. This equivalency provision would take into account all factors affecting productivity. These include topography, soil characteristics, adequacy of water supply, crop adaptability, costs of crop production, and length of growing season. Through this provision I hope to make the factors more equal for those who choose to remain under an acreage limitation.

This bill allows people to voluntarily pay the full cost of water, and at the same time free themselves from Federal intervention. They would be free to operate their farms as free enterprise businesses. The idea for this legislation is not brandnew—in fact this philosophy of the buy-out provision has been discussed for over 10 years. In 1968 a committee appointed by Governor Reagan issued a report which advocated the idea of taking away water subsidies in return for freeing farmers from the awesome regulations associated with reclamation law. The members of that Reagan committee are very distinguished members of society, and they deserve credit for their hard work on this subject.

We had hearings on reclamation law in the Senate last year, but many people did not have the opportunity to testify because of time constraints. I hope that this year the Senate Energy and Natural Resources Committee and the House Interior Committee will take the time to very carefully review all angles of this subject.

Up until now the administration has attempted to enforce regulations that would upset 75 years of established farming practices in the West, under the guise of enforcing reclamation law. We must recognize the fact that any Federal dollars spent on irrigation and other water projects are dollars well invested. Reclamation law reform is one of the most important issues to the people of California. I hope to see this issue addressed by the Senate this year.

By Mr. STEVENS:

S. 387. A bill to amend title 5 of the United States Code to provide paid leave for a Federal employee participating in certain athletic activities as an official representative of the United States; to the Committee on Governmental Affairs.

ATHLETIC OPPORTUNITIES ASSISTANCE ACT

Mr. STEVENS. Mr. President, in the last Congress, the distinguished former Senator from Minnesota, Hubert Humphrey, and I introduced a bill which provided leave time and flexible hours for Olympic athletes employed by the Federal Government. Hearings were held on the bill this past fall. At that time, the Civil Service Commission viewed the bill favorably, though they desired some minor modifications.

Today, I am introducing basically the same bill. It entitles an Olympic athlete credit for up to 90 days a year, in which he, as a member of the U.S. team, is preparing for or participating in world, Pan American or Olympic competition.

Until last year, our Government provided no financial support for U.S. teams in the Olympics. A great number of other nations have subsidized their athletic programs for years. The lack of funding has been one of the key impediments to a fully developed sports program.

My bill attempts to help resolve that problem. It does not provide direct Government subsidies. Rather, it gives Federal employees who are athletes the opportunity to continue to participate in major competitions. At the present time, if an individual takes a full-time job, he or she must often forego any serious athletic competition. Many of our college or even high school graduates who happen to graduate in a non-Olympic year must choose between participation in athletics or earning a living. We need to provide a way for athletes to work without foregoing the opportunity to represent the United States in international competition. The cost would be minimal. Testimony at the hearings stated that only one Federal employee would have been benefited by this bill for the 1976 Olympics.

Passage of this bill will certainly open up greater opportunities for a Federal employee to represent this Nation in Olympic competition. No longer will Federal employment bar the athlete from continuing his career in international amateur sports. We also hope passage of this bill will encourage private industry to assist our athletes in a similar fashion.

Mr. President, I ask unanimous consent to have the text of my bill printed in the RECORD.

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

S. 387

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Athletic Opportunities Assistance Act."

SEC. 2. (a) Subchapter II of chapter 63 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"SEC. 6327. ABSENCE WHILE REPRESENTING THE UNITED STATES IN CERTAIN COMPETITION

"(a) An employee (as defined in section 2105 of this title) is entitled to leave without loss of, or reduction in, pay, leave to which he is otherwise entitled, credit for time or service, or performance, or efficiency rating for each day, not in excess of 90 days in a calendar year, in which he, as a member of the United States team, is preparing for or participating in athletic competition on the world, Pan American or Olympic level in a sport which is contested in either Pan American or Olympic competition.

"(b) For purposes of subsection (a), the Term 'United States team' includes any coach or athlete who is a member of the official delegation of the United States to world, Pan American, or Olympic competition.

"(c) The Civil Service Commission is authorized to issue regulations for the administration of this section.".

(b) The table of sections for chapter 63 of such title is amended by adding at the end thereof the following new item:

"6327. Absence while representing the United States in certain athletic competition.".

By Mr. STEWART (for himself, Mr. NELSON, Mr. WEICKER, Mr. HATCH, and Mr. PRESSLER):

S. 388. A bill to promote the ownership of small businesses by their employees and to provide a means whereby employees can purchase their companies where

the companies would otherwise be closed, liquidated, or relocated, and to assure that firms owned wholly or party by their employees are eligible for all forms of assistance from the Small Business Administration; to the Select Committee on Small Business.

SMALL BUSINESS EMPLOYEE OWNERSHIP ACT

● Mr. STEWART. Mr. President, today, along with the distinguished chairman and ranking minority member of the Senate Select Committee on Small Business, and with the strong support of Senator RUSSELL LONG, I am pleased to introduce the Small Business Employee Ownership Act. The bill mandates that all of the assistance the Small Business Administration normally makes available under its 7(a) business loan program and 8(a) procurement assistance program will now also be made available to employee owned companies, companies with employee stock ownership plans (ESOP's) and trusts (ESOT's), and employee organizations which are seeking to purchase their companies when they would otherwise close, relocate, or be sold to an outside interest.

The bill is being introduced because the SBA current regulations discourage employee ownership of business. That is a major error in judgment, however, because employee ownership has been clearly shown to improve company profits and productivity, to provide a means for a retiring businessman to transfer his business, rather than be forced to liquidate it, and because employee purchase of businesses that would otherwise close or relocate has been a very successful and low-cost way to preserve jobs and community business activity. Under current SBA regulations, however, employee stock ownership trusts are ineligible for SBA assistance altogether, and employees seeking to buy their businesses through other financial devices find that they are subject to the same criteria that must be met by individual entrepreneurs—criteria such as individual assets and management experience. These criteria, except for a few employees, are totally inappropriate.

Employee ownership of business is a recent phenomenon, with the large majority of employee ownership plans having been established in this decade. There are now between 1,000 and 3,000 ESOP plans, and at least 100 companies in which a majority of the employees own a majority of the stock. Recently, researchers at the University of Michigan Survey Research Center found that companies wholly or partly owned by their employees were 1.5 times as profitable comparable conventionale firms. The more equity owned by employees, the higher the profits. They also confirmed the results of other studies showing that employee ownership leads to significant increases in productivity and worker satisfaction. Perhaps companies which were planning to close have been saved by employee purchase. According to a Small Business Committee staff study, all of the new companies for which information is available are still in business, and many have become extremely profitable. The Federal Government has made 13 loans to these companies (generally under considerable pressure) and all are being repaid. In these cases, communities would normally have been subject to the costly trauma of a plant closing, and the Government would have been forced to pay unemployment insurance and possibly welfare, public works jobs funds, and a host of other program costs to ameliorate the effects of unemployment. Instead, employee initiative saved the companies, and the Government has not been forced to activate any of these programs. Employee ownership has provided a free enterprise, community based solution to a problem traditionally handled by big government. This is the kind of solution the country needs.

Many of the plant closings have been of subsidiaries of larger companies. Research has shown that many conglomerates purchase companies only to find later that they are not interested in one of the company's plants, or that the company, although profitable, is not returning enough on investment to make the effort worthwhile. In these and similar cases, the conglomerate simply shuts down the company, with little regard for the effects on the community. Yet these plants could continue in operation profitably, and probably would if locally owned. In other cases, lack of employee incentive or corporate mismanagement has made a company unprofitable, but once employee owned, the company returns to profitability. Plant closings and relocations are likely to increase in coming years, business analysts say, in response to the merger trend of the last decades. Employee ownership is one way to ease the impact of these changes.

Employee ownership also helps the small businessman who wants to retire or leave his company. After working a lifetime to build a company, it is tragic that in most cases small businessmen end up liquidating their firms because no buyer can be found, or because the tax problems of a sale are too great. Special tax provisions already in the law, however, provide a sound means for selling to employees—if the employees can get the money they need. By providing that assistance, the Government can help many sound small businesses stay prosperous. This bill also provides that loan guarantees can be made directly to the seller of a business when an installment sale is used, a provision that simply brings SBA policy up to date with current business practices.

Finally, employee stock ownership plans have, in at least a number of cases, proved to be a very effective way for businesses to raise capital. For well-capitalized firms this is not a problem, but it is for many smaller companies. The ESOP tool provides a means to raise the money and use the same dollars to create an employee benefit and employee incentive plan of proven merit.

Of course, the SBA will not be able to help large companies. About half the employee-owned firms are small, however, and a large number of ESOP companies are as well. SBA also should not assist company owners to dump unprofitable companies on their employees. The bill requires that a feasibility study be done to assure that the company can succeed, and it is on the basis of this study that the loan will be made. The individual assets of employees will not be a factor.

The bill also assures that companies or employee organizations receiving assistance under the program will become employee owned within a reasonable period of time and that all employees will have a chance to participate in the ownership plan. Stock must vest to all employees by the end of the loan. Stock distribution plans may not discriminate in favor of higher paid employees, and when stock is distributed according to salary, all amounts over $50,000 will be ignored.

Virtually all assistance under this program will be in the form of loan guarantees, since the main difficulty employees have is in convincing creditors that their idea is sound, Hopefully, in time, private credit sources will come to the realization that employee ownership works and the guarantees will no longer be needed. No new funds are appropriated under this act. No new agency is credited, and no new bureaucrats will be needed to run the program. Despite the modesty of the changes in the law, however, this program could save the Government millions in unemployment related programs. It could give credibility to an idea that has been proven to work. It could help small businesses and their employees, as well as the communities in which they are located. Frankly, I do not think there are any credible arguments against this proposal, and I urge its speedy passage.

I ask unanimous consent that the text of the bill, a summary of the bill, a section-by-section analysis, together with a copy of a summary of the staff study of this issue, be printed in the RECORD.

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

S. 388

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Small Business Employee Ownership Act".

SEC. 2. The Congress finds and declares that—

(1) employee ownership of firms has been shown to be a successful means of organizing an enterprise and that employee owned firms are likely to have greater productivity rates, better long-range prospects, greater employee and management job satisfaction, and broader distribution of the company's profits and equity than similar non-employee owned firms;

(2) employee ownership of firms provides a means for preserving jobs and business activity where they would otherwise be lost due to company closings, liquidations, or relocations;

(3) employee ownership of firms provides a means of keeping a small business small when it might otherwise be sold to a conglomerate or other large enterprise;

(4) employee ownership provides a means for creating a new small business from the sale of a subsidiary of a large business, when such a subsidiary would otherwise be closed, liquidated, relocated, or sold to another business;

(5) unemployment insurance programs, welfare payments, and job creation programs are less desirable and most costly for

both the government and program beneficiaries than loan programs to maintain employment in firms that would otherwise close, be liquidated, or relocate;

(6) the continued closing of small businesses or the sale of small businesses to conglomerates represents an undesirable and anti-competitive trend towards economic concentration;

(7) the slow growth in productivity in the United States contributes to inflation and balance-of-payments deficits;

(8) the present concentration of capital ownership has created too great a disparity between the very wealthy few and the low- and moderate-income majority; and

(9) by making and guaranteeing loans to employee stock ownership trusts or other employee organizations, the Small Business Administration could provide feasible and desirable methods for the transfer of all or part of a company's ownership to employees, by aiding employee organizations in purchasing small business concerns that would otherwise close, be liquidated, or relocate, or in purchasing subsidiaries of companies which would close, be liquidated, or relocate, and would, if independently owned, be small businesses.

SEC. 3(a). It is the purpose of this act to include as small business concerns any employee owned company which would otherwise be defined as small, or any employee organization, or employee stock ownership plan, established for the purpose of purchasing a business which, when purchased, would otherwise be defined as a small business, and to make such employee owned firms or employee organizations eligible for all assistance available to small business concerns as provided in the Small Business Act.

(b) It is the further purpose of this act to assure that a small business using an employee stock ownership plan which qualifies under the specifications as set forth in this act can obtain assistance from the Small Business Administration through an employee stock ownership trust.

(c) It is the final purpose of this act to assure that the Small Business Administration shall give a high priority to guaranteeing loans to employee owned firms, to employee organizations or employee stock ownership plans seeking to buy their firms, and that such assistance shall be made available by the Small Business Administration on the basis of a firm's future prospects rather than past performance or individual employee-owner assets.

SEC. 4. Section 7 of the Small Business Act is amended by adding at the end thereof the following:

"(m)(1) As used in this subsection, the term—

"(A) 'employee organization' means any organization representing employees of a company which is a small business concern as presently constituted or, if the company is a subsidiary of a large business, would be a small business concern if independently owned;

"(B) 'employee' means any full-time employee of a small business concern;

"(C) 'employee stock ownership plan' or 'ESOP' means a plan described in section 4975(e)(7) of the Internal Revenue Code of 1954;

"(D) 'Administrator' means the Administrator of the Small Business Administration;

"(E) 'employee stock ownership trust' or 'ESOT' means a trust created by a small business concern or an employee organization as part of an employee stock ownership plan and which, among other functions, can (i) borrow funds for the purpose of investment in company stock and (ii) can receive contributions of stock from the small business concern or employee organization;

"(F) 'startup and operating costs' means the funds required to acquire ownership of a small business concern and operate it.

"(2)(A) The Administrator is directed to make all assistance available under this section available to employee organizations, employee owned small business concerns, and employee stock ownership trusts which meet the qualifications specified in this subsection.

"(B) Assistance to employee owned business concerns shall be made on the same basis as assistance to non-employee owned firms, except as specifically provided in this act.

"(C) Assistance to small business concerns using an employee stock ownership plan shall be made to the employee stock ownership trust on the same basis as assistance is made to companies not using an employee stock ownership plan, if—

"(i) the company seeking the assistance through an ESOT guarantees to the Administrator that it will be responsible for providing such funds as shall be necessary to the ESOT for the repayment of the obligation incurred by the ESOT;

"(ii) the trustee of the ESOT warrants in writing that funds acquired by the ESOT with the assistance of the Small Business Administration will be used solely for the purpose of purchasing stock in the small business concern adopting the ESOP, provided that nothing in this section shall limit the activities of ESOTs with regard to funds acquired from other sources except as may otherwise be specified by law;

"(iii) all stock issued to the ESOT pursuant to the assistance made available through this subsection fully vests with employees of the small business concern no later than the expiration date of the assistance;

"(iv) a plan certified by legal counsel for the business concern adopting the ESOP is presented to the administrator which assured that notwithstanding any other provisions of law, allocations of stock to participants in the ESOP will ignore all compensation of participants in excess of $50,000 when annual compensation is used as a guide for such allocation, provided that any allocation formula adopted under the ESOP must be one which satisfies the requirements of the Internal Revenue Code.

"(3) Loans to employee organizations, including employee organizations establishing an ESOP and using an ESOT, shall be guaranteed as provided in this section for the purpose of acquiring a small business concern in which the employees work, or for acquiring a subsidiary which, if independently owned, would be a small business concern, and in which the employees work, provided that—

"(A) the small business concern or subsidiary would otherwise close, be liquidated, or relocated, or be purchased by a large business, or the owner and employees agree to a transfer of ownership to the employees;

"(B) an employee organization has completed a feasibility report showing the management capability planned for the new firm, a marketing analysis, and such other features as the Administrator may require;

"(C) at the time the employee organization submits an application for a guarantee or a loan as provided in this subparagraph (B), whichever comes first, the organization provides a plan certified by legal counsel to the Administrator demonstrating that—

"(i) all employees will be offered an opportunity to participate in the ownership plan, and that employees subject to a collective bargaining agreement will be included in such an offering, unless the union representing the employees in the bargaining specifically requests, in writing, exclusion from the plan;

"(ii) at least 50% of the total stock or other asset value of the firm will be owned by at least 50% of the employees by the time the assistance made available from the Administration expires, or any other government assistance made at the same time expires, whichever occurs later;

"(D) in the case of subsidiaries, a plan is provided demonstrating that once the transfer of the subsidiary to the employees is completed, the subsidiary will be an independent business which qualifies as a small business concern.

"(E) In addition to the requirement in subparagraph (C), the organization, at the same time, must provide a plan which is certified by its legal counsel and which would—

"(i) provide that where stock is distributed, it will carry full voting rights and be vested by the expiration of the last government assistance made available at the time the Small Business Administration assistance is made available;

"(ii) enable the concern to retire stock being sold by employees leaving the firm or make the stock available to new emplyees;

"(iii) provide for a periodic review of the mode of company organization and the role employee owners will play in the management of the concern;

"(iv) except in the case of an ESOP, provide a method whereby the loan to the employee organization can be repaid by employee members through a system of payroll deductions should other methods or repayment as may be specified in the loan application be unable to provide the necessary cash; and

"(v) provide adequate management contracts to assure management expertise and continuity.

"(4) Assistance under this paragraph shall be provided on a high priority basis and shall be made when the feasibility study required shows that the future prospects of the firm show a likelihood of an ability to repay any loans guaranteed, and when the Administrator determines that the company will generate sufficient revenues to provide a reasonable assurance of repayment. The individual business experience or personal assets of individual employee-owners shall not be used as loan guarantee criteria, except inasmuch as certain employee-owners may assume managerial responsibilities, in which case business experience or ability may be considered.

"(5) The principal amount of any loan guaranteed under this section may not exceed $1,000,000.

"(6) For the purpose of the feasibility study specified in 3(B), the Administrator is authorized to loan not more than $10,000 to the employee organization, at the same rate as the current cost of money to the government and which shall be repayable within three years, provided that if the feasibility report does not result in an SBA guarantee, the loan shall be considered a grant.

"(7) Nothing in this section affects the status of any ESOP under Sec. 401 of the Internal Revenue Code of 1954.

"(8) The Administrator shall compile a separate list of applications for assistance under this provision, indicating which applications were accepted and which were denied, and shall report periodically to Congress on the status of employee owned firms assisted by the SBA.

"(9) The Administrator is authorized to make the guarantees under this subsection directly to the seller of a small business concern or a subsidiary of a large business that would become a small business upon becoming independently owned, as specified in subsection 4m(3)(D), provided that the guarantees under this subsection must be made in accordance with the provisions of this sub-

section for employee ownership, and further provided that—

"(A) In guaranteeing assistance under this subsection, the Administrator will guarantee payments on installment sale contracts by the buyer to the seller, provided that no more than 90 percent of the total remaining obligation at the time of default shall be paid;

"(B) In the case of default, the seller will have the option of (1) paying the SBA 90 percent of the total amount paid on the contract at the point of default and exercising his option to reassume title to the business, in which case the SBA will be relieved of any further obligations to the seller, including the obligation to pay 90 percent of the remaining payments on the contract, or (2) assigning to the SBA the option of assuming title to the business and receiving, in a lump sum, 90 percent of the remaining payments due on the contract;

"(C) If the seller should take option 2), the SBA may resell the business or its assets, or may seek another individual to reassume the contract and make the remaining payments to the SBA.

SEC. 5. Definitions of Minority Owned Firms with ESOPs—After the words in Section 8(a)(4)(A) "... at least 51% of the stock is owned by one or more socially and economically disadvantaged individuals;" add the phrase, "or in the case of a company with an employee stock ownership plan, in which 51% of the stock in the company is allocated through an ESOT to one or more socially and economically disadvantaged individuals;"

SUMMARY OF THE SMALL BUSINESS EMPLOYEE OWNERSHIP ACT

This bill would make employee owned businesses, businesses using employee stock ownership plans and trusts (ESOPs and ESOTs), and employee organizations seeking to buy firms which would otherwise close, relocate, or be sold to an outside interest eligible for all assistance normally available under the SBA's 7(a) business loan program and 8(a) minority enterprise contract assistance program. Currently, SBA will make loans and loan guarantees to employee organizations seeking to buy their firms, but only under very restrictive conditions. SBA will make no loans or guarantees available to ESOTs due to a technical interpretation of the law.

The bill would base the loans or loan guarantees for company buyouts by employees on a feasibility study of the future prospects of the company once employee owned. It would require that in any buyout case, feasibility be clear and a plan provided to assure that the company's employees actually will own a majority of the company stock by the expiration of the loan. Stock must be distributed in a way that does not discriminate in favor of higher paid employees. When distributed by salary, amounts over $50,000 per year must be ignored. All stock distributed must vest by the end of the loan.

In order to deal with SBA's objection that ESOTs are technically not small businesses, companies securing SBA backed loans through ESOTs must guarantee that all funds so acquired will be used solely to buy company stock and that the company will make whatever funds are necessary available to the ESOT to repay the loan.

Feasibility study loan funds are provided and the loan guarantee limit under the 7(a) program is raised from $500,000 to $1,000,000.

SECTION-BY-SECTION ANALYSIS OF THE SMALL BUSINESS EMPLOYEE OWNERSHIP AND JOB PRESERVATION BILL

Sec. 1. Title.

Sec. 2. Findings. The Congress finds that employee ownership of business helps to 1) preserve jobs, 2) increase worker productivity and company profits, 3) provide for the continuity of existing small businesses and create new ones from corporate divestitures, and 4) provide a means for broadening participation in the capitalist system. Employee ownership is a desirable alternative to unemployment insurance and other federal programs designed to ameliorate the effects of job loss. Small Business Administration guarantees of loans to employee ownership organizations and employee stock ownership trusts would facilitate employee ownership of business.

Sec. 3. The purposes of this act are to 1) provide that the SBA will make loans to employee stock ownership trusts, 2) assure that in those cases where an employee organization seeks to purchase a company that would otherwise close or relocate, or whose owner agrees to transfer ownership to the employees, the employee organizations, including those using an employee stock ownership trust, will be eligible for all SBA assistance under the Small Business Act, 3) provide that when guaranteeing loans to employee organizations under the circumstances described (2) the SBA will use a feasibility report on the company's future prospects once owned by employees as a basis for determining the soundness of the loan.

Sec. 4. Amendments to Sec. 7(a) of the Small Business Act.

(m)(1) Definitions. Employees are defined as all full-time employees. Employee stock ownership trusts (ESOTs) and plans (ESOPs) are defined.

(m)(2) Authorizes the Administrator of the SBA to make all assistance available under the 7(a) business loan program available to employee owned firms, employee organizations seeking to buy their companies, and to firms or employee organizations using ESOTs, provided that they meet the qualifications established in the Act. In the case of a company using an ESOP, the company must guarantee that it will make available to the ESOT such funds as are necessary to repay the loan guaranteed by the SBA and must further guarantee that the funds loaned to the ESOT will be used solely for the purchase of company stock. A plan certified by legal counsel must also be presented showing that the distribution of company stock to employees through the ESOT will be fully vested, will comply with all IRS requirements (these assure that higher paid employees will not be favored) and, when distributed by salary, will ignore all amounts of annual compensation in excess of $50,000.

(m)(3) Loans will be made to employee organizations, including those using an ESOT, for the purpose of acquiring a small business or a company which, when independently owned, would become a small business, provided that the company would otherwise close, relocate, be sold by a large business, or provided that the owner agrees to sell to employees. The employee organization must complete a feasibility study on the proposed transfer, and must present a plan to the administrator showing that 1) all employees will be offered an opportunity to participate in the ownership plan, and 2) that by the time the loan expires, a majority of the company stock will be owned by a majority of the employees, or 67% of the stock will be owned by employees in the lowest third of the salary distribution. The plan must also provide for the voting rights and vesting of any stock, the periodic review of the mode of company organization, and adequate management contracts. Finally, the plan must enable the company to buy stock from employees when they leave the firm or sell their stock and provide a method of wage deductions in non-ESOP cases where such deductions are necessary to repay the loan.

(m)(4) Assistance under this section will be given a high priority and will be based on the future prospects of the firm rather than the individual assets of employees.

(m)(5) The principal amount that can be guaranteed is $1,000,000.

(m)(6) Feasibility studies required under the act are eligible for $10,000 loans. The loans will be considered grants if the applications are denied.

(m)(7) This bill does not alter the status of ESOPs under the Internal Revenue Code.

(m)(8) The Administrator will report on this program to Congress.

(m)(9) Guarantees under this section may be made directly to the seller of a business when selling under an installment contract, provided that the seller agrees to pay a specified penalty if, after the default of a buyer, he chooses to reassume the contract and resell the business.

THE ROLE OF THE FEDERAL GOVERNMENT AND EMPLOYEE OWNERSHIP OF BUSINESS

SUMMARY

In the last several years, there has been a growing trend for employees to own substantial equity in the companies for which they work. It has been estimated that there are between 1,000 and 3,000 employees stock ownership plans ("ESOPs") in the country, and in at least 90 cases, employees, through ESOPs or other means, have actually purchased a majority interest in their companies. In part, the popularity of ESOPs has been a result of special tax incentives enacted in the last five years; in part it stems from the belief on the part of many companies that ESOPs provide a unique means of financing growth and providing an employee benefit plan with the same dollars. Similarly, the trend towards employee acquisition of business has partly been encouraged by government loans, 13 of which have been made to date. On the other hand, roughly 70 percent of the employee owned companies have been formed in this decade, so government assistance had usually not been a factor. This report will review the information available on employee ownership of business, with particular emphasis on the role the government has played and might play in the future.

Employee ownership has been sold primarily as a means to increase worker motivation and productivity by giving employees a clearer stake in their companies. A comprehensive study by the University of Michigan's Survey Research Center has confirmed that this argument is valid. In a study of 98 firms, the study found that companies with employee ownership were 1.5 times as profitable as comparable conventional firms. They also found that employee and managerial satisfaction was higher, and that managers reported increased productivity. Other studies of the plywood industry and individual case studies have confirmed these findings, and the plywood studies showed, in addition, that wages were 25 percent higher in employee owned firms than nonemployee owned firms. The higher wages were compensated for by 30 percent greater productivity in the worker owned companies. Finally, the Michigan study showed that the greater the amount of equity owned by employees, the greater the profits.

The most popular form of employee ownership is the employee stock ownership plan. In its typical form, a company establishes an ESOP and the ESOP includes an employee stock ownership trust. The trust secures a loan for company growth, with the company pledging to make whatever funds are necessary available to the ESOT to repay the loan. The ESOT uses the loan funds to purchase company stock, so that the company gets the money from the loan and the trust gets the stock. As the loan is repaid, the stock vests with employees. Contributions to the trust to repay the loan are tax deductible, so that the company can, in effect, deduct both the principal and interest on the loan, instead

of the interest only. In addition to this tax benefit, companies making qualified investments can receive an additional 1 percent–1.5 percent credit if the investment is financed through an ESOP.

The benefits and disadvantages of ESOPs have been widely disputed. For the company, there are, in some cases, cheaper ways to borrow, and the issuance of new stock to an ESOT dilutes the value of existing stock. The employee, although he pays nothing for the ESOP (unless there is a contribution plan), may be asked by the company to rely on the ESOP as his employee benefit plan in lieu of something else. If the company succeeds, this will be to his benefit; if it fails, the benefit is worthless. For companies with good prospects without access to other sources of equity capital, however, ESOPs appear to be very useful for financing growth as well as being very beneficial for individual employees. Moreover, the ability to deduct both principal and interest payments on loans makes ESOPs uniquely suited to employee purchases of companies. There is no other means by which this could be accomplished as well in these situations. Finally, ESOPs offer special tax advantages to owners of nonpublic companies who wish to transfer ownership of their companies, either gradually or through an immediate sale, to their employees.

While ESOPs have gained in popularity as a tool for existing companies, employee purchases of companies have gained in popularity in cases where companies would otherwise close. In the last decade, perhaps 50 or 60 such purchases have occurred. In most cases, an ESOP is used, but a variety of other ownership forms, including producer cooperatives and simple direct purchases of companies through the sale of stock to employees and others, have also been used. The motivation for such purchases is generally to preserve jobs that would otherwise be lost when a company plans to close, relocate, or be purchased by an unrelated interest. Roughly 70 percent of the employee purchases since 1971, in fact, have been of conglomerate subsidiaries which were scheduled to close. Most of the rest appear to have been voluntary sales by owners of independent businesses to their employees when the owners were ready to retire. The companies that have been purchased in this way appear to have been very successful, in many cases transforming companies or subsidiaries with poor performance records into profitmakers. Despite their success, however, efforts by employees to purchase their businesses still face enormous obstacles in the areas of financing and simply organizing people around what is still an unconventional goal.

Government policy toward employee ownership has been mixed. On the one hand, the Congress has enacted special tax benefits for ESOPs, and the Small Business Administration, the Economic Development Administration and the Farmers Home Administration have all made loans to employee organizations which have purchased their businesses. The ESOP tax incentives, however, are limited primarily to capital intensive, large companies. Certain so-called incentives for ESOPs, in fact, actually only have the effect of equalizing the treatment of ESOPs with other employee benefit plans. Government loans have been made, but not frequently—SBA has made three, EDA nine, and FmHA only one. The SBA has expressed reluctance to make loans to employee organizations and will not make loans to companies or employee organizations through ESOPs, arguing that the employee stock ownership trust is not formally a small business and therefore does not qualify for a loan. EDA has made more loans, but their legislative mandate is such that they must give priority to companies suffering from the effects of disasters, defense realignments, or government regulations. FmHA officials have expressed enthusiasm for the idea of employee ownership, but their loan program has not been seen, as yet, as a potential source of funding. Even if it were more broadly known that FmHA were favorable, however, only companies in places of less than 25,000 people would be eligible, and even then small business would be encouraged to go to SBA.

In the 95th Congress, a bill was introduced by Congressmen Kostmayer, Lundine and McHugh to create a special program in EDA, with $100 million in loan funds for employee or employee/community organizations seeking to purchase firms that would otherwise close, relocate, or be sold to outside interest. Loans would be granted only if feasibility studies confirmed that the company could make a profit when reorganized. The bill was not acted on, however, and will be reintroduced in the 96th Congress.

In the Senate, Senators Nelson and Long will introduce legislation to mandate that the SBA guarantee loans to ESOTs on a nondiscriminatory basis, and that SBA guarantee loans to employee organizations seeking to purchase their businesses when they would other wise close, relocate, or be sold to unrelated interests. These loans would also be granted on the basis of feasibility studies, without regard to the individual assets of employees, a criterion that, if in effect, would make it all but impossible for employee organizations to secure credit. Senator Nelson also plans to introduce legislation similar to the House bill mentioned above.

Given the lack of enthusiasm and regulatory policy of SBA and the legal limitations on EDA, legislation such as that proposed by Nelson, Long, Kostmayer, Lundine and McHugh is necessary if the government is to take a more active role in encouraging employee ownership. The alternative to this policy would be to allow the businesses to close and to make the variety of transfer payments that are involved when there is extended unemployment, such as occurs when a plant closes. Given the success of employee ownership, it seems much the wiser course for the government to make or guarantee loans, the large majority of which would almost certainly be repaid, then to spend money on various programs designed to ease the impact of unemployment. Of course, such loans should only be made to companies with reasonable prospects for success, and the government should not strive to make loans in every instance. Government encouragement of the concept and practice of employee ownership, however, could convince at least some conventional credit sources to treat it as just another way of organizing a business. That, it appears, would be a very positive development which could significantly increase the productivity, wealth, and job satisfaction of employees, as well as preserve and improve local businesses. Finally, it would accomplish these things within the framework of free enterprise rather than government regulation.●

By Mr. TOWER:

S. 389. A bill to amend the Credit Control Act of 1969; to the Committee on Banking, Housing, and Urban Affairs.

● Mr. TOWER. Mr. President, I am introducing legislation today which would limit the President's authority to impose credit controls. I am introducing this legislation in response to accounts in the press and elsewhere that the President and his economic advisers are considering credit controls as a possible tool in the fight against inflation. The President can impose such controls right now under the Credit Control Act of 1969. In my opinion, this would be a serious mistake. It would seriously disrupt and distort our Nation's financial system, which is the most efficient in the world. Moreover, it would divert attention away from the important steps which need to be taken if inflation is to be brought under control.

The Credit Control Act of 1969 gives the President almost unlimited authority to allocate credit. Under that act, the President can authorize the Federal Reserve Board to regulate "any or all extensions of credit" whenever he determines that is is "necesary or appropriate for the purpose of preventing or controlling inflation generated by the extension of credit in an excessive volume." The authority under this bill is so broad that it could include, among other things, the setting of conditions and terms of credit, the maximum rates of interest, the retention of certain unspecified credit records, and the prohibition or limitation of "any extension of credit under the circumstances the Board deems appropriate."

One can only guess at what form these credit controls would take. It could mean limitations on consumer credit, small business loans or loans to farmers. I do not think anyone knows at this point which groups in our society could be affected, and I do not believe there is anyone capable of establishing credit controls that could second guess the marketplace and be equitable at the same time.

This is a very dangerous law to have on the books, particularly at a time when quick and easy solutions to inflation are being sought. Unfortunately, credit allocation is not a very effective tool against inflation. It merely results in a redistribution in the flow of funds between different groups of lenders and borrowers.

The flow of credit can be pushed down in one area and it will just pop up elsewhere. Moreover, the marketplace is very effective in developing innovative ways of circumventing those controls.

Credit controls have very little effect on the overall volume of money and credit which is the critical factor in causing inflation. As Prof. Karl Brunner of the University of Rochester put it:

> The anti-inflationary argument on behalf of credit allocation is particularly defective. The reallocation of credit among various classes of borrowers exerts at most a marginal influence on aggregate demand for output. . . . Some marginal effects on aggregate demand are not impossible, but such credit controls are a singularly useless device to curb inflation

I do not believe that inflation can be solved by resorting to credit controls. But, it can be brought under control by limitations on the growth of overall money and credit, which the Federal Reserve has authority to do already. This would allow the marketplace to continue distributing credit in an efficient manner. The bill I am introducing today would make sure that credit controls would not be adopted without prior congressional approval. If the President determines that credit controls are needed, he would have to notify Congress of such a determination, and no action could be taken

to implement those controls until approved by both the House and the Senate.

Credit controls could be very damaging to our Nation's financial situation, and their imposition is a decision that is too important to be left in the hands of the President.

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

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

S. 389

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

SECTION 1. (Subsection 205(a) of the Credit Control Act (12 U.S.C. 1904(a))) is amended by striking the period at the end of the subsection and inserting a colon in lieu thereof and adding the following language: "*Provided*, That (i) the President shall transmit to Congress, within seven calendar days of such determination, a report specifying the necessity for regulating and controlling extensions of credit and (ii) the authorization of the Board by the President shall not take effect until approved by a concurrent resolution of the Congress, which resolution shall specify a termination date by which the authorization must be withdrawn by the President or resubmitted to the Congress for approval."

SEC. 2. Section 206 of the Credit Control Act (12 U.S.C. 1905) is amended by striking out "by the President" and "and for such period of time as he may determine." ●

By Mr. METZENBAUM (for himself, Mr. KENNEDY, Mr. BAYH, Mr. LEAHY, Mr. MORGAN, and Mr. BAUCUS):

S. 390. A bill to expedite and reduce the cost of antitrust litigation, and for other purposes; to the Committee on the Judiciary.

ANTITRUST PROCEDURAL IMPROVEMENTS ACT OF 1979

● Mr. METZENBAUM. Mr. President, I am introducing today with Senators KENNEDY, BAYH, BAUCUS, LEAHY, and MORGAN, the Antitrust Procedural Improvements Act of 1979. This bill also has been strongly supported by the administration.

As the new chairman of the Judiciary Subcommittee on Antitrust and Monopoly, I plan to bring the same dedication to the goals of free enterprise as my distinguished predecessors, Senators KENNEDY, Hart, and Kefauver.

At a time when our country is suffering from the effects of runaway inflation, effective antitrust laws, and expeditious enforcement of those laws is critical. Greater competition in the marketplace means lower prices for our consumers and more efficient use of our Nation's resources. President Carter recognized this in his state of the Union message when he called for "improvement and better enforcement of the antitrust laws" to fight inflation.

During this session of Congress, the Antitrust and Monopoly Subcommittee will carefully examine various legislative proposals which seek to strengthen existing antitrust laws with respect to conglomerate mergers and persistent monopoly power. In addition, the subcommittee will attempt to implement several recommendations of the National Commission for the Review of Antitrust Laws and Procedures which call for the repeal of outdated and anticompetitive antitrust immunities.

While these issues demand immediate attention, I believe that our first priority must be to expedite and reduce the cost of enforcing existing antitrust laws. The bill I introduce today is an important first step in this direction.

During the last 6 months, I had the honor of serving as a member of the President's National Commission for the Review of Antitrust Laws and Procedures—a Commission comprised of some of the most respected antitrust scholars and practitioners, representatives of the Government's enforcement and regulatory agencies and nine other Members of Congress.

When the Commission began its work in June of last year, the President emphasized that one of our two principal tasks was to make recommendations for expediting and reducing the costs of antitrust cases. He said then that—

> We have cases that drag out almost indefinitely. They sap away the legal talent of our country that could be more productively used in other efforts. They delay a resolution of judgment and decision which works to the advantage of one party or the other, and quite often against the best interests of the public. So how to deal with this question is one that I believe, if resolved, would have a greatly beneficial effect on the parties to the disputes and on the public itself.

Accordingly, the Commission spent considerable time examining the problem of extraordinary length and excessive cost of antitrust cases. We looked for the causes of the problem and, in our report to the President and the Attorney General, made several recommendations which, if implemented, should expedite and reduce the costs of antitrust litigation.

Detailed testimony from judges, professors, and private practitioners revealed that a large percentage of private antitrust cases take an astounding 5½ years or more, while even the average case takes nearly 4 years. Many Government suits last even longer. The gravity of this problem is strikingly illustrated by the Department of Justice's case against IBM. The suit was filed on January 17, 1969. Today—a decade later—IBM is still in the midst of presenting its defense.

Mr. President, the Commission recognizes that a primary source of the excessive length and expense of major antitrust suits lies in the degree to which the parties seek to obtain thousands of documents from each other. Many times, these requested documents have little or no relationship to the factual situation at hand. This search for documents or "discovery" is governed by the Federal Rules of Civil Procedure. The Commission found that these discovery rules were overbroad and that the parties often used them to delay proceedings.

The Commission proposed a number of changes in this area. They recommended that the courts take more active control of the discovery process, and that rule 26(B) of the Federal Rules of Civil Procedure be changed to narrow the scope of discovery. They also recommended an amendment to the Antitrust Civil Process Act in order to make it clear that the Government can issue a civil investigative demand for documents which had been produced during the course of private lawsuits. Sections 2 and 3 of the Antitrust Procedural Amendments Act of 1979 make the changes to the Antitrust Civil Process Act recommended by the Commission.

These amendments to the Antitrust Civil Process Act will result in substantial savings of Government enforcement resources, because the Department of Justice will not need to duplicate discovery efforts of others as it often must do now. For instance, in the past, some courts have refused to grant the Government access to materials discovered in major private antitrust suits, because of agreements among the parties to restrict disclosure. The concern about protecting truly confidential information is of course legitimate, but these agreements should not be construed to prevent the Justice Department from acquiring these documents. Legitimate concern over confidentiality is satisfied by giving discovery material the same confidential treatment that all other documents produced pursuant to civil investigative demands are given. In addition, under this bill, the person who originally gave up the documents is given notice of the demand before the material is to be delivered to the Government. This gives the affected persons opportunity to challenge the demand in court.

Sections 2 and 3 of the bill also specifically allow "agents" of the Department of Justice to process documents obtained by a civil investigative demand. This is necessary, because advanced automated data processing techniques must be used to organize and retrieve effectively the countless documents and other pieces of information which are part of every major antitrust suit. This task has placed a tremendous burden upon the limited number of employees working at the Department of Justice. The bill, therefore, makes clear that the Department has the power to contract with persons outside of the Department for automated data processing services.

Experienced jurists and litigators testified in detail before the commission about the lengthy delay caused in many antitrust suits by counsel's dilatory practices. In its report to the President and the attorney general, the commission described the multiple practices to which counsel frequently resort to prolong lawsuits:

> Dilatory and abusive conduct occurs far too frequently in complex litigation. Lawyers, particularly in "high stakes" antitrust litigation, too often file meritless claims, defenses, or counterclaims, make excessive or abusive discovery demands, unreasonably resist legitimate discovery requests, provide unresponsive "stonewalling" answers, and unreasonably produce masses of insignificant, nonresponsive information. Other dilatory behavior may take the form of unjustified refusals to stipulate or admit facts,

unwarranted motion practices, mishandling of documents, bad faith claims or privilege or confidentiality, and disruption of depositions.

The commission urged judges and lawyers to increase their awareness and use of existing sanctions and recommended that the sanctions now in the Federal Rules of Civil Procedure and the American Bar Association's disciplinary rule 7-102, together with the corresponding State disciplinary rules, be strengthened. Significantly, the commission also recommended that Congress amend 28 United States Code, section 1927 and sections 4, 4A, and 4(C)(A)(2) of the Clayton Act, 15 United States Code, sections 15, 15A and 15c(A)(2), to increase incentives for parties and counsel to expedite litigation. Sections 4 and 5 of the Antitrust Procedural Improvements Act of 1979 embody these Commission recommendations for statutory change.

Section 4 amends 28 United States Code, section 1927 by expressly making an attorney who engages in conduct primarily for the purpose of delay or increasing costs liable for the excess expenses and attorneys' fees reasonably incurred, because of the dilatory conduct. As section 1927 now stands, the attorney's conduct must be solely for the purpose of delay and reasonable attorney fees attributable to the delay are not recoverable by the innocent party. By liberalizing the intent requirement of section 1927 and expanding the costs which a court may award, the bill encourages counsel to focus on the legitimate issues in the lawsuits and to avoid strategic ploys that do not move the case nearer disposition.

Section 5 of the bill amends sections 4, 4A, and 4C of the Clayton Act to make unsuccessful defendants in antitrust damage suits liable for interest on the plaintiffs' actual damages from the date of service of the complaint to the date of judgment at the prevailing commercial rate at the time of judgment. Prejudgment interest, however, is not trebled under the bill. Allowing for prejudgment interest will provide antitrust defendants with a strong financial incentive to refrain from dilatory litigation activities.

The unavailability of prejudgment interest under current case law, *Transworld Airlines, Inc.* v. *Hughes*, 449 F. 2d 51 (2d cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973), provides a powerful disincentive for defendants to expedite antitrust trials. Defendants now may keep the earnings attributable to the value of the money's use during the litigation period. By permitting an award of interest from the date of service of the complaint to the date of judgment, these amendments, in effect, require that interest attributable to these ill-gotten fruits be paid by the antitrust law violators to the successful plaintiffs.

This amendment recognizes that plaintiffs may also be the cause of protracted litigation. Accordingly a court is permitted to deny or reduce an award of prejudgment interest if the award of all or part of the prejudgment interest is unjustified under the circumstances.

Under common law, courts have long allowed prejudgment interest to successful plaintiffs with liquidated, or sum certain, claims. However, courts have been reluctant to award prejudgment interest to plaintiffs, including plaintiffs in antitrust suits, whose claims are unliquidated until judgment. This reluctance, which stems from practical difficulties, not from substantive policy considerations, has been abating somewhat in recent years.

A recent Federal court opinion noted that awarding prejudgment interest in antitrust suits would require "highly abstruse inquiries as to proper rates and the time from which interest should run." *Transworld Airlines, Inc.* v. *Hughes*, 449 F. 2d 57,80, (2d cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973.) By providing for interest to be calculated at the commercial rate prevailing at the time of judgment and for interest to run always from the date of service of the complaint, the amendment eliminates these practical problems.

In its report to the President, the Commission took full aim at the needless retrying of issues in antitrust suits caused by the failure of section 5(a) of the Clayton Act, 15 United States Code, section 16(a), expressly to allow Federal courts to give prior Government judgments collateral estoppel effect. Collateral estoppel means that issues resolved against a defendant in a prior Government suit are conclusively resolved against the same defendants in a subsequent private suit. Only one district court has ruled that section 5(a) allows Federal courts to give prior Government judgments collateral estoppel effect in subsequent private suits. Several courts have construed section 5(a) not to permit this. In other areas of the law, however, Government judgments are given collateral estoppel effect in subsequent private actions. For example, the Supreme Court held in *Parklane Hosiery Co.* v. *Shore*, docket No. 77-1305 (U.S. Jan. 9, 1979), that a Securities and Exchange Commission judgment in an equitable action may be given collateral estoppel effect in a subsequent private suit. No good reason exists for treating prior Government judgments in antitrust actions any differently.

If a judgment in favor of the Government in the prior suit does not have collateral estoppel effect, a full range of trial witnesses and exhibits on issues already decided will be offered by the plaintiff and the defendant in the subsequent private suit. The burden on courts and litigants will be substantially reduced and trial time measurably shortened if in appropriate circumstances prior Government judgments are given collateral estoppel effect.

The Commission, therefore, recommended that section 5(a) be amended to allow collateral estoppel effect, and section 6 of the Antitrust Procedural Improvements Act of 1979 incorporates this recommendation.

Because of two loopholes in its jurisdiction under section 7 of the Clayton Act, the Department of Justice is unable to challenge some mergers which might have serious anticompetitive consequences. Section 7 of the bill closes these two loopholes.

The first loophole stems from the Supreme Court's decision in *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975) ("ABMI"). The Court held in ABMI that section 7 does not reach a merger involving a firm only "affecting" interstate commerce, although the merger may have the effect of substantially lessening competition or tending to create a monoply. The Court thereby concluded that Congress did not intend for jurisdiction under section 7 to extend to the full scope of the commerce clause. According to the Supreme Court, both firms involved in a merger must "participate directly in the sale, purchase, or distribution of goods or services in interstate commerce" for section 7 to apply.

Section 7 reflects the intense congressional concern about mergers and acquisitions leading to reduced competition and increased concentration in the American economy. The Supreme Court's decision in ABMI restricts the effectiveness of section 7 to deal with this congressional concern.

Expanding section 7 to the limits of the commerce clause, which this bill does, merely places it on equal footing with sections 1 and 2 of the Sherman Act and section 5 of the Federal Trade Commission Act. This is now particularly important, because, under section 7 in its present form, the Department of Justice cannot successfully challenge some mergers which have the effect of substantially lessening competition in the increasingly vital service sector of the economy.

In ABMI, for example, the Supreme Court affirmed a grant of summary judgment to American Building Maintenance Industries, which acquired two of its competitors in the southern California market. The two acquired companies had 7 percent of the market, and American Building Maintenance Industries had 10 percent of the market. Although the two acquired firms derived 80 to 90 percent of their revenues from interstate and international clients, the Supreme Court held they did not meet the "engaged in commerce" jurisdictional test of section 7. This bill will bring mergers of the type at issue in ABMI within the parameters of section 7.

The second loophole in section 7 arises from the use of "corporation" or "corporations" instead of "person" or "persons" in the statute. As a result, mergers involving large businesses which are unincorporated associations are beyond section 7's jurisdiction. There is no good policy reason for section 7 to differ in this respect from section 2 of the Sherman Act, which does cover "persons." The bill therefore substitutes "person" and "persons" for "corporation" and "corporations," respectively.

Mr. President, the time has come for Congress to take action to remove the roadblocks to effective antitrust enforcement created by too lengthy and too costly antitrust litigation. The Antitrust Procedural Improvements Act of 1979 makes significant statutory changes which will expedite and reduce the costs of antitrust cases.

Mr. President, I ask unanimous consent that the text of the Antitrust Procedural Improvements Act of 1979, to-

gether with the section-by-section analysis of the bill, the Justice Department's letter of support, and part One, section One, of the report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures, which contains the Commission's recommendations for expediting and reducing the costs of litigation, be printed in the RECORD.

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

S. 390

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Procedural Improvements Act of 1979".

ANTITRUST CIVIL PROCESS ACT AMENDMENTS; DEFINITIONS

SEC. 2. Section 2 of the Antitrust Civil Process Act (76 Stat. 548, 15 U.S.C. 1311) is amended—

(1) in subsection (g), by striking out the semicolon and "and" at the end thereof and inserting in lieu thereof a comma and the following: "and any product of discovery;",

(2) in subsection (h), by striking out the period at the end thereof and inserting in lieu thereof a semicolon; and

(3) by adding at the end thereof the following new subsections:

"(i) The term 'product of discovery' includes without limitation the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission obtained by any method of discovery in any litigation or other judicial or administrative proceeding; any digest, analysis, selection, compilation, or any derivation thereof; and any index or manner of access thereto; and

"(j) The term 'agent' includes any person retained or consulted by the Department of Justice in connection with the enforcement of the antitrust laws.".

ANTITRUST CIVIL PROCESS ACT AMENDMENTS; SERVICE REQUIREMENTS FOR A DEMAND FOR ANY PRODUCT OF DISCOVERY

SEC. 3. (a Section 3(a) of the Antitrust Civil Process Act (15 U.S.C. 1312(a)) is amended by adding at the end thereof the following new sentence: "Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General or the Assistant Attorney General in charge of the Antitrust Division shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and notify the person to whom such demand is issued of the date on which such copy was served.".

(b) Section 3(b) of that Act (15 U.S.C. 1312(b)) is amended by adding at the end thereof the following new sentence: "Any such demand which is an express demand for any product of discovery shall not be returnable until after ten days after a copy of such demand has been served upon the person from whom the discovery was obtained.".

(c) Section 3(c) of that Act (15 U.S.C. 1312(c)) is amended—

(1) by inserting "(1)" immediately after "(c)";

(2) by striking out "(1)" and inserting in lieu thereof "(A)";

(3) by striking out "(2)" and inserting in lieu thereof "(B)"; and

(4) by adding at the end thereof the following new paragraph:

"(2) Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege, including without limitation any right or privilege which may be invoked to resist discovery of trial preparation materials, to which the person making such disclosure may be entitled.".

(d) Paragraph (3) of Section 4(c) of that Act (15 U.S.C. 1313(c)(3)) is amended by inserting immediately after "transcripts" the second time it appears, a comma and the following: "and, in the case of any product of discovery produced pursuant to an express demand for such material, of the person from whom the discovery was obtained".

(e) Paragraphs (2) and (3) of Section 4 (c) of that Act (15 U.S.C. 1313(c)(2) and (3)) are amended by striking out the phrase "official or employee" and inserting in lieu thereof "official, employee, or agent" each time it appears.

(f) Section 5 of that Act (15 U.S.C. 1314) is amended—

(1) by amending subsection (b) to read as follows:

"(2)(1) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any antitrust investigator named in the demand, such person may file and serve upon such antitrust investigator, and in the case of an express demand for any product of discovery upon the person from whom such discovery was obtained, a petition for an order modifying or setting aside such demand—

"(A) in the district court of the United States for the judicial district within which such person resides, is found, or transacts business; or

"(B) in the case of a petition addressed to an express demand for any product of discovery, only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending.

"(2) The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court, except that such person shall comply with any portions of the demand not sought to be modified or set aside. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this Act, or upon any constitutional or other legal right or privilege of such person.";

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

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

"(c) Whenever any such demand is an express demand for any product of discovery, the person from whom such discovery was obtained may file, at any time prior to compliance with such express demand, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any antitrust investigator named in the demand and upon the recipient of the demand, a petition for an order of such court modifying or setting aside those portions of the demand requiring production of any such product of discovery. Such petition shall specify each ground upon which the petitioner relies in seeking such relief and may be based upon any failure of such portions of the demand to comply with the provisions of this Act, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of such petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand."; and

(4) in subsection (d), as that subsection has been redesignated by paragraph (2) of this section, by inserting immediately after "such person" a comma and the following: "and, in the case of an express demand for any product of discovery the person from whom such discovery was obtained,".

SANCTIONS FOR ATTORNEY DELAY

SEC. 4. Section 1927 of title 28, United States Code, is amended to read as follows:

"§ 1927. Counsel's liability for excessive costs

"Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who engages in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of litigation may be required by the court to satisfy personally the excess costs, expenses and attorney's fees reasonably incurred because of such conduct.".

PREJUDGMENT INTEREST

SEC. 5. (a) Section 4 of the Clayton Act (15 U.S.C. 15) is amended—

(1) by inserting after "sustained," the following: "interest on his actual damages from the date of service of the complaint to the date of judgment at the prevailing commercial rate at the time judgment is entered,"; and

(2) by adding at the end of the section the following new sentence: "The court may adjust interest on actual damages from the date of service of the complaint to the date of judgment if it finds that the award of all or part of such interest is unjust in the circumstances.".

(b) Section 4A of the Clayton Act (15 U.S.C. 15a) is amended—

(1) by inserting after "sustained" a comma and the following: "interest on such actual damages from the date of service of the complaint to the date of judgment at the prevailing commercial rate at the time judgment is entered,"; and

(2) by adding at the end of the section the following new sentence: "The court may adjust interest on actual damages from the date of service of the complaint to the date of judgment if it finds that the award of all or part of such interest is unjust in the circumstances.".

(c) Section 4C(a)(2) of the Clayton Act (15 U.S.C. 15c(a)(2)) is amended—

(1) by inserting after "subsection," the following: "interest on such total damage only from the date of service of the complaint to the date of judgment at the prevailing commercial rate at the time judgment is entered,"; and

(2) by adding at the end of the section the following new sentence: "The court may adjust interest on total damages from the date of service of the complaint to the date of judgment if it finds that the award of all or part of such interest is unjust in the circumstances.".

COLLATERAL ESTOPPEL

SEC. 6. Section 5(a) of the Clayton Act (15 U.S.C. 16(a)) is amended—

(1) by striking out "or by the United States under section 4A,";

(2) by striking out "or to judgments or decrees entered in actions under section 4A"; and

(3) by inserting at the end thereof the following new sentence: "Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel.".

MERGER JURISDICTION

SEC. 7. Section 7 of the Clayton Act (15 U.S.C. 18) is amended—

(1) by striking out "corporation" each time it appears in the first and second paragraphs and inserting in lieu thereof "person";

(2) by striking out "corporations" in the second paragraph and in the first sentence of the third paragraph and inserting in lieu thereof "persons"; and

(3) by inserting "or in any activity affecting commerce" after "commerce" each time it appears in the first three paragraphs.

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C. February 7, 1979.

Hon. HOWARD M. METZENBAUM,
Chairman, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am pleased to provide you with the views of the Department of Justice on your bill entitled the "Antitrust Procedural Improvements Act of 1979".

Your bill contains several important provisions that were recommended by the President's National Commission for the Review of Antitrust Laws and Procedures. In his recent State of the Union Message, President Carter pledged to work closely with the Congress to implement many of the recommendations of that Commission.

Your bill would materially enhance the Antitrust Division's ability to enforce the antitrust laws effectively and would significantly assist in expediting our antitrust investigations. Its provisions would assist the courts in reaching the merits of antitrust cases more swiftly in an efficient and up-to-date manner that would conserve scarce judicial resources. These provisions would also provide necessary disincentives to delay final resolution of such cases. Such provisions would assist in providing timely compensation to parties injured by antitrust violations, would help deter such violations from occurring, and would help restore public confidence in our judicial system.

Taken together, the overall thrust of these provisions would be to advance the effective enforcement of the antitrust laws and to expedite the movement of antitrust cases through the courts. Accordingly, I am happy to express the Administration's enthusiastic support for your legislation. I urge your Subcommittee—and the Congress—to give the bill its early and favorable consideration. A discussion of the bill's most important provisions follows.

I. Amendments to section 5(a) of the Clayton Act: Collateral estoppel:

One important way that antitrust litigation can be expedited is to insure against needless relitigation of issues already determined in prior litigation. Section 6 of the bill would amend Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), by adding a new sentence that would clearly affirm that that section is not a limitation on the application of the common law doctrine of collateral estoppel with respect to issues determined in antitrust litigation. In addition, section 5(a) would be amended by striking certain references to Clayton Act Section 4A to make clear that final judgments or decrees in government enforcement actions may be afforded full, preclusive effect in subsequent government damage actions under section 4A, and to extend prima facie effect to such damage actions in subsequent litigation. These amendments were recommended by the National Commission for the Review of Antitrust Laws and Procedures, see *Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures* 113–17 and n.21 (January 22, 1979) (hereafter referred to as *"Antitrust Commission Report"*), and are fully supported by the Department of Justice.

A. The application of collateral estoppel to issues previously determined in actions brought under the antitrust laws:

Clayton Act Section 5(a) provides that final judgments or decrees rendered in civil or criminal proceedings brought by the United States under the antitrust laws (other than consent judgments or decrees or judgments or decrees in actions brought by the United States under Clayton Act Section 4A, 15 U.S.C. § 15a) that establish that a defendant has violated the antitrust laws may be used against that defendant in later actions as prima facie evidence of all matters as to which the judgment or decree would be in estoppel between the parties. Prima facie evidence is sufficient, standing alone and uncontroverted, to sustain a judgment on the issues for which it is submitted. However, if a defendant presents rebuttal evidence, the plaintiff may be forced to relitigate some or all of the disputed issues in order to prevail.

An alternative to the prima facie effect provided by Clayton Section 5(a) is collateral estoppel, the equitable doctrine that precludes a party to a prior action from relitigating in a second action those issues actually litigated, decided and necessary to the result in the first action. Application of collateral estoppel achieves finality, certainty, and economy in the utilization of judicial resources and resources of litigants generally, and avoids the possibility of inconsistent results as to similar issues. As an equitable doctrine, collateral estoppel is applied only after the judge presiding over the second action has determined, in light of all relevant circumstances, that its application is fair; *i.e.*, that the above goals are not being achieved at the undue expense of the party being foreclosed from relitigating.

When section 5(a) was introduced as part of the original Clayton Act in 1914, both the Senate and House of Representatives favored granting collateral estoppel effect to government enforcement actions in subsequent private antitrust litigation as a matter of policy. However, Congress ultimately adopted the lesser prima facie standard on the belief that it was the most complete preclusive effect that could be legislated. The cause of Congress' concern was the concept of mutuality of estoppel. It had long been a tenet of the doctrine that collateral estoppel operated only between parties to a prior action or persons in privity with them. Thus, it was believed that in a second action collateral estoppel could not be invoked by a nonparty to the first action since, had the issue been resolved differently, the nonparty would not have been bound by it in the later action. The requirement of mutuality of estoppel had been upheld by the Supreme Court only two years before the Clayton Act was enacted. *Bigelow* v. *Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912). Concerned about the constitutional implications of legislating the use of collateral estoppel by private plaintiffs based on earlier government antitrust enforcement actions to which they had not been parties, Congress substituted prima facie effect for collateral estoppel effect in the version of section 5(a) that was ultimately enacted.

The application of collateral estoppel doctrine has changed significantly since passage of the Clayton Act. Mutuality of estoppel, which was at best a rule-of-thumb approach to preventing unfairness when a nonparty to prior litigation sought to invoke collateral estoppel, has largely given way to a more particularized fairness analysis—a case-by-case, due process-oriented examination by judges to determine whether or not it is fair to give estoppel effect to a particular action. *See, e.g., Bernhard* v. *Bank of America Nat'l Sav. & Trust Ass'n.*, 19 Cal. 2d 807, 122 P.2d 892 (1942); *Federal Savings & Loan Ins. Corp* v. *Hogan*, 476 F.2d 1182 (7th Cir. 1973); *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir. 1971); *Brown* v. *R. D. Werner Co.*, 428 F.2d 375 (1st Cir. 1970); *Graves* v. *Associated Transport, Inc.*, 344 F. 2d 894 (4th Cir. 1965); *Bruszewski* v. *United States*, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950). The Supreme Court ultimately upheld the constitutionality of nonmutual collateral estoppel and approved its use by defendants in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971). Recognizing that a judicial determination that a party against whom an estoppel was asserted had had a full and fair opportunity to litigate the relevant issues in a prior action provided a significant safeguard to the rights of the estopped party, the Supreme Court stated that "it is apparent that the uncritical acceptance of the principle of mutuality of estoppel . . . is today out of place." 402 U.S. at 350. The Court recently expanded its approval of nonmutual estoppel to include use by plaintiffs against defendants who have fully and fairly litigated issues in a prior action. *Parklane Hosiery Co.* v. *Shore*, 47 U.S.L.W. 4079 (U.S. January 9, 1979). In addition, the Court in *Parklane* held that where collateral estoppel can otherwise be applied to foreclose relitigation of particular factual issues in an action in which a right to jury trial exists, the Seventh Amendment does not require a different result merely because the issues were originally determined in an action in which no jury trial right existed.

However, a substantial possibility exists that antitrust plaintiffs will be unable to take full advantage of this modern trend in estoppel doctrine due to the very language of Clayton Act Section 5(a) that was intended to benefit them. At issue is the intent of Congress in providing, in section 5(a), prima facie effect to antitrust enforcement actions brought by the United States. Congress could have intended either that such actions were to have prima facie effect *only* and were never to have the benefit of the more complete collateral estoppel effect, or that government enforcement actions were to have *at least* prima facie effect but were to have the full, preclusive benefit of collateral estoppel whenever it appropriately could be applied. The federal courts have as yet been unable to determine conclusively congressional intent in this area. *See, e.g.*, cases cited in *McCook* v. *Standard Oil Co.*, 393 F. Supp. 256, 259 (C.D. Calif. 1975). For example, the Supreme Court stated, in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 690 (1961), that "[Section] 5 of the Clayton Act, . . . making an adjudication of liability in a government suit prima facie evidence of liability in a . . . private suit, would seem to be a definitive legislative pronouncement that a government suit cannot be preclusive of private litigation." However, a lower federal court has recently held to the contrary and applied collateral estoppel effect to a government enforcement action in later private litigation. *Illinois* v. *Huckaba & Sons Construction Co.*, 442 F. Supp. 56 (S.D. Ill. 1977), *appeal docketed sub nom. Illinois* v. *General Paving Co.*, No. 78–1479 (7th Cir. April 13, 1978).

Section 6(3) of the bill would add the following sentence at the end of Section 5(a) of the Clayton Act: "Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel." By enacting this legislation, Congress would encourage the use of conclusive, collateral estoppel effect in private antitrust actions based on fully and fairly litigated government judgments or, if circumstances warrant, on private judgments. The Department of Justice agrees that antitrust litigants should be entitled to the same benefits of collateral estoppel that are currently available to other litigants generally, and that congressional action is required to overcome the uncertainty created by section 5(a) respecting the application of collateral estoppel to antitrust litigation.

Collateral estoppel is a flexible, equitable

doctrine that is applied only after a court has decided that it is fair to do so on the basis of the facts and circumstances involved in the case before it. This determination of particularized fairness prevents collateral estoppel from being abusive or coercive. Moreover, the availability of collateral estoppel would reduce relitigation of already-determined antitrust issues and thus save scarce judicial resources as well as provide an additional deterrent to violation of the antitrust laws. Therefore, we urge Congress to amend Clayton Act Section 5(a) to clarify that that section does not in any way limit the application of collateral estoppel with respect to issues determined in antitrust litigation.

It should be noted that the availability of collateral estoppel would not mean that antitrust judgments would automatically be given full, conclusive effect in subsequent actions. Application of the equitable doctrine of collateral estoppel in any particular case requires appropriate consideration of fundamental fairness.

While we endorse appropriate use of collateral estoppel, we believe that the prima facie effect established by Clayton Act Section 5(a) should be retained. Questions remain over the proper scope of the application of nonmutual collateral estoppel. For example, the Supreme Court recognzed in *Parklane Hosiery Co.* v. *Shore, supra* at 4082, that equitable considerations may place limitations on the application of offensive collateral estoppel in certain private damage action contexts. Retaining prima facie effect will insure that, at a minimum, prima facie preclusive effect will be accorded to issues previously determined in government antitrust litigation, thereby helping speed the movement of antitrust actions through the courts.

B. Use of collateral estoppel in damages actions brought by the United States under Clayton Act Section 4A:

Section 6(1) of the bill would also amend Section 5(a) of the Clayton Act by deleting the phrase "or by the United States under section 4A,". This amendment would make clear that final judgments or decrees in government enforcement actions may be afforded full, preclusive effect in subsequent government damage actions under Clayton Act Section 4A, 15 U.S.C. § 15a.

At present, Clayton Act Section 5(a) provides that final judgments and decrees in government criminal and civil enforcement actions are to be given prima facie effect in subsequent government damage actions as to all matters respecting which such judgments or decrees would be an estoppel as between the parties. If such judgments and decrees "would be" an estoppel between the government and a defendant, the Department of Justice believes they should actually be given estoppel effect. Accordingly, we support this proposed amendment to remove any ambiguity that may exist and to clarify that full estoppel effect be accorded to government enforcement actions in subsequent government damage cases.

C. Prima facie effect of government damage actions:

Section 6(2) of the bill would amend Section 5(a) of the Clayton Act by deleting the phrase "or to judgments or decrees entered in actions under 4A." This amendment would extend prima facie effect to actions brought by the United States under Clayton Act Section 4A in subsequent litigation.

At present, Clayton Act Section 5(a) provides that final judgments or decrees in actions brought by the United States under Clayton Act Section 4A are not entitled to prima facie effect in subsequent litigation. The Department believes that government damage actions should be afforded prima facie effect. We reject the notion that government damage actions are less worthy of preclusive effect than government enforcement actions. In certain instances, an action under section 4A may be the only option available to the Antitrust Division, as where criminal charges would be unwarranted and the violation has been discontinued, making injunctive relief unnecessary. The judgment in such a case should be as entitled to prima facie effect as any other enforcement actions brought by the Justice Department.

Accordingly, we support the proposed amendment to extend prima facie effect to actions brought by the United States under Clayton Act Section 4A.

II. Amendment to 28 U.S.C. § 1027: Sanctions for attorney delay:

Another means by which antitrust litigation can be expedited is to authorize increased sanctions for delay by attorneys conducting such litigation. Section 4 of the bill would modify the "state of mind" requirement for imposing sanctions presently contained in 28 U.S.C. § 1927 for delay by attorneys and would broaden the range of sanctions authorized by the statute for dealing with dilatory behavior.

As recognized by the National Commission for the Review of Antitrust Laws and Procedures, dilatory conduct in a variety of forms continues to be a significant problem in antitrust litigation. It delays the adjudication of legitimate claims and defenses, unnecessarily increases costs to litigants, and squanders limited judicial resources. Moreover, by coercing parties to settle litigation simply to escape needless expense and frustration, and by making it difficult for the less wealthy to protect their interests through the courts, such conduct leads to public cynicism about the judicial system. *Antitrust Commission Report* at 91.

Section 1927 of Title 28, United States Code, allows a court to combat dilatory behavior by imposing resulting excess costs personally on an attorney ". . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously. . . ." The scope of this provision is unclear and has been variously interpreted by the courts. At least one court has viewed the statute as authorizing sanctions only in unusually egregious instances. *See Kiefel* v. *Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969). In addition, the section has been narrowly construed to allow imposition of only "taxable costs" rather than all the added expenses incurred because of the improper conduct. *See United States* v. *Ross*, 535 F.2d 346, 350 (6th Cir. 1976).

The proposed amendment would substantially strengthen section 1927 in two significant ways. First, it would remove the current uncertainty regarding the statute's application by eliminating the requirement of "vexatiousness" and establishing a clear standard authorizing sanctions whenever unreasonable conduct has been undertaken "primarily for the purpose of delaying or increasing the cost of the litigation." Second, the amendment would provide a much more effective and appropriate sanction than does the present statute by expressly allowing imposition of not only excess "taxable costs" but also all excess expenses and attorney's fees reasonably incurred because of the sanctionable conduct. However, the proposed amendment would not alter the fact that the decision to impose such sanctions would remain subject to the sound discretion of the Court.

The proposed amendment, which is identical to that recommended by the National Commission for Review of Antitrust Laws and Procedures, see *Antitrust Commission Report* at 197 and n.13, should assist in reducing unwarranted delay in antitrust litigation. The Department of Justice supports this proposed legislation and urges its enactment.

III. Amendment to sections 4, 4A and 4C of the Clayton Act: Prejudgment interest:

Another means by which to eliminate unwarranted delay would be to authorize courts to award, in appropriate situations, successful antitrust plaintiffs interest on their damage judgments for the period during which the case was being litigated. Section 5 of the bill would amend Sections 4, 4A, and 4C of the Clayton Act, 15 U.S.C. §§ 15, 15a, and 15c, to authorize an award of interest on a successful antitrust plaintiff's actual damages from the date of service of the complaint to the date of judgment, at the prevailing commercial rate at the time judgment is entered. These amendments would apply to private treble damage actions, actions by the United States for single damages, and *parens patriae* suits by State Attorneys General for damages suffered by citizens of their states, respectively. We understand that post-judgment interest would remain available under the general provisions of 28 U.S.C. § 1961.

As recognized by the National Commission for the Review of Antitrust Laws and Procedures, parties, especially defendants, frequently have little or no incentive to expedite litigation, and they sometimes have strong economic incentives to delay. *Antitrust Commission Report* at 101. The ability of judges to award prejudgment interest at prevailing commercial rates would reduce or eliminate the considerable financial benefit that may be available by protracting the litigation and thereby extending the period during which an amount eventually paid to the plaintiff is retained by the defendant for profitable use. However, existing law is unclear as to whether prejudgment interest may be awarded in any types of antitrust cases, and such an award has been denied in at least one treble damage action. *Trans World Airlines, Inc.* v. *Hughes*, 449 F.2d 51, 80 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973).

The proposed amendments would clearly authorize the award of prejudgment interest in antitrust cases in appropriate instances to eliminate substantial incentives to delay. Such awards would be based upon a plaintiff's established actual damage, not upon a trebled amount. Moreover, awarding such interest at the prevailing commercial rate was deemed necessary by the National Commission for the Review of Antitrust Laws and Procedures to deter delay effectively. *Antitrust Commission Report* at 108, n.28. These amendments are particularly helpful by making awards of prejudgment interest essentially automatic. However, courts would be permitted to disallow such interest where an award might be unjust in the circumstances, for example, because of dilatory conduct by the plaintiff. The Department of Justice believes that these amendments would materially assist in expediting final resolution of antitrust litigation, and would thereby assist in deterring antitrust law violations as well. Accordingly, we support the proposed amendments and urge their enactment.

IV. Amendments to the Antitrust Civil Process Act:

Government investigation and trial of antitrust cases would be expedited and facilitated by amending certain provisions of the Antitrust Civil Process Act to clarify the ability of the government to attain access to information developed in related antitrust litigation and its ability to make use of modern document analysis techniques and other support services.

A. Obtaining products of discovery:

The Antitrust Civil Process Act, 15 U.S.C. § 1311 *et seq.*, permits the Attorney General or the Assistant Attorney General in charge of the Antitrust Division to obtain information, in the form of documentary materials, written answers to interrogatories and oral testimony, that they have reason to believe is relevant to ascertaining whether an antitrust violation has occurred or may be about to occur. Section 3 of the bill contains sev-

eral provisions that would clarify the ability of the Antitrust Division to issue civil investigative demands (CIDs) for information that has been produced through discovery in litigation. These provisions would also clarify the procedures to be followed by the Antitrust Division and other parties when the Division issues CIDs for such products of discovery.

The bill would expressly provide for the issuance of CIDs for products of discovery. Section 2(3) of the bill would define products of discovery as including any materials in the possession of a party obtained by any method of discovery, together with any indexes, digests, analyses or compilations of the materials so obtained. In addition, whenever the Antitrust Division issues a CID for materials obtained through discovery, the party from whom the materials were originally discovered would receive a copy of the CID and would have at least ten days in which to challenge the CID's validity upon whatever grounds may be available to it. The person receiving the CID would, of course, also retain the right to challenge it.

The bill also provides that CIDs for products for discovery would take precedence over protective orders issued in the course of private litigation. Products of discovery received by the Division pursuant to a CID would be confidential and could be used only in the same manner and for the same purposes as other materials acquired under the Antitrust Civil Process Act. Section 3 of the bill contains the additional safeguard that both the party from whom the materials were demanded and the party from whom the materials were originally discovered could invoke the confidentiality protections currently provided by the Act for materials submitted pursuant to it. Moreover, disclosure of any product of discovery to the Division pursuant to a CID would not constitute a waiver of any privilege, including the privilege relating to trial preparation materials, that the party making such disclosure might have with respect to such materials.

The Division has attempted to obtain products of discovery by serving a CID upon a party having such materials in its possession. However, such efforts have been slowed by the absence of specific procedures in the Antitrust Civil Process Act relating to such materials. The Antitrust Division served a CID on the GAF Corporation in an attempt to obtain products of discovery in GAF's possession as a result of its litigation against the Eastman Kodak Company, which was simultaneously under investigation by the Division. GAF believed itself prohibited from voluntarily producing the desired materials because of a protective order entered in the private litigation, and accordingly resisted complying with the Division's CID for fear of violating that protective order. The Antitrust Division sued to compel compliance with its CID, but enforcement was denied, without resolution of the protective order issue, primarily on the ground that the Antitrust Civil Process Act did not grant the Division authority to obtain products of discovery because the Act did not contain express procedures for protecting the confidentiality of such materials. *United States* v. *GAF Corp.*, 449 F. Supp. 351 (S.D.N.Y. 1978), *appeal docketed*, No. 78-6102 (2d Cir. June 13, 1978).

The proposals embodied in this legislation would ensure the ability of the Antitrust Division to utilize its law enforcement resources effectively and would decrease the time required to institute enforcement actions through clarification of the Division's ability to attain access to materials already produced through discovery in litigation between other parties. In many instances, such parties will have spent considerable amounts of time and resources discovering and organizing materials relevant to an ongoing investigation by the Antitrust Division. If the Division was unable to attain access to such materials, it would be required to duplicate the efforts of these parties with unnecessary expense to the taxpayers and delay to its investigations. In addition, these proposals would protect the confidentiality of such materials and would preserve all rights and privileges with respect to such materials that presently exist. Such proposals were recommended by the National Commission for the Review of Antitrust Laws and Procedures in order to maximize the benefits to be derived from the Antitrust Civil Process Act for the speedy and efficient investigation, and perhaps trial, of antitrust cases. *Antitrust Commission Report* at 53-54.

Accordingly, the Department of Justice supports enactment of such legislation.

B. Use of contractor services:

An examination of the legislative history of the Antitrust Civil Process Act reveals that the goal of Congress, in passing both the original Act and its 1976 amendments, was to provide support to the Division for the "effective and expeditious" enforcement of the antitrust laws. H.R. Rep. No. 94-1343, 94th Cong., 2d Sess. 1 (1976); S. Rep. No. 94-803, 94th Cong., 2d Sess. 1 (1976). *See also* Conference Rep. No. 2291, 87th Cong., 2d Sess. 3 (1962). Indeed, the 1976 amendments were designed to provide the Division with "all the basic investigative tools necessary" to its law enforcement needs, H.R. Rep. No. 94-1343, 94th Cong., 2d Sess. 1 (1976), and "to improve and modernize antitrust investigation and enforcement mechanisms." S. Rep. No. 94-803, 94th Cong., 2d Sess. 1 (1976).

However, certain language contained in paragraphs (2) and (3) of subsection 4(c) of the Act [15 U.S.C. §§ 1313(c)(2), (3)] could arguably be seen as hindering the Division's ability expeditiously and effectively to enforce the antitrust laws by inhibiting its ability to take full advantage of contractor services. As presently written, the statute states that copies of materials obtained pursuant to it may be prepared as required for official use by any duly authorized "official or employee" of the Department of Justice [15 U.S.C. § 1313(c)(2)]. It also states that, with specified exceptions, such material may be made available to a duly authorized "official or employee" of the Department of Justice [*Id.* § (3)]. Use of the phrase "official or employee" in these paragraphs may be argued to limit personnel assigned to the organization, processing, analysis or evaluation of CID materials to those with full-time employee or special government employee status, to the exclusion of contractors working under the direction and/or control of the government attorneys in charge of an antitrust matter.

Section 3(e) of the bill would substitute the phrase "official, employee or agent" for the phrase "official or employee" in paragraphs (2) and (3) of subsection 4(c). In addition, the term "agent" would be defined in Section 2(3) of the bill, for purposes of the Antitrust Civil Process Act, as including "any person retained or consulted by the Department of Justice in connection with the enforcement of the antitrust laws." These amendments would thus clarify the Department's authority to contract for document analysis and consultant services in order effectively and efficiently to process, analyze, evaluate and utilize materials produced pursuant to the Act. Enactment of these proposals would be entirely consistent with, and would further, the policy objectives contained in the Act's 1976 amendments of providing the Division with support services necessary for the effective and expeditious enforcement of the antitrust laws.

Use of contractor services would most frequently occur where a civil antitrust investigation or prosecution required the production and analysis of great numbers of documents or involved complex issues. Such contractors generally would be either specialists in automated document processing and indexing techniques or professionals having particular knowledge or expertise in an industry or a discipline.

In the first instance, the Division has recognized that automated document processing and indexing techniques are necessary to expeditious, effective law enforcement, and that its ability to utilize fully such methods of document analysis for CID materials should be clarified. Not incidentally, we are increasingly opposed by defense trial teams with substantial automated document analysis resources at their command. For a variety of reasons, we have concluded that, in connection with major antitrust investigations and prosecutions, it would generally be preferable to contract for the delivery of such services rather than to utilize Department employees for these purposes. The costs associated with contracting for document analysis services would generally be less than the costs of hiring, training and maintaining a staff to provide those services. In addition, contracting for such services would have the significant advantage of being more flexible than utilizing government employees. Given substantial uncertainty as to the timing and volume of receipt of CID materials, contracting for support services would enable us to adjust changing work schedules quickly, accurately and efficiently to meet our needs with a minimum of delay and loss of resources.

Similarly, where an investigation or prosecution involves complicated issues or subject matter, the use of experts having particular knowledge or experience in those areas may be necessary in order effectively and efficiently to analyze, evaluate and utilize the information received. Again, use of experts is commonplace in complex litigation, and the ability of the Division to utilize such persons as necessary for the effective progress of its investigations and cases should be clarified. It simply would not always be practical or even feasible to hire such persons as employees or special employees of the Department of Justice.

Enactment of the proposed amendments would not introduce any new concepts in antitrust enforcement. The proposal tracks the longstanding "duly authorized agent" language contained in comparable Section 9 of the Federal Trade Commission Act (15 U.S.C. § 49), which provides similar authority to FTC personnel. Moreover, the proposal would not prejudice the purposes of subsection 4(c) of the Antitrust Civil Process Act, as the "agent" would be required to be "duly authorized" to perform the assigned task in the same manner as presently required of the "official or employee" of the Department of Justice. Thus, the responsibility for the proper use of the materials would remain with the antitrust investigator designated to serve as custodian of them. *See* 15 U.S.C. §§ 1313(a), (c)(1). Moreover, the obligation of confidentiality already imposed on a "duly authorized official or employee of the Department of Justice" would also extend to the duly authorized "agent" as well (15 U.S.C. § 1313(c)(3)); thus, safeguards against improper disclosure of CID information would likewise be applicable against such agent. Finally, the Department would impose appropriate measures and take appropriate steps in connection with any service contracts to insure that the security of CID materials is maintained.

In summary, the proposed technical amendments would simply clarify the ability of the Department's Antitrust Division to expeditiously and efficiently process, analyze, evaluate and utilize information produced pursuant to the Antitrust Civil Process Act in connection with its enforcement of the

laws. However, unless the Act is promptly clarified, the Division faces possible legal challenge to its use of contractor services, causing, at minimum, severe delays (and the inherent costs) in the challenged proceedings. At worst, if such challenge were successful, the Division would be compelled, without such assistance, to cut back the number and size of the civil antitrust investigations or prosecutions it could initiate because it would be less able, and in some instances totally unable, to bring them to a successful completion. Moreover, the use of contractor services for such proceedings would in most instances be less costly and more efficient than use of Departmental employees with no loss in the security of confidential information. Furthermore, it would not always be practical, or even possible, for the Department to employ the diverse array of professionals with which it may need to consult on a case-by-case basis.

Accordingly, the Department supports enactment of this legislation.

V. Amendments to section 7 of the Clayton Act: Mergers and acquisitions:

At the same time your Subcommittee is considering ways to improve antitrust enforcement, it is important to consider eliminating two jurisdictional limitations contained in Section 7 of the Clayton Act, 15 U.S.C. § 18, that place arbitrary limitations on the Division's ability successfully to challenge certain mergers and acquisitions. Section 7 of the bill would expand the coverage of section 7 to clearly include acquisitions involving partnerships and other unincorporated entities. Section 7 now applies only to acquisitions of the stock or assets of one "corporation" by another. Section 7 of the bill would also apply the anti-merger provisions of the Clayton Act to activities that "affect" commerce. Section 7 now applies only to acquisitions of corporations which are "engaged in commerce." These amendments would not affect the substantive standards governing the legality of stock or asset acquisitions or mergers.

The Department of Justice supports enactment of such legislation.

A. Transactions involving unincorporated entities:

The first two amendments of section 7 of the bill would substitute the words "person" and "persons" for "corporation" and "corporations" in Clayton Act Section 7 so as to prohibit anticompetitive mergers and acquisions by or of any "person". Section 1 of the Clayton Act provides that the word "person" "shall be deemed to include corporations and associations. . . ." This language has been construed expansively by the courts. The proposed amendments would bring within the coverage of section 7 acquisitions involving natural persons, partnerships, associations, and other unincorporated entities. In practice, however, the proposed amendments are not expected to affect significantly persons other than partnerships, since such persons will rarely be involved in acquisitions having the prohibited anticompetitive effects.

These amendments would remove an arbitrary limitation on the jurisdictional scope of Section 7 of the Clayton Act, the major antitrust law used to challenge mergers and acquisitions which are likely to lessen competition. Section 7 is intended to supplement the Sherman Act by preventing increases in economic concentration that could lead to actual restraints of trade. Although the Sherman Act provisions apply to all "persons", section 7 applies only to "corporations." The proposed amendments would eliminate this jurisdictional anomaly.

Anticompetitive economic concentration could occur through acquisitions of and by unincorporated entities. In the accounting profession, for example, 1977 revenues of the "Big Eight" accounting partnerships reportedly ranged from $350 million to $516 million. In 1975, these partnerships reportedly audited 5,769 publicly held firms with total sales of $1,501.6 billion. If a merger between large accounting partnerships substantially lessened competition, the national economy could be significantly affected. Unless existing law were construed flexibly—a result that is by no means certain—the legality of such a merger could be determined by the legal form of the firms involved, not by the substantive effect on competition produced by the merger.

Accordingly, we urge enactment of legislation to eliminate such a potential unwarranted result.

B. Transactions involving firms affecting commerce:

The third proposed amendment to Clayton Act Section 7 contained in section 7 of the bill would apply the antimerger provisions of the Clayton Act to firms whose activities "affect" commerce. This amendment was made necessary by the Supreme Court's decision in *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975). In that case, the Court, interpreting the phrase "engaged in commerce" as used in section 7, held that that statute does not apply to acquisitions of companies whose activities, while clearly *affecting* interstate commerce, are nevertheless basically intrastate in nature. Thus, the bill would expand the applicability of section 7 to "any activity affecting commerce."

This amendment would serve effective antitrust enforcement in a number of respects. First, it would make the jurisdictional reach of section 7 with respect to the "commerce" requirement coextensive with that of the Sherman Act and Section 5 of the Federal Trade Commission Act. The present restrictive interpretation of this section partially defeats the Clayton Act's central purpose, which, as noted above, is to provide a means for halting incipient anticompetitive situations before they develop into restraints and monopolies prohibited by the Sherman Act. Specifically, the current "in commerce" constraint on section 7 may permit major firms to obtain virtual nationwide monopolies by acquiring one local firm after another. The statute's objectives will be seriously undercut if it is not applicable to acquisitions of firms with a localized business, however large or dominant those firms may be. In addition, the "in commerce" limitation on section 7 creates an internal inconsistency in the statute. While its basic proscription is of acquisitions with certain predictable *effects* on competition, it may not be used to challenge some acquisitions of firms whose activities do in fact *affect* commerce. Thus, while such an acquisition may produce the effects proscribed by section 7, the Department of Justice would be helpless to prevent it.

Accordingly, we urge enactment of such legislation.

I am pleased to have this opportunity to provide you with the views of the Department of Justice on the Antitrust Procedural Improvements Act of 1979. Enactment of this legislation would implement several recommendations of the National Commission for Review of the Antitrust Laws and Procedures. I sincerely hope your bill will receive early and favorable action in the Congress, and I stand ready to assist you and your Subcommittee in your consideration of the bill and in securing its enactment.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely yours,

JOHN H. SHENEFIELD,
Assistant Attorney General, Antitrust Division.

ANTITRUST PROCEDURAL IMPROVEMENTS ACT OF 1979

(Section-by-section analysis of the legislation)

The bill provides that the short title of the legislation is the "Antitrust Procedural Improvements Act of 1979."

SECTION 2

Section 2 of the bill amends Section 2, the definition section, of the Antitrust Civil Process Act, 15 U.S.C. § 1311, by adding definitions of "product of discovery" and "agent."

"Product of discovery" is defined in Section 2(3) of the bill to include all products of discovery, documentary and otherwise, and all organizational and analytical materials relating thereto. Discovery material obtained in any litigation or other judicial or administrative proceeding is covered by the definition. Section 2(1) includes any product of discovery, as defined in Section 2(3), in the definition of "documentary material" which appears in Section 2(g) of the Antitrust Civil Process Act. Section 2(3) also defines "agent" to cover "any person retained or consulted by the Department of Justice in connection with the enforcement of the Antitrust laws."

SECTION 3

Section 3 expressly gives the Attorney General and the Assistant Attorney General in charge of the Antitrust Division the right to require a person to produce products of discovery for examination pursuant to a civil investigative demand. It sets forth the procedures that the Attorney General or the Assistant Attorney General must follow in issuing the demand and the procedures that a person affected by the demand must follow if he intends to challenge the action of the Attorney General or the Assistant Attorney General. Section 3 also makes clear that a duly authorized agent of the Department of Justice, who is not an officer, member or employee of the Department, may examine material produced pursuant to a civil investigative demand. This change gives the Department express authority to employ outside contractors to analyze and organize documents produced in response to civil investigative demands.

Section 3(a) adds a sentence to Section 3(a) of the Antitrust Civil Process Act, 15 U.S.C. § 1312(a), to require the Attorney General or the Assistant Attorney General, when making an express demand for products of discovery, to notify the person from whom the product of discovery was originally obtained by serving upon him a copy of the demand. Section 3(a) also requires the Attorney General or the Assistant Attorney General to notify the person to whom such express demand is issued of the date on which the copy of the demand is served upon the party from whom the discovery was originally obtained. These requirements assure that all affected parties are notified when an express demand for any product of discovery is issued.

Section 3(b) of the bill adds a sentence to Section 3(b) of the Act, 15 U.S.C. § 1312(b), to give the recipient of an express demand for any product of discovery at least ten days to comply. This allows an affected person time to challenge such demand in court.

Section 3(c) of the bill adds a new subsection to Section 3(c) of the Antitrust Civil Process Act, 15 U.S.C. § 1312(c), which makes clear that an express demand for any product of discovery supersedes a protective order covering such material. The subsection further provides that disclosure of any product of discovery pursuant to such demand does not constitute a waiver of any rights and privileges affecting additional disclosure of such material.

Section 3(d) of the legislation amends Section 4(c)(3) of the Act, 15 U.S.C. § 1313(c)(3), to prohibit disclosure of any product of discovery produced pursuant to an express demand for such material to anyone other than a duly authorized official, employee or agent of the Department of Justice without the consent of the person who produced the product of discovery to the Department and of the person from whom the discovery was originally obtained.

Section 3(e) amends Section 4(c)(2) and (3) of the Act, 15 U.S.C. § 1313(c)(2) and (3), expressly to add duly authorized agents of the Department of Justice to the class of persons who may examine material produced pursuant to a civil investigative demand. This provision is intended to make clear that the Department can contract with outside agents for the document analysis and automated document processing and indexing services which are often necessary to organize effectively the material produced pursuant to demands.

Section 3(f)(1) amends Section 5(b) of the Antitrust Civil Process Act, 15 U.S.C. §1314(b), to require that if a person to whom an express civil investigative demand for any product of discovery is issued intends to challenge the demand, he must file his petition in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending.

Section 3(f))(2) redesignates subsection (c), (d), (e), and (f) of Section 5 of the Act as subsections (d), (e), (f), and (g) respectively.

Section 3(f)(3) adds a new subsection to Section 5 of the Act expressly permitting the person from whom discovery was originally obtained to challenge an express civil investigative demand for any product of discovery in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. The new subsection, designated subsection (c), specifically preserves such person's right to base his petition for an order modifying or setting aside portions of such demand on any constitutional or other legal right or privilege.

Section 3(f)(4) amends Section 5(c) of the Act (redesignated Section 5(d) by Section 3(f)(2) of this bill) to permit the person from whom discovery was originally obtained to petition for a court order requiring the custodian of any product of discovery produced pursuant to an express demand to perform any duty imposed by the Act.

Sections 2 and 3 of the bill make clear that the Attorney General or the Assistant Attorney General in charge of the Antitrust Division can issue civil investigative demands expressly for products of discovery. Courts have on occasion declined to enforce express demands for products of discovery because the Antitrust Civil Process Act does not explicitly authorize demands for such material. The changes made by Sections 2 and 3 of this legislation will eliminate the duplicative and wasteful discovery efforts caused by these court decisions. In addition, other changes made by Section 3 fully protect the rights of persons from whom products of discovery, subject to an express demand, were originally obtained.

Sections 2 and 3 also make clear that the Department of Justice can contract with outsiders to analyze documents and perform document organization and indexing services with respect to materials produced pursuant to a civil investigative demand. Private litigants routinely do this in major antitrust cases. The procedures applicable to further disclosure apply in the same manner to these duly authorized agents as they do to duly authorized officials and employees of the Department of Justice.

SECTION 4

Section 4 of the legislation amends 28 U.S.C. § 1927 to give the federal courts increased authority to sanction attorneys for dilatory litigation practices. Section 4 changes Section 1927 in two respects. First, Section 4 contains a more realistic intent requirement for the imposition of sanctions. Section 1927 now permits a court to require an attorney who "so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously" to pay for certain of such increased costs incurred by other litigants. The language of Section 1927 can be construed to allow the court to assess the attorney for such increased costs only when his actions were solely for the purpose of delay. Section 4 makes clear that a court can require an attorney to pay for increased costs when his conduct is primarily, instead of solely, for the purpose of delay or increasing costs by substituting the following language for the language in Section 1927 quoted above: "engaged in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of litigation."

Second, Section 4 of the bill permits the court to require an attorney who engages in litigation conduct unreasonably and primarily for the purpose of delay to pay for increases in costs other than taxable costs. Section 1927 has been construed to limit an attorney's liability to excess taxable costs. Section 4 gives courts authority to require an attorney to pay all excess costs, expenses, and attorneys' fees reasonably incurred because of the attorney's dilatory conduct.

By providing for a more realistic intent standard under Section 1927 and by expanding the category of increased costs and expenses a court may award, Section 4 of the bill makes Section 1927 a more effective deterrent to dilatory litigation practices by attorneys.

SECTION 5

Section 5 of the bill amends Sections 4, 4A and 4C(a)(2) of the Clayton Act, 15 U.S.C. §§ 15, 15a, 15c(a)(2), expressly to authorize courts to award interest to successful antitrust plaintiffs on their actual damages from the date of service of the complaint to the date of judgment at the prevailing commercial rate at the time of judgment. The award of prejudgment interest is not trebled under Sections 4 and 4C of the Clayton Act, the provisions which authorize private suits and *parens patriae* actions, respectively. Section 5 of the bill does not affect successful antitrust plaintiffs' rights to postjudgment interest under 28 U.S.C. § 1961.

Sections 5(a)(1), 5(b)(1) and 5(c)(1) add language to Section 4, 4A and 4C(a)(2) of the Clayton Act, respectively, which allows the award of interest on actual damages from the date of service of the complaint to the date of filing of the complaint at the commercial rate prevailing at the time of judgment. By setting fixed dates for interest to begin running and for calculation of the rate, Section 5 avoids the practical problems that sometimes make courts reluctant to award interest on unliquidated damages.

Sections 5(a)(2), 5(b)(2) and 5(c)(2) are intended to allow a court to adjust the award of prejudgment interest if the plaintiff has unreasonably prolonged the case.

By permitting awards of prejudgment interest on actual damages, Section 5 provides an incentive for defendants in antitrust suits to refrain from litigation tactics which serve no purpose other than delay. The amount of interest for which they might be liable is a function of the length of the suit.

SECTION 6

Section 6 of the bill amends Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), to make clear that courts may give collateral estoppel effect to final judgments and decrees entered in favor of the government in criminal and equitable antitrust actions. Some courts have read Section 5(a) to limit the use of government judgments and decrees in criminal and equitable actions to prima facie evidence in subsequent private actions against the same defendants. In other areas of the law, government judgments and decrees are given collateral estoppel effect in appropriate circumstances. Thus, Section 6 of the bill merely directs courts to treat government judgments and decrees in antitrust actions the same as they do government judgments and decrees in other areas of the law for collateral estoppel purposes. The Supreme Court has announced standards in *Parklane Hosiery Company v. Shore*, Docket No. 77-1305 (U.S. Jan. 9, 1979), to prevent unfair application of collateral estoppel.

If a prior government equitable or criminal judgment in an antitrust suit is not given collateral estoppel effect in appropriate circumstances, a full range of trial witnesses and exhibits will be offered by the plaintiff and the defendant in a subsequent private suit. By making clear that Section 5(a) of the Clayton Act does not preclude the application of collateral estoppel, Section 6 of the bill will substantially reduce the burden on courts and litigants and shorten trial time.

SECTION 7

Section 7 of the legislation amends Section 7 of the Clayton Act, 15 U.S.C. § 18, in two respects. First, it allows the Department of Justice to challenge anticompetitive mergers involving business entities other than corporations. Second, Section 7 of the bill allows the Department to challenge anticompetitive mergers involving firms which affect interstate commerce.

Sections 7(1) and (2) substitute "person" and "persons" for "corporation" and "corporations" in the first two paragraphs and the first sentence of the third paragraph of Section 7 of the Clayton Act. There are large business entities in the economy that are not organized in the corporate form. These changes in Section 7 of the Clayton Act extend the prohibition of anticompetitive mergers to mergers involving businesses not organized in the corporate form. The application of other antitrust laws, including Section 2 of the Sherman Act, has always extended to noncorporate business entities.

Section 7(3) makes clear that Section 7 of the Clayton Act reaches mergers involving firms "in any activity affecting commerce." This subsection overrules the Supreme Court's decision in *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975) (*"ABMI"*). The Supreme Court held in *ABMI* that Section 7 of the Clayton Act does not reach mergers involving firms affecting interstate commerce. Under the Supreme Court's construction of Section 7 of the Clayton Act, many anticompetitive mergers, particularly in the important service sector of the economy, may well not be challenged. Like substituting "person(s)" for "corporation(s)", changing Section 7 of the Clayton Act to reach firms affecting commerce makes the statute consistent with other antitrust laws, including Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act.

These amendments to Section 7 of the Clayton Act close two significant loopholes in the Department of Justice's jurisdiction to challenge mergers which may have the effect of substantially lessening competition or tending to create a monopoly in important markets in the economy.

REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES

PART ONE: COMPLEX LITIGATION

Section I: Procedure and Management

Introduction

Not all antitrust cases are complex or protracted. Nor are all complex cases antitrust

cases. Evidence before the Commission, however, indicates that, on the average, antitrust cases take longer to litigate than other civil litigation; that some antitrust cases absorb enormous resources and time; and that undue delay is a serious problem in a significant number of complex antitrust cases.[1]

The resulting burdens on litigants and the courts are great. Excessive public and private resources are needlessly expended; confidence in antitrust enforcement and the judicial process is weakened; and effective enforcement is impeded. Difficult remedial problems are compounded because the market reflected in the record may have changed substantially by the time the remedial stage is reached. In short, the overall effectiveness of the antitrust laws in promoting a competitive economy is impaired.

Understandably, the Commission has not spent substantial time preparing solutions for those antitrust cases that do not pose special problems of delay. The focus of this Report, including its major conclusions and recommendations, concerns the complex, potentially very large and expensive civil antitrust case. It is the latter, multiyear, sometimes multimillion dollar phenomenon that has caused the greatest public concern and that the Commission has primarily addressed.[2] Most Commissioners also believe, however, that the general principles of litigation management discussed here should have applicability to most civil cases.

Several interrelated factors account for the complexity and length of some antitrust cases. Major antitrust litigation is necessarily complicated because the workings of any important industry, including its competitive relationships, are inevitably complex. The substantive rules of antitrust are in some instances purposely drawn broadly so that certain fundamental, general principles can be applied to changing economic and industrial conditions. Particularly when combined with such broad rules, modern procedural concepts of notice pleading and liberal discovery tend to expand, rather than define, the boundaries of litigation. The sweeping nature of potential relief, including treble damages and divestiture, often make the stakes in antitrust cases huge, so that parties may view litigation as all-out economic war.

Caseload burdens on federal district courts typically are acute. An average of almost 400 civil cases per judgeship are pending at any given time.[3] The strict time limits of the Speedy trial Act [4] for federal criminal cases and the fact that about 90 percent of all civil cases are settled before trial [5] provide incentives for judges to pay greatest attention to cases actually in trial or clearly headed for trial.

Many of these facts are as a practical matter not subject to change. Other related aspects of the problem clearly are.

The Commission believes that the failure of some judges to manage and control complex antitrust litigation adequately is a major component of unreasonable delay in such cases.[6] We recognize that the root of this part of the problem may lie in the adversary system itself. Traditional notions of the judicial role presuppose a largely passive, mediating status for the court, with critical decisions greatly affecting the scope and management of the case left primarily to the tactical initiatives and responses of the parties and their attorneys. In major antitrust suits where potential for protraction is acute, however, an uninvolved, unaggressive judicial posture is a prescription for directionless litigation and excessive delay.

The absence of strong judicial control permits discovery to mushroom and issues to go unfocused; delay and obfuscation are more likely to be adopted as litigation tactics; bitterness and suspicion may more readily develop and persist between counsel. As a result, excessive motion practice and other examples of dilatory or overly litigious conduct proliferate, while incentives for stipulations and other potentially expediting types of behavior are reduced.

Conversely, the Commission believes that early and active judicial involvement and control can substantially reduce undue delay in the big case, and the first section of the Report attempts to spell out more specifically how this result can be achieved.

While stronger judicial management and control may be the single best solution for unreasonably protracted cases, judges clearly are not the sole cause of the problem. Financial incentives operating on private parties contribute to delay. From the defendant's perspective, protracting a case over many years can extend the life of profitable business practices challenged by the suit. Plaintiffs, on the other hand, may hope that the high costs of responding to massive discovery and preparing for possible trial will induce a settlement, even where liability may be in doubt.

Lawyer excesses and inefficiencies surely also contribute to unreasonable delays. Discovery is too often used purposely to protract pretrial or to wear down an opponent rather than to gather relevant information in preparation for trial. Discovery demands frequently are overbroad and repetitious; discovery responses are often dilatory, confusing, and inadequate. Issues are often left unfocused far too long. Unnecessary motions are sometimes brought, causing considerable burden on other parties and the court but without serious prospects of any meaningful relief. Extreme caution or single-minded perseverance by lawyers can also be a factor, producing "the compulsion to leave no stone unturned and no idea unargued." [7] Inadequate preparation, limited resources, and relative inexperience on the part of the government can also produce inefficiencies and delay.

The recommendations below suggest ways of counteracting the various causes of undue delay. Central to our recommendations is the importance of effective judicial control, tailored to the contours of each case and flexibly applied or withheld as the circumstances of each case dictate. Judges, in our view, are in the best position to ensure that litigation is expedited. They have the opportunity and, we believe, the responsibility to see that issues are focused, that discovery is streamlined, that delaying tactics are avoided, and that issues are addressed as soon as they are reasonably framed.

Many of the recommendations below are of complex litigation more effective by involving the judge in the process of establishing schedules and time limits (Chapter Two); controlling discovery (Chapter Three); defining the issues and reducing matters in controversy (Chapter Four); imposing sanctions (Chapter Five); and otherwise expediting the case (Chapter Six). Together, these recommendations should provide a framework within which the judge can bring focus to the case and avoid unnecessary delay.

The recommendations are not necessarily appropriate for every antitrust case, and their use must be tailored to the individual facts of each case, but when delay and complexity are potential problems, application of the recommendations will, we believe, significantly reduce the burdens and expense of litigation. If the recommendations are followed, we believe that even very complex antitrust cases can be successfully tried within the judicial system and the basic substantive framework of existing law.

FOOTNOTES TO PART ONE

[1] For example, 1977 figures of the Administrative Office of the United States Courts showed that, for private antitrust cases reaching trial, the median time between filing and disposition was 44 months and that 10 percent of these cases took longer than 68 months (5.67 years). *See* Submission of James A. McCafferty, Chief, Statistical Analysis and Reports Div., Administrative Office of the United States Courts, to the Antitrust Commission (Aug. 2, 1978) [hereinafter cited as McCafferty Submission] (Time interval from Filing to Disposition of Selected Civil Cases Terminated During the 12 Months Ended June 30, 1970–77, by Method of Disposition). The Commission's Empirical Case Studies Project Report provides more detailed examples from a limited number of specific cases. *See* P. Gerhart, Report on the Empirical Case Studies Project to the National Commission for the Review of Antitrust Laws and Procedures (Jan. 15, 1979).

[2] *See, e.g.*, President's Remarks on Greeting Members of the National Commission for the Review of Antitrust Laws and Procedures, 14 Weekly Comp. of Pres. Doc. 1140 (June 21, 1978); President's Remarks at the 100th Anniversary Luncheon of the Los Angeles County Bar Association, 14 Weekly Comp. of Pres. Doc. 834 (May 4, 1978). Commissioner Blecher feels that some techniques suggested here, while useful for particularly complex cases, could be counterproductive and actually lengthen simpler antitrust litigation.

[3] Annual Report of the Director of the Administrative Office of the United States Courts in Reports of the Proceedings of the Judicial Conference of the United States 186 (1977). The recently enacted Omnibus Judgeship Act of 1978, Pub. L. No. 95–486, 92 Stat. 1629, will substantially increase the number of circuit and district court judges. Nonetheless, with the upward trend in civil litigation expected to continue, the docket pressures on federal court judges will remain heavy.

[4] 18 U.S.C. § § 3161–3174 (1976).

[5] McCafferty Submission, *supra* note 1 (United States District Courts: Civil Cases and Antitrust Cases Filed, Terminated and Pending on June 30, 1962–1977).

[6] Commissioner Fox believes that the amorphous state of the law, and tactical maneuvers or inefficiencies of the lawyers, are the sources of the problem, and that judicial management and control is one of the most effective solutions. She believes that the problem must be dealt with also by directly addressing the root causes: clarifying and simplifying the law and assuring that lawyers of skill, experience and proficiency handle the complex case.

[7] *Antitrust Commission Hearings* 38 (Nov. 14, 1978, afternoon session) (remarks of Commissioner Fox).

Chapter one: Judicial management and control

Virtually all our recommendations for expediting potentially protracted cases require strong judicial control. To this end, we recommend the following:

Recommendations

1. In complex or potentially protracted cases, judicial management should begin early and be applied continuously and actively, based on knowledge of the circumstances of each case.

2. Educational programs for federal judges concerning techniques of effective judicial management should be expanded. Study of techniques of judicial control should be undertaken on a continuing basis.

3. Additional support personnel and relief from other judicial assignments should be available, when necessary, to judges handling complex cases.

4. The Commission does not recommend the creation of a special roster of judges to handle complex antitrust litigation. District courts should consider, however, the possibility of assigning complex antitrust cases to judges whose background, temperament and interests are conducive to the exercise of firm and efficient case management.

5. We do not recommend use of masters or magistrates to supervise the pretrial stages of complex antitrust cases. Direct supervision should be exercised by the district court judge.

The need for effective judicial control of complex antitrust cases

Traditionally, federal judges have served as umpires to resolve disputes brought to them by the litigants. That continues to be an appropriate role in many cases. Greater judicial involvement is required, however, in complex antitrust actions. To ensure more efficient and less costly litigation, the courts should exercise close and continuous control at all stages of complex cases.

In the absence of attentive judicial management, antitrust litigants often lack sufficient motivation to press their claims and defenses efficiently. Given the high stakes of many antitrust cases, the parties may feel that creating delay and exhaustion is a necessary or desirable way to defeat their adversaries.[1] Some attorneys actually specialize in dilatory procedural maneuvers;[2] others, while free of ulterior motives, are nonetheless too cautious or indecisive to face the merits of a lawsuit directly.[3] In addition, there is often little personal financial incentive for attorneys to move a complex case quickly to resolution.[4]

The importance of judicial management and control in expediting complex litigation is shown by nearly unanimous evidence in the Commission's record. For example, an empirical case study done for the Commission found that when the parties lack incentives to expedite the case, judicial control is the single most important factor in eliminating waste and delay. The importance of judicial control is similarly confirmed by statistical data obtained from the Administrative Office of the United States Courts and the Federal Judicial Center. Research shows that much of the expenditure of time and resources in protracted antitrust cases is unnecessary and is traceable directly to inefficient management.[5]

Much of the testimony before the Commission likewise supports the conclusion that effective court control of complex antitrust actions has been too often lacking.[6] Letters and memoranda submitted to the Commission by judges and lawyers underscored the need for improving judicial management of such cases.[7] The literature regarding problems created by big case litigation, going back to at least 1950, is yet another indication that inefficient case control has endured too long. While the earlier literature diverged on the details, much of it stressed the primacy of judicial control. The arrival of the *Manual for Complex Litigation*, with its disavowal of early issue-narrowing practices, may have retarded the implementation of prior-developed judicial management concepts. *The Nature of Effective Judicial Control.*

Effective judicial management must be early, continuous, active and knowledgeable. As soon as a case can be identified as complex,[8] the court should initiate contacts, either formal or informal, with the litigants. Judicial control should continue throughout the litigation. Regular and frequent contacts between court and counsel are indispensable in moving a complex action efficiently toward final resolution.

Effective judicial management should be active, a creative force that steers the litigants toward reasonable assessments of their discovery needs and the strengths and weaknesses of their case. Judicial supervision, of course, should not be so rigid as to stifle cooperation between counsel; rather, the court should encourage and build upon cooperative efforts of counsel. The judge, however, must carefully and independently evaluate the conduct of the parties, imposing such guidelines and restrictions as are suited to the efficient conduct of the lawsuit.

Finally, effective judicial control must be well-informed—the degree and type of judicial control must be tailored to the particular circumstances of each case. Each lawsuit should be viewed organically and the judge, exercising discretion, should apply managerial techniques that appear reasonable and appropriate. Under this approach, no rigid rules should be allowed to dissipate the effectiveness of imaginative and active judicial control of the complex antitrust case.[9] The overriding objective, of course, is to move the case efficiently toward either settlement or a fair trial, the date for which should be early and firmly set.[10]

The court must hold the litigants to the established pretrial schedule, with exceptions granted only for good cause shown, in the interest of justice. Continuous monitoring of the progress of pretrial, together with quick action whenever required, will prevent problems that might otherwise require schedule deviations. In addition, close judicial attention and control can prevent the litigants from abusing the discovery process by dilatory, obstreperous, or unethical conduct.[11] Counsel should be sternly reminded, whenever necessary, of their professional duty to act in the interest of the efficient administration of justice and to avoid dilatory tactics.[12]

The court should also guide the parties in focusing the issues and theories involved in the lawsuit,[13] since this makes both pretrial and trial more efficient.[14]

Facilitating judicial control

Judicial control of complex antitrust litigation may be increased in a number of ways. The most important of these is to sensitize judges to the pressing need to take hold of each phase of complex cases and manage it effectively. Clearly, judicial management is a skill that can be increased by education as well as experience. The Federal Judicial Center already provides valuable educational aid to members of the judiciary. These programs should continue to be expanded and improved regarding special procedures in handling complex antitrust cases.[15]

Our investigations have also disclosed that resources available to judges handling complex cases in some instances may be inadequate. Judges handling complex cases should be provided extra support services, including extra law clerks with longer appointments, and relief from other judicial assignments.[16]

Complex cases should be handled by judges whose background, temperament and interests indicate an ability to exercise firm and efficient controls. Executive Order 12022[17] directed the Commission to consider a special "roster" of judges to manage complex antitrust cases. This idea generated considerable controversy and negative comment. Several witnesses, including a number of judges, expressed concern that unwanted "elitism" among the judiciary would result if a special panel or roster were chosen. Furthermore, implementation of this concept would, according to some observers, provide resources to antitrust cases at the expense of other important cases, such as those involving issues of civil rights or securities regulation.[18] Therefore, the Commission concluded that it would be unwise to establish a special "panel" or "roster" of specially qualified federal judges to hear complex antitrust cases.[19]

Nonetheless, the random assignment of cases to judges may be counterproductive because it does not necessarily result in assignment of cases to judges with the best ability to manage them. Where a district is faced with a potentially very protracted case, it should consider altering its usual random assignment procedures (as some do currently)[20] to make the most effective use of judicial resources. Where necessary, as when a small district is involved or the judges of a district are already overburdened, the Judicial Council of that circuit[21] should be called on to make an intracircuit assignment. This action would be consistent with the Judical Conference's 1971 Resolution regarding special assignment of "protracted, difficult or widely publicized cases."[22] Renewed study and application of that innovative resolution are in order, and its principles should be applied, whenever necessary, on an intracircuit as well as an intradistrict basis.

Judges with particular kinds of experience—such as the handling of multidistrict litigation—should be well-suited to managing complex cases. At the same time, it is clear that prior antitrust experience, or even prior "big case" experience, is not a prerequisite for a judge to be an effective case manager. Other qualities of management and administration also are relevant in making such assignments.

Another idea that led to considerable debate in the Commission's proceedings is the proposal that masters or magistrates be used more extensively in the pretrial management of complex cases.[23] While talented individual masters or magistrates may help in expediting some complex cases, their general use does not appear to offer any substantial hope of expediting pretrial procedures. Unless masters and magistrates are used in close consultation and virtual partnership with judges, their presence in a case may actually add to its complexity and hinder direct supervision by the district judge.[24]

Many good techniques of judicial management are already in use, albeit on an *ad hoc* and scattered basis. Such devices need to be collected and employed more systematically, and this Report is directed to that end. The *Manual for Complex Litigation*, in our opinion, is not in its present form an answer to the problems encountered in complex antitrust litigation. Its overall approach to pretrial is inconsistent with principles of close judicial control that, in our opinion, are vital to the efficient litigation of complex antitrust cases.[25] We therefore hope that the next revision of the *Manual*, expected in 1979, will give careful attention to our recommendations.

FOOTNOTES TO CHAPTER ONE

[1] *See Antitrust Commission Hearings* 7–8, 13 (Sept. 12, 1978, afternoon session) (testimony of William J. Manning, member, Special Committee for the Study of Discovery Abuse, Litigation Section, American Bar Ass'n); Submission of David L. Foster, member, Antitrust Section, American Bar Ass'n, to the Antitrust Commission 4–5 (Oct. 2, 1978) (tabulation of responses to the complex litigation questionnaire) [hereinafter cited as Foster Submission].

[2] *See, e.g.*, Grady, *Trial Lawyers, Litigators and Clients' Costs*, Litigation, Spring 1978, at 5, 6, 58.

[3] Foster Submission, *supra* note 1, at 3–5; *Grady, supra* note 2, at 5, 6, 58.

[4] *Antitrust Commission Hearings* 124 (July 11, 1978) (testimony of Judge Charles B. Renfrew, U.S. District Court, Northern District of California); *id.* at 47–48 (testimony of Stephen D. Susman, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n).

[5] *Id.* at 126–27 (testimony of Judge Charles B. Renfrew). *See id.* at 6, 10–11 (testimony of Joseph F. Spaniol, Jr., Deputy Dir., Administrative Office, U.S. Courts). A study conducted by the Federal Judicial Center revealed that strong judicial control can cut almost in half the time devoted to discovery. *See* P. Connolly, E. Holleman & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery 54–55, tables 19–20 (Federal Judicial Center 1978). In a questionnaire sent out by the ABA Antitrust Section, 100 percent of the respondents stated that lack of judicial supervision was a source of delay. *See* Foster Submission, *supra* note 1, at 1. *See also, id.* at 4–5. A survey of experienced lawyers from the Antitrust Division of the Justice Department yielded similar responses. *See* Submission of the Antitrust Div., Dep't of Justice, to the Antitrust Commission 2–6 (June 21, 1978) (tabulation of responses to the complex litigation questionnaire) [hereinafter cited as Antitrust Division Submission].

[6] *See, e.g., Antitrust Commission Hearings* 13-14, 25-26 (Sept. 12, 1978, afternoon session) (testimony of William J. Manning); *id.* at 60 (July 13, 1978) (testimony of Alan J. Hruska, Co-Chairman, Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation); *id.* at 110-11 (July 11, 1978) (testimony of Fred H. Bartlit, Jr., member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n); *id.* at 64-65 (testimony of Denis McInerney, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n).

[7] *See* Submission of David L. Foster to the Antitrust Commission (Sept. 29, 1978) (speech by James T. Halverson to the Conference Board, March 2, 1978, The Litigation Process as a Device for Resolving Complex Competitive Economic Problems 8-13, included as part of follow-up responses of Task Force Panel on Complex Litigation); Submission of Arthur R. Curtis, Esq., Chicago, Illinois, to the Antitrust Commission 1 (Aug. 21, 1978); Submission of Lee Loevinger, Esq., Washington, D.C. and former Ass't Att'y Gen., Antitrust Div., Dep't of Justice, to the Antitrust Commission 4 (Apr. 20, 1978). *See also* Foster Submission, *supra* note 1, at 3-5; Antitrust Division Submission, *supra* note 5, at 2-6.

[8] There are a number of ways in which a complex case can be identified. These include inspection of complaints by the clerk, consultation with counsel, and notification to the clerk by counsel. *Antitrust Commission Hearings* 11 (July 11, 1978) (testimony of Joseph F. Spaniol, Jr.); Manual for Complex Litigation § 0.23 (1977). Fortunately, the Administrative Office of the United States Courts already requires counsel to complete and file a form simultaneously with filing the complaint which discloses the nature of the litigation, including whether it is an antitrust action. The assigned judge, or other court officers, can thus promptly review this form and the complaint to determine whether the case will be a complex one.

[9] *Antitrust Commission Hearings* 18–19 (Sept. 12, 1978, morning session) (testimony of Judge Patrick E. Higginbotham, U.S. District Court, Northern District of Texas); *id.* at 36 (July 11, 1978) (testimony of Fred H. Bartlit, Jr.); *id.* at 67 (testimony of Denis McInerney). *See* Pollack, *Discovery—Its Abuse and Correction* (pt. 2), N.Y.L.J., May 11, 1978, at 3, col. 1; Pollack, *Pretrial Conferences*, 50 F.R.D. 451 (1970).

[10] *Antitrust Commission Hearings* 110–11 (Sept. 12, 1978, morning session) (testimony of Judge Charles R. Weiner, U.S. District Court, Eastern District of Pennsylvania); *id.* at 110–11 (July 11, 1978) (testimony of Fred H. Bartlit, Jr.); *id.* at 144 (testimony of Judge Frederick B. Lacey, U.S. District Court, District of New Jersey). *Contra, id.* at 67 (testimony of Denis McInerney). *See generally* P. Gerhart, Report on the Empirical Case Studies Project to the National Commission for the Review of Antitrust Laws and Procedures 45–46 (Jan. 15, 1979) [hereinafter cited as Gerhart Report].

[11] *See, e.g.*, Ellington, A Study of Sanctions for Discovery Abuse 109–13 (Nov. 27, 1978) (a report submitted to the Office for Improvements in the Administration of Justice Dep't of Justice).

[12] Report of the Special Advisory Panel on Ethical Issues in Complex Antitrust Litigation to the National Commission for the Review of Antitrust Laws and Procedures *passim* (Dec. 4, 1978).

[13] Gerhart Report *supra* note 10, at 14–15, 47–57.

[14] The subject of issue-focusing is treated in detail in Chapter Four, *infra*.

[15] *Antitrust Commission Hearings* 6 (July 13, 1978) (testimony of Joseph L. Ebersole, Deputy Dir., Federal Judicial Center); Submission of Joseph L. Ebersole, Deputy Dir., Federal Judicial Center, to the Antitrust Commission 7–9 (Sept. 28, 1978) (response to follow-up questions).

[16] *See, e.g., Antitrust Commission Hearings* 139–40 (July 11, 1978) (testimony of Judge Alvin B. Rubin, U.S. Court of Appeals for the Fifth Circuit). Judge Rubin suggested that a central resource and research staff could be created to assist judges facing complex litigation, and that it might be linked by computer with the various circuit courts.

[17] Exec. Order No. 12022, 3 C.F.R. 155 (1977), *as amended by* Exec. Order No. 12052, 43 Fed. Reg. 15,133 (1978).

[18] *Antitrust Commission Hearings* 76–82 (Sept. 12, 1978, morning session) (testimony of Senior Judge John Minor Wisdom, U.S. Court of Appeals for Fifth Circuit, and Chairman, Judicial Panel on Multidistrict Litigation); *id.* at 127–28 (July 11, 1978) (testimony of Judge Charles B. Renfrew). *See also* Resolution of the Eleventh Transferee Judges' Conference (Nov. 3, 1978) (opposes special roster of judges for antitrust cases because of perceived tendency to create an "elite" group of judges).

[19] Commissioner Arkins believes that a circuit-wide roster of district judges, who have demonstrated efficiency in handling of complex cases, to whom random assignment of complex antitrust cases could be made, would help assure effective judicial management. The roster should be continuously supplemented by the addition of judges who have successfully handled complex cases as transferee judges by assignment from the Multidistrict Panel.

The Commission notes that listed under the President's Standards for Evaluating Proposed Nominees for United States district court judgeships is the "ability and willingness to manage complicated pretrial and trial proceedings." Exec. Order No. 12097, § 1–201(g), 14 Weekly Comp. Pres. Doc. 1975, 1976 (Nov. 8, 1978).

[20] *See, e.g.*, United States v. Keane, 375 F. Supp. 1201 (N.D. Ill. 1974) (setting out and discussing unpublished assignment procedures); D.N.J. Local R. 11(C)(1); D.D.C. Local R. 3–3(c).

[21] *See* Oliver, *Reflections on the History of Circuit Judicial Councils and Circuit Judicial Conferences*, 64 F.R.D. 201 (1975). *See also* 28 U.S.C. §§ 332, 333 (1976).

[22] Report of the Proceedings of the Judicial Conference of the United States, October 28–29, 1971, at 70–74 (1971) (Resolution on Prompt Disposition of Certain Cases).

[23] Antitrust Commission Staff, *Magistrates and Masters* (Aug. 7, 1978) (options paper submitted to the Antitrust Commission).

[24] *Antitrust Commission Hearings* 53–54 (July 11, 1978) (testimony of James T. Halverson, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n); *id.* at 172–73 (testimony of Judge Charles B. Renfrew); *id.* at 174 (testimony of Judge Alvin B. Rubin); Foster Submission, *supra* note 1, at 11–13.

[25] *See* Chapter Four *infra*. The Commission received comment critical of the approach to pretrial management taken by the *Manual for Complex Litigation*. *See Antitrust Commission Hearings* 41, 99–100 (July 11, 1978) (testimony of Fred H. Bartlit, Jr.); Foster Submission, *supra* note 1, at 18–20; Submission of Denis McInerney, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n, to the Antitrust Commission 2 (Sept. 13, 1978); Submission of William E. Swope, Director of Operations, Antitrust Div., Dep't of Justice, to the Antitrust Commission 4–5 (Oct. 17, 1978) (response to follow-up questions). *See also* Comment, *Observations on the Manual for Complex and Multidistrict Litigation*, 68 Mich. L. Rev. 303 (1969).

Chapter two: The use of time limits to expedite litigation

This chapter discusses the use of time limits or cutoff dates as a way to avoid undue protraction of complex antitrust cases.

Recommendations

1. Time limits should be regularly used to expedite major phases of complex litigation.

2. Time limits should be established early, tailored to the circumstances of each case, firmly but fairly maintained, and accompanied by other methods of sound judicial management.

3. The regular use of pretrial time limits should be effectuated by amending Rule 16 of the Federal Rules of Civil Procedure to authorize the establishment of time limits and cutoff dates. A local court rule modeled on the one included here should set a preliminary pretrial conference for 45 days after the complaint is served, mandate the establishment of time limits as soon as practicable thereafter, direct the early establishment of a firm trial date, and establish a maximum of 24 months for the completion of pretrial, not as a norm and extendable only in truly extraordinary cases.

The Need for Time Limits

In many complex cases, much pretrial time is consumed by tangential and unfocused activity, by deliberately dilatory behavior, or by periods of inactivity between spasms of more productive effort. The Commission's own investigation indicates that much of what lawyers do during litigation could just as well be left undone. A recent, exhaustive study by the Federal Judicial Center shows that needlessly wasted time constitutes a substantial portion of pretrial in many complex cases.[1] In districts having strong time controls, cases were resolved as much as 50 percent faster than similar actions in other districts with weaker controls.[2]

The use of time limits to expedite judicial and administrative proceedings is now receiving widespread and favorable comment. For example, a special "task force" within the Federal Trade Commission has recommended that time limits be set in litigation before that agency.[3] The Administrative Conference of the United States[4] has suggested the use of time limits to expedite various types of administrative action.[5] Time limits also play an important part in ensuring manageability of class actions under a recent proposal sponsored by the Department of Justice's Office for Improvements in the Administration of Justice.[6] During its hearings the Commission heard much testimony favoring and little opposing the use of time limits as one means of effective judicial control.[7]

The value of time limits lies in their sim-

Footnotes at end of chapter.

plicity and their capacity to stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material.[8] Time limits not only compress the amount of time for litigation, they also reduce the amount of resources invested in litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first. Time limits may also be imposed on trials so that parties will pare away redundant witnesses and documents while still having wide latitude in putting on their cases.[9]

Using Time Limits Effectively

There are several necessary components to the successful use of time limits. Time limits should encompass relatively large segments of litigation activity, should be determined by the judge as early in the litigations as possible, should be firmly maintained, and must be accompanied by other controls, such as discovery management, issue definition, and effective sanctions.

It is desirable to establish time limits for each major phase of a complex case, so that within each fixed period the litigants are motivated to exercise self-discipline and creative choices between alternatives. In some cases, a judge may want to establish interim deadlines covering portions of discovery activity. The adoption of overall time limits, however, for all major phases of litigation, particularly discovery, is clearly needed.

Time limits should be set early in the litigation. This allows the parties and the court to plan complex litigation rationally from the outset. The Federal Judicial Center has endorsed the early setting of time limits,[10] as do a large number of local rules.[11]

The determination of proper cutoff dates is crucial. Time limits must be realistic. An arbitrarily short time limit will be unjust; one luxuriously long will be ineffective. Therefore, after consultation with counsel, the judge should establish time limits that are appropriate for the particular case, based on an intimate knowledge of the action, common sense, and the court's experience.

Clearly, as the Federal Judicial Center and others have emphasized, a time limit must be firm to be credible.[12] Time limits should be expanded only by court order, and then only on a showing of substantial need and the prior due diligence of the parties. Firmness, of course, does not mean absolute intractability. Even when time limits work credibly and well, situations do arise in which more time is necessary.[13] Failure to adjust time limits to the circumstances or to prevent harassment or oppression would be unreasonable.[14] Extension, however, should be allowed only when demonstrably necessary.

Finally, time limits for complex cases must be combined with other means of judicial control to maximize their effectiveness. Early judicial efforts leading to a clear understanding of the issues can help make tight time periods work more productively. Controls on the scope and responsiveness of discovery are necessary to keep time limits from being used to oppress an adversary. A willingness to employ appropriate sanctions can also help to prevent injustice. Thus integrated with other controls, time limits are an important tool of strong judicial control in complex cases.

Time limits for length of trial, as imposed recently in a large antitrust case,[15] have been rarely used. The power of judges to cut off cumulative, redundant presentations of proof may provide authority for the use of overall limits on trial presentations.[16] As long as the limitations established are realistic and fair, and the judge prevents delaying tactics by hostile witnesses, we believe that trial time limits would also be an appropriate means of expediting litigation.

Footnotes at end of chapter.

A New Method for Effective Use of Time Limits

Pretrial time limits have been used sporadically for some years and have been rarely challenged.[17] Time limits now are generally permissible as long as they are reasonable.[18] Several federal districts have local rules authorizing or mandating such limits in one form or another.[19] Some local rules contemplate the establishment of time limits by the judge at an early, preliminary pretrial conference; others allow court personnel to set limits when the complaint is filed. Some local rules simply stipulate the number of days or months allowed for discovery; others provide for no time limits until a pretrial conference held shortly before trial. Only a few local court rules address complex cases specifically; those that do tend simply to double the number of months allowed in noncomplex cases.[20] The existing rules are therefore too diverse and untailored to deal specifically with complex cases. Accordingly, effective and widespread use of time limits in the ways recommended here, although permissible under current law, would be facilitated by changes in existing local rules.

The Commission considered recommending a national rule governing the establishment of time limits, but concluded that such a rule would be too inflexible to allow for existing variations in local practice, particularly in view of the maximum time periods already provided in some districts. Accordingly, we endorse the adoption of a uniform but flexible rule at the district level.

Since an early, preliminary pretrial conference is vital to the Commission's recommendations, we recommend that Rule 16 of the Federal Rules of Civil Procedure be amended to authorize the establishment of time limits and cutoff dates. Time limits and cutoff dates should be added to the six enumerated items now listed in Rule 16 for consideration at a preliminary pretrial conference and should be included among the components of the pretrial order. Our suggested language, set out at the end of Chapter Four, is permissive, not mandatory, but it would encourage courts and litigants to utilize time limits in complex cases. We also recommend that Rule 16 be amended to provide, additionally, for a preliminary pretrial conference if requested by one of the parties.

The Proposed Model Local Rule

The full text of a model local rule is set out at the end of this chapter. Each essential element of the proposal has sufficient flexibility to permit minor adjustments to accommodate local conditions.

The rule would first require that in a potentially complex case a preliminary pretrial conference be held within 45 days of the service of a complaint.[21] As explained in the next chapter, an early, preliminary pretrial conference is vital to the process of making complex cases manageable. Such a conference, or, if necessary, a series of such conferences, should be the forum for ascertaining information and positions necessary to formulate fair and realistic pretrial time limits. Forty-five days should allow counsel time to prepare for the initial conference; indeed the judge may require the parties to meet beforehand to discuss the issues and a discovery schedule. The 45-day period should start to run upon service of the complaint since an answer or other responsive pleading may be delayed.[22] While the preliminary pretrial conference should be held on schedule whether or not the answer or responsive pleading has been served, the filing of answers and other responsive pleadings should not be delayed. An answer or other pleading directly assists the court in formulating realistic pretrial time limits and serves the important function of beginning the process of issue narrowing.[23]

The proposed rule applies only to potentially complex cases. If the local rules now in effect require an early, preliminary pretrial in all civil cases, as do many existing local rules, the designation of a lawsuit as complex would not be necessary. If the applicability of the local rule does depend on a determination of "complexity," the determination should be made quickly by the Chief Judge, the assigned judge or other court personnel.[24] Although not all antitrust cases are complex, a preliminary pretrial conference should be called whenever there is doubt as to the potential complexity of a particular action.

The second major change incorporated in the proposed local rule complements the first. A district judge assigned a complex case may need time to determine appropriate time limits; the proposed rule gives him 30 days after such a preliminary pretrial conference. The object is for the judge to be able to make a considered determination, but to do so with all due speed.

Thirdly, the model rule would articulate a strict standard for extending time periods. Extensions would not be available merely by stipulation of the parties, but would require leave of court. Extensions of time for the personal convenience of counsel would also be limited. A standard requiring both need and due diligence[25] for extensions provides needed flexibility but should ensure that the exception will not become the rule.[26]

While the judge handling a complex case should set a specifically tailored time limit that is not longer than circumstances require, the proposed model local rule should set a ceiling on the judge's discretion by specifying a maximum allowable pretrial period. Such a period should be clearly designated as a maximum, intended only for a few unusual cases, and not as a norm. Of course, the maximum itself may occasionally have to be extended to prevent injustice, but ordinarily it should signal the outer limit of allowable pretrial time. Because we believe that all but a handful of extraordinarily complex cases can be brought to trial within 24 months, we recommend that individual judges and the various district courts consider that period as a practical ceiling on pretrial time. Some Commissioners oppose the use of the 24-month figure or any other specific maximum time in the local rule because they fear that such a maximum could unintentionally become the norm, or even a minimum. These Commissioners believe that each case should have its own time limit, determined by the judge alone.[27] A majority of the Commissioners, however, believe that 24 months is a fair and reasonable specific maximum, based on their own experience and judgment, the pretrial blueprint recently set out in *United States* v. *AT&T*,[28] a highly complex case, and the available statistics on potential time savings in complicated cases.[29]

Finally, the proposed rule would require judges handling complex cases to report any relaxation of established time limits or the maximum 24-month period to their Chief Judge and the appropriate Circuit Council. Testimony before the Commission indicated that analogous reporting requirements have had salutary effects on judges' performance.[30] This requirement would not afford appellate review of the judge's action, but would facilitate administrative supervision and help to highlight any need for assistance that the judge may have.

The text of the model rule we recommend to federal district courts is set forth below.

Text of a Model Local Time Limits Rule

"Time limits for complex civil actions"

(1) Not later than 45 days after the service of the complaint in any civil action deemed to be potentially complex, the judge assigned the matter shall hold an initial pretrial conference. This conference shall be held for purposes of considering any and all matters which may be raised at such confer-

ence under Rule 16, of the Federal Rules of Civil Procedure, including the setting of pretrial time limits and cutoff dates. The court may require counsel to meet prior to such conference and either agree on a statement of issues and a plan and schedule of discovery or file a statement that they met and were unable to reach such an agreement.

(2) Within 30 days after the initial pretrial conference required in subsection (1) has been held, or as soon thereafter as is practicable, the judge assigned the matter shall enter an order fixing cutoff dates for the parties to complete discovery and also a trial date. The judge may, in his discretion, include in such order or by any supplemental order such other provisions as he deems appropriate.

(3) The parties and their counsel are bound by the dates specified in said order and no extensions thereof shall be granted without a showing of good cause. Failure on the part of counsel to proceed promptly and diligently with the processes of discovery shall not constitute such good cause. Orders for extensions of time shall be entered only after consultation with, or hearing before the court.

(4) Continuances of time periods pertaining to pretrial processes but not set out in the order specified in subsection (2) and based on the personal inconvenience of counsel shall be strictly limited and allowed only upon a showing of good cause.

(5) Save where manifest injustice would result, the maximum periods of time set out in any order entered under subsection (2) shall not exceed 24 months from the date of service of the complaint. A 24-month time period shall be allowed only rarely, where an action presents potential for extreme and unusual complexity.

(6) A judge assigned a case to which this rule applies shall report to the Chief Judge and to the Circuit Council, in writing, whenever any order is entered pursuant to subsection (3) granting an extension of time or an order is entered pursuant to subsection (2) allowing a time limit in excess of 24 months.

FOOTNOTES

[1] *See* P. Connolly, E. Holleman & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery 62–66 (Federal Judicial Center 1978) [hereinafter cited as FJC Discovery Report].

[2] *Id.* at 68–69.

[3] *See* Working Group, Federal Trade Commission Staff, Report on Complex Antitrust Case Procedures 11–12 (1978) (not necessarily official FTC policy) [hereinafter cited as Working Group Report].

[4] The Administrative Conference of the United States is a body created by statute to serve as a forum for the exchange of ideas about administrative procedure and to develop proposals to ensure that federal regulatory activities do not infringe on private rights and are "carried out expeditiously in the public interest." 5 U.S.C. § 571 (1976).

[5] Administrative Conference of the United States, Recommendation 78–3: Time Limits on Agency Actions (June 7–8, 1978).

[6] *See* Office for Improvements in the Administration of Justice, United States Department of Justice, S. 3475: Bill Commentary (Aug. 25, 1978) (Proposed Revisions in Federal Class Damage Procedures) (not necessarily Department of Justice policy).

[7] Numerous witnesses supported the use of time limits. *See, e.g., Antitrust Commission Hearings* 27–28 (Sept. 13, 1978, morning session) (testimony of A.G.W. Biddle, President, Computer Communications Industry Ass'n); *id.* at 17–18 (Sept. 12, 1978, morning session) (testimony of Judge Patrick E. Higginbotham, U.S. District Court, Northern District of Texas); *id.* at 110–11 (testimony of Judge Charles R. Weiner, U.S. District Court, Eastern District of Pennsylvania); *id.* at 133–34 (July 13, 1978) (testimony of Chief Administrative Law Judge Daniel H. Hanscom, Federal Trade Commission); *id.* at 75–76 (testimony of Alan J. Hruska, Co-Chairman, Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation); *id.* at 118 (July 12, 1978) (testimony of Harold E. Kohn, Esq., Philadelphia, Pa.); *id.* at 37 (July 11, 1978) (testimony of Fred H. Bartlit, Jr., member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n); *id.* at 52–53 (testimony of James T. Halverson, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n); *id.* at 144 (testimony of Judge Frederick B. Lacey, U.S. District Court, District of New Jersey); *id.* at 146, 148 (testimony of Judge Charles B. Renfrew, U.S. District Court, Northern District of California); *id.* at 147 (testimony of Judge Alvin B. Rubin, U.S. Court of Appeals for the Fifth Circuit); *id.* at 191–92 (testimony of John E. Sarbaugh, Chief, Chicago Field Office, Antitrust Div., Dep't of Justice); *id.* at 190 (testimony of William E. Swope, Director of Operations, Antitrust Div., Dep't of Justice); *id.* at 77–78 (testimony of Stephen D. Susman, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n). A few witnesses stressed their reservations about the use of time limits. *See, e. g., id.* at 677 (testimony of Denis McInerney, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n).

[8] *Id.* at 36–39 (July 11, 1978) (testimony of Fred H. Bartlit, Jr.).

[9] Time limits can also be useful in the post-judgment period, in that they might compel a defendant facing injunctive and/or structural relief to think more realistically and creatively about that relief. *See* Chapter 7 *infra*.

[10] FJC Discovery Report, *supra* note 1, at 78–79.

[11] *E.g.*, E.D. Pa. Local R. 7(b)(2); E.D. Va. Local R. 12(3)(a).

[12] *See, e.g., Antitrust Commission Hearings* 116–18 (July 12, 1978) (testimony of Harold E. Kohn); *id.* at 148 (July 11, 1978) (testimony of Judge Charles B. Renfrew); FJC Discovery Report, *supra* note 1, at 82–83.

[13] For example, in the Southern District of Florida, judges granted one discovery deadline extension in 48 percent of the cases with a cutoff date and multiple extensions in 14 percent of such cases. FJC Discovery Report, *supra* note 1, at 73.

[14] *See, e.g.*, Alamance Indus., Inc., v. Filene's, 291 F.2d 142 (1st Cir.), *cert. denied*, 368 U.S. 831 (1961).

[15] SCM Corp. v. Xerox Corp., 77 F.R.D. 10 (D. Conn. 1977).

[16] *Id.* at 13–14 and authorities cited therein.

[17] For example, in Alamance Indus., Inc. v. Filene's, 291 F.2d 142 (1st Cir.), *cert. denied*, 368 U.S. 831 (1961), and Freehill v. Lewis, 355 F.2d 46, 48–49 (4th Cir. 1966), strict time limits were found unreasonable because, in the view of the appellate court, the trial court had completely failed to consider the legitimate and reasonable interests of one or more parties in a later trial date.

[18] Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 144 (8th Cir. 1968); Freehill v. Lewis, 355 F.2d 46, 48 (4th Cir. 1966).

[19] T. Guyer, Survey of Local Civil Discovery Procedures 12–17 (Federal Judicial Center Staff Paper 1977).

[20] Local rules which impose longer discovery ceilings for antitrust, patent, and trademark matters or for complex matters generally include E.D.N.C. Civ. R. 7(E) (eight months from filing of answer for antitrust cases versus four months for other cases); S.D. Tex. Local R. 15(e) (six months versus four months); N.D. Ind. Local R. 12(d) (eight months versus five months).

[21] The Commission's position that 45 days provides adequate time for preparation for this conference is similar to the position of the Working Group Report, *supra* note 3, at 8, which recommends that a preliminary conference be held in FTC cases within 45 days of the filing of the answer to the complaint. Local Rule 7(b) of the Eastern District of Pennsylvania also requires an initial pretrial conference to be held within 45 days of the filing of the complaint.

[22] One study found that few answers are timely filed and that the answer may not be filed until several months after the filing of the complaint. *See* S. Flanders, Case Management and Court Management in United States District Courts 21–23 (Federal Judicial Center 1977).

[23] This is consistent with the import of the Working Group Report, *supra* note 3.

[24] The Administrative Office Form which must be completed and filed by plaintiff's counsel when a complaint is filed discloses the nature of the litigation, including whether it is an antitrust action. The person who determines whether the case is complex can base his decision on a prompt review of this form.

[25] The FJC Discovery Report, *supra* note 1, at 82, also concluded that "[p]ostponements of the cutoff date should be granted only if the moving party shows both active discovery during the initial control period and a specific need for further discovery."

[26] If at least one extension is granted in 85 percent of cases with cutoff dates for discovery and multiple extensions in 60 percent of those cases, as happens in the Central District of California, *id.* at 73, most of the benefits of setting the original schedule are lost.

[27] Commissioner Blecher believes that the 24-month limitation for pretrial may be desirable for government cases where the plaintiff has pre-complaint discovery powers. He believes, however, that such a limitation with respect to private plaintiffs is impractical and potentially oppressive. In private cases, particularly where no prior record has been developed as a result of a previous case, 24 months is simply inadequate. In such cases, the plaintiff may only know that it has been injured and that its injury, *e.g.*, termination of a dealership, appears to be linked to its competitive behavior, *e.g.*, price-cutting. Discovery in these circumstances is the lifeblood of the private case, and restricting it arbitrarily will penalize plaintiffs and unfairly advantage defendants.

[28] United States v. American Tel. & Tel. Co., [1978–2] Trade Cas. ¶ 62,247 (D.D.C. Sept. 11, 1978), *on motion for reconsideration*, [1978–2] Trade Cas. ¶ 62,312 (Oct. 18, 1978).

[29] Figures compiled by the Administrative Office of the United States Courts show that approximately one quarter of the antitrust cases tried in the statistical years 1970–1978 took more than two years from the filing of the answer to trial. Submission of Joseph F. Spaniol, Jr., Deputy Dir., Administrative Office, U.S. Courts, to the Antitrust Commission, Table 4A (Oct. 20, 1978) (attachments to letter to Wendell B. Alcorn, Jr., Spec. Counsel to the Antitrust Commission). These data include many cases in courts without strong judicial management, and the FJC Discovery Report, *supra* note 1, at 55 Table 20, found that strong judicial controls can cut almost in half the length of discovery in cases with a lot of discovery. Accordingly, many of the antitrust cases which took more than two years to get to trial could have been handled in considerably less time. These statistics, combined with the experience in cases like *AT & T*, demonstrate that a goal of 24 months or less between complaint and trial is realistic in all but a small percentage of antitrust cases.

[30] *See Antitrust Commission Hearings* 34 (Sept. 12, 1978, morning session) (testimony of Judge Robert R. Merhige, Jr., U.S. District Court, Eastern District of Virginia); *id.* at 35 (testimony of Judge Jon O. Newman, U.S. District Court, District of Connecticut); *id.*

at 107–08 (testimony of Senior Judge John Minor Wisdom, U.S. Court of Appeals for the Fifth Circuit, and Chairman, Judicial Panel on Multidistrict Litigation).

Chapter three: Control of discovery

Pretrial discovery usually consumes the greatest amount of time spent in complex litigation. This chapter discusses means of curbing wasteful or abusive discovery practices in complex cases, and makes recommendations designed to increase the efficiency of discovery procedures.

Recommendations

1. Courts handling complex cases should exercise effective, direct control over the discovery process. They should balance the burdensomeness of particular discovery activity against its materiality and reduce discovery of tangential, immaterial matters.

2. Application of existing discovery rules by the courts has not resulted in a balanced and reasonable discovery process. Therefore, Rule 26(b) of the Federal Rules of Civil Procedure should be amended to narrow the scope of discovery. Rule 26(c) should be amended to make it clear that the court may, on its own initiative, protect against "annoyance, embarrassment, oppression, or undue burden or expense" related to discovery.

3. Improvements should also be made in the mechanics of written interrogatories, oral depositions, and document production. Procedures authorizing government access to materials discovered in private antitrust actions should be liberalized, and the interest of litigation efficiency should be given greater weight by courts that are requested to grant private parties access to grand jury materials.

Nature of the Discovery Problem

Discovery practices that cause undue delay and unnecessary expense are a major problem in complex cases. The record of the Commission and the Commission's Empirical Case Studies Project [1] make clear the need for discovery reform, particularly in very large antitrust cases.[2] The Rules Committee of the Judicial Conference has been considering extensive revisions to discovery procedures, as has the American Bar Association and other groups.[3] Although lawyers often have greatly different perceptions about which specific practices are the most abusive, depending on whether they ordinarily represent plaintiffs or defendants, there is considerable unanimity that serious discovery abuses exist.

The Report on the Empirical Case Studies Project make clear the magnitude of discovery difficulties in major cases. For example, one recent complex antitrust case [4] consumed four years of pretrial and required a 14-month jury trial. Depositions took 700 days and hundreds of thousands of documents were produced. Over 60 pretrial motions, leading to more than 40 opinions, were filed. Another recently tried private monopolization case [5] resulted in 4½ years of pretrial effort during which 33 hearings were held and 21 written opinions were issued by the court on scheduling and discovery matters. In a still pending government action [6] under Section 2 of the Sherman Act,[7] which was filed in 1969, the plaintiff produced about 26 million pages of documents, of which the defendant selected about 890,000 for duplication. The defendant produced around 4 million pages directly in this action. It also produced approximately 60 million documents to various private parties, many of which were copied and turned over to the United States. The litigants in this case took 1,270 depositions, including over 800 depositions by the defendant on relevant market issues.

Although cases like those described above may be in a class by themselves in terms of size and complexity, available statistical data indicate that a substantial number of other antitrust cases also pose serious problems of delay and expense.[8] In such cases, discovery is frequently carried to excessive lengths. The uso of overly broad, intrusive, repetitious and confusing interrogatories and document requests does little to advance the litigation, and results in wasted time and resources.

Poor responsiveness to discovery can be equally abusive; responses may be delayed, incomplete, and evasive. The adverse impact of such resistance is increased because the party seeking more responsiveness has the burden of moving for an order compelling discovery.[9] Another abuse is to go beyond the scope of the inquiry. This technique consists of providing an opponent with a "flood" of low-grade information, often with the most important items deliberately buried or produced last.[10]

Courts, unfortunately, largely have been resigned to permitting such activity. Since the modern federal rules on civil discovery were enacted in 1938, the prevailing attitude has been that the discovery rules should be construed liberally and left to operate with little or no judicial intervention.[11] See, for example, *Hickman* v. *Taylor*,[12] a leading judicial pronouncement on the philosophy of the discovery rules.[13] This permissive attitude toward discovery appears, however, to have been carried too far with adverse consequences for efficient judicial management. At least in the area the Commission studied, some real tightening up of discovery is required.

Control of Discovery Through Better Management of Its Scope

In the Commission's judgment, there are four separable, but integrally related elements of better control over discovery: more active and informed judicial management; a more sensitive approach toward the scope and burdensomeness of discovery; an early and continuing effort to define issues; and certain "mechanical" improvements in the main discovery devices.

A timely and informed judicial presence, whether through pretrial conferences, "status calls," or informal meetings, sets a better tone for discovery and makes parties aware of their responsibilities. Even without any rule change, close monitoring and attention by the court can make the litigants more cooperative and sanctions less necessary.[14] A judge is by these means able to offer and adopt his own ideas for scheduling and limiting discovery.[15] Although the court should, through consultation with counsel, avoid the imposition of a discovery plan by fiat, uncooperative attitudes or unproductive proposals by the litigants should not be accepted by the court. Efficient discovery processes, in sum, are not promoted by the sort of passive judicial posture that has been traditional in discovery matters.

Past practice in antitrust cases has often favored exceptionally liberal discovery; little concern has been shown for preventing burdensome discovery or prolonged discovery into marginal areas. An example of this permissive attitude is the case of *Maritime Cinema Service Corp.* v. *Movies en Route, Inc.*,[16] where the court stated:

"[D]iscovery under the Federal Rules, particularly in antitrust cases, is extremely broad, and not limited to the allegations of the pleadings . . . In antitrust litigation discovery is broadly permitted, and the burden or cost of providing the information sought is less weighty a consideration than in other cases." [17]

Courts have often adopted this view because the broad remedial purposes of the antitrust laws are said to require great discovery latitude for those seeking to enforce them.[18]

Not all antitrust courts, however, have abdicated a supervisory role over discovery. Courts do have broad and flexible authority to manage discovery, and some have used their authority to cut off tangential and overly costly inquiries.[19] In *Carlson Cos.* v. *Sperry & Hutchinson Co.*,[20] the court denied discovery into the acquisition or operation of subsidiaries that did not directly engage in a business related to the relevant product market. The court observed:

"[W]hen the requests approach the outer bounds of relevance and the information requested may only marginally enhance the objectives of providing information to the parties or narrowing the issues, the court must then weigh that request with the hardship to the party from whom discovery is sought." [21]

Too much permissiveness in discovery can and should be redressed by greater judicial sensitivity to the burdens of the process. The materiality of information sought should be weighed against the expected burden of producing it. By this approach discovery of marginally relevant material should be prohibited, or sought through more economical means, or postponed until more fruitful matters have been explored. Judicial control reflecting such a balancing process will not unduly restrict discovery or deny a party important information; rather, it will stress the need for economical choices and alternatives.

Balancing the materiality of the information sought against the burden imposed by the inquiry cannot be done in a vacuum. To make balancing work, courts must appraise relevance and materiality more carefully. Antitrust discovery decisions demonstrate that stemming such unwarranted discovery is both practicable and worthwhile.[22]

Since many courts, however, apparently are reluctant, despite their existing power, to limit discovery, an amendment to Rule 26 (b) of the Federal Rules of Civil Procedure is desirable. The Rule now defines the scope of allowable discovery by providing: "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." [23]

In the face of this broad standard, many courts apparently feel unable to limit discovery significantly. The Rules Committee of the Judicial Conference and a Special Committee of the Litigation Section of the American Bar Association, among others, support revision of this language to emphasize that courts can and should place reasonable limitations on the scope of discovery.[24]

The Special Committee of the American Bar Association has indicated a preference for defining "relevance" in terms of the issues raised," [25] while the Rules Committee of the Judicial Conference has tentatively chosen, instead, to define "relevance" with regard to the "claims or defenses" of the parties.[26] In both versions, the phrase "subject matter" has been deleted because it has permitted overly broad discovery. While the ABA Committee's version is somewhat more consistent with our recommendations for early issue definition, we support the adoption of either of these approaches, since both appear to be aimed at the same objective: "to direct courts not to continue the present practice of erring on the side of expansive discovery." [27]

Rule 26(c) of the Federal Rules of Civil Procedure is also germane to the effective control of discovery since it authorizes courts to protect litigants or others from "annoyance, embarrassment, oppression, or undue burden or expense." [28] Although this rule has the potential to curb abusive discovery and has been used to facilitate discovery by protecting the confidentiality of privileged information, it has only occasionally been employed to prevent undue burden of expense.[29] Parties served with reasonable and

Footnotes at end of chapter.

potentially abusive discovery demands too often fail to seek judicial protection. If a judge does not know that wasteful and dilatory pretrial techniques are being employed, management controls cannot be applied to remedy the situation. Litigants should give more serious consideration to moving for relief under this rule when faced with unreasonable discovery demands, and courts should be receptive to curtailing such abuses by issuing protective orders. Indeed, the rule should be amended to authorize courts to issue such orders on their own motion, following consultation with counsel, rather than waiting for a motion from one of the parties. Some commissioners, however, believe that courts should take such initiative only in egregious circumstances, where litigants fail to assume their responsibility to invoke rule 26(c) to assure the efficient progress of litigation.

Control of Discovery Through Early and Continuous Issue Definition

To control discovery actively and effectively, judges must be familiar with the issues in the case. A judge who is familiar with the issues can effectively limit the scope of discovery, decisively rule on discovery motions and ensure that discovery responses are forthright. Indeed, the processes of controlling discovery and defining the issues must go together: close monitoring of discovery plans can help a court define the issues; focusing issues can help guide discovery. Our recommendations concerning early issue definition are set out in chapter four *infra*.

Reduction of Inefficiencies Through Improved Discovery Devices

A basic change is needed in the approach toward pretrial discovery prescribed in the *Manual for Complex Litigation*. The *Manual* advocates the use of consecutive waves or layers of discovery, each being confined to a different phase of inquiry. A first wave seeks background information, such as location of documents and witnesses; a second wave seeks information on the merits; and a third wave satisfies remaining discovery needs such as amount of damages suffered. Although this may be a logical sequence for discovery in some cases, it is not an efficient process in most complex antitrust cases since it often leads to repetitious and wasteful pretrial activities.[30] Courts, thus, should avoid the automatic use of such an approach. Judicial management of the overall scope and sequence of discovery should, instead, be based on educated, *ad hoc* determinations by the court.

The court should encourage the litigants to employ discovery devices suited to the particular objective of the inquiry. At the initial, preliminary pretrial conference, the court and counsel should consider setting flexible guidelines for interrogatories and depositions. Continued experimentation by local districts in setting limits on the number of interrogatories and depositions may also lead to greater efficiency.[31] The Rules Committee of the Judicial Conference has proposed an amendment to Rule 33 of the Federal Rules of Civil Procedure that would expressly authorize the promulgation of such local court rules.[32]

Some existing procedural rules themselves raise problems of delay and cost, particularly in complex cases. Examples are Federal Rules of Civil Procedure 33 (governing written interrogatories to parties) and 34 (governing the production of documents and things), which permit the production of masses of disorganized, undesignated documents in response to interrogatories or document requests. This can result in significant delays in complex cases. The Commission has considered proposals designed to overcome this problem by the Rules Committee of the Judicial Conference, the Litigation Section of the American Bar Association, and the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation.[33] These suggested changes would help prevent many serious abuses of the discovery process and we support them.[34]

In accordance with these recommendations, Rule 33(c) of the Federal Rules of Civil Procedure should be amended to require parties who respond to interrogatories by producing business records to specify the documents that are responsive to each interrogatory. This specification should be sufficiently detailed to permit the party seeking discovery to identify, as readily as the party producing the documents, the materials that contain the information sought.

Also, Rule 34 of the Federal Rules of Civil Procedure should be amended to require parties responding to a document request either to label the materials in a manner corresponding to the request or to produce files as they are maintained in the usual course of business. With respect to practice under Rule 34, the Second Circuit Commission has also suggested a promising change.[35] The party serving a document request would be able under the Second Circuit proposal to indicate the sequence in which the materials are desired and would have the right to inspect the files of the other party in the order so indicated (insofar as practicable). This would be an alternative, exercisable at the option of the discoverer, to the current practice of leaving the sequence and details of file searching solely to the discretion of the discoveree. This alternative procedure should prove less burdensome to both the party seeking and the party giving discovery. Where the alternative method is not chosen by the discovery seeker, the court could give objections regarding "burdensomeness" more weight than is presently done under Rule 34. We support a rule change to reflect this proposal.

Improved Procedures for Shared Discovery

Another important cause of unreasonable delay and extraordinary expense, particularly in complex antitrust suits brought by the government, is the denial of access to materials already produced in actions initiated by private parties. Courts have on occasion refused governmental access to such materials because of prior orders protecting such materials from disclosure to nonparties.[36] Such a response forces the government to devote enormous time and resources to duplicate the past discovery of private attorneys general, who are frequently willing but unable to share with the government already discovered materials. Potential defendants have no legitimate interest in wasting the government's time and taxpayers' money in the interest of gamesmanship. Requiring such waste and dissipation of government enforcement resources should be avoided, except upon a judicial determination that it would be grossly unfair or unjust to do otherwise. Potential unfairness or injustice could be prevented through the imposition of reasonable conditions on the government's use of the previously discovered materials.[37]

To dispel the ambiguity that presently exists, we recommend that the Antitrust Civil Process Act[38] be amended to authorize expressly the issuance of civil investigative demands for products of discovery.[39] By "products of discovery" we mean depositions, pre-existing collections of particularly significant documents, indices, digests, analyses, and the like.[40] Under the amended law, notice would be given to the party from whom discovery was originally obtained and that party, as well as the recipient of the demand, could raise any objection to production. The confidentiality protection accorded materials submitted to the government under the current Civil Process Act would continue to apply, and the courts would remain empowered to deny production if warranted by the circumstances.[41]

The Commission also heard testimony concerning the need of private antitrust litigants to obtain better access to grand jury material, particularly grand jury transcripts.[42] Disclosure to private parties has often been denied or delayed because of the strong public policy favoring grand jury secrecy. While we favor steps to increase the efficiency of pretrial discovery, we also recognize a need, in some cases, to preserve grand jury secrecy.[43]

Authority to order disclosure of grand jury documents and transcripts presently exists under Rule 6(e) of the Federal Rules of Criminal Procedure. Applications are handled on a case-by-case basis, balancing the need for disclosure against the need for grand jury secrecy. The standard of "particularized need" which the courts have used in ruling on disclosure requests does provide a flexible approach to the problem.[44] We emphasize, however, that the difficulty of obtaining discovery is a particular need that should also be given considerable weight by the courts.[45]

Commissioners Spivack, Blecher and Fox believe that secrecy now afforded antitrust grand jury proceedings is generally not justifiable after an indictment is returned. They would recommend amendment of Rule 6(e), Federal Rules of Criminal Procedure, to provide such secrecy in antitrust cases only where the government demonstrates to the court that there is a particularized need for preserving it. This, they contend, would be fairer to defendants in criminal cases and would significantly expedite treble damage litigation following indictment.

FOOTNOTES

[1] P. Gerhart, Report on the Empirical Case Studies Project to the National Commission for the Review of Antitrust Laws and Procedures (Jan. 15, 1979) [hereinafter cited as Gerhart Report].

[2] *Antitrust Commission Hearings* 29–36 (Sept. 13, 1978, morning session) (testimony of A.G.W. Biddle, President, Computer Communications Industry Ass'n); *id.* at 59 (July 13, 1978) (testimony of Alan J. Hruska, Co-Chairman, Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation); *id.* at 124–30 (testimony of Chief Administrative Law Judge Daniel H. Hanscom, Federal Trade Commission); Gerhart Report, *supra* note 1, at 13, 32; Submission of David L. Foster, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n, to the Antitrust Commission 6–7 (Oct. 2, 1978) (tabulation of responses to complex litigation questionnaire) [hereinafter cited as Foster Submission]; Submission of the Antitrust Div., Dep't of Justice, to the Antitrust Commission 5–6 (June 21, 1978) (tabulation of responses to complex litigation questionnaire).

[3] *See* Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Mar. 1978) [hereinafter cited as Rules Committee Proposed Amendments]; Litigation Section, American Bar Ass'n, Report of the Special Committee for the Study of Discovery Abuse (Oct. 1977) [hereinafter cited as Discovery Abuse Report]; and Submission of Alan J. Hruska, Co-Chairman, Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation, to the Antitrust Commission (July 5, 1978) (Proposal for a Volunteer Masters Pilot Program, Apr. 10, 1978) [hereinafter cited as Hruska Submission].

[4] SCM Corp. v. Xerox Corp., Civ. No. 15,807 (D. Conn. Dec. 29, 1978) and SCM Corp. v. Xerox Corp., 77 F.R.D. 10 (D. Conn. 1977).

[5] Berkley Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404 (S.D.N.Y. 1978) (memorandum on post-trial motions).

[6] United States v. International Business Machs. Corp., 69 Civ. 200 (S.D.N.Y., filed Jan. 17, 1969).

[7] 15 U.S.C. § 2 (1976).

[8] *Antitrust Commission Hearings* 7 (July 11, 1978) (testimony of Joseph F. Spaniol, Jr., Deputy Dir., Administrative Office of the U.S. Courts); Administrative Office of the United States Courts, 1978 Annual Report of the Director, Table C5A at A-32 and A-33, Table C8 at A-42 (1978).

[9] *Antitrust Commission Hearings* 65 (July 13, 1978) (testimony of Alan J. Hruska); Submission of Thompson, Hine and Flory, Cleveland, Ohio, to the Antitrust Commission 8 (July 28, 1978) (Control of Discovery Abuses).

[10] *Antitrust Commission Hearings* 13 (Sept. 12, 1978, afternoon session) (testimony of William J. Manning, member, Special Committee for the Study of Discovery Abuse, Litigation Section, American Bar Ass'n).

[11] Fed. R. Civ. P. 26(b) was first adopted in 1938 and was intended not to limit discovery, as had been the old Chancery practice, to facts supporting the case of the party seeking discovery. Notes of Advisory Committee on the Original Rules. Rule 26(b) was then amended in 1946 to permit "inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence." Notes of Advisory Committee on 1946 Amendment to Fed. R. Civ. P. 26(b). The Committee Note went on to state that "[t]he purpose of discovery is to allow a broad search for facts . . ." *Id.* In the 1970 amendments, the scope of discovery was not changed, but a provision was added whereby discovery could be limited as provided by any of the other rules. *See* Notes of Advisory Committee on 1970 Amendment to Fed. R. Civ. P. 26(b). As discussed *infra*, however, the primary mechanism for control, Rule 26 (c), has been employed infrequently.

[12] 329 U.S. 495 (1948).

[13] In language strongly endorsing an expansionist view of discovery, the Supreme Court stated:

"[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Id.* at 507 (footnote omitted).

[14] Gerhart Report, supra note 1, at 40–42; Ellington, A Study of Sanctions for Discovery Abuse 109–13 (Nov. 27, 1978) (A report submitted to the Office for Improvements in the Administration of Justice, Dep't of Justice).

[15] Judges currently have the power to take part in discovery planning, and should do so. For a recent example of constructive judicial participation, see United States v. American Tel. & Tel. Co., [1978–2] Trade Cas. ¶ 62,247 (D.D.C. Sept. 11, 1978), *on motion for reconsideration*, [1978–2] Trade Cas. ¶ 62,312 (Oct. 18, 1978). *See also* Professional Adjusting Syss. of America, Inc. v. General Adjustment Bureau, Inc., 373 F. Supp. 1225 (S.D.N.Y. 1974); Dolgow v. Anderson, 53 FR.D. 661 (S.D.N.Y. 1971); Prepared Statement by Judge Charles B. Renfrew, U.S. District Court, Northern District of California, Judge Frederick B. Lacey, U.S. District Court, District of New Jersey, and Judge Alvin B. Rubin, U.S. Court of Appeals for the Fifth Circuit, to the Antitrust Commission *passim* (July 11, 1978) (contains a detailed list of suggestions for the increased control of complex cases by trial judges); 4 Moore's Federal Practice ¶ 26.56[1], at 26–142 (1978) ("Antitrust cases are so peculiarly complex, however, that the court is often called upon to fashion some limits . . . ."); 6 C. Wright & A. Miller, Federal Practice and Procedure ¶ 1530 (1970); Manual for Complex Litigation (1977).

[16] 60 F.R.D. 587 (S.D.N.Y. 1973).

[17] *Id.* at 589, 592.

[18] *See, e.g.*, United States v. International Business Machs. Corp., 66 F.R.D. 180, 186, 215 (S.D.N.Y. 1974) (three separate orders) ("[D]iscovery in antitrust litigation is most broadly permitted." *Id.* at 189); Morgan Smith Automotive Prods. Inc. v. General Motors Corp., 54 F.R.D. 19, 20 (E.D. Pa. 1971) (In allowing discovery of information relating to all product lines of automobiles and trucks manufactured by defendant, court stated that "utmost liberality" should be allowed for discovery in civil cases). For the application of traditionally liberal principles of discovery in antitrust litigation, see, *e.g.*, In re Folding Carton Antitrust Litigation, 76 F.R.D. 420 (N.D. Ill. 1977) and FTC v. Lukens Steel Corp., 23 Fed. R. Serv. 2d 1142 (D.D.C. 1977) (allowing discovery of materials dated seven years beyond the reach of the statute of limitations). *See also* Foster Submission, *supra* note 2, at 6 ("Any excessive delay can be principally attributed to the judicial approach to the scope of discovery in antitrust cases and the courts' failure to utilize available techniques to control complex litigation."); Submission of Palmer Brown Madden, and Cass R. Sunstein, Esqs., San Francisco, Cal., to the Antitrust Commission 8–11 (July 20, 1978) [hereinafter cited as Madden and Suntein Submission].

[19] *See* Professional Adjusting Syss. of America, Inc. v. General Adjustment Bureau, Inc., 373 F. Supp. 1225 (S.D.N.Y. 1974) (limiting time and geographic area of discovery); William Goldman Theaters, Inc. v. Metro-Goldwyn-Mayer, Inc., 54 F.R.D. 201 (E.D. Pa. 1971) (refusing to allow nationwide discovery where local conspiracy is alleged); Schenker v. Pepperidge Farms, Inc., 7 Fed. R. Serv. 2d 684 (S.D.N.Y. 1963) (limiting discovery to shorter time period, smaller geographic area, and fewer products than defendant had requested).

[20] 374 F. Supp. 1080 (D. Minn. 1974).

[21] *Id.* at 1088

[22] Madden and Sunstein Submission, *supra* note 18, *passim*.

[23] Fed. R. Civ. P. 26(b).

[24] *Antitrust Commission Hearings* 147–57 (July 13, 1978) (testimony of Harold S. Levy, General Att'y, American Telephone & Telegraph); *id.* at 188–209 (testimony of William Simon, Esq., Washington, D.C.); Rules Committee Proposed Amendments, *supra* note 3, at 6–11; Discovery Abuse Report, *supra* note 3, at 2–33.

[25] Discovery Abuse Report, *supra* note 3, at 2–3.

[26] Rules Committee Proposed Amendments, *supra* note 3, at 6–11.

[27] *Id.* at 10 (quoting with approval Discovery Abuse Report, *supra* note 3, at 3). *See also* Madden and Sunstein Submission, *supra* note 18, at 2.

[28] Fed. R. Civ. P. 26(c).

[29] Such motions as are made to prevent burdensome discovery have usually met a heavy burden of proof. *See, e.g.*, Davis v. Romney, 55 F.R.D. 337, 340 (E.D. Pa. 1972) (compelling reason for granting protective order to preclude discovery of documents not shown); Apco-Oil Corp. v. Certified Transp. Co., 46 F.R.D. 428, 432 (W.D. Mo. 1969).

[30] *See Antitrust Commission Hearings* 41 (July 11, 1978) (testimony of Fred H. Bartlit, Jr., member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n); Foster Submission, *supra* note 2, at 18–20.

[31] Commissioner Atkins wishes to note that Judge Hugh Will, Northern District of Illinois, reports favorably on the experience of that district in limiting to 20 the total number of interrogatories including all subparts, except for cause. Very few requests have been received for leave to file a greater number of interrogatories. Also according to Commissioner Atkins, the Southern District of Florida, where a local rule limits the number of interrogatories to 40, has had similar favorable experience.

[32] *See* Rules Committee Proposed Amendments, *supra* note 3, at 29–32.

[33] *See Antitrust Commission Hearings* 13 (Sept. 12, 1978, afternoon session) (testimony of William J. Manning); *id.* at 63–71, 80–82, 106 (July 13, 1978) (testimony of Alan J. Hruska). Also, after the deadline for submissions, the Commission received a written report generally critical of the rules changes proposed by the Committee on Rules of Practice and Procedure (*see* Rules Committee Proposed Amendments, *supra* note 3). *See* Arizona State University Discovery Conference, Report on the Advisory Committee's Proposed Revision of the Rules of Civil Procedure (Discovery) (Nov. 1978).

[34] *See* Letter from John H. Shenefield, Chairman, Antitrust Commission, to the Hon. Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules, Judicial Conference of the United States (Nov. 30, 1978).

[35] *See Antitrust Commission Hearings* 80–82 (July 13, 1978) (testimony of Alan J. Hruska).

[36] Zenith Radio Corp. v. Matsushita Elec. Indus. Co., [1978–1] Trade Cas. ¶ 61,961 (E.D. Pa. 1976); GAF Corp. v. Eastman Kodak Co., 415 F. Supp. 129 (S.D.N.Y. 1976); Data Digests, Inc. v. Standard & Poor's Corp., 57 F.R.D. 42 (S.D.N.Y. 1972).

[37] *See* the discussion in note 39 *infra* concerning the proposed amendments to the Clayton and Antitrust Civil Process Acts to provide for notice to discoveree, preservation of privileges and immunities, and right of petitions for court order modifying a discovery order based on constitutional or other legal right or privilege.

[38] 15 U.S.C. §§ 1311–1314 (1976).

[39] *See, e.g.*, Submission by Neil E. Roberts, Chief, Evaluation Section, Antitrust Div., Dep't of Justice 3–12 (Mar. 1978) (proposed amendments to Clayton Act § 4 and the Antitrust Civil Process Act). Under the proposed amendment, sections 2 through 5 of the Antitrust Civil Process Act would be amended to provide in principal part that the Department of Justice may issue a civil investigative demand upon any person who may be in possession, custody, or control of any documentary material, "including any product cf discovery obtained by such person in any litigation." In this amendment a "product of discovery" would be defined to "include without limitation the original or a duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission obtained by any method of discovery; any digest, analysis, selection, compilation, or other derivation thereof; and any index or manner of access thereto." The amendment would also contain the following provisions:

"Whenever a civil investigative demand is issued for any product of discovery, a copy of the demand shall be served upon the person from whom the discovery was originally obtained and the person to whom demand is issued shall be notified of the date on which such copy is served.

". . . any demand for any product of discovery shall not be returnable until after ten days after notice of said demand has been served upon the person from whom the discovery was originally obtained.

". . . a demand pursuant to this Act for any product of discovery shall supersede any inconsistent order, rule, or provision of law preventing or restraining disclosure of such product of discovery to any person; and provided further, that disclosure of any product of discovery pursuant to this Act shall not be deemed to constitute a waiver of any right or privilege, including without

limitation any right or privilege which may be invoked to resist discovery of trial preparation materials, to which the person making such disclosure may be entitled."

The amendment would also provide that all materials produced pursuant to the demand would be confidential and could be used only in the manner and for the purposes set forth in the Civil Process Act. Further, a motion to modify or set aside a civil investigative demand directed at a product of discovery could be made by the recipient of the demand or by the person from whom discovery was originally sought in the district court in which the discovery was originally obtained.

[40] Under this amendment a "product of discovery" would be defined to "include without limitation the original or a duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission obtained by any method of discovery; any digest, analysis, selection, compilation, or other derivation thereof; and any index or manner of access thereto." *Id.*

[41] *See* note 39 *supra*. Senator Hatch dissents from the recommendation for modification of procedures authorizing government acces to materials discovered in private antitrust actions.

[42] *Antitrust Commission Hearings* 43–45 (July 11, 1978) (testimony of Stephen D. Susman, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n).

[43] *See* Submission of William E. Swope, Director of Operations, Antitrust Div., Dep't of Justice, to the Antitrust Commission 5–6 (Oct. 17, 1978) (responses to follow-up questions).

[44] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958); Petrol Stops N.W. v. United States, 571 F.2d 1127 (9th Cir.), *cert. granted sub nom.* Douglas Oil Co. v. Petrol Stops N.W., 98 S. Ct. 3087 (1978).

[45] Certainly the level of "need" required for permitting disclosure should diminish if the reasons for preserving secrecy become less compelling. *See, e.g.*, U.S. Indus., Inc. v. United States Dist. Court, 435 F.2d 18, 21 (9th Cir), *cert. denied*, 382 U.S. 814 (1965); Illinois v. Harper & Row Publishers, Inc., 50 F.R.D. 37, 41 (N.D. Ill. 1969). For example, if grand jury transcripts have previously been disclosed to a witness' employer, the need for secrecy is reduced. Illinois v. Sarbaugh, 552 F.2d 768, 775 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977).

Chapter four: Methods for early focusing and resolution of issues

Early focusing of issues in complex litigation can greatly aid in controlling discovery and simplifying the case. This chapter explores the types and uses of early issue-focusing, including the prompt exchange of "relevant market" contentions and the increased use, where appropriate, of judicial notice. Also addressed is the use of partial and full summary judgment and interlocutory appeals of controlling questions of law.

Recommendations

1. Procedures for early and continuous issue-focusing, including nonbinding statements of fact and contentions of law, should be used aggressively in complex litigation. Rule 16 of the Federal Rules of Civil Procedure, relating to pretrial conferences, should be amended to encourage this issue-focusing process and to strengthen judges' authority to manage and effectuate it.

2. The Department of Justice and the Federal Trade Commission, using pre-complaint investigation powers, should strive to bring well-prepared, well-focused cases that can be tried expeditiously. The government and private litigants should strive to use stipulations to the greatest extent practicable.

3. The parties should exchange their contentions and information concerning relevant market and market shares early in the proceedings. This information should be used by the judge to encourage stipulations or, at a minimum, more rapid resolution of issues involving market allegations.

4. In much antitrust litigation the parties may not significantly disagree on certain relevant facts, such as economic data. Where there is but one acceptable factual interpretation of economic or other evidence, the court should expedite the litigation by taking judicial notice of such facts.

5. Partial summary adjudication or summary judgment itself may expedite litigation by narrowing, resolving, or eliminating issues. While the standards for summary adjudication set forth in Rule 56 of the Federal Rules of Civil Procedure are workable, the utility of summary judgment has sometimes been impaired by overly restrictive judicial construction of Supreme Court precedent. In appropriate antitrust cases, courts should not be reluctant to use summary procedures to narrow or resolve the issues.

6. In certain cases, interlocutory appeal of controlling questions of law can expedite complex antitrust litigation. 28 U.S.C. § 1292 (b) should be employed in such litigation whenever appropriate and practical. Discovery and other pretrial activities generally should continue during such appeals.

Benefits and methods of issue definition

The definition and narrowing of issues promotes controlled discovery by helping to delineate its scope, and helping to outline the legal theories and evidentiary material on which each side intends to build its case. Exchanging and updating statements of contentions and issues can eliminate the waste that occurs when a party drops an issue or changes theories without informing the other side, a practice of which we strongly disapprove.[1] Moreover, when issue-focusing proceeds in conjunction with the refinement of the facts through discovery, areas of substantial agreement may emerge. Such agreed-on facts can be reduced to stipulations or presented in the form of requests to admit prior to trial.[2] The effort expended on pretrial issue definition can also help streamline the evidence and arguments to be presented at trial.[3] Accordingly, issues should be defined in each case to enable the judge to consider facts and law within the context of actual disputes and to limit the litigation to proceedings and activities that are truly relevant and material.

In many complex cases, final definition of the issues will be achieved only after a series of pretrial conferences and substantial discovery.[4] Yet, many authorities believe that early pretrial conferences should at least begin to focus the issues before discovery has progressed significantly.[5] We agree, although we recognize that in some cases little real refinement of the issues can occur until the parties have obtained some discovery. The contrary approach of the *Manual for Complex Litigation*, which recommends that discovery be completed before the issues are defined, is, in our view, generally inefficient and counterproductive.[6] In complex cases, discovery without concurrent issue definition is often conducted without sufficient direction or reasonable scope and can easily become unduly broad and protracted.

An early, preliminary pretrial conference should be the starting point for defining the issues and determining the proper scope and direction of discovery.[7] Subsequent conferences between the court and counsel should be employed to refine and redirect the scope of discovery, as appropriate, for each particular action. In this manner, the issue-narrowing process will not operate to inhibit discovery unduly. Obviously, the degree of specificity that reasonably can be demanded in early attempts to delineate the real issues will vary from case to case. Only a limited amount of information may be available when some private plaintiffs file their complaints, while in government or other private cases, the plaintiffs may already know the facts in considerably greater detail.[8]

In particular, the Commission would emphasize that both the Antitrust Division and the Federal Trade Commission should help solve the protracted case problem by better, earlier focusing of issues in their own litigations. Both the Antitrust Division and the FTC possess considerable pre-complaint investigative powers. Nonetheless, at times complaints have been issued by these agencies that, while perhaps well-founded in the facts and the law, have nevertheless lacked structure and clarity. In addition, government cases have at times been hampered by use of inexperienced legal personnel, rapid turnover of attorneys, and by inadequate support staff and services.

To remedy these shortcomings, the Commission believes that both enforcement agencies should strive consistently to bring cases well enough prepared to allow for a rapid pretrial, as well as a comparatively short trial, with the government's case-in-chief taking the shortest amount of time practicable, usually not more than a few months at most. To facilitate this, we urge Congress and the appropriate officials of both agencies to consider ways of attracting and retaining sufficient legal and support personnel to prosecute cases effectively. We recognize this may require increased financial and personnel support for government cases as well as greater use of pre-complaint investigations to produce well-organized, well-focused cases.

In both government and private cases, constructive issue-focusing activity can be begun early in the case. Various courts now attempt to bring the issues into early focus by requiring timely, written memoranda that concisely state material facts, points of law, and any issues in the pleadings that have been abandoned.[9] The requirement of written submissions, if coupled with close judicial control and management, can cause counsel to present the case in an organized fashion, encourage them to be prepared for pretrial conferences, and induce them to formulate reasonable and adequate discovery plans.[10]

There are a variety of other useful techniques by which the court and counsel can work to narrow issues. Their use depends on a flexible, imaginative approach. Among the best known devices are the exchange of progressively more specific statements of factual and legal positions and proofs [11] and the use and discussion of draft stipulations of uncontested facts.[12] This latter technique can work if paid adequate judicial attention, and if parties refusing to stipulate are obliged to present alternative versions of the facts wherever possible.

Parties should also be moved to stipulate objective facts to the maximum extent possible. Of course, litigants should not be expected to stipulate to questions involving motive, intent, or reasonableness. They should also be permitted to withdraw agreements or stipulations on a showing of good cause—for example, when new facts are ascertained in the course of discovery.

Pretrial proceedings should not become an occasion for special pleading that elaborately states arguments or allegations.[13] The Commission has considered and rejected the concept of "special" or detailed pleading in antitrust cases,[14] and pretrial proceedings should not be used to require this. Written pretrial submissions, however, can foster more useful and continuing clarification of the issues than is achievable by reliance on the complaint and answer alone. Moreover,

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submissions encourage continuous consideration of the case by the parties and the court.[15] We recommend, therefore, that Rule 16 of the Federal Rules of Civil Procedure be amended to encourage use of such written statements in the course of pretrial proceedings.[16]

Rule 16 should also be amended to clarify judicial authority to define issues unilaterally, where litigants have failed to use reasonable efforts to agree. In many cases the parties will arrive at mutual statements of the legal and factual issues that can be incorporated in a pretrial order.[17] If the parties fail to properly define or reasonably agree about those issues, however, the court should itself restate the issues and resolve the impasse. The authority of courts to define issues in the absence of agreement is not now specifically established by Rule 16 or case law.[18] There is nothing in the language or spirit of Rule 16 or the case law to prohibit it, and courts now have inherent issue-defining power in Rules 12(f) and 56.[19] Nevertheless, Rule 16 should be amended to make this power clear.

Such an amendment is not intended to become an alternate form of summary judgment. Rather, the amendment would enhance judicial management capacity when counsel fail to reach a workable statement of issues. These statements are essential to a productive pretrial, especially discovery, and their creation should not be left to chance. Once again, active judicial management is an absolutely necessary ingredient.

Rule 16 as now written empowers judges, but not litigants, to call pretrial conferences. The need for access to the court mandates that counsel have the ability to initiate a pretrial conference.[20] The Rules Committee's proposed amendment to Rule 26(f) of the Federal Rules of Civil Procedure would have the court hold a pretrial conference, on the subject of discovery, when requested by any party. While this proposal has merit, there is no need, in our view, to limit such a conference to discovery, given the close relationship of discovery and other pretrial activity.[21] It would thus be more appropriate to amend Rule 16 to allow a party to call a preliminary pretrial conference, rather than amending Rule 26 in this fashion. The underlying need is for pretrial conferences to be available at an early stage to parties who experience a need for them.

Early exchange of market information

In some complex antitrust cases proof of relevant markets and market structure involves enormous time and expense.[22] A company often has excellent market information concerning the market in which it operates, and in many cases can readily state market shares with only a small margin of error. Yet an adversary seeking to prove market shares may have to conduct costly, nationwide surveys of all industry members, often in the face of myriad motions for protective orders and other objections by nonparty competitors. Thus, it is often hard for the parties or the judge to get a firm grasp of the case and to understand its dimensions until long after the suit is filed.[23] Even when this process is completed, a plaintiff may get data that is less reliable and complete than the data its adversary had all along.

If market information were exchanged early in the litigation, the parties would be better able to focus their efforts and might well agree to drop some market issues where essential weaknesses of their contentions were exposed. Preliminary market information might be used in early motions to dismiss, for partial summary adjudication, or for interim injunctive relief. The parties would be in a better position to agree on facts or to serve notices to admit, and the judge would be in a better position to press for stipulations.

Within existing law and procedural rules, courts can usefully adopt guidelines for such early exchanges of market contentions. Accordingly, we recommend that in every antitrust case involving proof of markets and market structure, within 20 days after the first pretrial conference but no later than 60 days after joinder of issue, plaintiff be required to serve on defendant its preliminary product and geographic market definition contentions. Within 30 days thereafter defendant would be required to serve on plaintiff the defendant's preliminary contentions of market definition. Within 30 days thereafter each party would serve on the other a statement of its best estimate, with regard to each line of commerce alleged by a party, of: (1) all significant competitors, the allegedly competitive products of such competitors, and their market shares, and (2) the approximate number and size of the remaining competitors. All principal documents on which the estimates and contentions are based should be attached to the statement, along with identification of all persons on whom the producing party substantially relied in arriving at the contentions and estimates. Documents under the custody and control of the parties that pertain to the definition or measurement of any relevant market listed by either party should be available for inspection and copying.

If a party lists an unreasonable number of market definition contentions, the judge should require that party to select the markets most important to it.[24] The opposing party would then respond only with respect to its own markets plus those selected by the adversary as most important. Compliance with this proposal would not preclude either party from pursuing discovery on market issues, but it is likely to obviate much of the need for such discovery.[25] Nor would a party be precluded from later changing its contentions upon a proper showing of underlying data.

This proposal requires no rule change.[26] It is a procedure that judges should implement under present law and its feasibility is aptly demonstrated by such potentially protracted cases as *United States* v. *Amax, Inc.* where the major factual issues were promptly settled by stipulation before trial.[27]

Increased use of judicial notice

The concept of judicial notice permits the trial judge to place uncontroverted facts into the record on a nonadversary basis.[28] By taking such action the trial judge can identify and resolve some factual questions and may provide an instructive foundation of facts about the pertinent industry and market structure. Expanded pretrial use of judicial notice can help overcome the hesitancy of counsel to stipulate the facts that are not substantially disputed. The use of judicial notice to identify those factual issues over which there is no substantial disagreement woud lessen the ability of litigants to obscure the questions really at issue, and thereby expedite the pretrial stage of litigation.

The Supreme Court has made significant use of this doctrine in antitrust cases in analyzing the economic and structural background of various industries, by taking judicial notice of reports by government agencies, as well as economic treatises and professional articles.[29] Such use of judicial notice has been quite important to the ultimate determination of a number of antitrust cases, but current judicial attitudes towards this type of notice are somewhat ambiguous and in need of clarification.

Rule 201 of the Federal Rules of Evidence is the sole evidence rule pertaining to judicial notice.[30] Generally, "two categories of facts clearly fall within the parameters of judicial notice, these being facts generally known with certainty by all reasonably intelligent people in the community and facts capable of accurate and ready determination by resort to sources of indisputable accuracy."[31] A second school of thought would also allow notice of facts that are unlikely to be challenged and are highly reliable, though less than certain.[32] Although the language of Rule 201 leans toward the former, more conservative school, creative use of judicial notice nonetheless need not be precluded.

Operating within present standards for judicial notice, the judge should, after notification of the parties, take appropriate notice where there is but one acceptable fact resolution. Thus employed, the doctrine becomes a tool of judicial management that, along with other techniques discussed elsewhere in this Report, should facilitate the quick and intelligent resolution of factual nondisputes. If, in the future, it becomes clear that Rule 201 is insufficiently flexible for this purpose, then we would recommend an amendment to liberalize that rule.

Summary adjudication

Partial or full summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure can also help expedite certain cases through the early determination of appropriate legal questions. The express function of summary judgment is to discern whether a "genuine issue as to [a] material fact" exists, thus removing irrelevant or factually deficient claims and defenses.[33] While there is considerable support for greater use of both summary judgment and partial summary adjudication in complex cases there are fairness problems in overuse of these procedures and many judges are extremely reluctant to employ such devices at all, particularly in antitrust cases.[34]

We recommend summary procedures as a valuable, workable element in the pretrial of much complex antitrust litigation. They can help define the issues, reduce the scope of discovery, shorten the length of trial, and increase the prospect of settlement. We caution, however, that summary disposition must be employed judiciously, and not as a means for bypassing trial or as an excuse for staying other pretrial activity.[35]

By specifying the facts and issues not in substantial controversy, partial summary adjudication may be very similar to an order entered pursuant to Rule 16 following a pretrial conference.[36] Materials prepared for the summary judgment motion can be used as an aid to trial planning, or as the basis for evidentiary presentation at trial. For example, in *United States* v. *Bethlehem Steel Corp.*[37] and *Seligson* v. *New York Produce Exchange*,[38] the parties condensed the record to prepare summary judgment exhibits, while intending to use the exhibits as a major part of the trial evidence if summary judgment were not allowed.[39]

Also, antitrust litigants should give careful consideration to moving for full or partial summary judgment as a means of focusing pretrial and trial. Rule 56 of the Federal Rules of Civil Procedure and the accompanying Advisory Committee notes indicate a uniform summary judgment standard for all cases and no special category for antitrust or other complex actions. Some courts, however, have been much more reluctant to grant summary judgment in antitrust cases. This result, in our opinion, stems from overly restrictive interpretation of certain Supreme Court cases. In *Poller* v. *Columbia Broadcasting System*,[40] the Supreme Court stated:

We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . . Trial by

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affidavit is no substitute for trial by jury. . . .[41]

This language may have served at the time to correct overly eager use of summary judgment in some antitrust cases, and the Commission is not recommending a return to pre-*Poller* practice.[42] Some cases since *Poller*, however, appear to have gone to the opposite extreme.

Under *Poller* and other Supreme Court decisions, failure by the movant to disprove conclusively a disputed material fact or factual inference requires denial of a motion for summary judgment.[43] This formulation has led to overly strict application in some instances. Some appellate courts have stated, for example, that summary judgment should not be granted if there is the "slightest doubt" as to any material fact.[44] This is an unwarranted gloss on the "genuine issue" requirement. Opinions relying on the slightest doubt standard have been declining, however, and some circuits, including the Second Circuit, have explicitly rejected the more restrictive language found in older cases.[45]

The *Poller* decision, when properly applied, should discourage the use of summary adjudication only where such action encompasses subjective evidence such as motive, intent, credibility, and the like.[46] In assessing the contribution of summary judgment to the expedition of complex antitrust cases, the Commission does not wish to invite the sort of abuses of summary judgment that the *Poller* decision effectively condemned. On the other hand, the appellate courts should more realistically evaluate the availability and proper application of summary judgment.

Since we view the present language of Rule 56 as compatible with more effective use of summary adjudication, we do not recommend a change in the Rule. If, however, future decisions do not enhance the availability of summary judgment, an amendment to the Rule may be needed.[47]

Interlocutory appeal

Readier recourse to interlocutory appeal of controlling legal questions could be very helpful in the earlier determination of certain complex antitrust cases. Resolution of novel legal theories should not await an entire pretrial and trial period only to have the earlier effort declared in vain. When there is "a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation," Section 1292(b) of title 28, United States Code, allows, early appeals, in the discretion of the trial judge. A "controlling" question need not itself be a "dispositive one," so long as its resolution will indeed "materially advance" the end of the case.[48] Section 1292(b) must be employed with discretion, but it should be used more readily by district and appeals courts handling complex antitrust litigation.

There is considerable scholarly comment that Section 1292(b) has been underutilized.[49] We agree, and urge litigants in private antitrust suits to seek interlocutory appeals of truly key legal issues that are likely to lead to a significantly faster resolution of the action.[50] The statute, appropriately in our judgment, provides that no stay of proceedings shall occur unless specifically so ordered. This provision is important, because use of interlocutory appeal can be counterproductive if discovery and other activity are allowed simply to languish pending resolution of one issue, even a main issue. We therefore recommend against any "stays" of pretrial during interlocutory appeals except in extraordinary situations. An effort to resolve at an early point a controlling question of law should not be made at the expense of all other aspects of pretrial preparation.[51] Use of Section 1292(b) in tandem with vigorous pretrial work should promote economy without fostering delay.

Proposed amended rule 16

(Italics indicates an addition; brackets denote deleted material.)

In any action, the court may, in its discretion, *or upon the request of any party*, direct the attorneys for the parties to appear before it for a conference *or conferences* to consider

(1) The simplification of the issues;

(2) The necessity of desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) *The filing of non binding statements and counter-statements of facts and theories of claims or defenses, which shall be used to narrow issues, guide discovery and prevent surprise, but shall not be admissible at trial;*

(7) *The imposition of the sanctions stated in Rule 37(b)(2) against any party for failure to follow orders entered pursuant to Rule 16;*

(8) *The submission of a plan and schedule of discovery;*

(9) *The setting of pretrial time limits, cutoff dates, and a trial date;*

(10) [(6)] Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, *the time limits and cutoff dates set*, and the agreements made by the parties as to any of the matters considered, and which *defines the legal and factual issues and* limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for reconsideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

FOOTNOTES

[1] P. Gerhart, Preliminary Report on the Empirical Case Studies Project to the National Commission for the Review of Antitrust Laws and Procedures 14, 47–48 (Jan. 15, 1979) [hereinafter cited as Gerhart Report]; Smith, *Preliminary Particularization of Issues*, 21 F.R.D. 456 (1957).

[2] Requests to admit are governed by Fed. R. Civ. P. 36. Like contention interrogatories, requests to admit are useful pretrial tools. They are more formal alternatives to the statements we have recommended.

[3] Gerhart Report, *supra* note 1, at 14–15; Smith, *Defining the Issues and Establishing a Plan for Trial*, 23 F.R.D. 412 (1958); Comment, *Federal Rule 16—Definition of Issues by the Pre-trial Judge*, 61 Mich. L. Rev. 1566, 1567 (1963).

[4] *See, e.g.*, United States v. American Tel & Tel. Co., [1978–2] Trade Cas. ¶ 62,247, at 75,565–69 (D.D.C. 1978).

[5] *Antitrust Commission Hearings* 99 (Sept. 13, 1978, morning session) (testimony of Professor Philip E. Areeda, Harvard Law School); *id.* at 28–30 (testimony of A. G. W. Biddle, President, Computer Communications Industry Ass'n); *id.* at 79–80 (Aug. 15, 1978) (statement of Commissioner Atkins); *id.* at 95–98 (statement of Commissioner Nicholson); *id.* at 59–60 (July 13, 1978) (testimony of Alan J. Hruska, Co-Chairman, Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation); *id.* at 129–31 (July 11, 1978) (testimony of Judge Charles B. Renfrew, U.S. District Court, Northern District of California); Gerhart Report, *supra* note 1, at 14, 47; Judicial Conference Study Group on Procedure in Protracted Litigation, *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 373 (1960). *See also* Life Music, Inc. v. Broadcast Music, Inc., 31 F.R.D. 3, 5 (S.D.N.Y.), *petition for mandamus denied*, 309 F.2d 242 (2d Cir. 1962); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 204 (1976); Antitrust Section, American Bar Ass'n, *Streamlining the Big Case*, 13 ABA Antitrust L.J. 183, 184, 190–92 (1958); Smith, *supra* note 3, at 413.

[6] Manual for Complex Litigation, introduction, at 3 n.3, § 1.20, at 18 n.19 (1977). *See* Gerhart Report, *supra* note 1, at 75; *Oversight of Antitrust Enforcement: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 95th Cong., 1st Sess. 246 (1977) (statement of Ira Millstein); Flittie, *Judicial Notice in the Trial of Complex Cases—The Sherman Act § 1 Per Se as a Testing Ground*, 31 Sw. L.J. 819, 825 & n. 38 (1978); Withrow & Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 Cornell L. Rev. 1, 25 (1976); Note, *Observations on the Manual for Complex and Multidistrict Litigation*, 68 Mich. L. Rev. 303 (1969).

The *Manual* supports its recommendation against initial briefing of contentions with a citation to Perma Life Mufflers Inc. v. International Parts Corp., 392 U.S. 134 (1968), commenting that "where plaintiffs originally proceeded on one theory before discovering their entitlement to rely on another, early briefing would have clearly been pointless." Manual for Complex Litigation § 1.20, at 18 n.19 (1977). Reliance on *Perma Life* is questionable. In *Perma Life*, a group of franchisees alleged a conspiracy to restrain trade in violation of sections 1 and 2 of the Sherman Act. The district court granted summary judgment for the defendants on the grounds that plaintiffs were voluntary parties to the alleged antitrust violations and were barred from suing under the doctrine of *in pari delicto*. Alternatively, the district court held that plaintiffs could not claim a conspiracy among the defendants because they were in essence a single business enterprise although organized as separate corporations. *See* Perma Life Mufflers, Inc. v. International Parts Corp., [1966] Trade Cas. ¶ 71,802 (N.D. Ill. 1966); Perma Life Mufflers, Inc. 1. International Parts Corp., [1966] Trade Cas. ¶ 71,801 (N.D. Ill. 1966). The Supreme Court reversed, holding that the *in pari delicto* doctrine is not a defense to treble damage actions. The Court also held that doing business through separate corporations rendered them liable on conspiracy grounds. Plaintiffs raised before the Supreme Court the theories that conspiracies also existed between defendant and each plaintiff and between defendant and other franchisees. The Court held that these theories were alleged with sufficient specificity in the complaint to allow plaintiffs to rely on them.

Perma Life thus does not stand for the proposition for which the *Manual* cites it. An attempt at early issue definition might have forced plaintiffs to list their alternate theories of conspiracy more clearly. At worst, the late appearance of the alternate theories had little effect on the litigation, since plaintiffs' primary theories were upheld. Early issue definition might have focused discovery and lessened the "voluminous" record. Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692, 693 (7th Cir. 1967), which developed between the filing of the complaint in 1960 and the district court's

ruling on motion for summary judgment in 1966.

[7] If the initial pretrial conference is conducted within 45 days after service of the complaint, responses to discovery requests will not normally have been due. Responses to interrogatories and document production are not required until 45 days after service of the summons and complaint. Fed. R. Civ. P. 33(a), 34(b). Depositions within 30 days of service on the defendant are by leave of court. Fed. R. Civ. P. 30(a).

[8] *See, e.g.*, Furth, *The Anatomy of a Seventy Millon Dollar Sherman Act Settlement—A Law Professor's Tape-talk with Plantiff's Trial Counsel*, 23 De Paul L. Rev. 865, 874–75 (1974).

[9] *See, e.g.*, C.D. Cal. Local R. 9(e). The Northern District of Ohio has promulgated rules for litigation involving the antitrust or patent laws, damage claims exceeding $1 million, and multiple parties. Discovery is "confined to the genuine issues necessary to a decision of the case," and counsel submit tentative statements "explaining and clarifying the positions taken in the pleadings." A pretrial conference follows for the purpose of "defining the bounds of discovery in accordance with the elaboration and clarification of the issues." The rules specifically provide that a party is not precluded "from changing his position or amending his pleading, where otherwise proper"; the statement of issues is to serve only "as a framework for discovery." N.D. Ohio R. for Complex Litigation 1, 3, 4.

[10] For positive and negative views, see *Antitrust Commission Hearings* 40 (Sept. 12, 1978, morning session) (testimony of Judge Patrick E. Higginbotham, U.S. District Court, Northern District of Texas); *id.*, at 24–25, 39–40 (testimony of Judge Jon O. Newman, U.S. District Court, District of Connecticut); Gerhardt Report, *supra* note 1, at 38–40; Submission of Denis McInerney, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n, to the Antitrust Commission 5 (Sept. 13, 1978) (response to follow-up questions of Antitrust Commission).

[11] *See. eg.*, United States v. American Tel. & Tel. Co., [1978–2] Trade Cas. § 62,247, at 75,565–69 (D.D.C. 1978).

[12] Telex Corp. v. International Business Machs. Corp., 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd on other grounds*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). *See also* Gerhart Report, *supra* note 1, at 48–53.

[13] McCargo v. Hendrick, 545 F.2d 393, 401–02 (4th Cir. 1976); Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961).

[14] We have studied the "revision of pleading requirements in order to narrow as quickly and precisely as possible the scope of contested issues of fact and law." Exec. Order No. 12022, § 2(a)(1)(ii), 3 C.F.R. 155 (1977). Past experience with code systems and with the civil bill of particulars under Rule 12(e) between 1938 and 1948, demonstrates that in a system of detailed pleading there is an inherent risk of delay and abuse, whether well intentioned or not. 4 Moore's Federal Practice ¶ 26.02[1] (2d ed. 1976); Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155 (1953); Stayton & Boner, *The Plastic Code in Operation*, 36 Texas L. Rev. 561, 572 (1958). Moreover, there has been little comment presented to us favoring increased specificity in antitrust pleadings. *See, e.g.*, Submission of the Committee on Trade Regulation, Ass'n of the Bar of the City of New York, to the Antitrust Commission 5 (June 21, 1978). *But see Antitrust Commission Hearings* 153–54, 163, 181–83 (July 13, 1978) (testimony of Harold S. Levy, General Att'y, American Telephone & Telegraph).

The case for creation of a special or detailed system of pleading in antitrust or other complex cases is, in our view, very weak, and hence we do not support such revisions. Any gap in specificity which the present system of notice pleading creates can be remedied by the pretrial statements and conferences we have recommended.

[15] Gerhardt Report, *supra* note 1, at 47–54; McDowell, *Pretrial Procedures: Pretrial v. Procedure*, 4 Antitrust Bull. 675 (1959); Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1974); Wright, *The Pretrial Conference*, 28 F.R.D. 141 (1960).

[16] The text of the proposed amendment is set forth at the end of this Chapter.

[17] Rule 16 requires the court to make an order which "limits the issues for trial to those not disposed of by admission or agreements of counsel." The preparation of a comprehensive final pretrial order is a uniform and desirable practice in complex cases. Gerhart Reports, *supra* note 1, at 54, 63; S. Flanders, *Case Management and Court Management in United States District Courts* 39 (Federal Judicial Center 1977).

[18] Life Music, Inc. v. Broadcast Music, Inc., 31 F.R.D. 3, 5 (S.D.N.Y.), *petition for mandamus denied*, 309 F.2d 242 (2d Cir. 1962), is often cited for the proposition that a judge has authority to define the issues in the absence of agreement. *But see* United States v. International Business Machs. Corp., 68 F.R.D. 358 (S.D.N.Y. 1975); *see also* Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961).

[19] Rule 12(f) allows the court upon its own initiative to strike any "immaterial" matter from a pleading, which may result in removal of immaterial issues. Summary judgment under Rule 56 also results in the elimination or retention of issues. As to the Court's inherent power, *see* Link v. Wabash R.R., 370 U.S. 626 (1962); Grumbel v. Pitkin, 124 U.S. 131, 144 (1888); MacAlister v. Guterma, 263 F. 2d 65, 68 (2d Cir. 1958); *see also* Comment, *supra* note 3; Note, The Role of the Court in Simplifying the Triable Issues at Pretrial Conference, 72 Yale L.J. 383 (1962). One commentator suggests, however, that such power not be inferred. *See* 3 Moore's Federal Practice ¶ 16.11, at 1119, & n.5 (2d ed. 1978).

[20] Gerhart Report, *supra* note 1, at 29–30.

[21] *See* Letter from John H. Shenefield, Chairman, Antitrust Commission, to the Hon. Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules, Judicial Conference of the United States (Nov. 30, 1978).

[22] It has been estimated that market definitions required 20 to 25% of the trial time in SCM v. Xerox Corp., Civ. No. 15,807 (D. Conn. Dec. 29, 1978), and Berkey Photos, Inc. v. Eastman Kodak Inc., 457 F. Supp. 404 (S.D.N.Y. 1978). In United States v. International Business Machs. Corp., 69 Civ. 200 (S.D.N.Y., filed Jan. 17, 1969), this subject is estimated to be consuming 45 to 50% of the trial. Gerhart Report, *supra* note 1, at Appendix G. *See also Antitrust Commission Hearings* 74, 101–02 (Sept. 13, 1978, afternoon session) (testimony of Fred H. Bartlit, Jr., Esq., Chicago, Illinois); *id.* at 77–80 (testimony of Professor Thomas E. Kauper, University of Michigan Law School, and former Ass't Att'y Gen., Antitrust Div., Dep't of Justice); *id.* at 85–93 (testimony of Judge Frederick B. Lacey, U.S. District Court, District of New Jersey).

[23] *See, e.g.*, United States v. Standard Oil Co., 78 F. Supp. 850 (S.D. Cal. 1948), *aff'd*, 337 U.S. 293 (1949). Justice Frankfurter writing for the court, stated the economic facts in a few pages. 337 U.S. at 295–97. Apparently most of this evidence was introduced at trial on an adversarial basis and created a large record. Flittie, *supra* note 6, at 828–29.

[24] The number should depend upon what is reasonably necessary for the case.

[25] This savings should occur even though proof of conduct is also relevant to proving market shares. *Antitrust Commission Hearings* 79–80 (Sept. 13, 1978, afternoon session) (testimony of Professor Thomas E. Kauper); *id.* at 86–87 (testimony of Judge Frederick B. Lacey).

[26] The exchange of market data proposal was originated by Commissioner Fox and closely follows her ideas.

[27] 402 F. Supp. 956 (D. Conn. 1975). In *Amax*, the government sought to enjoin a merger. The complaint was filed on August 25, 1975, and at a pretrial conference on September 2, 1975, defendants voluntarily agreed to postpone the closing of the merger pending an expedited hearing on the merits. A four day trial was held on September 16–19, 1975. The court noted that the parties "were able to stipulate to uncontested facts and to narrow the issues to the minimum necessary for decision." *Id.* at 958 n.1. The parties stipulated the relevant geographic and product markets. Although they strongly disagreed whether the proposer measure of market shares in one product market should be sales or manufacturing capacity, the parties reached factual stipulations under each of their conflicting theories of measurement. *Id.* at 961 n.15, 964. *See also* Gerhart Report, *supra* note 1, at 55–56.

[28] Flittie, *supra* note 6, at 834. The potential savings to be realized through the use of judicial notice have long been recognized. *See, e.g.*, J. Thayer, A Preliminary Treatise on Evidence at the Common Law 309 (1898); 9 Wigmore on Evidence § 2583, at 585 (3d ed. 1940).

[29] Philadelphia Nat'l Bank v. United States, 374 U.S. 321 (1963) (commercial banking); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 332–33 (1961) (annual production, number of producers, sales to particular customers, and consumption in certain geographic areas for coal); Parker v. Brown, 317 U.S. 341 (1943) (California raisin industry); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting) (commercial bread production).

[30] Rule 201 governs judicial notice of "adjudicative" facts but not judicial notice of "legislative" facts. The rule does not define either term and leaves explanation to the Advisory Committee Notes. S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 56–68 (2d ed. 1977).

[31] C. McCormick, Evidence § 328, at 758 (2d ed. 1972); E. Morgan, Basic Problems of Evidence 9 (1962).

[32] J. Thayer, *supra* note 28, at 309; 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 201[03], at 201–37 (1975); 9 Wigmore on Evidence § 2571 (3d ed. 1940); Davis, *Judicial Notice*, 1969 L.J. & Soc. Ord. 513.

[33] Fed. R. Civ. P. 56(c); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745, 769 (1974).

[34] We use the term "partial summary adjudication" to refer to an order entered pursuant to Rule 56(d) or a partial summary "judgment" as to less than the whole case pursuant to Rule 56(a) or (b). 6 Moore's Federal Practice ¶ 56.20, at 56–120 (2d ed. 1976); 10 C. Wright & A. Miller, Federal Practice and Procedure § 2737, at 680–81 (1973). For support of summary adjudication, see *Antitrust Commission Hearings* 133 (July 11, 1978) (testimony of Judge Charles B. Renfrew); Gerhart Report, *supra* note 1, at 57–62; Submission of David L. Foster, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n, to the Antitrust Commission 21 (Oct. 2, 1978) (tabulation of responses to complex litigation questionnaire); 2 P. Areeda & D. Turner, Antitrust Laws §§ 316–317 (1978); Manual for Complex Litigation § 1.80 (1977); Section of Antitrust Law, American Bar Ass'n, Monograph No. 3, Expediting Pretrials and Trials of Antitrust Cases 100–40 (1978); Section of Antitrust Law, American Bar Ass'n, Panel on Improvement in Pretrial and Trial Procedures in Civil Anti-

trust Cases 22–27 (Nov. 18–19, 1977) (transcript of Chicago Conference); Bromley, *Judicial Control of Antitrust Cases*, 23 F.R.D. 417, 421 (1958); Louis, *supra* note 33; Judicial Conference Study Group on Procedure in Protracted Litigation, *supra* note 5, at 389 n.43; Withrow & Larm, *supra* note 6, at 30–36.

As to judicial utilization of summary judgment, see, *e.g.*, Section of Antitrust Law, American Bar Ass'n, Panel on Improvement in Pretrial and Trial Procedures in Civil Antitrust Cases 28 (Nov. 18–19, 1977) (transcript of Chicago conference). *But see* Hays, *The Use of Summary Judgment*, 28 F.R.D. 126 (1962); Withrow & Larm, *supra* note 6, at 31–32 & n.166 (collecting cases).

[35] Submission of Fulbright & Jaworski, Houston, Texas, to the Antitrust Commission (Aug. 7, 1978) (Stays of Discovery in Antitrust Litigation); 2 P. Areeda & D. Turner, *supra* note 34, § 317, at 73.

[36] Clark v. Kraftco Corp., 447 F.2d 933, 936 (2d Cir. 1971); Christianson v. Gaines, 174 F.2d 534, 536 (D.C. Cir. 1949); Leonard v. Socony-Vacuum Oil Co., 130 F.2d 535, 536 (7th Cir. 1942); Notes of Advisory Committee on 1948 Amendment to Fed. R. Civ. P. 56.

[37] 168 F. Supp. 576 (S.D.N.Y. 1958); 157 F. Supp. 877 (S.D.N.Y. 1958).

[38] 378 F. Supp. 1076 (S.D.N.Y. 1974).

[39] *See* Bromley, *supra* note 34; McDowell, *supra* note 15; Reycraft, *Practical Problems Presented in the Trials of Recent Merger Cases*, 4 Antitrust Bull. 635 (1959).

[40] 368 U.S. 464 (1962).

[41] *Id.* at 473.

[42] *Antitrust Commission Hearings* 41–43 (Nov. 30, 1978, morning session) (statement of Commissioner Blecher); 10 C. Wright & A. Miller, *supra* note 34, §§ 2712, at 378, 2732, at 609–10; Lemley, *Summary Judgment Procedure Under Rule 56 of the Federal Rules of Civil Procedure—Its Use and Abuse*, 11 Ark. L. Rev. 138 (1957).

[43] Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969). *But see* First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253 (1968) (suggesting that the motion be decided on the most probable inference rather than requiring the absence of any dispute).

[44] Cases decided under the slightest doubt standard include: Devex Corp. v. Houdaille Indus., Inc., 382 F.2d 17, 21 (7th Cir. 1967); Armco Steel Corp. v. Realty Inv. Co., 273 F.2d 483, 484 (8th Cir. 1960); Cox. v. American Fidelity & Cas. Co., 249 F.2d 616, 618 (9th Cir. 1957); Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945).

[45] 10 C. Wright & A. Miller, *supra* note 34, § 2725, at 510. As noted, the Second Circuit has explicitly rejected the slightest doubt standard found in some of their earlier cases. Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972); Dressler v. MV Sandpiper, 331 F.2d 130, 132–34 (2d Cir. 1964).

The significant role that summary adjudication can serve in antitrust litigation is illustrated by cases where it played a leading role. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (The Supreme Court affirmed the district court's grant of partial summary "judgment" against all plaintiffs that were indirect purchasers); Citizen Publishing Co. v. United States, 394, U.S. 131 (1969) (where record establishes a *per se* violation of the antitrust laws summary judgment is proper); White Motor Co. v. United States, 372 U.S. 253 (1963) (grant of summary judgment upheld on the government's price-fixing charges, but vertical restraint issue to be tried); International Salt Co. v. United States, 332 U.S. 392 (1947) (government granted summary judgment enjoining defendant from enforcing lease provisions on its patented machines); Associated Press v. United States, 326 U.S. 1 (1945) (documentary evidence established violation as a matter of law); United States v. Beatrice Foods Co., 344 F. Supp. 104 (D. Minn. 1972), *aff'd*, 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975); Withrow & Larm, *supra* note 6, at 31 n. 166 (collecting cases).

[46] First Nat'l Bank v. Cities Serv., Co., 391 U.S. 253, 285 (1968); White Motor Co. v. United States, 372 U.S. 253, 259 (1963); 2 P. Areeda & D. Turner, *supra* note 34, § 2732 at 609–17; 6 Moore's Federal Practice ¶¶ 56.15 [1.00], 56.16 (2d ed. 1976).

[47] Dressler v. MV Sandpiper, 331 F.2d 130, 132–134 (2d Cir. 1964); Notes of Advisory Committee on 1963 Amendment to Fed. R. Civ. P. 56.

[48] 7B Moore's Federal Practice § 1292 (2d ed. 1978).

[49] *Id.* at 435.

[50] Section 1292(b) does not apply to government equity suits under the antitrust laws. The amended Expediting Act, 15 U.S.C. § 29(a) (1976), precludes use of § 1292(b) appeals in such suits. United States v. International Business Machs. Corp., 406 F. Supp. 184 (S.D.N.Y. 1975) (denying request for § 1292(b) certification due to the strictures of the amended Expediting Act).

[51] Gerhart Report, *supra* note 1, at 57–62. Interestingly enough, a Senate Report mentioned that the new provision might be applied to statute of limitations defenses in antitrust cases. *See* S. Rep. No. 2434, 85th Cong. 2d Sess. 2–3 (1958), *reprinted in* [1958] U.S. Code Cong. & Ad. News 5255, 5256. The House Report described avoidance of a long trial by resolution of claimant's basic right of action as an appropriate use of the new section. *See* H.R. Rep. No. 1667, 85th Cong., 2d Sess. 1 (1958).

Chapter five: Sanctions and disincentives for dilatory behavior

The use of sanctions against dilatory behavior will sometimes be necessary to make judicial management techniques work effectively. Sanctions also have important deterrence and punishment functions. When used properly, they can be an important and integral part of the process of expediting complex cases, as can professional ethics standards. Moreover, the creation of financial disincentives to delay would help deter recalcitrance.

Recommendations

1. Appropriate sanctions should be used systematically to ensure that other litigation management techniques, including time limits, are effective. Lawyers and judges should increase their awareness and use of the sanctions available to help eliminate dilatory behavior.

2. Certain sanctions should be strengthened. Rule 7(b)(2) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 should be amended to incorporate a more realistic "state of mind" requirement, and Section 1927 should be amended to allow recovery of a fuller range of expenses, including attorneys' fees. Rule 37 of the Federal Rules of Civil Procedure should be changed to authorize sanctions for discovery delays caused by excessive and uncooperative conduct, to allow imposition of sanctions without a prior motion by a party, and to highlight the availability of costs under 28 U.S.C. § 1927.

3. Lawyers and judges involved in complex litigation should be more sensitive to actual or potential violations of professional ethics through dilatory or abusive litigation tactics and should be prepared to invoke disciplinary procedures for such violations. The ethical status of some apparently common practices needs to be clarified; law schools and professional associations can begin to do so. As a first step, the American Bar Association's Disciplinary Rule 7–102, and corresponding state disciplinary rules, should be amended to emphasize the obligation to litigate expeditiously.

4. Sections 4, 4A and 4C of the Clayton Act (15 U.S.C. §§ 15, 15a, and 15c) should be amended to mandate an award of interest on the amount of the plaintiff's actual damages, from the date the complaint is served unless the court finds that circumstances make an award of prejudgment interest unjust. The rate of interest to be paid should be the prevailing commercial rate at the time judgment is entered.

The Need for Control over Dilatory and Abusive Litigation Behavior

Dilatory and abusive conduct occurs far too frequently in complex litigation.[1] Lawyers, particularly in "high-stakes" antitrust litigation, too often file meritless claims, defenses, or counterclaims, make excessive or abusive discovery demands, unreasonably resist legitimate discovery requests, provide unresponsive "stonewalling" answers, and unreasonably produce masses of insignificant, nonresponsive information. Other dilatory behavior may take the form of unjustified refusals to stipulate or admit facts, unwarranted motion practice, mishandling of documents, bad faith claims of privilege or confidentiality, and disruption of depositions.

Such conduct postpones or frustrates fair adjudication of legitimate claims and defenses. It unnecessarily increases litigants' costs and wastes scarce judicial resources. Litigation harassment and delay coerce parties into settlement simply to avoid unnecessary expense and frustration, make it difficult for the less wealthy to protect their interests through the courts, and thus lead to public cynicism concerning the judicial system.

Lawyers should fully recognize that dilatory and abusive conduct is not legitimate and will not be tolerated. We believe that lawyers should take more seriously their responsibility to the system of justice, not just to their clients.

The Role of Sanctions in Controlling Unreasonable Litigation Behavior

To be effective, management of complex litigation will sometimes require that meaningful sanctions be threatened or imposed. For example, time limits on discovery may be effective only if appropriate sanctions are available to penalize tardy or inadequate discovery responses. Although time limits contain their own penalty for procrastination, the use of cutoff dates may allow one party to oppress an adversary. Sanctions should therefore be used to prevent a party resisting discovery from providing too little information too late, and to prevent the opposite tactic of responding to a discovery request with a flood of nonresponsive, unimportant documents.[2]

As judges tighten and refine their control of the timing, volume and content of pretrial activity in complex cases, it may become easier for them to recognize and punish uncooperative behavior.[3] Also, more precise judicial controls will, in all likelihood, encourage cooperative conduct and decrease the need for sanctions. Thus, while better judicial management requires more readiness to use appropriate sanctions, it should also make the imposition of sanctions easier and may induce at least some litigants to avoid behavior that would make sanctions necessary.

Dilatory behavior has often gone unchecked because lawyers have been reluctant to request, and judges hesitant to impose, sanctions.[4] Both judges and lawyers should become more aware of the sanctions available and more willing to turn to them in appropriate circumstances. In particular, greater attention should be paid to the various sanctions presently available under Rules 7(b)(2), 36, 37, 41(b), and 56 of the

Footnotes at end of chapter.

Federal Rules of Civil Procedure, 28 U.S.C. § 1927, the court's contempt power, provisions enforcing bar disciplinary rules, and local court rules. We encourage the courts to take dilatory conduct into account, under existing statutory and inherent authority, in calculating awards of postjudgment attorneys' fees.[5]

District court judges should more vigorously and frequently apply existing sanctions, including awards of costs, where warranted. To avoid undue delay during the litigation, argument and decision concerning sanctions sought during pretrial or trial can be made at the end of the case.[6] Appellate courts should be less hesitant than they often have been in the past to support the imposition of strong sanctions.[7] Many concerns and perceptions contributing to judicial reluctance to impose sanctions lack any real weight when analyzed carefully.[8]

Where necessary, judges should take the initiative in considering the imposition of sanctions. Lawyers have often been reluctant to seek sanctions against fellow attorneys or have delayed seeking sanctions because of the cumbersome, multistep procedure required. In such instances, courts should not tolerate the cost to the judicial system from dilatory conduct that is not promptly remedied.

The reluctance of counsel to seek sanctions should decline if courts become more willing to impose them. At the same time, greater willingness by counsel to seek sanctions is necessary to break the existing circular pattern whereby infrequent judicial imposition of sanctions, caused partially by the infrequency of sanction requests, discourages efforts to seek justifiable sanctions. Counsel should, of course, first try to resolve differences through consultation and cooperation, but, where such efforts are not successful, appropriate sanctions should be sought.[9] In addition, the amendments to Rule 37 of the Federal Rules of Civil Procedure endorsed below should reduce the hesitancy of both judges and lawyers by allowing greater imposition of sanctions without prior violation of a compelling order.

Furthermore, reluctance to punish a client for the wrongful acts of its counsel should not deter a judge from imposing sanctions. If the imposition of sanctions solely on a lawyer, with provision for nonreimbursement by the client, is insufficient or unenforceable in a given context, it is preferable to impose the costs resulting from dilatory conduct on the party employing the attorneys responsible, rather than on the party against whom such tactics were used. In appropriate cases of particularly egregious conduct, courts should resort to the sanctions of dismissal or default judgment.

As recently recognized by the Supreme Court,[10] the imposition of sanctions is important to the deterrence of dilatory conduct. Indeed, in terms of improving the efficacy of our system of justice, it is as important to deter dilatory conduct as it is to redress specific injury and punish particular wrongful conduct.

Increased judicial willingness to impose sanctions need not generate significant adverse effects. Fears that increased willingness to impose sanctions will flood the courts with routine requests for sanctions are overblown. Parties requesting sanctions would still have the burden of showing misconduct and might themselves be penalized for frivolous or unfounded motions. When a judge actively manages a case and has frequent meetings to check litigation progress, sanctions can be imposed quickly and efficiently.[11] Furthermore, the increased but careful use of sanctions should have no "chilling" effect on the assertion of legitimate rights and novel positions. Neither existing rules nor ones proposed herein allow for loose or arbitrary imposition of punishment.

Several amendments to the Federal Rules of Civil Procedure would provide more adequate authority for imposing sanctions. First, Rule 7(b)(2) should be amended, or a new rule adopted, to highlight the availability of sanctions for unwarranted motions (and other court papers besides pleadings) and to incorporate a more appropriate state of mind requirement for their imposition. Currently, Rule 7(b)(2) incorporates the intent requirement of Rule 11, which provides that the signature of an attorney on a pleading:

"* * * constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. * * *"

Such an "intent" standard has been interpreted to allow the imposition of sanctions only when a motion or other filing has been made *solely* for the purpose of delay. Such an interpretation is unnecessarily restrictive and provides inadequate authority for effectively dealing with dilatory practices. Accordingly, the rule should be amended to make it clear that imposition of appropriate disciplinary sanctions is authorized whenever a motion or other filing is "submitted primarily for delay."[12]

Second, 28 U.S.C., § 1927, which provides for the imposition of costs against an attorney who "so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously," should be modified to incorporate a similar, more adequate intent requirement. In addition, this statute should be amended to allow not only the taxing of the narrow range of "costs" now provided, but also all expenses and attorneys' fees incurred because of the dilatory behavior.[13]

Third, the chief authority for discovery sanctions, Rule 37 of the Federal Rules of Civil Procedure, should be amended along the lines suggested by the Advisory Committee on Civil Rules. We have not considered that part of the Committee's proposal that would require that discovery abuses by government attorneys be reported to the Attorney General.[14] However, we do support the balance of the Committee's proposed amendment, which would highlight the alternative availability of 28 U.S.C., § 1927; explicitly extend Rule 37's own coverage to excessive or abusive discovery demands, as well as failures to make discovery; and give the court broad general authority to impose sanctions for discovery abuse without the need for any prior motion by a party.[15]

Finally, since local rules can be a valuable supplement to other sanctions provisions, rules providing firm sanctions should be seriously considered by federal district courts.

The Desirability of Enhanced Awareness of Professional Ethics Issues in Litigation Practice

Professional ethics are a potentially important, yet seldom emphasized, dimension of the problems raised by complex litigation. To consider these issues, the Commission established a Special Advisory Panel on Ethical Issues in Complex Antitrust Litigation to study that dimension.[16] Based on our record and the independent analysis of the Panel, we urge courts and counsel to become more sensitive to ethical obligations in complex civil litigation.

Some types of litigation behavior, such as deliberate destruction or concealment of evidence, are, of course, clear violations of ethics and of law, and should be dealt with accordingly.[17] Ethical questions raised by many other undesirable litigation practices that are believed to be widely employed are not so easily answered under existing rules and guidelines.[18]

The American Bar Association's Code of Professional Responsibility gives only general guidance. The Code exhorts lawyers to represent their client's particular interest "zealously," while also emphasizing that this should be done within the law[19] and without use of "offensive tactics."[20] A lawyer is not allowed to "assert a position, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."[21]

The Code of Trial Conduct for members of the American College of Trial Lawyers urges a "specific responsibility" on trial counsel to seek "prompt, efficient, ethical, fair and just disposition of litigation."[22] It imposes affirmative obligations to "avoid unnecessary delays," to eschew use of "dilatory tactics," and (in civil cases) to "stipulate in advance with opposing counsel to all noncontroverted facts. . . ."[23]

These and similar rules, while well-intentioned, are uncomfortably general. We urge the American Bar Association and other professional organizations to study ethical issues arising from complex litigation and attempt a more particularized definition of practices that are unethical. Such guidance is needed, not only to allow punishment for misbehavior, but to give well-meaning practitioners a better opportunity to fulfill their obligations to both client and court.

We endorse, therefore, the recommendation of our Special Advisory Panel on Ethical Issues calling for a change in the American Bar Association's Disciplinary Rule 7–102. The ABA rule, and corresponding state disciplinary rules, should be amended to increase the emphasis on, and make more specific, the affirmative obligation of an attorney to refrain from dilatory conduct.[24] Such an amendment would at least foster greater sensitivity to the ethical imperative of expediting cases. The amendment could be an addition to the rule providing:

"(c) In representation of a client in civil cases, a lawyer shall make every effort consistent with the legitimate interests of his client to expedite litigation, to refrain from dilatory tactics and to avoid unnecessary delays. For this purpose any financial or other comparable benefit that may result to a client from lack of speedy resolution of the litigation shall not be considered a legitimate interest of the client."[25]

We also urge the judge in a complex case informally to impart to the attorneys, at the outset, the standards of conduct that he or she expects to be followed in the litigation. Thereafter, the judge should monitor litigation activity to see that the prescribed standards are followed, and should be ready to hold counsel to them.

Increased awareness by courts and counsel of the ethical obligations involved in the handling of complex antitrust cases will not solve all problems. Ethical rules are seldom clear-cut and are not designed to prevent vigorous advancement of a client's legal positions. Increased ethical sensitivity, however, coupled with other techniques of case management, can begin to reduce the dilatory and obfuscatory practices now apparently flourishing.[26]

A Proposed Financial Disincentive to Litigation Delay

Dilatory behavior can also be countered by incentives to expedite litigation. One incentive would be the award of prejudgment interest. Other powerful incentives, preliminary injunctions or "hold-separate" orders to preserve the status quo, will be discussed in Chapter Seven, *infra*.

Footnotes at end of chapter.

Parties, particularly defendants, often have little or no incentive to expedite litigation; some have economic incentives to delay. Defendants, especially those with fairly clear liability exposure, can garner considerable financial benefit by protracting litigation since such delay increases the period during which any eventual monetary award to the plaintiff can be retained for profitable use. A majority of the Commission believes that awarding interest on damages from the date of service of a complaint, rather than from the actual date of judgment, would provide an incentive to expedite case,[27] or at least remove a possible disincentive to expedition.[28] While this device will necessarily operate as an incentive to defendants, we reiterate our belief that plaintiffs can also be responsible for litigation delay. Accordingly, we urge courts to consider plaintiffs' litigation conduct carefully in awarding postjudgment attorneys' fees. Where warranted, fee awards should be reduced.

Existing statutes and case law do not provide clear authority for awarding prejudgment interest in antitrust cases. Sections 4, 4A and 4C of the Clayton Act, providing for damage suits by private plaintiffs, the federal government, and states suing as *parens patriae*, are silent on the subject of interest.[29] The general federal interest statute allows interest on a money judgment in a civil case from the date of entry of the judgment, calculated at the rate allowed by state law.[30] This statute does not preclude the award of prejudgment interest, but leaves such interest to be governed by the law concerning the compensation awarded to make an injured party whole.[31]

Prejudgment interest has not been allowed in treble damage actions because the multiple damage sums are not compensatory in nature.[32] Treble damages have, in fact, been viewed as more than adequately compensating a plaintiff for its losses.[33] While a treble damage award may handsomely compensate a plaintiff for actual losses, it often offers no particular incentive for a defendant to seek final resolution of the issue. In government cases seeking single damages under Clayton Act Section 4A,[34] prejudgment interest may be available on the basis of general legal principles, but its imposition is discretionary rather than automatic.[35]

In addition to providing a disincentive to delay, a statutory provision for awarding prejudgment interest has the advantage of being essentially self-executing. Interest would be awarded automatically unless the court determined that circumstances would make such an award unjust. For example, if a plaintiff engaged in dilatory tactics or purposeful delay, the court might disallow prejudgment interest. Such a decision would be discretionary with the court and should not itself provoke extensive briefing or hearings.

Finally, prejudgment interest should be based on a plaintiff's actual damages, not treble damages. Although it can be argued that awarding prejudgment interest on the full amount of the judgment would provide an even greater financial disincentive to delay by the defendant, the magnitude of such an award would raise serious questions concerning its fairness and workability. Also, courts might be more inclined to find the award of interest on treble damages to be unjust, and thus defeat the purpose of prejudgment interest.

Commissioners Blecher, Fox, Izard, McClory, Nicholson, Spivack, Wiggins and Hatch believe that automatic awards of prejudgment interest against defendants who lose antitrust cases are no more justifiable than automatic awards of attorneys' fees to defendants who win antitrust cases. Commissioner Seiberling believes that judges should have the discretionary authority to award prejudgment interest only upon a finding of a defendant's acting with a primary purpose being delay.

FOOTNOTES

[1] *See, e.g.*, Submission of Judge Charles B. Renfrew, U.S. District Court, Northern District of California, to the Antitrust Commission 1 (Oct. 3, 1978) (Sanctions: A Judicial Perspective; paper to be published in the California Law Review) [hereinafter cited as Renfrew Submission]; Submission of David L. Foster, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n, to the Antitrust Commission 1–6, 25–26 (Oct. 2, 1978) (tabulation of responses to complex litigation questionnaire).

[2] *See Antitrust Commission Hearings* 67 (July 11, 1978) (testimony of Denis McInerney, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n) (use of firm trial dates to coerce settlement).

[3] *See* C. Ellington, A Study of Sanctions for Discovery Abuse 107, 112 (Nov. 1978) (prepared for the Office for Improvements in the Administration of Justice, Dep't of Justice).

[4] *See, e.g.*, P. Gerhart, Report on the Empirical Case Studies Project to the National Commission for the Review of Antitrust Laws and Procedures 40–42 (Jan. 15, 1979); C. Ellington, *supra* note 3, at 44–45, 52.

[5] *See, e.g.*, Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 118 (3d Cir. 1976) (en banc); *cf.* Baughman v. Wilson Freight Forwarding Co., 583 F.2d 1208, 1216 (3d Cir. 1978) (disallowing compensation for hours spent in second trial required solely because of improper closing argument by plaintiff's attorney in first trial).

[6] This proposal was raised by, among others, Stephen D. Susman. *See Antitrust Commission Hearings* 49 (July 11, 1978) (testimony of Stephen D. Susman, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n).

[7] *See, e.g.*, Renfrew Submission, *supra* note 1, at 14–15. A survey of reported appellate decisions on discovery sanctions between January, 1975, and October, 1977, found that appellate courts reversed dismissals or default judgments in 11 of the 24 cases in which the trial court imposed these severe sanctions. M. Werner, Survey of Discovery Sanctions 28 (March 10, 1978) (unpublished student paper at the University of Pennsylvania Law School).

[8] For a more detailed analysis of these matters, *see* Renfrew Submission, *supra* note 1, at 8–17.

[9] Commissioner Atkins notes that in his district, the Southern District of Florida, a local rule requires a statement that counsel have conferred regarding any discovery problem and were unable to resolve their differences before a motion to compel will be considered.

[10] National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam).

[11] *See* C. Ellington, *supra* note 3, at 16–17.

[12] This proposed change adopts one portion of a suggestion originally offered by Chief Judge David N. Edelstein of the Southern District of New York in *The Ethics of Dilatory Motion Practice: Time for Change*, 44 Fordham L. Rev. 1069, 1079 (1976). The second prong of the Edelstein suggestion would allow imposition of sanctions for filings where the attorney "knows or should know that substantial delay will result and that the motion if granted will secure very insubstantial relief." A witness before the Commission, Mr. Denis McInerney, suggested a revision of this test. *See* Submission of Denis McInerney, member, Task Force Panel on Complex Litigation, Antitrust Section, American Bar Ass'n, to the Antitrust Commission 6 (Sept. 13, 1979) (responses to follow-up questions). While a minority of the Commission was in favor of adopting some such second test, the majority felt that it would necessarily be too subjective and difficult in application.

[13] Section 1927 should be amended as follows (existing language deleted is in brackets, new language is underscored):

"Any attorney or other persons admitted to conduct cases in any court of the United States or any Territory thereof who *engages in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of the litigation* [so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously] may be required by the court to satisfy personally [such] *the* excess costs, *expenses and attorneys' fees reasonably incurred because of such conduct.*"

[14] *See* Letter from John H. Shenefield, Chairman of the Antitrust Commission, to Hon. Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules, Judicial Conference of the United States (Nov. 27, 1978). Attorney General Bell has argued that a more direct approach would be enactment of proposed legislation repealing Rule 37(f), which would result in the availability of Rule 37 expense and fee award sanctions against the government. Letter from Griffin B. Bell, Attorney General, to Roszel C. Thomsen, Chairman, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (June 27, 1978); S. 3331, 95th Cong., 2d Sess., 124 Cong. Rec. S11500 (1978).

[15] *See* Committee on Rules of Practice and Procedure, Judicial Conference of the United States. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Mar. 1978). A sanction of expenses, including attorneys' fees, is already available under Rule 37 for excessive or abusive discovery, but its workings are a bit cumbersome. A party faced with an unreasonable discovery request who seeks a protective order under Fed. R. Civ P. 26(c) can be reimbursed the expenses incurred in obtaining such an order. Alternatively, a similarly situated party who simply fails to respond can be reimbursed under Fed. R. Civ. P. 37(a)(4) for the expenses incurred in successfully defending against a motion to compel. Nevertheless, the amendment to Rule 37 proposed by the Advisory Committee would better highlight the availability of sanctions for abusive discovery demands, while allowing their imposition by the court without the prior initiative of a party, in appropriate cases. Such authority to combat excessive or abusive requests might be used most effectively in conjunction with a pretrial conference establishing the permissible bounds of discovery, since such conferences would facilitate determinations of excess or abuse.

[16] *See* Report of the Special Advisory Panel on Ethical Issues in Complex Litigation to the National Commission for the Review of Antitrust Laws and Procedures (Dec. 4, 1978) [hereinafter cited as Ethics Panel Report]. The report contains some 10 well-reasoned recommendations. That we do not specifically restate all of them here should in no way be taken as a disagreement with any of them.

Senator Hatch would "go further than the majority . . . and recommend stronger disincentives directed at spurious suits by plaintiffs."

[17] *See* Ethics Panel Report, *supra* note 16, at 16–18. *See also* 18 U.S.C. §§ 401–402 (criminal contempt), 1505, 1509–10 (obstruction of justice), 2071 (destruction of court records) (1976).

[18] *See* Ethics Panel Report, *supra* note 16, at 18–19, for a detailed listing of questionable discovery, motion and other practices According to the Special Advisory Panel's ethics questionnaire, a majority of the antitrust litigators contacted believed that prac-

tices of this kind raised serious ethical concerns. Moreover, a large majority said that they had encountered what they regarded as unethical behavior during antitrust litigation. *Id.* at 10. It should be noted that the Panel did not find that ethics were at a lower level in complex antitrust litigation than in other sorts of litigation activity. *Id.* at 16. The Panel did find scant evidence of disciplinary measures being taken against such practices. *Id* at 7–8.

[19] ABA Code of Professional Responsibility, Canon 7.

[20] *Id.* DR 7–101(A)(1).

[21] *Id.* DR 7–102(A)(1).

[22] American College of Trial Lawyers, Code of Trial Conduct, preamble (1978) [hereinafter cited as Trial Lawyers Code].

[23] *Id.* Rule 21.

[24] This suggestion follows the Special Advisory Panel's Eighth Recommendation to the Commission. Ethics Panel Report, *supra* note 16, at 29.

[25] *Id.* at 25. This language is partially based on the American College of Trial Lawyers Code. *See* Trial Lawyers Code, *supra* note 22, Rule 21(a) and (d).

[26] Commissioner Fox wishes to associate herself with the entire Report of the Special Advisory Panel on Ethical Issues in Complex Antitrust Litigation, many of whose recommendations are reflected herein. She sees an increasing tension between the sporting theory of litigation and the efficient pursuit of truth and justice. See Wessel, The Rule of Reason (1976). She agrees that:

"Changing the rules of the game is, of course, an undertaking that far transcends antitrust litigation, since these types of practices exist in all litigation. Yet . . . faced with overwhelming evidence that the present system in antitrust and other complex cases generally does not produce effective and speedy justice—we call upon the American Bar Association, and other appropriate organizations, to come to grips with this basic issue of whether such litigation should not be tried on the basis of ethical premises very different from those that presently exist."

Ethics Panel Report, *supra* note 16, at 21–22.

* * * * *

"[S]erious consideration must be given by the bar, particularly in the context of complex cases, to a major reordering of the existing balance between an attorney's duty to his client and his duty to the system of justice in greater favor of the latter. . . ."

Ethics Panel Report, *supra* note 16, at 29.

[27] A minority of the Commission opposes the provision of prejudgment interest. Another minority endorses the use of prejudgment interest, but only on a much less automatic basis.

[28] Prejudgment interest should be set at prevailing commercial rates. While postjudgment interest would remain at the lower "legal interest" rate, setting prejudgment interest at full commercial rates is necessary to the deterrent effect of the prejudgment interest concept. Otherwise, a liable defendant could still be financially somewhat better off by delaying at the prejudgment stages.

[29] 15 U.S.C. §§ 15, 15a, and 15c (1976).

[30] 28 U.S.C. § 1961 (1970).

[31] Louisiana & Arkansas Ry. Co. v. Export Drum Co., 359 F.2d 311, 317 (5th Cir. 1966); Moore-McCormack Lines, Inc. v. Amirault, 202 F.2d 893, 895 (1st Cir. 1953).

[32] Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 80 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973).

[33] *Id.*

[34] 15 U.S.C. § 15a (1976).

[35] *See* Memorandum of the United States in Support of Motion for a Ruling that the Jury be Instructed that on a Finding of Liability It May in Its Discretion Award Prejudgment Interest as an Element of Damages if it Finds Such an Award is Necessary to Assure Full and Fair Compensation to the Government, United States v. Pfizer, Inc., No. 4–71 Civ. 403 (D. Minn., filed July 15, 1969) (memorandum filed Aug. 16, 1976).

Chapter six: Other procedural recommendations

The Commission considered several procedural topics in addition to those covered by the preceding chapters. This chapter discusses the use of efficient evidentiary practices to expedite the litigation process,[1] the doctrine of collateral estoppel, the use of separate trials on separable issues, and certain techniques for jury trials in complex cases.

Recommendations

1. Litigants in complex antitrust cases should be required to simplify their trial proofs, to minimize evidentiary disputes, and to organize efficiently their exhibits and other evidence prior to trial.

2. Section 5(a) of the Clayton Act should be amended to make it clear that the statute does not preclude a "collateral estoppel" effect in appropriate cases in addition to the "prima facie" effect now expressly permitted.

3. When confronted with a complex antitrust case, the court should consider the potential advantages of holding separate trials on different issues, for example, by trying liability issues prior to damage issues.

The Need for Streamlined Evidentiary Practices

Executive Order 12022 directed the Commission's attention, among other procedural topics, to possible "amendment of evidentiary practices to expedite introduction of testimony and exhibits at trial." [2] We do not believe that amendments of any evidentiary rules or statutes are necessary at this time. Greater use of certain existing evidentiary techniques is, however, highly desirable. Efficient evidentiary practices not only focus and shorten trials, but may also streamline pretrial discovery and issue-definition. These benefits can accrue whether or not the case is tried before a jury.[3]

Several procedures already recommended in this Report have substantial utility at trial as well as during pretrial. Time limits for presentation of evidence and cross-examination, when set before trial and based on the parties' own realistic assessments of their requirements, can keep the trial moving. Such time limits encourage the parties to decide which witnesses and exhibits are redundant or unnecessary rather than putting the onus for such decisions solely on the judge.[4]

The techniques suggested in Chapter Four, *supra*, for pretrial stipulation, market share determination and judicial notice should also result in useful evidentiary material.[5] If employed successfully, these techniques should create concise evidence that can be read into the record, thus eliminating the need for more cumbersome procedures. Similarly, partial summary judgment procedures under Rule 56(d) of the Federal Rules of Civil Procedure can aid evidentiary efficiency in two ways. First, they indicate which issues not in dispute can be handled summarily at the trial; secondly, they may lead to the creation of exhibits that can be used at trial. This consideration should be particularly true for summaries of statistical material or deposition testimony.

A number of important streamlining evidentiary techniques are available in the *Manual for Complex Litigation* and the new Federal Rules of Evidence.[6] These devices should be routinely employed in complex antitrust cases.

There should, for example, always be a specific listing of proofs and objections thereto prior to trial. The *Manual* recommends such procedures and a number of local rules and individual judges require them as a matter of regular practice.[7] Parties should be compelled to make reasonable listings of their proposed exhibits and witnesses prior to trial, and should be required to state their objections to their opponents' "offers of proof." To the extent deemed practical, the judge should rule on objections prior to trial, and should urge the parties to meet and attempt to resolve such basic issues as the authenticity of documents. As a variant on the practice of exchanging lists of proposed evidence and objections, motions *in limine* for the pretrial exclusion of particular proofs may also be useful.[8] The actual techniques used should be flexible and tailored to the individual case. The goal should be a pretrial winnowing of proofs and arguments over them, so that the trial moves quickly with a sharp focus. The judge who participates actively in pretrial should be able to use the available mechanisms quickly and capably.

Similarly, the judge presiding over a complex antitrust case should strongly encourage the use of summary materials. Summaries are essential, not only for statistical evidence, but also for deposition testimony. The trial judge should not allow litigants to consume trial time, particularly jury time, debating at length about underlying economic figures or reading individual deposition transcripts. Use of summaries is already widely recommended [9] and should be regularly done.

Collateral estoppel

Section 5(a) of the Clayton Act[10] provides that a final judgment or decree entered in a government action in which a defendant was found to have violated the antitrust laws can be used by a plaintiff suing the same defendant as prima facie evidence of an antitrust violation. The prima facie effect, however, extends only to "matters respecting which said judgment or decree would be an estoppel" [11] as between the government and the defendant. Judgments or decrees entered with the consent of the defendant in a prior government suit before testimony is taken, or in an action brought by the government to recover damages to its business or property, do not have such prima facie effect.

A fundamental question exists as to how Section 5(a) of the Clayton Act should be applied. A number of courts have interpreted the statute to limit the prior judgments or decrees to prima facie evidence only, rather than allowing them to have full collateral estoppel effect.[12] On the other hand, at least one district court has held that the statute does not preclude allowing more than prima facie effect to judgments or decrees in government cases.[13]

Giving prior litigated judgments in favor of the government only prima facie effect can cause considerable delay in subsequent actions because it enables the defendant to relitigate previously decided issues. The result, of course, is that both the defendant and plaintiff offer a full range of trial witnesses and exhibits. By contrast, if the prior judgment had greater evidentiary effect, relitigation of already proved violations could be avoided in appropriate cases, thus decreasing the burden on the courts and litigants. The public interest would be further served by facilitating recovery, as in other types of actions.

Some members of the Commission would amend Section 5(a) to require automatic collateral estoppel effect for prior government judgments, except where manifest injustice would result. The majority of the Commission, however, believes that this could lead to unjust results, even with the specified proviso. The defendant in the first case does not frame the complaint, and to a large extent, does not control the issues to be litigated. Also, the complexity of many antitrust cases can make full litigation of

Footnotes at end of chapter.

all issues in a government suit impracticable. Moreover, the defendant may be less motivated to fully litigate every issue in a government case than in a subsequent treble damage action, where huge amounts of money may be at stake. Conceding relatively minor issues for practical reasons in a prior action might preclude their consideration in subsequent litigation where they assume unanticipated significance.

Therefore, replacing Clayton Act Section 5 (a) with new legislation to make government judgments automatically conclusive in subsequent actions, is not recommended. Instead, the majority of the Commission recommends that Congress amend the statute to make it clear that the prima facie effect afforded prior litigated judgments won by the government does not preclude courts, in their discretion, from applying in antitrust cases the principles of collateral estoppel now applicable in other types of litigation. A defendant who lost either a prior government or private suit could be precluded from relitigating against subsequent plaintiffs those issues fully and fairly contested and necessary to the result in the first action.[14] In this way, the deterrent effect of the antitrust laws will be enhanced and complex antitrust cases can be litigated and adjudicated more efficiently.

In recommending an amendment to Section 5(a) of the Clayton Act to encourage the wider application of collateral estoppel in antitrust cases, we recognize that courts have fairly readily allowed the use of collateral estoppel defensively. Used defensively, the doctrine precludes the relitigation of an issue decided against the plaintiff in a prior suit. The offensive use of collateral estoppel, which arises when a defendant is barred from relitigating issues determined adversely to it, has been less generally allowed, since courts have rightly been sensitive to the potential unfairness of estopping a defendant from relitigating issues that it did not frame. Nevertheless, the risk of unfairness depends on the facts of a particular case, and the Supreme Court [15] and other federal courts [16] have approved the offensive use of collateral estoppel in some circumstances. A particularized inquiry based upon principles of fairness affords protection where an issue that was viewed by the defendant as insignificant in a prior action, and therefore not contested vigorously, becomes critical in a subsequent suit.[17]

The use of collateral estoppel may somewhat increase pressure on antitrust defendants to settle rather than litigate. The potential benefits of an equitable application of estoppel doctrine, including greater judicial finality, the preservation of resources, and increased deterrence, however, are substantial. Under these circumstances, the possibility that an innocent defendant will settle to avoid the potential collateral estoppel effects of an adverse litigated judgment, when that defendant would not have settled under the present prima facie rule, does not outweigh the substantial potential benefits that the reasoned application of estoppel doctrine can have.[18]

Nor does it appear that the broader application of collateral estoppel in antitrust cases will induce defendants to contest insignificant issues and to take unnecessary appeals. Under current law, litigated antitrust cases are generally thoroughly contested, and antitrust defendants now appeal most adverse judgments in any event. Moreover, insignificant issues should be subject to stipulation and, of course, issues not fully litigated should have no collateral estoppel effect.[19] Based on the foreging considerations, we recommend that Section 5(a) of the Clayton Act [20] be amended as follows (bracketed matter is deleted; italic matter is added):

Sec. 5(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws [or by the United States under section 4A,] as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken [or to judgments or decrees entered in actions under section 4A]. *Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel.*[21]

Division of Complex Antitrust Trials into Separate Parts

Holding separate trials on separate issues—such as liability and damages—can substantially shorten and simplify some complex antitrust cases.

Under Rule 42(b) of the Federal Rules of Civil Procedure, a court can order separate trials to avoid prejudice or to promote "expedition and economy." [22] Separate trials may promote efficiency and economy by resolving a dispositive issue, one that either makes further litigation unnecessary—for example, where the verdict upholds an affirmative defense [23]—or one that substantially increases the likelihood of settlement by eliminating fundamental uncertainty.

It is true, of course, that "separation of issues for trial is not to be routinely ordered," [24] but separation should be deemed appropriate where there is no significant overlap between the issues. There may well be antitrust cases where liability can be determined without any detailed evidence on the issue of damages.[25] Other possible candidates for separate trial include issues involving subject matter jurisdiction, patents,[26] impact, the terms of a written agreement, statute of limitations, fraudulent concealment, the *in pari delicto* defense, and the applicability of prior releases.[27]

Obviously, the greater the overlap between separated issues, the greater the potential for prejudice, reversible error, and wasted resources if separate trials are held.[28] Separate trials may also impede efficient litigation if issues are framed too narrowly or evidence is improperly excluded.[29] Moreover, separate trials may burden witnesses who have to testify at both. And, in some cases, the factfinder may be confused rather than aided by separate trials. Consequently, issues should only be separated if the court is satisfied that the potential advantages of doing so outweigh the disadvantages.

Other, broader considerations are also relevant in deciding whether to order separate trials. The Constitution and Rule 42(b) itself may require a "unitary" jury trial on integrally related issues.[30] A difference in the trial format—that is, single trial versus divided trial—may affect the substantive outcome.[31] Finally, the impact on discovery and pretrial are important. If the split trial will actually lead to an earlier disposition of the case, then discovery work can indeed be shortened and more narrowly focused. If the possibility of separate trials leading to a conclusive determination is not strong, however, orders staying discovery on separated issues may be counter-productive.[32]

In conclusion, separate trials can indeed be useful, but only in appropriate circumstances. For those antitrust cases where separable and apparently dispositive issues exist, separation can help to streamline pretrial, can shorten trial and make it more intelligible, and can lead to a quicker conclusion of the litigation. Accordingly, we recommend that judges handling complex antitrust litigation give careful consideration to employing the option afforded by Rule 42(b). In doing so, the judge should resolve the issue of whether the same jury should be used to decide the damage issue if liability is found.

The Role of the Jury

Recent judicial decisions, articles, and testimony before the Commission reflect growing interest in the role of juries in complex antitrust litigation. Evidence about the effect of juries on the length of such litigation is, in our opinion, inconclusive. Furthermore, the constitutional issue of the scope of the jury trial right in complex antitrust litigation is beyond the Commission's mandate. Accordingly, we make no recommendation concerning the role of the jury in complex antitrust litigation.

Even if the role of juries in some antitrust cases is limited, juries will continue to try many antitrust cases, including some that cannot be considered simple, and a number of innovative techniques can help juries understand those cases better. It has proved useful for courts to instruct the jury on the relevant legal issues at the beginning of trial as well as at the end. It may also be useful for courts to refresh juries on the factual and legal relationships of the different parts of the trial, such as evidence and argument on the "relevant" market. Counsel may assist the jury's early understanding of the case by giving more comprehensive and focused opening statements. If the case is to be submitted on interrogatories, a preliminary set of interrogatories may be given to the jury at the start of the trial. These procedures collectively should facilitate the jury's understanding and assessment of the evidence presented.

The parties might provide the jurors with a binder containing important exhibits. During trial, the expanded use of visual aids may contribute to ready comprehension. Jurors may be permitted to take notes during trial and the exhibits, trial transcript (if ready), and jury instructions can be made available in the jury room during deliberations.[33] Counsel should also evaluate the utility of preparing summaries of the evidence for the jury's use.

FOOTNOTES

[1] This topic was specifically referred to in the Executive Order that established the Commission. Exec. Order No. 12022, § 2(a)(1)(v), 3 C.F.R. 155 (1977), *as amended by* Exec. Order No. 12052, 43 Fed. Reg. 15,133 (1978).

[2] *Id.* at § 2(a)(1)(v).

[3] Submission of Martin Frederic Evans, Esq., New York, New York, to the Antitrust Commission 2 (Aug. 8, 1978) (Evidentiary Practices in Complex Antitrust Cases) [hereinafter cited as Evans Submission].

[4] *See* Chapter Two *supra*.

[5] *See* Chapter Four *supra*.

[6] While we do disagree with several aspects of the *Manual for Complex Litigation* (*see e.g.*, Chapter Three *supra*), we believe that its recommendations on preparation of evidence are very useful. Manual for Complex Litigation, §§ 2.70–.71, 3.30–4.70 (1977) [hereinafter cited as Manual]. The Federal Rules of Evidence were enacted in 1975. Federal Rules of Evidence, Pub. L. No. 93–595, 88 Stat. 1926 (1975).

[7] Manual, *supra* note 6, §§ 3.30, 4.20–.21.

[8] Note, *Pretrial Exclusionary Evidence Rulings*, 1967 Wis. L. Rev. 738.

[9] *See* Fed. R. Evid. 1006; Evans Submission, *supra* note 3, at 7–9; Manual, *supra* note 6, §§ 2.71, 4.211.

[10] 15 U.S.C. § 16(a) (1976).

[11] *Id.*

[12] *See, e.g.*, Sam Fox Publishing Co. v. United States, 366 U.S. 683, 690 (1961) (dictum); Purex Corp. v. Procter & Gamble Co., 308 F. Supp. 584, 589–90 (C.D. Cal. 1070), *aff'd*, 453 F.2d 288 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972); *see also* McCook v. Standard Oil Co., 393 F. Supp. 256, 259–60 (C.D. Cal. 1975).

[13] Illinois v. Huckaba & Sons Constr. Co., 442 F. Supp. 56 (S.D. Ill. 1977), *appeal docketed sub nom.* Illinois v. General Paving Co., No. 78-1479 (7th Cir. Apr. 13, 1978) (oral argument held on November 28, 1978).

[14] In place of the earlier doctrine of mutuality, which was used as a guideline for insuring against unfairness in the application of collateral estoppel, federal courts now generally undertake a more individualized analysis of the particular facts of each case in determining whether allowance of estoppel would be unfair or violate due process. *See, e.g.*, Federal Sav. & Loan Ins. Corp. v. Hogan, 476 F.2d 1182 (7th Cir. 1973); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451 (5th Cir.). *cert. denied*, 404 U.S. 940 (1971); Brown v. R. D. Werner Co., 428 F.2d 375 (1st Cir. 1970); Graves v. Associated Transp., Inc., 344 F.2d 894 (4th Cir. 1965); Bruszewski v. United States, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950). *See also* Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942). The Supreme Court has approved the non-mutual use of estoppel in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), and more recently in Parklane Hosiery Co. v. Shore, 47 U.S.L.W. 4079 (U.S. Jan. 9, 1979).

[15] *See* Parklane Hosiery Co. v. Shore, 47 U.S.L.W. 4079 (U.S. Jan. 9, 1979).

[16] *See, e.g.*, Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); United States v. United Air Lines, Inc., 216 F. Supp. 709, 725-29 (E.D. Wash., D. Nev. 1962), *aff'd as to estoppel sub nom.* United Air Lines, Inc. v. Wiener, 335 F.2d 379, 404 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964).

[17] Courts have recognized the much more severe fairness and due process concerns that would be raised by applying collateral estoppel against persons who were not represented in the earlier litigation, and such use of estoppel is available, if at all, only in extraordinary circumstances. *E.g.*, Note, *Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1485, 1496-97 (1974).

[18] It is also unlikely that allowing collateral estoppel will encourage putative claimants to wait on the sidelines until some plaintiff wins, thereby discouraging consolidation of claims. The first action is often a government enforcement action. Consolidation is usually not feasible. Furthermore, Congress has determined that potential plaintiffs should be able to await the outcome of such an action and accordingly has provided that the running of the statute of limitations is suspended during the action's pendency and for one year thereafter. *See* 15 U.S.C. § 16(i) (1976). When the first action is a private suit, plaintiffs may risk a partial loss of damages as a result of the running of the statute of limitations if they wait on the sidelines. In any event, a court may deny collateral estoppel effect where a later plaintiff "could easily have joined in the earlier action." Parklane Hosiery Co. v. Shore, 47 U.S.L.W. 4079, 4082 (U.S. Jan. 9, 1979).

[19] An additional concern sometimes expressed is the "multiple claimant anomaly." This occurs under principles of collateral estoppel where a defendant prevails in at least one suit but loses a later action by another claimant involving essentially the same facts. The defendant may then be estopped from litigating against subsequent plaintiffs those issues on which he prevailed in the first case but lost in the intervening action. However, this does not appear to be a cause for serious concern here. Antitrust litigation is sufficiently costly that it is unlikely that putative plaintiffs would continue to sue a victorious defendant on essentially the same facts. In any event, the court retains discretion to deny collateral estoppel where the prior judgments have been inconsistent. Parklane Hosiery Co. v. Shore, 47 U.S.L.W. 4079, 4082 (U.S. Jan. 9, 1979).

[20] 15 U.S.C. § 16(a) (1976).

[21] The recommended amendment clarifies the prima facie rule as a minimum standard, which can be triggered by government damage suits as well as enforcement actions. In addition, the proposed amendment would expressly allow the courts to grant collateral estoppel effect, in appropriate cases, as they would in other areas of the law, for issues previously litigated in civil or criminal suits brought by the government or private parties. Finally, the reference to excepting prima facie effect in subsequent government damage actions would be eliminated by the amendment, since retention of that reference would be superfluous.

Senator Hatch dissents from the recommendation for such an amendment.

[22] For a detailed exposition of interpretations of Rule 42(b), see 5 Moore's Federal Practice ¶ 42.03 (2d ed. 1978) and 9 C. Wright & A. Miller, Federal Practice & Procedure §§ 2387-91 (1971).

[23] *See, e.g.*, Kimberly Corp. v. Hartley Pen Co., 237 F.2d 294, 297 (9th Cir. 1956). *See also* Braun v. Berenson, 432 F.2d 538 (5th Cir. 1970).

[24] Notes of Advisory Committee on 1966 Amendment to Fed. R. Civ. P. 42(b).

[25] *See In re* Master Key Antitrust Litigation, 70 F.R.D. 23, 28-29 (D. Conn.), *appeal dismissed for lack of jurisdiction*, 528 F.2d 5 (2d Cir. 1975).

[26] *See, e.g.*, Components, Inc. v. Western Elec. Co., 318 F. Supp. 959, 965-68 (D. Me. 1970) and cases cited therein. *See also* Report of the Attorney General's National Committee to Study the Antitrust Laws 249 (1955), which recommended a separate trial of separable patent and antitrust issues.

[27] These items were selected from a list appearing in Antitrust Section, American Bar Ass'n, Expediting Pretrials and Trials of Antitrust Cases 125-33 (1978) (Monograph No. 3). *See also* Manual, *supra* note 6, § 4.12 (a lengthy and detailed list of potentially separable issues).

[28] *See, e.g.*, Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1324 (5th Cir. 1976); United States v. International Business Machs. Corp., 60 F.R.D. 654, 657 (S.D.N.Y. 1973).

[29] Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1324 (5th Cir. 1976).

[30] *See* United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir.), *cert. denied*, 266 U.S. 924 (1961); Hosie v. Chicago & N.W. Ry., 282 F.2d 639, 642-44 (7th Cir. 1960); C. Wright & A. Miller, *supra* note 22, § 2391. One Commission witness, Judge Robert Merhige, suggested that, where permissible, separate juries might hear separate, more manageable segments of the case. *See Antitrust Commission Hearings* 59 (Sept. 12, 1978, morning session) (testimony of Judge Robert R. Merhige, Jr., U.S. District Court, Eastern District of Virginia). A variant on this, to the extent feasible, is to retain the same jury but adjourn the trial for short periods between segments.

[31] One study of jury trials in personal injury cases indicated that defendants won 42 percent of those cases where damages and liability were tried together, but 79 percent of those where liability was tried alone. Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in The Courts, the Public and the Law Explosion 29, 48 (H. Jones ed. 1965), *cited in* C. Wright & A. Miller, *supra* note 22, § 2390, at 299. There is no indication that similar results need occur in the antitrust sphere.

[32] *See* Submission of Samuel E. Stubbs, Esq., Houston, Texas, to the Antitrust Commission 11-12 (Aug. 7, 1978) (Stays of Discovery in Antitrust Litigation).

[33] P. Gerhart, Report on the Empirical Case Studies Project to the National Commission for the Review of Antitrust Laws and Procedures 17, 72-73 (Jan. 15, 1979); *Those Complex Antitrust Cases*, Wall St. J., Aug. 29, 1978, at 16, col. 4. Some of these techniques were used in: SCM Corp. v. Xerox Corp., Civ. No. 15,807 (D. Conn. Dec. 29, 1978); Berkey Photo, Inc. v. Eastman Kodak Co., Civ. No. 73-424 (S.D.N.Y. June 16, 1978).

By Mr. ROTH:

S. 391. A bill to limit the burden reporting requirements placed on small businesses, to provide for the pilot testing of reporting forms issued or required by the Federal Government, to establish procedures for the reduction of the reporting burden upon small businesses on a continuing basis, and for other purposes; to the Committee on Governmental Affairs.

FEDERAL ADMINISTRATIVE IMPROVEMENTS IN REPORTS ACT

● Mr. ROTH. Mr. President, I am today introducing legislation which, I am hopeful, will go far toward easing the terrible paperwork burdens thrust upon our small business community by the Federal Government. I believe, as do a large majority of the American people, that something must be done, and done quickly to deal with the paperwork problem. Piecemeal actions and band aid repairs can no longer suffice.

The legislation I am submitting today is entitled the "Federal Administrative Improvements in Reports Act of 1979" or the FAIR Act. I carefully chose this title, because I believe it has special meaning. In my view, it is only fair and equitable that the huge Federal bureaucracy makes every possible effort, pursues every conceivable method, of reducing the terrible burden of paperwork thrust upon the small business community. It is not fair to me that a government spending close to $500 billion a year with all of the resources it commands continues to pile upon the shoulders of small businesspersons so many reporting requirements and regulations. In fairness to these entrepreneurs, we in the Federal Government must commit ourselves to the task of making the struggle to succeed in business a little easier.

The small businesses of our Nation are extremely important to its economic health. Forty-three percent of the Nation's gross national product is produced by small businesses of all types. Small businesses account for 64 percent of the total dollar volume generated by wholesaling, 73 percent of that generated by the construction industry. Somewhere between 95 and 99 percent of the businesses in the country can be considered small businesses. Census figures indicate that upwards of 90 percent of the businesses in the United States employ fewer than 50 workers. An equal number of these businesses earn $1 million or less in total annual receipts.

The importance of small businesses to our economy can be seen in the employment opportunities they offer. For the past 8 years, small businesses have accounted for 99 percent of the increased employment in the United States. While total employment rose in those years by 9,853,000, the Fortune 1,000 companies employed only 74,897 of that number, or 0.8 percent. Small businesses added 6.5 million new employees to their payrolls between 1969 and 1976. It is clear from these figures that small businesses are

the main hope for the unemployed and underemployed in our national economic recovery. Healthy, growing small businesses are one of the keystones to an expansion of job opportunities.

Small businesses are dynamic and innovative and provide vitality to our economy. It is the small businesses of our Nation that account for an estimated one-half of the new inventions developed in any given year by American businesses. Free from the shackles of corporate bureaucracy, small business people and individual entrepreneurs have come up with such inventions as power steering, the automatic transmission, the zipper, hand-held calculators, and countless others. Their imagination and vigor have kept American technological prowess second to none.

These facts indicate the extent of small business involvement in our national economic development. Big business may be more visible and more vocal, but smaller firms are every bit as active, and in many ways just as important to our Nation. We cannot allow these small businesses to sink in a quicksand pit of Federal paperwork in which the more they struggle, the faster they sink. With over 50 percent of all small businesses succumbing to failure within 2 years of their birth, it is inexcusable for the Federal Government to add more weight to their burdens through countless paperwork requirements.

Though the problem is serious today, it has not gone unexamined through the years. Since 1887, there have been at least nine major commissions or congressional hearings which looked into the paperwork problem in depth. Two lengthy statutes have been enacted in an attempt to stem the flow of reports requirements and to control the growth of paperwork. Countless studies by the General Accounting Office, hundreds of thousands of complaints from citizens, innumerable Executive orders, and agency circulars and study upon study by private institutes and businesses have failed to do anything to reduce the amount of paperwork created by Washington's bureaucrats. Since the time of the first Hoover Commission in 1950, the cost to the Government alone for paperwork has increased by a factor of 30 to over $30 billion. American businesses spent nearly $32 billion in 1976 to comply with Federal paperwork requirements and tragically, small businesses accounted for over $20 billion of this cost. We have studied the paperwork problem to death, tried to circumscribe its growth by law, attempted to corral the paperwork creators in the agencies and railed against the bureaucracy to no avail. The problem keeps growing, in large part, because the production of paperwork helps to justify a larger budget for each agency and provides more support for its existence and growth. We have found that bureaucrats cut paperwork only one way—lengthwise. In short, we have been unable to deal with a problem which has been with us since the bureaucracy began.

What effect do all of these paperwork requirements have on small businesses? We here in the Congress can not really understand the problem since we do not have to face it on a day-to-day, week-to-week basis. The financial impact is obvious but the psychological impact may be even more serious. In our modern society, the most prevalent (many would say the only) contact between the Federal Government and small businesses and citizens is through paper. Indeed, in many parts of the country the only time a citizen notices the Government is when he receives a form to fill out. Small businessmen are risk takers and they know they have taken a big step in relying on themselves for their livelihood. When they are forced to spend precious time filling out forms the purpose of which they cannot understand, they begin to believe their own Government is an enemy. Negative attitudes toward Government can be nurtured by the constantly increasing, burdensome, and unnecessary load of paperwork created in Washington.

A few small businesses can afford to hire an accountant to do their own bookkeeping. But recent surveys have shown that nearly 94 percent of all small business owners do their own records keeping. They seem to be more aware and concerned with the problem because they, unlike large business firms, cannot afford to hire an accountant and must complete Federal forms and reports themselves. In addition, the relative and absolute burden of Federal paperwork on small businesses is much larger than that upon large firms, because there are many more small businesses in existence and because the relative costs, the cost of complying compared to the gross income of the firm, of Federal reporting requirements are much higher for small firms.

The horror stories regarding paperwork have been cataloged at length. The sheer number of these stories should be ample warning to us here in the Congress that the problem is very serious. I have received numerous letters complaining about the general problems of bureaucratic redtape and "too much unnecessary paperwork." But two letters I recently received are particularly noteworthy and disturbing.

In the first letter, a small businessman in my State lamented the fact that he was forced to spend so much of his time filling out Federal forms. He not only received a huge number of forms, he also received forms which were too large to be stored in a standard filing cabinet or fit easily into a typewriter. The Government first deluged him with paperwork and then did not even have the courtesy to send him a standard sized form.

The second letter I received also complained of the tremendous number of forms which must be filled out each year by a small businessman and his two employee firm. His children took note of the long hours he was forced to work on Government paperwork and one of them commented:

> I don't want any part of a business of my own. You don't make that much, you have too many problems, and it would be much easier to work for someone else and let them worry.

I think this letter is an especially sad comment on our Federal Government. It is apparent to me that the paperwork problem has begun to severely hurt our small business community. In reality it hurts each and everyone of us regardless of whether we own a small business. Recent studies including one just completed by the Brookings Institution, indicate that Government regulation and redtape may be partially responsible for the recent decline in American productivity.

Declining productivity has meant rising prices and sluggish business activity. The costs to all of us are enormous, but the tragic fact is that the reporting system we use for compliance with Federal regulations is not very effective. It is often an unfair system as well as ineffective in achieving its goals, heaping the same burdens on small businesses it does on larger firms.

Burdensome Government regulations have many unseen effects. One of the most tragic results of bureaucratic redtape and regulation is the growth of what one authority has called the subterranean economy. A recent study has described this subterranean economy as an "attempt by overstressed small businesses to escape the demands of big government by going underground." These small firms leave the everyday business world and make all of their economic transactions in cash thereby avoiding Government recording, regulation, and snooping. It has been estimated that this subterranean economy generated an illegal GNP of $170 billion in 1976, and it is almost inevitable that rising tax rates and increased Government regulation will continue to drive more and more small businesses in the U.S. economic picture underground. We are literally forcing many small business owners to become fugitives in their own country, afraid of their own Government.

There is no doubt that Government regulations and redtape is a significant small business problem and small business owners have begun to shout, with increasing vigor, that they have becomfed up with Federal encroachment and dilly dallying in their business operations. As of January 1978, 12 percent of the Nation's small firms cited regulation and redtape as their single greatest business problem; only inflation and taxes were cited with greater frequency. In contrast, only 4 short years ago, the same survey revealed that inflation, shortage of fuels (remember the energy crisis), taxes, quality of labor, competition from large businesses, and interest rates, were cited with similar or greater frequency than Government regulation, as the single greatest problem for small businesses. The figures only represent the tip of the iceberg, for more than 40 percent of the small business community consider regulation to be a "major" business problem.

Small business owners spend an average of 58 hours per week running their businesses. How can we expect them to flip through the 70,000 pages contained in the Federal Register each year to find out what new paperwork requirements they are expected to fulfill? Even if they had the time, they frequently lack the

knowledge of foreign language necessary to decipher the "legalese" that constitutes the regulations. The burden has become unbearable.

I believe the time has come to take a forceful, direct approach to the paperwork problem. The legislation I am introducing today takes such an approach. It contains two important titles which I believe will have a major beneficial impact on the paperwork problem.

I must emphasize that this legislation will not exempt small businesses from complying with all applicable Federal laws and regulations. Its intent is to streamline and alleviate the paperwork burden borne by small businesses, not exempt them from the requirements of laws and regulations.

The FAIR Act provides for a uniform definition of a small business to expedite the paperwork reduction process provided for under the legislation. There are over 600 definitions of small business in use today, most of them created by bureaucratic sophists at the Small Business Administration. There is a small business definition for every purpose: For Government procurement, loan assistance, investment assistance, Government subcontracting, lease guarantees, uranium prospecting, mining rights, and countless others.

But that is not the whole story. The Government definition of small business for Government procurement purposes, to use a specific example, changes like a chameleon, from product to product. There are different procurement definitions for construction, dredging, janitorial services, research, and development, cargo handling, rug cleaning, computer programing services, freighting, crating, and helicopter services, to name only a few.

There is a further problem with these SBA definitions of small business, one that renders them virtually useless as a means of exempting small businesses from Federal regulations: the SBA definitions are too large.

For instance, the definition of "small" for purposes of Government procurement is any business with $42 million or less in annual recepits. Petroleum, ammunition, and aircraft manufacturers are considered small if they have 1,500 employees or less. Definitions such as these exclude all but the top few firms from benefits intended for small businesses. The confusion resulting from so many different definitions discourages Federal agencies from designing simpler forms for small businesses and reducing the number of reports for which small business persons are responsible. It also makes it extremely difficult for the Congress to legislate paperwork relief statutes.

Title I of my bill provides for a new, action forcing procedure designed to create a workable paperwork reduction process within the agencies and bureaus of the Federal Government. The Title establishes a 3-year time frame in which all agencies responsible for any paperwork requirements affecting small businesses would redesign their requirements with an eye toward eliminating or streamlining forms and reports. Consultation with affected groups would be required and criteria for improving and eliminating forms would have to be developed by each agency. The Office of Management and Budget would assume overall direction of the program and would assist each agency in its efforts.

As each agency completes its review process, it would submit its revised set of new reporting requirements in the form of a single report to the Congress. Either House of the Congress would then have 60 days to accept or reject any form in the report. An important provision in my legislation would also require each agency to reduce the number of new reporting forms required of small businesses by 30 percent in comparison with the number of previously utilized forms. In simple terms, my bill sets a firm goal and forces the agencies to reach that goal.

In addition, the legislation would also allow each agency to resubmit reporting forms initially rejected by the Congress. I believe this provision removes some of the inflexibility in the process and allows the agencies to react to congressional mandates with innovative and improved proposals. Once rejected for a second time, however, the legislation provides that such forms could not be utilized by the agency for at least 1 year and after such time the forms could only be used after they had been thoroughly tested under the provisions of title II of the bill. Through these procedures I believe we can achieve significant reductions in the paperwork burden and simplify the remaining reporting forms we require of small businesses.

At the end of the 3-year review period, all forms which were in use before the last day of the period would be eliminated and could not be used by any Government agency. This provision is the action forcing mechanism in my bill. It is designed to stimulate creative action on the part of the agencies in fulfilling the requirements of this bill.

While this legislation may seem a radical approach, similar efforts have been made at the State level with excellent results. In Minnesota, for example, the State Department of Administration set a goal of reducing the number of forms required to be completed by assistance recipients and businesses by 30 percent in 1 year. The program began in 1977 and at that time there were 35,939 forms in use in the State, including those forms used for interoffice purposes. By the end of the year, only 11,720 forms remained. By setting goals and forcing the bureaucrats to work toward them, real gains were made. In fact, many State agency heads became enthusiastic about the program and discovered that there really were duplications in requirements and unnecessary forms in use. In short, the State set a goal and forced itself to meet that goal. We must do the same if we hope to win the battle against paperwork.

The FAIR Act also creates a new system to control the regrowth of paperwork once we have cut it down to size. Title II of the bill would require the pilot or trial testing of any new Government form before it could be put into use on a regular basis. Each agency would be required to determine whether the paperwork requirements attached to any new regulation would affect a significant number of small businesses. The Office of Advocacy in the Small Business Administration would also be required to review each new paperwork requirement and make the same determination. If either the agency responsible for the regulation or the Office of Advocacy determine the impact of the requirements upon small businesses would be significant, the form in question would have to be pilot tested.

Essentially, pilot testing would allow small businesses the chance to comment on a form before it was issued in its final format. It would test the form in the real world working conditions under which it would be used. Small businesses would have the opportunity to comment on a proposed form directly and could indicate to an agency where they saw duplications or overlaps and could comment on the difficulty of completing the form. The legislation also would require that the pilot test forms would have to be clearly marked "voluntary" and would require that each agency describe th need and uses for which the form was developed. Finally, all information collected through these tests would have to be stored by each agency for at least 2 years providing the Congress with a good source of information on the Federal forms used by the Government. In a sense, the pilot testing program would provide Congress with a window on the problems small businesses experience with Federal paperwork.

In conjunction with the provisions in title I of the bill which require the 3-year review process to be begun anew every 7 years, the pilot testing procedures created by title II will provide for a workable, creative, and flexible paperwork streamlining and reduction process. These two titles together will set goals for reducing paperwork while at the same time forcing the agencies to carefully consider the impact their reporting requirements will have on small businesses.

Mr. President, I believe the comprehensive and carefully conceived paperwork reduction and improvement process provided by the FAIR Act will go far toward reducing the paperwork burden we impose upon our small business community. We have nickeled and dimed the problem for long enough. It is time we took firm and forceful action and made a strong commitment to reducing the Federal paperwork blizzard both now and in the future. My legislation will accomplish these goals and I urge my colleagues to give it thorough consideration.

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

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

S. 391

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That this Act may be cited as the "Federal Administrative Improvements in Reports Act".

FINDINGS AND PURPOSES

SEC. 2. The Congress finds and declares that—

(1) the reports and paperwork required of small businesses by the Federal government have become a severe financial, economic,

and social burden upon the small business community, and such reports and paperwork—

(A) lead to decreased productivity by small businesses and stimulate inflation;

(B) create anger, suspicion, and frustration among small business owners;

(C) are not highly effective in the enforcement of Federal laws;

(D) add to the cost of goods purchased by consumers; and

(E) decrease incentives for investment in and maintenance of new businesses;

(2) there has been extensive study and exhaustive examination of the problems surrounding Federal paperwork requirements, yet little has been accomplished to reduce the burdens imposed by such paperwork; and

(3) it is time for the Congress to take action to significantly and substantially reduce Federal paperwork requirements.

DEFINITIONS

SEC. 3 (a) Notwithstanding any other provision of law, and for the purpose of this Act and its application to all Federal statutes and administrative rules, regulations, orders, licenses, and permits, the term "small business" means any individual or other person, including any sole proprietorship, corporation, partnership, joint venture, governmental entity, or Indian tribe who employs fewer than 50 employees or whose gross receipts did not exceed $1,000,000 in the most recent taxable year.

(b) For the purposes of this Act the term—

"(1) 'agency' has the same meaning as in section 551(1) of title 5, United States Code, including any authority of the Government of the United States within or subject to review by another agency;

"(2) 'reporting form' means any document or written form, including application forms, schedules, questionnaires or similar devices which requires any small business to expend any time or effort in the provision of information to the Federal government including those forms not subject to the Federal Reports Act (44 U.S.C. § 3501 et. seq.); and

"(3) 'rule' has the same meaning as provided in section 551(3) of title 5, United States Code, and includes prescriptive or proscriptive standards of every description.

TITLE I—REVIEW OF REPORTING FORMS

SEC. 101. (a) On the date three years from the date of enactment of this Act, no Federal agency may require any small business to execute or respond to any reporting form in effect on the day before that date.

(b) Within three years of the date of enactment of this Act, each agency head shall review all reporting forms of that agency, and shall design and establish, in accordance with the procedure established in subsection (c), new reporting forms for small businesses which will become effective on the date three years from the date of enactment of this Act.

(c)(1) In designing and establishing new reporting forms under this section, each agency head shall—

(A) Consult as fully as possible with representatives of small business in order to obtain information concerning the impact of such reporting forms on small businesses;

(B) Consider every possibility for reducing the number of new reporting forms required, reducing the length and complexity of new reporting forms and simplifying the recordkeeping requirements of each new reporting form;

(C) Develop criteria for designing new reporting forms which should include, at a minimum, a consideration of the continued need for the reporting form, the type and number of complaints received with respect to previously utilized reporting forms, the burdens imposed upon small business, the need to simplify or clarify language, the need to eliminate overlap or duplication and the length of time since each reporting requirement has been reviewed;

(D) Reduce the total number of new reporting forms required of small businesses by fifty (50) per centum in comparison with the total number of previously utilized reporting forms; and

(E) Submit to Congress a single report containing each proposed reporting form, together with an identification number for each such form, supporting documentation concerning the need for each reporting form and a concise description of how the proposed reporting system significantly reduces the burdens upon small businesses in comparison with the existing reporting system.

(2)(A) The reporting forms contained in the report submitted by the agency head to the Congress pursuant to paragraph (1) may be utilized by the agency head upon the date described in Section 101(b) of this Act if, between the date of transmittal and the end of 60 calendar days of continuous session of Congress after the date on which such reporting forms are transmitted to the Congress, neither House passes a resolution stating in substance that the House does not favor any part or all of the reporting forms submitted under this section.

(B) Any reporting forms not approved by the Congress may be resubmitted for consideration, under the procedures described in subsection (2)(A) above, by the Congress 60 days following the passage of any such resolution provided:

(i) in passing such resolution the Congress has not found the proposed reporting form to be unnecessary or duplicative; or

(ii) in passing such resolution the Congress has not expressly prohibited the agency from resubmitting such reporting form.

(C) Any reporting forms not approved by the Congress upon resubmission of such reporting forms may not be issued by the agency for one year from the date described in Section 101(b) and shall be subject to the provisions contained in Title II of this Act without regard to the limitations of Section 201(a) of such Title.

(D) The provisions of Sections 908, 910, 911, and 912 of Title 5, United States Code, shall apply to any resolution considered under this paragraph. For the purposes of the preceding sentence of this subparagraph—

(i) all references in such sections to "reorganization plan" shall be treated as referring to "reporting forms" submitted under Section 101(c) of the "Federal Administrative Improvements in Reports Act of 1978"; and

(ii) all references in such sections to "resolution" shall be treated as referring to a resolution of either House of Congress, the matter after the resolving clause of which is as following: "That the ——— does not favor ——— of the reporting forms submitted under Section 101(c) of the "Federal Administrative Improvements in Reports Act of 1978", the first blank therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled.

SEC. 102. Seven years from the end of the three year period described in section 101(b), and for every seven years thereafter, the provisions of section 101 shall be implemented by all agencies as defined in sections 3(b)(1).

SPECIAL REQUIREMENTS FOR THE COMMISSIONER OF THE INTERNAL REVENUE SERVICE

SEC. 103. (a) The Internal Revenue Service of the Department of the Treasury shall be considered exempt from sections 101 (a) and (c) of this Act.

(b) In carrying out his responsibilities under section 101(b) in relation to the administration and enforcement of the Internal Revenue Code of 1954, the Commissioner of the Internal Revenue Service shall review all reporting forms for small businesses, especially those which require responses by small businesses at intervals of more than once each year, and in redesigning and establishing new reporting forms for small businesses, shall eliminate reporting forms which require responses by small businesses at intervals of more than once each year unless such reporting forms are absolutely necessary to the administration and enforcement of the Internal Revenue Code of 1954.

(c) After designing and establishing reporting forms for small businesses in accordance with section 101(b), the Commissioner shall take such action as may be necessary to continue to reduce, streamline and simplify the number and size of all reporting forms for small businesses used in the administration and enforcement of the Internal Revenue Code of 1954, and shall consult with groups representative of small business in order to obtain information concerning the effect of any such action on small businesses. The Commissioner shall report to the Congress every two years concerning efforts made to carry out the provisions of this subsection.

(d) In the report required under subsection (c), the Commissioner shall include—

(1) a list and description of all objections made by small businesses to any reporting form used by the Internal Revenue Service;

(2) a description of the efforts made to solicit input from the owners of small businesses;

(3) a list of small businesses or small business groups contracted;

(4) a description of how the comments of small business owners and groups have been utilized in the development of reporting forms for small businesses; and

(5) a list of reporting forms which require responses by small businesses at an interval of more than once each year, and a justification of the need for each such form.

TITLE II—PILOT TESTING PROGRAMS

PROCEDURES

SEC. 201. (a) Whenever any proposed rule becomes final, reporting forms which are required of small businesses pursuant to any such rule shall be subject to the requirements of this section if—

(1) the agency which proposed such rule determines, pursuant to careful analysis, that a significant number of those corporations or general businesses which would be required to complete such reporting forms are small businesses as defined in this Act; or

(2) the explicit language or the legislative history of any public law pursuant to which such report forms are issued or required by an agency, requires such agency to analyze and to take into account the effect of any such rule and its impact on small businesses; or

(3) the Office of Advocacy of the Small Business Administration, after reviewing the paperwork impact such rule would have on small businesses as defined in this Act, believes that the proposed requirements would have serious negative impacts upon such businesses; or

(4) otherwise required by law.

(b)(1) Reporting forms which are described under the provisions of subsection (a) of this section shall be distributed in a pilot test survey to a selected cross sample of all small businesses as defined in this Act.

(2) A survey conducted pursuant to paragraph (1) of this subsection shall accurately reflect the composition of the small business community, as reflected in such statistics of the Bureau of the Census, as would otherwise be subject to the provisions of the rule and should be designed according to the latest available scientific techniques.

(c) If any reporting form is not pilot tested pursuant to the requirements of subsection

(b) of this section before its use or execution is required, the agency which promulgated the rule pursuant to which such reporting form is required shall publish in the Federal Register a notice of explanation as to why such pilot testing has not been conducted and a detailed explanation of the means by which such report is to be executed.

COMPOSITION

SEC. 202. (a) Reporting forms utilized pursuant to section 201(b) of this Act shall be clearly marked as test forms, shall be voluntary in nature and shall be distributed as necessary together with explanations of—

(1) the purpose of the utilization of the test reporting form itself;

(2) how the results of such test surveys of reporting forms would be used to aid Federal agencies; and

(3) how such reporting forms may be beneficial to small businesses.

(b) Each such test reporting form shall include an additional solicitation sheet to be utilized by the agency to determine the problems and advantages which the proposed report may create for small businesses.

(c) Each such solicitation sheet shall provide for the recovery of the following information:

(1) problems a respondent has encountered in executing or fulfilling the requirements contained in the reporting form;

(2) difficulties the respondent may have had in completing or understanding the reporting form;

(3) duplications or overlapping areas of inquiry which the respondent detects between the reporting form and other reporting forms for which the respondent is responsible; or

(4) such other pertinent information as the agency may feel to be useful in analyzing the reporting form.

(d) Each agency shall maintain a complete file of all such responses for a period of at least two years from the date upon which such test reporting forms were distributed.

PUBLICATION

SEC. 203. Information determined pursuant to the pilot test survey authorized by section 201(b) of this Act shall be published in the Federal Register together with an acknowledgement by the agency which promulgated the rule pursuant to which such reporting forms are required of problems identified by small businesses and the steps such agency will take to alleviate such problems.

FEDERAL REPORTS ACT

SEC. 204. (a) All reporting forms, including those not subject to the provisions of the Federal Reports Act (44 U.S.C. § 3501 et seq.), shall be submitted to the Office of Advocacy in the Small Business Administration for review and analysis, and those subject to the Federal Reports Act shall be submitted at the same time such reporting forms are submitted to the Office of Management and Budget for approval pursuant to such Act.

GENERAL OVERSIGHT

SEC. 205. The Office of Management and Budget shall be responsible for the administration of this Act and shall issue such rules and regulations as are necessary for the implementation of this Act. It shall monitor and facilitate the activities of all agencies as they prepare their reports and shall convene interagency meetings as needed to help resolve conflicts and inconsistencies which may arise among agencies as they seek to reduce conflicting or duplicative reporting requirements. The General Accounting Office shall perform the same duties with respect to the independent regulatory agencies.

SEC. 206. In fulfilling its responsibilities pursuant to section 205, the Office of Management shall certify that each agency report submitted to Congress under section 101 of this Act contains no new reporting forms or requirements which are duplicative of others within such agency's reporting system or among the reporting systems administered by other agencies affected by this Act. Such certification shall be contained in each report submitted by the agencies to the Congress pursuant to the requirements of section 101. The General Accounting Office shall perform the same duties with respect to the independent regulatory agencies.●

By Mr. COHEN (for himself and Mr. HATFIELD):

S. 392. A bill to provide that polling and registration places for elections for Federal office be accessible to physically handicapped and elderly individuals, and for other purposes; to the Committee on Rules and Administration.

VOTING RIGHTS FOR THE ELDERLY AND THE HANDICAPPED ACT

● Mr. COHEN. Mr. President, today, joined by my colleague Senator HATFIELD, I am pleased to introduce legislation which will reenfranchise many handicapped and elderly citizens by making polling places and voter registration facilities accessible to persons using wheelchairs and other ambulatory aids.

Most of us take for granted the simple act of voting. Yet, certain groups of persons have been systematically deprived of the right to vote. Among those are the handicapped and elderly who lack the mobility to overcome architectural barriers that have been thoughtlessly placed in their way.

Despite our best intentions in passing laws making Federal buildings accessible to the handicapped and elderly and offering tax incentives to encourage similar changes in other buildings, accessibility to polling and voter registration places remains a problem. A few States, including my own State of Maine, have had the foresight to enact legislation which provides for accessibility to polling places. These laws should serve as a model for comprehensive Federal action.

The exact number of individuals who would benefit from Federal legislation in this area is unknown, but several reliable estimates underscore the magnitude of the problem.

The National Center for Health Statistics reports that there are approximately 1.87 million Americans of voting age whose mobility is restricted as a result of physical handicaps. A large percentage of the Nation's 23.5 million elderly citizens are also affected by structural barriers. The Department of Transportation estimates that, at any one time, more than 2.6 million potential voters are temporarily disabled by serious, but short-term illnesses or injuries. Together these groups represent a significant number of Americans whose ability to exercise their right to vote is threatened by the presence of architectural barriers.

In addition to architectural barriers, another obstacle to political participation by handicapped persons and the elderly is the requirement governing absentee ballot registration and voting procedures. Existing laws, which were designed to protect States from vote fraud, discriminate against the handicapped, and the frail elderly. Many States, for example, require a doctor's statement and often notarization before a disabled individual can vote absentee. These requirements can be expensive, difficult to obtain, and in a sense constitute a poll tax.

The bill I am introducing today directs the Attorney General and the Secretary of Health, Education, and Welfare to jointly develop standards which will insure that all polling places and registration facilities are fully accessible to the elderly and the handicapped. When promulgated, these standards will serve as a guideline for State and local jurisdictions in the selection of polling and registration facilities. States and local jurisdictions which have already adopted standards as stringent as those prescribed by the Attorney General will be unaffected by this legislation.

If no accessible polling place or voter registration site is available in a voting district, the State shall provide for alternative methods of voting and registration. In the case of voting, such alternatives will include setting up accessible voting places outside the voting precinct to which the handicapped or elderly individual is assigned to vote, modification of absentee laws, and "curbside" voting. Likewise, alternatives for voter registration are required.

In addition, the bill requires that paper ballots be available at all Federal election voting sites for the use of persons who are unable to operate a conventional voting machine. Another provision will aid the blind in their attempts to vote. Blind individuals and others who have difficulty in operating a voting machine and marking a paper ballot would be allowed to designate individuals to assist them in the voting booth.

More than 80 percent of the instructions given in voting places and registration sites are verbal. For the deaf and those with hearing difficulties, the bill requires that instructions and directions be written and posted.

Whatever the alternative method of voting or registration selected, public notice shall be given at least 60 days prior to the election or close of registration in order to advise those affected citizens of the options available to them. Handicapped and elderly voters would then have ample opportunity to notify election officials of their intention to vote by an alternative method.

If the Attorney General has reason to believe that a State or political subdivision is not complying with the provisions of this act, he has the authority to bring action in Federal District Court.

Mr. President, voting is one of the most cherished freedoms guaranteed by our Constitution. We in Congress have an overriding obligation to insure that no American is denied this basic right through no fault of his own. The time is at hand to remove the barriers which have made it difficult for the elderly and the handicapped to participate fully in

the political process, and I hope that we can enact this bill into law without further delay.●

By Mr. DOMENICI:

S. 393. A bill to amend the Railroad Retirement Act of 1974 with respect to annuities for widows and widowers of certain railroad employees; to the Committee on Human Resources.

SURVIVOR ANNUITIES FOR WIDOWS AND WIDOWERS

● Mr. DOMENICI. Mr. President, today I am introducing S. 393, which amends the Railroad Retirement Act of 1974 to modify the survivors benefits for widows and widowers of railroad employees.

Annuities are payable to surviving widows and widowers, children, and certain other dependents. Eligibility for survivor benefits depends on whether the employee was insured under the Railroad Retirement Act at the time of death. An employee is insured if he or she has at least 10 years of railroad service and a "current connection" with the railroad industry at the time of retirement or death. In the great majority of cases the "current connection" requirement is met if the employee had some railroad service in at least 12 of the months in the 2½ years before retirement or death.

Currently, over 300,000 widows and widowers are on the Railroad Retirement Board's annuity rolls.

The bill I am proposing today is intended to increase the annuities of widows and widowers by the difference between what they get under current law and what the railroad employee was getting. My bill will include widows and widowers of employees who died before retirement who qualify for survivors benefits under current law.

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

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

S. 393

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4 of the Railroad Retirement Act of 1974 is amended by adding at the end the following new subsection:

"(j) With respect to any month in which a survivor's annuity otherwise payable under this Act to a widow or a widower of a deceased employee would be in an amount less than the amount of the annuity under section 3 which would have been payable to such deceased employee if not deceased, the survivor's annuity of such widow or widower shall be increased to an amount equal to the amount of annuity that would have been so payable to that deceased employee. The annuity would continue to be reduced by the amount of social security benefits received. Coverage under this Section would include widows and widowers of employees who died before retirement who qualify for survivors benefits under current law. However, it would exclude supplemental annuity benefits under section 3(e)."

SEC. 2. The amendment made by the first section of this Act shall apply with respect to annuities accruing under the Railroad Retirement Act of 1974, for months beginning as to the date of the enactment of this Act."●

By Mr. CHILES (for himself, Mr. DOMENICI, Mr. DOLE, Mr. GLENN, Mr. BRADLEY, Mr. PRYOR, and Mr. COHEN):

S. 395. A bill to require studies and recommendations from the Department of Health, Education, and Welfare with respect to health insurance sold as a supplement to medicare, to provide penalties for certain sales practices, and for other purposes; to the Committee on Finance.

MEDICARE SUPPLEMENTAL HEALTH INSURANCE INFORMATION DISCLOSURE PROTECTION ACT OF 1979

● Mr. CHILES. Mr. President, today I am introducing a bill to provide protections against unethical and unscrupulous sales of "medi-gap" health insurance policies to older Americans. Senators DOLE, GLENN, BRADLEY, PRYOR, and COHEN are joining me as original cosponsors.

Medicare now pays for about 40 percent of the total health case bill for older Americans. The large gaps mean that most older Americans, fearful of illness and escalating health care costs, purchase commercially marketed health insurance to supplement their medicare protection. Some of it is good, and some of it is not.

Two-thirds of those age 65 and over have purchased some form of this insurance, spending at least $1 billion each year. Medi-gap policies pay for about 5 percent of their total health care bill.

Testimony before the Committee on Aging revealed widespread misinformation, unchecked sales of policies with questionable benefits, and callous attitudes toward older Americans fearful of rising health costs

We found gross instances of overselling: One woman had been sold 19 health insurance policies from 9 different companies by 6 different insurance agents in just over 1 year, most of which overlapped or were duplicated and would never be of benefit.

We found some agents "rolling over" policies: They would come back again and again to replace old policies with new ones, receiving a new, higher commission each time.

We found some agents claiming that the expensive policies they were selling covered everything medicare did not, when the policy really provided very little beyond medicare.

We found individuals posing as licensed insurance agents selling worthless pieces of paper as health insurance policies.

We found agents circulating lists of elderly people who were particularly vulnerable and would buy more insurance. In Wisconsin they were called "mooches" or "cripples." In Texas, they were called "goose lists."

Since our hearings, further examples have surfaced in hearings conducted by the House Committee on Aging and through newspaper investigations.

This bill would take what I feel are minimum necessary steps to acknowledge and fulfill our Federal responsibility to prevent these abuses. The magnitude of the problem has been acknowledged by many members of the health insurance industry and by a number of State insurance commissioners. During our hearings, a spokesman for the National Association of Insurance Commissioners made a commitment to develop recommendations for State action, and members of the health insurance industry have been participating in this effort.

I recognize these efforts, and support them. I believe the most effective corrective actions can be taken by the States and by individual insurance companies. The intent of this bill is to support these efforts. Concerned insurance commissioners and representatives of health insurance companies would be fully involved in all actions taken.

First, the Department of Health, Education, and Welfare would be required to develop, and propose for adoption by States, minimum standards for the content and sale of medi-gap policies. Included would be policies designed to supplement medicare, such as "wrap-around" policies which commonly pay for medicare deductibles and coinsurance charges; and other policies which are marketed heavily to the elderly, such as dread disease and hospital indemnity policies.

Second, HEW would be required to make a thorough evaluation of the feasibility and effects of a program of Federal certification of medi-gap policies. If a medi-gap policy met standards for benefits, exclusions, premiums, and loss ratios and if other standards for information disclosure, solvency guarantees, and company marketing practices were met, for instance, that policy could be advertised and sold as meeting Federal standards. Misuse or falsification of certification would be subject to penalties.

I would like to have some more evaluation of the effort and costs which would be involved in such a program, and the expected impact, before we fully institute such a measure. If model regulations and standards are uniformly adopted and enforced by all States, for instance, such a Federal program may not be necessary.

Third, the bill provides penalties of up to $25,000 fine or 5 years imprisonment for anyone who misrepresents in any way an association with medicare for the purpose of soliciting business for medi-gap sales.

This is a strong penalty, but it is consistent with existing medicare fraud penalties, and I think we owe the same protection to medicare beneficiaries. It would be a strong deterrent for those insurance agents who imply they are collecting premiums for medicare, or say they need to come to a home to explain changes in medicare, simply to get a foot in the door to sell insurance.

Fourth, HEW would be required to provide comprehensive, timely, and easy to understand information to all medicare beneficiaries on the types of medi-gap policies available, their relationship to medicare and medicaid benefits, and the probable need for such policies.

Virtually every witness during our hearings concluded that a significant amount of abuse could be avoided if

medicare beneficiaries were better informed about medicare and the medigap policies being sold. Federal Trade Commissioner Dole concluded that a wide information gap has made it virtually impossible for older Americans to make rational purchase decisions. As Wisconsin State Insurance Commissioner Harold R. Wilde observed: "Millions make a good choice. Millions of others do not."

I believe, and Secretary Califano has agreed, that the Federal Government has a responsibility to improve its medicare information and extend that responsibility to information to help evaluate supplemental insurance.

Fifth, the Federal Trade Commission would be required to undertake a nationwide study of unfair and deceptive practices in medi-gap advertising, solicitation, and marketing practices. The Commission would also be required to assess the relative impact of a number of different State approaches to regulation of medi-gap insurance sales. The activities of the Department of Health, Education, and Welfare and the Federal Trade Commission would be carried out in consultation with each other.

We are not facing a brand new issue, and I do not expect implementation of these provisions to take a long time. I urge my colleagues to see that this bill is passed soon, so we can bring a quick end to the incredibly callous treatment of too many older Americans.

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

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

S. 395

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

SHORT TITLE

SECTION 1. This Act may be cited as the "Medicare Supplemental Health Insurance Information disclosure and Protection Act of 1979".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that significant numbers of the Medicare beneficiaries who have availed themselves of the option, provided for under section 1803 of the Social Security Act, to obtain supplementary health insurance protection, have been subjected to misinformation and unethical sales practices when making purchases of supplementary policies, and that a combination of Federal, State, and private action is necessary to ensure that these beneficiaries have access to complete, timely, and accurate information on the nature and costs of supplementary health insurance. The Congress also finds that increased protection against certain selling practices is necessary.

(b) The Congress finds that Federal responsibility in fully carrying out the provisions of title XVIII of the Social Security Act extends to providing an assurance of the quality of suitable additional insurance protection against health costs not included within the protections offered by title XVIII.

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) the term "Medicare" means the program of health insurance for the aged and disabled under title XVIII of the Social Security Act;

(2) the term "Medicare eligible person" means a person entitled to benefits under part A or eligible to enroll under part B of the Medicare program; and

(3) the term "Medicare supplemental insurance" means—

(A) any policy of accident or sickness insurance which is designed to supplement Medicare or is advertised, marketed, or otherwise purported to be a supplement to Medicare; and

(B) any other policy of accident or sickness insurance marketed or sold to Medicare eligible persons, including a specific illness or specific benefit or hospital indemnity policy, regardless of whether it is purported to supplement Medicare benefits.

PENALTIES FOR CERTAIN SALES PRACTICES

SEC. 4. Section 1877 of the Social Security Act is amended by adding at the end thereof the following new subsection:

"(e) Whoever falsely assumes or pretends to be acting, or misrepresents in any way that he is acting, under the authority of or in association with the program of health insurance established under this title for the purpose of selling or attempting to sell insurance, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be guilty of a felony and upon conviction thereof shall be fined not more than $25,000 or imprisoned for not more than five years, or both.".

MINIMUM STANDARDS FOR MEDICARE SUPPLEMENTAL INSURANCE

SEC. 5. (a) The Secretary of Health, Education, and Welfare shall develop, for proposed adoption by States, model legislation and regulations concerning proposed minimum requirements for the sale of Medicare supplemental insurance to Medicare eligible persons.

(b) In the development of such model legislation and regulations, the Secretary shall consult with consumers, the Federal Trade Commission, the National Association of Insurance Commissioners, and representatives of the health and accident insurance industry.

(c) The Secretary shall include in such proposal recommendations for minimum national uniform standards for all health insurance policies advertised for sale to, or sold to, Medicare eligible persons.

(d) Recommendations shall address, but not be limited to, minimum benefits required of policies sold as Medicare supplemental insurance; accurate and descriptive labeling of all such policies; the relationship between premiums charged and benefits paid under such policies; policy exclusions and limitations (including limitations on pre-existing conditions) under such policies; and requirements for information disclosure and fair sales practices in the advertising and marketing of such policies.

(e) The recommended minimum national uniform standards shall be made widely available to members of State legislatures and the public.

STUDY OF FEDERAL CERTIFICATION

SEC. 6. (a) The Secretary of Health, Education, and Welfare shall undertake a study of the feasibility and desirability of a program of Federal certification of Medicare supplemental insurance, and report his findings and recommendations to Congress within one year.

(b) The study shall include an assessment of the probable impact of certification on prevention of abuses in the content, premiums, and marketing of Medicare supplemental insurance, and of any additional costs to consumers resulting from certification.

(c) For purposes of the study, the Secretary shall determine the relative impact of certification made available on a voluntary basis to insurance companies wishing to participate in the program, and of a mandatory requirement that all Medicare supplemental insurance sold to Medicare eligible persons meet conditions of certification.

(d) For purposes of the study, the Secretary shall include, to the extent practicable, analyses of the impact of standards for Medicare supplemental insurance which may have been proposed under the provisions of section 5 of this Act. The study shall also include an assessment of the feasibility and desirability of applying standards relating to insurance company marketing practices and such additional requirements for certification as the Secretary may deem appropriate.

INFORMATION FOR MEDICARE ELIGIBLE PERSONS

SEC. 7. (a) The Secretary of Health, Education, and Welfare shall make readily available to all Medicare eligible persons and persons about to become eligible, in easily understandable language, comprehensive information on the types of Medicare supplemental policies available, the relationship of these policies to Medicare and Medicaid benefits, and the probable need for supplemental insurance by Medicare eligible persons.

(b) Such information shall be made readily available in printed form and through other means, such as counseling, where feasible.

(c) The Secretary shall also recommend to Congress other appropriate means of ensuring full disclosure of essential information to Medicare eligible persons who purchase Medicare supplemental insurance.

FEDERAL TRADE COMMISSION STUDY

SEC. 8. (a) The Federal Trade Commission shall undertake a nationwide study of unfair or deceptive acts and practices in the sale of Medicare supplemental insurance to Medicare eligible persons and report its findings to Congress within one year after the date of the enactment of this Act.

(b) The study shall include, but not be limited to, unethical or inappropriate activities in the advertising, solicitation, and sale of such insurance policies by insurance companies or their agents, whether directly employed or acting as independent contractors, and a determination of the relative impact of differing State and regulatory approaches to the sale of such insurance to Medicare eligible persons. The Commission shall recommend to Congress additional actions which should be taken to deter misinformation and unethical or inappropriate activities in the sale of such policies to Medicare eligible persons.

(c) The Commission shall conduct such study in consultation with consumers, the Department of Health, Education, and Welfare, the National Association of Insurance Commissioners, and representatives of the health and accident insurance industry.●

● Mr. DOLE. Mr. President, I am pleased to join my distinguished colleague from Florida, Senator CHILES, in introducing this legislation requiring certain studies and recommendations with respect to supplementary health insurance sold to the elderly.

PLIGHT OF THE AGED

Without question, health care costs are a significant expense and of primary concern to those of our citizens who are elderly. At present, medicare pays only 38 percent of the total health care costs of the elderly. In addition to medicare deductibles and coinsurance, the elderly are required to pay for many types of services that are not reimbursable under the medicare program at this time. Examples of such services are out-patient drugs, eyeglasses, hearing aids, dental

care, and most importantly, certain types of long-term care.

The annual amount of out-of-pocket per capita health care expenditure for the elderly reached $403 in 1976. This amount continues to grow and is frightening for the elderly since many are on fixed budgets. The elderly are faced with serious dilemmas: Limited dollars versus escalating health care costs; the increasing risk of illness due to age; and the inability of medicare to finance all services necessary. Because of these dilemmas, many seek out supplementary health care insurance plans to cover the gaps in coverage (and financing) of health care services. These policies are often referred to as "medi-gap" plans.

SUPPLEMENTARY HEALTH INSURANCE

In 1975, it was estimated that 63 percent of all Americans over 65 had some private health insurance coverage for hospital care alone and that 55 percent of all older Americans had some sort of private health insurance to cover physicians' services. Premiums for this type of insurance coverage cost the elderly approximately $1 billion last year.

This type of private insurance, referred to as medi-gap or medicare supplemental insurance, is designed to fill the gaps in the benefits structure of the medicare program and pay service rather than indemnity benefits. Additionally, many elderly also purchase indemnity policies which pay a certain number of dollars per day of hospitalization. The third type of insurance frequently purchased by the elderly is a limited policy which is frequently referred to as a dread disease policy. It pays benefits, often indemnity, only in the event the insuranced individual contracts a certain disease, which is in most instances cancer.

Some of our elderly citizens hold 15, 20 or even more of these policies in an attempt to cover as many costs and services as possible. An estimated 23 percent of those who buy this private health insurance have some unnecessary duplication in coverage. Many other problems with these insurance plans have also been noted.

PROBLEMS WITH SUPPLEMENTARY HEALTH INSURANCE

In hearings held by the Special Committee on Aging of the U.S. Senate and in investigations by the Federal Trade Commission into the private health insurance market to supplement medicare, many unscrupulous and questionable practices came to light. In a document prepared by the staff of the Federal Trade Commission, the following description of some present insurance company practices can be found: "Unscrupulous agents selling door-to-door or mail order advertisements often mislead or frighten them (the elderly) into "loading up" on two or more policies or replacing policies each year—a practice known as "twisting." When they file claims, many of them find that coverage they thought would fill all the gaps in medicare falls short of their expectations. Most supplemental policies would not pay for preexisting conditions or the major gaps in medicare, such as nursing home care, excess provider charges, and prescription drugs."

The report which is summarized in the testimony presented by Elizabeth Handford Dole, Commissioner, FTC, to the Senate Special Committee on Aging, also indicates that inadequate information, ignorance about the real health risks faced by the elderly, nonstandardized coverage, and special limitations for the elderly in these plans all lead to problems. Commissioner Dole, in addition to outlining these difficulties, also notes that the elderly are frequently confronted with policies which pay back in benefits only a relatively low percentage of dollars paid in premiums. Of course, the worse abuse of all are the scare tactics used by some agents to sell these questionable policies.

Mr. President, I ask unanimous consent that Commissioner Dole's testimony be printed in the RECORD.

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

TESTIMONY OF ELIZABETH HANFORD DOLE, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. Chairman and Members of the Committee: Thank you for inviting me to testify here today on behalf of the Federal Trade Commission. I welcome this opportunity, for I share with you a deep personal concern about the problems of the elderly. I am pleased that, thanks to your efforts, the issue of Medicare supplement or "Medigap" insurance is beginning to receive the attention it so urgently needs.

More than half the people in this country aged 65 and over have private health insurance in addition to Medicare. They purchase it because they worry about meeting the medical expenses which Medicare does not cover, and with good reason. On the average, elderly individuals spend $1360 per year on health care, three times as much as the rest of the adult population. In 1976 Medicare paid only 38% of their health care costs.[1]

At this Committee's hearing on May 16, both state officials and consumers told of the abuses associated with the marketing of Medicare supplement insurance. There was testimony that some dishonest agents take advantage of the isolation or phsysical disability of many older people. Some agents engage in "stacking," or selling several policies with overlapping coverages to the same person. Another common marketing abuse is "twisting," or persuading people to cancel their policies and buy new ones which subject them to new exclusions and waiting periods. Some agents also misrepresent that they are from Medicare or Social Security or that the policies they sell have been approved or sponsored by the federal government. The Federal Trade Commission commends those state insurance commissioners who have increased their enforcement efforts in order to put an end to misconduct by agents.

It is also important to recognize that there is such a dearth of consumer information in the Medicare supplement market that it is almost impossible for consumers to make rational purchase decisions; agent misconduct is thus facilitated. A great variety of differing policies effectively precludes buyers from comparing benefits or premiums, resulting in lack of price competition and the sale of duplicate coverage to hundreds of people who are under the impression that they are filling all the gaps in Medicare. Other areas of widespread misunderstanding are the limited nature of Medicare supplement coverage, the relatively high cost of coverage for the initial deductibles compared to insurance against catastrophic medical expenses, and exclusions for pre-existing medical conditions.

Footnotes at end of article.

This morning I would like to describe some of the common informational problems in the Medicare supplement area, and then review briefly the public policy alternatives and some recent state initiatives. These subjects are discussed at length in a staff report which is nearing completion and which we hope to release to you next month. Finally, I'd like to discuss the possibility of an impact evaluation of various state approaches, conducted perhaps as a cooperative federal-state effort, to determine the most effective method of making Medigap supplement insurance comprehensible to everyone.

Why should the federal government become involved in this area?

First, the Medicare supplement market is a by-product of the federal Medicare program. Supplemental insurance is confusing because Medicare's benefit structure is complicated. Commissioner Harold Wilde of Wisconsin has observed that the federal government has a moral responsibility to cope with the problems Medicare has caused.

Second, there are arguments for a uniform approach to Medicare supplement regulation, which federal study could facilitate. Continuing variation in state standardization regulations carries the spectre of insurers having to market different Medigap policies in every state, with obvious increasing costs. In addition, it would appear that uniformity would benefit consumers by ensuring that the categories for Medigap insurance will be the same should they move to another state. These and other issues should be assessed in the impact evaluation to determine if there are particular reasons why uniformity is desirable in this segment of the insurance market.

Third, most states would not be able to enforce their Medicare supplement regulations against mail order insurers not licensed in their states. Many supplement and indemnity plans are sold by mail.

As you know, the McCarran-Ferguson Act generally immunizes the "business of insurance" from the Sherman, Clayton, and FTC Acts to the extent that such business is regulated by state law. However, federal agencies can make valuable contributions to the deliberations in this important area by undertaking studies and making recommendations to Congress and to the states.

THE COMPLEXITY OF THE MARKET

Three types of health insurance policies are commonly sold to the elderly. "Medigap" or Medicare supplement policies pay service benefits to fill some of the gaps in Medicare;[2] generally they pay some or all of Medicare's initial and daily deductibles and coinsurance.

The second and third types, hospital indemnity and dread diseases policies, may be sold to adults of any age, but many companies emphasize sales to the elderly.[3] Unlike Medigap policies, indemnity policies pay a certain dollar amount per day of hospitalization, typically $20 to $50, to offset daily hospital costs which usually run to $150 or more. Finally dread disease contracts cover only some of the expenses incurred for care of a particular illness, such as cancer.

Even in the Medigap category alone, there is virtually no standardization.[4] Let me give you a few examples. Some Medigap policies cover only the Part A initial and daily hospital deductibles; some place low dollar limits on coverage for the 20% coinsurance under Part B; some cover virtually the full 20% Part B coinsurance, but others only for those medical services rendered in a hospital setting, and not for the same procedures performed outside a hospital. Some sell several policies with piecemeal, but overlapping, coverages. Some mix service and indemnity benefits.

It is difficult enough for anyone to have a thorough understanding of Medicare's complex benefit structure and its gaps. Now add to that the bewildering variety of ways each different insurer fills some of those gaps.

Then, when hospital and nursing home indemnity plans and dread disease contracts complicate the picture, comprehension and comparison become almost impossible for consumers.

Confusion caused by the multiplicity of policies often leads consumers to buy two or more policies in an effort to obtain complete coverages. It has been estimated that twenty-three percent of the people over 65 who have private insurance have two or more policies covering hospital costs, resulting in some degree of overlapping coverage.[5] Medigap policies generally include coordination of benefits clauses. This means that in the areas of overlap, only one policy will pay for each gap. For instance, a person who buys three policies which cover the $144 Part A deductible will not receive $432 in the event of hospitalization. Only the first policy will pay $144 in benefits. The buyer has wasted the portion of the second and third premiums which paid for the duplicate coverage of the initial deductible. Those elderly persons who live on fixed incomes can ill afford to spend their money on such worthless duplication.

Both indemnity and dread disease plans will pay benefits in addition to Medicare and any other private insurance, giving "extra cash."[6] However, these policies often produce few benefits in relation to the amount of money invested; they typically have very low loss ratios.

Even the elderly person with only one Medigap policy may have a low value product. Since comparison shopping is foreclosed, many Medicare supplement insurers are not obliged to price or operate competively. Recently the outgoing Chairman of the Board of the Health Insurance Association of America criticized those companies whose loss ratios are "far too low," saying they "give a bad name to the whole industry."[7]

LACK OF INFORMATION

Many people purchase supplemental coverage in the belief that their private insurance will take care of all of the medical expenses Medicare will not pay. Often agents tell their prospects: "This policy will cover everything that Medicare doesn't cover."[8] In reality many Medigap policies exclude from coverage the very same areas which Medicare will never cover: out-of-hospital prescription drugs, most nursing home care, routine physical examinations, eyeglasses, hearing aids, and dental care. Medicare will not pay for the portion of physicians' fees which exceed a "reasonable charge," as determined by the Medicare carrier.[9] We are not aware, either, of any Medicare supplement insurer who will pay those excess charges.

Of course, Medicare's determination of reasonable charges is a measure designed to control costs. We are not suggesting that Medigap insurers should provide reimbursement for excess physicians' charges. Nor do we mean to say that supplemental policies should fill every gap in Medicare. The problem is the common misperception that Medicare supplemental coverage is comprehensive. Actually its role is limited; private health insurance accounts for only 5% of the health care expenses of the elderly. How many people would buy Medigap policies if they knew how incomplete their coverage might prove to be?

Consumers may not realize that some kinds of Medicare supplement coverage are more expensive than others. For example, they pay more for coverage for the initial deductibles than for insurance covering those catastrophic medical expenses which could mean financial disaster. The California Department of Insurance estimates that it costs, on the average, $30 per year to buy insurance for the $60 annual Part B deductible.

It is important that consumers know how much first-dollar insurance coverage really costs them, as well as which Medigap policies provide it and which do not. Some people, however, want first-dollar coverage for health care expenses because it gives them a sense of security, and they may not realize that not all Medigap policies cover the initial deductibles. Once again, the problem is lack of information. And if consumers knew the true cost of first-dollar coverage, perhaps they would not choose it.

Many Medigap policies exclude coverage or require waiting periods before they will cover pre-existing conditions. Under "pre-X" clauses, an insurance company can deny coverage for conditions which existed before the policy went into effect. Since many elderly people have multiple health problems, a policy may lose much of its value if the insurer interprets a pre-X clause strictly to deny claims for any illness which developed out of pre-existing conditions. Some campanies insure all applicants regardless of medical history, then deny their claims, citing pre-existing conditions.[10] Because pre-X clauses are not uniform, it may be extremely difficult for the consumer to anticipate what his premium dollar is buying.

POSSIBILITIES FOR GOVERNMENTAL ACTION: STATE APPROACHES

In attempting to solve the consumer information problems in the Medicare supplement area, the states have developed three possible approaches. The first of these is the establishment of minimum standards. California has set a benchmark minimum loss ratio of 55% for Medicare policies.[11] An Illinois statute requires that all such policies delivered in that state must fill certain gaps, including the initial Part A deductible, Part A copayments, and Part B coinsurance.

A second approach is to bring about standardization by establishing categories for policies and requiring that each policy carry an appropriate label. Wisconsin's new rule sets up four benefit levels for Medigap policies, which must now bear the corresponding number. Categories 1 to 3 range from most to least comprehensive. Policies in category 4A supplement only Part A of Medicare, which those in category 4B supplement only Part B.[12] California has also established, in a different way, three categories for Medicare supplement policies, labelling them "in-hospital only", "in-and out-of hospital", and "catastrophic."

The third type of public policy initiative involves efforts to provide information to consumers in order to permit the market to function more effectively. The most common method is a disclosure requirement. Wisconsin requires agents to give out an 18 page booklet and California mandates the use of general one-page disclosure forms. In Oregon, insurers or agents must fill in the blanks on a disclosure chart showing Medicare benefits, gaps, and policy benefits. New Mexico requires a slightly different disclosure chart. In my opinion, a chart would be particularly useful if it could show not only Medicare's coverage and gaps and the policy's benefits and costs, but also the expenses the consumer would still have to pay out-of-pocket.

I should emphasize that these state approaches—minimum standards, standardization combined with labelling, and disclosure requirements—are not mutually exclusive. It may well be that a combination of these regulatory measures would be most effective.

At present, when an agent or an advertisement exaggerates the worth of a Medigap policy, the prospective buyer typically has no where else to turn for impartial information to correct the misunderstanding. Other methods have been suggested besides mandatory written disclosures to assure that buyers get the information they need, such as individualized insurance counseling and consumer education measures to furnish facts which insurers do not generally provide: Medicare coverage and gaps; eligibility for Medicaid;[13] health risk information (e.g., average length of hospital stay for the over-65 age group); and rating of companies' records in handling claims. In addition, nontraditional avenues for increasing consumer awareness, such as the use of television spots, should be explored.

IMPACT EVALUATION

What is needed to ferret out the problems and evaluate the public policy implications of alternative solutions? We believe the answer is an impact evaluation of existing state regulations of Medicare supplement insurance, with central focus on the effectiveness of different regulatory systems in facilitating the purchase of Medicare supplement insurance which meets consumers' needs and expectations.

Considerable groundwork would be necessary to narrow the focus of the study. Basic facts about the Medicare supplement industry, such as total premium volume, are presently unavailable.[14] It is evident that duplicate coverage is a serious problem, but no one knows its precise nature or extent. It would be important to learn from consumers what information they feel is essential to make wise purchasing decisions.

A full-scale impact evaluation would help to answer the complex and important policy questions which abound in the Medicare supplement area: Is it possible to provide complete yet comprehensible explanations of Medicare and the multitude of ways private insurers fill some of its gaps? Is standardization necessary to make the market's offerings understandable? Should public policy try to influence the consumer's choice between costly first-dollar coverage and what economists might call more rational insurance for catastrophic medical expenses? What are the arguments for and against the sale of dread disease or indemnity policies?

An impact evaluation would be timely because several states' regulations have become effective within the past year. As I have already indicated, Wisconsin and California have established totally different systems of standardization and labelling. Oregon and New Mexico have different disclosure requirements, but no regulations involving standards. Illinois sets minimum standards but does not prescribe any particular disclosures. An evaluation should point up the strengths and weaknesses of each state's system and should assess the desirability of a model regulation.

An impact evaluation could also provide information about the effectiveness of various disclosures and recommend follow-up consumer education and counseling measures. And if current debates lead to the establishment of some form of national health insurance, it appears that the results of such a study would be valuable to policy makers since a similar supplemental market might well develop under any system providing a less than comprehensive benefit package. The results of the impact evaluation would be available, of course, for the use of state regulators and legislators, Congress and the public.

How should this impact evaluation be performed? Perhaps a cooperative federal/state effort would be best, with participation by the National Association of Insurance Commissioners, FTC, and HEW. A joint HEW/FTC/NAIC project would bring together different types of expertise, each of which would contribute greatly to such a study. The NAIC and state insurance departments have first-hand experience with insurance regulation

Footnotes at end of article.

and access to data. In fact, on June 12 the Accident and Health Subcommittee of the National Association of Insurance Commissioners voted to create a Task Force to investigate regulation of health insurance sold to the elderly and identification of other health insurance products "which do not fulfill the public's interest." HEW would contribute knowledge about the Medicare program, and the FTC's expertise in the areas of consumer protection, information disclosure, and competition would be pertinent. We would welcome the opportunity to work with the NAIC and HEW in such an undertaking.

In conclusion, Mr. Chairman, I am convinced that inappropriate medicare supplement insurance purchases can impose severe hardships on the elderly. We must begin now to determine the best approaches for resolving these problems, and I hope that my testimony this morning will make some contribution to that endeavor.

FOOTNOTES

[1] They must pay initial and daily hospital deductibles under Part A, and the initial deductible and 20 percent coinsurance for medical services under Part B. In addition, they must pay the entire bill for certain kinds of care: routine physical examinations; most eye, hearing, and dental care; medical appliances such as eyeglasses, hearing aids, and dentures; out-of-hospital prescription drugs which can be self-administered; and homemakers' services or meals at home, among others. The Medicare program was never intended, of course, to provide complete coverage. Instead, it was meant to serve as a base on which people could build by means of private health insurance and employer retirement plans. *See Medicare Gaps and Limitations*, Hearing Before the Subcom. on Health and Long-Term Care of the House Select Committee on Aging, 95th Cong., 1st Sess. 36 (1977) (Appendix I; "The Aged and their Health Expenditures").

[2] The health insurance industry sometimes designates such Medigap policies as "wrap-around" coverage.

[3] Some companies make a special sales pitch to older women with limited incomes. Commercial Health and Accident Industry, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 92nd Cong., 2nd Sess. 591, 829, 1150 (1972).

[4] *See* generally Health Insurance for Older People: Filling the Gaps in Medicare, Consumer Reports 27 (Jan. 1976).

[5] G. Ellenbogen, Private Health Insurance Supplementary to Medicare (a working paper prepared for the Senate Special Committee on Aging) 7–8 (1974) (1972 Social Security Administration estimate). For another estimate based on the 1974 National Health Survey of 40,000 households, see 52 *Hospitals* (Journal of the American Hospital Association) 20 (May 16, 1978) (In 1974 53.8% of those 65 and older had private hospital insurance in addition to Medicare and 12.1% of those had two or more plans).

[6] Since indemnity and dread disease policies are a fixed dollar amount per day regardless of Medicare coverage, the benefits are not necessarily related to a Medicare patient's need for cash to pay for medical expenses.

[7] Speech by Robert A. Beck, CLU, Chairman and Chief Executive Officer-Elect and President of Prudential Insurance Company of America, to the Health Insurance Association of America, Group Insurance Forum, Chicago, Illinois, May 1, 1978. Mr. Beck said that these low loss ratios "could never be expected to reach a reasonable figure." Sometimes a low loss ratio reflects the fact that a policy has only been in use for a few years; in later years the claims paid out to policy-holders will increase. Apparently, Mr. Beck meant that some supplemental policies will never show a loss experience sufficiently favorable to represent a good value for buyers, because of limited benefits, arbitrary denials of claims, and/or unreasonable expense ratios.

[8] *See, e.g., International Security Life Insurance Co.* v. *Finck*, 475 S.W. 2d 263 (Tex. Civ. App. 1972); *aff'd in part* and *rev'd in part*, 496 S.W. 2d 544 (Tex. 1973).

[9] During the second quarter of 1977, Medicare Part B carriers made some reduction in 80% of the unassigned claims for physicians' services filed with them. They reduced the total dollar amount of unassigned Part B claims filed by 21%. This means that Medicare patients can expect to pay, on the average, 36% of their physicians' bill themselves (20% coinsurance plus roughly 20% of the remaining 80%). Medigap policies which cover the 20% coinsurance under Part B generally pay 20% of the amount the Medicare carrier determines to be reasonable.

[10] Dishonest agents sometimes "clean-sheet" elderly applicants, or encourage submission of their applications without any indication of prior health problems, to ensure that the company will underwrite the risk. Again, the company can deny claims on the basis of pre-existing conditions, a practice known as "post-claims underwriting."

[11] Recently, New Jersey Insurance Commissioner Sheeran banned the sale of more than 100 individual health policies with loss ratios of less than 50%, including many low-value products marketed especially to the elderly.

[12] The major factor which distinguishes categories 1, 2, and 3 is the difference in the lowest permissible dollar limit each may set on claims. Categories 4A and 4B have dollar limits as high as category 1, but each supplements only one part of Medicare. 4B policies may also provide for a large deductible, up to $500.

[13] In most states, Medicaid programs pay for almost all the medical expenses for people whose incomes are low enough to qualify. It is almost always unnecessary and inadvisable for an elderly person who is eligible for Medicaid to buy any private health insurance at all, but many now do.

[14] Estimates of total annual Medicare supplement premium volume range from $0.5 to $1 billion. However, no reliable figure exists because insurance companies are generally not required to separate Medicare supplement experience from the accident and health insurance data they report to state insurance departments.

WHERE GOVERNMENT HAD FAILED

Mr. DOLE. Mr. President, it is additionally difficult for senior citizens to make informed and rational decisions about their need for private health insurance because they lack the appropriate amount and type of information about medicare. A great deal of blame for this problem must certainly be placed on the Government, which has done an inadequate job of informing elderly individuals fully about their medicare benefits. While many individuals may be aware that medicare does not cover everything, they are unsure of what the exact gaps are and how to most rationally fill them with private insurance.

UNITED EFFORT

The Senator from Kansas joins the distinguished Senator from Florida in his effort to form a United Front to combat the problems I have outlined. All the solutions will certainly not fall solely within the appropriate jurisdiction of the Federal Government, nor the insurance industry, nor of the State insurance commissioners. The responsibility for solving the problems with supplementary health insurance must be shared by us all.

The insurance industry itself has begun to address these problems, and they are to be commended for their efforts. Many State insurance commissioners are contributing their thoughts and expertise in helping solve the question of how to prevent abuses in the system while still providing and encouraging the availability of rational and responsive supplementary health insurance.

The legislation we introduce today is built upon our belief in this need for a united front. As Senator CHILES has outlined, our legislation requires studies and recommendations from the Department of Health, Education, and Welfare and the Federation Trade Commission with respect to health insurance sold as a supplement to medicare. The legislation also contains a penalty provision for certain sales practices found to be misleading or abusive. One of the most important responsibilities given to the Federal Government in this legislation will be the development of understandable and complete information on the medicare program for the elderly.

CONCLUSION

We, each of us, have a responsibility to the elderly in our communities to protect them against the type of abusive practices that have come to light with respect to the sale of supplementary health insurance. The Senator from Kansas is hopeful that the legislation introduced today will assist us in these efforts.●

By Mr. DOLE (for himself and Mr. MCGOVERN):

S. 396. A bill to amend the Internal Revenue Code of 1954 to exempt farm trucks and soil and water conservation trucks from the highway use tax; to the Committee on Finance.

HIGHWAY USE TAX EXEMPTION

● Mr. DOLE. Mr. President, I am pleased to join with my distinguished colleague from South Dakota, Mr. MCGOVERN, in introducing legislation to exempt farm trucks and soil and water conservation vehicles from the highway use tax.

SENATE APPROVAL

This legislation is similar to a proposal which the Senate adopted as an amendment to the Revenue Act of 1978. Senators at that time were in agreement that the present law is inequitable to owners of farm use trucks. Unfortunately, the amendment was not included in the conference report and the inequity remains.

Mr. President, the highway use tax is designed to maintain our Federal highway system by having trucks pay a special tax, based on weight. Under current law, the highway use tax is levied on all single unit trucks of 13,000 pounds unloaded weight; on all three-, four-, or more-axled truck/tractors; on two-axled truck/tractors if the unloaded weight is 5,500 pounds or more; and on all combination-type trucks with two axles or more if the unloaded weight is 9,000 pounds or more. Each owner is required to file annually and pay the tax. The current tax ranges between $81 and $240 annually.

FARM VEHICLES

I do not, however, feel that owners of farm-related vehicles need be subject to this tax. Farm trucks are for farm use and do not make extensive use of Federal highways. In general, farm trucks can be found operating in the field or on State and county back roads. Requiring the owners of farm trucks to pay a special tax for the upkeep of the Federal highway system is inherently unjust.

This bill has been carefully drawn to limit the exemption to bona fide farm-owned, not for hire, farm use trucks. The exemption would not apply to vehicles owned or registered in the name of a corporation whose gross receipts for the last taxable year exceeded $950,000 or which derive more than 50 percent of their gross income from activities other than farming.

TAX IS UNJUST

Furthermore, Mr. President, sufficient precedent exists for exempting certain vehicles from the highway use tax. At the present time derrick-drilling trucks and some logging trucks are not liable for the use tax. That exemption is certainly warranted and it seems to me that farm use and soil and water conservation trucks should be granted a similar exemption.

Mr. President, this is not a controversial bill. As I mentioned earlier, the Senate agreed to this bill in the form of an amendment last session. There exists broad support on both sides of the aisle for the elimination of this unfair tax burden on the owners of farm use trucks. I am hopeful that my colleagues will see fit to eliminate this inequity in the near future.●

● Mr. McGOVERN. Mr. President, during the 94th Congress, Senator DOLE and I introduced legislation designed to correct inequities in the manner in which the highway use tax currently applies to vehicles used for agricultural and closely related purposes. At the request of Senator LONG, we withdrew our proposal on the condition that the Finance Committee would carefully study our proposal during their consideration of the next tax bill. As a result, during the last session of Congress the Senate adopted our amendment. Unfortunately, this proposal, as were many others, was dropped from the final package during the House-Senate conference.

Today, we again ask the Senate to correct this inequity.

Since its inception, the highway trust fund has proved an excellent and successful means of generating essential revenues to offset increased road construction and maintenance costs. The highway use tax, which is imposed on most heavy road vehicles, is the source of trust fund revenues. The overwhelming majority of those who pay the use tax are commercial truckers. As regular users of the road system it is entirely appropriate to expect commercial truckers to contribute toward public expenses which are necessary to sustain their own industry.

Unfortunately, for the purposes of tax liability, the Internal Revenue Code fails to distinguish between commercial trucking firms, which use the Federal highway system on a regular basis, and those farmers or ranchers who own heavy vehicles, but seldom use them on Federal highways, and only for agricultural purposes. Consequently, thousands of family farmers are subject to the same use tax burden which applies to large interstate trucking firms.

I am particularly familiar with one case in which the Internal Revenue Service found a farmer fully liable for the use tax on his truck despite the fact that he operated it 90 percent of the time on township roads or on his own farm. To make matters worse, this individual, as well as several others from whom I have heard, had no idea that he might be liable for the tax until he was billed by the IRS some months after he registered the truck. My earlier bill, S. 2897, in the 94th Congress, was intended to exempt farm vehicles from the use tax.

In addition to farm trucks, the IRS has also determined that vehicles used exclusively for soil and water conservation activities are liable for this tax. Even though a survey conducted in 1976 indicated that the average conservation vehicle travels only 3,000 miles per year—and 80 percent of that is traveled on State and county roads—soil and water conservation vehicles continue to be subject to an annual Federal tax of $175. Correction of these inequities is long overdue.

Mr. President, in recent years revenues generated by the highway trust fund have become increasingly important. While our Nation's Interstate Highway System is nearing completion, our interstates and Federal-aid highways are rapidly deteriorating. Repair and maintenance costs for this vast transportation system are rapidly rising.

Ordinarily, I would not propose any further exemptions from the highway use tax. However, I contend, and many of my colleagues agree, that it was never the intent of Congress to impose a tax on a limited category of vehicles seldom operated on our Federal-aid highways, and on the family farmer whose operations bear no resemblance to those of commercial truckers.

It makes no sense to treat farm trucks and conservation vehicles in the same way we treat commercial trucks for highway tax purposes. I cannot believe that it was the intent of Congress in the development of the highway trust fund and highway use taxes, to equate the farmer transporting his own supplies or the small businessman engaged in soil and water conservation activities with long distance truckers moving the Nation's freight.

Our amendment would correct this situation by adding heavy trucks used for farm and soil and water conservation purposes to the list of exemptions from the highway use tax. In order to insure that the exemption is limited to family farmers and small soil and water conservation concerns, the amendment specifically excludes vehicles registered in the name of any corporation with gross receipts for the last taxable year in excess of $950,000 or which derived more than 50 percent of its gross profits in that taxable year from activities other than farming or soil and water conservation activities.

If enacted, this measure will have minimal effect on highway trust fund revenues. Revenue from farm trucks, for example, is so small that the IRS does not bother to segregate income from this source in compiling its own internal data. Regarding soil and water conservation vehicles, Senator DOLE has estimated that an exemption would cost the Treasury approximately $7 million per year. It can be argued that the cost of collecting the tax probably comes to a high percentage of the total revenue generated by this means.

I submit that this tax is little more than a nuisance. It penalizes farmers and small businessmen unfairly, produces minimal revenue and absorbs IRS time and energy which could better be expended elsewhere. More importantly, it is discriminatory and I cannot believe that Congress intended to enact such an unfair and discriminatory tax.●

By Mr. CHILES (for himself, Mr. STONE, and Mr. BUMPERS):

S. 398. A bill to amend section 8e of the Agricultural Adjustment Act, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, to subject imported tomatoes to restrictions comparable to those applicable to domestic tomatoes; to the Committee on Agriculture, Nutrition, and Forestry.

● Mr. CHILES. Mr. President, I introduce on behalf of myself and Senators STONE and BUMPERS, legislation to amend section 8e of the Agricultural Adjustment Act of 1933, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, to require that imported tomatoes conform with pack-of-container standards under marketing orders.

This bill is identical to legislation introduced in the last Congress which passed the Senate as a separate measure and was also approved by the House as an amendment to the farm bill.

Through this proposed legislation, we are seeking to clarify section 8e of the act with respect to requirements, imposed under marketing order, on the way in which tomatoes are packed for shipping. This amendment is offered to revise the interpretation of section 8e as adopted by the Department of Agriculture, which is inconsistent with the original intent of section 8e.

The difference in the interpretation of section 8e has an impact on whether there is an orderly marketing situation for tomatoes and whether domestic producers are able to effectively compete with imports.

Under marketing order, domestic producers of fresh tomatoes are not permitted to mix different grades or sizes of tomatoes in the same shipping container. Since tomatoes are sold by grade and size, this requirement is quite significant in the pricing and orderly marketing of fresh tomatoes.

Section 8e of the act requires that imports of selected commodities—including tomatoes—meet the same minimum grade, size, quality, or maturity stand-

ards imposed on domestic shipments under a marketing order. Its purpose is to insure that market regulation would be of equal benefit to both domestic and foreign producers. It is not the purpose of section 8e to exclude or curtail imports. Rather, its aim is to see that imports and domestic produce are on an equal footing with respect to marketing orders.

The U.S. Department of Agriculture, however, maintains that the prohibition against the mixing of grades or sizes within a container is not a grade or size regulation, but a "pack" regulation. The Department further maintains that pack regulations cannot be imposed on imports under section 8e of the Agricultural Marketing Agreement Act.

As a result of the Department's interpretation, foreign shippers are permitted to ship different grades and sizes of tomatoes in a single container, while U.S. producers must comply with the pack regulation.

A substantial volume of the tomatoes sold in the United States are foreign grown. Because pack restrictions are not applied to these tomatoes, the buyer does not know what he is getting, and the domestic producer is placed at a disadvantage.

I am convinced that the solution to this problem lies in a clarifying amendment to section 8e, which would supply pack regulations to imports. Such a clarification would benefit the grower, shipper, importer, and ultimately, the consumer of tomatoes. Enactment of this legislation would incur no additional cost to the Government. It would not create hardship for other states or for foreign producers, and would not create a trade barrier. It would standardize the sizes and grades of tomatoes offered for sale in the United States, and equalize the competition between domestic and foreign producers.

Mr. President, I ask unanimous consent that the text of the bill we are introducing today be printed in the RECORD.

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

S. 398

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8e of the Agricultural Adjustment Act, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 608e-1), is amended—

(1) by inserting in the first sentence after "eggplants" a comma and "or regulating the pack of any container of tomatoes,";

(2) by inserting in the first sentence after "provisions", each time such word appears, a comma and "and in the case of tomatoes any provisions regulating the pack of any container,"; and

(3) by inserting in the fourth sentence after "classifications" a comma and "and with respect to imported tomatoes such restrictions on the pack of any container,".●

By Mr. DOLE (for himself, Mr. PRESSLER, Mr. STEWART, Mrs. KASSEBAUM, and Mr. HAYAKAWA):

S. 399. A bill to amend the Federal Crop Insurance Act; to the Committee on Agriculture, Nutrition, and Forestry.

FEDERAL CROP INSURANCE EXPANSION ACT OF 1979

● Mr. DOLE. Mr. President, today I am pleased to introduce the Federal Crop Insurance Expansion Act of 1979. This proposed legislation is especially pertinent and timely. The expiration of the crop disaster payments program at the end of this year affords Congress with an excellent opportunity to fashion a new and comprehensive strategy in helping agricultural producers meet the risk of disastrous crop losses resulting from causes beyond their control.

DISASTER PAYMENTS

Almost everyone agrees that our current efforts to alleviate the impact of natural crop disasters are cumbersome, duplicative, inequitable and ineffective.

The disaster payments program which is administered by the agricultural stabilization and conservation service, is limited to producers of upland cotton, wheat, rice, and three feedgrains—corn, grain sorghum, and barley.

The program is meant to alleviate losses when natural disasters or other uncontrollable conditions prevent the specified crops from being planted or result in abnormally low yields.

The program is subject to numerous inconsistencies in payment computations, eligibility requirements and program coverage. The program is also difficult to administer because the provisions are so complicated farmers do not fully understand them. My office is constantly receiving calls from farmers unhappy with the disaster payments program.

CROP INSURANCE IS LIMITED

Additional protection from crop losses is provided by the Federal Crop Insurance Corporation—FCIC. Unfortunately, Federal crop insurance is not available in all agricultural counties nor does it cover all basic commodities in the counties where insurance is available.

In many instances, insurance is not available where it is needed most. Moreover, high premiums and competition from the disaster payments program have kept participation low.

COMPREHENSIVE COVERAGE

The purpose of the Federal Crop Insurance Expansion Act is to replace these current efforts with a new, equitable, and comprehensive system of crop coverage. Specifically—

First, my legislation requires FCIC to expand into all agricultural counties and provide coverage for six basic commodities wherever they are grown commercially. They include wheat, cotton, corn, rice, grain sorghum, and barley.

Second, coverage will include up to 85 percent of a farm's average yield, in contrast to the existing limitation of 75 percent.

Third, FCIC is authorized to offer lower levels of coverage—at reduced premiums—to be selected at the discretion of each producer, depending on the needs of the farmer.

Fourth, the legislation also provides for 33⅓ percent Federal subsidy of the premiums producers pay into FCIC. A premium subsidy of this size, together with the existing Federal payment of the Corporation's operating and administrative expenses, will reduce the cost of insurance to producers and make it a viable and attractive alternative to the disaster payments program.

The Federal premium subsidy will substantially increase the level of Government support, but the expirations of the disaster payments program—which cost $526 million in 1978—will more than offset the Federal subsidy of a nationwide FCIC.

The Department projects an impressive savings if an expanded FCIC were to replace the present crop insurance/disaster payments system. Crop insurance and disaster payments cost the taxpayer a total of $683 million in 1978. In contrast, a nationwide FCIC, operating with 33⅓ percent premium subsidy and assuming a participation level of at least 30 percent, will cost the taxpayer only about $125 to $175 million per annum.

In short, taxpayers will save money and producers will enjoy more comprehensive coverage.

Fifth, this bill excludes hail, fire and lightening coverage from the Federal crop insurance program. The insurance industry already offers such coverage nationwide at highly competitive rates. This legislation does not have the Federal Government directly competing with the private insurance industry.

Sixth, this legislation authorizes the sale of FCIC policies by private agents and provides that Federal reinsurance of private crop insurors will be provided only if the reinsurance deemed necessary is not available from recognized private sources at reasonable costs.

Seventh, the existing provision of law restricting the number of counties eligible for the Federal reinsurance of private insurors of producers of agricultural crops is deleted.

Eighth, a new crop insurance coverage is authorized to insure producers against losses that they may incur when they are unable to plant an agricultural crop because of weather conditions.

Ninth, Federal crop insurance premiums are required to be increased to cover administrative and operating costs of the Corporation, as well as claims for losses and the establishment of a reserve against unforeseen losses.

Tenth, the authorized capital stock of the Federal Crop Insurance Corporation is increased from $200 to $450 million.

Eleventh, a revolving fund in the Treasury is established to be available without fiscal year limitation to the FCIC to carry out the Federal Crop Insurance Act.

Twelfth, the Corporation is authorized to borrow from the Treasury as necessary if moneys available in the revolving fund are insufficient to enable the Corporation to meet its responsibilities under the Federal Crop Insurance Act.

I believe this bill is a sound, equitable, and realistic attempt at providing a protection plan to all producers. I believe it is imperative that crop insurance be dealt with quickly in order to provide the protection needed by farmers with the lapsing of the disaster payment program. Protection must also be there for those producers who are not now covered by the low-yield disaster payment pro-

gram or the Federal crop insurance program.

Mr. President, I ask unanimous consent that my bill be printed in the RECORD.

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

S. 399

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Crop Insurance Expansion Act of 1979".

SEC. 2. Section 504(a) of the Federal Crop Insurance Act, as amended, is amended to read as follows:

"SEC. 504. (a) The Corporation shall have a capital stock of $450,000,000 subscribed by the United States of America, payment for which shall, with the approval of the Secretary of Agriculture, be subject to call in whole or in part by the Board of Directors of the Corporation.".

SEC. 3. The second sentence of subsection (c) of section 505 of the Federal Crop Insurance Act, as amended, is amended to read as follows: "The members of the Board who are not employed by the Government shall be paid such compensation for their services as directors as the Secretary of Agriculture shall determine, but such compensation shall not exceed the daily equivalent of the rate prescribed for grade GS-18 in section 5332 of title 5, United States Code, when actually employed, and be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.".

SEC. 4. Section 507 of the Federal Crop Insurance Act, as amended, is amended—

(1) by striking out ", and county crop insurance committeemen" in subsection (a);

(2) by striking out the comma after the word "title" in subsection (b) and all that follows down through the end of the sentence and inserting in lieu thereof a period;

(3) by striking out subsection (c) in its entirety;

(4) by redesignating subsection (d) as subsection (c) and amending such subsection (as redesignated) to read as follows:

"(c) The Corporation may contract with, and transfer funds to, other agencies and offices of the Department of Agriculture or with the county committees established pursuant to section 8(b) of the Soil Conservation and Domestic Allotment Act, as amended, for assistance in carrying out this title; but any employees of such other agencies and offices responsible for performing functions under this title shall be responsible directly to the Corporation without the intervention of any intermediate office or agency."; and

(5) by redesignating subsection (e) as subsection (d).

SEC. 5. Section 508 of the Federal Crop Insurance Act, as amended, is amended to read as follows:

"SEC. 508. To carry out the purposes of this the Corporation—

"(a)(1) shall for the 1979 and subsequent crop years insure producers of wheat, cotton, grain sorghum, corn, rice, and barley, wherever grown commercially, but subject to the limitations herein, and may insure producers of other agricultural commodities wherever grown commercially, subject to the limitations herein, at such time as the Board determines that insurance on any other agricultural commodity has been developed to the point that it can be offered to the producers thereof. The insurance for any commodity shall be offered under any plan or plans determined by the Board to be adapted to the commodity. Such insurance shall be against loss of the insured commodity due to one or more unavoidable causes, including drought, flood, wind, frost, winter-kill, excessive rain, snow, wildlife, hurricane, tornado, insect infestation, plant disease, and such other unavoidable causes, other than hail, lightning, or fire, as may be determined by the Board: *Provided,* That except in the case of tobacco, such insurance shall not extend beyond the period the insured agricultural crop is in the field. Any insurance offered against loss in yield shall cover up to 85 per centum of the average yield for a representative period of years for a farm, or area in which the farm is located, as determined by the Corporation on the basis of recorded or appraised yields, subject to such adjustments as may be necessary to the end that the average yield fixed for farms in the same area, which are subject to the same conditions, may be fair and just. In addition, the Corporation may offer lower levels of coverage to be selected at the option of each producer. Insurance provided under this subsection shall not cover losses due to the neglect or malfeasance of the producer, or to the failure of the producer to reseed to the same crop in areas and under circumstances where the Corporation determines it was practical to so reseed, or to the failure of the producer to follow established good farming practices. For each crop insured, the Corporation shall not offer insurance on any acreage not suited to the production of such crop or in any county where the planted acreage of such crop is below a minimum county acreage as established by the Corporation, except that it may, if it is deemed practical to do so, offer insurance on acreage in such county through the office serving another county which meets the minimum requirement. The Corporation shall report annually to the Congress the results of its operations on each community insured.

"(2) may implement the program set forth in paragraph (1) for crops planted for harvest in 1979, as determined by the Board, consistent with the purposes of this Act, as amended, to insure, or reinsure insurers of, producers of such agricultural commodities under any plan or plans of insurance determined by the Board to be adapted to any such commodity.

"(3) may insure producers against losses that they may incur when they are unable to plant an agricultural crop because of weather conditions. Insurance issued under authority of this paragraph shall be subject to the applicable provisions of paragraph (1) of this subsection.

"(b) may fix adequate premiums of insurance at such rates as the Board deems sufficient to cover claims for crop losses on such insurance, establish as expeditiously as possible a reasonable reserve against unforeseen losses, and sell the crop insurance provided for under this Act through contract arrangements with commercially operated insurance companies. For the purpose of encouraging the broadest possible participation in the crop insurance program 33⅓ per centum of each participant's calculated premium shall be paid by the Federal Government. The remaining 66⅔ per centum of the premium shall be paid by each participant and such premiums shall be collected at such time or times or shall be secured in such manner as the Board may determine.

"(c) may adjust and pay claims for losses under rules prescribed by the Board. In the event that any claim for indemnity under the provisions of this title is denied by the Corporation, an action on such claim may be brought against the Corporation in the United States district court, or in any court of record of the State having general jurisdiction, sitting in the district or county in which the insured farm is located, and jurisdiction is hereby conferred upon such district courts to determine such controversies without regard to the amount in controversy: *Provided,* That no suit on such claim shall be allowed under this section unless the same shall have been brought within one year after the date when notice of denial of the claim by registered mail is sent to the claimant.

"(d) may provide, upon such terms and conditions as the Board may determine to be consistent with section 508(b) and sound reinsurance principles, reinsurance to private insurance companies, or groups or pools of such companies, which insure producers of any agricultural commodity under contracts acceptable to the Corporation: *Provided,* That no application for reinsurance shall be approved unless the Corporation shall have determined that the reinsurance deemed necessary is not available from recognized private sources at reasonable cost.

SEC. 6. The second sentence of section 515 of the Federal Crop Insurance Act, as amended, is amended to read as follows: "The compensation of the members of such committee shall be determined by the Board, but shall not exceed the daily equivalent of the rate prescribed for grade GS-18 in section 5332 of title 5, United States Code, when actually employed, and be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law (section 5703 of title 5, United States Code) for persons in the Government service employed intermittently.".

SEC. 7. Section 516 of the Federal Crop Insurance Act, as amended, is amended to read as follows:

"SEC. 516. (a) There is hereby created within the Treasury a separate fund (hereafter in this section called the 'fund') which shall be available to the Corporation without fiscal year limitation as a revolving fund for carrying out the purposes of this title. A business-type budget for the fund shall be prepared, transmitted to the Congress, considered, and enacted in the manner prescribed by sections 102, 103, and 104 of the Government Corporation Control Act (31 U.S.C. 847-849) for wholly owned Government corporations.

"(b)(1) There are authorized to be appropriated to the fund such amounts as may be necessary to restore the expense of the Corporation, including administrative and operating expenses, Federal premium payments, interest, the direct cost of loss adjustment and agents' commissions, but excluding indemnities. All amounts received by the Corporation as premiums, fees, and other moneys, property, or assets derived by it from its operations in connection with this title shall be deposited in the fund.

"(2) The Corporation is hereby authorized to use any funds available to it for administrative and operating expenses subject to limitations that shall be prescribed in applicable Acts: *Provided,* That, the direct cost of loss adjustment for crop inspections and loss adjustments, Federal premium payments, interest expense, and agents' commissions may be considered by the Corporation as being nonadministrative or nonoperating expenses.

"(3) All expenses, including reimbursements to other Government accounts, and payments pursuant to operations of the Corporation under this title shall be paid from the fund. From time to time, and at least at the close of each fiscal year, the Corporation shall pay from the fund into Treasury as miscellaneous receipts interest on its outstanding capital stock and outstanding borrowings from the Treasury, less the average undisbursed cash balance in the fund during the year and Federal premium payments due the Corporation. The rate of such interest shall be determined by the Secretary of the Treasury and shall be not less than a rate determined by taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States to compara-

ble maturities. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest. If at any time the Corporation determines that moneys in the fund exceed the present and any reasonably prospective future requirements of the fund, such excess may be transferred to the general fund of the Treasury.

"(c) If at any time the moneys available in the fund are insufficient to enable the Corporation to discharge its responsibilities under this title, it shall issue to the Secretary of the Treasury notes or other obligations in such forms and denominations bearing such maturities, and subject to such terms and conditions, as may be prescribed by the Secretary of the Treasury. Redemption of such notes or obligations shall be made by the Corporation from appropriations or other moneys available under subsection (b) of this section. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the notes or other obligations. The Secretary of the Treasury shall purchase any notes or other obligations issued hereunder and for that purpose he is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act and the purposes for which securities may be issued under that Act are extended to include any purchase of such notes or obligations. The Secretary of the Treasury may at any time sell any of the notes or other obligations acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of such notes or other obligations shall be treated as public debt transactions of the United States.

"(d) The Secretary of Agriculture and the Corporation, respectively, are authorized to issue such regulations as may be necessary to carry out the provisions of this title.".

SEC. 8. Section 518 of the Federal Crop Insurance Act is amended by striking out "Sec. 518. 'Agricultural commodity'," and inserting in lieu thereof "Sec. 518. 'Agricultural crop',".●

By Mr. SCHWEIKER:

S. 400. A bill to relieve the liability for the repayment of certain erroneously made contributions by the United States; to the Committee on the Judiciary.

RELIEF OF SIX PENNSYLVANIA LIBRARIES

● Mr. SCHWEIKER. Mr. President, today I am reintroducing a bill for the relief of six Pennsylvania libraries which have been placed in an awkward position by the Federal Government. The Federal Disaster Assistance Administration is demanding from them repayment of $561,066.09 which they received as disaster payments after Hurricane Agnes.

An identical bill to relieve these libraries from repayment was passed by the Senate last September 14 unanimously, after being favorably reported by the Senate Judiciary Committee. The Office of Management and Budget also approved the bill. Unfortunately, in the rush to finish at the end of the last session, the House did not have the time to consider the bill. Therefore, I am reintroducing it today. I would also like my distinguished colleague from Pennsylvania JOHN HEINZ, to be shown as a cosponsor of this bill once again.

Under most circumstances, I would commend the tenacity of our Federal auditors in collecting funds mistakenly given out. Considering the size of this year's Federal budget—almost $500 billion—any sums we might recover would seem prudent. However, the circumstances of these six libraries deserves a closer look. I have included at the end of my statement a summary prepared by FDAA detailing its claims.

Pennsylvania, more than any other State, suffered extensive damage from Tropical Storm Agnes in June 1972. Damage nationwide was so great that Congress wisely adopted for all States hit by Agnes, a special relief package to help individuals and businesses repair or replace their losses. In addition, section 252(a) of Public Law 91-606, which was law at the time of the Agnes disaster, provided Federal assistance to State and local governments to restore public facilities belonging to such State or local governments which were damaged or destroyed by a major disaster.

After the President declared Pennsylvania a major disaster area, making State and local government facilities eligbile for Public Law 91-606 assistance, the Federal Disaster Assistance Administration approved project applications for Federal assistance from a large number of local governments in Pennsylvania. Included among them were applications for damages to these six privately owned library facilities covered by this bill.

Mr. President, I see no evidence of attempted fraud on the part of these libraries. They suffered damages at the hands of Tropical Storm Agnes, were informed they were eligible for disaster relief and their applications for relief were approved by the Government. For example, it was pointed out in 1972 to State and Federal officials that although the Shippensburg Public Library received funds from the borough of Shippensburg and the school district, it was privately owned. But disaster relief aid was still granted.

I cannot dispute the Federal Disaster Assistance Administration when it now claims these six Pennsylvania libraries in fact should not have received funds under Public Law 91-606. The law is clear. Privately owned facilities are not eligible to receive grants. But I am not here today demanding to know who is at fault for this payment error or requesting a significant change in Federal law. I am asking Congress to recognize the tenuous financial position in which these libraries will be placed if they are forced to repay FDAA and am encouraging it to adopt this special relief measure.

I have been informed by FDAA that this is a unique situation. These are the only privately owned libraries nationwide which erroneously received disaster relief payments under section 252(a) of Public Law 91-606.

The roots of the community library system go back to our prerevolutionary period when most libraries were privately owned and looked to community generosity for support. Since then, community libraries, both privately and publicly supported, have made valuable contributions to the United States. They frequently double as community centers and make a variety of educational programs available to the general public which frequently cannot be obtained by the average person because of cost or rarity. I would be greatly distressed if we are to turn our backs on these six libraries and force them to raise over one-half million dollars for Uncle Sam to pay for damages received from the worst disaster in Pennsylvania's history.

Mr. President, I strongly recommend this bill, which has been passed once already, to my colleagues and respectfully urge its early passage. I ask unanimous consent that the text of my bill and fiscal summary be printed at this point in the RECORD.

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

S. 400

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of section 252 (a) of the Disaster Relief Act of 1970, any unit of local government or any of the following privately owned libraries is relieved from any liability for the repayment of contributions erroneously made by the United States for disaster relief activities for the benefit of the following private facilities which were damaged or destroyed by Hurricane Agnes:

(1) the William D. Himmelreich Memorial Library in Lewisburg, Pennsylvania, in the amount of $4,136;

(2) the Milton Library in Milton, Pennsylvania, in the amount of $21,869;

(3) the Shippensburg Public Library in Shippensburg, Pennsylvania, in the amount of $12,827;

(4) the West Shore Public Library in Camp Hill, Pennsylvania, in the amount of $26,772;

(5) the Osterhout Library in Wilkes-Barre, Pennsylvania, in the amount of $457,318; and

(6) the West Pittston Library in West Pittston, Pennsylvania, in the amount of $9,984.

FISCAL SUMMARY—INELIGIBLE LIABILITIES AFFECTED BY TROPICAL STORM AGNES

Project application No.: Library	Cost of restoration	Refund due Federal Government
OEP 340-DR-		
60-1: Himmelreich	$4,136.68	$4,136.68
49-1: Milton	21,869.89	21,869.89
21-7: Shippensburg	12,827.45	12,827.45
21-9: West Shore	26,772.12	26,772.12
40-57: Osterhout, City of Wilkes-Barre	[1] 565,423.42	[1] 446,474.00
40-20: West Pittston	[2] 48,985.95	[2] 9,984.40
Total	680,015.51	561,066.09

[1] $565,423.42 is the approved audited claim for the Osterhout Library. Final payment has not been made, so that only the advance of $446,474 is due the Federal Government.

[2] A claim of $48,985.95 for the West Pittston Library has been received but not audited. The remainder of the West Pittston Borough project application claim has been audited and approved for $23,362.60. The refund due to Federal Government of $9,984.40 reflects the difference between an advance of $33,347 for the library and the final amount of the West Pittston Borough claim.

Note: Funds have been used for general flood restoration work, including debris clearance, structural repair, and the replacement of contents of the libraries.●

By Mr. BAYH:

S. 410. A bill amending title 5 of the United States Code to improve agency rulemaking by expanding the opportuni-

ties for public participation, by creating procedure for congressional review of agency rules, and by expanding judicial review, and for other purposes; to the Committee on Governmental Affairs.

ADMINISTRATIVE RULEMAKING REFORM ACT OF 1979

● Mr. DURKIN. Mr. President, I rise today to introduce the Administrative Rulemaking Reform Act of 1979. This legislation represents a comprehensive treatment of the matter of congressional review of regulations promulgated by Federal agencies.

I initiated my efforts in this area in the 94th Congress with the Regulatory Limitation Act of 1975. My colleague from Georgia, Congressman ELLIOTT LEVITAS, and I joined together in the 95th Congress in introducing the Administrative Rulemaking Reform Act of 1977.

There is no doubt that escalating agency regulation is high on the list of matters troubling Americans. In talking with Georgians from all walks of life, I have found the burdensome regulatory situation to concern them fully as much as do economic and energy problems. Indeed, in many ways the three problems seem interrelated. More and more frequently I am asked to "Do something about those bureaucrats," to bring some measure of accountability to bear on the 40 agencies and 100,000 employees who, though no doubt well meaning, impose unrealistic restrictions on our citizens without regard to the practical consequences.

Federal regulation now touches nearly every aspect of our lives—at home, at work, and even at play. Regulation took a three point five billion dollar chunk of the Federal budget last year.

We all realize that the number and the complexity of issues with which Congress must deal force the delegation of implementation of many laws to regulatory agencies. Mr. President, I do not believe that that delegation of congressional responsibility carries with it an abdication of representative responsibility to the American people. The Congress writes "The Secretary shall have the power to promulgate regulations" into an act and then leaves its practical implementation to faceless, unelected bureaucrats. We have seen the original congressional intent subverted by agency rules and our people deluged and demoralized by an avalanche of ill-conceived, impractical rules. Of the 61,000 pages of the 1978 Federal Register, more than 11,000 pages were devoted to publication of proposed rules and rule amendments and final rules and amendments occupied another 15,000 pages.

When an agency promulgates an off-the-wall rule clearly at odds with reality or congressional intent, the only resource available for correcting the situation is legislation to the contrary. Corrective legislation must frequently take a back seat as other important and timely issues demand Congress attention.

The Administrative Rulemaking Reform Act of 1979 is a mechanism designed to directly address this problem by insuring congressional review of proposed rules and by increasing citizen participation and control over agency rulemaking.

The act reflects several suggestions made by the American Bar Association, especially in the notice requirements. A Federal agency would have to make a reasonable effort (something more than a notice in the Federal Register) to notify those affected by a proposed rule. Where that number is large, representatives of the affected group should be notified. Notification should include not only the text of the rule and the time and place of hearings, but an adequate description of the purpose and subject of the rule as well as a list of those technical or theoretical studies on which the rule rests. These procedures will allow greater, more informed participation by those whose lives and businesses are most affected by agency regulations. The "faceless bureaucracy" will be confronted directly with those who are the object of the rules.

The second major feature of the act subjects many agency rules, except emergency rules, to congressional review. Following hearings, an agency would be required to file the rule with Congress. The rule would not become effective, if within 90 days both Houses of Congress disapproved the rule or if one House disapproved the rule in 60 days and the other failed to take action within 30 days. If one House votes yes and the other no, the rule goes into effect. If within 60 days after filing, no committee of either House reported or was discharged from consideration, the rule would take effect.

Also, either House can require an agency to reconsider and resubmit any rule subject to this act.

Mr. President, my colleague, Congressman LEVITAS, has taken the lead in this effort to impose some degree of accountability on the regulatory bureaucracy. I want to commend him for his efforts in this area and to express my hope that my colleagues in the Senate will join in the battle to make some sense out of the regulatory process.●

By Mr. HARRY F. BYRD, JR. (for himself and Mr. HELMS):

S.J. Res. 38. A joint resolution to amend the Constitution of the United States to mandate a balanced budget; to the Committee on the Judiciary.

(The remarks of Mr. HARRY F. BYRD, JR. when he introduced the joint resolution appear elsewhere in today's proceedings.)

ADDITIONAL COSPONSORS

S. 1

At the request of Mr. DOLE, the Senator from Texas (Mr. TOWER) was added as a cosponsor of S. 1, the Food and Agricultural Act of 1979.

S. 22

At the request of Mr. PROXMIRE, the Senator from Indiana (Mr. LUGAR) was added as a cosponsor of S. 22, the First Amendment Clarification Act of 1979.

S. 37

At the request of Mr. PROXMIRE, the Senator from California (Mr. CRANSTON) was added as a cosponsor of S. 37, a bill to repeal a section of Public Law 95-630.

S. 107

At the request of Mr. MORGAN, the Senator from South Carolina (Mr. HOLLINGS), the Senator from South Dakota (Mr. MCGOVERN), the Senator from Alaska (Mr. STEVENS), the Senator from Nebraska (Mr. ZORINSKY), the Senator from South Carolina (Mr. THURMOND), and the Senator from South Dakota (Mr. PRESSLER) were added as cosponsors of S. 107, a bill to create a National Agricultural Cost of Production Board.

S. 266

At the request of Mr. MOYNIHAN, the Senator from Florida (Mr. CHILES) and the Senator from Arizona (Mr. DECONCINI) were added as cosponsors of S. 266, a bill to amend the Social Security Act with respect to the issuance of social security cards.

S. 267

At the request of Mr. MOYNIHAN, the Senator from Florida (Mr. CHILES) and the Senator from Arizona (Mr. DECONCINI) were added as cosponsors of S. 267, a bill to amend title 18, United States Code, to prohibit the counterfeiting and forgery of social security cards, and the sale of such forged or counterfeited social security cards.

S. 333

At the request of Mr. DURKIN, his name was added as a cosponsor of S. 333, a bill to combat international and domestic terrorism.

SENATE JOINT RESOLUTION 20

At the request of Mr. ZORINSKY, the Senator from South Carolina (Mr. HOLLINGS) was added as a cosponsor of Senate Joint Resolution 20, to increase the price for milk, wheat, corn, soybeans, and cotton to not less than 90 per centum of the respective parity prices thereof, and for other purposes.

SENATE RESOLUTION 65—SUBMISSION OF A RESOLUTION AUTHORIZING EXPENDITURES BY THE SPECIAL COMMITTEE ON AGING

Mr. CHILES (for himself and Mr. DOMENICI) submitted the following resolution, which was referred to the Committee on Rules and Administration:

S. RES. 65

Resolved, That the Special Committee on Aging, established by section 104 of S. Res. 4, Ninety-fifth Congress, agreed to February 4 (legislative day, February 1), 1977, is authorized from March 1, 1979, through February 28, 1980, in its discretion to provide assistance for the members of its professional staff in obtaining specialized training, in the same manner and under the same conditions as a standing committee may provide such assistance under section 202(j) of the Legislative Reorganization Act of 1946, as amended.

SEC. 2. In carrying out its duties and functions under such section and conducting studies and investigations thereunder, the Special Committee on Aging is authorized from March 1, 1979, through February 28, 1980, to expend $325,305.00 from the contingent fund of the Senate, of which amount (1) not to exceed $25,000 may be expended for the procurement of the services of individual consultants, or organizations thereof (as authorized by section 202(i) of the Legislative Reorganization Act of 1946, as amended), and (2) not to exceed $1,000 may be expended for the training of the professional staff of such committee (under pro-

cedures specified by section 202(j) of such Act).

SEC. 3. The Committee shall report its findings, together with such recommendations for legislation as it deems advisable, to the Senate at the earliest practicable date, but not later than February 28, 1980.

SEC. 4. Expenses of the committee under this resolution shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the committee, except that vouchers shall not be required for the disbursement of salaries of employees paid at annual rate.

SENATE RESOLUTION 66—ORIGINAL RESOLUTION REPORTED AUTHORIZING ADDITIONAL EXPENDITURES BY THE COMMITTEE ON VETERANS' AFFAIRS

Mr. CRANSTON, from the Committee on Veterans' Affairs, reported the following original resolution, which was referred to the Committee on Rules and Administration:

S. RES. 66

Resolved, That, in holding hearings, reporting such hearings, and making investigations as authorized by sections 134(a) and 136 of the Legislative Reorganization Act of 1946, as amended, in accordance with its jurisdiction under rule XXV of the Standing Rules of the Senate, the Committee on Veterans' Affairs is authorized from March 1, 1979, through February 29, 1980, in its discretion (1) to make expenditures from the contingent fund of the Senate, (2) to employ personnel, and (3) with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable basis the services of personnel of any such department or agency.

SEC. 2. The expenses of the committee under this resolution shall not exceed $279,000, of which amount not to exceed $22,500 may be expended for the procurement of the services of individual consultants, or organizations thereof (as authorized by section 202 (i) of the Legislative Reorganization Act of 1946, as amended).

SEC. 3. The committee shall report its findings, together with such recommendations for legislation as it deems advisable, to the Senate at the earliest practicable date, but not later than February 29, 1980.

SEC. 4. Expenses of the committee under this resolution shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman of the committee, except that vouchers shall not be required for the disbursement of salaries of employees paid at an annual rate.

SENATE RESOLUTION 67—SUBMISSION OF A RESOLUTION WITH REGARD TO COOPERATION WITH THE GOVERNMENT OF MEXICO RELATING TO OIL AND NATURAL GAS

Mr. DURKIN submitted the following resolution, which was referred to the Committee on Foreign Relations:

S. RES. 67

Whereas, the United States of America is becoming increasingly dependent on imported petroleum and natural gas;

Whereas this dependence is on foreign governments which are using cartel power to raise prices beyond the point of reason;

Whereas continual price hikes for imported petroleum and natural gas are wreaking havoc on all sectors of our economy;

Whereas the foreign governments which supply much of our imported petroleum and natural gas are often unstable;

Whereas New England and other parts of our country may suffer severe economic dislocations because of worldwide oil and natural gas shortages;

Whereas the Government of Mexico recently announced substantial new discoveries of petroleum and natural gas;

Whereas the Government of Mexico is a friendly and stable government which has had a close relationship with the United States of America for many years;

Whereas the Government of Mexico is not a member of any international petroleum and natural gas cartel; and

Whereas, when it is necessary to obtain petroleum and natural gas from abroad, it is desirable for the United States of America to shift its dependence on foreign energy supply sources away from less stable members of international cartels and towards our closest allies who have significant mutual interests in assuring that our Nation has a secure and reasonably priced energy supply: Now, therefore, be it

Resolved, That it is the sense of the Senate that the President and the Secretary of Energy shall make every effort to pursue an active policy of reaching an equitable agreement with the Government of Mexico with regard to securing a share of the newly discovered oil and natural gas for the United States of America.

● Mr. DURKIN. Mr. President, recent developments in Mexico are having increasingly important implications for energy policies in New Hampshire, New England, and other parts of the country. As I pointed out on the Senate floor almost 1½ years ago, Mexico has become a potentially major oil and natural gas producer at a time when major cutbacks in Iranian oil production once again reminds us of the insecurity of our Middle Eastern energy supplies. It is time for this country to take positive and immediate measures to take advantage of energy resources Mexico can offer us, and to stop treating our great neighbor to the South worse than we treat members of OPEC.

That is why I am today submitting a sense of the Senate resolution that President Carter and Energy Secretary Schlesinger pursue an immediate and vigorous policy of securing Mexican oil and natural gas for this country. We must move on this now, before our energy problems get worse. It truly concerns me that we send Cabinet secretaries to Saudi Arabia to treat their Crown Princes as if they were our royalty, and then give our Mexican friends and neighbors the backs of our hands.

This administration had better wake up quickly to some hard realities before New England and other parts of the country begin to suffer severe economic dislocations caused by energy shortages. The recent cutbacks in oil production, including some in Saudi Arabia, mean only one thing for New Hampshire and New England: Oil and gas shortages, people out of work, and cold factories and homes.

Our dependence on any foreign oil—from Mexico, Saudi Arabia, Iran, or any other place in the world—is regrettable. But it is a fact that we must deal with for now. With that before us, it clearly makes more sense for New Hampshire and the rest of the country to obtain our oil and natural gas from our closest and most reliable sources, rather than from OPEC who raised prices over 14 percent, and then tell us they are doing us a favor. With Mexico, a stable and long standing ally, on our border, that is where we should look for supplies.

Of course, not only are we a market for Mexican oil and gas, they are a market for our products. With a large and growing population, an influx of dollars from their oil and gas sales, and cheap transportation costs from American plants, Mexico is a natural outlet for U.S. goods. We are seeing today that Iran, supposedly a great market, has proved to be unreliable, with literally billions of dollars worth of contracts being canceled outright. Mexico's stability, politically and economically, and its longstanding relations with our country make that country a much more dependable outlet for our products.

Up until now, the President and Secretary Schlesinger have indicated at best a lukewarm, and, at worst, a hostile attitude toward Mexican oil and gas imports. It is time for the President to redirect his thinking before he travels to Mexico next week, rather than after his return when it may be too late. I agree with the President that we should not increase our dependence on imports, by bringing in Mexican oil and gas, but there is no reason that Mexican oil and gas cannot be substituted for higher priced and somewhat uncertain Mideast oil.

This will become increasingly important in the next few months as the cutback in Iranian production caused by the riots and strikes there begins to put the squeeze on the New Hampshire and New England consumers. One does not have to be a prophet of doom to realize that the worldwide daily shortfall of 1 to 2 millions of barrels per day of production caused by events in Iran must inevitably lead right back to the homes, jobs, and lives of the people of my State, so critically dependent on energy imports. But New Hampshire and New England are not alone in this problem: It is national and worldwide.

I am glad to see that at least a few people in Washington are beginning to wake up to the facts I put before them 1½ years ago about Mexican energy resources. A major study just completed by the Library of Congress has shown that Mexican resources are of major proportions, rivaling those of Middle Eastern OPEC countries. By next year, Mexico will be easily able to export over a million barrels per day, and even that could double within 10 years. Unless this administration acts immediately and aggressively, I am convinced that those exports will go to friendly competitors rather than to this country where they are sorely needed now.

As a Senator from a region which is dependent on imported oil for 63 percent of its energy, nobody is more suspicious than I of dependence on foreign energy sources. But Mexico's newly discovered energy riches promise to permit us to switch our foreign purchases to a more stable supplier than our present sellers.

My resolution is a simple statement of support for a more aggressive effort to

reach agreement with Mexico on this crucial question. It stresses that our long and close alliance, as well as the stability of the Mexican Government, make Mexican oil and natural gas desirable for at least part of our existing burden of foreign imports. As the President is about to leave the United States to visit Mexico, it is important to let him know that the Senate supports his efforts to arrive at an immediate agreement on this issue.●

SENATE RESOLUTION 68—SUBMISSION OF A RESOLUTION TO COMMEMORATE THE 150TH ANNIVERSARY OF THE CITY OF SPRINGFIELD, MO.

Mr. DANFORTH (for himself and Mr. EAGLETON) submitted the following resolution, which was referred to the Committee on the Judiciary:

S. RES. 68

Whereas during 1979 the city of Springfield, Missouri is celebrating its one hundred and fiftieth anniversary:

Whereas in 1829 pioneers cleared the land, and settled their families in the Springfield area;

Whereas the Springfield region became an independent county known as Greene County in 1833;

Whereas Springfield became the permanent seat of justice for all of Greene County in 1835;

Whereas Springfield was the site of the Civil War Battles of Wilson Creek in 1866 and of Springfield in 1863;

Whereas Springfield has become known as the "Queen City of the Ozarks" and is today a center of trade, business and commerce: Now therefore, be it

Resolved, That the Senate recognizes and commemorates the contributions of Springfield, Missouri to the growth of this great nation and joins with the people of Missouri in honoring the city and its people.

SEC. 2. The Secretary of the Senate is directed to transmit a copy of this resolution to the mayor of Springfield, Missouri.

THE SESQUICENTENNIAL OF SPRINGFIELD, MO.

● Mr. DANFORTH. Mr. President, I am happy to join today with my senior colleague from Missouri (Mr. EAGLETON) in introducing a resolution to commemorate the sesquicentennial of our State's third largest city, Springfield.

One hundred and fifty years ago, in 1829, John Polk Campbell and William Fulbright settled with their wives and families near the site of what was to become Springfield's public square. Gifted with the same capacity for extended effort, the same determination and the same spirit of independence that still characterize the people of Missouri's Ozarks, they set to work to make a better life for themselves and their families. In their labors they were soon joined by other settlers who recognized the wisdom of their choice of sites. Within 2 years, Springfield had a primitive log school with a mud floor; within 3 years, it had a larger school with a plank floor and a chimney; within 5 years it was receiving weekly mail service from parts of Missouri and Arkansas; and within 6 years, it had become the permanent seat of justice for Greene County, an independent jurisdiction created by the Missouri Legislature in 1833 with John Polk Campbell as its first clerk.

Perhaps, Mr. President, the character of Springfield was indelibly shaped by these early years of rapid and progressive growth, because certainly, in the ensuing years, Springfield has maintained and enhanced its position as a center of vitality for the entire Ozarks region. Today, this city of approximately 150,000 persons is the site of several outstanding institutions of higher learning; it is the gateway to a tourist region of rugged hills and beautiful lakes that is a national treasure; it is the marketplace of a trade region with annual business of over a billion dollars; and it is one of the fastest growing cities in our Nation.

Mr. President, it is altogether fitting that over the years Springfield has become known as the "Queen City of the Ozarks"; and it is just as fitting that the Senate should join with the people of Missouri in honoring Springfield and her citizens for their contributions over the past 150 years to the growth of our great Nation. I urge the Senate's favorable consideration of this resolution at the earliest possible time.

Mr. EAGLETON. Mr. President, the city of Springfield, Mo., will celebrate the 150th anniversary of its settlement throughout 1979. I am pleased to sponsor this resolution to commemorate the city's sesquicentennial.

In 1829, John Polk Campbell journeyed from Tennessee and staked claim to land in southwest Missouri inhabited by the Osage Indians. Along with John Fulbright and A. J. Burnett, the families worked together to clear the land and build log cabins, pioneering the way for the "Queen City of the Ozarks". By 1833, the population in the region had grown so much that the State legislature designated it as an independent county—Greene County, after the Revolutionary War Gen. Nathanael Greene. John Campbell became the first county clerk, and largely through his efforts, the State legislature named Springfield as the permanent seat of justice for Greene County.

Campbell donated 50 acres of land for the town site, and the county courthouse was built in the center of the public square. By 1835, the city boasted a blacksmith, a dry goods store, a cabinet maker, and a hotel, unique because its proprietor, John Campbell, served everything free of charge. Weekly mail service was already in operation at the cost of 25 cents for an out-of-State letter. Wages were 50 cents a day. The first schoolhouse was built with Joseph Rountree as the first teacher.

From the modest beginning, Springfield has grown to become a thriving center of commerce, industry, transportation, education, and tourism. With a population of 150,000, Springfield is the business and shopping center of a four-State area. The "Queen City of the Ozarks" is the gateway to one of mid-America's favorite vacation areas. The city is the home of a major State university, Southwest Missouri State, as well as several outstanding private colleges.

Springfieldians are understandably proud, both of their 150 years of achievement and of their bright prospects for the future. I know my colleagues will want to join me in paying tribute to Springfield, as its pioneer spirit carries it forward into the 21st century.●

SENATE CONCURRENT RESOLUTION 5—SUBMISSION OF A CONCURRENT RESOLUTION RELATING TO THE IMPACT OF REGULATION Q ON DEPOSITORS AND ACCOUNT HOLDERS WITH SMALL DEPOSITS AND ACCOUNTS

Mr. CRANSTON submitted the following concurrent resolution which was referred to the Committee on Banking, Housing and Urban Affairs:

S. CON. RES. 5

Resolved by the Senate (the House of Representatives concurring), That it is the sense of the Congress that, in the administration of interest rate controls under Regulation Q, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board should promptly provide an appropriate method under which the interest rate on small savings deposits and accounts is increased equitably in order to reduce the adverse impact of such Regulation on the holders of such deposits and accounts.

SENATE CONCURRENT RESOLUTION 6—SUBMISSION OF A CONCURRENT RESOLUTION AUTHORIZING THE PRINTING OF THE "BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS"

Mr. PELL submitted the following concurrent resolution, which was referred to the Committee on Rules and Administration:

S. CON. RES. 6

Resolved by the Senate (the House of Representatives concurring), That there shall be compiled and printed, with illustrations, as a Senate document, in such style and form as may be directed by the Joint Committee on Printing, a revised edition of the Biographical Directory of the American Congress up to and including the Ninety-sixth Congress (1774–1979); and that three thousand five hundred additional copies shall be printed, of which one thousand copies shall be for the use of the Senate, two thousand two hundred copies for use by the House of Representatives, and three hundred copies for use by the Joint Committee on Printing.

SEC. 2. There is hereby authorized to be appropriated for the Joint Committee on Printing such sums as may be necessary for the employment of personnel and the payment of expenses to carry out the provisions of this resolution through January 2, 1981.

AMENDMENTS SUBMITTED FOR PRINTING

AMENDMENT OF RULE XXII OF THE STANDING RULES OF THE SENATE—SENATE RESOLUTION 61

AMENDMENT NO. 57

(Ordered to be printed and to lie on the table.)

(Mr. STEVENS submitted an amend-

ment intended to be proposed by him to Senate Resolution 61, a resolution to amend XXII of the Standing Rules of the Senate.)

Mr. STEVENS. Mr. President, I submit an amendment in the nature of a substitute to Senate Resolution 61, that being the separate resolution that was introduced by the distinguished majority leader, pursuant to the colloquy that took place here yesterday.

This amendment is the work product of the ad hoc committee that was appointed on our side, which I have had the privilege to Chair. It does modify to some extent the provisions that were in that proposed substitute yesterday. Those modifications or changes were made following a lengthy conference with the majority leader and other Senators. We offer it in the hope that it will be considered.

I am offering it today so that it will be printed, and I hope it will be on the desks of Senators tomorrow, in order that we can start discussing it.

I will call it up, of course, after the recess, and am in hopes that the process we follow will lead to substantial support for the concepts that are involved in this substitute.

I might say to my good friend, the distinguished majority leader, that many of the proposals that are in his Senate Resolution 61 are also in this substitute. We have added rather than subtracted from the concepts of the majority leader.

I ask that this amendment be printed and be on the Members' desks.

The PRESIDING OFFICER. The amendment will be printed in order to allow it to be on the Members' desks.

Mr. STEVENS. I also ask unanimous consent that the amendment be printed in the RECORD.

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

AMENDMENT NO. 57

Strike all after the resolving clause and insert in lieu thereof the following: (a) The last paragraph of paragraph 2 of Rule XXII of the Standing Rules of the Senate is amended by striking out the first sentence and inserting in lieu thereof the following:

"After cloture has been invoked, no Senator shall be entitled to use more than one hour on the measure, motion, or other matter pending before the Senate, the amendments thereto, and motions affecting the same, except as hereinafter provided.

A Senator shall be charged with the use of all time consumed after he is recognized and until he yields the floor, except the time consumed in roll call votes and one quorum call immediately prior to a vote on final passage. A Senator may yield any of his remaining time to another Senator or may yield it back to the Presiding Officer, in which case the hours of consideration shall be reduced by the time so yielded back, and it shall be the duty of the Presiding Officer to keep the time of each Senator. No Senator may be yielded more than 9 additional hours. If unanimous consent is requested to dispense with the remainder of a quorum call and an objection is heard to the request, the time consumed in the remainder of that quorum call is charged against the time of the objecting Member. If the objecting Senator does not have at least 10 minutes remaining, he may not object to dispensing with further proceedings under the quorum call. If the time required to call a quorum exceeds the balance of the objecting Senator's time, such time shall not be charged against the 100 hours."

(b) The last paragraph of paragraph 2 of Rule XXII of the Standing Rules of the Senate is amended by inserting the following sentence at the end thereof:

"Whenever a Senator indicates an intention to appeal from a decision of the Presiding Officer, that Senator shall be given preferential recognition for that purpose. Any Member may make a point of order that any other Member's pending amendment is violative of the rule, and the Chair shall then rule upon that point of order. Where such point of order is sustained, the amendment or amendments in question shall not then be considered further. A Member moving an amendment or amendments against which a point of order is made and sustained by the Chair may take such appeal en bloc, or such Member may choose those specific amendments which such Member wishes to make subject of the appeal. Such Member shall have a right to one such appeal (including the quorum call on such appeal) without being chargeable against such Member's time for debate."

(c) After the last paragraph of paragraph 2 of Rule XXII of the Standing Rules of the Senate, insert the following:

"After 100 hours of consideration of the measure, motion, or other matter on which cloture has been invoked, which time is the aggregate of the one hour of time to which each Member is entitled, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof to the exclusion of all amendments not then actually pending before the Senate at that time and to the exclusion of all motions, except a motion to table, or to reconsider and one quorum call on demand to establish the presence of a quorum (and motions required to establish a quorum) immediately before a vote on an amendment or the final vote begins.

New amendments in the second degree can be offered after cloture has been invoked if they are germane to the amendment in the first degree to which offered and have been printed and available at each Member's desk for at least 24 hours. Amendments which are otherwise in order may amend the measure or matter in more than one place, if they involve only one substantive issue.

If, for any reason, a measure or matter is reprinted, amendments which were in order prior to the reprinting of the measure or matter will continue to be in order and may be technically conformed to the bill as it then reads when the amendments are called up, and reprinted at the request of any Member.

After cloture is invoked, the reading of all amendments, including House amendments, shall be dispensed with when the proposed amendment has been identified and has been available in printed form at the desk of the Members for not less than 24 hours."

(d) Paragraph 1 of Rules III of the Standing Rules of the Senate is amended—

(1) by inserting "(a)" before "The" in the first sentence;

(2) by striking "The" in the second sentence and inserting in lieu thereof: "Except as provided in subparagraph (b), the"; and

(3) by adding at the end thereof, the following new subparagraph:

"(b) Whenever the Senate is proceeding under paragraph 2, Rule XXII, the reading of the Journal shall be dispensed with."

INTERNATIONAL AND DOMESTIC TERRORISM—S. 333

AMENDMENT NO. 58

(Ordered to be printed and referred to the Committee on Governmental Affairs.)

Mr. DURKIN (for himself, Mr. STEVENS, Mr. HELMS, Mr. CHURCH, Mr. MCCLURE, Mr. DOMENICI, Mr. SCHWEIKER, Mr. GARN, and Mr. RANDOLPH) submitted an amendment intended to be proposed by them, jointly, to S. 333, a bill to combat international and domestic terrorism.

● Mr. DURKIN. Mr. President, I announce my strong support for S. 333, a bill to combat international and domestic terrorism, which has been introduced by my friend and colleague from Connecticut, Senator RIBICOFF. But I wish to state at the same time that I strongly oppose the provision of that bill which requires the tagging of black powder and smokeless powder, and am today submitting with my friend and colleague from Alaska, Senator STEVENS, and Senators CHURCH, HELMS, MCCLURE, DOMENICI, GARN, and Mr. RANDOLPH, an amendment to that bill to exempt black powder and smokeless powder from tagging requirements.

The need for strong legislation to combat terrorism both within this country's borders and abroad, is beyond dispute. Rarely a week goes by without some incident of domestic or international terrorism that might have been prevented by stronger Government action and worldwide cooperation. When a similar bill to the one I am supporting was considered by Congress last year, it received widespread support. The administration, respected authorities on terrorism, and aviation-related groups all gave the measure endorsements. Only the press of Senate and House business at the end of the session kept the bill from becoming law. I hope that Congress will complete action on this bill this year, and that it will be signed into law.

The bill introduced this session, however, contains one provision which is unneeded, unworkable, inflationary, and detrimental to millions of American sportsmen who reload their own ammunition or who shoot antique and reproduction firearms using black powder propellant. That provision requires the tagging of black and smokeless powders. The amendment we are introducing today exempts black and smokeless powders from the tagging provisions. During Senate committee consideration of the anti-terrorism bill last session, a similar exemption was written into the bill with my support, the support of Senator STEVENS and many other colleagues.

The list of serious problems with the tagging of black and smokeless powders is well known, and I will not spend a lot of time reviewing it here. The most important problem is that it represents another attempt by the Federal bureaucracy to reach needlessly and without adequate justification into the lives of American citizens. The tens of thousands of New Hampshire sportsmen are peaceful, law-abiding citizens, who certainly should not be bothered and burdened by more unworkable Federal regulations. And I want to assure all the sportsmen in New Hampshire that I will do everything possible in this legislation and any other matter that comes before the Congress to keep the Federal tentacles off their backs and out of their lives. I have opposed all Federal gun control legislation and I will continue to do so.

While tagging of firearms propellants would place a burden upon sport shooters and upon the small businessmen who sell powder, it would do little or nothing to benefit law enforcement. The record-keeping would be extremely cumbersome and complex, making it difficult to trace powder even with the taggants. And even then, bombers are unlikely to obtain their supplies of powder through legal commerce where registration is at least possible.

The technology for tagging powders is still developing, and presents a great many unknowns. There could be major problems with fouling and clogged barrels caused by the taggants, potentially causing safety hazards to the shooters. On top of this, the financial costs of tagging are projected to be extraordinary, raising the cost of powders by 20 to 30 percent. This inflationary move would certainly require substantial justification, exactly the kind of justification which has not been produced by the Federal bureaucrats.

In sum, Mr. President, while the Federal Government must do everything reasonably possible to fight the ominous cloud of terrorism which potentially threatens each and every one of us, this Congress cannot allow the Federal Government to continue to meddle into the lives of law-abiding citizens at the whim of a few bureaucrats. Tagging black and smokeless powders will not contribute substantially to antiterrorism, but it will pose another threat to the basic freedoms and liberty of the people in our society. That is why I will fight this provision, and urge my colleagues to do so.

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

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

AMENDMENT No. 58

Amendment to section 303.

After subsection "t", add a new subsection "u":

"(u) Black and smokeless powders, manufactured as propellant powders, shall be excluded from the provisions of this section."

Reletter the existing subsection accordingly.●

NOTICES OF HEARINGS

SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT

Mr. HARRY F. BYRD, JR. Mr. President, the Subcommittee on Taxation and Debt Management of the Senate Committee on Finance will hold hearings on March 12, 19, and 20, 1979 on the carryover basis provisions of the estate tax law.

The hearings will begin at 10 a.m. in room 2227 of the Dirksen Senate Office Building.

The Department of the Treasury will testify on March 12, 1979.

The Congress during the last session agreed to defer the effective date of carryover basis until December 31, 1979. The hearings will focus upon whether or not carryover basis should be repealed or modified, and if modified, what modifications should be made.

The hearings will give the Senate Finance Committee an opportunity to explore in detail the implications and full ramifications of this significant departure from tax law prior to 1976.

Other witnesses who desire to testify at the hearings should submit a written request to Michael Stern, Staff Director, Committee on Finance, room 2227, Dirksen Senate Office Building, Washington, D.C. 20510, by no later than the close of business on March 1, 1979.

The subcommittee would be pleased to receive written testimony from those persons or organizations who wish to submit statements for the record. Statements submitted for inclusion in the record should be typewritten, not more than 25 double-spaced pages in length and mailed with five copies by April 13, 1979, to Michael Stern, Staff Director, Committee on Finance, room 2227, Dirksen Senate Office Building, Washington, D.C. 20510.

ADDITIONAL STATEMENTS

RHODESIA AND THE ARROGANCE OF ANDREW YOUNG

● Mr. GARN. Mr. President, the unmitigated arrogance of the U.S. Ambassador to the United Nations, Andrew Young, manifested itself again the other day. Mr. Young saw fit to declare that "only Neofacists in this country would be willing to support the neofascism of the Smith regime" in Rhodesia/Zimbabwe.

Mr. President, this is not the statement of a private citizen—it is the declaration of an official of the United States. Mr. Young's record for embarrassing public utterance in the name of U.S. policy is a disgrace. I remain convinced that Mr. Young should be removed from office for gross incompetence detrimental to the interest of the United States.

By an 85-percent majority vote, white Rhodesians recently passed a referendum to approve a new constitution, drawn up in March 1978, to hold universal suffrage elections in order to bring a form of qualified black majority rule. Elections are now scheduled to be held in April. Is the new constitution perfect? No it is not. I recognize this. But to say that it bears any resemblance to fascism is ludicrous.

The United States and its allies have every reason to work for a peaceful settlement of the Rhodesian problem. Yet, we continue to dismiss the efforts of the internal settlement to accomplish this very objective. Instead, we insist that the guerrilla forces of Robert Mugabe and Joshua Nkomo be made participants in the new government. This administration has, in effect, given these guerrila forces, the so-called Patriotic Front, a defacto veto over the efforts of blacks and whites to avoid a bloody and destabilizing civil war.

With the April elections, the leaders of the biracial internal settlement will have met the two conditions set by Congress for an end to the U.S. economic embargo against Rhodesia/Zimbabwe. I call on my colleagues to insure that we do not go back on our word in this regard. We have already made a tragic error in not backing the internal settlement when it first determined to establish black majority rule. Let us not compound this error by remaining silent as the Carter administration continues to pursue a course that can only lead to disaster.

These points are recognized very well in an editorial in the Washington Star, which I will ask to have inserted in the RECORD in a moment. By contrast, the Washington Post's editorial staff is oblivious to the damage it, and others like it, has caused.

The bloodthirsty nature of the Mugabe and Nkomo guerrillas has been clear from the beginning. Their Marxist and racist rhetoric has never left any doubt as to the nature of any "government" they might establish, if they were successful in coming to power. It would be a regime of blood and horror, similar to a dozen others in Africa. The rule in Africa is one-party autocratic rule, with no civil freedoms, religious repression, and genocidal vendettas against rival tribal factions. There are a few exceptions, and two of them are the governments of South Africa and Rhodesia.

The fact is, Mr. President, that there was never any chance for peace and freedom in the direction of Mugabe and Nkomo. These two worthies have from the beginning shunned every invitation to an all-parties conference, and any invitation to participate in free and supervised elections. They know that neither has a chance of coming to power peacefully, and for that reason they have done everything they can to destabilize the country, in the hopes of coming to power by the gun. When they do, of course, they will have to fight each other, and the result will be a bloody civil war, followed by the familiar autocracy.

The chances of peace under the direction of the Salisbury government were never high. But in that direction there was a chance of success. Had the nations of the world supported the Smith government's efforts to bring blacks into power, to provide for a stable transition to black majority rule, it is possible that Smith could have succeeded. We will never know, because this administration, led by the fatuous Andrew Young, has from the beginning cast its lot with the revolutionary Marxists. The Washington Post editorial is a perfect example of the silliness and the tragedy of this line of thinking. Now that bloody war is inevitable, the Post looks around and asks what happened. I will tell you what happened. America's liberal establishment has let itself be led into the wilderness by Andrew Young and his coterie of displaced civil rights workers. And it will be a bloody road coming home.

Somewhat bewildered, the Post concludes wistfully that there is "blame enough to go around." Indeed there is, and the Post has earned its share. I would like to think that they recognize it, but today's editorial indicates otherwise.

Mr. President, I ask that the editorials from the two Washington papers be printed in the RECORD, and I invite my colleagues to examine them closely, to see where the blame belongs.

The editorial follows:

[From the Washington Post, Feb. 7, 1979]

DEAD END IN RHODESIA

The British and American foreign secretaries put their heads together on the matter of Rhodesia the other day and came up with nothing. We say this not in derision but with a certain approval. For the several conflicts in Rhodesia—between the multiracial regime in Salisbury and the guerrillas, and among each of these groupings—have produced a degree of violence and fragmentation demonstrably beyond Anglo-American repair.

It is painful to recall that the Carter administration once saw in Rhodesia an exciting opportunity to make the United States both the champion of black majority rule in Africa and the manager of peaceable change. But the administration's diplomacy, as it developed, seemed to focus on the first of these roles—though not openly enough to gain African credit for it—and fulfillment of the second role was made that much more difficult. There is no doubt now that black majority rule is coming, but not peaceably, and not in a context ensuring white minority rights, and not under American patronage, and not in a way that promises to advance other American interests.

The transitional government of Ian Smith has just sponsored a poll in which whites approved a white-written majority rule constitution due to take effect when general elections are held in April. At one point, those elections looked like they might help win international acceptance for the "internal" settlement. But the military deterioration since then has put them in a different light. The elections will be held under military-law conditions in the shrinking fraction of the country where the government's writ runs. Salisbury figures the vote will meet one of the two tests Congress set last year for lifting economic sanctions; it met the second by announcing its availability for negotiations with the guerrillas. But even if Salisbury meets Congress' technical requirements—and it may—what will that avail? Salisbury's talk of elections, the lifting of sanctions, and then somehow a miraculous Western bailout, sounds increasingly like whistling in the dark. The overwhelming fact is the war.

The guerrillas are winning, under the worst imaginable conditions for the future of Zimbabwe—economic devastation, political radicalization, racial conflict, black civil war. Their military advance is sweeping away the whites and the assorted blacks of the transitional regime. There is blame enough all around; the leaders of Rhodesia/Zimbabwe deserve most of it. But what Americans cannot avoid asking is whether things are better or worse for the people of that brutalized country as a result of the administration's exertions in their behalf.

[From the Washington Post, Feb. 6, 1979]

"NEO-FACISM" IN RHODESIA

UN Ambassador Andrew Young recently declared, with even less than his usual regard for the weight of words, that "only neo-fascists in this country would be willing to support the neo-facism of the Smith regime" in Rhodesia.

No doubt Mr. Young would include, as neo-fascism, last week's successful referendum on a new Rhodesian constitution. The vote, after all, was limited to non-black Rhodesians; and the constitution, under which a black-majority government will be elected this spring, reserves considerable power over a five-year transition period to whites.

If Andrew Young spoke for himself alone, and not for the United States, he would be at liberty to mangle the language as he pleased. But he is, in fact, an American official who pretends to be interested in drawing the Rhodesian government into all-party talks with the guerrilla insurgents on the country's future. If this is more than pretense, he approaches it in a curious fashion.

It is not, of course, as if the new Rhodesian constitution were immune to reasoned criticism. It is, one could say, conservative and cautious; and it is open to the practical objection that it may not fully satisfy even the black partners in Mr. Smith's slow-motion movement from white to majority rule.

Even so, the effort is far from contemptible, and far indeed from being "fascist" in flavor, neo- or otherwise. The advent of a government in Rhodesia-Zimbabwe (as it's to be called) in which blacks will have the predominant place is a milestone. It imposes a certain obligation on the U.S. to approach it, approve or not, with some consideration.

A more considerate and receptive attitude would indeed have been appropriate months ago, when Ian Smith first decided to scrap exclusive white rule and negotiate a settlement with the black majority. The Rhodesians thought then that Mr. Smith and his collaborators had met the "six points" on which Dr. Kissinger, as a Ford administration emissary, had implicitly conditioned some relaxation of diplomatic hostility. Even now, one of Mr. Smith's selling points in inducing the embattled Rhodesian whites to accept a new power-sharing constitution has been the stubborn hope that the U.S. may lift economic sanctions.

That is almost certainly a vain hope as long as Ambassador Young is calling the shots on U.S. policy in Africa. But what is the alternative? What, in other words, is the price of Mr. Young's policy? Now as before, it is that the U.S. may be a bystander, and by inaction a collaborator, in the subversion of an elected government in Rhodesia by Marxist guerrillas, hostile to both form and substance of our political values.

If they succeed, there will be many Rhodesians, black and white, who if lucky enough to escape alive will find themselves nostalgic for a bit of what Andrew Young is pleased to call "neo-fascism." ●

A COLLISION OVER TRUCKING

● Mr. TSONGAS. Mr. President, I would like to direct the attention of my colleagues to an editorial which appeared in the Boston Globe on January 29.

I believe that the editorial emphasizes several valid and important points regarding the current controversy surrounding referral of antitrust legislation to eliminate the 1948 antitrust exemption for price fixing in the trucking industry.

The editorial accurately states that the matter is a parliamentary question. I believe that the parliamentarian has ruled correctly. However, even more importantly, I would hope that my colleagues will focus their attention on that ruling and the question of whether or not to abide by the decision of the Parliamentarian, rejecting attempts to confuse the issue by casting the debate as a vote on the issue far down the road: Truck deregulation.

The January 29 Boston Globe editorial follows:

A COLLISION OVER TRUCKING

The public may get an early reading this year on exactly how committed the U.S. Senate is to stemming inflation when that inflation benefits powerful private interests. The test would be posed by a vote on the question of whether the Senate Commerce Committee or the Senate Judiciary Committee receives jurisdiction over a bill to end the trucking industry's antitrust exemption. While the matter may seem technical, the Senate's decision could substantially influence the future of trucking deregulation—with its potential benefits for consumers.

The jurisdictional fight pits Sen. Edward M. Kennedy, chairman of the Judiciary Committee, against Sen. Howard Cannon, the Nevada Democrat who chairs the Commerce Committee. While Kennedy has expressed a willingness to support a "joint referral" to both committees, Cannon has balked at this notion. The issue may come before the full Senate this week for resolution. And more is at stake than committee "turf."

Kennedy is a supporter of trucking deregulation; in fact, he is the author of the legislation ending the antitrust exemption at the center of current fight. Cannon says only that he has an open mind on the subject; the American Trucking Association and the Teamsters Union are lobbying the Senate furiously for referral of the bill to the Commerce Committee.

In a less political environment, the matter might be considered a parliamentary question. And in that regard, it is interesting to note that the Senate parliamentarian has ruled that the legislation should be sent to Kennedy's committee. And properly so. Other elements of comprehensive trucking deregulation—those involving Interstate Commerce Commission's regulation of routes and entry—are within the jurisdiction of the Commerce Committee. But the Kennedy legislation, which would overturn the current government sanction of private agreements between truckers on pricing, is clearly an antitrust measure.

It is true that the exemption to the antitrust statutes, enacted in 1948, was attached to the Commerce Act. But that was only an effort to end-run House Judiciary Committee chairman Emmanuel Cellar, who was opposed to such doings. And it is true that the Kennedy bill would affect a particular sector of commerce. But any antitrust legislation does that. And the Senate has given the Judiciary Committee responsibility for antitrust legislation no matter what sector of the economy it affects.

As the current parliamentary fight reveals, trucking deregulation will be a tough battle. The $30 billion industry is well organized. And both labor and management gain from the anticompetitive aspects of the business. Only the consumer loses. A decision by the Senate to refer the legislation exclusively to the Commerce Committee would not only violate common sense; it would be a sign that the Senate is not anxious to make the fight to restore competition to the trucking industry.●

STATE DEPARTMENT MEMORANDUM ON TREATY TERMINATION: A REBUTTAL

● Mr. GOLDWATER. Mr. President, as you know, I have filed a lawsuit, together with 25 other Members of Congress, challenging as being unconstitutional, President Carter's attempted abrogation of the defense treaty with Taiwan. In defense of the President's unilateral action, the Department of State has released a lengthy memo arguing that Presidents have terminated treaties before, in situations similar to President Carter's action.

Mr. President, the State Department memo is absolutely wrong. It is a desperate attempt to erect some sort of justification for the President's usurpation of legislative power.

The so-called memorandum is actually a one-sided argument that distorts and

twists history and contains many self-contradictions.

First, I would note that the State Department has dredged up only 12 claimed precedents for Presidential treaty termination, and not one of them involves a defense treaty.

Even if the 12 incidents were taken at face value, the State Department does not tell us what legal significance this would have. Of course, the answer is they would have no legal bearing.

A handful of precedents cannot create a Presidential power that does not appear in the Constitution itself. As the Supreme Court said in 1969:

> That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.

Thus, the alleged 12 precedents beg the question. For all anyone knows, they were unconstitutional actions, so that these disclosures might be no more than admissions of past illegalities.

In this connection, I might remind my colleagues that Federal courts have decided at least three important issues of power against the President in the past 5 years, although a long line of precedents were argued as a basis for Presidential power in each of these cases. We can all remember the Nixon tapes case where executive privilege was decided against the President. Then there is the impoundment of funds case which the executive branch lost. And, there is the executive veto case, in which the U.S. Court of Appeals for the District of Columbia rejected 38 pocket vetos as not having any legal meaning. The court squarely held that precedents cannot create an Executive power.

Now, if the State Department memorandum were truly that, a fair discussion of all points so that the President and Secretary of State could act on full information, it surely would have discussed exactly what significance the 12 precedents are supposed to have. But there is no mention in the memo about the quite recent Federal court cases which rule that past practice does not make a Presidential power. It is obvious the lawyers at the State Department did not want to bring this question up with their superiors.

Mr. President, turning to the so-called precedents contained in the State Department memo, it is revealing that two of the incidents involved treaties which did not contain notice provisions. Now, I must ask, what are these two examples doing in the memo?

What has happened here is that the State Department has shown its hand. It is not arguing merely that President Carter has implied authority to terminate a treaty when the treaty itself includes a provision for termination upon notice by either party. If that is all the State Department is claiming, it would not have used these two examples in its memorandum.

Instead, it is clear the State Department is asserting a broad power for the President to terminate any treaty he wants, whether the treaty includes a notice provision in it or not.

In other words, the State Department wants the President to have total power over treaties. State has long taken the position that the President can make a treaty by calling it an executive agreement, and now they are saying he can break a treaty, even if it was ratified with the advice and consent of the Senate.

So I would warn my colleagues against allowing the State Department to get away with what is an obvious power grab.

Mr. President, I have mentioned that 2 of the 12 treaties asserted in the State Department list did not contain notice provisions. If we remove these 2 incidents, that leaves 10. Of these treaties, only eight were actually terminated. Presidents withdrew the notice of termination in two cases and there is no proof they would have gone ahead with terminating the treaties.

So that leaves us with only eight incidents. But the terminations of three of these treaties were necessitated by superseding statutes in conflict with earlier treaties. In these situations, the President was acting under the implied authority of congressional statutes. Another treaty termination clearly was authorized under no less than four separate acts of Congress.

Some of the treaties discussed by the State Department were canceled in full agreement with the other countries, which is completely different from the present case where the Republic of China wishes to keep the defense treaty alive.

And, there is no evidence Congress was informed when the President acted on each of these treaties. He notified the foreign countries, but in many cases he neglected to tell Congress. Congress could hardly challenge what it did not know about and a situation where the President acted in secrecy hardly qualifies as a precedent for his independent action.

Mr. President, I have prepared a detailed analysis of the alleged precedents argued in the State Department memo which shows that not one of the incidents back up the President's position. Since the paper relates to an important issue of shared power between the President and Congress, I ask that it be printed in the RECORD.

The material follows:

ANALYSIS OF PRESIDENTIAL TREATY "TERMINATIONS" ARGUED IN STATE DEPARTMENT MEMORANDUM

1. 1815: President Madison's administration exchanged correspondence with the Netherlands which allegedly established that the 1782 Treaty of Amity and Commerce had been annulled.

Analysis: There is strong historical evidence the treaty was not annulled in 1815, but remained in effect assuming the treaty was then annulled, the cause was the wartime destruction of one of the governments and nations, not independent Presidential power. Also, President Madison did *not* give notice of the treaty's termination; the foreign government first denounced the treaty.

Discussion: The Netherlands took the initiative in insisting the treaty of 1782 had expired because of the Napoleonic wars, during which the United Netherlands, with whom the treaty was made, was absorbed into the French Empire, entirely disappearing as a separate nation. After the war, it was transformed into a new nation unlike the original one. According to Samuel Crandall in his *Treaties: Their Making and Enforcement*, the State thus formed "differed in name, territory, and form of government from the state which had entered into the treaty of October 8, 1782, with the United States." (p. 429)

In response to a letter from the government of the new state, in 1815 Secretary of State Monroe appeared to acknowledge the Netherlands' claim that the treaty had been annulled. However, when Monroe became President, he himself repudiated this interpretation. His Secretary of State John Q. Adams argued in 1818 that the 1782 treaty was still operative. (U.S. Foreign Relations 722 et seq. (1873)) In 1831, the Supreme Court of North Carolina enforced the treaty as law in *University* v. *Miller*, 14 N.C. 188, 193.

At most, the incident is a precedent for termination of a treaty *in agreement* with the other government. Obviously, in the present case, the Republic of China wishes the 1954 treaty to remain in effect.

It is true that much later in 1873, the State Department informed the Minister of Holland that "The Treaty of 1782 is no longer binding on the parties." However, the State Department did not claim President Madison had terminated it. Rather, in a list of treaties that have been abrogated, which was prepared and published by the State Department in 1889, the Department included the Netherlands treaty under a category entitled "Treaties with Powers that have been absorbed into other nationalities."

The Department explained the termination of the treaty as follows:

"The principle of public law which causes Treaties under such circumstances to be regarded as abrogated is thus stated: The obligations of Treaties, even where some of their stipulation are in their terms perpetual expire in case either of the contracting parties losses its existence as an independent State, or in case its internal constitution is so changed as to render the Treaty inapplicable to the new condition of things." (U.S. Treaties and Conventions 1776–1887 (1889), at 1236–1236).

2. In 1899, President McKinley gave notice to the Swiss Government of intent "to arrest the operations" of certain articles of the 1850 Convention of Friendship, Commerce and Extradition.

Analysis: The Convention was superseded by a later Act of Congress inconsistent with the earlier treaty. That statute conferred implied authority on the President.

Discussion: The State Department memo itself admits the Presidential notice "may have been necessitated by the Tariff Act of 1897." (p. 9) This admission hardly qualifies the incident as a precedent for notice where there is *no* accompanying legislative action.

Following enactment of the Tariff Act of 1897, the United States entered into an agreement with France under authority expressly granted by that law. The Swiss government thereupon claimed the right to enjoy the same concessions for Swiss imports as granted French products, but without making reciprocal concessions.

The United States rejected the Swiss demand because, in the words of the State Department memo: "It was contrary to U.S. general policy *and to the policy of the Tariff Act* to make trade concessions in the absence of a reciprocal arrangement." (p. 9) Section 3 of the Tariff Act denied the President authority to negotiate trade agreements unless "reciprocal and equivalent concessions may be secured in favor of the products and manufactures of the United States." (30 Stat. 203).

Since Congress had passed a law clearly in-

consistent with an earlier treaty, the President was compelled to enforce the later expression of legislative will. Unlike the 1899 incident, there is no subsequent statute which President Carter claims is in conflict with the Mutual Defense Treaty of 1954. To the contrary, there are numerous statutes and treaties which reinforce the purpose of that treaty.

3. In 1920, President Wilson "by agreement" terminated the 1891 Treaty of Amity, Commerce, and Navigation with the Congo.

Analysis: The treaty was terminated following Congressional action affecting that treaty. It was denounced in its entirety by the foreign government, not by notice of the United States.

Discussion: In the Seamen's Act of 1915, Congress ordered President Wilson to notify several countries of the termination of all articles in treaties and conventions of the United States "in conflict with this act." (38 Stat. 1184) The authoriy of Congress to impose this obligation on the President was upheld by the Supreme Court in *Van der Wayde v. Ocean Transport Co.*, 297 U.S. 114, 118 (1936).

In accordance with this statutory mandate, President Wilson notified Belgium of his intention to terminate Article 5 of the 1891 treaty. (The treaty was originally concluded with the independent state of the Congo, which later came under Belgian control. The change of governments further weakens the incident as a precedent for termination of the Mutual Defense Treaty since the identical governmental authorities on Taiwan with whom we made the treaty are still in effective control of the territory covered by that treaty.)

In view of the Congressionally-mandated termination of a substantive article of the treaty, Belgium replied that it wanted to terminate the entire treaty. A month later, Belgium sent a second note instructing the United States that its first note was intended as formal notice of termination of the treaty. In acknowledgement of this notice, the United States regarded the treaty as expiring one year later.

The situation is entirely different from the 1954 Mutual Defense Treaty with the Republic of China. The 1891 treaty was terminated with the agreement of both parties. The Republic of China, however, does not wish to terminate the 1954 treaty.

4. In 1927, President Coolidge gave notice of termination of the 1925 Convention with Mexico on the Prevention of Smuggling.

Analysis: The Convention was terminated during an unsettled period in Mexico which caused a fundamental change in conditions essential to its continued effectiveness. The President did not inform Congress, depriving legislators of an opportunity to challenge his action.

Discussion: In 1927, United States relations with Mexico were unsettled because of alleged religious persecution within Mexico and the confiscation of American-owned private and oil lands. In fact, President Coolidge claimed Mexico was *smuggling* arms and ammunition to revolutionists in Nicaragua, indicating Mexico was not a reliable treaty partner under a Convention relating to the prevention of smuggling.

In the circumstances, it appears changed conditions were a cause of President Coolidge's notice. Under the doctrine of *rebus sic stantibus*, a treaty "ceases to be binding when the basic conditions upon which it was founded have essentially changed." (40 Opinions Attorneys' General 121)

However, in the case of the 1954 Mutual Defense Treaty, President Carter has not invoked *rebus sic stantibus*. Nor could he. For an essential requirement of the doctrine is that the change in conditions must not be the result of action by the party seeking to invoke it. (1969 Vienna Convention on the Law of Treaties, Articles 61, 62; Restatement of the Law 2d, Foreign Relations Law of the U.S., at 467–470 (1965)).

There is another reason the 1927 incident is not a valid precedent. Congress was not informed of the notice at the time and thus it went unchallenged.

5. In 1933, President Roosevelt withdrew the United States from the 1927 Convention for the Abolition of Import and Export Prohibitions and Restrictions.

Analysis: The 1927 Convention was inconsistent with and had a restrictive effect on the National Industrial Recovery Act of 1933. It also was terminated due to a fundamental change in conditions, not the result of any action by the United States.

Discussion: The official papers published in connection with the termination of the 1927 Import-Export Convention prove that the provisions of the National Industrial Recovery Act, a later statute, were instrumental in moving the President to give notice. (U.S. Foreign Relations 784–786 (1933); W. McClure, *International Executive Agreements* 18 (1941)).

The incident stands as no more than an example of the President implementing the latest expression of Congressional intent. Since the President cannot enforce two laws which are in conflict, as the 1927 convention and 1933 statute were, he is compelled to select the one which reflects the current will of Congress.

The U.S. Government notice gave as the reason for withdrawal the fact that several other nations had already withdrawn, thereby defeating the original purpose and assumption for the convention. Eleven countries out of an anticipated original 19 had ceased to be bound by the convention on June 20, 1933, when the United States gave its notice. So our notice stated that while it "had been hoped that the principle embodied in the convention would be widely accepted", the "reverse" has been true.

These circumstances fit the classic example of *rebus sic stantibus*, where a basic set of conditions or expectations were assumed to exist as the basis for carrying out the treaty, but due to changed conditions, those original purposes or expectations are no longer present. When such a fundamental change occurs, the treaty is no longer operative or binding.

The principle was recognized by Mr. Justice Davis, who wrote, in *Hooper* v. *United States*, that a "treaty might be construed as abrogated when material circumstances on which it rested changed." (22 Court of Claims 408 (1887)).

Thus, rather than asserting any general power to withdraw the nation from all treaties having a notice provision, President Roosevelt's 1933 notice itself clearly limits the basis of his action to the change in conditions. As the State Department memo states: "A convention on the abolition of import and export prohibitions and restrictions clearly needed widespread acceptance to be effective . . . " (p. 18)

In contrast to the 1927 convention, there is no change in circumstances which prevents the 1954 Mutual Defense Treaty from being effective. The same regime with which we concluded the treaty remains in effective control of the territory of Taiwan and the Pecadores, regardless of derecognition. The territory governed by the authorities remains a critical and strategic link in the entire chain of Pacific Basin security bases from which the United States supports its national security and the security of allies with whom we have formal defense treaties.

Even if derecognition were viewed as a basic change, it cannot be invoked as a reason for terminating the 1954 treaty. Under customary international law, a nation cannot use a change of conditions as a ground for terminating a treaty if the change is the result of its own action, inconsistent with the original purposes of the treaty.

In any event, President Carter is not asserting changed circumstances as a ground of his notice; he claims implied authority solely under the notice provision of the treaty. Thus, the 1933 incident has no similarity to the present case.

6. In 1933, President Roosevelt gave notice of termination of the 1931 Treaty of Extradition with Greece.

Analysis: The treaty was not terminated. The sole basis for the President's notice was violation of the treaty by the other nation, a charge that has not been made against the Republic of China.

Discussion: The incident is not a precedent for Presidential treaty termination because the treaty was not terminated. President Roosevelt did give notice, but *withdrew* it. Whether he would have completed the termination is speculation; the strongest evidence points to his purpose only of using the threat of termination as pressure for negotiating purposes.

The President's action was initiated because Greece had refused to extradite an individual accused of fraud as required under the extradition agreement. Clearly, his action was founded on the fact the treaty had already been violated by breach of the other party. The President may have power to determine that a treaty has become void in this narrow situation under the ancient principle of traditional contract law whereby a party is released from a contract obligation if the other party is guilty of a substantial breach.

Even so, the principle has no application to the 1954 defense treaty. The Republic of China has not committed any breach of the treaty, nor is any violation on her part alleged. In contrast, the 1933 notice by President Roosevelt clearly identified the violation by Greece of the treaty as the reason for the notice.

7. In 1936, President Roosevelt signed a protocol agreeing with Italy to terminate the 1871 Treaty of Commerce and Navigation.

Analysis: The 1871 treaty had become inconsistent with a later Act of Congress which conferred implied authority upon the President. Also, the treaty was terminated in joint action with the other country by a protocol mutually agreed upon. In contrast, the Republic of China wishes to keep in effect the 1954 defense treaty.

Discussion: President Roosevelt's action in agreeing with Italy to terminate the 1871 treaty arose directly out of and was tied to the 1934 trade law enacted by Congress. That law authorized the President to suspend beneficial duties to imports from any country discriminating against our exports. Since American commerce was being subjected to what the State Department described as "highly prejudicial treatment" by the trade control measures of Italy, the Department warned the President he "would be placed in the position of having to choose between the execution of the act and observance of the treaty."

In order to avoid being forced to breach the treaty or ignore the obvious intent of the statute, the State Department advised the President to notify Italy of our intent to terminate the treaty. (G. Hackworth, 5 Digest of International Law 330–331 (1943)).

Thus, the statute conferred implied authority on the President to terminate the treaty. In the present case, President Carter has no implied or express authority under a separate statute.

Instead of giving the initial, formal notice to Italy of the treaty's termination as suggested, President Roosevelt approved a joint protocol entered into between the United States and Italy announcing the intention of *each* government to terminate the treaty. Thus, the treaty was not cancelled by Presidential notice alone, as is proposed in the case of the 1954 treaty with the Republic of China, but by mutual agreement with the other government.

8. In 1939, President Roosevelt gave notice of termination of the 1911 Treaty of Commerce and Navigation with Japan.

Analysis: The 1911 treaty was clearly terminated pursuant to authority granted by a later treaty. Also, the treaty had become inoperative due to wartime conditions.

Discussion: The termination of the 1911 commercial treaty with Japan is not an example of independent Presidential power. Under the Treaty on Principles and Policies Concerning China of 1922, known as the Nine Power Agreement, the United States was bound to participate with other governments in respecting the territorial integrity of China. But in the early 1930's, Japan repudiated the Kellogg-Briand Pact, which outlawed war "as an instrument of national policy," and withdrew from the 1921 treaty for the limit of naval fleets. After Japanese troops invaded China, by overrunning Manchuria in 1931 and by entering upon all-out war in 1937, it was apparent that Imperial Japan had the same designs in the Far East that Nazi Germany had in Europe.

Accordingly, President Roosevelt made his famous "Quarantine" speech in which he announced on October 5, 1937, that war was becoming a contagion whose spread could be stopped only by a "quarantine" against aggressors. The Japanese made a partial answer to this speech on December 12, 1937, when their planes sunk a U.S. gunboat in the Yangtze River, with the loss of two dead and 30 wounded, and destroyed three American merchantmen.

Consequently, an American embargo was mounted against Japan. In the middle of 1938, the State Department informed all manufacturers and exporters of aircraft and airplane parts that it frowned upon the sale of such commodities to countries such as Japan, which indiscriminately bombed civilians, and the following year this ban was extended to high octane gasoline. These warnings were heeded by the producers, with the result that a virtual embargo on planes, parts, and gasoline was raised against Japan.

In similar fashion, the State Department gradually ended the extension of credit to Japan by American citizens after 1938. Then in 1939, the United States gave Japan the necessary notice for termination of the commercial treaty. Thereafter, shipment of every type to Japan fell off greatly.

Thus, it is undeniable that the notice was an integral part of American policy which took a no-compromise stand on behalf of the territorial integrity of China. Clearly, this policy of morality on behalf of the welfare of China was exactly the type of governmental action contemplated and authorized by the Nine Power Treaty.

The aggression by Japan, even against U.S. vessels, also created a fundamental change in circumstances not the result of our personal actions. Absent a Supreme Court decision of the issue, it is not known whether the President acts legally when he invokes the doctrine of *rebus sic stantibus*, but this principle of international law would at least have given President Roosevelt an additional plausible ground for independent action.

In the present case, neither any asserted authority under a related treaty subsequent in time to the 1954 treaty, nor the principle of *rebus sic stantibus* has been invoked by President Carter.

9. In 1944, President Roosevelt gave notice of denunciation of the 1929 Protocol to the Inter-American Convention for Trademark and Commercial Protection.

Analysis: Denunciation of the 1929 Protocol is at most an example of an international agreement becoming inoperative when the basic conditions upon which it was founded have essentially changed and the change is not the result of any action by the nation deciding to withdraw. Moreover, Congress was not informed of the notice and was denied any opportunity to challenge the action.

Discussion: The notice of denunciation of the 1929 protocol expressly stated that it had failed to serve any purpose. Secretary of State Hull explained the United States had decided to withdraw from the protocol "in view of past ineffectiveness and absence of any evidence of future increased activity."

Accordingly, the situation fits the classic case of invoking the principle of international law known as *rebus sic stantibus*, described in an Attorneys' General Opinion of July 28, 1941, as "a declaration of the inoperativeness of a treaty which is no longer binding because the conditions essential to its continued effectiveness no longer pertain." (40 OP. A.G. 119)

Even so, the incident may have been an improper exercise of power by the President. Assuming for the sake of argument, however, that the notice was legally made, the action can be explained under the principles of ordinary contract law. The principle of *rebus sic stantibus* was known to international law authorities at the time of the Constitutional Convention of 1787. Vattel, Grotius and other writers, whose works were read by several of the Framers, each mentioned that one of the implied conditions inherent in public contracts, such as a treaty, was the right of a government to consider itself no longer bound by the agreement when fundamental conditions assumed as the basis of the contract no longer existed.

There is no similar, well-established principle of international law, however, providing that in a government of divided powers as ours, the Executive alone possesses a general power of treaty termination. The principle of *rebus sic stantibus* does not apply to President Carter's notice affecting the treaty with the Republic of China; nor has he sought to invoke the principle. Rather, he is claiming a general power of terminating any treaty which includes a notice provision, regardless of any special surrounding circumstances.

Moreover, the State Department memo admits at page 27 that there "was no prior or subsequent communication" of the 1944 notice with the Senate or Congress. Thus, the notice was in effect kept secret from Congress and did not present an opportunity for challenge in the courts.

10. In 1954, President Eisenhower gave notice of withdrawal from the 1923 Convention on Uniformity of Nomenclature for the Classification of Merchandise.

Analysis: The United States withdrew from the 1923 Convention because it had been "rendered inapplicable" by a basic change in conditions not the result of our government's actions. Also, termination of the Convention was done with the agreement of other parties.

Discussion: The 1954 notice is a classic example of the application of the principle of international law known as *rebus sic stantibus*, discussed above.

The 1923 Convention relied on use of the Brussels nomenclature of 1913 in statistical reporting of international commerce. In the words of the State Department memo, at page 29, "the Brussels system of 1913 had become outdated."

In 1950, the United Nations Economic and Social Council had urged governments to use a new system known as the Standard International Trade Classification instead of the Brussels system. Then in 1954, the 10th Inter-American Conference of American States adopted a resolution on customs nomenclature which specifically declared that "the Brussels nomenclature of 1913 has become outdated and has thereby rendered inapplicable the Santiago Convention on Uniformity of Nomenclature for the Classification of Merchandise . . ." The resolution urged member nations to abandon the 1923 Convention and adopt the new United Nations-sponsored system.

The United States notice of withdrawal from the convention acted upon the wide agreement of other governments, who were parties to it, that the convention was no longer applicable to current conditions. It is obvious a fundamental change of conditions had occurred. If the basic system of statistical reporting had become "outdated" and governments generally wished to adopt a new system to replace the old, and if governments generally viewed this change as having "rendered inapplicable" the 1923 Convention which utilized the earlier reporting system, these facts surely must constitute a fundamental change in the basic conditions upon which the convention was founded.

Unlike the situation as to the 1923 convention, there is no argument by President Carter that a basic element of the Mutual Defense Treaty with the Republic of China has become "outdated." Nor is there any claim the defense treaty has been "rendered inapplicable." To the contrary, it has an even greater significance to the people and authorities of Taiwan after the recognition of the Peoples Republic of China by the United States; and it remains significant to United States security interests in the Pacific Basin.

Moreover, unlike the situation with the 1923 convention, where there was widespread agreement among parties to the convention that it should be abandoned, here the Republic of China wishes to keep the defense treaty in effect. Whatever the President's power may be to act by agreement with other parties to a treaty in denouncing it, this does not create a general power of unilaterally deciding to withdraw from a bilateral treaty when the other nation does not agree or join his action.

One of the specific defects meant to be corrected by the Framers of the Constitution was the unfaithfulness of the United States under the Articles of Confederation in keeping its treaty obligations. Several of the Framers declared the Constitution was supposed to aid in restoring respect to the United States as a treaty partner. Thus, it is exactly the easy escape from a treaty represented by President Carter's unilateral notice, not in agreement with our foreign treaty partner, that the Framers wanted to prevent.

11. In 1962, President Kennedy gave notice of termination of the 1902 Convention on Commercial Relations with Cuba.

Analysis: The President's action clearly was authorized by several statutes and one other treaty.

Discussion: The termination of the 1902 commercial convention was an integral part of the U.S. economic embargo of Castro Cuba, declared on February 2, 1962, in which we were joined by the Organization of American States. (13 CQ Almanac 295–298, 331, 333 (1962)).

President Kennedy's notice of August 21, 1962, occurred only eight weeks before the naval blockade of Cuba. He had ample authority to impose a trade embargo under provisions of the Foreign Assistance Act of 1961, the Export-Control Act of 1948, the Trading with the Energy Act, and Battle Act of 1954. Termination of the convention was also authorized pursuant to the Inter-American Treaty of Reciprocal Assistance of 1947, which contemplated a "partial or complete interruption of economic relations" as a means of enforcement. Thus, notice of terminating the commercial convention was given pursuant to a national policy authorized and developed with full legislative participation.

Moreover, the notice may have been authorized under implied authority conferred by Congress when it enacted the Tariff Act of 1945 (59 Stat. 410).

Under the specific authority granted by this statute, the United States Government had entered into numerous trade agreements with other nations by executive agreement through the General Agreement on Tariffs

and Trade (GATT). Pursuant to authority granted by the same trade statute, the commercial treaty with Cuba had already been suspended by an executive agreement with Cuba. Thus, it is possible the notice of termination would have been made even had the United States not been engaged in an embargo of Cuba.

However, had the notice been given in the absence of the embargo policy, it still would have been authorized by the enabling statute which set in motion the GATT process on the part of the United States. In either event, the President's action was exercised under the authority of Acts of Congress. In contrast, there is no past or current statute which is cited as having any plausible bearing on the notice given by President Carter. His notice was given in the absence of any separate, supporting legislative enactment and rests solely on the President's unilateral and self-serving interpretation of the Mutual Defense Treaty.

12. In 1965, President Johnson gave notice of denunciation of the 1929 Warsaw Convention limiting claims by passengers on international air carriers.

Analysis: Our government's participation in the Convention was not terminated; President Johnson withdrew the notice. It is not a precedent for Presidential termination. The Convention was widely viewed in this country as being outdated and, in fact, was being ignored by American courts. At most, the incident is an example of a treaty becoming inoperative due to changed conditions.

Discussion: The United States did not withdraw from the Warsaw Convention. It is pure speculation to assume President Johnson would have denounced the agreement unilaterally. To the contrary, it appears he used the threat of U.S. withdrawal as leverage in negotiations with other nations leading to acceptance of a protocol to the convention favorable to our wishes for a sizable increase in the ceiling on claims awarded to air passengers. The incident is not a precedent for Presidential termination of a treaty because President Johnson did not actually denounce a treaty.

There was strong support in the Senate and the country for U.S. withdrawal from the convention. An unfortunate tragedy had befallen then Senator Capehart, whose son and daughter-in-law were killed in a plane crash in Jamaica on January 21, 1960, leaving four young children orphaned. The survivors were clearly entitled to recover damages against the grossly negligent airline, however the Warsaw Convention limited liability to $8,300. Lawyers for the airline literally waved the convention in Senator Capehart's face in refusing initially to pay a realistic award to his relatives. Only court proceedings eventually forced the airline to settle at a higher amount.

With the personal experience of one of their colleagues much in mind, many Senators were revolted at the deficiencies in the Warsaw Convention. Their attitude was reinforced by testimony before the Foreign Relations Committee by trial attorneys who demonstrated that the convention was "outdated, archaic" and further that the proposed Hague Protocol to the convention was inadequate in lifting airline liability to a sufficient amount.

It was established at the Senate hearings that American courts had successfully avoided the limits of the convention by developing a judicial principle which allowed exceptions to the convention in cases of "willful misconduct" by an airline. The exception had become the norm in U.S. courts and the convention had been effectively replaced by legal practice. (Hearings on the Hague Protocol before Senate Foreign Relations Committee, 89th Cong., 1st Sess., 1965, at 41, 59).

In this setting, there was a basic change in conditions. The convention had become inapplicable in U.S. courts and outdated as practical matter. Moreover, its original purpose had been met. It was adopted to help fledging airlines, now become strong carriers. If President Johnson had denounced it, his action would have been consistent with the principle of international law known as *rebus sic stantibus*, discussed above. The principle has no application to the defense treaty with the Republic of China. Unlike the history of the Warsaw Convention in the mid-1960's, there is no line of consistent judicial decisions desregarding the defense treaty. There is no similarity between the two situations.

Moreover, as Lee S. Kreindler, Chairman, Aviation Law Section, American Trial Lawyers Association, testified at the Senate Committee hearings: "It should be pointed out that the Warsaw Convention is a 'private law' treaty which only regulates rights and liabilities as between private individuals and corporations. It does not involve real interests of governments as such. Whatever reluctance there might be to withdraw from a public law treaty involving the performance of governmental responsibilities, it does not apply to the Warsaw Convention which only regulates rights between private persons." (Hearings at 106)

Thus there is a critical difference between the Warsaw Convention and the Mutual Defense Treaty. The latter is a "public" treaty involving the performance of governmental duties. Even if, for the sake of argument, the President has power to terminate treaties involving "private rights," it does not follow that he has power to revoke a treaty which involves fundamental policy for the country on a matter of vital interest to all the people.

It is true, 29 Senators joined in sponsoring a Senate Resolution urging President Johnson to denounce the Warsaw Convention. The resolution was introduced several months after he had given notice and anticipated that the notice might be withdrawn. It is wrong to infer from this that the 29 Senators, or a majority of the Senate, believed the President possessed authority to denounce the convention absent legislative action. In fact, the very act of introducing or cosponsoring the legislation was an affirmative action which in the normal process of legislative activity would result, if successful, in a grant of authority or ratification by the Senate of Presidential action as required by the Constitution. From this, the logical conclusion is that the Senators sponsoring the resolution believed legislative participation was necessary to fulfill the decision to denounce the convention.●

TRIBUTE TO JOHN W. SLEDGE

● Mr. MORGAN. Mr. President, I would like to share with the Members of this body an excellent article about an individual who is most dedicated to the welfare of America's farmers. That individual is John W. Sledge who, for the past 5 years, has been president of the North Carolina Farm Bureau Federation. John, who operates a 260-acre farm at Oak City in Martin County, N.C., has had influence on farm policymaking far beyond the borders of North Carolina. Indeed, Mr. Sledge's counsel is sought by people interested in farm issues across this Nation and abroad. Mr. President, everyone who knows John considers him to be informed, tough yet fair. In my 4 years in the Senate, his advice has been most welcome on the many important farm issues that face our Nation. Mr. President, I ask that the January 1979, article on John W. Sledge which appeared in the Flue Cured Tobacco Farmer magazine be printed in the RECORD.

The article follows:

JOHN W. SLEDGE

(By Bill Humphries)

Both as a tobacco farmer and as president of the 160,000-members North Carolina Farm Bureau Federation, John W. Sledge is vitally interested in tobacco. And when he speaks out on the issues affecting tobacco, people listen—including USDA officials and Congressmen.

From its beginnings at Greenville in 1936, the N.C. Farm Bureau has been a strong backer of the tobacco quota and price support program and has provided major input into decisions affecting the evolution of the program over the years.

Sledge, 54, accurately describes himself as "a product of the soil." He also is a skilled administrator and an articulate spokesman for tobacco farmers as well as for producers of other commodities.

"The main thing we've got to do regarding tobacco," he believes, "is to keep ourselves informed.

"We must be vigilant about the problems that come along. We in the producing community, as well as in the total tobacco industry, should make every effort to stand together and work together to ward off anti-tobacco attacks."

Farmers in North Carolina will be producing tobacco for many years to come, says Sledge, and for that reason Farm Bureau "must be in position to try to sustain the the commodity in the most favorable position for those who grow it."

When the "four-leaf" program was being developed by USDA in an effort to reduce the heavy flow of downstalk priming and and nondescript grades into loan stocks, Sledge said the members of his organization had mixed emotions about the plan. For many farmers there was little or no economic incentive to participate. Yet there was a feeling that the entire support program was in jeopardy and some type of adjustment was inevitable.

"We felt it would be easier to accept the four-leaf plan than, say, changes in the support formula which could have been much more far-reaching," he said.

After the experience of the 1978 season, Sledge still has mixed feelings about the four-leaf plan.

"The concept is good," he said. "The real problem in 1978 was the 20 percent overplanting tolerance for those who participated. We took a strong stand on this and said the tolerance ought to be more like 10 percent.

"I think everybody in the industry will tell you now we were right."

He hopes a consensus will be reached that the overplanting tolerance should be reduced to the 10 to 12 percent range for the 1979 season.

"Even though there are questions about the economics of the four-leaf plan, I think the bottom line is a plus for the tobacco program. Any time we can put forth the image that we're taking action to deal with our problems and keep our program on a sound basis, then we're much better off and better able to defend the program against its enemies," thinks Sledge.

As for the size of the 1979 quota, he said at presstime the figures clearly show there is no need for an increase—in fact, possibly some decreases—in the flue-cured tobacco supply during the coming year.

The most important thing: "We must avoid wide fluctuations in the quota level from year to year. Farmers can't make those kinds of adjustments very easily. We ought to stay on top of the supply-demand situation and limit annual changes in the quota,

either plus or minus, to something like five percent or so."

Sledge is concerned about the increase in U.S. imports of "scrap" tobacco. The crux of the problem, he says, is the definition of scrap.

"It used to be floor sweepings. Now it can be groundup good-quality foreign tobacco which competes directly with the tobaccos that we grow."

The U.S. duty rate on regular cigarette leaf is 45 cents a pound, but if such tobacco is shredded, the rate drops to 16.1 cents a pound.

"We'll continue to work on this problem until we find out exactly what the situation is," Sledge says.

What about the outlook for U.S. tobacco exports?

"I'm optimistic, even though many existing trade barriers hinder the movement of American tobacco into world markets," he says. "It's especially encouraging to note the tremendous increase in the value of manufactured products being exported.

"We've got to continue to raise the very best tobacco we know how to raise. This is an absolute must.

"Much has been said about the danger of pricing our tobacco out of the world market. Certainly people are going to buy qualities of tobacco based on price. But we have the quality. And as far as I can determine, we're not pricing ourselves out of the market. We've said this all along, even when others were saying our prices were too high and we should reduce the support formula.

"This past season, market prices generally stayed $15 to $20 above support rates. So actually, the support level is not a real factor as I see it."

As for the smuggling of cigarettes from North Carolina to high-tax states, Sledge said the cause of the problem is not that North Carolina has a low tax of two cents a pack, but that some other states have cigarette taxes exceeding 20 cents a pack. "They ought to recognize they are the ones causing the problem."

New legislation passed by Congress making cigarette smuggling a federal crime, while not an ideal solution, "may have been the best we could come out with at present—and hopefully it will do a little good."

How does Sledge see the future of tobacco?

"We are going to have tobacco as long as anybody presently living is still alive. People are going to be smoking, perhaps to about the extent they are now. We still are seeing some increase in total consumption.

"I really think the events of the past two or three years—some of the exercises we went through—have helped us. The continuing attacks on tobacco have brought the total industry together as never before.

"Tobacco means so much to individual farmers who produce it and to a state like North Carolina, which gets a third of its farm income from this one crop. If all of the cultivable land in North Carolina were planted in crops such as corn and soybeans, the returns still would not equal the returns from tobacco grown on much smaller acreage," he points out.

Will the support program survive? Sledge isn't sure but he's pleased that President Carter has given all-out endorsement to the program. Although the program has cost the government relatively little over four decades, and although government at all levels collects over $6 billion a year in taxes on tobacco products, there still are many people who oppose the program.

"What would happen if we suddenly woke up one morning and learned we no longer had a tobacco program? We in Farm Bureau have tried to address this question. We have some things in mind and hopefully we could implement them.

"It would take some consideration by Congress and would take a lot of money—but we believe some of the things we have in mind would enable us to continue some semblance of the present tobacco program."

A North Carolina trade delegation of 16 tobacco farmers went to England and Europe November 12-24 in an effort to improve sales of Tar Heel tobacco overseas. Sledge was one of the leaders of the delegation.

John William Sledge was born August 20, 1924, on a farm near Bunn, N.C., in Franklin County. While he was still an infant the family moved to a farm at Spring Hope in Nash County, where John grew up. He met Ludell Belflower of Oak City while both were teaching school at Spring Hope in the 1940s. They were married in 1947.

Since 1950 the Sledges have owned and operated a 260-acre farm at Oak City in Martin County. They produce about 12 acres of tobacco, using priming aids and bulk curing barns. Other crops are peanuts and corn. In two years they have developed a farrow-to-finish swine operation of more than 100 sows, in cooperation with a son-in-law, Russell Perkins.

John has one brother, George, who is associate dean of agriculture at the University of Wisconsin. He has four sisters: One is the wife of agronomist Dr. Philip Upchurch of the University of Arizona, two are residents of Raleigh, and the fourth, Joyce, is married to William Griffin of Pollocksville, a leading eastern North Carolina farmer.

John and Ludell Sledge have three daughters. The oldest, Johnsie Lou Perkins, is dean of continuing education at Martin Community College. A second Valeta, who attended N.C. State University and completed a medical technology course at Bowman Gray School of Medicine, Wake Forest University, is married to Dr. Jack Pittman and they live at Roanoke, Va. The third, Nancy, is a student at East Carolina University, Greenville.

John attended Momeyer and Spring Hope schools and Louisburg College. Very active in the Baptist church, first at Momeyer and since 1950 at Oak City, he has served continuously since the age of 16 as either a Sunday school teacher or superintendent, and since the age of 21 as a deacon.

A former director and former president of Martin County Farm Bureau, he served as vice president and member of the North Carolina Farm Bureau until 1970, when he was appointed administrative assistant to President B.C. Mangum. When Mangum retired late in 1974, Sledge was elected to succeed him as president of the federation and all its affiliates.

In 1978 he was elected to the board of the American Farm Bureau Federation. He is a director of Southern Farm Bureau Life Insurance Company.

Sledge has held many positions of responsibility in Martin County. Without opposition he was elected to two terms as a member of the Board of County Commissioners.

He has served at various times as chairman of the State Committee on Vocational Agricultural Education, president of Coastal Plain Development Association, co-chairman of National Farm-City Week in North Carolina, lieutenant governor of Roanoke Ruritan District. He serves on several foundations at N.C. State University and is a member of the Dean's Advisory Committee for the School of Agriculture and Life Sciences. "We're very supportive of the land-grant university because it has meant so much to the farmers of North Carolina, particularly in research, extension and education," Sledge said.

John is 6 feet tall and weighs 155. How does he stay so slim? "I had good parents. Also, I always tell everybody I work real hard and get plenty of exercise and that helps." He and his wife have an apartment in Raleigh but try to get to the farm in Oak City most weekends.

Hobbies? "I don't have a lot of hobbies like hunting and fishing. People tell me I'm a workaholic."

"I'm a farmer at heart, and I look forward to going back to the farm and driving either nails or tractors. In Farm Bureau, our activities are expanding rapidly—in fact, nearly everything has doubled in size or scope in the past five years."

And that's the way John Sledge likes it. Summing up his attitude toward life in general, he says "I just like to see things moving on."●

NATIONAL ENERGY CONFERENCE

● Mr. BAKER. Mr. President, last weekend, February 2-4, the National Conference on Energy Advocacy and the Nuclear Option was held at the Mayflower Hotel. This conference was convened for the purpose of devising a strategy for the development and expansion of all domestic energy sources. It was attended by over 700 individuals.

Although there were several noteworthy speeches, two addresses were particularly insightful and significant. I ask that the texts of the speeches given by the distinguished junior Senator from Idaho (Mr. McCLURE), and the distinguished chairwoman of the NAACP National Board of Directors, Mrs. Margaret Bush Wilson, be printed in the RECORD.

The material follows:

NUCLEAR ENERGY: THE MORAL ISSUE

In the early days of nuclear power, the scare tactic was the threat of atomic power plants becoming atomic bombs. After that nonsense was discredited, the antinuclear types began the campaign about how deadly the radiation was that was emitted by these power plants. This, too, was thoroughly discredited, as was the subsequent scare campaign about how the cooling water discharges would boil our nation's rivers and lakes, destroying all fish and plant life. So, pre-1977, the nation was moving ahead with development of nuclear energy, despite the continuing propaganda efforts and guerilla attacks. But, then the anti-nuclear movement finally discovered a winning combination: (1) stop the breeder reactor program, using phony press releases concerning plutonium, (2) stop spent nuclear fuel reprocessing, while making vague threats about terrorists who somehow are immune to radiation, (3) create serious doubts as the the future availability of spent fuel storage facilities, and (4) cripple the opportunities for our domestic nuclear industry to survive through exports, using the threat of nuclear weapon proliferation while ignoring the reality that such prohibitions actually increase the threat of proliferaton.

I believe that we are all aware of the success that each of these tactics has enjoyed. But, why, we should ask ourselves, do the opponents of nuclear energy continue to successfully advance, even though the facts, data, evidence, and realities concerning nuclear energy discredit their positions? The answer, I believe, lies in Congress.

The proponents of nuclear energy have surrendered the moral issues involved, the opponents have wrapped themselves in the invisible emperor's cloak of righteousness. They have assumed the role of good, while casting the proponents as evil. The validity of this proposition can be demonstrated by talking with some of the men and women who support nuclear energy.

Even while disagreeing with the anti-nuclear crowd, they still ascribe to them pure and sincere motives. They are just "misguided idealists", trying to save mankind, even though they do not have all their facts

straight. The supporters, on the other hand, are imagined as being concerned with "only" such self-serving worries as jobs and profits. It is time that the record be set straight. This battle for the survival of nuclear energy cannot be won while conceding the moral position to the opposition.

It is indeed ironic that the moral defense offered for the American nuclear energy program comes from a Russian. Of course, he is no ordinary Russian. He is Andrei Sakharov, a Nobel Peace Prize winner in 1975 and prominent advocate of international disarmament, including the banning of nuclear weapons.

Doctor Sakharov has summarized the issue perfectly, regarding the development of nuclear energy. In his own words, "It is not just a question of comfort or maintaining what is called "the quality of life". It is a more important question—an issue of economic and political independence, of maintaining freedom for your children and your grandchildren."

And that is the decision before us today. Will the United States and its allies have the nuclear energy required during the decades ahead for national independence and military defense, or will we continue our disastrous increasing dependence on outside energy sources?

Continued American independence on Middle East oil does not benefit us or the Arabs or our other allies. It serves the best interest of only one nation—the Soviet Union. Reducing this dependence is essential if we are to maintain our ability to discourage Soviet aggression, not to mention preventing further decay of our dollar and our national economy.

The battle lines have been clearly drawn: breeder reactors, the Barnwell reprocessing plant, nuclear exports, and spent nuclear fuel storage. It is disgraceful, though, that there are those who support the nuclear program, but who still believe that you can negotiate with the opponents of nuclear energy.

Clinch River and Barnwell are not the real targets. The final solution to the nuclear energy problem is, in their eyes, the complete cessation of construction of light water reactors, to be followed by the dismantling of the existing LWR's. The opponents of nuclear energy do not hide this goal. It is there for anyone who does not refuse to face reality. There is, for them, no compromise, short of total destruction of the nation's nuclear energy program.

This anti-nuclear attitude is quite prevalent on Capitol Hill. One Senate staff member, who works on nuclear energy was overheard to say that he "wished they could put wheels on it", referring to a nuclear power plant operating in his home state, and "push it out of the state." Another staff member, working on the House side and holding a senior position on a committee exercising jurisdiction over energy, was quoted as saying that Amory Lovins is "his guru." For those of you who may not be familiar with Mr. Lovins' work—and I strongly suggest you quickly become familiar with it—his position on nuclear energy is quite compatible with Ralph Nader's: in other words, nuclear energy might be preferable to bubonic plague, but not by much.

These individuals, though, have one major advantage over the supporters of nuclear energy: they are embarked on a quasi-religious crusade to rid mankind of the imagined horrors of the atom. This provides a strong moral position, which can easily override the factual arguments and logical presentations of nuclear energy supporters, unless they too believe that their position is morally correct. The supporter of nuclear energy must truly believe that nuclear energy is a moral necessity for mankind and that, without it, future generations will sink even deeper into poverty and, eventually, dictatorship. Shortages of energy will result in shortages of jobs, housing, and food. And, shortages of necessities—even when caused by government action—always result in increased government controls. And, increased government controls will always lead to increased shortages. And, the tragic culmination of such a chain of events is war, as those who are without seek to take from those who have.

Dr. Sakharov understands very well the true nature of the battle over nuclear energy. The question in Congress today is, "Do the supporters of nuclear energy share his understanding?" If they do not, but continue to concede the moral issue to their opponents, then it is only a matter of time before the Congress joins the Administration in performing the final rites over our nuclear energy program.

One American organization which also clearly understands the nature of the battle over energy versus anti-energy is the NAACP. As they so accurately stated in their message of December, 1977, referring to the President's energy plan, "We cannot accept the notion that our people are best served by a policy based upon the inevitability of energy shortages and the need for government to allocate an ever diminishing supply among competing interests."

The NAACP strongly believes that nuclear power is vital for the expansion of our economy. Their concern about the plan was specifically described as "(It) seems to call for a retreat from nuclear energy on the basis that the environmental and safety costs may be too high."

The NAACP disagrees with that pessimistic criticism, as I do. The NAACP believes that the problems posed by nuclear power "can be solved through the dedicated efforts by government, the scientific community and industry working cooperatively together."

I share their positive approach to the need for nuclear energy, as a means to provide the jobs and improve the quality of life desired by all reasonable Americans.

When you debate the issue of nuclear energy, you are actually debating the issue of growth. Growth will be the key issue for the remainder of this century, and it is the resolution of that issue which will determine the lifestyles of most Americans for generations to come. To fully understand the implications of this debate, it is useful to take a look at who the opponents of growth are.

Tom Wolfe has called them the "me generation", and Herman Kahn terms them "the new class". They often call themselves consumerists or environmentalists. Whatever label is used, however, what this group represents is an affluent, politically active, college-educated minority whose influence is far out of proportion to its numbers. This is partly because the members of this group often occupy key positions in the media and in federal agencies through which they can act on their beliefs and publicize them.

What then are they looking to do? First and foremost, the advocates of this "new class" philosophy want to limit economic growth. In a sense this is ironic, as they are the beneficiaries of the growth which has taken place to date. Having reaped the benefits of an expansionary economy, though, they are beginning to question the merit of further expansion. This is because they see such expansion as infringing on their ability to enjoy the material benefits they have been able to acquire. Perhaps I can draw an example which will make this more clear. If, for example, I, as a member of this group have been able to purchase a fast, sleek sports car in which I can experience the joys of motoring, I might not want to see too many more such automobiles on the road, because then there would be a traffic jam which would limit my capacity to enjoy the machine. If I have a cabin on a lake in the woods, I might not want to see others build in my area because they might infringe on my privacy. If I have a home in a comfortable neighborhood, with good schools, I might not want to see further development in my area so that the schools will remain uncrowded. The point is, of course, that one of the characteristics of this "new class" is to want to limit growth so that no one else's enjoyment of the goods of society will infringe on their own.

Hypocritically, the members of this new class choose to couch their selfish desires to limit the amount of goods and services available to the population in moral terms, speaking of husbanding scarce resources and preserving the environment, but this is really a smokescreen. Unfortunately, the smokescreen seems to be working and all too many people believe what they are saying.

Another characteristic of this new class is that while they give lip service to the concept of democracy they actually hold it in contempt. Nowhere was this more dramatically demonstrated than in the instance of the California initiatives related to a nuclear moratorium. The citizens of California voted, by a margin of more than two-to-one against such a moratorium, and yet the State bureaucrats turned around and imposed one anyway. So much for the popular will.

You see, these people honestly believe that they know better than the rest of society. They see themselves as more insightful, intelligent, and perceptive than the rest of the population, and feel that this gives them the right to impose their standards and values on the rest of society—for its own good. What would this value system entail?

On the surface, what new class is advocating is a return to a simpler, less hectic existence. On the surface, at least, it is certainly attractive. It is a pastoral vision, out of late 19th century England, with every man a country squire. The only problem is that during this period every man was not a squire, and their vision bears no resemblance to what the society they advocate would really be like.

What their society, which they term a stable economy, would resemble, would be more akin to the feudal era than to the last period of the industrial revolution. The reason is that an economy which does not grow makes no allowance for upward mobility. Of necessity, it would result in the creation of a permanent underclass. Were it imposed on our economy, those who were only just attaining the American dream would be the ones condemned to that fate.

How then, does the concept of a stagnant economic system relate to the question of energy advocacy? The answer simply is that economic growth has been inextricably linked to the growth of the supply of energy throughout history. The advocates of the stable state economy realize that if they can control the supply of energy, they can control the rate at which an economy is to grow. Energy is the one crucial variable in any economic system. You see, no matter what the cost of energy, a way can be found to pay for it. This lesson has been well learned in both Europe and Japan, both of which experience far higher energy costs than does the United States. In the case of both of these nations, adjustments have been made, and methods of conservation have been instituted.

On the other hand, if energy is not available, nothing can make up for its absence. For this reason, control of the supply of energy is tantamount to control of the economy. This, in turn, would give the Federal Government an unprecedented ability to control individual lifestyles.

The concept of controlling the behavior of the energy-using population, or for controlling behavior generally, is found throughout the actions proposed by the new class.

The key lies in their attitude. As I mentioned earlier, they believe that they know

better than the rest of the population, and that their superior knowledge gives them the right to impose their standards, values, and lifestyles on the rest of the population regardless of the wishes of that population. After all, it's for their own good.

This relentless onslaught seems to be progressing on all fronts. Virtually every energy option is under attack. First, nuclear plants came under fire as the harbingers of doom. With their usual restraint and recourse to reason, opponents of the atom claimed that anyone advocating nuclear power or connected with it in any fashion was committing random, willful murder. Shortly thereafter, coal came under attack. Persons advocating coal as a fuel were polluters of the environment, who were going to raise the earth's CO_2 level to the point that the polar icecaps were going to melt. There was always, of course, the benign source of electricity, hydroelectric power. The only trouble with that is there always seems to be an endangered species somewhere near the site of a proposed dam, and no matter how far along the project is, the Endangered Species Act seems to be able to stop it.

Solar energy seems to be acceptable, until you start talking about providing it in large amounts. Then, problems with capital costs and land use seem to arise. The one common factor behind the opposition to a particular energy form seems to be that as long as it remains unfeasible, or in the planning stage, it is all right, but the moment it seems that the option may become practical, it is met with opposition.

On the surface, the picture seems bleak, but there is some good news and some bad news. The bad news is that at present, the opponents of a secure energy future seem to have the initiative. The good news is that you assembled in this room can take that initiative away from them, and just by being here you have taken a giant step in that direction. You have a number of advantages on which you can capitalize. First, the public is really on your side. Virtually every poll taken regarding energy attitudes has demonstrated that, on balance, most Americans favor the development of all energy options, whether they be coal, nuclear, or what have you. This gives you a tremendous edge.

Secondly, the facts are on your side. The opponents of the development of our domestic energy supplies have relied for too long on rhetoric and emotion to convey their message. They simply do not have their facts straight. For the most part, their inaccuracies are so blatant that even the unsophisticated observer can see through them when they are challenged by accurate data.

A third point in your favor is that the American public is basically optimistic. People want to believe that we can solve our problems, and are rapidly tiring of the harbingers of doom who seem to see disaster in every action.

The most important thing to remember is to speak out. The only reason for the current advantage enjoyed by the advocates of the new class philosophy is that too many of us have been complacent. We have stood by and let the other fellow do it. For most of you in this room this is not the case, as you have already been involved in advocacy in some fashion, but that is not enough. Now is the time for you to go out and get your friends, neighbors, co-workers, and others who agree with you to add their voices to the debate. A day should not go by, in which you do not encourage someone to pitch in. You may be surprised to find out just how willing many people will be to help.

Finally, don't let yourself be intimidated by the other side. They love to make statements they don't have to back up. Make them back them up. They love to use figures which have no basis. Challenge them. They love to talk about energy options which will be available in the middle of the next century. Make them talk about the middle of the next decade. If you do this they will quickly be shown up for the frauds that they are.

Most of all, keep heart. It is easy, especially when you are beginning an advocate group, to get the feeling that you are all alone, the sense that somehow you are the odd one on the block. This can be depressing. But if you will stop for a minute, and look around this room, you will see that this is not the case. Everyone in this room is united by a common belief in the development of our domestic resources. Some of you work in the industry, some of you are students, some of you are just interested citizens, but you do share that common bond. You are not alone. Rather, you are the people of vision, and the hope of our nation. For it is your foresight which will insure that our children and grandchildren will continue to enjoy the standard of living and personal freedom which our economic system has created.

FLOATING IN A SEA OF CIRCUMSTANCE

It was only a year ago that a few of us within the NAACP were undergoing a very sound baptism in fire as a result of what some critics felt was our meddling in energy. The energy field, we were scolded, was supposed to have been a highly specialized domain beyond the province of civil rights organizations. We were challenged to prove that minorities, the poor and other socially oriented groups had a vested interest in energy other than paying for heating fuel or gasoline.

Needless to say, the experience was a profound education for persons such as myself about the immense responsibilities of leadership. And, as we seek to confront the economic and social challenges ahead, it is ever more incumbent upon all of us to look seriously at the type of leadership that is required to steer this great nation through the many shoals and barrier reefs that lie hidden beneath the surface of prosperity.

It was partly for these reasons that we welcomed the great awakening that occurred a year ago over the universal implications of a national energy policy. The very fact that the Carter Administration could have prepared an energy plan for the nation without first seeking the views and hearing the concerns of minorities was further, disturbing evidence of the depth of governmental insensitivity to the needs of some segments of society.

Somehow, there are still many Americans who find it incomprehensible that the mere enactment of civil rights laws does not of itself constitute freedom or fulfillment of the civil rights dream. To have a dream is the first step toward full social justice.

But to fulfill that dream, we must have a strategy and a task. The civil rights laws resents is an affluent, politically active, colstruggle for civil rights and equal social justice. These laws not only provide for the protection of individual rights for every American, but they also established mechanisms for the implementation of social and economic goals.

How then do we pursue our task, the fulfillment of our dreams and goals.

Historically, a primary function of the NAACP has been to help shape governmental policy in both the executive and legislative branches. In this regard, we welcomed the subsequent flexibility and resolve that President Carter showed by utilizing the full weight of his office in getting the energy package through Congress last year.

No doubt, you are well aware of the extensive imperfections contained in those bills. But, there are considerable benefits as well. We are confident that, among other things, natural gas producers and industrial users of this energy source welcome the end to the uncertainty over national pricing policy. Furthermore, there is every indication that Midwestern workers will not have to endure the costly layoffs this winter that they experienced in the past as a result of restrictions on natural gas usage by industries.

In fact, the supply picture has improved to such an extent that Energy Secretary Schlesinger is now encouraging industry to use up the present surplus of natural gas as an alternative to higher priced oil. At the same time, the Mexicans and Canadians are burning off their natural gas because prices in the United States are lower than what they are demanding for their product.

Clearly, there is now some chaos resulting from residual pricing imbalances that have led to a wasteful surplus of natural gas in some areas.

While we welcome the abundance of this precious resource, therefore, we must at the same time strongly deplore the lack of planning at home and abroad that is still evident in segments of the energy industry. Too often, as we have seen, especially in recent years, there is little rational relationship between supply, demand and prices. Much of this problem stems from the fact that the U.S. does not have control over many crucial factors involved in supply and pricing.

We are well aware as well that free market forces hardly apply anymore to energy prices. At work, instead, is an archaic system of regulations that are rapidly crumbling by their own weight and the unpredictable nature of forces and developments abroad. Furthermore, the U.S. has for so long been complacent about developing new energy sources that it is now almost at the mercy of fate.

Let us be on guard, therefore, that this temporary surplus in natural gas will not lull us back into complacency. Indeed, we actually doubt that the nation will relax its concern to the extent that it did in the period preceding the 1973 Mideast oil boycott. For one thing is certain. The U.S. has reached the limits of its energy expansion ability. Cutbacks must soon be made in production here at home in natural gas supply.

There is the danger, however, in the rush to counter the recent 14½ percent price increase imposed by the Organization of Petroleum Exporting Countries and to meet the challenges posed by disrupted Iranian oil supplies as well as dwindling supplies here at home, that our national government will pursue policies that over the long run are counterproductive.

So, as the NAACP has been doing for well over a year, we are once more urging the Carter Administration to seek the views and hear the concerns of the most vulnerable segments of the population—minorities, the poor and the aged. We are encouraged by the knowledge that many leaders within the industry recognize the problem and are working along with NAACP units in various regions, such as New England, to devise appropriate proposals and strategies for easing the severe economic burdens that are presently being experienced by some groups. Furthermore, these burdens are certain to increase.

Because the NAACP perceived this danger, its policy statement opposed the oil equalization tax as an unwanted burden on the poor. It is to be expected that the Association will continue to oppose any move to increase oil prices appreciably until, and unless such steps also include provisions to lessen the impact on the poor and lower income groups.

The inability of a large number of the NAACP's constituents to bear the high costs of energy is a very real concern to all of us. Nevertheless, considerable pressure is being placed on President Carter to abandon controls almost indiscriminately, with little or no regard for the poor.

We understand that President Carter will be submitting his Energy Plan II to Congress in April. While the first plan dealt with such

specifics as energy availability, pricing, environmental impact, and conservation, Plan II, we understand, will be more concerned with broad national policy. It will pose such questions as the government's role and responsibility for providing subsidies for developing cleaner coal products and for the development of geothermal energy sources, among others.

The questions of energy supply and availability were dealt with in the NAACP's first energy statement. The central thrust of the NAACP's policy is that the national government must be made to lead in ensuring that the country develops abundant, affordable energy supplies that will promote vigorous economic growth.

We continue to stand fully behind that statement. Furthermore, future NAACP energy statements, we are sure, will continue to pursue these issues as well as questions relevant to Plan II.

At the same time, however, let us guard against the misconception that it is only the disadvantaged who will be hurt by sharply rising oil prices. For we are well aware that in such regions as New England, which has its own peculiar supply problems, heating fuel oil companies are equally victims of price instability.

If the customers of fuel oil companies cannot pay their bills, companies have found, they too suffer serious financial losses. Consequently, these companies began pushing Congress last year to pass a $200 million fuel subsidy bill for the poor.

We are also aware that the unstable world oil price situation is one of the primary factors behind the U.S. inflation problem, which last year was more than 9 percent. The 1978 deficit was also a whopping $28.45 billion, even though we imported $3 billion less in oil. But the reality still is that the least able to pay are required to make the greatest sacrifices.

Industry's role in helping to devise solutions to many of these critical problems is well documented. We know that, despite a persisting image of corporate unconcern for social problems, there are many leaders in industry who are genuinely aware of the immense urban and human problems around them.

From our cities to many rural areas, the extensive evidence of poverty is real. Indeed, since the sixties, we have been focusing on the glaring poverty and extensive decay that are destroying the big cities and many smaller ones. These problems have not only gotten worse as cities find themselves increasingly in financial trouble because of a shrinking tax base; but they are also now spreading into many suburban areas. They are more and more finding it impossible to pay for services from their limited resources.

The major problems, however, abound in older cities such as New York, Newark, Pittsburgh and my own hometown, St. Louis.

Because the cities are so close to us, our focus has naturally been on these areas. Indeed, the majority of the nation's black citizens live in urban centers outside the South.

In a recent article, however, The Wall Street Journal reminded us that deep poverty also exists in the South. "Economically," the article said, "the South has risen again; Sun Belt prosperity is radiating through Southern cities and putting many an entrepreneur into the comfortable upper middle class. But the South is distinguished also by a disproportionate proportion of dirt-poor people like Mrs. Wilson—that is, Mrs. Helen Wilson of Mashulaville, Mississippi.

The article proceeded to report that: "The Southern Regional Council's Task Force on Southern Rural Development says the South has about 25% of the nation's land, 33% of the nation's population and 45% of its poor people—some 10 million persons. It is color blind; blacks and whites share deprivation, hunger, malnutrition and chronic illness."

Our main reason for giving this reminder on rural poverty is to note that, yes, America is a land of prosperity. But we must never forget that there are a great many citizens who have not yet bridged the gap between stark deprivation and simple comforts.

So, not only the government, but industries as well are challenged to multiply their efforts to solve these problems. The energy industry, especially, should regard these challenges as new frontiers of opportunity for the development of a variety of energy sources.

The NAACP will continue to seek the support of industry in the search for meaningful and lasting solutions to these grave social and economic problems. A serious concern for industry in recent years has been the growth of the regulatory bureaucracy. This monster—for that is what it often is—has gone well beyond its mandate for protecting the public in too many areas.

So much so, that, many times, instead of serving the public, the regulatory bureaucracy hamstrings it. Quite often, we have seen, regulations function more for the protection of the bureaucracy. They needlessly delay construction plans. They impose many burdensome costs that are non-productive. Consequently, they restrict job opportunities and add to inflation.

The Carter Administration in recent months has given some indication that it is aware of this problem. Repeatedly, the airline industry is held up as a shining example. A reduction of some regulations here has led to welcomed price reductions and permitted a number of inducements for people to fly more.

The trucking industry is also receiving some attention. We trust that the result will be increasing competition and reduced operating costs.

Regulations affecting other key industries serving masses of people also need to be reviewed.

At the same time, let us also stress the grave need for the private sector to increase its implementation of affirmative action programs. We are aware of the dearth of black engineers, scientists, nuclear physicists and other experts in technology. The majority of black college graduates historically have been, and continue to be, in the softer professional fields, especially teaching and religion. Few are in economics, accounting and other business-related fields.

Yet, there are areas where better job opportunities abound. Last year, I had the pleasure of addressing a group of specially selected students from black colleges in a seminar that was sponsored by Citibank. These students were being prepared to work in business and areas such as the banking sector.

The program was an enlightening experience. For it demonstrated so well that when an industry is seriously interested in hiring and promoting minorities, it can find the means to do so.

But not only must the energy industry recruit and train promising minority candidates for middle and management level positions, it must also aggressively recruit the many who are already qualified. In the future, as even more federal dollars are invested in developing new energy sources, it will be all the more incumbent upon these industries to provide greater job opportunities for minorities.

Also upon us at this time is the question of how best to foster mutually beneficial arrangements with Mexico for the development of its extensive oil resources. America's historical neglect of the economic and social needs and interests of its lesser developed neighbors to the South is well known.

Partly as a result of this lack of interest in the past, and exploitation, there is throughout South America and the Caribbean extensive suspicions, if not outright hostility in several areas toward the U.S.

The United States, therefore, must take care that it does not repeat old mistakes. One looming trap relates to this country's needs for immediate replacements for Iranian oil. At the same time, Mexico is well aware that its new oil will greatly accelerate its economic and social development.

But at how fast a pace.

Mexican leaders are very leary of seeing their country turned into another Iran. Pressed to use up its immense oil riches, Iran, under the Shah, embarked on an unbridled path of modernization. Billions of dollars were spent on ultra modern weapons and construction.

However, the masses of the people received little benefit. They were encouraged and pushed into modernization to such an extent that they felt their religious and social customs were being destroyed. Given the long-seething hostility toward the Americanization of Iran, it really boggles the mind that United States intelligence did not detect this developing volcano.

Added to that hostility, of course, was the astronomical inflation that racked the nation. Iran was simply not able to absorb its immense wealth in the short time it was allowed. Consequently, prices spiralled; corruption increased; the people revolted, and the government collapsed.

These are the dangers that Mexico sees and fears. The manner in which the U.S. deals with the Mexican immigration problem will also require care and consummate diplomatic skills.

According to published reports, Mr. Carter has been fully briefed in a Presidential Review Memorandum 41 about the situation along the 1,933 mile border with Mexico. The Washington Post story on this document was helpfully candid. It said, "Perhaps never before in peacetime has a U.S. foreign policy decision reached so deeply into the lives, livelihoods and neighborhoods of Americans as this one will reach into Mex-America."

MexAmerica, we must explain, is the term being used to describe what is regarded as a hybrid, unique nation within a nation. It is made up of California, Texas, New Mexico, Arizona and Colorado. More than 7 million Mexicans live legally in the area, and there are many millions more living there illegally.

The Carter Administration clearly recognizes Mexico's concerns about the treatment of its citizens who are in this country to work. At the same time, the president and his advisers are giving the Mexican oil connection high priority.

It seems clear, that the administration has accepted the idea of bartering oil for free access to the U.S. job market by the hordes of Mexican unemployed.

Historically, the United States has welcomed immigrants from other lands. We see no reason why this receptivity and welcome should be withdrawn for the Mexicans.

There are, however, several significant differences between the manner in which the bulk of Mexicans are illegally entering the U.S. and the way other immigrants continue to be settled here. It is to be expected that any unrestricted entry by foreign nationals will have a severe, even adverse impact on the job market for Americans who depend on the types of low income work that the newcomers seek.

We sincerely hope, therefore, that in its negotiations with the Mexican government, Mr. Carter ensures that the internal development of our southern neighbor is also a priority discussion item. For it is only by assisting Mexico to develop can we hope to help that nation respond to its own internal social problems.

We live in a rapidly changing world, which,

in these times of profound social and economic upheavals, test our will to survive in ways unknown to earlier generations. The American economic system is increasingly showing signs of the strain.

Its inadequacies are glaring. The boom-recession cycles are recurring with troubling frequency. At the same time, hardcore social problems intensify. What are the answers?

As in the past periods of crisis, the fundamental difference between success and failure has been leadership. We have had our George Washington, Abraham Lincoln, Franklin Delano Roosevelt, John Kennedy and Lyndon Baines Johnson. Leaders are made by events. Without a doubt, President Carter's challenge today is the economy. Irrevocably, the foundations of the American economic system are changing. The question of how well, and how smoothly will depend on how perceptive, wise and bold Mr. Carter is.

In discussing the Carter Budget priorities recently, Congressman Barber Conable, ranking Republican on the Ways and Means Committee, observed that, "We float in a sea of circumstances."

Whether we simply drift or are purposefully steered to new and solid foundations is the challenge for America's leaders.●

S. 210—LEGISLATION TO CREATE A DEPARTMENT OF EDUCATION

● Mr. CHILES. Mr. President, I am pleased to be counted among the original cosponsors of S. 210, the bill to create a separate, Cabinet-level Department of Education. This week the Governmental Affairs Committee will be holding hearings on the measure. State and local representatives of government and school boards will be testifying on the bill, as well as national associations of colleges and universities, spokesmen for black organizations, and administration officials. In conjunction with the extensive hearings the 95th Congress held on the issue, this testimony evidences the widespread input we have received and utilized in planning for a Department of Education.

The need for this legislation is clear. Expenditures for the Education Division of the Department of HEW have risen from $8.7 billion in 1977 to an appropriation of $12 billion for fiscal year 1979. In elementary and secondary programs alone, we have appropriated almost $3.5 billion for fiscal year 1979. Federal aid to education programs for the disadvantaged will be 1½ times the 1977 allocation in 1979 and funding of handicapped education programs will have nearly tripled within the same period.

When we look at these figures by themselves, it becomes evident we have made a real commitment to providing every child—including the disadvantaged, the handicapped, the gifted, and the child who has not mastered English—a free, public education.

When we examine these figures in light of the Department of HEW's total spending of about $162 billion in 1978, we see the impossibility of maximizing usage of Federal education dollars without a separate agency to administer these programs, as well as the numerous other education programs scattered throughout 20 other Federal agencies. And if the $12 billion we are going to spend this year for education looks too small in comparison with the total budget for HEW's 300 programs to merit a Cabinet-level department, we should remind ourselves that we are spending more for the Education Division than for five other Cabinet-level agencies.

The 95th Congress put a good deal of hard work and positive effort into the drafting and consideration of a Department of Education bill. Hearings brought together a broad range of individuals and groups committed to improving the quality of education in this country. The issues were debated and discussed, and the consensus which emerged was that there is strong grassroots support, as well as enthusiasm by the educational community, for the creation of a separate Education Department at the Federal level.

The Senate-passed version of the bill reflected the views we heard from parents, teachers, students, school administrators, the handicapped, the poor, and others who are working with or benefiting from Federal education programs. Rather than lumping together every single education-related program, we listened to those who sincerely felt a particular program could best be administered by the agency currently operating it.

For example, the transfer of the Headstart program was opposed by many groups who work with or benefit from these comprehensive services to preschool children. There was widespread fear that putting the program in an education-oriented agency would undermine the progress that has been made toward integrating health and other social services in the readiness program. Even though our original intent in incorporating Headstart in the new Department was not to make it an exclusively educational program, nor to undercut the effective delivery of a wide range of services to preschoolers and their families, we heeded the wishes of Headstart parents and administrators and withdrew the program from the legislation.

The same is true of child nutrition programs. The agricultural community and supervisors of school lunch and breakfast programs let us know their feelings that these activities are best administered by the Department of Agriculture. They saw serious obstacles ahead if the commodities program was to be split off from the rest of child nutrition programs. Again their objections were heeded by retaining these programs under the Agriculture Department's jurisdiction.

The original proposal to transfer the operation of the Bureau of Indian Affairs schools, which serve more than 50,000 Indian children, caused a great deal of controversy. I heard from native Americans in my State who were concerned that opportunities to serve Indian children would be sharply decreased. The new Department of Education legislation reflects the wishes of native Americans and leaves administration of Indian education programs with the Bureau of Indian Affairs.

Each of the aforementioned areas of disagreement and their resolution demonstrates the point I am making: S. 210 is the product of many people—educators, legislators, parents, and specialists in education-related fields—putting their heads together to devise a plan and organizational structure that will give eduction the priority it deserves in this country. The concerns raised by proponents as well as opponents of the legislation have focused on this key question: How can we best serve the needs of students? I would suggest, Mr. President, that this is precisely where the debate should focus. Accordingly, I would strongly suggest that students are best served when the Federal bureaucracy has effectively consolidated its many varied programs in an orderly fashion.

I would strongly suggest that students are best served when effective coordination in education becomes a reality instead of a code word for no action.

I would strongly suggest that students are best served when at the Federal level we orient educational programs in such a manner so as to insure equal educational opportunities for all students and promote a close working relationship with local, State, and private institutions.

At the end of the process, I think we have reached a common understanding that the goal of creating a separate Department was not to undermine our tradition of State and local control of the public schools but to strengthen it, by providing more efficient, effective program administration, eliminating wasteful duplication and paperwork, and focusing on our national education needs and priorities.

The wisdom and guidance of the chairman of the Governmental Affairs Committee, the Senator from Connecticut (Mr. RIBICOFF) has been of particular importance to those who support this legislation. The Senate is indebted to him for his leadership on this issue.

Mr. President, educators as well as other interested persons around the country have a particular concern about our action on this legislation. Congressional commitment to education should at least equal our commitment to the environment, transportation, and energy as well as other legislative initiatives.

The Department of Education bill that has been introduced incorporates the knowledge and experience which was gained over the past two sessions of Congress. It goes even further to protect the rights of State, local, and private education agencies to direct the course of public education in this Nation. The American people are watching us closely to see if we will fulfill the promises we have made to bring about a more responsive, more effective, and more productive Government. I hope we will make good those commitments to streamline the bureaucracy, cut out waste and duplication, and target Federal spending efficiently by passing this legislation to reorganize our education programs.●

ADDRESS BY SENATOR GOLDWATER BEFORE THE AMERICAN INSTITUTE OF ASTRONAUTICS AND AERONAUTICS

● Mr. GOLDWATER. Mr. President, it certainly is not my desire to fill the RECORD with speeches I have made before

various groups. However, there are times when I make observations which I wish could be given a little wider circulation because they bear directly on the future of our freedoms and our country. Yesterday, I delivered a speech before the American Institute of Astronautics and Aeronautics raising the question of whether we have not begun to see the twilight of American greatness. Needless to say, my remarks received virtually no attention in the media; and I can only conclude that those who control the media do not share my concern over the future of our Nation or else they believe that the observations of a mere Republican in this day and age are not pertinent enough to be reported.

Whatever the cause, I ask to have my remarks before the AIAA printed in the RECORD.

The remarks follow:

SPEECH BY SENATOR BARRY M. GOLDWATER

At certain times of the day in the nation's capital, the sun strikes the Washington Monument in a way that casts a giant shadow in the direction of the Arlington National Cemetery. To me, this is symbolic and it reminds me of a giant hour glass showing that as the shadow lengthens, time is passing away. I say symbolic because I think of it in terms of our greatness as a nation and the shadows that are now being cast over that greatness and over our position as a leader of the free world. These lengthening shadows dimming and obscuring the honor and the respect and the strength which marked our nation's rise to the number one leader of the free world cause me to wonder if we haven't really already begun to see the twilight of our American destiny.

Here we sit at this early date in the year 1979 with serious questions rising in the minds of many, questions which squarely confront our nation. Will we remain free? Will we ever regain the power and the respect and the honor that we have allowed to dribble through our fingers by following policies of appeasement and timidity? And will we live to see the day when there is again openness and honesty in the dealings between our President and the other nations of the world and with our own people? I say these are questions which must be faced in all truth and while they cannot be answered at a meeting such as this, it is meetings like this repeated across the length and breadth of our country that can have the effect of bringing pressure on the Congress and the President to do something about the miserable and declining position which we now hold in this world.

My friends, a United States that is second in military strength to the Soviet Union cannot possibly guarantee its own future and its own survival let along that of friendly nation-states in other parts of the world. A vast Soviet superiority will enable the Russians to engage in a poker diplomacy which could give her the victory she seeks merely by American default.

Unless drastic steps are taken by the United States and other western powers, the Soviet Union will be able to achieve her aim of world domination without firing a shot or dropping a bomb or releasing a missile. She can achieve that frightening objective merely by the threat of overpowering military might combined with gunboat diplomacy and the use of proxy forces from Cuba and other Communist-controlled states.

So long as the Soviets have terrorist forces that they can train and equip, there is no need for them to soil their hands with the dirty work needed to reduce the West to a position of servitude.

Now, let me briefly run through the events contributing heavily to the trend which has given the Soviet Union the upper hand throughout the world. At the root of much of our troubles are negotiations which have taken place under the Carter Administration in almost complete secrecy—negotiations which have resulted in earth-shaking decisions being made quite evidently on the spur of the moment and without prolonged and mature deliberation.

There is the whole question of China and the precipitous, unilateral moves which President Carter made to curry favor with the communist regime in Peking. This was taken with no prior consultation with the United States Senate and may well have far-reaching and serious effects on the balance of power throughout the world. Let me give you just one possibility. How do we handle the situation if our former allies on Taiwan should suddenly cozy up to the Soviet Union, thereby enabling the Russians to establish a power base which we gave away?

The history of the Soviet expansion throughout the world has been one of moving quickly into power vacuums wherever they exist, and believe me, we created such a vacuum on Taiwan when the President unlawfully abrogated our defense treaty with that government. And who could blame the Taiwanese if they should now decide that the Soviets would make more dependable allies than the United States proved to be?

Remember the great fear of the Taiwanese is grounded in the possibility of an assault by Communist China. What better buffer could they erect to such a contingency than an alliance with the Soviet Union? But if none of this happens, let me say that our treatment of Taiwan, all by itself, has handed the Soviets a great advantage—not only in the Far East, but in every other area of the world where they compete with American influence. The Taiwan sellout was a measure of American expediency. It showed the world that our commitments to the defense of freedom are subject to readjustment and abrogation whenever it suits our government to dishonor them. This has had a disastrous effect on American prestige everywhere, especially in the Middle East and among the NATO allies.

Then there were those secret negotiations at Camp David followed by glowing promises of lasting peace in the Middle East—negotiations which were so secret and complex that we still don't have an accurate picture of what went on, what promises were made, how American commitments were employed. The only thing we do know is that much of what went on involved political window dressing which quickly disappeared when hard bargaining began and the entire operation is more and more beginning to look like a non-productive sham.

We also have negotiations going on in an attempt to reach a SALT II agreement with the Soviet Union. It seems every other week somebody in the Administration says that an agreement is only weeks or days or hours away. Then we wait and nothing happens. And I believe sincerely that it is because the Soviets detect in the Administration's attitude an eagerness that will permit them to take their demands for more concessions just one step further. Even before the talks became serious, we began giving away our hold cards. We jettisoned the B-1 bomber, decided not to produce the so-called neutron bomb, scaled down most of what we had planned to do with cruise missiles, closed our Minute Man III production line and delayed development of the Mobile M-X.

We were forewarned about the overthrow of the Afghanistan government, a move that could prove fatal to any use of the Indian Ocean we have to have. The information on a situation in Iran supplied to the President and his council by the C.I.A. was sufficient and adequate enough for anyone to understand that trouble was coming. This was not, and I repeat, this was not a lack of intelligence, this was a failure on the part of our policy makers to either understand plain English or to have refused to do so. Our position in this world is precarious and it seems that everyone in the world knows it but the President, his State Department and his other close advisors on foreign policy.

And while we were busily cancelling, cutting back and delaying our weapons development and double crossing our allies, what were the Soviets up to? I am indebted to author Joseph Churba for a rundown he gave on this trend in a recent article published in the Washington Star. He points out the following:

1. While the U.S. has developed one ICBM system since 1965, the U.S.S.R. has developed seven.

2. Soviet advances in MIRV (Multiple Reentry Vehicles) technology are rapidly overcoming whatever lead the United States previously had in quality and quantity of nuclear warheads.

3. The Soviets have invested heavily in additional submarine-launch ballistic missiles while the U.S. will not begin modernization of its Polaris-Poseidon force until 1980.

4. The Soviets are now deploying their supersonic bomber, the Backfire, which is capable of delivering weapons anywhere in the U.S. without refueling.

5. Soviets have more naval ships than the U.S. in every category except aircraft carriers and destroyers and more shore-based naval aircraft. They have many ship based anti-ship cruise missiles with both nuclear and conventional warheads. The U.S. is only beginning to deploy its first non-nuclear anti-ship missile.

In addition to all this, the Soviet Union has a tremendous lead in general purpose forces. They have a better than two to one ratio of armed forces and larger inventories of nearly every category of equipment.

And their military budget is believed to be 40 to 60 percent higher than that of the United States.

This massive military buildup is affecting American interests everywhere in the world. It threatens our freedom of the seas, our access to raw materials, our free alliances with great industrial democracies in Europe and the Pacific Basin because you must understand the Soviet Union is not engaged in strictly defensive military preparedness. In a recent White Paper, the British government concluded, and I believe correctly, that the Soviet military posture and building programs are offensive in character and cannot be explained by considerations of defense. And it is perfectly obvious that the Soviet Union is beginning to feel its oats—beginning to exercise its might—is using, threatening and deploying its military power to attain its policy goals.

As Mr. Eugene V. Rostow, Chairman of the Committee on the Present Danger, recently told the Foreign Policy Association, "The Soviet Union has moved forward since 1970 with increasing boldness in Asia, Africa, and the Middle East. Pressures of Soviet policies have been greater since 1970 than ever before. The agreements for peace in Indo-China were torn up in disregard. The Soviets supported aggressive and large scale war in Bangladesh, in the Middle East and in Africa. There has been an alarming slide towards chaos."

Mr. Rostow went on to point out that as things got worse, many writers and politicians kept telling us that they were getting better, that the cold war was over and that we were living in an age of detente, an age in which negotiations had replaced confrontation.

Now, I am sure I don't have to remind you that even when the U.S. enjoyed a clear strategic nuclear advantage, the Soviets were not deterred from erecting serious challenges

in the Cuban Missile Crisis and in the Middle East. If they were unafraid to challenge us from a position of inferiority, just think what they can do from their present position of superiority.

In view of Soviet military buildup—a buildup without equal in modern world history—it behooves us to look with great care at any SALT II agreement that is ultimately agreed to by the Carter Administration. Any further concessions on the part of the United States will be nothing short of total disaster. We are at the end of the string in the military sphere and the shadows which I mentioned at the beginning of my talk are indeed lengthening. We are certainly in the twilight of our military strength. The hour is late and the clock is ticking.

No speech of mine touching on our place in the world could possibly be complete without mentioning the disaster which struck our great and valued ally, Iran. And, here, I again fault the Carter Administration for a weak-kneed belated response to a crisis which deeply involved American material and strategic interests. When the Shah of Iran encountered his hour of greatest need, the United States was nowhere in sight. It is true, President Carter and his advisors gave weak lip service to the Shah and then quickly flip-flopped when things began to get rough.

And now they have recognized the new government without a single word of thanks to the Shah of Iran for all he has done to help this country with its energy needs and with the problem of erecting an effective buffer to the Soviet Union in the area of the Caspian Sea. What many Americans don't understand is that our stake in Iran is not confined to oil, it is also vital to our defense needs and to our requirements for adequate intelligence.

For example, it would be very difficult for the United States to verify Soviet compliances with the terms of any future SALT agreement without the valuable observation posts which we have heretofore been able to maintain in Iran.

Much of this adds up to deep trouble in the way the United States is perceived throughout the rest of the world. Everywhere we have failed miserably to propose the kind of policy and the kind of action that once won us the honor and the respect of other nations.

Our whole stupid attitude in Rhodesia and South Africa has made us, together with the British, a diplomatic laughing stock and our efforts have done nothing but strengthen the hands of those who are out to grind axes for the Soviet Union. In the Indian Ocean, in my opinion, the greatest strategic point in the world, we have dillied and dallied and we have yet to finish our desperately needed air base and naval shelter on Diego Garcia. And we stood by helplessly and watched the communists overthrow Afghanistan, thereby guaranteeing the Soviets a route to the Indian Ocean and eventual domination of the Straits of Malacca in a move that could close off the oil lines to the Pacific.

Even in its implementation of the finest facet of President Carter's foreign policy—the insistence on human rights—the Administration has managed to present the world with a picture deeply flawed by favoritism and expediency. The President came into office with a firm dedication to human rights but as things progressed, the world began to understand that this policy was to be applied selectively and with little regard for actual examples of mass repression and trampling of human rights.

In other words, the Administration's insistence on human rights has little to do with reality. For example, throughout the entire negotiations on Chinese recognition, there was no mention ever of Mainland China's miserable, murder-strewn record in this regard. The President who finds so much to complain about in other areas of the world apparently saw nothing wrong in recognizing a communist regime that has killed more people in its short history of control over the teeming millions of that great country than any other collection of dictators or tyrants in the history of the world.

And apparently, the President and his advisors see nothing wrong in the way the Cubans continue to mistreat their people. In fact, I am the first to admit that the President has a laudable policy but he has made a total mockery of it and it has done nothing about restoring the world's faith in America as a nation dedicated to human rights.

In conclusion, let me say that I believe it is much later than we think. The clock on the wall of the Oval Office is ticking away but President Carter does not seem to understand. He does not seem to recognize that our prestige and our strength and our future are slipping away as the Soviet military juggernaut builds ever greater and begins to roll. He does not seem to understand that words and gestures will not take the place of fighting planes and fighting ships and other weapons needed to lend credibility and authority to American policies. He does not seem to understand that even if we had enough power to be arrogant about, there is great doubt throughout the world over whether we would have the will to make effective use of that power in the cause of freedom. I wish sincerely that I could bring you a happier more optimistic message here today. But the facts as I see them are pretty grim and the stakes are as important as our very survival.●

THE LIMITS OF SOVIET INFLUENCE IN AFRICA

● Mr. TSONGAS. Mr. President, one hears, these days, a great deal about Soviet expansionism in Africa. Experts point to the large number of Cuban troops on the continent and speak solemnly of our "defeat" in Angola. One gets the impression from these observations that Soviet influence has swept over the continent without difficulty.

That portrait of Soviet power completely ignores, however, the needs and interests of Africans themselves. The Soviet role in Africa is severely constrained by what Africa states need and what the Soviets have to offer. At times, these two factors have coincided; quite often they have not. The record of Soviet exploits in Africa is therefore a mixture of limited success and frequent failure.

Mr. President, Africans are well versed in the narrow limits of Soviet power and a recent editorial in the Daily News of Nigeria illustrates their point of view clearly.

I ask that the article entitled "From the Daily News of Nigeria", as it appeared in the Washington Post on February 2, 1978, be printed in the RECORD.

EDITORIAL

The situation in Africa at the present time is such that the Soviet Union is losing out to the Americans, not so much because African countries detest socialism, as because the Soviet Union is unwilling to, or incapable of, providing more economic than military aid.

Sudan and Egypt are already sold on the Western way of life. Somalia's problem was a little different, but it boiled down to the same issue of incompatibility of purposes. Ethiopia is still basking in the first phase of military brotherhood, and may yet ask the Russians and Cubans to leave. Mozambique and Angola are already flirting with the West (that's what "nonalignment" usually means). Guinea has decided to mend its fences with France. And Zimbabwe and Namibia are unlikely to go a different course.

It is a truly ironic situation, for what it means is that all Americans have to do is fold their hands and wait for the honeymoon to end before stepping in for the picking. The Americans are, of course, well aware of this, and their protests against Russian incursions into Africa are designed precisely to accelerate the process of disaffecting and disillusionment.

In a quite profound sense, what it does mean is that African nations, often against their own inclination, are being denied all meaningful options in terms of the economic arrangements they have to make for themselves. But it also means that we need not get too starry-eyed about the possible gains to be had from the Russians, at least in terms of our concern for economic development. They would have to modify their policies first.●

PUBLIC AWARENESS PROGRAMS

● Mr. RIEGLE. Mr. President, as chairman of the Subcommittee on Alcoholism and Drug Abuse, I would like to alert my colleagues to an announcement being made today by the Bureau of Alcohol, Tobacco, and Firearms. The Bureau is releasing a progress report calling for a national educational campaign to inform Americans of the dangers that excessive alcohol consumption by pregnant women can present to their unborn children.

The fetal alcohol syndrome causes birth defects including congenital abnormalities, growth retardation, and functional abnormalities. These tragic consequences could be avoided if expectant mothers were aware of the risks they may run by drinking during their pregnancy.

The Bureau's proposal calls for a cooperative governmental and private campaign to raise the level of public awareness of this problem. Although no new funds are requested (other than those already requested by the National Institute of Alcohol Abuse and Alcoholism as part of Secretary Califano's "new initiatives" program), the Bureau believes that through a joint endeavor with the alcohol beverage industry, the incidence of alcohol-related birth defects can be significantly reduced. An integral part of this proposal is the provision that, after a reasonable period of time, the success of the program will be reviewed to see if it has been effective or if other steps, possibly including a warning label on all alcoholic beverage containers, should be taken.

I strongly support this initiative, and I would urge the Bureau to conduct the followup review within a period of months, rather than years. If private groups, including the alcoholic beverage industry, can coordinate their activities with those of the Bureau of Alcohol, Tobacco, and Firearms and with the Department of Health, Education, and Welfare, I am hopeful that we will be able to help pregnant women protect their unborn babies. If the program proves ineffective, however, I would sup-

port additional steps, possibly including warning labels.

To carry out the educational program proposed by the Bureau, I would suggest that HEW Secretary Califano consider requiring that all departmental programs involving pregnant women—such as the adolescent pregnancy program currently being launched—include a fetal alcohol information component. I strongly believe that local groups providing pregnancy assistance should make it a point to educate their clients to the risks of drinking during pregnancy. Organizations (such as Planned Parenthood and local health clinics) which conduct pregnancy tests should also be involved in distributing informational materials regarding the fetal alcohol syndrome.

On a related matter, I would also like my colleagues to be aware that the Bureau of Alcohol, Tobacco, and Firearms has recently proposed that labels on alcoholic beverages include a listing of their ingredients. As a strong proponent of ingredient labeling for all foods, I will be closely examining the Bureau's proposal to evaluate whether it would adequately inform consumers of what they are drinking in a reasonable, realistic manner, taking into account seasonal variations and changes in possible components. Of course, I am also concerned that labeling decisions in the alcoholic beverage field are compatible with parallel decisions that this Congress will make in terms of comprehensive food labeling. It is essential if the American consumer is to know what goes into the food we eat.●

QUORUM CALL

The PRESIDING OFFICER. The Chair, in his capacity as a Senator from the State that is almost heaven, West Virginia, suggests the absence of a quorum.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

(Mr. RIEGLE assumed the chair.)

Mr. ROBERT C. 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.

ORDER TO PRINT SENATE RESOLUTION 61

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that Senate Resolution 61 be reprinted overnight with the language that has been added shown in italics and the language that has been deleted shown in stricken-through type.

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

Mr. ROBERT C. BYRD. So that now, Mr. President, on tomorrow the reprinted Senate Resolution 61 will show the amendments that have been adopted today by voice vote and the language that has been deleted will be in stricken-through type and the language that has been added will be in italics.

ORDER FOR RECESS UNTIL 12 NOON TOMORROW

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that when the Senate completes its business today it stand in recess until the hour of 12 noon tomorrow, rather than 11 a.m.

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

ORDERS FOR PROCEDURE TOMORROW

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that on tomorrow, after the prayer and the approval of the Journal, the two leaders or their designees be recognized, each for not to exceed 5 minutes, and that thereafter Mr. STENNIS, Mr. PROXMIRE, and Mr. PRESSLER be recognized each for not to exceed 15 minutes, after which there be a period for the transaction of routine morning business of not to exceed 15 minutes, with statements therein limited to 3 minutes, after which the Senate then resume its consideration of Senate Resolution 61, as amended.

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

RECESS

Mr. ROBERT C. BYRD. Mr. President, if there be no further business to come before the Senate, I move, in accordance with the order previously—before I do this I look around to ascertain whether or not any Senator seeks recognition. I do not want to close off opportunities for debate or for offering of amendments to the resolution. I see no Senator seeking recognition.

I therefore move, Mr. President, that the Senate stand in recess until 12 noon tomorrow, under the order previously entered.

The motion was agreed to, and, at 3:35 p.m., the Senate recessed until tomorrow, Friday, February 9, 1979, at 12 o'clock meridian.

CONFIRMATIONS

Executive nominations confirmed by the Senate February 8, 1979:

DEPARTMENT OF STATE

W. Beverly Carter, Jr., of Pennsylvania, a Foreign Service information officer of class 1, to be Ambassador at Large.

Robert H. Pelletreau, Jr., of Connecticut, a Foreign Service officer of class 3, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the State of Bahrain.

Stephen Warren Bosworth, of Michigan, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Tunisia.

Jonathan Dean, of New York, a Foreign Service officer of class 1, for the rank of Ambassador during the tenure of his service as Representative of the United States of America for Mutual and Balanced Force Reductions Negotiations.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

William Brownlee Welsh, of Virginia, to be an Assistant Secretary of Housing and Urban Development.

Sterling Tucker, of the District of Columbia, to be an Assistant Secretary of Housing and Urban Development.

The above nominations were approved subject to the nominees' commitments to respond to requests to appear and testify before any duly constituted committee of the Senate.

IN THE AIR FORCE

Gen. John W. Roberts, U.S. Air Force, (age 57), for appointment to the grade of general on the retired list pursuant to the provisions of title 10, United States Code, section 8962.

The following-named officer under the provisions of title 10, United States Code, section 8066, to be assigned to a position of importance and responsibility designated by the President under subsection (a) of section 8066, in grade as follows:

To be lieutenant general

Maj. Gen. James Patrick Mullins, [redacted], U.S. Air Force.

The following officers for temporary appointment in the U.S. Air Force under the provisions of chapter 839, title 10 of the United States Code:

To be major general

Brig. Gen. William P. Acker, [redacted] FR, Regular Air Force.

Brig. Gen. Christopher S. Adams, Jr., [redacted] FR, Regular Air Force.

Brig. Gen. James I. Baginski, [redacted] FR, Regular Air Force.

Brig. Gen. Emil N. Block, Jr., [redacted] FR, Regular Air Force.

Brig. Gen. Bill V. Brown, [redacted] FR, Regular Air Force.

Brig. Gen. Norma E. Brown, [redacted] FR, Regular Air Force.

Brig. Gen. William E. Brown, Jr., [redacted] FR, Regular Air Force.

Brig. Gen. George M. Browning, Jr., [redacted] FR, Regular Air Force.

Brig. Gen. Carl H. Cathey, Jr., [redacted] FR, Regular Air Force.

Brig. Gen. Murphy A. Chesney, [redacted] FR, Regular Air Force, Medical.

Brig. Gen. Philip J. Conley, Jr., [redacted] FR, Regular Air Force.

Brig. Gen. David B. Easson, [redacted] FR, Regular Air Force.

Brig. Gen. Jay T. Edwards III, [redacted] FR, Regular Air Force.

Brig. Gen. Herbert L. Emanuel, [redacted] FR, Regular Air Force.

Brig. Gen. James C. Enney, [redacted] FR, Regular Air Force.

Brig. Gen. Billy B. Forsman, [redacted] FR, Regular Air Force.

Brig. Gen. Irwin P. Graham, [redacted] FR, Regular Air Force.

Brig. Gen. Patrick J. Halloran, [redacted] FR, Regular Air Force.

Brig. Gen. William W. Hoover, [redacted] FR, Regular Air Force.

Brig. Gen. Charles C. Irions, [redacted] FR, Regular Air Force.

Brig. Gen. Robert E. Kelley [redacted] FR, Regular Air Force,

Brig. Gen. James H. Marshall, [redacted] FR, Regular Air Force.

Brig. Gen. Earl T. O'Loughlin, [redacted] FR, Regular Air Force.

Brig. Gen. Leighton R. Palmerton, [redacted] FR, Regular Air Force.

Brig. Gen. Don H. Payne, [redacted] FR, Regular Air Force.

Brig. Gen. Herman O. Thomson, [redacted] FR, Regular Air Force.

Brig. Gen. William R. Usher, [redacted] FR, Regular Air Force.

Brig. Gen. Jack W. Waters, [redacted] FR, Regular Air Force.

Brig. Gen. Larry D. Welch, [redacted] FR, Regular Air Force.

Brig. Gen. William R. Yost, [redacted] FR, Regular Air Force.

The following officers for appointment in the Regular Air Force to the grades indi-

cated, under the provisions of chapter 835, title 10 of the United States Code:

To be major general

Lt. Gen. John G. Albert, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. Rufus L. Billups, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. Richard C. Bowman, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. Edgar A. Chavarrie, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. Lynwood E. Clark, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. Robert W. Clement, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. Charles G. Cleveland, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. Thomas E. Clifford, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Lt. Gen. Bennie L. Davis, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Lt. Gen. Charles A. Gabriel, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. John W. Hepfer, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Lt. Gen. Lloyd R. Leavitt, Jr., [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. Richard E. Merkling, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. Earl G. Peck, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. Andrew Pringle, Jr., [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Lt. Gen. Thomas M. Ryan, Jr., [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Lt. Gen. Winfield W. Scott, Jr., [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. James W. Stansberry, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Maj. Gen. LeRoy W. Svendsen, Jr., [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

Brig. Gen. Jack W. Waters, [redacted] FR (brigadier general, Regular Air Force), U.S. Air Force.

To be brigadier general

Brig. Gen. William P. Acker, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. Christopher S. Adams, Jr., [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Charles C. Blanton, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Robert M. Bond, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. James R. Brickel, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Bruce K. Brown, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. George M. Browning, Jr., [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Gerald J. Carey, Jr., [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Robert F. Coverdale, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Charles L. Donnelly, Jr., [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. George A. Edwards, Jr., [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. Herbert L. Emanuel, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. Billy B. Forsman, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Martin C. Fulcher, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. James L. Gardner, Jr., [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Philip C. Gast, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. Allison G. Glover, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. James R. Hildreth, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Dewey K. K. Lowe, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. James H. Marshall, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. William B. Maxson, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. James E. McInerney, Jr., [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. Waymond C. Nutt, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. Earl T. O'Loughlin, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. Leighton R. Palmerton, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. John E. Ralph, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Len C. Russell, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Lawrence A. Skantze, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. Click D. Smith, Jr., [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Lt. Gen. Thomas P. Stafford, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Maj. Gen. Jasper A. Welch, Jr., [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

Brig. Gen. William R. Yost, [redacted] FR (colonel, Regular Air Force), U.S. Air Force.

The following officers for temporary appointment in the U.S. Air Force to the grades indicated, under the provisions of chapter 839, title 10 of the United States Code:

To be major general

Brig. Gen. Joseph B. Dodds, [redacted] FR, Regular Air Force.

To be brigadier general

Col. Clarence R. Autrey, [redacted] FR (lieutenant colonel, Regular Air Force), U.S. Air Force.

Col. Leon W. Babcock, Jr., [redacted] FR, Regular Air Force.

Col. Robert D. Beckel, [redacted] FR (major, Regular Air Force), U.S. Air Force.

Col. Kenneth H. Bell, [redacted] FR, Regular Air Force.

Col. Harry H. Bendorf, [redacted] FR, Regular Air Force.

Col. Charles E. Bishop, [redacted] FR, Regular Air Force.

Col. John A. Brashear, [redacted] FR, Regular Air Force.

Col. Donald D. Brown, [redacted] FR, Regular Air Force.

Col. Stanford E. Brown, [redacted] FR, Regular Air Force.

Col. Lyman E. Buzard, [redacted] FR, Regular Air Force.

Col. John E. Catlin, Jr., [redacted] FR, Regular Air Force.

Col. Robert D. Caudry, [redacted] FR, Regular Air Force.

Col. William M. Charles, Jr., [redacted] FR, Regular Air Force.

Col. Neil L. Eddins, [redacted] FR, Regular Air Force.

Col. James D. Gormley, [redacted] FR, Regular Air Force.

Col. James I. Granger, [redacted] FR, Regular Air Force.

Col. Jack I. Gregory, [redacted] FR, Regular Air Force.

Col. John J. Halki, [redacted] FR, Regular Air Force, Medical.

Col. Monroe W. Hatch, Jr., [redacted] FR, Regular Air Force.

Col. Delbert H. Jacobs, [redacted] FR, Regular Air Force.

Colonel Ralph H. Jacobson, [redacted] FR (lieutenant colonel, Regular Air Force), U.S. Air Force.

Col. Albert J. Kaehn, Jr., [redacted] FR, Regular Air Force.

Col. William L. Kirk, [redacted] FR, Regular Air Force.

Col. Stanley C. Kolodny, [redacted] FR, Regular Air Force, Medical.

Col. Donald P. Litke, 524-38-6925FR, (lieutenant colonel, Regular Air Force), U.S. Air Force.

Col. Rano E. Lueker, [redacted] FR, Regular Air Force.

Col. William J. Mall, Jr., [redacted] FR, Regular Air Force.

Col. Charles McCausland, [redacted] FR (lieutenant colonel, Regular Air Force), U.S. Air Force.

Col. Horace W. Miller, [redacted] FR, Regular Air Force.

Col. Joseph D. Moore, [redacted] FR, (lieutenant colonel, Regular Air Force), U.S. Air Force.

Col. Richard D. Murray, [redacted] FR, Regular Air Force.

Col. Robert C. Oaks, [redacted] FR (major, Regular Air Force), U.S. Air Force.

Col. Peter W. Odgers, [redacted] FR, Regular Air Force.

Col. Norris W. Overton, [redacted] FR, Regular Air Force.

Col. David L. Patton, [redacted] FR, Regular Air Force.

Col. Attilio Pedroli, [redacted] FR, Regular Air Force.

Col. John L. Pickitt, [redacted] FR, Regular Air Force.

Col. Eugene M. Poe, Jr., [redacted] FR, Regular Air Force.

Col. Gerald L. Prather, [redacted] FR (lieutenant Colonel, Regular Air Force), U.S. Air Force.

Col. Raymond C. Preston, Jr., [redacted] FR (lieutenant colonel, Regular Air Force), U.S. Air Force.

Col. Richard W. Pryor, [redacted] FR Regular Air Force.

Col. Robert H. Reed, [redacted] FR, Regular Air Force.

Col. Albert G. Rogers, [redacted] FR, Regular Air Force.

Col. Carl R. Smith, [redacted] FR, Regular Air Force.

Col. Perry M. Smith, [redacted] FR (lieutenant colonel, Regular Air Force), U.S. Air Force.

Col. James P. Smothermon, [redacted] FR (lieutenant colonel, Regular Air Force), U.S. Air Force.

Col. John H. Storrie, [redacted] FR, Regular Air Force.

Col. Thomas S. Swalm, [redacted] FR, Regular Air Force.

Col. Chester D. Taylor, Jr., [redacted] FR, Regular Air Force.

Col. Donald A. Vogt, [redacted] FR, Regular Air Force.

Col. Rudolph F. Wacker, [redacted] FR, Regular Air Force.

Col. Sarah P. Wells, [redacted] FR, Regular Air Force, Medical.

Col. Harold J. M. Williams, [redacted] FR (lieutenant colonel, Regular Air Force), U.S. Air Force.

The following officers for appointment in the Reserve of the Air Force to the grade indicated, under the provisions of chapters 35, 831, and 837, title 10, United States Code:

To be major general

Brig. Gen. John B. Conley, [redacted] FG, Air National Guard of the United States.

Brig. Gen. Lloyd W. Lamb, [redacted] FG, Air National Guard of the United States.

Brig. Gen. Orlando Llenza, [redacted] FG, Air National Guard of the United States.

Brig. Gen. Stanley F. H. Newman, [redacted] FG, Air National Guard of the United States.

Brig. Gen. Hal C. Tyree, Jr., [redacted] FG, Air National Guard of the United States.

Brig. Gen. Emory M. Wright, Jr., [redacted] FG, Air National Guard of the United States.

To be brigadier general

Col. William F. Casey, [redacted] FG, Air National Guard of the United States.

Col. Robert J. Collins, [redacted] FG, Air National Guard of the United States.

Col. James E. Cuddihee, [redacted] FG, Air National Guard of the United States.

Col. William A. Free, [redacted] FG, Air National Guard of the United States.

Col. Roy A. Jacobson, [redacted] FG, Air National Guard of the United States.

Col. Lloyd L. Johnson, [redacted] FG, Air National Guard of the United States.

Col. Monroe G. Mathias, [redacted] FG, Air National Guard of the United States.

Col. Charles B. Ocksrider, [redacted] FG, Air National Guard of the United States.

Col. William E. Riggs, [redacted] FG, Air National Guard of the United States.

Col. Frank H. Smoker, Jr., [redacted] FG, Air National Guard of the United States.

Col. Emmett J. Whalen, [redacted] FG, Air National Guard of the United States.

Col. Charles J. Young, Jr., [redacted] FG, Air National Guard of the United States.

The following officers for appointment in the Reserve of the Air Force to the grade indicated, under the provisions of chapter 837, title 10, United States Code:

To be major general

Brig. Gen. Bruce M. Davidson, [redacted] FV, Air Force Reserve.

Brig. Gen. Walter R. Longanecker, Jr., [redacted] FV, Air Force Reserve.

Brig. Gen. George W. Miller III, [redacted] FV, Air Force Reserve.

Brig. Gen. Dalton S. Oliver, [redacted] FV, Air Force Reserve.

Brig. Gen. John E. Taylor, Jr., [redacted] FV, Air Force Reserve.

To be brigadier general

Col. Ronald R. Blalack, [redacted] FV, Air Force Reserve.

Col. William L. Copeland, [redacted] FV, Air Force Reserve.

Col. Charles M. Duke, Jr., [redacted] FV, Air Force Reserve.

Col. Wayne E. Garrett, [redacted] FV, Air Force Reserve.

Col. Arthur Gerwin, [redacted] FV, Air Force Reserve.

Col. Vincent P. Luchsinger, Jr., [redacted] FV, Air Force Reserve.

Col. Milton Matter, Jr., [redacted] FV, Air Force Reserve.

Col. John A. Paterson, [redacted] FW, Air Force Reserve.

Col. John D. Roper, [redacted] FV, Air Force Reserve.

Col. Alan G. Sharp, [redacted] FV, Air Force Reserve.

Col. Jerome N. Waldor, [redacted] FV, Air Force Reserve.

Col. Charles T. Yarington, Jr., [redacted] FV, Air Force Reserve.

The following-named officer under the provisions of title 10, United States Code, section 8066, to be assigned to a position of importance and responsibility designated by the President under subsection (a) of section 8066, in grade as follows:

To be lieutenant general

Maj. Gen. Charles Curtis Pattillo, [redacted] FR, U.S. Air Force.

The following-named officers under the provisions of title 10, United States Code, section 8066, to be assigned to a position of importance and responsibility designated by the President under subsection (a) of section 8066, in grade as follows:

To be lieutenant general

Maj. Gen. Lawrence Albert Skantze, [redacted] FR, U.S. Air Force.

Lt. Gen. John J. Burns, U.S. Air Force, (age 54), for appointment to the grade of lieutenant general on the retired list pursuant to the provisions of title 10, United States Code, section 8962.

Lt. Gen. James A. Knight, Jr., U.S. Air Force, (age 55), for appointment to the grade of lieutenant general on the retired list pursuant to the provisions of title 10, United States Code, section 8962.

The following-named officers under the provisions of title 10, United States Code, section 8066, to be assigned to a position of importance and responsibility designated by the President under subsection (a) of section 8066, in grade as follows:

To be lieutenant general

Maj. Gen. Evan William Rosencrans, [redacted] FR, U.S. Air Force.

Lt. Gen. Andrew B. Anderson, Jr., U.S. Air Force (age 52), for appointment to the grade of lieutenant general on the retired list pursuant to the provisions of title 10, United States Code, section 8962.

IN THE ARMY

The following-named officer to be placed on the retired list in grade indicated under the provisions of title 10, United States Code, section 3962:

To be lieutenant general

Lt. Gen. Harold Robert Aaron, [redacted], (age 57), Army of the United States (major general, U.S. Army).

The following-named officer under the provisions of title 10, United States Code, section 3066, to be assigned to a position of importance and responsibility designated by the President under subsection (a) of section 3066, in grade as follows:

To be lieutenant general

May. Gen. Richard Hulbert Groves, [redacted], U.S. Army.

The following-named Army Reserve officer for appointment to the grade of brigadier general, Army of the United States, under the provisions of title 10, United States Code, sections 3442 and 3447:

To be brigadier general

Brig. Gen. Carl D. McIntosh, [redacted].

The following-named officers for appointment in the Regular Army of the United States to the grade indicated under the provisions of title 10, United States Code, sections 3284, 3306 and 3307:

To be major general

Lt. Gen. Sidney B. Berry, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Homer S. Long, Jr., [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Clay T. Buckingham, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Charles I. McGinnis, [redacted] Army of the United States (brigadier general, U.S. Army).

Maj. Gen. James L. Kelly, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Thomas U. Greer, [redacted], Army of the United States (brigadier general, U.S. Army).

Lt. Gen. Robert G. Gard, Jr., [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Paul F. Gorman, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. John C. Faith, [redacted] Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Emil L. Konopnicki, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Paul M. Timmerberg, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Charles K. Heiden, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Hillman Dickinson, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Sinclair L. Melner, [redacted], Army of the United States (brigadier general, U.S. Army).

Lt. Gen. Marvin D. Fuller, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Phillip Kaplan, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Lucien E. Bolduc, Jr., [redacted] Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Louis W. Prentiss, Jr., [redacted] Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Jack V. Mackmull, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. James H. Merryman, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. William E. Eicher, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. James G. Boatner, [redacted], Army of the United States (brigadier general, U.S. Army).

Lt. Gen. Edward C. Meyer, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. William R. Richardson, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Edward A. Partain, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Ernest D. Peixotto, [redacted], Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Benjamin L. Harrison, [redacted] Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Richard E. Cavazos, [redacted] Army of the United States (brigadier general, U.S. Army).

Maj. Gen. Oscar C. Decker, Jr., [redacted] Army of the United States (brigadier general, U.S. Army).

Maj. Gen. John K. Stoner, Jr., [redacted] Army of the United States (brigadier general, U.S. Army).

To be brigadier general

Maj. Gen. John D. Bruen, [redacted], Army of the United States (colonel, U.S. Army).

Maj. Gen. Jack N. Merritt, [redacted] Army of the United States (colonel, U.S. Army).

Big. Gen. Elvin R. Heiberg III, [redacted] Army of the United States (colonel, U.S. Army).

Maj. Gen. Glenn K. Otis, [redacted], Army of the United States (colonel, U.S. Army).

Maj. Gen. John W. Seigle, [redacted], Army of the United States (colonel, U.S. Army).

Brig. Gen. Richard D. Boyle, [redacted],

Army of the United States (colonel, U.S. Army).

Brig. Gen. Richard D. Lawrence, [redacted], Army of the United States (colonel, U.S. Army).

Maj. Gen. Tom H. Brain, [redacted], Army of the United States (colonel, U.S. Army).

Maj. Gen. Guy S. Meloy III, [redacted], Army of the United States (colonel, U.S. Army).

Maj. Gen. Maxwell R. Thurman, [redacted], Army of the United States (colonel, U.S. Army).

Maj. Gen. Jerry R. Curry, [redacted], Army of the United States (colonel, U.S. Army).

Brig. Gen. James J. Lindsay, [redacted], Army of the United States (colonel, U.S. Army).

The following-named Army Medical Department officer for appointment as a major general, Dental Corps, Regular Army and as a major general, Dental Corps, in the Army of the United States, under the provisions of title 10, United States Code, sections 3036, 3040, 3442, and 3447.

DENTAL CORPS

To be major general

Brig. Gen. George Kuttas, [redacted], Dental Corps, U.S. Army.

The following-named Army Medical Department officer for appointment to the grade indicated under the provisions of title 10, United States Code, sections 3442 and 3447.

DENTAL CORPS

To be brigadier general

Col. Hubert T. Chandler, [redacted], Dental Corps, U.S. Army.

The following-named officers for temporary appointment in the Army of the United States to the grade indicated, under the provisions of title 10, United States Code, sections 3442 and 3447:

To be brigadier general

Col. Arthur Holmes, Jr., [redacted], U.S. Army.

Col. Johnny J. Johnston, [redacted], U.S. Army.

Col. Joe S. Owens, [redacted], U.S. Army.

Col. Maurice O. Edmonds, [redacted], U.S. Army.

Col. Arthur E. Brown, Jr., [redacted], U.S. Army.

Col. Claude M. Kicklighter, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Wendell H. Gilbert, [redacted], U.S. Army.

Col. Andrew L. Cooley, Jr., [redacted], Army of the United States (lieutenant colonel U.S. Army)

Col. Ronald L. Watts, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Nathan C. Vail, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Scott B. Smith, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Joseph P. Franklin, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Edwin C. Keiser, [redacted], U.S. Army.

Col. Henry J. Hatch, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. William E. Klein, [redacted], U.S. Army.

Col. Zeb B. Bradford, Jr., [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Jack A. Apperson, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Josiah Blasingame, Jr., [redacted], U.S. Army.

Col. Bobby B. Porter, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. David W. Stalings, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Eugene L. Stillions, Jr., [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Thomas W. Kelly, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. James E. Thompson, Jr., [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. John F. Wall, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Dave R. Palmer, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Michael J. Conrad, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Victor J. Hugo, Jr., [redacted], U.S. Army.

Col. Joseph C. Lutz, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Robert D. Hammond, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Kenneth C. Leuer, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Johnie Forte, Jr., [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. John H. Mitchell, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Anthony F. Albright, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Leonard P. Wishart III, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Edward Honor, [redacted], U.S. Army.

Col. Jerry M. Bunyard, [redacted], U.S. Army.

Col. Colin L. Powell, [redacted], Army of the United States (major, U.S. Army).

Col. Jack O. Bradshaw, [redacted], Army of the United States (major, U.S. Army).

Col. Thomas E. Carpenter III, [redacted], Army of the United States (major, U.S. Army).

Col. George R. Stotser, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Robert D. Wiegand, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. James E. Drummond, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Homer Johnstone, Jr., [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Richard D. Kenyon, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Crosbie E. Saint, [redacted], Army of the United States (major, U.S. Army).

Col. Gerald T. Bartlett, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Robert J. Donahue, [redacted], U.S. Army.

Col. James E. Moore, Jr., [redacted], U.S Army.

Col. William G. O'Leksy, [redacted], U.S. Army.

Col. Joseph J. Skaff, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. James R. Demoss, [redacted], U.S Army.

Col. Gerald E. Monteith, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. William G. T. Tuttle, Jr., [redacted], Army of the United States (major, U.S. Army).

Col. John M. Brown, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Thomas J. Flynn, [redacted], U.S. Army.

Col. Gerald G. Watson, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Wayne E. Alley, [redacted], Army of the United States (lieutenant colonel, U.S. Army).

Col. Hugh R. Overholt, [redacted], U.S. Army.

Col. Richard J. Bednar, [redacted], U.S. Army.

The U.S. Army Reserve officers named herein for appointment as Reserve commissioned officers of the Army, under the provisions of title 10, United States Code, sections 593(a), 3371, and 3384:

To be major general

Brig. Gen. Robert Dewey Bay, [redacted],

Brig. Gen. Russell Ivan Berry, [redacted]

Brig. Gen. Allen Earl Stilson, Jr. [redacted]

To be brigadier general

Col. Jimmy Franklin Bates, [redacted]

Col. George Harrison Cate, Jr. [redacted]

Col. Norman Wright Martell, [redacted]

Col. Thomas Milton Moore, [redacted]

Col. Mack Jay Morgan, Jr., [redacted]

Col. Gilbert Gerald Parker [redacted].

Col. James Louis Pelton, [redacted]

Col. Alfred Winston Porter, Jr. [redacted]

Col. Garnet Ray Reynolds, [redacted]

Col. John Ricottilli, Jr., [redacted].

Col. Ronald Doyle Worcester, [redacted].

The Army National Guard of the United States officers named herein for appointment as Reserve commissioned officers of the Army under the provisions of title 10, United States Code, sections 593(a) and 3385:

To be major general

Brig. Gen. John B. (IO) Garrett, [redacted]

Brig. Gen. Joseph Andrew Healy, [redacted]

Brig. Gen. Robert Woodson Teater, [redacted].

Brig. Gen. Robert George Walker, [redacted]

To be brigadier general

Col. James Alexander Baber III, [redacted]

Col. Joaquin Balaguer-Rivera, [redacted].

Col. Dan Bullard III, [redacted].

Col. Bernard Thomas Chupka, [redacted].

Col. William Eugene Doris [redacted].

Col. Charles Phillip Doyle, [redacted]

Col. James Glynn Fanning, [redacted]

Col. Robert Samuel Ford, [redacted]

Col. Richard George Geith, [redacted]

Col. Joseph Guadalupe Iniguez, Jr., [redacted]

Col. Bruce Jacobs, [redacted].

Col. Hubert Monroe Leonard, [redacted].

Col. Jay Meredith Lotz, [redacted]

Col. Jerome Joseph Mathieu, Jr., [redacted]

Col. Dana Carleton Ramsay, [redacted]

Col. Lawrence Felix Roy [redacted]

Col. Paul Eugene Staples, [redacted]

The Army National Guard of the United States officers named herein for appointment as Reserve commissioned officers of the Army, under the provisions of title 10, United States Code, sections 593(a) and 3392:

To be major general

Brig. Gen. Robert Lee Childers, [redacted]

Brig. Gen. Francis Alphonse Ianni, [redacted]

To be brigadier general

Col. Lawrence Pierce Flynn, [redacted].

Col. Luis Ernesto Gonzalez-Valez, [redacted]

Col. William Henry Henderson, [redacted]

Col. Leonard Robert Herbst, [redacted].

Col. Stuart Joel Shoob, [redacted]

Col. Dayle Eugene Williamson, [redacted].

Col. Hershel Cleveland Yeargan, [redacted]

IN THE NAVY

Adm. Stansfield Turner, U.S. Navy, (age 55) for appointment to the grade of admiral on the retired list pursuant to the provisions of title 10, United States Code, section 5233.

IN THE AIR FORCE

Air Force list beginning Wilfred K. Abbott, to be colonel, and ending William P. Dubose III, to be major, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

Air Force list beginning David R Abel, to be lieutenant colonel, and ending Donald E. Kessell, to be lieutenant colonel, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

Air Force list beginning Robert A. Abbott, to be lieutenant colonel, and ending James H. Slepicka, to be major, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

Air Force list beginning George H. Aberth, Jr., to be colonel, and ending Frank R. Young, to be captain, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

Air Force list beginning Richard B. Almour, to be colonel, and ending Leo E. McFadden, to be colonel, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

Air Force list beginning Jon S. Allen, to be colonel, and ending Virginia L. Floyd, to be colonel, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

IN THE ARMY

Army list beginning Albert Abraham, to be colonel, and ending Joseph Saltas, to be first lieutenant, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

Army list beginning Byron B. Alexander, to be colonel, and ending Lloyd A Youngblood, to be lieutenant colonel, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

Army list beginning Howard T. Prince II, to be colonel, and ending Gerald A. St. Amand, to be captain, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

Army list beginning Carl W. Ackerman, to be colonel, and ending Paul J. Sullivan, to be lieutenant colonel, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

IN THE NAVY

Navy list beginning Herbert J. Kendall II, to be lieutenant, and ending Jeffrey L. Roddahl, to be permanent lieutenant (j.g.), and temporary lieutenant, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

Navy list beginning Larry E. Baker, to be chief warrant officer, and ending Pamela J. Rhyner, to be lieutenant (j.g.), which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

Navy list beginning John W. Dreon, Jr., to be ensign, and ending William B. Humphrey, to be commander, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

IN THE MARINE CORPS

Marine Corps list beginning Ronald G. Horton, to be second lieutenant, and ending Robert W. Smith, to be second lieutenant, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

Marine Corps list beginning Ronald E. Anderson, to be second lieutenant, and ending Gary R. Zeller, to be second lieutenant, which nominations were received by the Senate on January 22, 1979, and appeared in the CONGRESSIONAL RECORD on January 23, 1979.

HOUSE OF REPRESENTATIVES—*Thursday, February 8, 1979*

The House met at 11 a.m. and was called to order by the Speaker pro tempore (Mr. WRIGHT).

DESIGNATION OF SPEAKER PRO TEMPORE

The SPEAKER pro tempore laid before the House the following communication from the Speaker:

WASHINGTON, D.C.,
February 7, 1979.

I hereby designate the Honorable JIM WRIGHT to act as Speaker pro tempore on Thursday, February 8, 1979.

THOMAS P. O'NEILL, Jr.,
Speaker of the House of Representatives.

PRAYER

Rev. Mladen Cuvalo, pastor, Sts. Cyril and Methodius Church and St. Raphael's Church, New York, N.Y., offered the following prayer:

Heavenly Father, we thank Thee for Thy great blessings bestowed upon the American nation, and pray for divine guidance for this "Forum of the People." We ask Thy protection for all the people of the world, born and unborn, and its nations, independent or not yet independent.

We pray for the Croatian nation which has contributed so many immigrants to America and its sacred cause. We pray for the fulfillment of the divine right of self-determination of nations, with all nations of the world achieving their independence and equality and an end of nations being divided or subjugated to other nations.

We pray for people of all faiths and nations to live in brotherhood, not only in the forthcoming days, but throughout the entire year. Amen.

THE JOURNAL

The SPEAKER pro tempore. The Chair has examined the Journal of the last day's proceedings and announces to the House his approval thereof.

Pursuant to clause 1, rule I, the Journal stands approved.

MESSAGE FROM THE SENATE

A message from the Senate, by Mr. Sparrow, one of its clerks, announced that the Senate had passed without amendment a concurrent resolution of the House of the following title:

H. Con. Res. 42. Concurrent resolution providing for an adjournment of the House from February 8 to February 13, 1979, and a recess of the Senate from February 9 to February 19, 1979.

The message also announced that the Vice President, pursuant to Public Law 95–216, appointed Ms. Joyce Miller, of New Jersey, from private life, to be a member of the National Commission on Social Security.

The message also announced that the vice president, pursuant to Public Law 81–754, as amended by Public Law 93–536, appointed Mr. PELL to the National Historical Publications and Records Commission.

The message also announced that the vice president, pursuant to Public Law 94–280, appointed Mr. PRESSLER, from the Committee on Commerce, Science, and Transportation, to the National Transportation Policy Study Commission, in lieu of Mr. Pearson, retired.

REV. MLADEN CUVALO

(Mr. BIAGGI asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. BIAGGI. Mr. Speaker, it is indeed an honor for me today to note that the opening prayer in the House today was offered by Father Mladen Cuvalo, pastor of Sts. Cyril and Methodius and St. Raphael's Churches in New York City.

Today marks a day of dual significance. Father Cuvalo has the largest Croatian-American parish in the United States, numbering over 100,000 and hailing from the tri-State area of New York, New Jersey, and Connecticut. It is also the first time in over 200 years that a Croatian-American clergyman has offered the prayer in the House of Representatives. In addition, for people of Croatian heritage everywhere, today holds another special significance as it marks the death of Cardinal Aloysius Stepinac and the 34th year commemoration of the massacre of 29 priests in Croatia, Yugoslavia, on February 8, 1945. Cardinal Stepinac, at the age of 36 became the youngest archbishop in the world and from there went on to become a noted and zealous