think that Senator BYRD has to ask himself that question. We know his answer. It is one with which I agree. But all of us should ask ourselves that question.

Mr. President, in later days I will speak more on the subject.

## DIRECTING THE SENATE LEGAL COUNSEL TO BRING A CIVIL ACTION

The Senate continued with the consideration of the resolution.

Mr. LEAHY. I would like, Mr. President, to speak about Senate Resolution 199. We have been asked this session to consider a number of matters with which I did not agree. I think, frankly, this one, Senate Resolution 199, may take a special holiday season award. I am not here to talk about the arguments over the attorney-client privilege issues or the precedent we are being asked to establish, or the failure fully to explore settlement of this matter in light of the President's willingness to produce the notes to the Whitewater special counsel and to the Senate so long as a general waiver of privilege does not result. I will not linger on being asked to enforce a subpoena that was not properly served.

Let me direct my colleagues' attention to one aspect of this matter that has not yet been explored: We are being asked to authorize Senate legal counsel to commence an action that cannot be brought.

Senate resolution 199 expressly proposes that we, the Senate, direct our Senate legal counsel to bring a civil action to enforce a subpoena of the Special Committee To Investigate Whitewater Development Corporation and Related Matters for notes taken by an associate counsel to the President. The statute under which we are being asked to authorize the proposed civil contempt proceeding expressly precludes just the kind of legal action we are being asked to authorize, one that would create a confrontation with the executive branch.

The second sentence of section 1365 of title 28, United States Code, provides:

> This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Federal Government acting within his official capacity.

This, of course, was put in the statute to avoid putting the courts in a position of having to resolve a conflict between the other two independent branches of government.

So long as it would not violate anyone's attorney-client privilege, I would be extremely interested in knowing what Senate legal counsel has advised the special committee with regard to subpoenas to the White House and for White House legal counsel notes and with regard to their enforceability by way of civil action. I think before the Senate is asked to authorize it, we ought to know whether the civil contempt proceeding we are being asked to authorize is even legal. Does the special committee have a legal opinion from our Senate legal counsel on the viability of the action proposed? If so, I would like to have it put in the RECORD.

This dispute arises, as the special committee's report explains, from a demand for documents to the White House in response to which the White House identified Mr. Kennedy's notes as privileged.

The special committee goes to great lengths in its report to argue Mr. Kennedy was not acting as a personal attorney to the President and the First Lady, but then dismisses the conclusion that follows. If Mr. Kennedy attended the meeting in his role as associate counsel to the President, then it would appear that no legal action can be brought under section 1365. The special committee cannot have it both ways.

So I think we should consider that which we are being asked to authorize. I know millions of dollars have been spent on this investigation. I know we will probably spend millions more. But at least when we vote we ought to know whether we are voting to do something that can be done.

We have no need to authorize legal action, least of all one that cannot be brought under the terms of the very statute under which authorization is being sought.

I appreciate the distinguished chairman arranging this time for me.

Mr. D'AMATO. Mr. President, in order to attempt to move the flow, I would ask unanimous consent that following Senator MACK, Senator SIMON be recognized, and following Senator SIMON, Senator THOMPSON be recognized.

Mr. SARBANES. And then Senator GLENN.

Mr. D'AMATO. And then followed by Senator GLENN.

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

Mr. MACK addressed the Chair.

The PRESIDING OFFICER. The Senator from Florida.

Mr. MACK. I thank the Chair.

## CIVILITY IN SENATE DEBATE

Mr. MACK. Mr. President, I had initially come to participate in the debate on Whitewater, but there was a speech of some 45 minutes or so by Senator BYRD a little bit earlier that made reference to some comments I made in the Chamber of the Senate last Friday. The Senator referred to my use of the word ''guts'' and drew from that that I was implying that a number of Senators maybe did not have the guts to present an alternative proposal.

It would be easy for me to come here with a sense of defensiveness and anger, but I do not. I come to the floor to speak—I am not quite sure how long, and I am not quite sure what about, other than it was clearly not my intention to impugn the integrity or the intentions of my colleagues in the U.S. Senate.

I really have been, I think, driven to come to the floor this afternoon, as I said, not out of anger but, frankly, out of love. I have strived in my life to try to make civility one of my No. 1 concerns. And when I heard civility being talked about, and I heard it being talked about with reference to words that I had said last Friday, it made me take notice, it made me think about that impassioned speech that I gave last Friday.

Let me say that I feel very strongly about what I had to say about what was going on with respect to the budget and the failure to get a balanced budget and the importance of getting a balanced budget and what that means for this country, for America, for future generations, for children, for my grandchildren. I felt that very deeply.

But since I apparently—maybe I should take out the word ''apparently'' so there would be no question—since I have been charged with breaking rule IXX, I apologize to my colleagues in the U.S. Senate. I am driven to do this even though I know there are those who would say, ''Oh, you should never apologize, never engage in a defense of your actions because, you know, that brings too much attention to what you've done.'' But I come to the floor of the U.S. Senate to once again say to my friend and colleague, and somebody whom I respect tremendously, Senator DASCHLE, who in essence is kindness, that in no way did I attempt or did I mean to challenge the minority leader.

I have no ill-feelings toward Senator BYRD. He is right to remind us of the rules of the U.S. Senate. But I hope that we would all take notice of that, Democrat and Republican alike.

For me to stand here on the floor of the U.S. Senate and imply or allow others to conclude that I am the only one that might have pushed the envelope with respect to words used would, in fact, be a tragic mistake. So I hope that we would all listen to what Senator BYRD had to say.

If my coming forward today to react to Senator BYRD's comments will help reduce the rhetoric and allow us to return to a time of greater civility, then my coming to the floor will have been worth it.

I do not know how many times I thought of how we could begin the process of bridging the differences between us, of truly understanding how the other side truly believes the policies, the ideas, and the principles they put forward instead of always questioning the motive. And so I welcome those on the other side of the aisle who want to be engaged in discussions about how we bridge that divide, how we could begin the process of really truly finding out how it is that we can satisfy your concerns and at the same time satisfy ours, instead of there always having to be one winner.