

our earnings because of this product or this market or what have you, but we have confidence in the future and this is what we expect. The investors will stay with the ship. This is especially true for the small high-tech companies, which is what my company was. These are companies whose growth we want to encourage. It is not in the public interest for these companies to go out of business because of a lawsuit based on a financial forecast or information which despite the company's best efforts later turns out to be inaccurate. And that can happen despite the best intentions of the company.

I remember how much the stock of biotech companies dropped when we were discussing health care last year. And should those biotech companies be held accountable for this drop? Of course not. We want to protect the research and the innovation that develops from such firms. But I believe that this bill goes too far in the effort to do that.

The recently amended language in S. 240 provides a safe harbor from liability unless the issuer's statement is knowingly made with the purpose and actual intent of misleading investors, and on its face that legislative language looks reasonable. But the committee report notes that purpose and actual intent are separate elements that must be proven by the investor.

To me, this standard, although an improvement over the version reported out of the Banking Committee, is still too high a threshold. This amendment provides safe harbor protections for issuers who make forecasts, but we narrow this protection so that issuers who make statements with the knowledge that the information was false or misleading would be liable. That is a reasonable standard, and it is a standard supported by the SEC and by the administration. It protects those who should be protected. And it does so without creating a safe harbor for those who should be subject to litigation.

It may seem to those listening or who may be watching this debate that the Senator from Maryland and I are splitting hairs with single word changes. However, when the next financial scandal rocks our markets and investors are prevented from recovering their losses caused by intentionally misleading forecasts because they are unable to demonstrate actual intent, those affected investors will certainly feel the difference. We do not want to hurt those investors who are able to demonstrate that an issuer intentionally made a misleading statement but are unable to show actual intent.

I cannot understand this. I say that again as a person who has been on both sides of the matter—as an investor and as an issuer. I believe that the amendment as proposed provides the right balance. If you make a forward-looking statement knowing it was false or misleading, you should not be immune

from liability. You have to pay the price for the deception.

Now, I understand why the Senator from New York would want to expand the current safe harbor. Everyone wants that, including the SEC. But I think this bill has gone too far in the other direction. We should not be encouraging or protecting fraudulent statements, which I believe is what S. 240 might inadvertently do.

Mr. President, we have the most efficient markets in the world, and this is due in large part to the reliability of information available to investors. I do not understand why we would want to enact legislation that might jeopardize this.

Once again, I thank my colleague from Arizona for yielding the floor.

I urge my colleagues to support this amendment, and now I yield the floor.

Mr. MCCAIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. MCCAIN. Mr. President, I thank my friend from New Jersey. I say to him I understand the sensitivity of recognition. I remained in the minority party for some 12 years, and I appreciate the sensitivity involved with that. I believe that in all fairness the Chair is required to recognize the person that the Chair hears first, and I as always appreciate his courtesy.

Mr. President, I rise in support of the amendment.

#### HAITI'S ELECTION

Mr. MCCAIN. Mr. President, last September, the United States sent 20,000 of its sons and daughters to Haiti. Their ostensible mission was defined in the name given to this unopposed invasion of another country—Operation Uphold Democracy. Today, we are told by some Haitian Government Ministers, by the head of Haiti's Provisional Electoral Council, and even by our own Washington Post, that democracy—a form of government that we exported to Haiti at the risk of American lives—may be, in the end, too much to expect from this poor, troubled, violent country.

Few would disagree that what happened last Sunday at least raised questions, serious questions, about whether Haiti's elections were free and fair. But, as I just noted, among the few, were some Aristide ministers; Mr. Remy, the hopelessly incompetent chairman of Haiti's election council; and, again, the Washington Post. In truth, the gross irregularities that plagued last Sunday's election, and the polling that occurred on Monday purportedly to compensate for a small fraction of those irregularities, as well as the mounting evidence of vote counting fraud have made it, in the sensible judgment of Representative PORTER GOSS—"impossible to verify the results of this election."

Mr. GOSS led an accredited election observation team from the International Republican Institute [IRI]. I

have the honor of serving the institute as chairman of its board of directors. I am proud of IRI's work generally, and its work in Haiti specifically. I will talk some more about the quality of that work a little later in my remarks.

I want to first talk briefly about the elections and the gross irregularities that indeed make it impossible to verify the results. It is important to note that no observer of the election—be it OAS observers, or observers on the White House delegation, or even one very candid Government minister in Haiti, will dispute the evidence of irregularities which IRI's observers and these other monitors uncovered. IRI observers found that these elections were, in a word, chaotic.

The headline for today's Washington Post story on the elections was "Unanimity in Haiti: Elections Were Chaotic." Unfortunately, no one seems to have told the Washington Post's editorial writers. Or, possibly, those writers do not believe that the chaos which, in truth, defined these elections seriously undermined their integrity. If that is the judgement of the Washington Post's editors it is a faulty one, and it cannot withstand the weight of the abundant evidence that the election process—from the campaign season through election day to the ballot counting—was plagued by very grave problems.

People can judge for themselves whether these problems have rendered the elections completely unfair and unfree. The IRI delegation's responsibility as impartial observers was to simply call them as they saw them. What they saw was rather discouraging, so discouraging that even Aristide's Minister for Culture, Jean-Claude Bajeux, offered an apology. "As a member of the Government," he said, "I am not proud of this." Minister Bajeux went on to observe that "instead of improving on the 1990 elections, we have done worse."

Not surprisingly, the widespread irregularities have prompted opposition parties to reject these elections as fraudulent. That charge was leveled by the mayor of Port-au-Prince, Evans Paul, as well. You will recall, Mr. President, that Mayor Paul's post support for President Aristide was often referred to by President Aristide's supporters in the United States.

Mr. President, let me offer a brief sampling of the irregularities which the IRI delegation documented. I will first read from the executive summary of IRI's pre-election report which evaluated the pre-electoral process and environment for their comparison to minimal standards of acceptability.

The elections were originally to be held in December, but were postponed several times for a variety of reasons.

Mr. President, I ask unanimous consent that the complete executive summary be printed in the RECORD.

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

EXECUTIVE SUMMARY  
ELECTORAL PROCESS

The legal foundation for these elections was a Presidential decree that subverted the legislative process.

The formulation of the Provisional Electoral Council (CEP) itself breached an agreement between the President of the Republic and the political parties to allow the parties to nominate all candidates from which CEP members would be chosen by the three branches of government. Only two of the nine CEP members were chosen from the parties' list.

The voter registration process, to have been administered by the CEP, was complicated by miscalculations of population size, lack of sufficient materials and registration sites, and one million missing voter registration cards.

The CEP review of the over 11,000 candidate dossiers for eligibility was a protracted process that occurred under a cloak of secrecy. When the CEP made its decisions known, by radio, no reasons were given for the thousands of candidates rejected. After vehement protests by the parties, some reasons were supplied and supplemental lists were announced through June 14, thirty-one days after the date the final candidate list was to be announced. This stripped the CEP of its credibility with the political parties. There is still not a final list of approved candidates available.

The sliding scale of registration fees imposed by the CEP—whereby political parties with fewer CEP approved candidates pay larger fees—has made it difficult for many parties to compete. As of June 20, five days before the election, protests against this unusual requirement have gone unanswered.

The ability of the CEP and those under its direction to administer an election is unclear. As of June 20, five days prior to the election, formal instructions for the procedures of election day and the count had yet to be issued; this has prevented the 45,000 persons needed to administer election day from receiving specific training.

As of June 20, those persons designated by the political parties as pollwatchers had not yet received any training from the CEP which could lead to serious confusion on election day.

These actions have led to deep misgivings across the Haitian political spectrum about the ability of the CEP to fulfill the mandate and functions normally executed by election commissions. Political parties had no idea to whom to turn with complaints in the process—the CEP, the President of the Republic, the United Nations Electoral Assistance Unit or the United States Government. Three political parties withdrew from the process as a form of protest.

ELECTORAL ENVIRONMENT

A concern for security is an issue that has permeated every step of the process. The assassination of Mireille Durocher Bertin, a well-known lawyer and leading political opponent of Aristide, only conformed the fears of the parties and candidates. During the crisis, many elected representatives feared returning to their districts, contributing to the decay of political infrastructure. Candidates have curtailed their campaign activities and has given personal security a higher priority.

The campaign itself began late and has been barely visible until some activities in the last week prior to elections. Given the process and environment surrounding these elections, it is doubtful many of Haiti's recognized political parties could have competed effectively.

The electorate itself is basically uninformed about this election—what it stands

for and who is running. There has been no civic education campaign, with the exception of some limited U.S. and U.N. military efforts, to illuminate the purpose of this election.

Similarly, there has been no educational campaign on how to vote, which for a largely illiterate population in Haiti could pose serious difficulties on election day.

Compared to other "transition elections" observed by IRI, such as in Russia in 1993, El Salvador in 1994, South Africa in 1994 and even China's Jilan Province village elections in 1994, the pre-electoral process and environment in Haiti has seriously challenged the most minimally accepted standards for the holding of a credible election.

Mr. McCain. Those are the problems that undermined the integrity of the election before election day. We have all read newspaper accounts over the last 2 days which chronicled the abuses and irregularities that occurred on Sunday. Mr. Goss accurately reported in a press statement yesterday the following serious problems.

While the international military served well as a deterrent to widespread violence, the elections were not free of violence and intimidation. Violent incidents closed local polling stations in Port-au-Prince, Limbe, Port de Paix, Don Don, Ferrier, Jean Rabel, Carrefour, and Cite Soleil.

The election council failed to deliver and distribute voter materials to a number of polling stations. This resulted in countless delayed voting place openings and postponed the elections in some places. Unsurprisingly, these delays and postponements caused widespread voter frustration which helps explain why turnout was low.

There was also widespread disregard for the secrecy of the ballot. Many voters had little choice but to mark their ballots in the open.

The thoroughly arbitrary process of qualifying candidates led to serious consequences which we anticipated in our pre-election survey. The disqualification of some candidates proved to destabilize the electoral environment in certain areas, this was most acutely the case in Saint Marc and Jean Rabel.

The New York Times reports that at least 200,000 voters are still waiting to cast their ballots, but election officials still won't say when and if they will be allowed to do so.

Regarding the vote tally, I will quote not from IRI's report but from the Organization of American States which had a much larger observation team in Haiti. Because of administrative failings in the election it remains to be seen how effectively the count will be carried out.

As anyone who read a newspaper today discovered, allegations of widespread abuse and irregularities in the counting process are coming in by the dozens. Again and again, we are hearing from all observers that unmarked ballots are being marked at the regional counting centers to indicate a vote for Lavalas candidates.

Mr. President, this is, as I said, only a brief sampling of the problems which IRI observers and all credible observers

witnessed. For calling the press' attention to these problems, the IRI mission was chastised today in a Washington Post editorial for unconstructive political science correctness.

In response to that charge let me just quote the last two paragraphs of Mr. Goss' statement yesterday as chairman of our delegation.

It was important for Haiti and the international community to hold this election, but holding an election is simply not enough. The purpose of this election was to create layers of government that can serve as checks and balances on each other and decentralize power as envisioned by the 1987 Constitution. That is why it was important to have an inclusive process, not one marked by exclusion.

It has been IRI's intent throughout this process to be thorough, independent, objective and constructive. In this regard, IRI will maintain a presence in Haiti through the final round of elections and will make recommendations for the formation of the permanent electoral council.

This is hardly inflammatory language, Mr. President. In fact, I think most people would consider it as well as all of IRI's reporting to be constructive, informed criticism. Indeed, Brian Atwood, Director of U.S.A.I.D. and head of the Clinton administration's observation delegation in Haiti, said about IRI's reporting: "they have performed a service."

The Post's editors are being a little disingenuous, I fear, when they raise the obviously bogus charge of political correctness. After all, that is not a problem that the Post usually finds distressing.

What the Post is really saying, as are those hysterical critics of IRI's delegation in the Aristide Government and on the Provisional Electoral Council; What they are really saying is that Haiti should not be expected to adhere to minimally acceptable election process standards.

IRI has observed elections in 48 countries. Some of those countries and some of those elections were the subject of disagreements, sometimes, but not always, partisan disagreements in the U.S. Congress. Elections in Chile, Nicaragua, El Salvador, Russia come to mind. Never, not once, has there been the slightest intimation that IRI delegations were anything other than objective, scrupulously fair, committed, hard working professionals. On the contrary, IRI delegations are routinely acclaimed for their thorough professionalism.

But because IRI discovered and reported information which, apparently, the Washington Post editorial writers would have preferred to have gone unnoticed, the integrity of these observers—not the election, but the observers—is now called into question by those editorialists and others.

What the Post editorial writers and others are really saying is that whatever standards we hold El Salvador to; whatever standards we hold Nicaragua to; whatever standards we hold Croatia to; whatever standards we hold Serbia

to; whatever standards we hold Albania to; whatever standards we hold Bulgaria to; whatever standards we hold Azerbaijan to; whatever standards we hold Russia to; whatever standards to which we hold all these countries where IRI observed elections without controversy, no matter how minimal those standards are we cannot expect Haiti to meet them.

Mr. President, that is what the Washington Post said today, and it is an injustice. It is an injustice to IRI; to Mr. Porter Goss and all the good and honorable people on IRI's election observation delegation in Haiti.

Most importantly, Mr. President, it is an injustice to the people of Haiti. They are human beings who yearn for freedom like any other nation, and who are capable of building and sustaining the institutions that will protect that freedom. To expect any less of Haiti is, as I said, an injustice. The people who have condescended to Haitians, including the Post editorialists, by asking the world's indulgence of their election's failings, should apologize to the Haitian people, and to those good Americans who they have maligned in the process.

Mr. President, I yield the floor.

#### PRIVATE SECURITIES LITIGATION REFORM ACT

The Senate continued with the consideration of the bill.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

AMENDMENT NO. 1478

Mr. D'AMATO. Mr. President, I would like to inquire of my colleagues if any of them have any statements to make with respect to the pending amendment, and how much time they intend to take. Might I ask my colleague how long he believes he will take?

Mr. BROWN. I have a brief statement that I think will be more than completed in 5 minutes.

Mr. D'AMATO. Mr. President, I ask unanimous consent that after the Senator from Colorado makes his statement that I be recognized—it is my intent to make a motion to table. Does the Senator wish to claim time to respond?

Mr. SARBANES. I may. I do not know what he is going to say. Why do we not say 10 minutes evenly divided and go to the vote?

Mr. D'AMATO. That is fine. I ask unanimous consent that after the statement of the Senator from Colorado, which will take 10 minutes equally divided, at that point in time I will ask for the yeas and nays and make a motion to table.

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

The Senator from Colorado.

Mr. BROWN. Mr. President, distributed on our desk is a statement from Abner Mikva, counsel to the President and former Member of this Congress,

who has what I believe is a very distinguished record, as well as a fine record as a judge for this Nation. I have the utmost respect for Judge Mikva, and so it is with seriousness that I view his letter that has been distributed.

It addresses the subject which we are discussing, and the implication is, of course, that this is an important factor in the President deciding whether he will sign this bill. He speaks out strongly on behalf of Senator SARBANES' amendment, I think for no other reason than that it is worth taking a serious look at.

As I read the two standards, I suspect other Members will find it a challenge, as I do, in pinpointing precisely what the difference is. The bill carves out an exclusion; that is, a safe harbor. What we found under current law is that people in business, in order to avoid liability in terms of speculating about their company or commenting on their company's future, simply have clammed up. Their lawyers tell them, "Look, if you say anything and it turns out not to be totally accurate or if you speculate on the future and it goes the other way, you are going to get sued." So to avoid being sued they say, "We don't want you to say anything." Literally, that is what many companies will say.

"How is the weather at your plant?"

"Can't say."

"What do you expect your earnings to be?"

"I don't know."

What this issue revolves around is the fact that we have denied economic free speech. It is a different issue than misleading people. I think everyone here—at least I hope they would—would feel very strongly that if someone intentionally misleads you for their own gain that we give redress for that. We expect people to be honest and that is fair and reasonable. But what we have found is the penalties are so profound and enormous and the ease of bringing a suit is so great that we have tried to address the problem by at least not penalizing people who make reasonable statements about the future of their company. That is what this is all about.

The first thing the bill does is go through a series of instances where some people have been known to make misstatements about a company in the past, and they specifically exclude them from this safe harbor. In other words, they say, Look, if you are convicted of any felony or misdemeanor, you are not going to come under this provision at least for a few years. If you are offering securities by a blank check company, you're not going to come under this safe harbor provision. If you are involved in issuance of penny stocks, you are not going to come under this safe harbor provision. If you are dealing with a rollup transaction, you will not come under the safe harbor provision. If you are dealing with a going private transaction, you will not come under the safe harbor provision.

The bill has said here are some areas, and we understand in the past people

have made misleading statements or false statements, and we are going to specifically exclude them from the safe harbor. Mr. President, I think that is responsible. I want to commend the chairman of the committee for doing that. I think it is a responsible approach. I want to say on this floor that if there are other areas that have had this kind of problem, we ought to pay attention and add them to this section. That is how to deal with this area. If there is a problem, we have to deal with it. What is left, which is considerably reduced, is meant to give some freedom of speech and is meant to allow people to make reasonable statements.

The problem here is that any time you attempt to forecast earnings, any time you, again, attempt to forecast what is going on, you are probably not going to have any better record of forecasting than the weather bureau has. They are conscientious, honest, and they miss it about half of the time. It does not mean that they are evil. What it means is that it is difficult to forecast. The question we have to answer is, should we simply, by putting tough penalties into place, prevent people from economic forecasting. Maybe we ought to put into law that it is illegal for anybody to come in about the future of their company. The reason we do not is that it probably does not help investors very much.

Mrs. BOXER. Will the Senator yield?

Mr. BROWN. I will yield when I finish my statement. This is an attempt. One says, "knowingly made with a purpose and actual intent of misleading investors." The amendment says, "made with the actual knowledge that it was false or misleading."

Well, "knowingly made" and "actual knowledge" sound similar and have some similarities. I believe, in reading the legislation, the big difference is this: It is in the words of "purpose" and "actual intent." I think as Members try and make a decision about how they can vote, they ought to ask themselves, if somebody makes a statement and it turns out not to be accurate, should we insist, before we penalize them, that they had the purpose and actual intent of misleading someone? Or was it an innocent statement and they did not intend to mislead someone, they did not have that actual intent? I believe the purpose of misleading someone and intent of misleading someone is at the heart of this amendment.

The amendment is offered by a very conscientious, thoughtful legislator. It is endorsed by a very thoughtful and reasonable judge, who acts as counsel to the President. I think the heart of the issue comes down to whether or not we want to extend economic free speech in these areas. Should you have the purpose and intent of misleading people, or should you be allowed to say what is appropriate without that?