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PROCEEDINGS AND DEBATES OF THE 111th CONGRESS, FIRST SESSION

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House of Representatives

The House met at 2 p.m. and was called to order by the Speaker pro tempore (Ms. EDWARDS of Maryland).

DESIGNATION OF THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore laid before the House the following communication from the Speaker:

WASHINGTON, DC,
February 2, 2009.

I hereby appoint the honorable DONNA F. EDWARDS to act as Speaker pro tempore on this day.

NANCY PELOSI,
Speaker of the House of Representatives.

PRAYER

Dr. Alan N. Keiran, Chief of Staff, Office of the Senate Chaplain, offered the following prayer:

Lord God Almighty, as the Psalmist tells us, ''You have been our dwelling place throughout all generations. Before the mountains were born or You brought forth the Earth and the world, from everlasting to everlasting to everlasting, You are God.''

Your Word is a light unto the nations, a lamp for all who seek the path to eternal life. As the Psalmist says, ''Show us Your ways, O Lord; teach us Your paths; guide us in Your truth and teach us, for You are God our Savior, and our hope is in You all day long.''

Sovereign God, we depend on You to make known to our Nation's leaders Your plans to prosper us and not to harm us, plans to give us hope and a bright future. Move in Your mighty power and restore us to faith in the veracity of Your Word. Inspire and equip us to take charge of our destiny by seeking Your wisdom and praying for Your favor to fall upon us as we align ourselves with Your perfect will.

May the heart of every leader turn to You for wisdom and guidance, for You are the One who promises that all who seek You will find You. If we confess, we will be forgiven. If we humble ourselves and pray, You will hear our petitions and move mightily on our behalf.

Restore faith to the fearful, joy to the brokenhearted and comfort to the afflicted. Be with those in harm's way and their families. This I ask in the Name above every name.

Amen.

THE JOURNAL

The SPEAKER pro tempore. The Chair has examined the Journal of the last day's proceedings and announces to the House her approval thereof.

Pursuant to clause 1, rule I, the Journal stands approved.

PLEDGE OF ALLEGIANCE

The SPEAKER pro tempore. The Chair will lead the House in the Pledge of Allegiance.

The SPEAKER pro tempore led the Pledge of Allegiance as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

COMMUNICATION FROM THE CLERK OF THE HOUSE

The SPEAKER pro tempore laid before the House the following communication from the Clerk of the House of Representatives:

JANUARY 30, 2009.

Hon. NANCY PELOSI,
Speaker, House of Representatives,
Washington, DC.

DEAR MADAM SPEAKER: Pursuant to the permission granted in Clause 2(h) of Rule II of the Rules of the U.S. House of Representatives, the Clerk received the following message from the Secretary of the Senate on January 30, 2009, at 4:06 p.m.:

That the Senate passed with an amendment; requested a conference and appointed conferees H.R. 2.

That the Senate passed S. 352.

Appointments: United States Senate Caucus on International Narcotics Control.

With best wishes, I am,

Sincerely,

LORRAINE C. MILLER,
Clerk of the House.

ADJOURNMENT

The SPEAKER pro tempore. Without objection, the House stands adjourned until 12:30 p.m. tomorrow for morning-hour debate.

There was no objection.

Accordingly (at 2 o'clock and 3 minutes p.m.), under its previous order, the House adjourned until tomorrow, Tuesday, February 3, 2009, at 12:30 p.m., for morning-hour debate.

NOTICE OF PROPOSED RULE MAKING

OFFICE OF COMPLIANCE,
Washington, DC, January 26, 2009.

Re USERRA regulations.

Hon. NANCY J. PELOSI,
Speaker, House of Representatives,
Washington, DC.

DEAR MADAM SPEAKER: Section 304(b)(3) of the Congressional Accountability Act of 1995 (CAA), 2 U.S.C. 1384(b)(3), requires that, with regard to substantive regulations under the CAA, after the Board has published a general notice of proposed rulemaking as required by subsection (b)(1), and received comments as required by subsection (b)(2), ''the Board shall adopt regulations and shall transmit notice of such action together with a copy of such regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the Congressional Record on the first day on which both Houses are in session following such transmittal.''

The Board of Directors of the Office of Compliance has adopted the proposed regulations in the Notice of Adoption of Substantive Regulations and Transmittal for Congressional Approval which accompany this transmittal letter. The Board requests that the accompanying Notice, ''H'' and ''C'' versions of the Adopted Regulations, and the Numbering Index be published in the House

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version of the Congressional Record on the first day on which both Houses are in session following receipt of this transmittal. The Board also requests that Congress approve the proposed Regulations, as further specified in the accompanying Notice.

Any inquiries regarding the accompanying Notice should be addressed to Tamara E. Chrisler, Executive Director of the Office of Compliance, 110 2nd Street, S.E., Room LA–200, Washington, D.C. 20540; 202–724–9250, TDD 202–426–1912.

Sincerely,

SUSAN S. ROBFOGEL,
Chair of the Board of Directors.

Text of USERRA Regulations

"H" Version

When approved by the House of Representatives for the House of Representative, these regulations will have the prefix "H."

Subpart A: Introduction to the Regulations

§ 1002.1 What is the purpose of this part?

This part implements certain provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or "the Act"), as applied by the Congressional Accountability Act ("CAA"). 2 U.S.C. 1316. USERRA is a law that establishes certain rights and benefits for employees, and duties for employers. USERRA affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services. There are five subparts to these regulations. Subpart A gives an introduction to the USERRA regulations. Subpart B describes USERRA's anti-discrimination and anti-retaliation provisions. Subpart C explains the steps that must be taken by a uniformed service member who wants to return to his or her previous civilian employment. Subpart D describes the rights, benefits, and obligations of persons absent from employment due to service in the uniformed services, including rights and obligations related to health plan coverage. Subpart E describes the rights, benefits, and obligations of the returning veteran or service member. Subpart F explains the role of the Office of Compliance in administering USERRA as applied by the CAA.

§ 1002.2 Is USERRA a new law?

USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was commonly referred to as the Veterans' Reemployment Rights Act ("VRRA"), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. In enacting USERRA, Congress emphasized USERRA's continuity with the VRRA and its intention to clarify and strengthen that law. Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA. USERRA authorized the Department of Labor to publish regulations implementing the Act for State, local government, and private employers. USERRA also authorized the Office of Personnel Management to issue regulations implementing the Act for Federal executive agencies, with the exception of certain Federal intelligence agencies. For those Federal intelligence agencies, USERRA established a separate program for employees. Section 206 of the CAA requires the Board of Directors of the Office of Compliance to issue regulations to implement the statutory provisions relating to employment and reemployment rights of members of the uniformed services. The regulations are required to be the same as substantive regulations promulgated by the Secretary of Labor, except where a modification of such regulations would be more effective for the implementation of the rights and protections of the Act. The Department of Labor issued its regulations, effective January 18, 2006. The regulations set forth herein are the substantive regulations that the Board of Directors of the Office of Compliance has promulgated for the legislative branch, for the implementation of the USERRA provisions of the CAA. All references to USERRA in these regulations, means USERRA, as applied by the CAA.

§ 1002.3 When did USERRA become effective?
USERRA, as applied by the CAA, became effective for employing offices of the legislative branch on January 23, 1996. These regulations will become effective upon approval by Congress.

§ 1002.4 What is the role of the Executive Director of the Office of Compliance under the USERRA provisions of the CAA?
(a) As applied by the CAA, the Executive Director of the Office of Compliance is responsible for providing education and information to any covered employing office or employee with respect to their rights, benefits, and obligations under the USERRA provisions of the CAA.
(b) The Office of Compliance, under the direction of the Executive Director, is responsible for the processing of claims filed pursuant to these regulations. More information about the Office of Compliance's role is contained in Subpart F.

§ 1002.5 What definitions apply to these USERRA regulations?
(a) **Act or USERRA** means the Uniformed Services Employment and Reemployment Rights Act of 1994, as applied by the CAA.
(b) **Benefit, benefit of employment, or rights and benefits** means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues to the employee because of an employment contract, employment agreement, or employing office policy, plan, or practice. The term includes rights and benefits under a pension plan, health plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and, where applicable, the opportunity to select work hours or the location of employment.
(c) **Board** means Board of Directors of the Office of Compliance.
(d) **CAA** means the Congressional Accountability Act of 1995, as amended (Pub. L. 104-1, 109 Stat. 3, 2 U.S.C. §§ 1301-1438).
(e) **Covered employee** means any employee, including an applicant for employment and a former employee, of (1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Government Accountability Office; (9) the Library of Congress; and (10) the Office of Compliance.
(f) **Eligible employee** means a covered employee performing service in the uniformed services, as defined in 1002.5 (t) of this subpart, whose service has not been terminated upon occurrence of any of the events enumerated in section 1002.135 of these regulations. For the purpose of defining who is covered under the discrimination section of these regulations, "performing service" means an eligible employee who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services.
(g) **Employee of the Office of the Architect of the Capitol** includes any employee of the Office of the Architect of the Capitol, the Botanic Gardens, or the Senate Restaurants.
(h) **Employee of the Capitol Police** includes any member or officer of the Capitol Police.
(i) **Employee of the House of Representatives** includes an individual occupying a position for which the pay is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not

any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.
(j) **Employee of the Senate** includes an individual occupying a position for which the pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.
(k) **Employing office** means (1) the personal office of a Member of the House of Representatives; (2) a committee of the House of Representatives or a joint committee of the House of Representatives and the Senate (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives.
(l) **Health plan** means an insurance policy, insurance contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.
(m) **Notice**, when the eligible employee is required to give advance notice of service, means any written or oral notification of an obligation or intention to perform service in the uniformed services provided to an employing office by the employee who will perform such service, or by the uniformed service in which the service is to be performed.
(n) **Office** means the Office of Compliance.
(o) **Qualified**, with respect to an employment position, means having the ability to perform the essential tasks of the position.
(p) **Reasonable efforts**, in the case of actions required of an employing office, means actions, including training provided by an employing office that do not place an undue hardship on the employing office.
(q) **Seniority** means longevity in employment together with any benefits of employment that accrue with, or are determined by, longevity in employment.
(r) **Service in the uniformed services** means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. Service in the uniformed services includes active duty, active and inactive duty for training, National Guard duty under Federal statute, and a period for which a person is absent from a position of employment for an examination to determine the fitness of the person to perform such duty. The term also includes a period for which a person is absent from employment to perform funeral honors duty as authorized by law (10 U.S.C. 12503 or 32 U.S.C. 115). The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107– 188, provides that service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System (NDMS) or as a participant in an authorized training program is deemed "service in the uniformed services." 42 U.S.C. 300hh– 11(d)(3).
(s) **Undue hardship**, in the case of actions taken by an employing office, means an action requiring significant difficulty or expense, when considered in light of—
(1) The nature and cost of the action needed under USERRA and these regulations; (2) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (3) The overall financial resources of the employing office; the overall size of the business of an employing office with respect to the number of its employees; the number, type, and location of its facilities; and, (4) The type of operation or operations of the employing office, including the composition, structure, and functions of the work force of such employing office; the geographic

separateness, administrative, or fiscal relationship of the State, District, or satellite office in question to the employing office.

(t) **Uniformed services** means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the National Disaster Medical System (NDMS) when federally activated or attending authorized training in support of their Federal mission is deemed "service in the uniformed services," although such appointee is not a member of the "uniformed services" as defined by USERRA.

§ 1002.6 What types of service in the uniformed services are covered by USERRA?

The definition of "service in the uniformed services" covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.

§ 1002.7 How does USERRA, as applied by the Congressional Accountability Act, relate to other laws, public and private contracts, and employing office practices?

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employing office may provide greater rights and benefits than USERRA requires, but no employing office can refuse to provide any right or benefit guaranteed by USERRA, as applied by the CAA.

(b) USERRA supersedes any contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an office policy that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not supersede, nullify or diminish any Federal law, contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employing office to pay an eligible employee for time away from work performing service, an employing office policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employing office provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employing office may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employing office to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.

Subpart B: Anti-Discrimination and Anti-Retaliation

PROTECTION FROM EMPLOYER DISCRIMINATION AND RETALIATION

§ 1002.18 What status or activity is protected from employer discrimination by USERRA?
An employing office must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.

§ 1002.19 What activity is protected from employer retaliation by USERRA?
An employing office must not retaliate against an eligible employee by taking any adverse employment action against him or her because the eligible employee has taken an action to enforce a protection afforded any person under USERRA; testified or otherwise made a statement in or in connection with a proceeding under USERRA; assisted or participated in a USERRA investigation; or exercised a right provided for by USERRA.

§ 1002.20 Does USERRA's prohibitions against discrimination and retaliation apply to all employment positions?
Under USERRA, as applied by the CAA, the prohibitions against discrimination and retaliation apply to eligible employees in all positions within covered employing offices, including those that are for a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. However, USERRA's reemployment rights and benefits do not apply to such brief, non-recurrent positions of employment

§ 1002.21 Does USERRA protect a covered employee who has not actually performed service in the uniformed services?
USERRA's provisions, as applied by Section 206 of the CAA, prohibit discrimination and retaliation only against eligible employees. Section 207(a) of the CAA, however, prohibits retaliation against all covered employees because the employee has opposed any practice made unlawful under the CAA, including a violation of USERRA's provisions, as applied by the CAA; or testified; assisted; or participated in any manner in a hearing or proceeding under the CAA.

Subpart C – Eligibility for Reemployment

GENERAL ELIGIBILITY FOR REEMPLOYMENT

§ 1002.32 What criteria must an employee meet to be eligible under USERRA for reemployment after service in the uniformed services?
(a) In general, if an eligible employee has been absent from a position of employment in an employing office by reason of service in the uniformed services, he or she will be eligible for reemployment in that same employing office, if that employing office continues to exist at such time, by meeting the following criteria:
(1) The employing office had advance notice of the eligible employee's service; (2) The eligible employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employing office; (3) The eligible employee timely returns to work or applies for reemployment; and, (4) The eligible employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.
(b) These general eligibility requirements have important qualifications and exceptions, which are described in detail in §§ 1002.73 through 1002.138. If the employee meets these eligibility criteria, then he or she is eligible for reemployment unless the employing office establishes one of the defenses described in § 1002.139. The employment position to which the eligible employee is entitled is described in §§ 1002.191 through 1002.199.

§ 1002.33 Does the eligible employee have to prove that the employing office discriminated against him or her in order to be eligible for reemployment?
No. The eligible employee is not required to prove that the employing office discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment

COVERAGE OF EMPLOYERS AND POSITIONS

§ 1002.34 Which employing offices are covered by these regulations?
(a) USERRA applies to all covered employing offices of the legislative branch as defined in 2 U.S.C. § 1301(9) and 2 U.S.C.§ 1316(a)(2)(C).

§ 1002.40 Does USERRA protect against discrimination in initial hiring decisions?
Yes. The definition of employer in the USERRA provision as applied by the CAA includes an employing office that has denied initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employing office need not actually employ an individual to be liable under the Act, if it has denied initial employment on the basis of the individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Similarly, the employing office would be liable if it denied initial employment on the basis of the individual's action taken to enforce a protection afforded to any person under USERRA, his or her testimony or statement in connection with any USERRA proceeding, assistance or other participation in a USERRA investigation, or the exercise of any other right provided by the Act. For example, if the individual has been denied initial employment because of his or her obligations as a member of the National Guard or Reserves, the employing office denying employment is liable under USERRA. Similarly, if an employing office withdraws an offer of employment because the individual is called upon to fulfill an

obligation in the uniformed services, the employing office withdrawing the employment offer is also liable under USERRA.

§ 1002.41 Does an eligible employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?
USERRA rights are not diminished because an eligible employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employing office is not required to reemploy an eligible employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employing office bears the burden of proving this affirmative defense.

§ 1002.42 What rights does an eligible employee have under USERRA if he or she is on layoff or on a leave of absence?
(a) If an eligible employee is laid off with recall rights, or on a leave of absence, he or she is protected under USERRA. If the eligible employee is on layoff and begins service in the uniformed services, or is laid off while performing service, he or she may be entitled to reemployment on return if the employing office would have recalled the employee to employment during the period of service. Similar principles apply if the eligible employee is on a leave of absence from work when he or she begins a period of service in the uniformed services.
(b) If the eligible employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she still remains an eligible employee for purposes of the Act. Therefore, if the employee is otherwise eligible, he or she is entitled to reemployment following the conclusion of the period of service, even if he or she did not respond to the recall notice.
(c) If the eligible employee is laid off before or during service in the uniformed services, and the employing office would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is an eligible employee. Reemployment rights under USERRA cannot put the eligible employee in a better position than if he or she had remained in the civilian employment position.

§ 1002.43 Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?
Yes. USERRA applies to all eligible employees. There is no exclusion for executive, managerial, or professional employees.

§ 1002.44 Does USERRA cover an independent contractor?
No. USERRA, as applied by the CAA, does not provide protections for an independent contractor.

COVERAGE OF SERVICE IN THE UNIFORMED SERVICES

§ 1002.54 Are all military fitness examinations considered "service in the uniformed services?"
Yes. USERRA's definition of "service in the uniformed services" includes a period for which an eligible employee is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services. Military fitness examinations can address more than physical or medical fitness, and include evaluations for

mental, educational, and other types of fitness. Any examination to determine an eligible employee's fitness for service is covered, whether it is an initial or recurring examination. For example, a periodic medical examination required of a Reserve component member to determine fitness for continued service is covered.

§ 1002.55 Is all funeral honors duty considered "service in the uniformed services?"

(a) USERRA's definition of "service in the uniformed services" includes a period for which an eligible employee is absent from employment for the purpose of performing authorized funeral honors duty under 10 U.S.C. 12503 (members of Reserve ordered to perform funeral honors duty) or 32 U.S.C. 115 (Member of Air or Army National Guard ordered to perform funeral honors duty).

(b) Funeral honors duty performed by persons who are not members of the uniformed services, such as members of veterans' service organizations, is not "service in the uniformed services."

§ 1002.56 What types of service in the National Disaster Medical System are considered "service in the uniformed services?"

Under a provision of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42 U.S.C. 300hh 11(d)(3), "service in the uniformed services" includes service performed as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or participation in an authorized training program, even if the eligible employee is not a member of the uniformed services.

§ 1002.57 Is all service as a member of the National Guard considered "service in the uniformed services?"

No. Only Federal National Guard Service is considered "service in the uniformed services." The National Guard has a dual status. It is a Reserve component of the Army, or, in the case of the Air National Guard, of the Air Force. Simultaneously, it is a State military force subject to call-up by the State Governor for duty not subject to Federal control, such as emergency duty in cases of floods or riots. National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.

(a) National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty performed under Title 10 of the United States Code. Service under Federal authority also includes duty under Title 32 of the United States Code, such as active duty for training, inactive duty training, or full-time National Guard duty.

(b) National Guard service under authority of State law is not protected by USERRA. However, many States have laws protecting the civilian job rights of National Guard members who serve under State orders. Enforcement of those State laws is not covered by USERRA or these regulations.

§ 1002.58 Is service in the commissioned corps of the Public Health Service considered "service in the uniformed services?"

Yes. Service in the commissioned corps of the Public Health Service (PHS) is "service in the uniformed services" under USERRA.

§ 1002.59 Are there any circumstances in which special categories of persons are considered to perform "service in the uniformed services?"

Yes. In time of war or national emergency, the President has authority to designate any category of persons as a "uniformed service" for purposes of USERRA. If the President exercises this authority, service as a member of that category of persons would be "service in the uniformed services" under USERRA.

§ 1002.60 Does USERRA cover an individual attending a military service academy?

Yes. Attending a military service academy is considered uniformed service for purposes of USERRA. There are four service academies: The United States Military Academy (West Point, New York), the United States Naval Academy (Annapolis, Maryland), the United States Air Force Academy (Colorado Springs, Colorado), and the United States Coast Guard Academy (New London, Connecticut).

§ 1002.61 Does USERRA cover a member of the Reserve Officers Training Corps?

Yes, under certain conditions:

(a) Membership in the Reserve Officers Training Corps (ROTC) or the Junior ROTC is not "service in the uniformed services." However, some Reserve and National Guard enlisted members use a college ROTC program as a means of qualifying for commissioned officer status. National Guard and Reserve members in an ROTC program may at times, while participating in that program, be receiving active duty and inactive duty training service credit with their unit. In these cases, participating in ROTC training sessions is considered "service in the uniformed services," and qualifies a person for protection under USERRA's reemployment and anti-discrimination provisions.

(b) Typically, an individual in a College ROTC program enters into an agreement with a particular military service that obligates such individual to either complete the ROTC program and accept a commission or, in case he or she does not successfully complete the ROTC program, to serve as an enlisted member. Although an individual does not qualify for reemployment protection, except as specified in (a) above, he or she is protected under USERRA's anti-discrimination provisions because, as a result of the agreement, he or she has applied to become a member of the uniformed services and has incurred an obligation to perform future service.

§ 1002.62 Does USERRA cover a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?

No. Although the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) is a "uniformed service" for some purposes, it is not included in USERRA's definition of this term. Service in the Civil Air Patrol and the Coast Guard Auxiliary similarly is not considered "service in the uniformed services" for purposes of USERRA. Consequently, service performed in the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA), the Civil Air Patrol, and the Coast Guard Auxiliary is not protected by USERRA.

ABSENCE FROM A POSITION OF EMPLOYMENT NECESSITATED BY REASON OF SERVICE IN THE UNIFORMED SERVICES

§ 1002.73 Does service in the uniformed services have to be an eligible employee's sole reason for leaving an employment position in order to have USERRA reemployment rights?
No. If absence from a position of employment is necessitated by service in the uniformed services, and the employee otherwise meets the Act's eligibility requirements, he or she has reemployment rights under USERRA, even if the eligible employee uses the absence for other purposes as well. An eligible employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services, although such uniformed service must be the main reason for departure from employment. For example, if the eligible employee is required to report to an out of state location for military training and he or she spends off-duty time during that assignment moonlighting as a security guard or visiting relatives who live in that State, the eligible employee will not lose reemployment rights simply because he or she used some of the time away from the job to do something other than attend the military training. Also, if an eligible employee receives advance notification of a mobilization order, and leaves his or her employment position in order to prepare for duty, but the mobilization is cancelled, the employee will not lose any reemployment rights.

§ 1002.74 Must the eligible employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?
No. At a minimum, an eligible employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning service in the uniformed services:
(a) If the eligible employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the eligible employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the eligible employee can report for uniformed service fit for duty.
(b) If the eligible employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.
(c) If the eligible employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.

§ 1002.85 Must the eligible employee give advance notice to the employing office of his or her service in the uniformed services?
(a) Yes. The eligible employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employing office that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an eligible employee is employed by more than one employing office, the employee, or an appropriate officer of the uniformed service in which

his or her service is to be performed, must notify each employing office that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.
(b) The Department of Defense USERRA regulations at 32 CFR 104.3 provide that an "appropriate officer" can give notice on the eligible employee's behalf. An "appropriate officer" is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.
(c) The eligible employee's notice to the employing office may be either oral or written. The notice may be informal and does not need to follow any particular format.
(d) Although USERRA does not specify how far in advance notice must be given to the employing office, an eligible employee should provide notice as far in advance as is reasonable under the circumstances. In regulations promulgated by the Department of Defense under USERRA, 32 CFR 104.6(a)(2)(i)(B), the Defense Department "strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so."

§ 1002.86 When is the eligible employee excused from giving advance notice of service in the uniformed services?
The eligible employee is required to give advance notice of pending service unless giving such notice is prevented by military necessity, or is otherwise impossible or unreasonable under all the circumstances.
(a) Only a designated authority can make a determination of "military necessity," and such a determination is not subject to judicial review. Guidelines for defining "military necessity" appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by "military necessity." See 42 U.S.C300hh–11(d)(3)(B).
(b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the eligible employee's employing office or the employing office's representative, or a requirement that the eligible employee report for uniformed service in an extremely short period of time.

§ 1002.87 Is the eligible employee required to get permission from his or her employing office before leaving to perform service in the uniformed services?
No. The eligible employee is not required to ask for or get the employing office's permission to leave to perform service in the uniformed services. The eligible employee is only required to give the employing office notice of pending service.

§ 1002.88 Is the eligible employee required to tell the employing office that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?
No. When the eligible employee leaves the employment position to begin a period of service, he or she is not required to tell the employing office that he or she intends to seek reemployment after completing uniformed service. Even if the eligible employee tells the employing office before entering or completing uniformed service that he or she does not intend to seek

reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The eligible employee is not required to decide in advance of leaving the position with the employing office, whether he or she will seek reemployment after completing uniformed service.

PERIOD OF SERVICE

§ 1002.99 Is there a limit on the total amount of service in the uniformed services that an eligible employee may perform and still retain reemployment rights with the employing office?

Yes. In general, the eligible employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employing office. The exceptions to this rule are described below.

§ 1002.100 Does the five-year service limit include all absences from an employment position that are related to service in the uniformed services?

No. The five-year period includes only the time the eligible employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the eligible employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

§ 1002.101 Does the five-year service limit include periods of service that the eligible employee performed when he or she worked for a previous employing office?

No. An eligible employee is entitled to a leave of absence for uniformed service for up to five years with each employing office for whom he or she works or has worked. When the eligible employee takes a position with a new employing office, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an eligible employee is employed by more than one employing office, a separate five-year period runs as to each employing office independently, even if those employing offices share or co-determine the employee's terms and conditions of employment. For example, an eligible employee of the legislative branch may work part-time for two employing offices. In this case, a separate five-year period would run as to the eligible employee's employment with each respective employing office.

§ 1002.102 Does the five-year service limit include periods of service that the eligible employee performed before USERRA was enacted?

It depends. Under the CAA, USERRA provides reemployment rights to which an eligible employee may become entitled beginning on or after January 23, 1996, but any uniformed service performed before January 23, 1996, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA's five-year limit.

§ 1002.103 Are there any types of service in the uniformed services that an eligible employee can perform that do not count against USERRA's five-year service limit?

(a) USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the eligible employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the eligible employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault;

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and, (ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the eligible employee's professional development, or to complete skill training or retraining;

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:

(i) 10 U.S.C. 688 (involuntary active duty by a military retiree);

(ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);

(iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);

(iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);

(v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);

(vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);

(vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);

(viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);

(ix) 14 U.S.C. 359 (involuntary active duty by retired Coast Guard enlisted member);

(x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);

(xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty); and

(xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service performed in a uniformed service if the eligible employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(6) Service performed in a uniformed service if the eligible employee was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304, as determined by a proper military authority;

(7) Service performed in a uniformed service if the eligible employee was ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned; and,

(8) Service performed as a member of the National Guard if the eligible employee was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States.

(b) Service performed in a uniformed service to mitigate economic harm where the eligible employee's employing office is in violation of its employment or reemployment obligations to him or her.

§ 1002.104 Is the eligible employee required to accommodate his or her employing office's needs as to the timing, frequency or duration of service?

No. The eligible employee is not required to accommodate his or her employing office's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employing office cannot refuse to reemploy the eligible employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employing office is permitted to bring its concerns over the timing, frequency, or duration of the eligible employee's service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.

APPLICATION FOR EMPLOYMENT

§ 1002.115 Is the eligible employee required to report to or submit a timely application for reemployment to his or her pre-service employing office upon completing the period of service in the uniformed services?

Yes. Upon completing service in the uniformed services, the eligible employee must notify the pre-service employing office of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the eligible employee is required to report to work or submit a timely application for reemployment depends upon the length of service, as follows:

(a) Period of service less than 31 days or for a period of any length for the purpose of a fitness examination. If the period of service in the uniformed services was less than 31 days, or the eligible employee was absent from a position of employment for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the eligible employee must report back to the employing office not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the eligible employee's residence. For example, if the eligible employee completes a period of service and travel home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employing office until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six o'clock the next morning. If it is impossible or unreasonable for the eligible employee to report within such time period through no fault of his or her own, he or she must report to the employing office as soon as possible after the expiration of the eight-hour period.

(b) Period of service more than 30 days but less than 181 days. If the eligible employee's period of service in the uniformed services was for more than 30 days but less than 181 days, he or she must submit an application for reemployment (written or oral) with the employing office not later than 14 days after completing service. If it is impossible or unreasonable for the eligible

employee to apply within 14 days through no fault of his or her own, he or she must submit the application not later than the next full calendar day after it becomes possible to do so.
(c) Period of service more than 180 days. If the eligible employee's period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or oral) not later than 90 days after completing service.

§1002.116 Is the time period for reporting back to an employing office extended if the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?
Yes. If the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an application for reemployment to the employing office at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the eligible employee's control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employing office, and is not applicable following reemployment.

§ 1002.117 Are there any consequences if the eligible employee fails to report for or submit a timely application for reemployment?
(a) If the eligible employee fails to timely report for or apply for reemployment, he or she does not automatically forfeit entitlement to USERRA's reemployment and other rights and benefits. However, the eligible employee does become subject to any conduct rules, established policy, and general practices of the employing office pertaining to an absence from scheduled work.
(b) If reporting or submitting an employment application to the employing office is impossible or unreasonable through no fault of the eligible employee, he or she may report to the employing office as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to the employing office by the next full calendar day after it becomes possible to do so (in the case of a period of service from 31 to 180 days), and the eligible employee will be considered to have timely reported or applied for reemployment.

§ 1002.118 Is an application for reemployment required to be in any particular form?
An application for reemployment need not follow any particular format. The eligible employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employing office. The eligible employee is permitted but not required to identify a particular reemployment position in which he or she is interested.

§ 1002.119 To whom must the eligible employee submit the application for reemployment?
The application must be submitted to the pre-service employing office or to an agent or representative of the employing office who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor.

§ 1002.120 If the eligible employee seeks or obtains employment with an employer other than the pre-service employing office before the end of the period within which a reemployment application must be filed, will that jeopardize reemployment rights with the pre-service employing office?

No. The eligible employee has reemployment rights with the pre-service employing office provided that he or she makes a timely reemployment application to that employing office. The eligible employee may seek or obtain employment with an employer other than the pre-service employing office during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employing office. However, such alternative employment during the application period should not be of a type that would constitute a cause for the employing office to discipline or terminate the employee following reemployment. For instance, if the employing office forbids outside employment, violation of such a policy may constitute a cause for discipline or even termination.

§ 1002.121 Is the eligible employee required to submit documentation to the employing office in connection with the application for reemployment?

Yes, if the period of service exceeded 30 days and if requested by the employing office to do so. If the eligible employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employing office, provide documentation to establish that:

(a) The reemployment application is timely;

(b) The eligible employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,

(c) The eligible employee's separation or dismissal from service was not disqualifying.

§ 1002.122 Is the employing office required to reemploy the eligible employee if documentation establishing the employee's eligibility does not exist or is not readily available?

Yes. The employing office is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The eligible employee is not liable for administrative delays in the issuance of military documentation. If the eligible employee is re-employed after an absence from employment for more than 90 days, the employing office may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the eligible employee is not entitled to reemployment, the employing office may terminate employment and any rights or benefits that the employee may have been granted.

§ 1002.123 What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?

(a) Documents that satisfy the requirements of USERRA include the following:

(1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;

(2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;

(3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;

(4) Certificate of completion from military training school;

(5) Discharge certificate showing character of service; and,
(6) Copy of extracts from payroll documents showing periods of service;
(7) Letter from NDMS Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.
(b) The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.

CHARACTER OF SERVICE

§ 1002.134 What type of discharge or separation from service is required for an eligible employee to be entitled to reemployment under USERRA?
USERRA does not require any particular form of discharge or separation from service. However, even if the employee is otherwise eligible for reemployment, he or she will be disqualified if the characterization of service falls within one of four categories. USERRA requires that the employee not have received one of these types of discharge.

§ 1002.135 What types of discharge or separation from uniformed service will make the employee ineligible for reemployment under USERRA?
Reemployment rights are terminated if the employee is:
(a) Separated from uniformed service with a dishonorable or bad conduct discharge;
(b) Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;
(c) A commissioned officer dismissed as permitted under 10 U.S.C. 1161(a) by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or,
(d) A commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

§ 1002.136 Who determines the characterization of service?
The branch of service in which the employee performs the tour of duty determines the characterization of service.

§ 1002.137 If the employee receives a disqualifying discharge or release from uniformed service and it is later upgraded, will reemployment rights be restored?
Yes. A military review board has the authority to prospectively or retroactively upgrade a disqualifying discharge or release. A retroactive upgrade would restore reemployment rights providing the employee otherwise meets the Act's eligibility criteria.

§ 1002.138 If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to claim back wages and benefits lost as of the date of separation from service?
No. A retroactive upgrade allows the employee to obtain reinstatement with the former employing office, provided the employee otherwise meets the Act's eligibility criteria. Back pay and other benefits such as pension plan credits attributable to the time period between

discharge and the retroactive upgrade are not required to be restored by the employing office in this situation.

EMPLOYER STATUTORY DEFENSES

§ 1002.139 Are there any circumstances in which the pre-service employing office is excused from its obligation to reemploy the eligible employee following a period of uniformed service? What statutory defenses are available to the employing office in an action or proceeding for reemployment benefits?

(a) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if the employing office establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employing office may be excused from re-employing the eligible employee where there has been an intervening reduction in force that would have included that employee. The employing office may not, however, refuse to reemploy the eligible employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee;

(b) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if it establishes that assisting the eligible employee in becoming qualified for reemployment would impose an undue hardship, as defined in § 1002.5(s) and discussed in § 1002.198, on the employing office; or,

(c) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if it establishes that the employment position vacated by the eligible employee in order to perform service in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

(d) The employing office defenses included in this section are affirmative ones, and the employing office carries the burden to prove by a preponderance of the evidence that any one or more of these defenses is applicable.

Subpart D—Rights, Benefits, and Obligations of Persons Absent from Employment Due to Service in the Uniformed Services

FURLOUGH AND LEAVE OF ABSENCE

§ 1002.149 What is the eligible employee's status with the employing office while performing service in the uniformed services?

During a period of service in the uniformed services, the eligible employee is deemed to be on leave of absence from the employing office. In this status, the eligible employee is entitled to the non-seniority rights and benefits generally provided by the employing office to other employees with similar seniority, status, and pay that are on leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employing office characterizes the eligible employee's status during a period of service. For example, if the employing office characterizes the employee as "terminated" during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on leave of absence, and therefore, entitled to the non-seniority rights and benefits generally provided to employees on leave of absence.

§ 1002.150 Which non-seniority rights and benefits is the eligible employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an eligible employee is entitled during a period of service are those that the employing office provides to similarly situated employees by an agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the eligible employee's employment and those established after employment began. They also include those rights and benefits that become effective during the eligible employee's period of service and that are provided to similarly situated employees on leave of absence.

(b) If the non-seniority benefits to which employees on leave of absence are entitled vary according to the type of leave, the eligible employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employing office to an eligible employee on a military leave of absence only if the employing office provides that benefit to similarly situated employees on comparable leaves of absence.

(d) Nothing in this section gives the eligible employee rights or benefits to which the employee otherwise would not be entitled if the employee had remained continuously employed with the employing office.

§ 1002.151 If the employing office provides full or partial pay to the eligible employee while he or she is on military leave, is the employing office required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?
Yes. If the employing office provides additional benefits such as full or partial pay when the eligible employee performs service, the employing office is not excused from providing other rights and benefits to which the employee is entitled under the Act.

§ 1002.152 If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the eligible employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?
If employment is interrupted by a period of service in the uniformed services and the eligible employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those non-seniority rights and benefits. The eligible employee's written notice does not waive entitlement to any other rights to which he or she is entitled under the Act, including the right to reemployment after service.

§ 1002.153 If employment is interrupted by a period of service in the uniformed services, is the eligible employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employing office require the eligible employee to use accrued leave during a period of service?
(a) If employment is interrupted by a period of service, the eligible employee must be permitted upon request to use any accrued vacation, annual, or similar leave with pay during the period of service, in order to continue his or her civilian pay. However, the eligible employee is not entitled to use sick leave that accrued with the employing office during a period of service in the uniformed services, unless the employing office allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. Sick leave is usually not comparable to annual or vacation leave; it is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.
(b) The employing office may not require the eligible employee to use accrued vacation, annual, or similar leave during a period of service in the uniformed services.

HEALTH PLAN COVERAGE

§ 1002.163 What types of health plans are covered by USERRA?
(a) USERRA defines a health plan to include an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or arrangement under which the employee's health services are provided or the expenses of those services are paid.
(b) USERRA covers group health plans as defined in the Employee Retirement Income Security Act of 1974 (ERISA) at 29 U.S.C. 1191b(a). USERRA applies to group health plans that are subject to ERISA, and plans that are not subject to ERISA, such as those sponsored by the Federal Government.
(c) USERRA covers multi-employer plans maintained pursuant to one or more collective bargaining agreements between employers and employee organizations. USERRA applies to

multi-employer plans as they are defined in ERISA at 29 U.S.C. 1002(37). USERRA contains provisions that apply specifically to multi-employer plans in certain situations.

§ 1002.164 What health plan coverage must the employing office provide for the eligible employee under USERRA?

If the eligible employee has coverage under a health plan in connection with his or her employment, the plan must permit the employee to elect to continue the coverage for a certain period of time as described below:

(a) When the eligible employee is performing service in the uniformed services, he or she is entitled to continuing coverage for himself or herself (and dependents if the plan offers dependent coverage) under a health plan provided in connection with the employment. The plan must allow the eligible employee to elect to continue coverage for a period of time that is the lesser of:

(1) The 24-month period beginning on the date on which the eligible employee's absence for the purpose of performing service begins; or,

(2) The period beginning on the date on which the eligible employee's absence for the purpose of performing service begins, and ending on the date on which he or she fails to return from service or apply for a position of employment as provided under sections 1002.115–123 of these regulations.

(b) USERRA does not require the employing office to establish a health plan if there is no health plan coverage in connection with the employment, or, where there is a plan, to provide any particular type of coverage.

(c) USERRA does not require the employing office to permit the eligible employee to initiate new health plan coverage at the beginning of a period of service if he or she did not previously have such coverage.

§ 1002.165 How does the eligible employee elect continuing health plan coverage?

USERRA does not specify requirements for electing continuing coverage. Health plan administrators may develop reasonable requirements addressing how continuing coverage may be elected, consistent with the terms of the plan and the Act's exceptions to the requirement that the employee give advance notice of service in the uniformed services. For example, the eligible employee cannot be precluded from electing continuing health plan coverage under circumstances where it is impossible or unreasonable for him or her to make a timely election of coverage.

§ 1002.166 How much must the eligible employee pay in order to continue health plan coverage?

(a) If the eligible employee performs service in the uniformed service for fewer than 31 days, he or she cannot be required to pay more than the regular employee share, if any, for health plan coverage.

(b) If the eligible employee performs service in the uniformed service for 31 or more days, he or she may be required to pay no more than 102% of the full premium under the plan, which represents the employing office's share plus the employee's share, plus 2% for administrative costs.

(c)USERRA does not specify requirements for methods of paying for continuing coverage. Health plan administrators may develop reasonable procedures for payment, consistent with the terms of the plan.

§ 1002.167 What actions may a plan administrator take if the eligible employee does not elect or pay for continuing coverage in a timely manner?

The actions a plan administrator may take regarding the provision or cancellation of an eligible employee's continuing coverage depend on whether the employee is excused from the requirement to give advance notice, whether the plan has established reasonable rules for election of continuation coverage, and whether the plan has established reasonable rules for the payment for continuation coverage.

(a) No notice of service and no election of continuation coverage:

If an employing office provides employment-based health coverage to an eligible employee who leaves employment for uniformed service without giving advance notice of service, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service. However, in cases in which an eligible employee's failure to give advance notice of service was excused under the statute because it was impossible, unreasonable, or precluded by military necessity, the plan administrator must reinstate the employee's health coverage retroactively upon his or her election to continue coverage and payment of all unpaid amounts due, and the employee must incur no administrative reinstatement costs. In order to qualify for an exception to the requirement of timely election of continuing health care, an eligible employee must first be excused from giving notice of service under the statute.

(b) Notice of service but no election of continuing coverage:

Plan administrators may develop reasonable requirements addressing how continuing coverage may be elected. Where health plans are also covered under the Consolidated Omnibus Budget Reconciliation Act of 1985, 26 U.S.C. 4980B (COBRA), it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding election of continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule. If an employing office provides employment-based health coverage to an eligible employee who leaves employment for uniformed service for a period of service in excess of 30 days after having given advance notice of service but without making an election regarding continuing coverage, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service, but must reinstate coverage without the imposition of administrative reinstatement costs under the following conditions:

(1) Plan administrators who have developed reasonable rules regarding the period within which an employee may elect continuing coverage must permit retroactive reinstatement of uninterrupted coverage to the date of departure if the eligible employee elects continuing coverage and pays all unpaid amounts due within the periods established by the plan; (2) In cases in which plan administrators have not developed rules regarding the period within which an employee may elect continuing coverage, the plan must permit retroactive reinstatement of uninterrupted coverage to the date of departure upon the eligible employee's election and payment of all unpaid amounts at any time during the period established in section 1002.164(a).

(c) Election of continuation coverage without timely payment:

Health plan administrators may adopt reasonable rules allowing cancellation of coverage if timely payment is not made. Where health plans are covered under COBRA, it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding payment for continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule.

§ 1002.168 If the eligible employee's coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?
(a) If health plan coverage for the eligible employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service.
(b) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that are not service-related (or for the employee's dependents, if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section.

§ 1002.169 Can the eligible employee elect to delay reinstatement of health plan coverage until a date after the date he or she is reemployed?
USERRA requires the employing office to reinstate or direct the reinstatement of health plan coverage upon request at reemployment. USERRA permits but does not require the employing office to allow the employee to delay reinstatement of health plan coverage until a date that is later than the date of reemployment.

§ 1002.170 In a multi-employer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?
Liability under a multi-employer plan for employer contributions and benefits in connection with USERRA's health plan provisions must be allocated either as the plan sponsor provides, or, if the sponsor does not provide, to the eligible employee's last employer before his or her service. If the last employer is no longer functional, liability for continuing coverage is allocated to the health plan.

§ 1002.171 How does the continuation of health plan benefits apply to a multi-employer plan that provides health plan coverage through a health benefits account system?
(a) Some employees receive health plan benefits provided pursuant to a multi-employer plan that utilizes a health benefits account system in which an employee accumulates prospective health benefit eligibility, also commonly referred to as "dollar bank," "credit bank," and "hour bank" plans. In such cases, where an employee with a positive health benefits account balance elects to continue the coverage, the employee may further elect either option below:
(1) The eligible employee may expend his or her health account balance during an absence from employment due to service in the uniformed services in lieu of paying for the continuation of coverage as set out in § 1002.166. If an eligible employee's health account balance becomes depleted during the applicable period provided for in § 1002.164(a), the employee must be permitted, at his or her option, to continue coverage pursuant to § 1002.166. Upon reemployment, the plan must provide for immediate reinstatement of the eligible employee as required by § 1002.168, but may require the employee to pay the cost of the coverage until the employee earns the credits necessary to sustain continued coverage in the plan.

(2) The eligible employee may pay for continuation coverage as set out in § 1002.166, in order to maintain intact his or her account balance as of the beginning date of the absence from employment due to service in the uniformed services. This option permits the eligible employee to resume usage of the account balance upon reemployment.

(b) Employers or plan administrators providing such plans should counsel employees of their options set out in this subsection.

Subpart E—Reemployment Rights and Benefits

PROMPT REEMPLOYMENT

§ 1002.180 When is an eligible employee entitled to be reemployed by the employing office?
The employing office must promptly reemploy the employee when he or she returns from a period of service if the employee meets the Act's eligibility criteria as described in Subpart C of these regulations.

§ 1002.181 How is "prompt reemployment" defined?
"Prompt reemployment" means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the eligible employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employing office may have to reassign or give notice to another employee who occupied the returning employee's position.

REEMPLOYMENT POSITION

§ 1002.191 What position is the eligible employee entitled to upon reemployment?
As a general rule, the eligible employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the eligible employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the eligible employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service. Depending upon the specific circumstances, the employing office may have the option, or be required, to reemploy the eligible employee in a position other than the escalator position.

§ 1002.192 How is the specific reemployment position determined?
In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the eligible employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employing office may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the eligible employee's length of service, qualifications, and disability, if any. The actual reemployment position may be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions.

§ 1002.193 Does the reemployment position include elements such as seniority, status, and rate of pay?
(a) Yes. The reemployment position includes the seniority, status, and rate of pay that an eligible employee would ordinarily have attained in that position given his or her job history, including

prospects for future earnings and advancement. The employing office must determine the seniority rights, status, and rate of pay as though the eligible employee had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the eligible employee's service, and any changes that may have occurred during the period of service. In particular, the eligible employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.

(b) If an opportunity for promotion, or eligibility for promotion, that the eligible employee missed during service is based on a skills test or examination, then the employing office should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the eligible employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.

§ 1002.194 Can the application of the escalator principle result in adverse consequences when the eligible employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the eligible employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an eligible employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an eligible employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employing office to assess what would have happened to such factors as the eligible employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

§ 1002.195 What other factors can determine the reemployment position?

Once the eligible employee's escalator position is determined, other factors may allow, or require, the employing office to reemploy the employee in a position other than the escalator position. These factors, which are explained in §§ 1002.196 through 1002.199, are:

(a) The length of the eligible employee's most recent period of uniformed service;
(b) The eligible employee's qualifications; and,
(c) Whether the eligible employee has a disability incurred or aggravated during uniformed service.

§ 1002.196 What is the eligible employee's reemployment position if the period of service was less than 91 days?
Following a period of service in the uniformed services of less than 91 days, the eligible employee must be reemployed according to the following priority:
(a) The eligible employee must be reemployed in the escalator position. He or she must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position after reasonable efforts by the employing office, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible employee is not qualified to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employing office, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

§ 1002.197 What is the reemployment position if the eligible employee's period of service in the uniformed services was more than 90 days?
Following a period of service of more than 90 days, the eligible employee must be reemployed according to the following priority:
(a) The eligible employee must be reemployed in the escalator position or a position of like seniority, status, and pay. He or she must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position or a like position after reasonable efforts by the employing office, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began or in a position of like seniority, status, and pay. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible employee is not qualified to perform the duties of the escalator position, the pre-service position, or a like position, after reasonable efforts by the employing office, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

§ 1002.198 What efforts must the employing office make to help the eligible employee become qualified for the reemployment position?

The eligible employee must be qualified for the reemployment position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position. The employing office is not required to reemploy the eligible employee on his or her return from service if he or she cannot, after reasonable efforts by the employing office, qualify for the appropriate reemployment position.

(a)(1) "Qualified" means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.

(2) Whether a task is essential depends on several factors, and these factors include but are not limited to:

(i) The employing office's judgment as to which functions are essential;

(ii) Written job descriptions developed before the hiring process begins;

(iii) The amount of time on the job spent performing the function;

(iv) The consequences of not requiring the individual to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(b) Only after the employing office makes reasonable efforts, as defined in § 1002.5(p), may it determine that the otherwise eligible employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.

§ 1002.199 What priority must the employing office follow if two or more returning employees are entitled to reemployment in the same position?

If two or more eligible employees are entitled to reemployment in the same position and more than one employee has reported or applied for employment in that position, the employee who first left the position for uniformed service has the first priority on reemployment in that position. The remaining employee (or employees) is entitled to be reemployed in a position similar to that in which the employee would have been re-employed according to the rules that normally determine a reemployment position, as set out in §§ 1002.196 and 1002.197.

SENIORITY RIGHTS AND BENEFITS

§ 1002.210 What seniority rights does an eligible employee have when reemployed following a period of uniformed service?

The eligible employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. The eligible employee is not entitled to any benefits to which he or she would not have been entitled had the employee been continuously employed with the employing office. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employing office and those required by statute. For example, under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601–2654 (FMLA), if the number of

months and the number of hours of work for which the service member was employed by the employing office, together with the number of months and the number of hours of work for which the service member would have been employed by the employing office during the period of uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.

§ 1002.211 Does USERRA require the employing office to use a seniority system?
No. USERRA does not require the employing office to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the eligible employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

§ 1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?
A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:
(a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;
(b) Whether it is reasonably certain that the eligible employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,
(c) Whether it is the employing office's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employing office's actual custom or practice is different from what is written in the contract or handbook.

§ 1002.213 How can the eligible employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?
A reasonable certainty is a high probability that the eligible employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The eligible employee does not have to establish that he or she would have received the benefit as an absolute certainty. The eligible employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employing office cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the eligible employee from gaining the right or benefit.

DISABLED EMPLOYEES

§ 1002.225 Is the eligible employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?
Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the eligible employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employing office must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the eligible employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employing office to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employing office must make reasonable efforts to accommodate the eligible employee's disability and to help him or her to become qualified to perform the duties of one of these positions:
(a) A position that is equivalent in seniority, status, and pay to the escalator position; or,
(b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the eligible employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.

§ 1002.226 If the eligible employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employing office make to help him or her become qualified for the reemployment position?
(a) USERRA requires that the eligible employee be qualified for the reemployment position regardless of any disability. The employing office must make reasonable efforts to help the eligible employee to become qualified to perform the duties of this position. The employing office is not required to reemploy the eligible employee on his or her return from service if he or she cannot, after reasonable efforts by the employing office, qualify for the appropriate reemployment position.
(b) "Qualified" has the same meaning here as in § 1002.198.

RATE OF PAY

§ 1002.236 How is the eligible employee's rate of pay determined when he or she returns from a period of service?
The eligible employee's rate of pay is determined by applying the same escalator principles that are used to determine the reemployment position, as follows:
(a) If the eligible employee is reemployed in the escalator position, the employing office must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the eligible employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employing office may examine the returning eligible employee's own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. For example, if the eligible employee missed a merit

pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed. If the merit pay increase that the eligible employee missed during service is based on a skills test or examination, then the employing office should give the employee a reasonable amount of time to adjust to the reemployment position and then give him or her the skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. The escalator principle also applies in the event a pay reduction occurred in the reemployment position during the period of service. Any pay adjustment must be made effective as of the date it would have occurred had the eligible employee's employment not been interrupted by uniformed service.
(b) If the eligible employee is reemployed in the pre-service position or another position, the employing office must compensate him or her at the rate of pay associated with the position in which he or she is reemployed. As with the escalator position, the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the eligible employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service.

PROTECTION AGAINST DISCHARGE

§ 1002.247 Does USERRA provide the eligible employee with protection against discharge?
Yes. If the eligible employee's most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause –
(a) For 180 days after the eligible employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,
(b) For one year after the date of reemployment if the eligible employee's most recent period of uniformed service was more than 180 days.

§ 1002.248 What constitutes cause for discharge under USERRA?
The eligible employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.
(a) In a discharge action based on conduct, the employing office bears the burden of proving that it is reasonable to discharge the eligible employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.
(b) If, based on the application of other legitimate nondiscriminatory reasons, the eligible employee's job position is eliminated, or the eligible employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employing office bears the burden of proving that the eligible employee's job would have been eliminated or that he or she would have been laid off.

PENSION PLAN BENEFITS

§ 1002.259 How does USERRA protect an eligible employee's pension benefits?
On reemployment, the eligible employee is treated as not having a break in service with the employing office for purposes of participation, vesting and accrual of benefits in a pension plan, by reason of the period of absence from employment due to or necessitated by service in the uniformed services.
(a) Depending on the length of the eligible employee's period of service, he or she is entitled to take from one to ninety days following service before reporting back to work or applying for reemployment (See § 1002.115). This period of time must be treated as continuous service with the employing office for purposes of determining participation, vesting and accrual of pension benefits under the plan.
(b) If the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, service, he or she is entitled to report to or submit an application for reemployment at the end of the time period necessary for him or her to recover from the illness or injury. This period, which may not exceed two years from the date the eligible employee completed service, except in circumstances beyond his or her control, must be treated as continuous service with the employing office for purposes of determining the participation, vesting and accrual of pension benefits under the plan.

§ 1002.260 What pension benefit plans are covered under USERRA?
(a) The Employee Retirement Income Security Act of 1974 (ERISA) defines an employee pension benefit plan as a plan that provides retirement income to employees, or defers employee income to a period extending to or beyond the termination of employment. USERRA also covers certain pension plans not covered by ERISA, such as those sponsored by the Federal Government.
(b) USERRA does not cover pension benefits under the Federal Thrift Savings Plan; those benefits are covered under 5 U.S.C. 8432b.

§ 1002.261 Who is responsible for funding any plan obligation to provide the eligible employee with pension benefits?
With the exception of multi-employer plans, which have separate rules discussed below, the employing office is required to ensure the funding of any obligation of the plan to provide benefits that are attributable to the eligible employee's period of service. In the case of a defined contribution plan, once the eligible employee is reemployed, the employing office must ensure that the amount of the make-up contribution for the employee, if any; the employee's make-up contributions, if any; and the employee's elective deferrals, if any; in the same manner and to the same extent that the amounts are allocated for other employees during the period of service. In the case of a defined benefit plan, the eligible employee's accrued benefit will be increased for the period of service once he or she is reemployed and, if applicable, has repaid any amounts previously paid to him or her from the plan and made any employee contributions that may be required to be made under the plan.

§ 1002.262 When must the plan contribution that is attributable to the employee's period of uniformed service be made?
(a) Employer contributions are not required until the eligible employee is reemployed. For employer contributions to a plan in which the eligible employee is not required or permitted to

contribute, the contribution attributable to the employee's period of service must be made no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later. If it is impossible or unreasonable for the contribution to be made within this time period, the contribution must be made as soon as practicable.

(b) If the eligible employee is enrolled in a contributory plan, he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions, or elective deferrals, must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the eligible employee's immediate past period of uniformed service, with the repayment period not to exceed five years. Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employing office.

(c) If the eligible employee's plan is contributory and he or she does not make up his or her contributions or elective deferrals, he or she will not receive the employer match or the accrued benefit attributable to his or her contribution. This is true because employer contributions are contingent on or attributable to the employee's contributions or elective deferrals only to the extent that the employee makes up his or her payments to the plan. Any employer contributions that are contingent on or attributable to the eligible employee's make-up contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions.

(d) The eligible employee is not required to make up the full amount of employee contributions or elective deferrals that he or she missed making during the period of service. If the eligible employee does not make up all of the missed contributions or elective deferrals, his or her pension may be less than if he or she had done so.

(e) Any vested accrued benefit in the pension plan that the eligible employee was entitled to prior to the period of uniformed service remains intact whether or not he or she chooses to be reemployed under the Act after leaving the uniformed service.

(f) An adjustment will be made to the amount of employee contributions or elective deferrals that the eligible employee will be able to make to the pension plan for any employee contributions or elective deferrals he or she actually made to the plan during the period of service.

§ 1002.263 Does the eligible employee pay interest when he or she makes up missed contributions or elective deferrals?

No. The eligible employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service.

§ 1002.264 Is the eligible employee allowed to repay a previous distribution from a pension benefits plan upon being reemployed?

Yes, provided the plan is a defined benefit plan. If the eligible employee received a distribution of all or part of the accrued benefit from a defined benefit plan in connection with his or her service in the uniformed services before he or she became reemployed, he or she must be allowed to repay the withdrawn amounts when he or she is reemployed. The amount the eligible employee must repay includes any interest that would have accrued had the monies not been withdrawn. The eligible employee must be allowed to repay these amounts during a time period starting with the date of reemployment and continuing for up to three times the length

of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years (or such longer time as may be agreed to between the employing office and the employee), provided the employee is employed with the post-service employing office during this period.

§ 1002.265 If the eligible employee is reemployed with his or her pre-service employing office, is the employee's pension benefit the same as if he or she had remained continuously employed?

The amount of the eligible employee's pension benefit depends on the type of pension plan.

(a) In a non-contributory defined benefit plan, where the amount of the pension benefit is determined according to a specific formula, the eligible employee's benefit will be the same as though he or she had remained continuously employed during the period of service.

(b) In a contributory defined benefit plan, the eligible employee will need to make up contributions in order to have the same benefit as if he or she had remained continuously employed during the period of service.

(c) In a defined contribution plan, the benefit may not be the same as if the employee had remained continuously employed, even though the employee and the employer make up any contributions or elective deferrals attributable to the period of service, because the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period or periods of service.

§ 1002.266 What are the obligations of a multi-employer pension benefit plan under USERRA?

A multi-employer pension benefit plan is one to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. The Act uses ERISA's definition of a multi-employer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multi-employer plans, as follows:

(a) The last employer that employed the eligible employee before the period of service is responsible for making the employer contribution to the multi-employer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the eligible employee.

(b) An employer that contributes to a multi-employer plan and that reemploys the eligible employee pursuant to USERRA must provide written notice of reemployment to the plan administrator within 30 days after the date of reemployment. The returning service member should notify the reemploying employer that he or she has been reemployed pursuant to USERRA. The 30-day period within which the reemploying employer must provide written notice to the multi-employer plan pursuant to this subsection does not begin until the employer has knowledge that the eligible employee was re-employed pursuant to USERRA.

(c) The eligible employee is entitled to the same employer contribution whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same multi-employer plan, provided that the pre-service employer and the post-service employer share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

§ 1002.267 How is compensation during the period of service calculated in order to determine the eligible employee's pension benefits, if benefits are based on compensation?

In many pension benefit plans, the eligible employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.

(a) Where the eligible employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service.

(b) (1) Where the rate of pay the eligible employee would have received is not reasonably certain, the average rate of compensation during the 12-month period prior to the period of uniformed service must be used.

(2) Where the rate of pay the eligible employee would have received is not reasonably certain and he or she was employed for less than 12 months prior to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded service.

Subpart F—Compliance Assistance, Enforcement and Remedies

COMPLIANCE ASSISTANCE

§ 1002.277 What assistance does the Office of Compliance provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

The Office of Compliance provides assistance to any person or entity who is covered by the CAA with respect to employment and reemployment rights and benefits under USERRA as applied by the CAA. This assistance includes responding to inquiries, and providing a program of education and information on matters relating to USERRA.

INVESTIGATION AND REFERRAL

§ 1002.288 How does an eligible employee initiate a claim alleging a violation of USERRA under the CAA?

(a) If an eligible employee is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employing office has failed or refused, or is about to fail or refuse, to comply with the Act, the eligible employee may file a complaint with the Office of Compliance, after a required period of counseling and mediation.

(b) To commence a proceeding, an eligible employee alleging a violation of the rights and protections of USERRA must request counseling by the Office of Compliance no later than 180 days after the date of the alleged violation. If an eligible employee misses this deadline, the claim may be time barred under the CAA.

(c) The following procedures are available under subchapter IV of the CAA for eligible employees who believe their rights under USERRA as made applicable by the CAA have been violated:

(1) counseling;

(2) mediation; and

(3) election of either -

(A) a formal complaint filed with the Office of Compliance (which must meet the requirements as set forth in the Office of Compliance Procedural Rules, Section 5.01(c)), and a hearing before a hearing officer, subject to review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit; or

(B) a civil action in a district court of the United States.

(d) Regulations of the Office of Compliance describing and governing these procedures can be found at 141 Cong. Rec. H15645-H15655 (daily ed. December 30, 1995) and 141 Cong. Rec. S19239-19249 (daily ed. December 22, 1995), 143 Cong. Rec. H8316-H8317 (daily ed. October 2, 1997)(as amended, applying USERRA to the Government Accountability Office and the Library of Congress).

ENFORCEMENT OF RIGHTS AND BENEFITS AGAINST AN EMPLOYING OFFICE

§ 1002.303 Is an eligible employee required to bring his or her USERRA claim to the Office of Compliance?

Yes. All eligible employees who file claims under Section 206 of the CAA, are required to go through counseling and mediation before electing to file a civil action or a complaint with the Office of Compliance

§ 1002.308 Who has legal standing to bring a USERRA claim under the CAA?
An action under Section 206 of the CAA may be brought by an eligible employee, as defined by Section 1002.5 (f) of Subpart A of these regulations. An action under 207(a) of the CAA may be brought by a covered employee, as defined by section 1002.5 (e) of Subpart A of these regulations. An employing office, prospective employing office or other similar entity may not bring an action under the Act.

§ 1002.309 Who is a necessary party in an action under USERRA?
In an action under USERRA, only the covered employing office or a potential covered employing office, as the case may be, is a necessary party respondent. Under the Office of Compliance Procedural Rules, a hearing officer has authority to require the filing of briefs, memoranda of law, and the presentation of oral argument. A hearing officer also may order the production of evidence and the appearance of witnesses.

§ 1002.310 How are fees and court costs awarded in an action under USERRA?
If an eligible employee is a prevailing party with respect to any claim under USERRA, the hearing officer, Board, or court may award reasonable attorney fees, expert witness fees, and other litigation expenses.

§ 1002.311 Is there a statute of limitations in an action under USERRA?
USERRA does not have a statute of limitations. However, Section 402 of the CAA requires a covered employee to bring a request for counseling alleging a violation of the CAA no later than 180 days after the date of the alleged violation. A claim by an eligible employee alleging a USERRA violation as applied by the CAA would follow this requirement .

§ 1002.312 What remedies may be awarded for a violation of USERRA?
In any action or proceeding the following relief may be awarded:
(a) The court and/or hearing officer may require the employing office to comply with the provisions of the Act;
(b) The court and/or hearing officer may require the employing office to compensate the eligible employee for any loss of wages or benefits suffered by reason of the employing office's failure to comply with the Act;
(c) The court and/or hearing officer may require the employing office to pay the eligible employee an amount equal to the amount of lost wages and benefits as liquidated damages, if the court and/or hearing officer determines that the employing office's failure to comply with the Act was willful. A violation shall be considered to be willful if the employing office either knew or showed reckless disregard for whether its conduct was prohibited by the Act.
(d) Any wages, benefits, or liquidated damages awarded under paragraphs (b) and (c) of this section are in addition to, and must not diminish, any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employing office).

DOL SECTIONS

Subpart A

Sec. 1002.1 What is the purpose of this subpart?
Sec. 1002.2 Is USERRA new law?
Sec. 1002.3 When did USERRA become effective?
Sec. 1002.4 What is the role of the Secretary of Labor under USERRA?
Sec. 1002.5 What definitions apply to USERRA?
Sec. 1002.6 What types of service in the uniformed services are covered by USERRA?
Sec. 1002.7 How does USERRA relate to other laws, public and private contracts, and employer practices?

Subpart B

Sec. 1002.18 What status or activity is protected from employer discrimination by USERRA?
Sec. 1002.19 What activity is protected from employer retaliation by USERRA?
Sec. 1002.20 Does USERRA protect an individual who does not actually perform service in the uniformed services?
Sec. 1002.21 Do the Act's prohibitions against discrimination and retaliation apply to all employment positions?
Sec. 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?
Sec. 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

OOC SECTIONS

Subpart A

Sec. 1002.1 What is the purpose of this part?
Sec. 1002.2 Is USERRA new law?
Sec. 1002.3 When did USERRA become effective?
Sec. 1002.4 What is the role of the Executive Director of the Office of Compliance under the USERRA provisions of the CAA?
Sec. 1002.5 What definitions apply to these USERRA regulations?
Sec. 1002.6 What types of service in the uniformed services are covered by USERRA?
Sec. 1002.7 How does USERRA as applied by the CAA relate to other laws, public and private contracts, and employer practices?

Subpart B

Sec. 1002.18 What status or activity is protected from employer discrimination by USERRA?
Sec. 1002.19 What activity is protected from employer retaliation by USERRA?
Sec. 1002.20 Does USERRA's prohibitions against discrimination and retaliation apply to all employment positions?
Sec. 1002.21 Does USERRA protect a covered employee who has not actually performed service in the uniformed services?

Sections 1002.22-23 are deleted from OOC regulations.

DOL SECTIONS	OOC SECTIONS
Subpart C **Sections 1002.32-34 and 1002.40-139** are the same in DOL and OOC regulations.	Subpart C **Sections 1002.32-34 and 1002.40-139** are the same in DOL and OOC regulations. **Sections 1002.35-39** are deleted from OOC regulations.
Subpart D **Sections 1002.149-171** are the same in DOL and OOC regulations.	Subpart D **Sections 1002.149-171** are the same in DOL and OOC regulations.
Subpart E **Sections 1002.180-267** are the same in DOL and OOC regulations.	Subpart E **Sections 1002.180-267** are the same in DOL and OOC regulations.
Subpart F **Section 1002.277** What assistance does the Department of Labor provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?	Subpart F **Section 1002.277** What assistance does the Office of Compliance provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?
Section 1002.288 How does an individual file a USERRA complaint?	**Section 1002.288** How does an eligible employee initiate a claim alleging a violation of USERRA under the CAA?
Section 1002.289 How will VETS investigate a USERRA complaint? **Section 1002.290** Does VETS have the authority to order compliance with USERRA? **Section 1002.291** What actions may an individual take if the complaint is not resolved by VETS? **Section 1002.292** What can the Attorney General do about the complaint?	**Sections 1002.289-292** are deleted from OOC regulations.
Section 1002.303 Is an individual required to file his or her complaint with VETS?	**Section 1002.303** Is an eligible employee required to bring his or her USERRA claim to the Office of Compliance?
Section 1002.304 If an individual files a complaint with VETS and VETS' efforts do not resolve the complaint, can the individual pursue the claim on his or her own? **Section 1002.305** What court has jurisdiction in an action against a State or private employer? **Section 1002.306** Is a National Guard civilian technician considered a State or Federal employee for purposes of USERRA? **Section 1002.307** What is the proper venue in an action against a State or Private employer?	**Sections 1002.304-307** are deleted from OOC regulations.

DOL SECTIONS

Section 1002.308 Who has legal standing to bring an action under USERRA?
Section 1002.309 Who is a necessary party in an action under USERRA?
Section 1002.310 How are fees and court costs charged or taxed in an action under USERRA?
Section 1002.311 Is there a statute of limitations in an action under USERRA?
Section 1002.312 What remedies may be awarded for a violation of USERRA?
Section 1002.313 Are there special damages provisions that apply to actions initiated in the name of the United States?
Section 1002.314 May a court use its equity powers in an action or proceeding under the Act?

OOC SECTIONS

Section 1002.308 Who has legal standing to bring a USERRA claim under the CAA?
Section 1002.309 Who is a necessary party in an action under USERRA?
Section 1002.310 How are fees and court costs awarded in an action under USERRA?
Section 1002.311 Is there a statute of limitations in an action under USERRA?
Section 1002.312 What remedies may be awarded for a violation of USERRA?

Sections 1002.313-314 are deleted from OOC regulations.

OFFICE OF COMPLIANCE: NOTICE OF ADOPTION OF SUBSTANTIVE REGULATIONS, AND SUBMISSION FOR CONGRESSIONAL APPROVAL

Adoption of the Office of Compliance Regulations Implementing Certain Substantive Employment Rights and Protections for Veterans, as Required by 2 U.S.C. 1316, the Congressional Accountability Act of 1995, as Amended

Procedural Summary:

Issuance of the Board's Initial Notice of Proposed Rulemaking:

On April 21, 2008 and May 8, 2008, the Office of Compliance published a Notice of Proposed Rulemaking ("NPR") in the Congressional Record (154 Cong. Rec. S3188 (daily ed. April 21, 2008) H3338 (daily ed. May 8, 2008))

Why did the Board propose these new Regulations?

Section 206 of the Congressional Accountability Act ("CAA"), 2 U.S.C. §1316, applies certain provisions of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Title 38, Chapter 43 of the United States Code. Section 1316 of the CAA provides protections to eligible employees in the uniformed services from discrimination, denial of reemployment rights, and denial of employee benefits. Subsection 1316(c) requires the Board not only to issue regulations to implement these protections, but to issue regulations which are "the same as the most relevant substantive regulations promulgated by the Secretary of Labor . . ." This section provides that the Board may only modify the Department of Labor regulations if it can establish good cause as to why a modification would be more effective for the application of the protections to the legislative branch. In addition, Section 1384 provides procedures for the rulemaking process in general.

What procedure followed the Board's April 16 Notice of Proposed Rulemaking?

The May 8, 2008 Notice of Proposed Rulemaking included a thirty day comment period, which began on May 9, 2008. A number of comments to the proposed substantive regulations were received by the Office of Compliance from interested parties. The Board of Directors has reviewed the comments from interested parties, made a number of changes to the proposed substantive regulations in response to comments, and on December 3, 2008 adopted the amended regulations.

What is the effect of the Board's "adoption" of these proposed substantive regulations?
Adoption of these substantive regulations by the Board of Directors does not complete the promulgation process. Pursuant to section 304 of the CAA, 2 U.S.C. 1384, the procedure for promulgating such substantive regulations requires that:

(1) the Board of Directors issue proposed substantive regulations and publish a general notice of proposed rulemaking in the *Congressional Record*;
(2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking; and
(3) after consideration of comments by the Board of Directors, that the Board adopt regulations and transmit notice of such action together with the regulations and a recommendation regarding the method for Congressional approval of the regulations to the Speaker of the House and President pro tempore of the Senate for publication in the *Congressional Record.*

This **Notice of Adoption of Substantive Regulations and Submission for Congressional Approval** completes the third step described above.

What are the next steps in the process of promulgation of these regulations?
Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to "include a recommendation in the general notice of proposed rulemaking and in the regulations as to whether the regulations should be approved by resolution of the Senate, by resolution of the House of Representatives, by concurrent resolution, or by joint resolution." The Board of Directors recommends that the House of Representatives adopt the "H" version of the regulations by resolution; that the Senate adopt the "S" version of the regulations by resolution; and that the House and Senate adopt the "C" version of the regulations applied to the other employing offices by a concurrent resolution.

Which employment and reemployment protections are applied to eligible employees in 2 U.S.C. 1316?
USERRA was enacted in December 1994, and the Department of Labor final regulations for the executive branch became effective in 2006. USERRA's provisions ensure that entry and re-entry into the civilian workforce are not hindered by participation in military service. USERRA provides certain reemployment rights; protection from discrimination based on military service, denial of an employment benefit as a result of military service; and protection from retaliation for enforcing USERRA protections.

The selected statutory provisions which Congress incorporated into the CAA and determined "shall apply" to eligible employees in the legislative branch include nine sections: sections 4303(13), 4304, 4311(a)(b), 4312, 4313, 4316, 4317, 4318, and paragraphs (1), (2)(A), and (3) of 4323(c)[1] of title 38.

The first section, section 4303(13), provides a definition for "service in the uniformed services."

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[1] As written in Section 206 of the CAA, reference is made to application of paragraphs (1), (2)(A), and (3) of section 4323(c) (Venue). However, in USERRA, section 4323(c) is not comprised of paragraphs (1), (2)(A), and (3) - - section 4323(d) (Remedies) is comprised of those paragraphs. Because of this apparent typographical error, where the CAA references paragraphs (1), (2)(A), and (3) of section 4323(c), the Board refers to section 4323(d).

This is the only definition in USERRA that Congress made applicable to the legislative branch. Section 4303(13) references Section 4304, which describes the "character of service" and illustrates situations which would terminate eligible employees' rights to USERRA benefits.

Congress applied section 4311 to the legislative branch in order to provide discrimination and retaliation protections, respectively to eligible and covered employees. Interestingly, although Congress adopted these protections, it did not adopt the legal standard by which to establish a violation of this section of the regulations.

Sections 4312 and 4313 outline the reemployment rights that are provided to eligible employees. These rights are automatic under the statute, and if an employee meets the eligibility requirements, he or she is entitled to the rights provided therein.

Sections 4316, 4317, and 4318 provide language on the benefits given to eligible employees.

Are there veterans' employment regulations already in force under the CAA?
No. The Board has issued to the Speaker of the House and the President Pro Tempore of the Senate its Notice of Adoption of Substantive Regulations and Transmittal for Congressional Approval for Veterans Employment Opportunities Act (VEOA). The Board is awaiting Congressional approval of those regulations.

Why are there substantive differences in the proposed regulations for the House of Representatives, the Senate, and the other employing offices?
As the Board of Directors has identified "good cause" to modify the executive branch regulations to implement more effectively the rights and protections for veterans, there are some differences in other parts of the proposed regulations applicable to the Senate, the House of Representatives, and the other employing offices. Therefore, the Board is submitting three separate sets of regulations: an "H" version, an "S" version, and a "C" version, each denoting those provisions in the regulations that are applicable to the House, Senate, and other employing offices, respectively.

Are these proposed regulations also recommended by the Office of Compliance's Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives?
Yes, as required by section 304(b)(1) of the CAA, 2 U.S.C. 1384(b)(1), these regulations have also been recommended by the Executive Director and Deputy Executive Directors of the Office of Compliance.

Are these proposed CAA regulations available to persons with disabilities in an alternate format?
This Notice of Adoption of Substantive Regulations, and Submission for Congressional Approval is available on the Office of Compliance web site, www.compliance.gov, which is compliant with section 508 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. 794d. This Notice can also be made available in large print or Braille. Requests for this Notice in an alternative format should be made to: Annie Leftwood, Executive Assistant, Office of Compliance, 110 2nd Street, S.E., Room LA-200, Washington, D.C. 20540; 202-724-9250; TDD:

202-426-1912; FAX: 202-426-1913.

Supplementary Information: The Congressional Accountability Act of 1995 (CAA), PL 104-1, was enacted into law on January 23, 1995. The CAA applies the rights and protections of 12 federal labor and employment statutes to covered employees and employing offices within the Legislative Branch of Government. Section 301 of the CAA (2 U.S.C. 1381) establishes the Office of Compliance as an independent office within the Legislative Branch.

The Board's Responses to Comments

SUMMARY OF MAJOR COMMENTS

General Comments

The Board noted in the Notice of Proposed Regulations (NPR) that it had not identified any "good cause" for issuing three separate sets of regulations and that if the regulations were approved as proposed, there would be one text applicable to all employing offices and covered employees. During the notice and comment period, the Board received comments from the Committee on House Administration ("CHA"), Senate Employment Counsel ("Counsel"), and the United States Capitol Police ("Capitol Police"). All of the commenters noted, in different places throughout the regulations, the need for modifications that would apply specifically to the House, Senate or other employing offices. Although the Board has not found "good cause" to vary the Department of Labor (DOL) regulations in all instances where requested, there are a number of places where such variances are warranted. In light of that and the comment by the CHA that the Congressional Accountability Act (CAA) requires the publication of separate regulations for the Senate, House and other covered employees and employing offices, the Board has made that change and put forward three separate sets of regulations, an "H" version, an "S" version, and a "C" version, each denoting the provisions that are included in the regulations that are applicable to the House, Senate, and other employing offices, respectively.

Eligible Employees

In its comments, CHA maintains that the definition of "eligible employee" in the regulations is overly broad. Pointing to Section 206(a)(2)(A) of the CAA, which defines an "eligible employee" as "a covered employee performing service in the uniformed service, within the meaning of section 4303(13) of title 38, whose service has not been terminated upon occurrence of any of the events enumerated in section 4304 of title 38," the CHA notes that the definition references only the present tense of the verb "performing" and makes no mention of the past tense. CHA also notes the Section 206 does not define eligible employee to include an individual who was previously a member of the uniformed services or one who applies or has applied to perform service in the uniformed services. CHA acknowledges that this "stands in marked contrast to the general USERRA statute's protection of individuals who currently serve as well as to those who have previously served, to those who have an obligation to serve, and to those who have applied to serve in the uniformed services (regardless of whether they actually served)." CHA further recognizes "that USERRA's intent is to provide broad protections for those who serve and have served in the uniformed services..." CHA comments that the regulations are inappropriately broad, notwithstanding language in Section 206(a)(2)(A) that strongly suggests inclusion of an individual who has been honorably discharged and is therefore not currently serving, but who has served in the past.

The Board acknowledges the tension in the language in Section 206(a)(2)(A), but does not agree with the conclusions reached by the CHA, that, absent a statutory amendment revising the

definition in Section 206(a)(2)(A), the proposed regulations should be revised to reflect that, "as applied by the CAA, USERRA only protects employees who are currently 'performing service in the uniformed services.'"

The Board's authority to promulgate substantive regulations is found in Section 206 of the CAA, 2 U.S.C. §1316, which applies certain provisions of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Title 38, Chapter 43 of the United States Code. Section 1316 of the CAA provides protections to eligible employees in the uniformed services from discrimination, denial of reemployment rights, and denial of employee benefits.

Subsection 1316(c) of the CAA requires the Board not only to issue regulations to implement these protections, but to issue regulations which are "the same as the most relevant substantive regulations promulgated by the Secretary of Labor . . ." This section provides that the Board may modify the Department of Labor regulations only if it can establish good cause as to why a modification would be more effective for application of the protections to the legislative branch. The Board chooses to apply a broad definition of "eligible employee".

The Board does not read the "performing service" language in Section 206(a)(2)(A) as limiting the discrimination protection of USERRA to only those employees who are currently serving in the uniformed services. Rather, we interpret the phrase "performing service" in this context to refer to covered employees who have some form of military status (i.e., those who have performed service or who have applied or have an obligation to perform military service, as well as those who are currently members of or who are serving in the uniformed services) as distinguished from covered employees who do not have this military status.

This application of the phrase "performing service" is supported by several indicia of Congressional intent. First, Section 206(a)(2)(A) prohibits discrimination against eligible employees "within the meaning of" subsection (a) of section 4311 of Title 38, which states: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." Most, if not all, of these protections would be lost if the phrase "performing service" were applied to exclude covered employees who are not currently performing service at the moment of the alleged violation. It would vitiate the reemployment rights under USERRA because employees would lose their statutory rights at the moment of discharge, whether honorable or not. Similarly, had Congress intended to so limit the coverage of USERRA, it could have said that "any" discharge was a disqualifying condition, not those that are other than honorable.

Congressional intent is also reflected in the USERRA statute itself, passed in 1994, which states, "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 USC 4301(b). A narrow application of the phrase "performing service" would be directly contrary to this statement of the sense of Congress.

Finally, we note that after the CAA was enacted, Congress enacted the Veteran Employment Opportunities Act and thereby granted certain preferences in hiring and retention during layoffs to *all* covered employees who are "veterans" as defined in 5 U.S.C. § 2108, or any superseding legislation. We conclude that Congress intended a broad application of the phrase "performing service" so that covered employees who will or have performed service are also protected against discrimination and the improper denial of reemployment or benefits.

In light of the above, the Board has found "good cause" to modify the Department of Labor's definition of "eligible employee". Further, in order to avoid any confusion as to the application of the regulations to "eligible" employees, the Board has made the appropriate editorial changes throughout the adopted regulations.

Other Definitions

Section 1002.5 contains the definitions used in the regulations. Several commenters have recommended that some of the definitions in this section be edited to be consistent with the CAA. Where appropriate, the Board has made those changes.[2]

Section 1002.5(i) defines an employee of the House of Representatives. The Committee on House Administration noted that because there may be some joint employees of the House and Senate, the definition of an employee of the House of Representatives should also include individuals employed by the Senate. We agree and have made the necessary revisions.

Section 1002.5(k) defines employing office. CHA commented that the definition in 1002.5(k)(4) was broader than the definition of "employing office" in Section 101(9) of the CAA. We note that during the rulemaking procedures for the Veterans Equal Opportunities Act (VEOA), the Board determined that in view of the selection process for certain Senate employees, the words "or directed" would be added to the definition of "covered employee" to include any employee who is hired at the direction of a Senator, but whose appointment form is signed by an officer of either House of Congress. Although we included such language in the proposed rules on USERRA, it appears that this language would be overreaching for the House and other employing offices. As the House has different methods of making appointments and selections, this language is unnecessary and may create confusion given the practices of the House. Accordingly, the Board has deleted this provision from the House and other employing offices version, but will include it in the Senate version.

Section 1002.5(l) defines health plan. The Capitol Police has recommended that the language in the definition of health care plans be limited to the FEHB program. As discussed more fully below, the Board is mandated to follow, as closely as possible, the regulations applied to the executive branch. In view of the fact that the DOL regulations apply to federal employees in the executive branch who are also only covered under the Federal Employees Health Benefits (FEHB) program, the Board finds that there is no good cause to limit the definition.

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[2] On October 20, 2008, Congress passed the Capitol Visitor Center Act (PL 110-437) amending Sections 101(3)(C) and 101(9)(D) of CAA to substitute "the Office of Congressional Accessibility Services" for both "the Capitol Guide Service" and "the Capitol Guide Board". The Board has modified its regulations to reflect this change in §1002.5(e)(3) in all versions and in §1002.5(k)(1) in the "C" version.

Section 1002.5(q) defines seniority. The Capitol Police has also recommended that this definition of seniority be deleted because of potential conflict with definitions of seniority in various collective bargaining agreements. The Board has determined that there is no good cause for such a change. The definition in the adopted regulations are not limiting and are consistent with §4316 of USERRA. Further, as DOL indicated in its notice to the final USERRA regulations, section 4316(a) of USERRA is not a statutory mandate to impose seniority systems on employers. Rather, USERRA requires only that those employers who provide benefits based on seniority restore the returning service member to his or her proper place on the seniority ladder. Because each employing office defines and determines how seniority is to be applied, the definition of seniority in the adopted regulations should not conflict with collective bargaining agreements.

Section 1002.5(s) defines undue hardship. The CHA has noted that in setting out the standards for considering when an action might require significant difficulty or expense, the proposed regulations did not include the language from §1002.5(n)(2) of the DOL's regulations. In the DOL's regulations, §1002.5(n)(2) provides that an action may be considered to be an undue hardship if it requires significant difficulty or expense when considered in light of: the overall financial resources of the *facility or facilities* involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility. Section 1002.5(s)(2) of the proposed regulations similarly referred to the overall financial resources of the *employing office.* However, in view of the fact that employing offices also may have multiple facilities, the Board agrees with the CHA comments and finds that there is no "good cause" to delete what was §1002.5(n)(2) of the DOL regulations. Therefore, what was §1002.5(n)(2) of the DOL regulations has been included in the adopted regulations as §1002.5(s)(2) and subsequent sections have been renumbered accordingly.

The Relationship Between USERRA and Other Laws, Contracts and Practices

Section 1002.7 states that USERRA supersedes any state and local law, contract, or policy that reduces or limits any rights or benefits provided by USERRA, but does not supersede those provisions that are more beneficial. Senate Employment Counsel has commented that reference to the fact that USERRA supersedes any state and local laws is superfluous and does not apply to legislative offices. Further, Counsel has recommended that the section referring to the fact that USERRA does not supersede more beneficial state or local laws be omitted. The Board acknowledges that state and local laws do not apply to federal employees or the employing offices covered under the CAA. Therefore, in order to avoid any confusion, the Board has made the appropriate changes.

Anti-Discrimination and Anti-Retaliation Provisions

As a general comment, the Capitol Police has raised questions about the Board's reference in the notice to *Britton v. Office of the Architect of the Capitol.* The Capitol Police maintains that *Britton* is not applicable to §4311(a) or (b) and that the USERRA regulations should not be changed to include substantive regulations under section 207 of the CAA. The Board notes that

the reference to the *Britton* case and retaliation under Section 207 of the CAA is merely explanatory and not a part of the substantive regulations. In the NPR, there is a typographical error and the correct statement is that the Board does not propose a particular standard for claims of discrimination or retaliation brought by eligible employees under section 206. Any discussion referring to Section 207 retaliation was for explicative purposes only. Accordingly, it should be noted that in these regulations, the Board is not discussing claims of retaliation under Section 207 and that references to Section 207 have been omitted from the adopted regulations.

Section 1002.20, as set out in the proposed regulations, discussed the extent of the coverage of USERRA's prohibitions against discrimination and retaliation. Several commenters noted that §1002.20 and §1002.21 were confusing and did not clearly differentiate discrimination and retaliation protections as applied by §206 and §207 of the CAA. The Board agrees and has modified section 1002.20 and replaced section 1002.21 with a new section to reflect that USERRA protects eligible employees in all positions with covered employing offices. Thus, because Section 206 of the CAA only covers "eligible employees" as defined in §1002.5(f), "covered employees" would only be protected by the anti-retaliation provisions under Section 207 of the CAA.

Additionally, in its comments, the Capitol Police asks why the numbering of §1002.20 and §1002.21 was reversed and why §1002.22 covering the burden of proving discrimination or retaliation was excluded. The Board notes that it had good cause to delete §1002.22 as Congress specifically did not adopt the "but for" test (38 U.S.C 4311 (c) (1) and (2)) and therefore it was confusing and unnecessary to include this provision. In view of the revisions to sections 1002.20 and 1002.21 noted above, the Board has kept the order as it was in the proposed regulations to be more consistent with these edits.

Eligibility for Reemployment

As a general comment, the CHA notes that with respect to employees in the House, the statement in the NPR that "it is not permitted for an employee to work for a Member office and a Committee at the same time" is incorrect. Although this statement is not part of the substantive regulations, where there are variations in the employment requirements of different employing offices, the Board has made the necessary changes to each of the versions of the adopted regulations.

Section 1002.32 sets out the criteria that an employee must meet to be eligible under USERRA for reemployment after service in the uniformed services. The CHA has recommended that this section be changed to be consistent with the definition of eligible employee in section 206(a)(2)(A) of the CAA, and for clarity as applied to individual employing offices which may cease to exist while an eligible employee is performing service. The Board agrees and has changed the House and Senate versions to reflect that generally, if an eligible employee is absent from a position in an employing office by reason of service in the uniformed services, he or she will be eligible for employment in the same employing office if that employing office continues to exist at such time.

Section 1002.34 of the proposed regulations established that USERRA applies to all covered employing offices of the legislative branch as defined in Subpart A, section 1002.5(e). Both the Capitol Police and Senate Employment Counsel commented that the definition of "employing office" should be changed to track the CAA, rather than the definition in the proposed regulations. Thus, Counsel notes that any regulation the Office of Compliance issues for an "employing office" should track 2 U.S.C. §1301(9), and include the General Accounting Office and Library of Congress, as required under 2 U.S.C. §1316(a)(2)(C). The Board agrees and has changed the definition to more closely follow the CAA.

Section 1002.40 states that in protecting against discrimination in initial hiring decisions, an employing office need not actually employ an individual to be his or her employer. The CHA commented that it is not correct to say that "[a]n employing office need not actually employ an individual to be his or her 'employer'." The CHA notes that while the result is the same-- an applicant who is otherwise an eligible employee cannot be discriminated against in initial employment based on his or her performing service in the uniformed service, to say that the employing office is his or her employer is incorrect. The Board agrees and has made the change to reflect that while an employing office may not technically be the "employer" of an applicant, the result is the same -- the employing office is *liable* under the Act if it engages in discrimination against an applicant based on his or her performing service in the uniformed service.

Section 1002.120 allows an employee to seek or obtain employment with an employer other than the pre-service employing office during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employing office. The proposed regulations stated that such alternative employment during the application period should not be of a type that would constitute a cause for the employing office to discipline or terminate the employee following reemployment. The CHA has noted that because employees of the House are "at-will", reference to termination and/or discipline for "cause" in this section is inapplicable and could be confusing. While the Board recognizes that employees of the House are "at-will", the same issues raised by the CHA can apply to many executive branch and private sector employees, as well. In view of the fact that the DOL regulations contain the same provision, notwithstanding the different employment arrangements in the private sector and executive branch agencies, the Board finds no good cause to make the change.

Health and Pension Plan Coverage

USERRA ensures that eligible employees are provided with health and pension plan coverage on a continuing basis in certain circumstances and reinstatement of coverage upon reemployment. All of the commenters have raised concerns over the inclusion of provisions concerning health and pension plan benefits and ask that these provisions be withdrawn or limited specifically to the specific health and pension plans covering federal employees. For example, the CHA notes that House employing offices do not provide health or retirement benefits to their employees and do not pay or administer contributions and/or premiums for such plans. Similarly, Senate Employment Counsel explains that while employees of Senate employing offices are entitled to health plan coverage and pension benefits under the FEHB and Civil Service Retirement System

(CSRS) or the Federal Employment Retirement System (FERS), their respective employing offices do not provide the "employer contribution" for such coverage and do not determine when such coverage starts or is reinstated or any terms or conditions of the coverage. Moreover, while the Senate appropriates monies for any agency contribution to such plans, these contributions do not come from the monies appropriated to individual employing offices.

The Board recognizes that the role of the Senate and House employing offices, in administering health and pension plans is somewhat attenuated. With the caveat in mind that it is the U.S. Office of Personnel Management that controls not only federal employee health plans, but pension plans as well, the Board nonetheless does not find good cause to exclude these provisions from the adopted regulations. In support of this, the Board notes that the DOL regulations cover federal employees in the executive branch who are also covered under the FEHB, CSRS and FERS. Moreover, USERRA itself states in Section 4318 that a right provided under any Federal or State law governing pension benefits for governmental employees (except for benefits under the Thrift Savings Plan) is covered. The Board is not aware of every employment relationship in the legislative branch and there is always the possibility that there may be situations where employees are not covered under the FEHB or CSRS/FERS, or may be covered under craft union or multi-employer plans. The Board further notes that to the extent that an employing office does not control nor is responsible for assuring that eligible employees are properly covered under health and pension plans, these provisions would not apply. Although employing offices may not have direct control over health and pension plans, they are responsible for ensuring that eligible employees are covered by facilitating or requesting that the necessary contribution or funding is made. Rather than deleting sections of the regulations, the Board has revised the regulations to reflect the responsibility of the employing offices and where appropriate, has made changes to reflect that while employing agencies may not have control over the plans, they do have some responsibility in assuring that eligible employees are covered as required under USERRA.

Protection Against Discharge

Section 1002.247 protects an employee against discharge. Rather than state that a discharge except for cause is prohibited if an employee's most recent period of service was for more than 30 days, the proposed regulations stated that, because legislative employees are at will, a discharge without cause could create a rebuttable presumption of a violation. In its comments, the CHA notes that in modifying this section, the explanation regarding the discharge of a returning employee was unclear. The Board agrees that there is no "good cause" for making the revisions originally contained in the proposed regulations and has changed this section to be consistent with DOL regulations.

Enforcement of Rights and Benefits Against an Employing Office

Section 102.303 requires that employees who file claims under USERRA are required to go through counseling and mediation before electing to file a civil action or a complaint with the Office of Compliance. The proposed regulations contained language that provided for "covered" rather than "eligible" employees to bring claims under USERRA to the Office of Compliance. The CHA commented that to be consistent with Section 206(a)(2)(A) of the CAA, this provision

should be modified to make clear that only "eligible employees" may bring claims under Section 206. The Board agrees and because only eligible employees are covered under Section 206 discrimination and retaliation provisions, this section has been modified.

Section 1002.312 provides for the various remedies that may be awarded for violations of USERRA, including liquidated damages. The CHA comments that because of a technical error in the CAA, there is no statutory authority to provide for liquidated damages remedies under USERRA. In its notice of rulemaking, the Board noted the same error. Thus, as written in Section 206 of the CAA, reference is made to the application of paragraphs (1), (2)(A), and (3) of section 4323(c). However, in USERRA, section 4323(c), which refers to venue, is not comprised of paragraphs (1), (2)(A), and (3). Rather, section 4323(d), which does address remedies, is comprised of those paragraphs. Because of this apparent typographical error, the Board noted that where the CAA references paragraphs (1), (2)(A), and (3) of section 4323(c), it would read it as referring to section 4323(d). The Board disagrees with CHA's position that because of this technical error, the liquidated damages remedy section of USERRA is not incorporated into the CAA. There is no question from the context and the express language of §206(b) which specifically provides that the remedy for a violation of §206(a) of the CAA shall be the same as remedies awarded under USERRA, that there has been a waiver of sovereign immunity sufficient to provide for all the remedies covered in paragraphs (1), (2)(A), and (3) of section 4323(d). Contrary to the CHA's observations, it does not require a court to look beyond the express language of the statute to understand Congress's intent that the liquidated damages provision of USERRA be applied under the CAA.

Under sections 1002.310 and 1002.314 of the proposed regulations, respectively, fees and court costs may not be charged against individuals claiming rights under the CAA and courts and/or hearing officers may use their equity powers in actions or proceedings under the Act. The CHA commented that because § 1002.314 and the first sentence of § 1002.310 are based on sections of USERRA that are not incorporated by the CAA (§4323(e) and §4323(h) respectively), these provisions should be deleted from the adopted regulations. The Board has reviewed these comments and while we would find that, notwithstanding any "technical" error, the CAA does incorporate the remedies set out in §1002.314 (a)-(c), we agree that the CAA does not include the remedies articulated in §4323(e) and §4323(h) of USERRA. As the first sentence in §1002.310 of the proposed regulations does appear to mirror §4323(h) of USERRA and §1002.314 of the proposed regulations similarly mirrors §4323(e), in order to avoid any confusion, the Board has found good cause to delete these provisions. The Board has retained the part of §1002.310 pertaining to the awarding of fees and costs. As discussed in the NPR, the Board found that the DOL regulations permitting an award of fees and court costs for an individual who has obtained counsel and prevailed in his or her claim against the employer was consistent with Section 225(a) of the CAA, permitting a prevailing covered employee to be awarded reasonable fees and costs. To be more fully consistent with the CAA, the Board has kept its modification of the language removing the requirement that the individual retain private counsel as a condition of such an award.

Text of USERRA Regulations

"C" Version

When approved by Congress for the other employing offices covered by the CAA, these regulations will have the prefix "C."

Subpart A: Introduction to the Regulations

§ 1002.1 What is the purpose of this part?

This part implements certain provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (''USERRA'' or ''the Act''), as applied by the Congressional Accountability Act ("CAA"). 2 U.S.C. 1316. USERRA is a law that establishes certain rights and benefits for employees, and duties for employers. USERRA affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services. There are five subparts to these regulations. Subpart A gives an introduction to the USERRA regulations. Subpart B describes USERRA's anti-discrimination and anti-retaliation provisions. Subpart C explains the steps that must be taken by a uniformed service member who wants to return to his or her previous civilian employment. Subpart D describes the rights, benefits, and obligations of persons absent from employment due to service in the uniformed services, including rights and obligations related to health plan coverage. Subpart E describes the rights, benefits, and obligations of the returning veteran or service member. Subpart F explains the role of the Office of Compliance in administering USERRA as applied by the CAA.

§ 1002.2 Is USERRA a new law?

USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was commonly referred to as the Veterans' Reemployment Rights Act ("VRRA"), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. In enacting USERRA, Congress emphasized USERRA's continuity with the VRRA and its intention to clarify and strengthen that law. Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA. USERRA authorized the Department of Labor to publish regulations implementing the Act for State, local government, and private employers. USERRA also authorized the Office of Personnel Management to issue regulations implementing the Act for Federal executive agencies, with the exception of certain Federal intelligence agencies. For those Federal intelligence agencies, USERRA established a separate program for employees. Section 206 of the CAA requires the Board of Directors of the Office of Compliance to issue regulations to implement the statutory provisions relating to employment and reemployment rights of members of the uniformed services. The regulations are required to be the same as substantive regulations promulgated by the Secretary of Labor, except where a modification of such regulations would be more effective for the implementation of the rights and protections of the Act. The Department of Labor issued its regulations, effective January 18, 2006. The regulations set forth herein are the substantive regulations that the Board of Directors of the Office of Compliance has promulgated for the legislative branch, for the implementation of the USERRA provisions of the CAA. All references to USERRA in these regulations, means USERRA, as applied by the CAA.

§ 1002.3 When did USERRA become effective?
USERRA, as applied by the CAA, became effective for employing offices of the legislative branch on January 23, 1996. These regulations will become effective upon approval by Congress.

§ 1002.4 What is the role of the Executive Director of the Office of Compliance under the USERRA provisions of the CAA?
(a) As applied by the CAA, the Executive Director of the Office of Compliance is responsible for providing education and information to any covered employing office or employee with respect to their rights, benefits, and obligations under the USERRA provisions of the CAA.
(b) The Office of Compliance, under the direction of the Executive Director, is responsible for the processing of claims filed pursuant to these regulations. More information about the Office of Compliance's role is contained in Subpart F.

§ 1002.5 What definitions apply to these USERRA regulations?
(a) **Act or USERRA** means the Uniformed Services Employment and Reemployment Rights Act of 1994, as applied by the CAA.
(b) **Benefit, benefit of employment, or rights and benefits** means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues to the employee because of an employment contract, employment agreement, or employing office policy, plan, or practice. The term includes rights and benefits under a pension plan, health plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and, where applicable, the opportunity to select work hours or the location of employment.
(c) **Board** means Board of Directors of the Office of Compliance.
(d) **CAA** means the Congressional Accountability Act of 1995, as amended (Pub. L. 104-1, 109 Stat. 3, 2 U.S.C. §§ 1301-1438).
(e) **Covered employee** means any employee, including an applicant for employment and a former employee, of (1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Government Accountability Office; (9) the Library of Congress; and (10) the Office of Compliance.
(f) **Eligible employee** means a covered employee performing service in the uniformed services, as defined in 1002.5 (t) of this subpart, whose service has not been terminated upon occurrence of any of the events enumerated in section 1002.135 of these regulations. For the purpose of defining who is covered under the discrimination section of these regulations, "performing service" means an eligible employee who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services.
(g) **Employee of the Office of the Architect of the Capitol** includes any employee of the Office of the Architect of the Capitol, the Botanic Gardens, or the Senate Restaurants.
(h) **Employee of the Capitol Police** includes any member or officer of the Capitol Police.
(i) **Employee of the House of Representatives** includes an individual occupying a position for which the pay is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not

any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.
(j) **Employee of the Senate** includes an individual occupying a position for which the pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.
(k) **Employing office** means (1) the Office of Congressional Accessibility Services; (2) the Capitol Police Board; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Government Accountability Office; (7) the Library of Congress; or (8) the Office of Compliance.
(l) **Health plan** means an insurance policy, insurance contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.
(m) **Notice**, when the eligible employee is required to give advance notice of service, means any written or oral notification of an obligation or intention to perform service in the uniformed services provided to an employing office by the employee who will perform such service, or by the uniformed service in which the service is to be performed.
(n) **Office** means the Office of Compliance.
(o) **Qualified**, with respect to an employment position, means having the ability to perform the essential tasks of the position.
(p) **Reasonable efforts**, in the case of actions required of an employing office, means actions, including training provided by an employing office that do not place an undue hardship on the employing office.
(q) **Seniority** means longevity in employment together with any benefits of employment that accrue with, or are determined by, longevity in employment.
(r) **Service in the uniformed services** means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. Service in the uniformed services includes active duty, active and inactive duty for training, National Guard duty under Federal statute, and a period for which a person is absent from a position of employment for an examination to determine the fitness of the person to perform such duty. The term also includes a period for which a person is absent from employment to perform funeral honors duty as authorized by law (10 U.S.C. 12503 or 32 U.S.C. 115). The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107– 188, provides that service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System (NDMS) or as a participant in an authorized training program is deemed ''service in the uniformed services.'' 42 U.S.C. 300hh– 11(d)(3).
(s) **Undue hardship**, in the case of actions taken by an employing office, means an action requiring significant difficulty or expense, when considered in light of—
(1) The nature and cost of the action needed under USERRA and these regulations; (2) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (3) The overall financial resources of the employing office; the overall size of the business of an employing office with respect to the number of its employees; the number, type, and location of its facilities; and, (4) The type of operation or operations of the employing office, including the composition, structure, and functions of the work force of such employing office; the geographic separateness, administrative, or fiscal relationship of the State, District, or satellite office in question to the employing office.

(t) **Uniformed services** means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the National Disaster Medical System (NDMS) when federally activated or attending authorized training in support of their Federal mission is deemed "service in the uniformed services," although such appointee is not a member of the "uniformed services" as defined by USERRA.

§ 1002.6 What types of service in the uniformed services are covered by USERRA?
The definition of "service in the uniformed services" covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.

§ 1002.7 How does USERRA, as applied by the Congressional Accountability Act, relate to other laws, public and private contracts, and employing office practices?
(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employing office may provide greater rights and benefits than USERRA requires, but no employing office can refuse to provide any right or benefit guaranteed by USERRA, as applied by the CAA.
(b) USERRA supersedes any contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an office policy that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.
(c) USERRA does not supersede, nullify or diminish any Federal law, contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employing office to pay an eligible employee for time away from work performing service, an employing office policy, plan, or practice that provides such a benefit is permissible under USERRA.
(d) If an employing office provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employing office may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employing office to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.

Subpart B: Anti-Discrimination and Anti-Retaliation

PROTECTION FROM EMPLOYER DISCRIMINATION AND RETALIATION

§ 1002.18 What status or activity is protected from employer discrimination by USERRA?
An employing office must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.

§ 1002.19 What activity is protected from employer retaliation by USERRA?
An employing office must not retaliate against an eligible employee by taking any adverse employment action against him or her because the eligible employee has taken an action to enforce a protection afforded any person under USERRA; testified or otherwise made a statement in or in connection with a proceeding under USERRA; assisted or participated in a USERRA investigation; or exercised a right provided for by USERRA.

§ 1002.20 Does USERRA's prohibitions against discrimination and retaliation apply to all employment positions?
Under USERRA, as applied by the CAA, the prohibitions against discrimination and retaliation apply to eligible employees in all positions within covered employing offices, including those that are for a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. However, USERRA's reemployment rights and benefits do not apply to such brief, non-recurrent positions of employment

§ 1002.21 Does USERRA protect a covered employee who has not actually performed service in the uniformed services?
USERRA's provisions, as applied by Section 206 of the CAA, prohibit discrimination and retaliation only against eligible employees. Section 207(a) of the CAA, however, prohibits retaliation against all covered employees because the employee has opposed any practice made unlawful under the CAA, including a violation of USERRA's provisions, as applied by the CAA; or testified; assisted; or participated in any manner in a hearing or proceeding under the CAA.

Subpart C – Eligibility for Reemployment

GENERAL ELIGIBILITY FOR REEMPLOYMENT

§ 1002.32 What criteria must an employee meet to be eligible under USERRA for reemployment after service in the uniformed services?
(a) In general, if an eligible employee has been absent from a position of employment in an employing office by reason of service in the uniformed services, he or she will be eligible for reemployment in that same employing office by meeting the following criteria:
(1) The employing office had advance notice of the eligible employee's service; (2) The eligible employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employing office; (3) The eligible employee timely returns to work or applies for reemployment; and, (4) The eligible employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.
(b) These general eligibility requirements have important qualifications and exceptions, which are described in detail in §§ 1002.73 through 1002.138. If the employee meets these eligibility criteria, then he or she is eligible for reemployment unless the employing office establishes one of the defenses described in § 1002.139. The employment position to which the eligible employee is entitled is described in §§ 1002.191 through 1002.199.

§ 1002.33 Does the eligible employee have to prove that the employing office discriminated against him or her in order to be eligible for reemployment?
No. The eligible employee is not required to prove that the employing office discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment

COVERAGE OF EMPLOYERS AND POSITIONS

§ 1002.34 Which employing offices are covered by these regulations?
(a) USERRA applies to all covered employing offices of the legislative branch as defined in 2 U.S.C. § 1301(9) and 2 U.S.C.§ 1316(a)(2)(C).

§ 1002.40 Does USERRA protect against discrimination in initial hiring decisions?
Yes. The definition of employer in the USERRA provision as applied by the CAA includes an employing office that has denied initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employing office need not actually employ an individual to be liable under the Act, if it has denied initial employment on the basis of the individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Similarly, the employing office would be liable if it denied initial employment on the basis of the individual's action taken to enforce a protection afforded to any person under USERRA, his or her testimony or statement in connection with any USERRA proceeding, assistance or other participation in a USERRA investigation, or the exercise of any other right provided by the Act. For example, if the individual has been denied initial employment because of his or her obligations as a member of the National Guard or Reserves, the employing office denying employment is liable under USERRA. Similarly, if an employing office withdraws an offer of employment because the individual is called upon to fulfill an

obligation in the uniformed services, the employing office withdrawing the employment offer is also liable under USERRA.

§ 1002.41 Does an eligible employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?
USERRA rights are not diminished because an eligible employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employing office is not required to reemploy an eligible employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employing office bears the burden of proving this affirmative defense.

§ 1002.42 What rights does an eligible employee have under USERRA if he or she is on layoff or on a leave of absence?
(a) If an eligible employee is laid off with recall rights, or on a leave of absence, he or she is protected under USERRA. If the eligible employee is on layoff and begins service in the uniformed services, or is laid off while performing service, he or she may be entitled to reemployment on return if the employing office would have recalled the employee to employment during the period of service. Similar principles apply if the eligible employee is on a leave of absence from work when he or she begins a period of service in the uniformed services.
(b) If the eligible employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she still remains an eligible employee for purposes of the Act. Therefore, if the employee is otherwise eligible, he or she is entitled to reemployment following the conclusion of the period of service, even if he or she did not respond to the recall notice.
(c) If the eligible employee is laid off before or during service in the uniformed services, and the employing office would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is an eligible employee. Reemployment rights under USERRA cannot put the eligible employee in a better position than if he or she had remained in the civilian employment position.

§ 1002.43 Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?
Yes. USERRA applies to all eligible employees. There is no exclusion for executive, managerial, or professional employees.

§ 1002.44 Does USERRA cover an independent contractor?
No. USERRA, as applied by the CAA, does not provide protections for an independent contractor.

COVERAGE OF SERVICE IN THE UNIFORMED SERVICES

§ 1002.54 Are all military fitness examinations considered "service in the uniformed services?"
Yes. USERRA's definition of "service in the uniformed services" includes a period for which an eligible employee is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services. Military fitness examinations can address more than physical or medical fitness, and include evaluations for

mental, educational, and other types of fitness. Any examination to determine an eligible employee's fitness for service is covered, whether it is an initial or recurring examination. For example, a periodic medical examination required of a Reserve component member to determine fitness for continued service is covered.

§ 1002.55 Is all funeral honors duty considered "service in the uniformed services?"

(a) USERRA's definition of "service in the uniformed services" includes a period for which an eligible employee is absent from employment for the purpose of performing authorized funeral honors duty under 10 U.S.C. 12503 (members of Reserve ordered to perform funeral honors duty) or 32 U.S.C. 115 (Member of Air or Army National Guard ordered to perform funeral honors duty).

(b) Funeral honors duty performed by persons who are not members of the uniformed services, such as members of veterans' service organizations, is not "service in the uniformed services."

§ 1002.56 What types of service in the National Disaster Medical System are considered "service in the uniformed services?"

Under a provision of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42 U.S.C. 300hh 11(d)(3), "service in the uniformed services" includes service performed as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or participation in an authorized training program, even if the eligible employee is not a member of the uniformed services.

§ 1002.57 Is all service as a member of the National Guard considered "service in the uniformed services?"

No. Only Federal National Guard Service is considered "service in the uniformed services." The National Guard has a dual status. It is a Reserve component of the Army, or, in the case of the Air National Guard, of the Air Force. Simultaneously, it is a State military force subject to call-up by the State Governor for duty not subject to Federal control, such as emergency duty in cases of floods or riots. National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.

(a) National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty performed under Title 10 of the United States Code. Service under Federal authority also includes duty under Title 32 of the United States Code, such as active duty for training, inactive duty training, or full-time National Guard duty.

(b) National Guard service under authority of State law is not protected by USERRA. However, many States have laws protecting the civilian job rights of National Guard members who serve under State orders. Enforcement of those State laws is not covered by USERRA or these regulations.

§ 1002.58 Is service in the commissioned corps of the Public Health Service considered "service in the uniformed services?"

Yes. Service in the commissioned corps of the Public Health Service (PHS) is "service in the uniformed services" under USERRA.

§ 1002.59 Are there any circumstances in which special categories of persons are considered to perform "service in the uniformed services?"

Yes. In time of war or national emergency, the President has authority to designate any category of persons as a "uniformed service" for purposes of USERRA. If the President exercises this authority, service as a member of that category of persons would be "service in the uniformed services" under USERRA.

§ 1002.60 Does USERRA cover an individual attending a military service academy?

Yes. Attending a military service academy is considered uniformed service for purposes of USERRA. There are four service academies: The United States Military Academy (West Point, New York), the United States Naval Academy (Annapolis, Maryland), the United States Air Force Academy (Colorado Springs, Colorado), and the United States Coast Guard Academy (New London, Connecticut).

§ 1002.61 Does USERRA cover a member of the Reserve Officers Training Corps?

Yes, under certain conditions:

(a) Membership in the Reserve Officers Training Corps (ROTC) or the Junior ROTC is not "service in the uniformed services." However, some Reserve and National Guard enlisted members use a college ROTC program as a means of qualifying for commissioned officer status. National Guard and Reserve members in an ROTC program may at times, while participating in that program, be receiving active duty and inactive duty training service credit with their unit. In these cases, participating in ROTC training sessions is considered "service in the uniformed services," and qualifies a person for protection under USERRA's reemployment and anti-discrimination provisions.

(b) Typically, an individual in a College ROTC program enters into an agreement with a particular military service that obligates such individual to either complete the ROTC program and accept a commission or, in case he or she does not successfully complete the ROTC program, to serve as an enlisted member. Although an individual does not qualify for reemployment protection, except as specified in (a) above, he or she is protected under USERRA's anti-discrimination provisions because, as a result of the agreement, he or she has applied to become a member of the uniformed services and has incurred an obligation to perform future service.

§ 1002.62 Does USERRA cover a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?

No. Although the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) is a "uniformed service" for some purposes, it is not included in USERRA's definition of this term. Service in the Civil Air Patrol and the Coast Guard Auxiliary similarly is not considered "service in the uniformed services" for purposes of USERRA. Consequently, service performed in the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA), the Civil Air Patrol, and the Coast Guard Auxiliary is not protected by USERRA.

ABSENCE FROM A POSITION OF EMPLOYMENT NECESSITATED BY REASON OF SERVICE IN THE UNIFORMED SERVICES

§ 1002.73 Does service in the uniformed services have to be an eligible employee's sole reason for leaving an employment position in order to have USERRA reemployment rights?
No. If absence from a position of employment is necessitated by service in the uniformed services, and the employee otherwise meets the Act's eligibility requirements, he or she has reemployment rights under USERRA, even if the eligible employee uses the absence for other purposes as well. An eligible employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services, although such uniformed service must be the main reason for departure from employment. For example, if the eligible employee is required to report to an out of state location for military training and he or she spends off-duty time during that assignment moonlighting as a security guard or visiting relatives who live in that State, the eligible employee will not lose reemployment rights simply because he or she used some of the time away from the job to do something other than attend the military training. Also, if an eligible employee receives advance notification of a mobilization order, and leaves his or her employment position in order to prepare for duty, but the mobilization is cancelled, the employee will not lose any reemployment rights.

§ 1002.74 Must the eligible employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?
No. At a minimum, an eligible employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning service in the uniformed services:
(a) If the eligible employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the eligible employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the eligible employee can report for uniformed service fit for duty.
(b) If the eligible employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.
(c) If the eligible employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.

§ 1002.85 Must the eligible employee give advance notice to the employing office of his or her service in the uniformed services?
(a) Yes. The eligible employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employing office that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an eligible employee is employed by more than one employing office, the employee, or an appropriate officer of the uniformed service in which

his or her service is to be performed, must notify each employing office that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.
(b) The Department of Defense USERRA regulations at 32 CFR 104.3 provide that an "appropriate officer" can give notice on the eligible employee's behalf. An "appropriate officer" is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.
(c) The eligible employee's notice to the employing office may be either oral or written. The notice may be informal and does not need to follow any particular format.
(d) Although USERRA does not specify how far in advance notice must be given to the employing office, an eligible employee should provide notice as far in advance as is reasonable under the circumstances. In regulations promulgated by the Department of Defense under USERRA, 32 CFR 104.6(a)(2)(i)(B), the Defense Department "strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so."

§ 1002.86 When is the eligible employee excused from giving advance notice of service in the uniformed services?
The eligible employee is required to give advance notice of pending service unless giving such notice is prevented by military necessity, or is otherwise impossible or unreasonable under all the circumstances.
(a) Only a designated authority can make a determination of "military necessity," and such a determination is not subject to judicial review. Guidelines for defining "military necessity" appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by "military necessity." See 42 U.S.C300hh–11(d)(3)(B).
(b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the eligible employee's employing office or the employing office's representative, or a requirement that the eligible employee report for uniformed service in an extremely short period of time.

§ 1002.87 Is the eligible employee required to get permission from his or her employing office before leaving to perform service in the uniformed services?
No. The eligible employee is not required to ask for or get the employing office's permission to leave to perform service in the uniformed services. The eligible employee is only required to give the employing office notice of pending service.

§ 1002.88 Is the eligible employee required to tell the employing office that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?
No. When the eligible employee leaves the employment position to begin a period of service, he or she is not required to tell the employing office that he or she intends to seek reemployment after completing uniformed service. Even if the eligible employee tells the employing office before entering or completing uniformed service that he or she does not intend to seek

reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The eligible employee is not required to decide in advance of leaving the position with the employing office, whether he or she will seek reemployment after completing uniformed service.

PERIOD OF SERVICE

§ 1002.99 Is there a limit on the total amount of service in the uniformed services that an eligible employee may perform and still retain reemployment rights with the employing office?

Yes. In general, the eligible employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employing office. The exceptions to this rule are described below.

§ 1002.100 Does the five-year service limit include all absences from an employment position that are related to service in the uniformed services?

No. The five-year period includes only the time the eligible employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the eligible employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

§ 1002.101 Does the five-year service limit include periods of service that the eligible employee performed when he or she worked for a previous employing office?

No. An eligible employee is entitled to a leave of absence for uniformed service for up to five years with each employing office for whom he or she works or has worked. When the eligible employee takes a position with a new employing office, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an eligible employee is employed by more than one employing office, a separate five-year period runs as to each employing office independently, even if those employing offices share or co-determine the employee's terms and conditions of employment. For example, an eligible employee of the legislative branch may work part-time for two employing offices. In this case, a separate five-year period would run as to the eligible employee's employment with each respective employing office.

§ 1002.102 Does the five-year service limit include periods of service that the eligible employee performed before USERRA was enacted?

It depends. Under the CAA, USERRA provides reemployment rights to which an eligible employee may become entitled beginning on or after January 23, 1996, but any uniformed service performed before January 23, 1996, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA's five-year limit.

§ 1002.103 Are there any types of service in the uniformed services that an eligible employee can perform that do not count against USERRA's five-year service limit?

(a) USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the eligible employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the eligible employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault;

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and, (ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the eligible employee's professional development, or to complete skill training or retraining;

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:

(i) 10 U.S.C. 688 (involuntary active duty by a military retiree);

(ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);

(iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);

(iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);

(v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);

(vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);

(vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);

(viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);

(ix) 14 U.S.C. 359 (involuntary active duty by retired Coast Guard enlisted member);

(x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);

(xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty); and

(xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service performed in a uniformed service if the eligible employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(6) Service performed in a uniformed service if the eligible employee was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304, as determined by a proper military authority;

(7) Service performed in a uniformed service if the eligible employee was ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned; and,

(8) Service performed as a member of the National Guard if the eligible employee was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States.

(b) Service performed in a uniformed service to mitigate economic harm where the eligible employee's employing office is in violation of its employment or reemployment obligations to him or her.

§ 1002.104 Is the eligible employee required to accommodate his or her employing office's needs as to the timing, frequency or duration of service?

No. The eligible employee is not required to accommodate his or her employing office's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employing office cannot refuse to reemploy the eligible employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employing office is permitted to bring its concerns over the timing, frequency, or duration of the eligible employee's service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.

APPLICATION FOR EMPLOYMENT

§ 1002.115 Is the eligible employee required to report to or submit a timely application for reemployment to his or her pre-service employing office upon completing the period of service in the uniformed services?

Yes. Upon completing service in the uniformed services, the eligible employee must notify the pre-service employing office of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the eligible employee is required to report to work or submit a timely application for reemployment depends upon the length of service, as follows:

(a) Period of service less than 31 days or for a period of any length for the purpose of a fitness examination. If the period of service in the uniformed services was less than 31 days, or the eligible employee was absent from a position of employment for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the eligible employee must report back to the employing office not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the eligible employee's residence. For example, if the eligible employee completes a period of service and travel home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employing office until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six o'clock the next morning. If it is impossible or unreasonable for the eligible employee to report within such time period through no fault of his or her own, he or she must report to the employing office as soon as possible after the expiration of the eight-hour period.

(b) Period of service more than 30 days but less than 181 days. If the eligible employee's period of service in the uniformed services was for more than 30 days but less than 181 days, he or she must submit an application for reemployment (written or oral) with the employing office not later than 14 days after completing service. If it is impossible or unreasonable for the eligible

employee to apply within 14 days through no fault of his or her own, he or she must submit the application not later than the next full calendar day after it becomes possible to do so.
(c) Period of service more than 180 days. If the eligible employee's period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or oral) not later than 90 days after completing service.

§1002.116 Is the time period for reporting back to an employing office extended if the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?
Yes. If the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an application for reemployment to the employing office at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the eligible employee's control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employing office, and is not applicable following reemployment.

§ 1002.117 Are there any consequences if the eligible employee fails to report for or submit a timely application for reemployment?
(a) If the eligible employee fails to timely report for or apply for reemployment, he or she does not automatically forfeit entitlement to USERRA's reemployment and other rights and benefits. However, the eligible employee does become subject to any conduct rules, established policy, and general practices of the employing office pertaining to an absence from scheduled work.
(b) If reporting or submitting an employment application to the employing office is impossible or unreasonable through no fault of the eligible employee, he or she may report to the employing office as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to the employing office by the next full calendar day after it becomes possible to do so (in the case of a period of service from 31 to 180 days), and the eligible employee will be considered to have timely reported or applied for reemployment.

§ 1002.118 Is an application for reemployment required to be in any particular form?
An application for reemployment need not follow any particular format. The eligible employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employing office. The eligible employee is permitted but not required to identify a particular reemployment position in which he or she is interested.

§ 1002.119 To whom must the eligible employee submit the application for reemployment?
The application must be submitted to the pre-service employing office or to an agent or representative of the employing office who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor.

§ 1002.120 If the eligible employee seeks or obtains employment with an employer other than the pre-service employing office before the end of the period within which a reemployment

application must be filed, will that jeopardize reemployment rights with the pre-service employing office?

No. The eligible employee has reemployment rights with the pre-service employing office provided that he or she makes a timely reemployment application to that employing office. The eligible employee may seek or obtain employment with an employer other than the pre-service employing office during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employing office. However, such alternative employment during the application period should not be of a type that would constitute a cause for the employing office to discipline or terminate the employee following reemployment. For instance, if the employing office forbids outside employment, violation of such a policy may constitute a cause for discipline or even termination.

§ 1002.121 Is the eligible employee required to submit documentation to the employing office in connection with the application for reemployment?

Yes, if the period of service exceeded 30 days and if requested by the employing office to do so. If the eligible employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employing office, provide documentation to establish that:

(a) The reemployment application is timely;

(b) The eligible employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,

(c) The eligible employee's separation or dismissal from service was not disqualifying.

§ 1002.122 Is the employing office required to reemploy the eligible employee if documentation establishing the employee's eligibility does not exist or is not readily available?

Yes. The employing office is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The eligible employee is not liable for administrative delays in the issuance of military documentation. If the eligible employee is re-employed after an absence from employment for more than 90 days, the employing office may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the eligible employee is not entitled to reemployment, the employing office may terminate employment and any rights or benefits that the employee may have been granted.

§ 1002.123 What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?

(a) Documents that satisfy the requirements of USERRA include the following:

(1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;

(2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;

(3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;

(4) Certificate of completion from military training school;

(5) Discharge certificate showing character of service; and,

(6) Copy of extracts from payroll documents showing periods of service;

(7) Letter from NDMS Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.
(b) The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.

CHARACTER OF SERVICE

§ 1002.134 What type of discharge or separation from service is required for an eligible employee to be entitled to reemployment under USERRA?
USERRA does not require any particular form of discharge or separation from service. However, even if the employee is otherwise eligible for reemployment, he or she will be disqualified if the characterization of service falls within one of four categories. USERRA requires that the employee not have received one of these types of discharge.

§ 1002.135 What types of discharge or separation from uniformed service will make the employee ineligible for reemployment under USERRA?
Reemployment rights are terminated if the employee is:
(a) Separated from uniformed service with a dishonorable or bad conduct discharge;
(b) Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;
(c) A commissioned officer dismissed as permitted under 10 U.S.C. 1161(a) by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or,
(d) A commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

§ 1002.136 Who determines the characterization of service?
The branch of service in which the employee performs the tour of duty determines the characterization of service.

§ 1002.137 If the employee receives a disqualifying discharge or release from uniformed service and it is later upgraded, will reemployment rights be restored?
Yes. A military review board has the authority to prospectively or retroactively upgrade a disqualifying discharge or release. A retroactive upgrade would restore reemployment rights providing the employee otherwise meets the Act's eligibility criteria.

§ 1002.138 If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to claim back wages and benefits lost as of the date of separation from service?
No. A retroactive upgrade allows the employee to obtain reinstatement with the former employing office, provided the employee otherwise meets the Act's eligibility criteria. Back pay and other benefits such as pension plan credits attributable to the time period between discharge and the retroactive upgrade are not required to be restored by the employing office in this situation.

EMPLOYER STATUTORY DEFENSES

§ 1002.139 Are there any circumstances in which the pre-service employing office is excused from its obligation to reemploy the eligible employee following a period of uniformed service? What statutory defenses are available to the employing office in an action or proceeding for reemployment benefits?

(a) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if the employing office establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employing office may be excused from re-employing the eligible employee where there has been an intervening reduction in force that would have included that employee. The employing office may not, however, refuse to reemploy the eligible employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee;

(b) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if it establishes that assisting the eligible employee in becoming qualified for reemployment would impose an undue hardship, as defined in § 1002.5(s) and discussed in § 1002.198, on the employing office; or,

(c) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if it establishes that the employment position vacated by the eligible employee in order to perform service in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

(d) The employing office defenses included in this section are affirmative ones, and the employing office carries the burden to prove by a preponderance of the evidence that any one or more of these defenses is applicable.

Subpart D—Rights, Benefits, and Obligations of Persons Absent from Employment Due to Service in the Uniformed Services

FURLOUGH AND LEAVE OF ABSENCE

§ 1002.149 What is the eligible employee's status with the employing office while performing service in the uniformed services?

During a period of service in the uniformed services, the eligible employee is deemed to be on leave of absence from the employing office. In this status, the eligible employee is entitled to the non-seniority rights and benefits generally provided by the employing office to other employees with similar seniority, status, and pay that are on leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employing office characterizes the eligible employee's status during a period of service. For example, if the employing office characterizes the employee as "terminated" during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on leave of absence, and therefore, entitled to the non-seniority rights and benefits generally provided to employees on leave of absence.

§ 1002.150 Which non-seniority rights and benefits is the eligible employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an eligible employee is entitled during a period of service are those that the employing office provides to similarly situated employees by an agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the eligible employee's employment and those established after employment began. They also include those rights and benefits that become effective during the eligible employee's period of service and that are provided to similarly situated employees on leave of absence.

(b) If the non-seniority benefits to which employees on leave of absence are entitled vary according to the type of leave, the eligible employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employing office to an eligible employee on a military leave of absence only if the employing office provides that benefit to similarly situated employees on comparable leaves of absence.

(d) Nothing in this section gives the eligible employee rights or benefits to which the employee otherwise would not be entitled if the employee had remained continuously employed with the employing office.

§ 1002.151 If the employing office provides full or partial pay to the eligible employee while he or she is on military leave, is the employing office required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

Yes. If the employing office provides additional benefits such as full or partial pay when the eligible employee performs service, the employing office is not excused from providing other rights and benefits to which the employee is entitled under the Act.

§ 1002.152 If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the eligible employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

If employment is interrupted by a period of service in the uniformed services and the eligible employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those non-seniority rights and benefits. The eligible employee's written notice does not waive entitlement to any other rights to which he or she is entitled under the Act, including the right to reemployment after service.

§ 1002.153 If employment is interrupted by a period of service in the uniformed services, is the eligible employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employing office require the eligible employee to use accrued leave during a period of service?

(a) If employment is interrupted by a period of service, the eligible employee must be permitted upon request to use any accrued vacation, annual, or similar leave with pay during the period of service, in order to continue his or her civilian pay. However, the eligible employee is not entitled to use sick leave that accrued with the employing office during a period of service in the uniformed services, unless the employing office allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. Sick leave is usually not comparable to annual or vacation leave; it is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.

(b) The employing office may not require the eligible employee to use accrued vacation, annual, or similar leave during a period of service in the uniformed services.

HEALTH PLAN COVERAGE

§ 1002.163 What types of health plans are covered by USERRA?

(a) USERRA defines a health plan to include an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or arrangement under which the employee's health services are provided or the expenses of those services are paid.

(b) USERRA covers group health plans as defined in the Employee Retirement Income Security Act of 1974 (ERISA) at 29 U.S.C. 1191b(a). USERRA applies to group health plans that are subject to ERISA, and plans that are not subject to ERISA, such as those sponsored by the Federal Government.

(c) USERRA covers multi-employer plans maintained pursuant to one or more collective bargaining agreements between employers and employee organizations. USERRA applies to

multi-employer plans as they are defined in ERISA at 29 U.S.C. 1002(37). USERRA contains provisions that apply specifically to multi-employer plans in certain situations.

§ 1002.164 What health plan coverage must the employing office provide for the eligible employee under USERRA?

If the eligible employee has coverage under a health plan in connection with his or her employment, the plan must permit the employee to elect to continue the coverage for a certain period of time as described below:

(a) When the eligible employee is performing service in the uniformed services, he or she is entitled to continuing coverage for himself or herself (and dependents if the plan offers dependent coverage) under a health plan provided in connection with the employment. The plan must allow the eligible employee to elect to continue coverage for a period of time that is the lesser of:

(1) The 24-month period beginning on the date on which the eligible employee's absence for the purpose of performing service begins; or,

(2) The period beginning on the date on which the eligible employee's absence for the purpose of performing service begins, and ending on the date on which he or she fails to return from service or apply for a position of employment as provided under sections 1002.115–123 of these regulations.

(b) USERRA does not require the employing office to establish a health plan if there is no health plan coverage in connection with the employment, or, where there is a plan, to provide any particular type of coverage.

(c) USERRA does not require the employing office to permit the eligible employee to initiate new health plan coverage at the beginning of a period of service if he or she did not previously have such coverage.

§ 1002.165 How does the eligible employee elect continuing health plan coverage?

USERRA does not specify requirements for electing continuing coverage. Health plan administrators may develop reasonable requirements addressing how continuing coverage may be elected, consistent with the terms of the plan and the Act's exceptions to the requirement that the employee give advance notice of service in the uniformed services. For example, the eligible employee cannot be precluded from electing continuing health plan coverage under circumstances where it is impossible or unreasonable for him or her to make a timely election of coverage.

§ 1002.166 How much must the eligible employee pay in order to continue health plan coverage?

(a) If the eligible employee performs service in the uniformed service for fewer than 31 days, he or she cannot be required to pay more than the regular employee share, if any, for health plan coverage.

(b) If the eligible employee performs service in the uniformed service for 31 or more days, he or she may be required to pay no more than 102% of the full premium under the plan, which represents the employing office's share plus the employee's share, plus 2% for administrative costs.

(c)USERRA does not specify requirements for methods of paying for continuing coverage. Health plan administrators may develop reasonable procedures for payment, consistent with the terms of the plan.

§ 1002.167 What actions may a plan administrator take if the eligible employee does not elect or pay for continuing coverage in a timely manner?

The actions a plan administrator may take regarding the provision or cancellation of an eligible employee's continuing coverage depend on whether the employee is excused from the requirement to give advance notice, whether the plan has established reasonable rules for election of continuation coverage, and whether the plan has established reasonable rules for the payment for continuation coverage.

(a) No notice of service and no election of continuation coverage:

If an employing office provides employment-based health coverage to an eligible employee who leaves employment for uniformed service without giving advance notice of service, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service. However, in cases in which an eligible employee's failure to give advance notice of service was excused under the statute because it was impossible, unreasonable, or precluded by military necessity, the plan administrator must reinstate the employee's health coverage retroactively upon his or her election to continue coverage and payment of all unpaid amounts due, and the employee must incur no administrative reinstatement costs. In order to qualify for an exception to the requirement of timely election of continuing health care, an eligible employee must first be excused from giving notice of service under the statute.

(b) Notice of service but no election of continuing coverage:

Plan administrators may develop reasonable requirements addressing how continuing coverage may be elected. Where health plans are also covered under the Consolidated Omnibus Budget Reconciliation Act of 1985, 26 U.S.C. 4980B (COBRA), it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding election of continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule. If an employing office provides employment-based health coverage to an eligible employee who leaves employment for uniformed service for a period of service in excess of 30 days after having given advance notice of service but without making an election regarding continuing coverage, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service, but must reinstate coverage without the imposition of administrative reinstatement costs under the following conditions:

(1) Plan administrators who have developed reasonable rules regarding the period within which an employee may elect continuing coverage must permit retroactive reinstatement of uninterrupted coverage to the date of departure if the eligible employee elects continuing coverage and pays all unpaid amounts due within the periods established by the plan; (2) In cases in which plan administrators have not developed rules regarding the period within which an employee may elect continuing coverage, the plan must permit retroactive reinstatement of uninterrupted coverage to the date of departure upon the eligible employee's election and payment of all unpaid amounts at any time during the period established in section 1002.164(a).

(c) Election of continuation coverage without timely payment:

Health plan administrators may adopt reasonable rules allowing cancellation of coverage if timely payment is not made. Where health plans are covered under COBRA, it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding payment for continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule.

§ 1002.168 If the eligible employee's coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?
(a) If health plan coverage for the eligible employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service.
(b) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that are not service-related (or for the employee's dependents if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section.

§ 1002.169 Can the eligible employee elect to delay reinstatement of health plan coverage until a date after the date he or she is reemployed?
USERRA requires the employing office to reinstate or direct the reinstatement of health plan coverage upon request at reemployment. USERRA permits but does not require the employing office to allow the employee to delay reinstatement of health plan coverage until a date that is later than the date of reemployment.

§ 1002.170 In a multi-employer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?
Liability under a multi-employer plan for employer contributions and benefits in connection with USERRA's health plan provisions must be allocated either as the plan sponsor provides, or, if the sponsor does not provide, to the eligible employee's last employer before his or her service. If the last employer is no longer functional, liability for continuing coverage is allocated to the health plan.

§ 1002.171 How does the continuation of health plan benefits apply to a multi-employer plan that provides health plan coverage through a health benefits account system?
(a) Some employees receive health plan benefits provided pursuant to a multi-employer plan that utilizes a health benefits account system in which an employee accumulates prospective health benefit eligibility, also commonly referred to as "dollar bank," "credit bank," and "hour bank" plans. In such cases, where an employee with a positive health benefits account balance elects to continue the coverage, the employee may further elect either option below:
(1) The eligible employee may expend his or her health account balance during an absence from employment due to service in the uniformed services in lieu of paying for the continuation of coverage as set out in § 1002.166. If an eligible employee's health account balance becomes depleted during the applicable period provided for in § 1002.164(a), the employee must be permitted, at his or her option, to continue coverage pursuant to § 1002.166. Upon reemployment, the plan must provide for immediate reinstatement of the eligible employee as required by § 1002.168, but may require the employee to pay the cost of the coverage until the employee earns the credits necessary to sustain continued coverage in the plan.

(2) The eligible employee may pay for continuation coverage as set out in § 1002.166, in order to maintain intact his or her account balance as of the beginning date of the absence from employment due to service in the uniformed services. This option permits the eligible employee to resume usage of the account balance upon reemployment.

(b) Employers or plan administrators providing such plans should counsel employees of their options set out in this subsection.

Subpart E—Reemployment Rights and Benefits

PROMPT REEMPLOYMENT

§ 1002.180 When is an eligible employee entitled to be reemployed by the employing office?
The employing office must promptly reemploy the employee when he or she returns from a period of service if the employee meets the Act's eligibility criteria as described in Subpart C of these regulations.

§ 1002.181 How is "prompt reemployment" defined?
"Prompt reemployment" means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the eligible employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employing office may have to reassign or give notice to another employee who occupied the returning employee's position.

REEMPLOYMENT POSITION

§ 1002.191 What position is the eligible employee entitled to upon reemployment?
As a general rule, the eligible employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the eligible employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the eligible employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service. Depending upon the specific circumstances, the employing office may have the option, or be required, to reemploy the eligible employee in a position other than the escalator position.

§ 1002.192 How is the specific reemployment position determined?
In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the eligible employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employing office may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the eligible employee's length of service, qualifications, and disability, if any. The actual reemployment position may be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions.

§ 1002.193 Does the reemployment position include elements such as seniority, status, and rate of pay?
(a) Yes. The reemployment position includes the seniority, status, and rate of pay that an eligible employee would ordinarily have attained in that position given his or her job history, including

prospects for future earnings and advancement. The employing office must determine the seniority rights, status, and rate of pay as though the eligible employee had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the eligible employee's service, and any changes that may have occurred during the period of service. In particular, the eligible employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.

(b) If an opportunity for promotion, or eligibility for promotion, that the eligible employee missed during service is based on a skills test or examination, then the employing office should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the eligible employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.

§ 1002.194 Can the application of the escalator principle result in adverse consequences when the eligible employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the eligible employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an eligible employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an eligible employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employing office to assess what would have happened to such factors as the eligible employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

§ 1002.195 What other factors can determine the reemployment position?

Once the eligible employee's escalator position is determined, other factors may allow, or require, the employing office to reemploy the employee in a position other than the escalator position. These factors, which are explained in §§ 1002.196 through 1002.199, are:

(a) The length of the eligible employee's most recent period of uniformed service;
(b) The eligible employee's qualifications; and,
(c) Whether the eligible employee has a disability incurred or aggravated during uniformed service.

§ 1002.196 What is the eligible employee's reemployment position if the period of service was less than 91 days?
Following a period of service in the uniformed services of less than 91 days, the eligible employee must be reemployed according to the following priority:
(a) The eligible employee must be reemployed in the escalator position. He or she must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position after reasonable efforts by the employing office, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible employee is not qualified to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employing office, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

§ 1002.197 What is the reemployment position if the eligible employee's period of service in the uniformed services was more than 90 days?
Following a period of service of more than 90 days, the eligible employee must be reemployed according to the following priority:
(a) The eligible employee must be reemployed in the escalator position or a position of like seniority, status, and pay. He or she must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position or a like position after reasonable efforts by the employing office, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began or in a position of like seniority, status, and pay. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible employee is not qualified to perform the duties of the escalator position, the pre-service position, or a like position, after reasonable efforts by the employing office, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

§ 1002.198 What efforts must the employing office make to help the eligible employee become qualified for the reemployment position?

The eligible employee must be qualified for the reemployment position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position. The employing office is not required to reemploy the eligible employee on his or her return from service if he or she cannot, after reasonable efforts by the employing office, qualify for the appropriate reemployment position.

(a)(1) "Qualified" means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.

(2) Whether a task is essential depends on several factors, and these factors include but are not limited to:

(i) The employing office's judgment as to which functions are essential;

(ii) Written job descriptions developed before the hiring process begins;

(iii) The amount of time on the job spent performing the function;

(iv) The consequences of not requiring the individual to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(b) Only after the employing office makes reasonable efforts, as defined in § 1002.5(p), may it determine that the otherwise eligible employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.

§ 1002.199 What priority must the employing office follow if two or more returning employees are entitled to reemployment in the same position?

If two or more eligible employees are entitled to reemployment in the same position and more than one employee has reported or applied for employment in that position, the employee who first left the position for uniformed service has the first priority on reemployment in that position. The remaining employee (or employees) is entitled to be reemployed in a position similar to that in which the employee would have been re-employed according to the rules that normally determine a reemployment position, as set out in §§ 1002.196 and 1002.197.

SENIORITY RIGHTS AND BENEFITS

§ 1002.210 What seniority rights does an eligible employee have when reemployed following a period of uniformed service?

The eligible employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. The eligible employee is not entitled to any benefits to which he or she would not have been entitled had the employee been continuously employed with the employing office. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employing office and those required by statute. For example, under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601–2654 (FMLA), if the number of

months and the number of hours of work for which the service member was employed by the employing office, together with the number of months and the number of hours of work for which the service member would have been employed by the employing office during the period of uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.

§ 1002.211 Does USERRA require the employing office to use a seniority system?
No. USERRA does not require the employing office to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the eligible employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

§ 1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?
A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:
(a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;
(b) Whether it is reasonably certain that the eligible employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,
(c) Whether it is the employing office's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employing office's actual custom or practice is different from what is written in the contract or handbook.

§ 1002.213 How can the eligible employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?
A reasonable certainty is a high probability that the eligible employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The eligible employee does not have to establish that he or she would have received the benefit as an absolute certainty. The eligible employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employing office cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the eligible employee from gaining the right or benefit.

DISABLED EMPLOYEES

§ 1002.225 Is the eligible employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?
Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the eligible employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employing office must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the eligible employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employing office to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employing office must make reasonable efforts to accommodate the eligible employee's disability and to help him or her to become qualified to perform the duties of one of these positions:
(a) A position that is equivalent in seniority, status, and pay to the escalator position; or,
(b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the eligible employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.

§ 1002.226 If the eligible employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employing office make to help him or her become qualified for the reemployment position?
(a) USERRA requires that the eligible employee be qualified for the reemployment position regardless of any disability. The employing office must make reasonable efforts to help the eligible employee to become qualified to perform the duties of this position. The employing office is not required to reemploy the eligible employee on his or her return from service if he or she cannot, after reasonable efforts by the employing office, qualify for the appropriate reemployment position.
(b) "Qualified" has the same meaning here as in § 1002.198.

RATE OF PAY

§ 1002.236 How is the eligible employee's rate of pay determined when he or she returns from a period of service?
The eligible employee's rate of pay is determined by applying the same escalator principles that are used to determine the reemployment position, as follows:
(a) If the eligible employee is reemployed in the escalator position, the employing office must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the eligible employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employing office may examine the returning eligible employee's own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. For example, if the eligible employee missed a merit

pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed. If the merit pay increase that the eligible employee missed during service is based on a skills test or examination, then the employing office should give the employee a reasonable amount of time to adjust to the reemployment position and then give him or her the skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. The escalator principle also applies in the event a pay reduction occurred in the reemployment position during the period of service. Any pay adjustment must be made effective as of the date it would have occurred had the eligible employee's employment not been interrupted by uniformed service.
(b) If the eligible employee is reemployed in the pre-service position or another position, the employing office must compensate him or her at the rate of pay associated with the position in which he or she is reemployed. As with the escalator position, the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the eligible employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service.

PROTECTION AGAINST DISCHARGE

§ 1002.247 Does USERRA provide the eligible employee with protection against discharge?
Yes. If the eligible employee's most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause –
(a) For 180 days after the eligible employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,
(b) For one year after the date of reemployment if the eligible employee's most recent period of uniformed service was more than 180 days.

§ 1002.248 What constitutes cause for discharge under USERRA?
The eligible employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.
(a) In a discharge action based on conduct, the employing office bears the burden of proving that it is reasonable to discharge the eligible employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.
(b) If, based on the application of other legitimate nondiscriminatory reasons, the eligible employee's job position is eliminated, or the eligible employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employing office bears the burden of proving that the eligible employee's job would have been eliminated or that he or she would have been laid off.

PENSION PLAN BENEFITS

§ 1002.259 How does USERRA protect an eligible employee's pension benefits?
On reemployment, the eligible employee is treated as not having a break in service with the employing office for purposes of participation, vesting and accrual of benefits in a pension plan, by reason of the period of absence from employment due to or necessitated by service in the uniformed services.
(a) Depending on the length of the eligible employee's period of service, he or she is entitled to take from one to ninety days following service before reporting back to work or applying for reemployment (See § 1002.115). This period of time must be treated as continuous service with the employing office for purposes of determining participation, vesting and accrual of pension benefits under the plan.
(b) If the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, service, he or she is entitled to report to or submit an application for reemployment at the end of the time period necessary for him or her to recover from the illness or injury. This period, which may not exceed two years from the date the eligible employee completed service, except in circumstances beyond his or her control, must be treated as continuous service with the employing office for purposes of determining the participation, vesting and accrual of pension benefits under the plan.

§ 1002.260 What pension benefit plans are covered under USERRA?
(a) The Employee Retirement Income Security Act of 1974 (ERISA) defines an employee pension benefit plan as a plan that provides retirement income to employees, or defers employee income to a period extending to or beyond the termination of employment. USERRA also covers certain pension plans not covered by ERISA, such as those sponsored by the Federal Government.
(b) USERRA does not cover pension benefits under the Federal Thrift Savings Plan; those benefits are covered under 5 U.S.C. 8432b.

§ 1002.261 Who is responsible for funding any plan obligation to provide the eligible employee with pension benefits?
With the exception of multi-employer plans, which have separate rules discussed below, the employing office is required to ensure the funding of any obligation of the plan to provide benefits that are attributable to the eligible employee's period of service. In the case of a defined contribution plan, once the eligible employee is reemployed, the employing office must ensure that the amount of the make-up contribution for the employee, if any; the employee's make-up contributions, if any; and the employee's elective deferrals, if any; in the same manner and to the same extent that the amounts are allocated for other employees during the period of service. In the case of a defined benefit plan, the eligible employee's accrued benefit will be increased for the period of service once he or she is reemployed and, if applicable, has repaid any amounts previously paid to him or her from the plan and made any employee contributions that may be required to be made under the plan.

§ 1002.262 When must the plan contribution that is attributable to the employee's period of uniformed service be made?
(a) Employer contributions are not required until the eligible employee is reemployed. For employer contributions to a plan in which the eligible employee is not required or permitted to

contribute, the contribution attributable to the employee's period of service must be made no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later. If it is impossible or unreasonable for the contribution to be made within this time period, the contribution must be made as soon as practicable.

(b) If the eligible employee is enrolled in a contributory plan, he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions, or elective deferrals, must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the eligible employee's immediate past period of uniformed service, with the repayment period not to exceed five years. Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employing office.

(c) If the eligible employee's plan is contributory and he or she does not make up his or her contributions or elective deferrals, he or she will not receive the employer match or the accrued benefit attributable to his or her contribution. This is true because employer contributions are contingent on or attributable to the employee's contributions or elective deferrals only to the extent that the employee makes up his or her payments to the plan. Any employer contributions that are contingent on or attributable to the eligible employee's make-up contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions.

(d) The eligible employee is not required to make up the full amount of employee contributions or elective deferrals that he or she missed making during the period of service. If the eligible employee does not make up all of the missed contributions or elective deferrals, his or her pension may be less than if he or she had done so.

(e) Any vested accrued benefit in the pension plan that the eligible employee was entitled to prior to the period of uniformed service remains intact whether or not he or she chooses to be reemployed under the Act after leaving the uniformed service.

(f) An adjustment will be made to the amount of employee contributions or elective deferrals that the eligible employee will be able to make to the pension plan for any employee contributions or elective deferrals he or she actually made to the plan during the period of service.

§ 1002.263 Does the eligible employee pay interest when he or she makes up missed contributions or elective deferrals?

No. The eligible employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service.

§ 1002.264 Is the eligible employee allowed to repay a previous distribution from a pension benefits plan upon being reemployed?

Yes, provided the plan is a defined benefit plan. If the eligible employee received a distribution of all or part of the accrued benefit from a defined benefit plan in connection with his or her service in the uniformed services before he or she became reemployed, he or she must be allowed to repay the withdrawn amounts when he or she is reemployed. The amount the eligible employee must repay includes any interest that would have accrued had the monies not been withdrawn. The eligible employee must be allowed to repay these amounts during a time period starting with the date of reemployment and continuing for up to three times the length

of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years (or such longer time as may be agreed to between the employing office and the employee), provided the employee is employed with the post-service employing office during this period.

§ 1002.265 If the eligible employee is reemployed with his or her pre-service employing office, is the employee's pension benefit the same as if he or she had remained continuously employed?

The amount of the eligible employee's pension benefit depends on the type of pension plan.

(a) In a non-contributory defined benefit plan, where the amount of the pension benefit is determined according to a specific formula, the eligible employee's benefit will be the same as though he or she had remained continuously employed during the period of service.

(b) In a contributory defined benefit plan, the eligible employee will need to make up contributions in order to have the same benefit as if he or she had remained continuously employed during the period of service.

(c) In a defined contribution plan, the benefit may not be the same as if the employee had remained continuously employed, even though the employee and the employer make up any contributions or elective deferrals attributable to the period of service, because the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period or periods of service.

§ 1002.266 What are the obligations of a multi-employer pension benefit plan under USERRA?

A multi-employer pension benefit plan is one to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. The Act uses ERISA's definition of a multi-employer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multi-employer plans, as follows:

(a) The last employer that employed the eligible employee before the period of service is responsible for making the employer contribution to the multi-employer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the eligible employee.

(b) An employer that contributes to a multi-employer plan and that reemploys the eligible employee pursuant to USERRA must provide written notice of reemployment to the plan administrator within 30 days after the date of reemployment. The returning service member should notify the reemploying employer that he or she has been reemployed pursuant to USERRA. The 30-day period within which the reemploying employer must provide written notice to the multi-employer plan pursuant to this subsection does not begin until the employer has knowledge that the eligible employee was re-employed pursuant to USERRA.

(c) The eligible employee is entitled to the same employer contribution whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same multi-employer plan, provided that the pre-service employer and the post-service employer share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

§ 1002.267 How is compensation during the period of service calculated in order to determine the eligible employee's pension benefits, if benefits are based on compensation?

In many pension benefit plans, the eligible employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.

(a) Where the eligible employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service.

(b) (1) Where the rate of pay the eligible employee would have received is not reasonably certain, the average rate of compensation during the 12-month period prior to the period of uniformed service must be used.

(2) Where the rate of pay the eligible employee would have received is not reasonably certain and he or she was employed for less than 12 months prior to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded service.

Subpart F—Compliance Assistance, Enforcement and Remedies

COMPLIANCE ASSISTANCE

§ 1002.277 What assistance does the Office of Compliance provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

The Office of Compliance provides assistance to any person or entity who is covered by the CAA with respect to employment and reemployment rights and benefits under USERRA as applied by the CAA. This assistance includes responding to inquiries, and providing a program of education and information on matters relating to USERRA.

INVESTIGATION AND REFERRAL

§ 1002.288 How does an eligible employee initiate a claim alleging a violation of USERRA under the CAA?

(a) If an eligible employee is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employing office has failed or refused, or is about to fail or refuse, to comply with the Act, the eligible employee may file a complaint with the Office of Compliance, after a required period of counseling and mediation.

(b) To commence a proceeding, an eligible employee alleging a violation of the rights and protections of USERRA must request counseling by the Office of Compliance no later than 180 days after the date of the alleged violation. If an eligible employee misses this deadline, the claim may be time barred under the CAA.

(c) The following procedures are available under subchapter IV of the CAA for eligible employees who believe their rights under USERRA as made applicable by the CAA have been violated:

(1) counseling;

(2) mediation; and

(3) election of either -

(A) a formal complaint filed with the Office of Compliance (which must meet the requirements as set forth in the Office of Compliance Procedural Rules, Section 5.01(c)), and a hearing before a hearing officer, subject to review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit; or

(B) a civil action in a district court of the United States.

(d) Regulations of the Office of Compliance describing and governing these procedures can be found at 141 Cong. Rec. H15645-H15655 (daily ed. December 30, 1995) and 141 Cong. Rec. S19239-19249 (daily ed. December 22, 1995), 143 Cong. Rec. H8316-H8317(daily ed. October 2, 1997)(as amended, applying USERRA to the Government Accountability Office and the Library of Congress).

ENFORCEMENT OF RIGHTS AND BENEFITS AGAINST AN EMPLOYING OFFICE

§ 1002.303 Is an eligible employee required to bring his or her USERRA claim to the Office of Compliance?

Yes. All eligible employees who file claims under Section 206 of the CAA, are required to go through counseling and mediation before electing to file a civil action or a complaint with the Office of Compliance

§ 1002.308 Who has legal standing to bring a USERRA claim under the CAA?
An action under Section 206 of the CAA may be brought by an eligible employee, as defined by Section 1002.5 (f) of Subpart A of these regulations. An action under 207(a) of the CAA may be brought by a covered employee, as defined by section 1002.5 (e) of Subpart A of these regulations. An employing office, prospective employing office or other similar entity may not bring an action under the Act.

§ 1002.309 Who is a necessary party in an action under USERRA?
In an action under USERRA, only the covered employing office or a potential covered employing office, as the case may be, is a necessary party respondent. Under the Office of Compliance Procedural Rules, a hearing officer has authority to require the filing of briefs, memoranda of law, and the presentation of oral argument. A hearing officer also may order the production of evidence and the appearance of witnesses.

§ 1002.310 How are fees and court costs awarded in an action under USERRA?
If an eligible employee is a prevailing party with respect to any claim under USERRA, the hearing officer, Board, or court may award reasonable attorney fees, expert witness fees, and other litigation expenses.

§ 1002.311 Is there a statute of limitations in an action under USERRA?
USERRA does not have a statute of limitations. However, Section 402 of the CAA requires a covered employee to bring a request for counseling alleging a violation of the CAA no later than 180 days after the date of the alleged violation. A claim by an eligible employee alleging a USERRA violation as applied by the CAA would follow this requirement .

§ 1002.312 What remedies may be awarded for a violation of USERRA?
In any action or proceeding the following relief may be awarded:
(a) The court and/or hearing officer may require the employing office to comply with the provisions of the Act;
(b) The court and/or hearing officer may require the employing office to compensate the eligible employee for any loss of wages or benefits suffered by reason of the employing office's failure to comply with the Act;
(c) The court and/or hearing officer may require the employing office to pay the eligible employee an amount equal to the amount of lost wages and benefits as liquidated damages, if the court and/or hearing officer determines that the employing office's failure to comply with the Act was willful. A violation shall be considered to be willful if the employing office either knew or showed reckless disregard for whether its conduct was prohibited by the Act.
(d) Any wages, benefits, or liquidated damages awarded under paragraphs (b) and (c) of this section are in addition to, and must not diminish, any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employing office).

EXECUTIVE COMMUNICATIONS, ETC.

Under clause 8 of rule XII, executive communications were taken from the Speaker's table and referred as follows:

304. A letter from the Director, Defense Procurement, Department of Defence, transmitting the Department's final rule — Defense Federal Acquisition Regulation Supplement; Responsible Prospective Contractors (DFARS Case 2008-D022) (RIN: 0750-AG20) received January 21, 2009, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Armed Services.

305. A letter from the Director, Legislative & Regulatory Department, Pension Benefit Guaranty Corporation, transmitting the Corporation's ''Major'' final rule — Allocation of Assets in Single-Employer Plans; Interest Assumptions for Valuing Benefits — received January 26, 2009, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Education and Labor.

306. A letter from the Assistant Secretary Legislative Affairs, Department of State, transmitting a report on the Millenium Challenge Corporation's (MCC) activities for fiscal year 2008, pursuant to Public Law 108-199, section 613; to the Committee on Foreign Affairs.

307. A letter from the Secretary, Department of the Treasury, transmitting as required by section 401(c) of the National Emergencies Act, 50 U.S.C. 1641(c), and section 204(c) of the International Emergency Economic Powers Act, 50 U.S.C. 1703(c), a six-month periodic report on the national emergency with respect to Lebanon that was declared in Executive Order 13441 of August 1, 2007; to the Committee on Foreign Affairs.

308. A communication from the President of the United States, transmitting a report including matters relating to the interdiction of aircraft engaged in illicit drug trafficking, pursuant to 22 U.S.C. 2291 -4 Public Law 107-108; (H. Doc. No. 111–18); to the Committee on Foreign Affairs and ordered to be printed.

309. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-609, ''Closing of a Portion of a Public Alley in Square 1872, S.O. 05-2617, Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

310. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-605, ''Ward 4 Neighborhood Investment Fund Boundary Expansion Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

311. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-592, ''Protection of Students with Disabilities Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

312. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-591, ''Vehicle Towing, Storage, and Conveyance Fee Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

313. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-590, ''University of the District of Columbia Board of Trustees Temporary Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

314. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-589, ''Utility Line Temporary Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

315. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-588, ''Fiscal Year 2009 Children and Youth Investment Trust Corporation Allowable Administrative Costs Increase Temporary Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

316. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-586, ''Washington Metropolitan Area Transit Commission District of Columbia Commissioner Temporary Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

317. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-585, ''Neighborhood Supermarket Tax Relief Clarification Temporary Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

318. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-584, ''Adoption and Safe Families Continuing Compliance Temporary Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

319. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-583, ''SOME, Inc. Technical Amendments Temporary Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

320. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-536, ''Firearms Control Temporary Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

321. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-582, ''Real Property Tax Benefits Revision Temporary Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

322. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-524, ''Title 22 Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

323. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-581, ''New Convention Center Hotel Temporary Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

324. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-580, ''Rhode Island Avenue Metro Plaza Revenue Bonds Approval Temporary Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

325. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-579, ''New Town Boundary Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

326. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-606, ''Pharmacy Practice Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

327. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-577, ''Benning-Stoddert Recreation Center Property Lease Approval Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

328. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-608, ''Adverse Event Reporting Requirement Amendment,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

329. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-576, ''Property and Casualty Actuarial Opinion Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

330. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-619, ''Historic Motor Vehicle Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

331. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-618, ''Anti-Littering Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

332. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-613, ''Smoke and Carbon Monoxide Detector Program Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

333. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-612, ''Veterans Appreciation Scholarship Fund Establishment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

334. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-611, ''Inclusionary Final Rulemaking Temporary Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

335. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-610, ''Closing of a Public Alley in square 375, S.O. 06-656, Clarification Temporary Amendment Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

336. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-607, ''Close Up Foundation Sales Tax Exemption Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

337. A letter from the Chairman, Council of the District of Columbia, transmitting a copy of D.C. ACT 17-578, ''Contract No. DCAM-2007-C-0092 Change Orders Approval and Payment Authorization Act of 2008,'' pursuant to D.C. Code section 1-233(c)(1); to the Committee on Oversight and Government Reform.

338. A letter from the Assistant Attorney General for Administration, Department of Justice, transmitting the Department's report for fiscal year 2004 on competitive sourcing, pursuant to Public Law 108-199, section 647(b) of Division F; to the Committee on Oversight and Government Reform.

339. A letter from the Co-Chief Privacy Officer, Federal Election Commission, transmitting the Commission's Privacy Act Report for fiscal year 2008, pursuant to Section 522 of the Consolidated Appropriations Act (2005); to the Committee on House Administration.

340. A letter from the Deputy Assistant Administrator for Regulatory Programs, NMFS, National Oceanic and Atmospheric Administration, transmitting the Administration's final rule — Atlantic Highly Migratory Species; Atlantic Commercial Shark Management Measures [Docket No.: 080723890-81590-02] (RIN: 0648-AX03) received January 21, 2009, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Natural Resources.

341. A letter from the Acting Director, Office of Sustainable Fisheries, NMFS, National Oceanic and Atmospheric Administration, transmitting the Administration's final rule — Fisheries of the Exclusive Economic Zone Off Alaska; Greenland Turbot and Rougheye Rockfish in the Bering Sea and Aleutian Islands Management Area [Docket No.: 071106673-8011-02] (RIN: 0648-XM30) received January 21, 2009, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Natural Resources.

342. A letter from the Acting Director, Office of Sustainable Fisheries, NMFS, National Oceanic and Atmospheric Administration, transmitting the Administration's final rule — Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Biennial Specifications and Management Measures; Inseason Adjustments [Docket No.: 060824226-6322-02] (RIN: 0648-AX46) received January 21, 2009, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Natural Resources.

343. A letter from the Acting Office Director, National Oceanic and Atmospheric Administration, transmitting the Administration's final rule — Channel Islands National Marine Sanctuary Regulations [Docket No. 080311420-9008-02] (RIN: 0648-AT17) received January 22, 2009, pursuant to 5 U.S.C. 801(a)(1)(A); to the Committee on Natural Resources.

344. A letter from the Commissioner, Social Security Administration, transmitting the Administration's update on the impact of the economic downturn on the Social Security Administration; to the Committee on Ways and Means.

345. A letter from the Chair of the Board of Directors, Office of Compliance, transmitting notice of proposed rulemaking regulations under Section 304(b)(1) of the Congressional Accountability Act of 1995 for publication in the Congressional Record, pursuant to 2 U.S.C. 1384(b)(1); jointly to the Committees on Education and Labor and House Administration.

346. A letter from the Secretary, Department of Energy, transmitting the Department's report entitled, ''2009 Annual Plan,'' pursuant to Public Law 109-58, section 999B(e)(3); jointly to the Committees on Science and Technology and Natural Resources.

PUBLIC BILLS AND RESOLUTIONS

Under clause 2 of rule XII, public bills and resolutions of the following titles were introduced and severally referred, as follows:

By Mr. FRANK of Massachusetts:

H.R. 786. A bill to make permanent the temporary increase in deposit insurance coverage, and for other purposes; to the Committee on Financial Services.

By Mr. FRANK of Massachusetts:

H.R. 787. A bill to make improvements in the Hope for Homeowners Program, and for other purposes; to the Committee on Financial Services.

By Mr. KANJORSKI (for himself, Mr. CASTLE, and Mr. FRANK of Massachusetts):

H.R. 788. A bill to provide a safe harbor for mortgage servicers who engage in specified mortgage loan modifications, and for other purposes; to the Committee on Financial Services.

By Mr. LEWIS of Georgia:

H.R. 789. A bill to reduce and prevent teen dating violence, and for other purposes; to the Committee on the Judiciary.

By Mr. MARKEY of Massachusetts (for himself, Mr. FRANK of Massachusetts, Mr. DELAHUNT, Mr. MCGOVERN, Mr. TIERNEY, Mr. WELCH, Mr. HODES, Ms. SHEA-PORTER, Ms. PINGREE of Maine, Mr. HINCHEY, Ms. TSONGAS, Mr. CAPUANO, Mr. KENNEDY, and Mr. LYNCH):

H.R. 790. A bill to prohibit issuance of any lease or other authorization by the Federal Government that authorizes exploration, development, or production of oil or natural gas in any marine national monument or national marine sanctuary or in the fishing grounds known as Georges Bank in the waters of the United States; to the Committee on Natural Resources.

By Mr. WEINER:

H.R. 791. A bill to prohibit the Department of Homeland Security from limiting the amount of Urban Area Security Initiative or State Homeland Security Grant Program grant funds that may be used to pay salaries or overtime pay of law enforcement officials engaged in antiterrorism activities, and for other purposes; to the Committee on Homeland Security.

By Mr. WEINER (for himself, Mr. CROWLEY, Ms. BERKLEY, Mr. HOLT, Mrs. MALONEY, and Mr. COHEN):

H.R. 792. A bill to prohibit assistance to Saudi Arabia; to the Committee on Foreign Affairs, and in addition to the Committee on Financial Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

By Mr. LEWIS of Georgia:

H. Res. 102. A resolution supporting the goals and ideals of National Teen Dating Violence Awareness and Prevention Week; to the Committee on Oversight and Government Reform.

MEMORIALS

Under clause 3 of rule XII,

3. The SPEAKER presented a memorial of the Senate of New Jersey, relative to Resolution No. 37 memorializing Congress to protect the automobile industry and expand national infrastructure project and related industries; jointly to the Committees on Financial Services and Transportation and Infrastructure.

ADDITIONAL SPONSORS

Under clause 7 of rule XII, sponsors were added to public bills and resolutions as follows:

H.R. 74: Mr. MCHUGH and Mrs. MYRICK.

H.R. 155: Mr. CALVERT, Mr. MASSA, Ms. FOXX, Mr. SIMPSON, Mr. ROGERS of Michigan, and Mr. TIAHRT.

H.R. 156: Mr. DENT, Mr. BUCHANAN, Mr. BARROW, Ms. KAPTUR, and Mrs. EMERSON.

H.R. 157: Mr. CONNOLLY of Virginia and Ms. PINGREE of Maine.

H.R. 226: Mr. CASSIDY, Mr. HARPER, and Ms. ROS-LEHTINEN.

H.R. 450: Mr. ROE of Tennessee, Mr. GOHMERT, and Mr. PAUL.

H.R. 460: Mr. BRADY of Pennsylvania, Ms. BERKLEY, Mr. COHEN, Mr. CARNAHAN, and Mr. COURTNEY.

H.R. 587: Mr. CALVERT.

H.R. 622: Mr. BERRY, Mr. MCINTYRE and Mr. SALAZAR.

H.R. 624: Mr. HALL of New York, Ms. JACKSON-LEE of Texas, Mr. ROSS, and Ms. SHEA-PORTER.

H.R. 636: Mr. SOUDER, Mr. FRANKS of Arizona, Mr. TERRY, Mr. BURTON of Indiana, Mr. PENCE, and Mr. FLEMING.

H.R. 731: Mrs. MCMORRIS RODGERS.

H.R. 775: Mr. PERLMUTTER, Ms. LORETTA SANCHEZ of California, Mr. BURTON of Indiana, Ms. SCHAKOWSKY, Mr. BARROW, and Mr. WAMP.

PETITIONS, ETC.

Under clause 3 of rule XII,

14. The SPEAKER presented a petition of the Village of Moravia, New York, relative to a resolution supporting the relief for infrastructure projects; which was referred to the Committee on Transportation and Infrastructure.

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Congressional Record

PROCEEDINGS AND DEBATES OF THE 111th CONGRESS, FIRST SESSION

Vol. 155 WASHINGTON, MONDAY, FEBRUARY 2, 2009 No. 20

Senate

The Senate met at 2 p.m. and was called to order by the Honorable JIM WEBB, a Senator from the Commonwealth of Virginia.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Immortal, invisible, God only wise, allow the mystery of Your power and grace to be felt by our Senators today. May this transcendent presence empower our lawmakers to be faithful managers of their God-given talents. As they use their different gifts for Your glory, fill their hearts with gratitude. May this spirit of thankfulness engender a unity of purpose that will enable them to meet the challenges of our time. Lord, keep these Your servants under the protection of Your divine favor. Allow them to so conduct the business of freedom that the next generation will speak their names with gratitude.

We pray in Your great Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable JIM WEBB led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

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. BYRD).

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, February 2, 2009.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable JIM WEBB, a Senator from the Commonwealth of Virginia, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

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

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. REID. Mr. President, following leader remarks, the Senate will turn to consideration of H.R. 1, the Economic Recovery Act of 2009.

At 3:15 p.m. today, the Senate will proceed to executive session to consider the nomination of Eric Holder to be United States Attorney General. The time until 6:15 p.m. will be equally divided and controlled between Senator LEAHY and Senator SPECTER or their designees. At 6:15 p.m. the Senate will vote on the Holder confirmation.

This week, Senators should expect long days with votes on numerous amendments as the Senate considers the economic recovery legislation.

I am going to make a few remarks on the Attorney General nomination, but let me say this. Senators BAUCUS and INOUYE are going to be managing the bill, because it is equally divided between appropriations matters and finance matters. We are going to work, starting today, with them making statements—and I haven't finalized this with the Republican leader yet—but I think for tonight it will be debate only, after the Holder nomination, and then tomorrow we will move to amendments.

We are going to have as many amendments as people feel are appropriate on this legislation, without any prejudgment as to what amendments are good or bad. I have worked something out so that on Wednesday Senator INOUYE has agreed to be here at the time when we are at our annual retreat, which is right close to Capitol Hill. We will come in about 10:30 and that will be over about 3 p.m., in the afternoon, but there is no reason why the Republicans can't offer amendments on Wednesday. So we should be able to move this along quite well.

We will try to be as understanding of everyone's schedules, especially the committees, so that, if necessary, we will try to stack some votes. I say to my distinguished Republican colleague that we are willing to have a number of amendments pending at a given time; we just have to be careful that we don't get so many pending it is unmanageable. But we will be happy to work on this.

Before I say anything about the Attorney General nomination, I wish to ask my friend if he has anything to say about the schedule.

Mr. MCCONNELL. I say to my friend the majority leader that the two managers on this side will be Senators COCHRAN and GRASSLEY, of the two relevant committees.

I appreciate very much the thought about Wednesday. My Members are anxious to offer amendments, and that gives us an opportunity to do that during the day on Wednesday, even though your conference is tied up. It would be my hope that we could vote Wednesday night and process amendments. This is such a big week, and such an important measure, as we all know, that I have told my Members—and I hope it is the case—that after tonight, all bets are off in terms of working in the evening, and my Members are expecting that to happen. I ask my friend the majority leader if it is his view that is the way we will operate this week?

Mr. REID. Yes. We should tomorrow have a very long, hard day, and Wednesday, even though there are a few hours that a lot of Democrats

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

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won't be in and we won't be able to have votes, in the evening we can have as many votes as we need. There is no reason we can't work into the night and then come back on Thursday.

There are some important things going on this weekend, and the Republican leader and I have talked about that. We will be as understanding as we can of everybody's schedule, but I do remind everyone that the Presidents Day recess is coming up. We have been here 6 weeks, and we not only have obligations here but we have obligations at home. There is work we have to do at home, but we are not going to be able to do that important work until we finish this economic recovery legislation. So we are going to be as thoughtful and as considerate on both sides as necessary.

I have to say, Mr. President, as far as the managers of this legislation, we are in the majority at this time, but it wasn't long ago that Senator COCHRAN and Senator GRASSLEY were chairmen of those committees. These are four of the most respected, knowledgeable, and experienced managers we could have, the four people we have mentioned—INOUYE, BAUCUS, SPECTER, and COCHRAN. So there is no reason that these people, with the experience they have, can't help us move through this legislation.

Mr. MCCONNELL. May I ask the majority leader one other question?

I have a very short statement, unrelated to the Holder nomination, if the majority leader wouldn't mind.

Mr. REID. I would be happy to have the Senator do that.

RECOGNITION OF THE MINORITY LEADER

The ACTING PRESIDENT pro tempore. The Republican leader is recognized.

JUMP STARTING THE ECONOMY

Mr. MCCONNELL. On the same subject, Mr. President, I think we all agree it is important to jump-start the economy, and this week we will have the opportunity, as the majority leader and I have been discussing, to have full debate and many amendments on how to do that and how to improve on the bill passed by the House.

Republicans agree with President Obama that we should trim things out that don't put people back to work. The standard he set for this bill is pretty simple and easy to understand. He wanted to incorporate good Republican ideas and trim the fat that won't put people to work right now. I think that is a pretty good principle. Republicans believe a stimulus bill must fix the main problem in the economy, which is housing. We need to fix housing first.

Republicans also believe we must put money back into the pockets of taxpayers, and we believe we must eliminate wasteful spending from this package.

The American people have real questions about the merits of spending tens of millions of dollars sprucing up government buildings here in Washington, for example, or removing fish barriers, rather than growing the economy and creating jobs. We will have an opportunity to further craft this measure as it moves through the Senate. Republicans are anxious to offer amendments, have debate, and have votes.

Mr. President, I yield the floor, and I thank the majority leader for deferring to me for a moment.

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

HOLDER NOMINATION

Mr. REID. Mr. President, in the long and lurching march toward equality that in no small manner defines our progress as a nation, this moment in history will be remembered as a golden age. The election of Barack Obama fulfills a dream that seemed unimaginable a generation ago, or even a few years ago. A child born today will have every reason to believe the old adage that in America any boy or girl can grow up to be President.

To join him in governing our country, President Obama has chosen a brilliant, honorable, and exceptionally well qualified individual to serve as Attorney General of the United States. With historic challenges facing the Department of Justice, I urge all my colleagues to support the nomination of Eric Holder.

What began as a one-man, part-time office to represent the United States in Supreme Court trials, the Attorney General now has been transformed over the years to be the lead agency to fight terrorism, prosecute crime, and uphold the fundamental rights of every citizen.

In 1957, with the civil rights movement growing and conflicts bubbling in all regions of our country, the Civil Rights Division of the Department of Justice was established. When Congress passed the Civil Rights Act of 1964, the Voting Rights Act of 1965, and other legislation prohibiting discrimination on the basis of race, sex, handicap, religion, or national origin, it was the Civil Rights Division that ensured they would be enforced; that is, the laws passed would be enforced.

In the fall of 1962, Attorney General Robert F. Kennedy ordered U.S. Marshals to stand guard at the University of Mississippi so that James Meredith, the first African American accepted for admission, could enroll and attend classes peacefully amidst a violent mob of thousands.

In the summer of 1963, the Justice Department, led by Deputy Attorney General Nicholas Katzenbach, confronted Governor George Wallace as he physically blocked the admission of two African-American students to the University of Alabama. It took the federalization of the Alabama National Guard to force Governor Wallace to step aside and allow those students to enter.

These are only two of countless examples of the U.S. Department of Justice enforcing the laws of our country.

Although the parchment of our Constitution may be a little yellow and the ink faded somewhat, as long as the Justice Department stands behind the people's demands for liberty, the spirit of our Founders will never recede. I have no desire to rehash the many ways the Bush administration politicized and degraded the Justice Department away from its historic mission. While we must not fail to remember that sad chapter in our history, I am far more interested in looking toward a more hopeful future.

With President Obama in the White House and Eric Holder leading the Justice Department, that brighter future begins right now. The experience of this nominee is unquestioned. As a young lawyer, fresh out of Columbia Law School, one of the finest law schools in America, Eric Holder accepted a job at the Justice Department. He didn't want to see how much money he could make, he wanted to enter public service, and he did. The job he took at the Justice Department is now a department he stands ready to lead.

At the time he worked there, as a young new lawyer, he was charged with the unenviable task of prosecuting corrupt public officials who had violated the public trust. This kind of work can be thankless and politically sensitive, but from a young age Eric Holder showed the courage to stand for the public interest no matter the personal or political cost.

In 1988, Eric Holder was appointed by President Reagan to be a judge in the District of Columbia Superior Court. In this capacity he presided over countless trials involving violent crimes and murder, proving himself to be a fair and tough administrator of justice.

In 1993, President Clinton chose Eric Holder as U.S. Attorney for the District of Columbia, where he focused on improving some of Washington, DC's most crime-ridden neighborhoods by locking up wrongdoers and involving communities in law enforcement.

As Deputy U.S. Attorney General starting in 1997, Holder showed fearlessness in prosecuting crimes against children, white-collar crimes, and crime in general. During his tenure as Deputy Attorney General, Mr. Holder was also faced with the difficult decision of how to advise Attorney General Janet Reno on the investigation that led to the impeachment of President Clinton. He chose to urge the Attorney General to expand the investigation to ensure that all facts would come to light. He was harshly criticized by members of his own party for causing political trouble for the President.

But in this decision, Eric Holder again showed the courage to uphold perhaps the most important principle for any Justice Department official: answering to the people first.

There is no question that a difficult job awaits our next Attorney General. He must strengthen the fight against terrorism, he must do more to keep our streets and boardrooms safe from crime, and rebuild the Justice Department to be once again a guardian of the common good. Eric Holder has proven that he has the courage and wisdom to do justice to this critical job.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to the consideration of H.R. 1, which the clerk will report.

The legislative clerk read as follows:

A bill (H.R. 1) making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for the fiscal year ending September 30, 2009, and for other purposes.

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

AMENDMENT NO. 98

(Purpose: In the nature of a substitute)

Mr. REID. Mr. President, on behalf of Senators INOUYE and BAUCUS, I call up amendment 98 and ask unanimous consent that once the amendment is offered, no further amendments be in order during today's session of the Senate.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. The clerk will report.

The legislative clerk read as follows:

The Senator from Nevada [Mr. REID], for Mr. INOUYE and Mr. BAUCUS, proposes an amendment numbered 98.

(The amendment is printed in the RECORD of Friday, January 20, 2009, under ''Text of Amendments.'')

The ACTING PRESIDENT pro tempore. The Senator from Hawaii is recognized.

Mr. INOUYE. Mr. President, I rise today in support of H.R. 1, the American Recovery and Reinvestment Act. This bill will create 4 million American jobs, invest in the future of America by rebuilding our roads, bridges and schools, and will give State and local governments the resources they need to deal with surging demand for social services and falling tax revenues.

Further, this measure will provide tax cuts to working families who are struggling every day to cope with this terrible recession.

Today, we face the gravest economic crisis that this Nation has seen since the Great Depression. Our fourth quarter gross domestic product shrank by 3.8 percent, the largest drop since 1982.

A million jobs have been lost in the past 2 months, and this coming Friday we expect to learn that during the month of January, another 600,000 jobs, at a minimum, have been lost.

The American people fully understand the depth and seriousness of our economic problems.

U.S. foreclosures increased by more than 81 percent last year, a record, with over 2.3 million foreclosures. Our States are struggling terribly, facing the prospect of cutting off vital services, including schools and police.

Forty-four States are facing budget shortfalls totaling $90 billion for fiscal year 2009 and $145 billion for fiscal year 2010.

In 2008, U.S. stocks lost roughly $7 trillion in value. In an instant, the life savings of millions of Americans simply disappeared. Our banking system is in grave shape. Last year, 25 banks with $373.6 billion in total assets failed in the U.S.

All the while, the critical needs of our Nation are going unmet. The American Society of Civil Engineers—ASCE—estimates that $2.2 trillion is needed over a 5-year period to bring the Nation's infrastructure to an adequate condition.

How can we grow our economy and provide opportunities for today's working men and women if the basic physical infrastructure that underlies every job in this country is falling apart?

We must invest in our future by making the necessary commitments to ensure that our infrastructure will support our future economic growth.

But today, we face a much more immediate crisis. In Saturday's New York Times, economist Allen Sinai stated:

My sense is that business is slashing hugely and across the board. Everyone is cutting prices, people, capital spending and all kinds of expenses. It is almost a herd instinct.

There is nothing more destructive to economic growth than deflation. It was the defining characteristic of the Great Depression, and it is the single most difficult economic condition to reverse. We cannot allow a deflationary spiral to develop.

Only one institution in the United States, the Federal Government, has the capacity to step into the breach and stop the terrible spiral of increased layoffs leading to decreased spending, in turn leading to more layoffs and so on.

The Federal Government must take aggressive action. We must use all means at our disposal to address this deepening crisis.

Some argue that this is all part of the natural business cycle, that the best course of action is to stand back and let this crisis work itself out. I would remind those who take this position that the Great Depression was also a part of the natural business cycle.

President Hoover refused to take aggressive action, and the results speak for themselves.

It was not until President Roosevelt took office in 1933 and implemented a series of drastic policy reforms that the economy slowly began to improve, and, almost as important, gave the average American reason to believe that there was a light at the end of the tunnel.

We must act boldly, decisively, and with all possible speed, or we will face dire consequences. The American Recovery and Reinvestment Act is the answer. This legislation will not only create jobs now, but will also begin the process of rebuilding the physical infrastructure of America that is the key to future prosperity.

Based on these needs, The American Recovery and Reinvestment Act focuses on the following goals:

First, creating or saving at least 4 million jobs;

Second, investing in America's future by rebuilding our basic infrastructure.

Third, providing for job retraining for those workers who need to learn new skills in order to compete in the global economy today, while at the same time, improving the education of our children and young adults so Americans can remain competitive tomorrow;

Fourth, moving toward energy independence and away from burning fossil fuels that leave us dependent on foreign oil;

Fifth, improving our healthcare system so all Americans can have access to quality treatment;

Sixth, providing tax cuts and other means of assistance to lessen the impact of this crisis on America's working families.

To meet these goals the Finance and Appropriations Committees recommend a total of $888 billion in funding, including $365.6 billion in new appropriations. This is a significant amount of money, but an amount that we believe is wholly necessary to confront the challenges facing our Nation.

My distinguished colleague from Montana will address the tax and mandatory spending issues that we are recommending and I will address the spending programs that were approved by the Appropriations Committee by a vote of 21 to 9.

It would take far too long to describe in detail the hundreds of programs that are included in this bill, but I would like to take a moment to mention some of the more significant investments that we recommend.

We will invest in our future by funding projects that will rebuild and improve our physical and cyber infrastructure. These projects, totaling $142 billion, will create jobs in the near-term, and will provide an improved foundation for future growth by fixing our crumbling roads, bridges, and schools, improving our broadband network, and increasing our ability to conserve energy.

America's tradition of public education is second-to-none, but it has been sadly underfunded in recent years. We all know that for the United States

to compete in the 21st century, Americans must be well-educated and capable of adapting to an ever-changing economic environment.

Accordingly, we recommend investing $125 billion in education and training so that the next generation of American workers is ready and able to meet the challenge of global competition. In addition, providing job training to recently laid-off workers in new and expanding fields will help to lower the unemployment rate and will allow today's workers to better compete against foreign competition.

In the area of energy, the American Recovery and Reinvestment Act provides $49 billion in investments in areas critical to the development of clean, efficient, American energy, including modernizing energy transmission, research and development of renewable energy technologies, and modernizing and upgrading government buildings and vehicles.

The current economic crisis has affected all Americans, but none more so than the most vulnerable among us. The $25 billion in spending proposed here will serve to lessen the blow of the current recession, providing immediate relief for children, the poor, and others who may find themselves struggling to put food on the table or a roof over their head.

The bill provides $16 billion in investments in areas critical to immediate and long-term healthcare for millions of Americans. Improved information technology, research facilities, and health and wellness programs will all provide a better foundation for providing quality healthcare to consumers.

We face a critical period in our Nation's history. The next few years will either see us emerge from this crisis with renewed vigor and with an economy that remains the leading engine of global growth, or we may face years of slow growth and an ongoing struggle just to maintain our current standard of living.

Clearly, the goal of this package is to find ways to stimulate the private sector through public sector spending, to jump start the private sector with much needed projects that will create jobs as soon as possible, and that will provide meaningful improvements for our communities.

At the same time, we seek to ensure that the funds that are appropriated in this legislation are spent carefully and with unprecedented transparency. We include $110 million in the bill to increase the resources of agency Inspectors General and the Government Accountability Office.

In addition, this measure would establish a new oversight board within the executive branch which will be charged with oversight of the funding provided in this bill.

Such times as these are only overcome with courageous leadership and a willingness to embrace change, listen to new ideas and take chances. This bill is not perfect. But we must not let our fear of imperfection stop us from taking the bold steps necessary to address this crisis and move America forward.

The time for action is now. The American Recovery and Reinvestment Act of 2009 is the right policy at the right time, and I urge each and every Member of this body to join me in support of creating jobs, supporting our State and local governments, and investing in the future of America.

I yield the floor.

Mr. BAUCUS. Mr. President, I first want to commend my colleagues, Senator INOUYE from Hawaii, the chairman of the Appropriations Committee, who I think has undertaken a masterful job in helping to craft, along with his counterpart, Senator COCHRAN from Mississippi, an economic recovery package that will go a long way toward getting people back to work.

They have done half of the job; the other half was left to the Finance Committee. I think together we have come up with a very good beginning to get Americans back to work and to invest in many of the projects this country needs so desperately.

In 1932, President Franklin Roosevelt said:

> The country needs and . . . the country demands bold, persistent experimentation. . . . [A]bove all, try something. The millions who are in want will not stand idly by silently forever . . . .

Today, the country once again demands bold action. Our country demands bold action to help rebuild a very badly damaged American economy.

Consider the terrible blows to our economy and the problems that we face if we do not act.

Last Friday the Commerce Department reported that from October through December of last year the economy shrank at its fastest pace in a quarter century.

Last year 2.6 million people lost their jobs. If we do not act, 3 to 4 million more people will lose their jobs.

The decline in home prices and the stock market collapse have sharply reduced the net worth of American families. Net worth declined by roughly one-fifth between the middle of 2007 and the fourth quarter of 2008.

CBO projects that the national average home price will fall by another 14 percent between the third quarter of 2008 and the middle of 2010.

Equity wealth has declined by $6 trillion between the end of 2007 and the end of 2008.

The Standard and Poor's 500 stock index fell by almost 45 percent from October 2007 to December 2008.

And the financial crisis has spread around the world.

These are not just numbers. These are families who are hurting. These are mothers and fathers who have lost jobs. These are parents who have seen college savings decimated. These are couples who are struggling to keep their homes.

We need to act. This economic recovery bill will save or create 3 to 4 million jobs. It will position our economy to be more competitive. The measure before us today provides an appropriate response to the conditions that we face.

The Senate Finance Committee worked with the President and Members of the Senate and the House to put together its part of the economic recovery substitute that we are considering this week. The Senate Appropriations Committee took the lead on its part, as well.

We think that the provisions in this substitute represent the best ways to address spending slowdowns and rising unemployment.

And it will be effective. More than 99 percent of the Finance Committee's provisions effects will come in the first 2 years of the bill.

To counteract weak consumer demand and spending slowdowns, we have included several proposals that will put more cash in the pockets of America's taxpayers, seniors, and disabled veterans.

The making work pay tax credit cuts taxes for more than 95 percent of American working families. It gives single taxpayers up to $500 and married taxpayers up to $1,000 this year and next in additional cash that they can use just now.

People will be able to receive the benefit throughout the year through a reduction in the amount of income tax withheld from their paychecks.

Seniors, disabled veterans, other disabled workers, and SSI recipients would receive a one-time payment of $300.

Families with children would also benefit from these proposals. The income threshold to receive the refundable child tax credit would be reduced so that more people would be eligible. The earned income tax credit would be increased for families with three or more children.

An amendment added in the Finance Committee will ensure that the alternative minimum tax will not hit any new taxpayers for 1 more year.

Folks struggling to pay for higher education would get relief. The proposal includes a partially-refundable new tax credit up to $2,500 for the cost of tuition and fees, including books. Section 529 plans would be enhanced by including the cost of computers as a qualifying expense.

This measure would help homeowners who are taking advantage of the first-time homebuyer's credit enacted last year. Under current law, homebuyers have to pay this credit back over 10 years. The substitute before us today would eliminate the repayment obligation, unless the homebuyer sells the home within 36 months of the purchase.

For small businesses, we have included expanded expensing through section 179. This provision helps small businesses quickly recover the cost of certain capital expenses.

For businesses in general, we would increase the years that they can carry back losses and general business credits. This would put cash in the hands of businesses right now.

Businesses would also get a tax incentive through the work opportunity tax credit for hiring unemployed veterans and disadvantaged youth.

The economic downturn has frozen the municipal bond market. This recovery bill includes changes that would help to free up this market, unlocking cash for infrastructure investment.

Banks would be able to inject more capital into projects creating demand for municipal bonds, driving down interest rates. And increasing the small issuer exception would increase the range of municipalities from which banks can buy.

This substitute would also eliminate tax-exempt interest on private activity bonds as a preference item under the alternative minimum tax. This would draw new investors and help stabilize the market.

The legislation would also establish parity for tribal governments on $2 billion of tax-exempt bonds. This important change would allow tribal governments to issue debt for projects on equal footing with other government issuers.

And this substitute would create a new tax-credit bond option. This new bond would give State and local governments a new tool to finance infrastructure projects.

We have also included incentives for energy in this recovery package. These incentives would create green jobs producing the next generation of renewable energy sources, wind, solar, geothermal.

The substitute would extend and modify the renewable energy production tax credit for qualifying facilities.

The substitute includes additional funding for clean renewable energy bonds to finance facilities that generate electricity from renewable resources. And the substitute includes conservation bonds for States to use to reduce greenhouse gas emissions.

Energy experts often cite efficiency as the low-hanging fruit. Efficiency is the easiest way for us to reduce our energy consumption and greenhouse gas emissions.

So we have included incentives for energy efficiency. The substitute would increase the value of the existing credit for energy efficient homes. The substitute would eliminate the limitations on specific energy-efficient property. And the substitute would extend the credits for various types of energy efficient property, for both residential and business.

Two new tax credits would spur our alternative energy and production.

The advanced energy research and development credit would provide an enhanced 20 percent R&D credit for research expenditures incurred in the fields of fuel cells, energy storage, renewable energy, energy conservation technology, efficient transmission and distribution of electricity, and carbon capture and sequestration.

The second energy tax credit is an advanced energy investment credit for facilities engaged in the manufacture of advanced energy property.

This substitute would make sound investments in health information technology, or health I.T. These investments should reduce costs, improve quality, and help patients make better decisions about their health care. Expanding use of health I.T. should make our health care system more efficient, reduce errors, and help bring down costs.

Health I.T. would also provide a platform for standardizing and collecting data to move toward paying for performance, another way to improve efficiency and decrease costs.

Investing in health I.T. will help to put that infrastructure in place, while creating thousands of high-tech jobs.

And reforming health care is the right way to get a handle on entitlement spending.

The economic crisis has also created significant fiscal difficulties for States. At least 45 States will face budget shortfalls. Economists expect those shortfalls to total more than $350 billion over the next 2 years.

These dire circumstances have forced painful choices. Almost half the States have already made or proposed cuts to their Medicaid Programs.

The continued rise in unemployment places a further strain on Medicaid. Decreased revenue coming in means less money to fund Medicaid. And experts warn that every percentage point increase in unemployment adds 1 million people to the Medicaid and CHIP rolls.

Economists tell us that State fiscal relief is an effective means to stimulate the economy. And they also advise that targeted relief to those most in need, not based on circumstances of States' own making but based on true measures of distress, is the best means of distribution.

The substitute before us today would provide much-needed relief to every State through a temporary increase in the Federal share of Medicaid funding. The substitute would also provide additional aid targeted to States facing the most precarious fiscal situations, measured by an increase in unemployment.

These measures will keep States from having to lay off cops or teachers. And keeping those workers on the job will help the economy.

The economic recovery package also supports those who have lost employment and helps them to find new jobs.

While almost all workers pay into the unemployment insurance program, only about half of them qualify for benefits. American workers deserve better. The substitute before us would increase and extend benefits to those currently looking for work.

The substitute before us would help States to cope with the increasing number of families needing temporary assistance. And it would remove the incentive for States to artificially keep their TANF caseloads low.

In addition, the substitute would ensure that families that qualify could continue to receive child support payments that are intended to be spent on children. For those who receive it, child support constitutes about 30 percent of poor families' income.

The substitute before us would also increase the incentive to become employed by extending the transitional medical assistance program under Medicaid for 18 months. TMA allows former TANF recipients to retain Medicaid coverage for one year after they become employed. These workers usually earn too little to afford private coverage.

The substitute before us would also remove barriers to getting Medicaid and CHIP for low-income American Indians and Alaska Natives.

The funds directed toward these programs for vulnerable populations would go into the hands of folks who need it and who will spend it right away. These proposals will increase economic activity, create jobs, and shorten the amount of time that we all spend in this economic crisis.

Another key component of our economic recovery package would help unemployed workers maintain their health coverage.

When workers lose their jobs, they lose more than their paychecks. They often lose their health insurance coverage, as well.

To address this problem, our proposal includes help for unemployed workers to pay for their health care premiums.

Today, most workers who lose their jobs have the right to keep their health insurance for up to 18 months under the COBRA program. But to be eligible for COBRA health benefits, workers must pay all of the premium costs, plus an additional 2 percent for administrative costs. For most folks who have just lost their job, this is simply unaffordable.

Our plan would provide a subsidy to cover up to 65 percent of health premium costs, for up to 9 months.

This premium subsidy is shortterm. It would be available only to unemployed workers while they look for a new job.

For those workers who lose their jobs to international trade, President Kennedy established trade adjustment assistance, or TAA. I have long championed TAA and worked to expand its reach and improve its effectiveness. Today, TAA gives workers the chance to retrain for new jobs, get access to health care, and ultimately get back to work. And that is why the substitute before us today includes a 2-year extension of TAA.

Yet in a time when Americans are doing everything they can to change, adapt, and be flexible in a global economy, TAA should do the same.

We can do more to expand who can benefit from TAA, and we can improve

how we get them those benefits. That is why I am working with Senator GRASSLEY, Chairman RANGEL, and Congressman CAMP on a robust expansion of TAA. We hope to include this improved TAA in the economic recovery package before it is enacted.

The package that we are considering this week is our best effort to reach a consensus on an economic recovery bill that can pass the Senate and the House quickly.

The Nation demands action and action now. Let us act quickly to put our economy back on track. Let us act to restore the Nation's financial health. And let us act pass this important legislation this week.

The PRESIDING OFFICER (Mrs. HAGAN). The Senator from Mississippi.

Mr. COCHRAN. Madam President, the bill now before the Senate provides $365 billion in new spending reported by the Appropriations Committee and $522 billion in tax and mandatory spending measures recommended by the Finance Committee. The bill as a whole has a price tag of $887 billion. When the borrowing costs associated with this spending are included, the cost of the package rises well over $1.2 trillion. The President has suggested that even more measures such as this, other requests to stimulate the financial system, may be needed to resuscitate the housing market and reform financial regulatory institutions. We don't know what the cost of all of these measures will be, but it sounds as if we may be asked to enlarge these commitments even further as time goes by.

Proponents of this bill say that the fiscal cost of inaction is also substantial. They argue that failure to enact the bill will lead to lower growth and diminished tax receipts. Yet there is little documentation to back up that claim. Those suggestions have not been described in any detail by administration officials or their economic experts.

In size alone, this measure has few precedents. We are considering this bill in the absence of any formal request or documentation from the executive branch. This bill has been described as President Obama's recovery plan. Yet we have not had an official request from the administration for these funds. I am not one who believes Congress must always wait for the executive branch to lead, but with regard to this bill, we are giving the executive branch immense latitude in the disbursement of the spending it contains. We are doing so without any official request and without any documentation that speaks to the issue of how this spending will stimulate the economy or what the long-term implications of the spending will be. Normally, this kind of information would be contained in an administration budget or supplemental request. For items that are well understood to have a short-term stimulative effect, most of us will feel comfortable debating their merits as part of an emergency measure. But there is a great deal of spending in this bill that is not immediately stimulative.

The majority describes it as investments in our Nation's future. We have the responsibility to be deliberate and consider these items carefully in the context of the President's formal budget request.

The distinguished chairman of the Appropriations Committee, who is my dear friend, made a sincere effort to accommodate priorities expressed by Republican members of the committee and others who are not on the committee and to respond to some of their concerns. He resisted efforts to clutter the bill with controversial policy initiatives that might detract from the focus of the legislation or slow down the progress of the bill. He also insisted on a committee markup of the bill. All of these actions demonstrate his unquestioned sense of fairness.

The fact remains, however, that the Senate is being asked by the administration to take a big leap of faith that the massive spending proposed in this bill will, in fact, stimulate growth of the economy, even though much of the funding will not be spent in the next year or two.

We are all searching for solutions that will help the economy in the short term. Yet we must consider the long-term effects of any so-called stimulative actions we take today. Will the jobs associated with these proposals be created just as the economy is recovering, causing inflationary pressures that may not be welcome 2 years from now? What will be the impacts on Federal borrowing costs of this additional deficit spending, particularly once recovery is underway and we are no longer able to borrow money as cheaply as we are now? And perhaps of greatest concern, is it reasonable to expect stimulus spending to cease after 18 months or 2 years' time? The Federal Government's track record for terminating programs is not very good.

Let me share some of the provisions of this specific legislation. There are well over 20 new spending initiatives and programs that are either being authorized in this bill or being funded for the first time. These programs account for over $230 billion of the appropriated spending in the bill.

The bill allocates $16 billion to build and repair local schools, something which has not before been considered the responsibility of the Federal Government. That is a State and local responsibility.

The bill provides $9 billion to construct broadband infrastructure throughout the country, even as it requires development of a plan to actually spend this money, and the creation of a broadband infrastructure map that might inform development of that plan. Is this putting the cart before the horse or at least maybe putting it alongside the horse?

The bill appropriates $23 billion to create an improved health information technology system, virtually from scratch. This is not a 1- or 2-year project; it is an expensive, long-term program for which there is barely a foundation. Yet we are putting taxpayers on the hook for $23 billion.

The bill invests heavily in science and energy programs. Like many of my colleagues in the Senate, I supported passage of the America COMPETES Act during the last Congress. The goal of that legislation was to ensure that science education in America is of a quality that will sustain our economy in the 21st century. I also supported passage of Energy bills in the last 5 years in the hope that they would enhance our Nation's energy security. Yet I did not support any of these bills with the expectation that their various elements would be immediately funded in their entirety or that they would be funded outside the context of our Federal budget, the regular annual process.

Like most Senators, I assumed we would evaluate the merits of the individual programs as part of the annual budget and appropriations process. Even if this spending may be entirely appropriate, it is reckless to be providing it in the absence of any budgetary context and having done very little due diligence.

Much of the spending will have little stimulative effect. Projected spend-out rates are very slow. The Director of the Congressional Budget Office observed in a January 28 letter to the chairman of the Senate Budget Committee:

> Throughout the federal government, spending for new programs has frequently been slower than expected and rarely been faster.

Is our putting it in this one bill going to change that? What will be the cost of these programs 5 years from now? If we control the overall level of discretionary spending in future years, what programs and priorities will these new initiatives displace? If the spending is entirely additive, what are the impacts of that spending on our national debt or on future tax rates? These questions are difficult to answer without supporting documentation and without having held any hearings.

It seems to me there will be time enough to consider these long-term investments in the regular order and in the context of future Federal budgets.

As former Clinton Budget Director Alice Rivlin recently testified:

> . . . a long-term investment program should not be put together hastily and lumped with an anti-recession package. The elements of the investment program must be carefully planned and will not create many jobs right away.

Yet it is not just these new programs that should concern us. This bill also greatly expands a number of programs such as Head Start, Pell grants, and the Individuals with Disabilities Education Act. These are all programs with merit. I have supported them all, with supporters on both sides of the aisle each year approving bills to extend the authorizations and fund the programs. But the question is, Do they

stimulate the economy? How? Is it realistic to expect funding levels for these programs to revert to today's levels once the economy recovers? I think it is safe to expect just the opposite.

The Committee for a Responsible Federal Budget, cochaired by former Congressman Bill Frenzel, my friend, and another of President Clinton's former Budget Directors, Leon Panetta, another friend, recently warned of this danger. Speaking of stimulus recommendations like planting grass on the national mall, the committee said such things are ''a distraction from the bigger risks in this bill.''

More troubling is the number of items in the stimulus plan that are really intended to be permanent new policies rather than temporary items to help boost the economy.

They said:

> While we need deficit spending now, extending out borrowing beyond the economic downturn will make our already-dismal fiscal picture far, far worse.

They go on to say:

> The economy simply can't handle that. There is a very real risk that many of these items will become a permanent part of the budget and unless Congress suddenly shows an uncharacteristic willingness to pay for the new items, the deficit will deteriorate even further.

The committee they chaired went on to say:

> Many of these items may be worthwhile, but an emergency measure is the wrong way to push through permanent changes to the budget. If politicians want to enact long-term spending or tax policies, they should be enacted through the normal legislative process.

I think that is very well put. I think we ought to pay attention to what people like that are saying.

The President's Chief of Staff recently said—probably in jest, maybe in jest—

> You never want a serious crisis to go to waste.

Well, clearly we are seeing the efforts by some—and I am not saying the President's Chief of Staff—to use this stimulus bill to achieve long-term objectives that go beyond addressing our short-term economic policies and problems.

But we agree—I think all Senators agree—the economy is under severe pressure and Congress should take quick but sharply focused action to do those things we are confident will have an immediate stimulative impact on the economy and improve economic prospects. We should address the housing problem that seems to be the central problem in this crisis. We should not, however, rush headlong into fiscal commitments that may haunt us for years to come.

If Federal spending on infrastructure and other programs is truly stimulative, is it not unfortunate Congress has failed to enact 9 of the 12 regular appropriations bills for this fiscal year? These bills account for almost half of all discretionary spending. Yet the agencies and programs supported by those bills have essentially been idling for 4 months under a continuing resolution. This is funding at last year's approved levels of spending; whereas, if enactment had taken place in a timely fashion by this Congress—this Senate and the House of Representatives working together—we would have much of this money that has previously been budgeted and approved by committees, approved by the Congress.

Funding contained in those bills is for projects such as roads, bridges, water projects, Federal buildings, and other activities that might provide jobs now, and they have been held in abeyance under the terms of a continuing resolution, which is continuing this fiscal year to spend at the levels appropriated for spending during the last fiscal year.

That is not something that can be laid at the feet of President Bush. That is the Congress. We hear a lot of criticism of the former President, such as he is the reason for all this. We need to look at ourselves. Congress did not even try to enact the bills. The bicameral leadership made a conscious decision not to engage the former President on spending issues or Outer Continental Shelf oil-and-gas leasing—another example of something that could be labeled ''stimulative.''

Had we enacted those appropriations bills last fall, agencies would already be contracting, hiring, and spending their funding allocations. This week we would be having a debate probably about the merits of supplementing some of those allocations of Federal funds. Instead, we are considering a bill that supplements many existing programs without Members even knowing what the regular appropriations bills contain for those same programs.

In closing, I express my heartfelt thanks and appreciation to the distinguished Senator from Hawaii, the chairman of our Appropriations Committee, for his distinguished leadership and congratulate him on the way he has undertaken to respond to these emergency requests that have been submitted to the committee. He has handled it all in a fair and thoughtful way. It is a pleasure working with him and the other members of our Committee on Appropriations in the Senate.

We, I know, stand ready to continue to work to improve this bill, to listen to suggestions of Senators for changes. It has been an open process, an open, public markup of the bill, an effort to invite suggestions from any member of the committee, and now it is open for amendment. This is no effort to railroad something through here without giving individual Senators the opportunity to carefully consider everything in here, to ask questions of those who maybe were responsible for the inclusion of certain provisions and the like. We are ready to take on these suggestions and consider them carefully to improve this bill over the coming days.

The PRESIDING OFFICER. The Senator from Oregon.

Mr. WYDEN. Madam President, as the Senate turns to the economic recovery bill I believe there is a message coming to the Senate from Oregon and every corner of our country. The message is that Americans do not want a bailout. They do not want a handout. What they want is legislation that provides a path out of these very difficult economic times.

I believe that, working together this week, Democrats and Republicans can start building that path. I want to stress that I am especially interested in working with colleagues on the other side of the aisle on this critical legislation.

I serve on the Senate Finance Committee, led by Chairman BAUCUS, and one of the best additions to this bill has been the relief that it provides from the crushing alternative minimum tax. This is a killer tax for middle-class folks. It is something, in my view, that we ought to get rid of permanently and I have proposed doing that as part of comprehensive tax reform. Well, as a result of the bipartisan work on this legislation in the Finance Committee, there is going to be relief from the AMT for hard-hit, middle-class families.

There has also been important bipartisan work on the legislation's approach to infrastructure financing. A member of the Senate Republican leadership, Senator THUNE of South Dakota, has worked with me to craft legislation called Build America Bonds, which uses a tax credit approach to bonds to wring more value from every dollar that's made available for infrastructure. The economic recovery bill includes a tax credit bond provision that is similar to our legislation, although not quite the same, and I will continue to push to improve it.

I believe there are other ideas we are going to focus on, on the floor of the Senate, that will bring Democrats and Republicans together. A number of my colleagues on the other side of the aisle have stressed the need to expand the legislation's support for homeowners and home buyers, to help make sure that people who want to stay in their homes and who are trying to buy a home can get additional relief. I am very pleased that colleagues on both sides of the aisle have come together to work on these kinds of ideas.

For this week, I think there are several key principles that we ought to focus on. One that I feel especially strongly about is rewarding success. Instead of subsidizing failure, this legislation takes an approach that, in fact, rewards success.

A prime example is the extension, for 3 years, of the renewable energy production tax credit. To get this tax credit, energy companies actually have to produce energy. As a result, American taxpayers will get something back for their hard-earned money. That is the kind of accountability that I think

the American people have a right to expect.

I think the legislation rewards enterprise, and I am very pleased about the bill's provision to provide enhanced writeoffs under section 179 for small businesses that invest in plants and equipment.

Ultimately, what it comes down to is providing relief for middle-class folks so they can get assistance during these difficult times.

For example, there has been discussion of the bill's supports for health information technology. One big reason that middle-class folks cannot get ahead is that their medical costs gobble up their paychecks and one of the reasons that medical costs have skyrocketed is that there are so many errors in the health care system—errors and inefficiencies, such as duplicative tests. It seems to me that by investing in health information technology, you make a downpayment on a long-term strategy for holding down medical costs and that is extraordinarily important to middle-class folks. So we will be talking about this issue more.

I note the presence of the distinguished chairman of the Appropriations Committee. One of the reasons I am confident we can approach this issue in a bipartisan way is because that is how the chairman of the Appropriations Committee has always worked. That has also been the case with Senator COCHRAN, Chairman BAUCUS, and Senator GRASSLEY.

We are open to the best possible ideas. That is why President Obama, to his credit, has been reaching out. As far as I can tell, he has that phone practically attached to his ear talking to colleagues and saying: Bring us your best ideas. We have tried in the Senate Finance Committee, as Chairman INOUYE has done in the Appropriations Committee, to start incorporating good ideas, whether they come from the Republican side of the aisle or the Democratic side.

I think we can improve this bill even more. But because it rewards success, because it rewards enterprise, because there are already good ideas that both parties support, I would urge colleagues to use this week, working with our chairs and with the Obama administration, to come together—because my view is, as I articulated, that the public does want a path out of these terrible economic times. We have a chance to make it clear that this is not a bailout, that it is not a handout, but rather the start of a path out of this tough economic period.

I hope our colleagues will use this week, under the leadership of the chairman of the Appropriations Committee, Chairman BAUCUS of the Finance Committee, and the ranking minority members, to make sure that by the end of this week we have shown the American people that this important legislation on recovery and investment is moving forward—to deal with the critical needs of those we represent at home.

Madam President, I yield the floor.

Mr. INOUYE. Madam President, as we begin the process of our discussions and debate on legislation to revitalize our Nation's economy, I want to take this opportunity to underscore the points I made on Tuesday of last week as we undertook the markup of the American Recovery and Reinvestment Plan.

As I indicated, it is my belief that we all support the central goals of the legislation, which include the creation of jobs, the rebuilding of America's infrastructure, improving our children's education, moving toward energy independence, improving our health care system, and lessening the burden that this crisis has brought to the most vulnerable among us.

As you well know, beginning in 1987, I served for 19 years as the chairman and vice chairman of the Senate's Committee on Indian Affairs—and in that capacity I came to know a group of American citizens who have clearly been the most vulnerable amongst us—the indigenous, native people of the United States—American Indians, Alaska Natives and Native Hawaiians.

President Obama projects that in the near term, the nationwide unemployment rate could reach 10 percent. But for many of our Nation's First Americans, an unemployment rate of 10 percent in their communities would signal a giant step forward—given average unemployment rates in Indian country that range from 50 to 90 percent.

The infrastructure on many Indian reservations is not only in need of rebuilding—in most parts of Indian country, infrastructure is so sorely lacking or simply nonexistent, that it must be built for the first time. Members of Congress have come to this realization time and again, as we have enacted scores of settlements of Indian land and water claims over the years, and ratified agreements between State and tribal governments—only to find that there is none of the necessary infrastructure that would enable the delivery of water to tribal lands, nor the jobs associated with the establishment of businesses on tribal lands.

In Indian country, another goal that this bill seeks to accomplish—stimulating the private sector through public sector spending—Federal funding has rarely been able to achieve. And that phenomenon is also fundamentally a function of the lack of infrastructure—adequate roads, safe water supplies, access to commercial and transportation corridors, good schools and access to quality health care. These are the critical components if we are ever to successfully encourage private sector investment in Native America through public funding.

There are vast natural resources that remain untapped in Indian country—wind energy, hydropower, solar energy, and other sources of clean, renewable energy—undeveloped in large part because of the lack of infrastructure and lack of access to electric transmission lines The same is true for those things most Americans have come to take for granted—basic connections to the outside world, such telephone service, access to the Internet and broadband services, public health and safety broadcast systems. A transition to digital television isn't a challenge to those who have no electricity.

Safe and affordable housing, running water, potable water, a source of heat—these aren't givens in Indian country as they are elsewhere in America.

So tribal governments have taken matters into their own hands—they have sought to restore their federally recognized status, to reacquire the lands that were lost through the opening of Indian reservations to homesteading and the treaty-making process, and to reconsolidate their traditional tribal land bases, so that in turn, they can develop a geographic base upon which to build and sustain economic growth and the means to effectively serve—through tribal government programs and services—all of those who reside on tribal lands—not just the citizens of their governments.

But our Federal bureaucracies—as well intentioned and well meaning as they may have been—have stood in the way of the tribal governments' efforts to achieve this economic growth and development of Native communities and those communities which surround them, and I believe that the scope of this bill must be inclusive enough to embrace initiatives that are designed to remedy not only centuries-old problems but to fulfill the commitments that we have made in a host of land and water claims settlements, in agreements involving State and tribal governments, and most importantly in our treaties with the Indian nations.

Accordingly I will look forward to working with my colleagues to assure that this bill does not inadvertently place obstacles in the paths of those who seek to become self-sufficient and self-sustaining—those who have faithfully served our country and placed themselves in harm's way in the defense of our country in larger proportions than any other group of Americans—this Nation's First Americans, the Native people of the United States of America.

Madam President, I want to inform the Senate that neither S. 336 as reported to the Senate nor division A of the Inouye-Baucus substitute amendment to H.R. 1, Senate amendment numbered 98, contains any congressional directed spending items as defined in rule XLIV of the Standing Rules of the Senate. I can also inform the Senate that division B of the amendment, prepared by the Committee on Finance, contains no limited tax benefit, limited tariff benefits, or congressional directed spending items as defined in rule XLIV.

Madam 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.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

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

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

EXECUTIVE SESSION

NOMINATION OF ERIC H. HOLDER, JR., TO BE ATTORNEY GENERAL

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination which the clerk will report.

The assistant legislative clerk read the nomination of Eric H. Holder, Jr., of the District of Columbia, to be Attorney General.

The PRESIDING OFFICER. Under the previous order, there will be 3 hours of debate equally divided and controlled between the Senator from Vermont and the Senator from Pennsylvania or their designees.

The Senator from Vermont is recognized.

Mr. LEAHY. Madam President, I thank the distinguished Presiding Officer and appreciate her being here. We are starting a minute or so late. It is my fault. When I saw my friend from Pennsylvania, the distinguished ranking member, come out, we had to have some discussion of last night's Super Bowl game. It was one of the most spectacular ones. He feels even more spectacular than Senators from some other States—any other State—because his State won.

I think it is also a spectacular day because the Senate is considering President Obama's historic nomination of Eric Holder to be Attorney General of the United States.

The Judiciary Committee voted last week to report Mr. Holder's nomination to the Senate for consideration. That strong, bipartisan 17 to 2 vote in favor was a statement that members from both sides of the aisle recognize that Mr. Holder has the character, integrity and independence to be Attorney General. It is a statement that we all want to restore the integrity and competence of the Justice Department and to restore another critical component—the American people's confidence in Federal law enforcement. The broad support Mr. Holder's nomination has from law enforcement, from advocates for crime victims, from civil rights organizations and from across the political spectrum comes as no surprise to those of us that have known of Eric Holder during his decades of dedicated public service.

After more than 2 months of scrutiny and consideration, I was pleased to see Mr. Holder's nomination gain the support of such a large majority from the Judiciary Committee. I thank all the Democratic members for their thorough consideration of this nomination. In particular, I thank our newly assigned members for following the hearings and participating in our deliberations without missing a step. I thank the Republican members, as well. I had said that Senators could vote for or against the nomination and two Senators determined to vote no, as is their right. With respect to the six Republican members who ended up supporting the nomination, I note that Senator HATCH, a former chairman of the Judiciary Committee, did so early on. Then, in the last days the ranking Republican member of the committee, another former committee chairman, as well as Senator GRASSLEY, Senator SESSIONS, a former U.S. attorney and State attorney general, Senator KYL, the Republican whip, and Senator GRAHAM came to support the Holder nomination. In my three and a half decades in the Senate, I have never seen a nominee as qualified as Eric Holder to serve as the Nation's top law enforcement officer.

The need for new leadership at the Department of Justice is as critical today as it has ever been. Over the last few years, political manipulation from the White House has undercut the Justice Department in its mission, and shaken public confidence in our Federal justice system.

The Judiciary Committee expended a good deal of effort over the last 2 years to uncover scandals at the Department of Justice. Former Attorney General Gonzales and virtually every top-ranking Department official resigned during our inquiry. Likewise, Karl Rove and his White House political deputies resigned.

Before the November election, I coauthored an article with our ranking Republican member. We wrote that the next Attorney General ''must be someone who deeply appreciates and respects the work and commitment of the thousands of men and women who work in the branches and divisions of the Justice Department, day in and day out, without regard to politics or ideology, doing their best to enforce the law and promote justice.'' I have every confidence that Eric Holder is such a person.

Mr. Holder's designation was greeted with delight by the career professionals at the Justice Department because they know him well. They know he is the right person to restore the Department. They know him from his 12 years at the Public Integrity Section, from his time as the U.S. attorney for the District of Columbia, from his tenure on the bench, and from his years as the Deputy Attorney General, the second-highest ranking official at the Department. His confirmation will do a great deal to restore morale and purpose throughout the Department.

It is important that the Department also have the rest of its senior leadership in place without delay. This week, we will hold a hearing for the Deputy Attorney General nominee, and I will soon notice hearings for the other members of the Justice Department leadership team.

I wished we could have moved even more quickly to put the new leadership in place at the Department at a time when we face serious challenges and threats. When President Bush nominated Michael Mukasey in 2007 to the Attorney General's seat vacated by the resignation of Alberto Gonzales, Senator JON KYL said:

> Since the Carter administration, attorney general nominees have been confirmed, on average, in approximately three weeks, with some being confirmed even more quickly. The Senate should immediately move to consider Judge Mukasey's nomination and ensure he is confirmed before Congress recesses for Columbus Day.

Well, it has been more than twice that long since Mr. Holder's designation and three times that long since reports of his impending nomination. Our consideration was delayed because I accommodated requests from the ranking Republican member and committee Republicans and postponed the hearing until January 15 and then they postponed consideration another week through procedural objections.

Mr. Holder spent more than nine hours testifying before the Judiciary Committee at his hearing 2½ weeks ago, answering every question any member of the Judiciary Committee, Republicans and Democrats, chose to ask him. All Senators were accorded such time as they needed in three extended rounds of questioning to ask whatever they chose.

Despite that extended hearing and a second day of hearings with public witnesses that I convened at the request of our Republican members, in the week after the hearings 12 Senators sent Mr. Holder 125 pages of extensive follow up questions. He has answered these questions—more than 400 of them—as well.

I asked for the cooperation of all members to debate and vote on Mr. Holder's nomination on the day after the President's inauguration but instead, as is his right, the ranking Republican member held over the nomination for another week. I was, as I said, extremely disappointed. I did not schedule that markup until I had consulted with the Senator from Pennsylvania first. Indeed, he had assured me that he would not hold the matter over. Yet he joined with the Republican members of this committee in a unanimous request to hold over the nomination. Senator MCCAIN was right last week when he said about the President's Cabinet nominations:

> We shouldn't delay. . . . We had an election, and we also had a remarkable and historic [inauguration], and this nation has come together as it has not for some time.''

He concluded that he understood that ''the message that the American people are sending us now is they want us to work together and get to work.''

Regrettably the Republican members of the Judiciary Committee did not

hear or act on that message 2 weeks ago. I am glad that they changed course last week and that so many of them have come to support the nomination.

Yet even after receiving strong bipartisan support in the committee, a handful of Senate Republicans chose to delay yet again confirming this well-qualified nominee to his vital post. We could and should have debated Mr. Holder's nomination and confirmed him last week, but some Senators on the other side of the aisle seem unable to resist continuing their partisan tactics of obstruction and delay.

President Obama in his inaugural address spoke about the real challenges facing the country and the American people. He urged that we all work for the common good and ''proclaim an end to the petty grievances'' and ''recriminations'' and that we ''set aside childish things.''

President Obama is right. There is work to be done. There are real threats. There are abuses to be undone and rights that need to be restored. We need to get on with the task of remaking America.

Eric Holder is a good man, a decent man, a public servant committed to the rule of law. He will be a good Attorney General. Republicans know this. They heard from him at his hearing. They have heard the endorsements of former FBI Director Louis Freeh, President Bush's homeland security adviser Fran Townsend, Senator WARNER of Virginia, Senator HATCH, Senator MARTINEZ, and the many Reagan and Bush administration officials who have endorsed his nomination. They have seen the endorsements from the National Association of Police Organizations, the Fraternal Order of Police and the entire law enforcement community.

I would like to put into the RECORD a list of the more than 130 law enforcement and criminal justice organizations, civil rights organizations, victims' advocates, legal practitioners, bar associations, and current and former public officials that support Senate confirmation of Mr. Holder's nomination. These letters from nearly every part of the political spectrum are in the committee's hearing record and available for any Senator to read.

Judge Louis Freeh, a former Director of the Federal Bureau of Investigation who testified before the committee in support of Mr. Holder, said that Mr. Holder ''has the highest legal competence, total integrity, leadership, and, most importantly, the political independence to discharge faithfully the immense trust this Nation reposes in its Attorney General.'' Judge Freeh was ''honored to give him my very highest personal and professional recommendation.'' Former Attorney General William Barr and nine Republican lawyers and former officials wrote to the committee in support of Mr. Holder's nomination. They noted ''that not only is Eric superbly qualified to be Attorney General, but he is truly a good man.'' They further urged ''his rapid confirmation as our next Attorney General of the United States.'' James Comey, the Deputy Attorney General under President George W. Bush and before that prosecutor in charge of the Marc Rich case and the criminal investigation into the Marc Rich pardon, described Mr. Holder as ''a smart, decent, humble man, who knows and loves the Department and has demonstrated his commitment to the rule of law across an entire career,'' and urged his confirmation.

The endorsement from the Leadership Conference on Civil Rights and a number of civil rights organizations expressed ''strong support for the historic nomination of Eric Holder to the position of Attorney General of the United States,'' citing Holder as ''among the most qualified nominees for Attorney General in the last fifty years and . . . uniquely suited to lead the Department at this moment in time.'' The endorsement noted that: ''The nation urgently needs an Attorney General dedicated to restoring the independence and integrity of the Department, with an unquestionable commitment to the Constitution and the rule of law. Eric Holder is the right person for this job.''

Nearly every major law enforcement organization has expressed support for Mr. Holder, including the National Association of Police Organizations, NAPO, and the Fraternal Order of Police, FOP. The National Sheriffs' Association highlighted Mr. Holder's ''outstanding record of public service in his role as a federal prosecutor, a trial judge, the United States Attorney for the District of Columbia and the Deputy Attorney General for the Department of Justice.'' The National Troopers Coalition urged Mr. Holder's ''speedy confirmation to the office of Attorney General'' and wrote that he ''presents a distinguished career as a prosecutor, Superior Court Justice and Deputy Attorney General. This unmatched experience will prove to be invaluable in directing our law enforcement efforts at this difficult time in history.''

Chuck Canterbury, the national president of the FOP, testified in support of Mr. Holder's nomination, saying that Mr. Holder is ''not only well qualified but possessing in excess the requisite character, knowledge, and skills to do this job and be an extremely effective leader for the Department.''

Fran Townsend, President Bush's homeland security adviser, also testified and said:

> I am not here because I believe that, if confirmed as Attorney General, Eric Holder will decide legal issues necessarily in the same way that I would. On the contrary, I expect that there would often be times where this is not the case. I am here because I believe Eric is competent, capable, and a fair-minded lawyer who will not hesitate to uphold and defend the laws and the Constitution of the United States.

Ms. Townsend also pointed to the dangers of delay in confirming Mr. Holder as Attorney General. She testified:

> The Attorney General position must be filled quickly. We remain a nation at war and a nation that faces the continuous threat of terrorist attack. We cannot afford for the Attorney General position to sit vacant or for there to be a needlessly protracted period where the leadership of the department is in question.

I do not know why Republican Senators who supported the confirmation of Alberto Gonzales without any reservation slowed the consideration of the nomination of Eric Holder. He meets and exceeds any fair standard for confirmation. And at this time in our history, with the challenges we face, we need to move forward and confirm the new Attorney General and the leadership team at the Justice Department.

Mr. Holder has demonstrated that he is committed to restoring the rule of law, and, as President Obama said, ''to reject as false the choice between our safety and our ideals.'' I am more convinced than ever that Eric Holder is a person who will reinvigorate the Department of Justice and serve ably as a key member of the President's national security team. He will pursue the Justice Department's vital missions with skill, integrity, independence and a commitment to the rule of law.

I remember when the senior Senator from Pennsylvania took the occasion of the confirmation hearing for John Ashcroft to be Attorney General to apologize to Judge Ronnie White of Missouri for the manner in which his nomination to the Federal court had been rejected in a party-line vote of Senate Republicans.

I remember when the senior Senator from Utah and I had to labor for weeks to overcome the anonymous Republican hold on the Senate floor of Mr. Holder's nomination to be the Deputy Attorney General in 1997. Regrettably, after celebrating the Martin Luther King Jr. holiday and the inauguration of Barack Obama as the 44th President of the United States, the Judiciary Committee treated Mr. Holder's nomination to be Attorney General to the tactics of the past—more delay, more obstruction, more partisan muscle flexing. I am pleased that this week those who sought to delay and were considering opposing had second thoughts. Perhaps the unifying spirit of President Obama's inauguration had a delayed effect, perhaps it was the overwhelming support for the nomination, perhaps it was the qualities and qualifications of the nominee himself. Whatever the reason, I am glad to see so many Senators heed President Obama's call and perhaps heard the echo of President Lincoln's first inaugural address and were ''touched . . . by the better angels of [their] nature.''

I questioned Mr. Holder at his hearing and he gave his commitment to respect the second amendment right to bear arms as an individual right guaranteed by our Bill of Rights. I asked him to work with me on a media shield

law, and he said that he would do so. I asked him about revitalizing the Freedom of Information Act, and he was agreeable. President Obama took action on that score in his first full day in office, and once confirmed, Attorney General Holder can bring that policy to fruition so that the Federal Government is more open to the American people.

I asked about anticrime initiatives, strengthening the Violence Against Women Act and defending the Voting Rights Act. On all these matters he was straightforward and supportive. I look forward to working with him to provide greater Federal assistance to State and local law enforcement and to aggressively target fraud and public corruption. He said that his priorities will be the safety and security of the American people and reinvigorating the traditional work of the Justice Department in protecting the rights of Americans.

Mr. Holder has had a long and distinguished career in public service. His willingness to leave a lucrative private law practice and forego extensive earnings in order to return to public service at a time when judges are leaving the Federal bench because of their salary constraints, is commendable.

We need an Attorney General, as Robert H. Jackson said 68 years ago, ''who serves the law and not factional purposes, and who approaches his task with humility.'' That is the kind of man Eric Holder is, the kind of prosecutor Eric Holder always was, the kind of Attorney General he will be, and the kind of family person he is. I met his wife and his family and his wonderful children, and they show what a person he is. The next Attorney General will understand our moral and legal obligation to protect the fundamental rights of all Americans and to respect the human rights of all people.

It is important that the Justice Department have its senior leadership in place without delay. The Attorney General is the top law enforcement officer in the country and a key member of the national security team. With the Bush administration having devoted billions to bailouts in the last few months, we need to ensure that those resources are not diverted by fraud or deceit. We need the Justice Department to be at its best.

The responsibilities of the Attorney General of the United States are too important to have had this appointment delayed by partisan bickering. We have known and worked with Mr. Holder for more than 20 years. He has been nominated by a Republican President and by a Democratic President and confirmed three times by the Senate to important positions over the last 20 years. His record of public service, his integrity, his experience and his commitment to the rule of law merit our respect and deserve our support.

Republicans over the last months sought to make comparisons to other confirmation hearings at other times, and even to those for lifetime appointments to the Supreme Court. These comparisons are inappropriate. For example, the circumstances of the Ashcroft nomination were very different. The country at that time was deeply divided, and those divisions had been inflamed by the manner by which the Supreme Court had intervened to stop the counting of ballots in Florida and decide the outcome. Just before Christmas, President-elect Bush had further accentuated the divide by his polarizing designation of John Ashcroft to be Attorney General. By contrast, we have just experienced the historic election of Barack Obama. President Obama has made numerous efforts already to be inclusive and to reach across the political aisle.

His selection of Eric Holder 2 months ago was greeted by nearly universal acclaim. The domestic and economic challenges to our country in recent years have been the most serious since the Great Depression. In recognition of those circumstances, Democrats expedited consideration of President Bush's nomination of Michael Mukasey to be Attorney General. Democrats scheduled a hearing quickly and did not hold the nomination over when it was scheduled for consideration. Those of us who were troubled by his unwillingness to acknowledge that waterboarding is torture voted no, but we were not dilatory. We did not play partisan political games.

My fundamental concern with President Bush's nomination of his White House counsel Alberto Gonzales was that he would not be independent of the White House. I did not oppose that nomination in a kneejerk, partisan reflex. Indeed, I initially hoped that he would be an improvement over the Ashcroft years. I met with Mr. Gonzales, raised the issue in my initial statement at his confirmation hearings and gave him opportunity after opportunity to demonstrate that he understood the role of the Attorney General. He did not. Ultimately I opposed that nomination. History proved me right. At the time, not a single Republican Senator was concerned. They all voted in favor of the Gonzales nomination. If that nomination met their standard for consideration, all of them must support Mr. Holder's nomination.

Unlike Mr. Gonzales, Eric Holder understands the responsibilities of the Attorney General of the United States, and the need to uphold the law and act in the interests of the American people, and not just the President. Unlike Mr. Ashcroft, he admitted past errors and has learned from his mistakes. Unlike Judge Mukasey, he recognizes that waterboarding is torture and that the legal opinions of the Bush era need to be reviewed and revised where they are found to be wrong. If an American were waterboarded by some government or terrorist anywhere in the world, it would be torture and illegal. It would not ''depend on the circumstances'' as the Bush Attorneys General maintained.

I recall the incident that Jane Mayer wrote about in her book ''The Dark Side.'' During a meeting of top White House officials like Vice President Cheney, National Security Adviser Rice, the CIA Director and the Attorney General, in which they were hearing the details of what the Bush administration liked to call ''enhanced interrogation techniques,'' Attorney General Ashcroft is quoted as warning: ''History will not judge us kindly.''

The Senate should proceed to confirm President Obama's nomination of Eric Holder without further delay. We must have leadership in place at the Justice Department to begin the vital work that must be done to carry out the Executive orders signed by President Obama last week that will finally put an end some of the Bush administration's most damaging national security policies. These orders call for the Attorney General to coordinate comprehensive interagency reviews of the Guantanamo Bay Detention Facility by the State Department, Director of National Intelligence, Homeland Security Department and Joint Chiefs of Staff and to chair task forces with the DNI and Department of Defense reviewing interrogation and detention policies. We need Mr. Holder in place as Attorney General to carry out these orders and put the government's detainee policies on a solid legal footing for the first time in many years.

I do not want another Attorney General who sits in the room while others in our Government approve the secret wiretapping of Americans in violation of our laws, or approve torture.

I want an Attorney General who stands up for the rule of law and our long-cherished American values. I believe Eric Holder will be that kind of Attorney General.

The rationales for holding up and opposing this nomination have shifted over time, since Karl Rove called for partisan opposition. Now it seems that some Republican Senators want the Nation's chief prosecutor to agree that he will turn a blind eye to possible lawbreaking before investigating whether it occurred. Senator WHITEHOUSE is quite right that what Senator CORNYN and others are now asking for is a pledge no prosecutor should give. No Senator should demand such a bargain for his vote. Senators can vote in favor or they can ignore the needs of the country and the qualifications of the nominee and vote against, but no one should be seeking to trade a vote for such a pledge.

When he designated Mr. Holder, President Obama said:

> The Attorney General serves the American people. And I have every expectation that Eric will protect our people, uphold the public trust, and adhere to our Constitution.

I have no doubt that Mr. Holder understands the serious responsibilities of the Attorney General of the United

States and that his experience and integrity will serve him and the American people well.

Madam President, I ask unanimous consent to have the list of 130 supporters of the nomination of Eric Holder that I mentioned earlier printed in the RECORD.

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

LETTERS OF SUPPORT FOR THE NOMINATION OF ERIC HOLDER TO BE ATTORNEY GENERAL OF THE UNITED STATES

CURRENT & FORMER PUBLIC OFFICIALS

Asa Hutchinson, former U.S. Attorney, Republican Congressman, Undersecretary for Homeland Security in Bush Administration; Bob Barr, Former Congressman; Carla Hills, former Assistant Attorney General, Civil Division, former U.S. Trade Representative; Carol Lamm, former President of the District of Columbia Bar; Charles La Bella, former US Attorney; Chris Wray, former Assistant Attorney General, Criminal Division; Dan Bryant, former Assistant Attorney General, Office of Legal Policy and Office of Legislative Affairs; Congressional Black Caucus; Craig S. Morford, former Acting Deputy Attorney General.

GOP Lawyers: William P. Barr, Former Attorney General; Joseph E. diGenova, Former United States Attorney for the District of Columbia; Manus M. Cooney, Former Chief Counsel, Senate Judiciary Committee; Stuart M. Gerson, Former Acting Attorney General, Former Assistant Attorney General; Makan Delrahim, Former Staff Director, Senate Judiciary Committee and Former Deputy Assistant Attorney General; Michael J. Madigan, Former Federal Prosecutor and Chief Counsel, Senate Special Investigations, Committee on Government Affairs; Michael O'Neill, Former Chief Counsel/Staff Director, Senate Judiciary Committee and Former Commissioner, United States Sentencing Commission; Victoria Toensing, Former Deputy Assistant Attorney General and Former Chief Counsel, Senate Intelligence Committee; George J. Terwilliger, III, Former United States Attorney for the District of Vermont and Former Deputy Attorney General; Charles R. Work, Former Federal Prosecutor and Former President, District of Columbia Bar.

James B. Comey, former Deputy Attorney General; John P. Sarcone, Polk County Attorney, Iowa; Karen Tandy, former Administrator, Drug Enforcement Administration; Larry D. Thompson, former Deputy Attorney General; Louis J. Freeh, Judge and Former FBI Director; Paul McNulty, former Deputy Attorney General, former U.S. Attorney; Sheila Jackson-Lee, Congresswoman, Eightheenth District, Texas.

State Attorneys General: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wyoming.

Theodore B. Olsen, former Solicitor General and Assistant Attorney General, Office of Legal Counsel; United States Conference of Mayors; Luis G. Fortuño, Governor of Puerto Rico; Kenneth L. Wainstein, former Assistant to the President for Homeland Security and Counterterrorism.

LAW ENFORCEMENT & CRIMINAL JUSTICE ORGANIZATIONS

American Probation and Parole Association; Federal Law Enforcement Officers Association; Fraternal Order of Police; International Association of Chiefs of Police; International Union of Police Associations; Major Cities Chiefs Association; National Association of Assistant U.S. Attorneys ; National Association of Blacks in Criminal Justice; National Association of Drug Court Professionals; National Association of Attorneys General; National Association of Police Organizations (NAPO); National Black Prosecutors Association; National Crime Prevention Council; National Criminal Justice Association; National District Attorneys Association; National Law Enforcement Officers Memorial Fund, Inc.; National Narcotics Officers' Associations' Coalition; National Organization of Black Law Enforcement Executives; National Sheriffs Association; National Troopers Coalition; Police Executive Research Forum.

VICTIMS' ADVOCATES

Anne Seymour, National Crime Victim Advocate ; Appriss; Brady Campaign to Prevent Gun Violence; Dan Levey, National President of Parents of Murdered Children, Inc (POMC), Advisor for Victims to Arizona Governor Janet Napolitano; Illinois Victims; International Organization for Victim Assistance; Justice Solutions, NPO; Maryland Crime Victims' Resource Center, Inc.; Mothers Against Drunk Driving (MADD); National Center for Missing and Exploited Children; National Center for Victims of Crime; National Crime Victims Research & Treatment Center; National Leadership Council for Crime Victim Justice; National Network to End Domestic Violence; National Network to End Violence Against Immigrant Women; National Organization for Victim Assistance; National Organization of Victims of ''Juvenile Lifers''; Partnership for Safety and Justice; Security on Campus; Sharon J. English, Homicide Victim Survivor, Crime Victim Services Advocate.

CIVIL RIGHTS ORGANIZATIONS

American-Arab Anti-Discrimination Committee; Anti-Defamation League; Asian American Justice Center; Center for Neighborhood Enterprise; Leadership Conference on Civil Rights, December 18, 2008 (signatories: Leadership Conference on Civil Rights, Alliance for Justice, American Federation of Labor and Congress of Industrial Organizations, Americans for Democratic Action, Inc., Asian American Justice Center, Center for Inquiry, Feminist Majority, Human Rights Campaign, The Judge David L. Bazelon Center for Mental Health Law, Lawyers' Committee for Civil Rights Under Law, National Abortion Federation, National Association for the Advancement of Colored People, NAACP Legal Defense & Education Fund, Inc., National Council of Jewish Women, National Council of La Raza, National Fair Housing Alliance, National Health Law Program, National Partnership for Women & Families, National Organization for Women, National Urban League, People for the American Way, Planned Parenthood Federation of America).

Leadership Conference of Civil Rights, January 14, 2009 (additional signatories: A Network for Ideas & Action; American Federation of State, County and Municipal Employees; American-Arab Anti-Discrimination Committee; Americans United for Change; Association of Community Organizations for Reform Now; Campaign for America's Future; Center for Community Change; Center for the Study of Hate & Extremism; Coalition of Labor Union Women; Coalition of Human Needs; Common Cause; Communications Workers of America; DC Vote; Family Equality Council; GLSEN—The Gay, Lesbian and Straight Education Network; International Union, United Automobile, Aerospace, & Agricultural Implementation Workers of America; League of United Latin American Citizens; Mexican American Legal Defense and Educational Fund.

National Asian Pacific American Bar Association; National Association of Human Rights Workers; National Black Justice Coalition; National Center for Lesbian Rights; National Center for Transgender Equality; National Coalition for Asian Pacific American Community Development; National Council of Negro Women; National Education Association; National Employment Lawyers Association; National Gay and Lesbian Task Force Action Fund; National Network to End Domestic Violence; National Women's Law Center; Parents, Families and Friends of Lesbians and Gays National; Progressive Future; Service Employees International Union; Sikh American Legal Defense and Education Fund; U.S. Public Interest Research Group; Unitarian Universalist Service Committee; United Food and Commercial Workers International Union; USAction; Wider Opportunities for Women; Women Employed).

Leadership Conference of Civil Rights, January 14, 2009 (signatories: Wade Henderson and Nancy Zirkin);Mexican American Legal Defense and Educational Fund; National Association for the Advancement of Colored People (NAACP); National Women's Law Center; People for the American Way; Southern Poverty Law Center; National Council of Asian Pacific Americans.

OTHER SUPPORTERS

African-American Partners at Covington & Burling, LLP: Thomas S. Williamson, Jr., Michael St. Patrick Baxter, Catherine J. Dargan, Jennifer A. Johnson, Lisa Peets, Loretta Shaw-Lorelle.

Boys and Girls Clubs of America; City of Mendota California; Hispanic National Bar Association; John Walsh, Host of America's Most Wanted; Mario Thomas Gaboury, J.D., Ph.D., Professor and Chair of Criminal Justice, University of New Haven, Ct.; National Bar Association; Partners of Color in Washington, D.C. Firms; Samuel M. Aguayo, M.D., Staff Physician at the Atlanta Veterans Affairs Medical Center; Young Lawyers Section of the Bar Association of the District of Columbia; Washington Bar Association; Wesley S. Williams, Jr., former Partner, Covington & Burling, LLP; Karen Hastie Williams; retired Partner, Crowell & Moring, LLP; Stanley V. Campbell, Jr., CEO of Business Intel Solutions.

Mr. LEAHY. I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Madam President, I begin today as I began my opening statement on the confirmation hearing of Mr. Holder as Attorney General-designate. I begin today with the statement that I wish to be helpful to President Obama in his new administration and to reach across in a bipartisan fashion to help the President restructure the Department of Justice. In so doing, the beginning point of reference is the Constitution, which places upon the Senate the responsibility to confirm. That involves, under the principles of checks and balances, inquiry into the nominee, which has been undertaken in the Judiciary Committee.

There is a sharp distinction between the Attorney General and other Cabinet officers. Other Cabinet officers carry out the President's programs and his policies. But the Attorney General has an independent responsibility to

the people to uphold the rule of law. That is a very important quality. We have seen, historically, some Attorneys General who have succeeded admirably in that responsibility. Elliot Richardson, for example, refused to fire Archibald Cox at the direction of President Nixon on the infamous Saturday Night Massacre. Richardson himself resigned. Griffin Bell, Attorney General for President Carter, stood up to the President, who wanted him to initiate a certain criminal prosecution that Attorney General Bell thought was inappropriate, and he laid down the marker: If the President wanted that prosecution brought, he would have to find himself a new Attorney General.

Other Attorneys General have not fared so well. Attorney General Daugherty of the Teapot Dome fame was sharply criticized in that scandal, although later he was personally exonerated. Attorney General Homer Cummings in the Roosevelt administration, author of the so-called court-packing plan, did not display the kind of independence that was requisite. And I expressed my own concerns about Mr. Holder on a series of matters he handled as Deputy Attorney General.

Beyond any question, Mr. Holder brings an extraordinary résumé to this position, an excellent academic record, including Columbia for his undergraduate degree and law school; he served as U.S. attorney for the District of Columbia; he was a District of Columbia Superior Court judge; he served as a Deputy Attorney General and as a partner in a prestigious law firm handling many important matters.

One recommendation in favor of his nomination I found particularly weighty was the recommendation of former FBI Director Louis Freeh. I have a very high regard for former Director Freeh. I knew him and worked closely with him on the Judiciary Committee on FBI matters and especially closely during the 104th Congress when I chaired the Intelligence Committee. Director Freeh was sharply critical of Mr. Holder on a number of items that were concerns of mine. Notwithstanding that, Director Freeh recommended Mr. Holder for the job.

There is the infamous case of the Marc Rich pardon. He was a man who was a fugitive from justice, a man who had violated the Federal law, selling arms to Iran. Yet he was given a pardon out of the ordinary, without going through regular channels. That was a pardon to be rejected by any standard, in my opinion. Mr. Freeh characterized the pardon as corrupt. I cannot be any stronger than that. The corrupt act was in granting the pardon, not in Mr. Holder's recommendation of ''neutral, leaning favorable.'' But that was beyond the realm of what would ordinarily be considered prudent and independent.

Mr. Freeh was also critical of Mr. Holder on the FALN terrorist commutation of sentences. The FALN terrorists robbed banks and committed murders and were released from jail on the recommendation of Mr. Holder. There again, Mr. Freeh was very critical. Nonetheless, he recommended Mr. Holder for Attorney General.

The failure to appoint independent counsel in the investigation into Vice President Gore for an alleged violation of campaign finance laws, raising money from the White House—Director Freeh characterized it as one of the strongest possible grounds for appointing independent counsel, and the Department of Justice, with Mr. Holder's participation, declined to do so. Still, Mr. Freeh recommended the confirmation of Mr. Holder.

Also, there is the strong recommendation of former Deputy Attorney General James Comey, a man whom I also worked with in the Department of Justice, which was weighty, as was the strong recommendation of former Secretary of Transportation William Coleman.

So with all of those factors considered, it seemed to me that Mr. Holder was entitled to the benefit of the doubt and President Obama's nominee ought to be confirmed. It was for that reason that I voted aye in recommending Mr. Holder for action by the full Senate.

I think, too, at the beginning of an administration it is significant to have bipartisan support. I commented at the committee level that when Senator LEAHY or his ranking member supported the confirmation of Chief Justice Roberts, that was a signal of bipartisan support, which was important and another factor that weighed in my consideration.

I had discussed with Mr. Holder the issue of how to handle possible prosecutions against individuals who may have been engaged in waterboarding, where that question has been raised in some quarters. Mr. Holder went about as far as he could, saying that if there is a valid legal opinion and there is action within the confines of the opinion, that would weigh heavily against prosecution. Obviously, all of these matters are very much fact-determinative. I think those assurances go about as far as one can go.

I also questioned Mr. Holder about the recognition of the differences in interrogation techniques of the Army Field Manual, contrasted with that of the FBI, which is stronger, and then again contrasted with the CIA, which may be a little stronger yet, and that all of those factors had to be considered in evaluating the interrogation tactics, depending upon the rule and the circumstances.

I expressed my concerns to Mr. Holder about the Department of Justice policy on extracting really what amounts to coercion of a waiver of the attorney-client privilege, where the Department goes in and deals with the corporation and secures a waiver of the attorney-client privilege, subjecting employees to losing their privilege, in the context where the Department threatens more severe charges or stronger recommendation on sentencing. This practice began with the Holder Memo in 1999 and was carried through in the so-called Thompson Memo and then the McNulty Memo, and legislation is pending which would change that.

In my view, there are two very basic principles involved. One is the obligation of the commonwealth government to prove its case beyond a reasonable doubt and, secondly, the right to counsel. An indispensable ingredient of right to counsel is a privilege, to be able to communicate freely to an attorney. When I was district attorney of Philadelphia, handling very complex, tough prosecutions, many involving governmental corruption, I would never have dreamed of trying to prove my case out of the mouth of the defendant. I believe Mr. Holder will look at this with a conciliatory attitude as we work on that legislation through the Congress.

I also talked to Mr. Holder about the issue of reporters' privilege. Judith Miller of the New York Times spent 85 days in jail—I visited her in a jail in Virginia—for failing to disclose confidential informants when the source of the information was known. Mr. Holder also acknowledged the extensive authority of the Congress under standards defined in the congressional research memorandum, which I provided to him, and gave assurances that he would be available to talk to the minority as well as to the majority on matters of concern.

For all these reasons, I am pleased to move ahead at this time to lend my support to the confirmation of Attorney General-designate Eric Holder.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Madam President, I was about to yield—we do our normal back and forth—to the Senator from Illinois. I understand the Senator from Oklahoma has a time constraint, if the Senator from Pennsylvania would like to yield time off his side to him.

Mr. SPECTER. Yes, I am prepared to yield time. Senator CORNYN is next on the list. How much time would the Senator from Oklahoma like?

Mr. COBURN. Madam President, short of 15 minutes; probably 15 minutes.

Mr. SPECTER. I yield that time to Senator COBURN.

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

The Senator from Oklahoma is recognized.

Mr. COBURN. Madam President, I thank the chairman for his graciousness, and I thank the ranking member.

Last week in the Judiciary Committee, I voted against the nomination of Eric Holder. I was not, because of time constraints, offered the opportunity to express my reasoning and logic for that opposition. Today, I rise to explain my opposition and to urge others to share my concerns to do the same.

I have high praise for Eric Holder as an individual and as a lawyer. I believe certain aspects, however, of his record disqualify him as serving as Attorney General. I plan on outlining those in this talk before the Senate today, specifically, his facilitation of the Marc Rich pardon, his defense as reasonable of the FALN terrorists' commutations, in addition to his views on the first amendment and second amendment, specifically his answers with respect to the fairness doctrine.

Eric Holder has spent most of his distinguished career as a public servant. By all accounts, he is a brilliant lawyer. His nomination was met with high praise from both sides of the aisle. His intellect and ability have been noted throughout his career, and they were duly noted in his appearance before the Senate Judiciary Committee.

Moreover, I believe him to be a man of good character. The long line of individuals who have voiced support for his nomination speaks to the high regard in which he is clearly held. In our private meeting, I found him to be personable and kind. He is undoubtedly a good man.

These good qualities, however, are not enough to overcome the concerns I have with this nomination. In particular, four issues have caused me to conclude that Eric Holder should not be given the assignment as the next Attorney General of the United States. I believe these matters suggest he lacks judgment, that he lacks independence, and my concern is that he now, from his testimony, lacks candor for such an important job.

Eric Holder's role in facilitating the controversial pardon of fugitive financier Marc Rich is perhaps the most notorious blight on his record. Even now, 10 years later, the condemnation of that pardon is strong. Indeed, not even Mr. Holder will defend his actions, telling the committee it was a naive mistake.

Eric Holder's involvement in this unconscionable pardon suggests he has dangerously poor judgment or he has an inability to say no to powerful political pressure. As Deputy Attorney General, he orchestrated an end run around the Justice Department, ignoring the advice of prosecutors and career professionals who opposed clemency for Marc Rich. Although pardoning a fugitive was extremely rare, the candidate appeared to have no qualms with the proposition.

While he acknowledges his role in this pardon as a mistake, Mr. Holder offers a curious explanation for the error. He told the committee he was not familiar with Rich's record at the time of the pardon. First of all, I find this to be unbelievable, as the facts suggest otherwise.

Just a few years before the pardon, when Holder was U.S. attorney for the District of Columbia, his office sued one of Rich's companies after an extensive investigation into contract fraud. The complaint that was filed in that case and comments that were made to the press make it almost impossible to believe Eric Holder was unfamiliar with Rich at the time of the pardon.

Moreover, given that Rich had been featured as one of the FBI's top 10 most wanted fugitives, it is even harder to believe Mr. Holder did not become familiar with the man in the 15 months that passed between the time he was first contacted by Rich's lawyer and the day clemency was issued.

To say that this pardon was a mistake is an understatement of the worst kind. As others have pointed out, the best thing Eric Holder could have done for himself and his boss would have been to oppose the pardon and convince President Clinton not to issue it.

While I readily acknowledge mistakes are inevitably made by us all, I find the excuse for this one implausible. Eric Holder is a bright and contentious lawyer. At the time of the Rich pardon, he had served for 3 years as Deputy Attorney General. In short, he should have known better. Because he allowed his good judgment to be overridden by political influence, I believe this act alone should suffice to disqualify him from higher office.

Although the Marc Rich pardon may have been the best known act of controversial clemency in Eric Holder's record, the commutation of sentences for 16 FALN terrorists became an issue of equal, if not greater, concern throughout the hearing. The FALN organization had been linked to 150 bombings, threats, kidnappings, and other events which resulted in the deaths of at least six Americans and the injury of many more between 1974 and 1983. It is not hard to understand why these commutations were strongly opposed by the U.S. attorney, the FBI, the pardon attorney at the Department of Justice, as well as the victims' families. What is hard to understand is why Eric Holder chose to ignore those opinions and instead facilitate clemency for these convicted terrorists.

New information discovered just before the hearing revealed that Eric Holder played an active role in securing these commutations. According to the L.A. Times, ''Holder instructed his staff at Justice's Office of the Pardon Attorney to effectively replace the department's original report recommending against any commutations, which had been sent to the White House in 1996, with one that favored clemency for at least half the prisoners.''

Unlike the Rich pardon, Holder has embraced his role in endorsing these commutations. He told Senator SESSIONS during our committee hearings that the decision was reasonable and has stood unapologetically by that statement, even when it was proven that he knew very little about the terrorists or their crimes at the time of the commutations.

Perhaps no one is as angry about Holder's role in this incident, or about his elevation to this distinguished office, as Joseph Connor, whose 33-year-old father was murdered when the FALN bombed the New York City restaurant where he was eating lunch. Mr. Connor was 9 years old. He has written numerous editorials and gave compelling testimony at our hearing about how devastating and indefensible these commutations were. I quote him:

> We Americans have to make clear that we will not tolerate officials who would put our lives in jeopardy by releasing terrorists. It is a disrespectful affront to all Americans, particularly to those of us who have come face to face with their violence.

Mr. Connor's testimony struck a chord with me due to my own experiences with domestic terrorism. Having dealt with the shock and the aftermath of the Oklahoma City bombing, which happened prior to the FALN commutations, I can relate to the grief and anger felt by the family member of a victim murdered senselessly by terrorists. I have seen the devastation these acts of violence inflict on a community and especially on the families they most directly impact. I have heard from the many law enforcement officers who work the scene, gather the evidence, and tend to the victims. I have witnessed the long and difficult process of prosecution, conviction, and sentencing. I know that bringing perpetrators to justice is a crucial part for these families' healing process.

I cannot imagine how all those things would come undone if justice were undermined, as it was in the FALN case.

The danger of commuting the sentences of terrorists responsible for the murder of American citizens and intent on killing even more is obvious. I will not recount those concerns here, but to help give a voice to Joe Connor and to the many other surviving family members of terrorist victims, I ask that our colleagues consider the effect these decisions had on them. We are accountable to each and every one.

Eric Holder also raises another concern with me and that is his hostility to the second amendment. I heard our chairman speak earlier about how he said he would uphold the second amendment, but when queried directly and specifically about components of the second amendment, the answers were not forthcoming.

As Deputy Attorney General, he advocated restrictive gun control legislation, such as waiting periods, an age limit, that a soldier coming back from Iraq could not own a shotgun because he wasn't 21 yet, a registration for every gun in this country, the elimination for me to be able to give my shotgun to my grandson when it is time to teach him to go hunting. All those things he has espoused limiting the second amendment.

While he has advanced those restrictions as a member of the Clinton administration, working under Attorney General Janet Reno, he remained active in anti-gun advocacy after he entered the private sector. After the attacks of September 11, he authored an

op-ed for the Washington Post, entitled ''Keeping Guns Away from Terrorists.''

I will not go through the details of that piece, but the details of what he purports to support would have a devastating impact on the second amendment in this country.

Perhaps the most telling and unsettling aspect of Mr. Holder's anti-gun record is the signing of an amicus brief in the Supreme Court's seminal second amendment case, in which he argued that the Constitution did not protect an individual's right to bear arms. I believe he actually believes that—that we don't have the right. He now tells us that is settled with the Heller case. But on further query, we get tremendously nervous about his support for the second amendment. The Supreme Court rejected his view on the second amendment unanimously.

His statement in our hearing that he respects Heller as the law of the land does not provide enough assurance on his commitment to defend the second amendment. It is neither controversial nor instructive to make such a statement. What matters are his views on specific proposals for gun control legislation and regulation.

At his hearing, I used the vast amount of my time in three rounds of questioning to try and extract opinions from Eric Holder on the second amendment. In his testimony, he advocated a permanent ban on so-called assault weapons, an age restriction on handgun possession—again, many of our troops returning home and out of the military after 2 years would not be able to have a handgun because they are not 21—and closing the gun show loophole. What that means is I cannot sell a gun to one of my neighbors without a background check on my neighbor. I cannot actually sell a piece of material I have to someone without going through a gun check, or I cannot even sell it to my brother.

He refused to commit to defending State right-to-carry laws. There are more than 40 States that have these laws. He was questioned over and over and would not answer affirmatively that he would use the power of the attorney to uphold the second amendment.

He repeatedly testified that gun regulation was not a priority for either he or the administration. Consistently, Mr. Holder has unapologetically embraced his anti-gun views. Yet at his confirmation hearing, he would not tell us what those views were.

He has been a vocal gun control advocate in the past, both in his official and individual capacities. He was not candid on the second amendment issue, an issue he has followed for years, as he was on interrogation techniques, an issue which he could not possibly have enough information to prejudge.

After an extensive review of his record and his testimony, I have concluded that Eric Holder as Attorney General will not defend—not adequately defend—the second amendment.

Finally, I have serious doubts as to whether Eric Holder is committed to defending the first amendment against threats such as the so-called fairness doctrine. This policy existed for decades before being abolished in 1987 and rightly so. Today, the concept has been revived and the threat of Government censorship over the airwaves is again a real possibility.

At our hearing, Eric Holder was asked about his thoughts on this proposal. Specifically, he was asked whether, as a matter of public policy, the fairness doctrine should be reinstated, to which he replied:

> [T]hat's a toughie. I've not given an awful lot of thought to [it].

It is hard to accept that Eric Holder, a former Deputy Attorney General, somehow missed the debate over this prominent issue in our society. It is even harder to accept his answer when reviewing his past statements about media bias.

This not-so-thinly-veiled attack targets the very media outlets that advocates of the fairness doctrine hope to cripple. While this may be an acceptable position for a private advocate, there is no room for this kind of bias in the Department of Justice. Unfortunately, Mr. Holder said nothing to ease concerns about his predisposition on this issue. In written responses to further questions from the committee he said this: If a law or regulation is enacted that seeks to implement some version of the fairness doctrine, I will work with other agencies in the new administration and in the Department's Office of Legal Counsel to reach a considered view about the constitutionality of the specific law or regulation under consideration.

Remarkably, although Mr. Holder was given an opportunity to distance himself from the inflammatory comments he made in the 2004 speech, the best he could offer was a commitment to give a ''considered view'' of any such legislation.

What I expected from a prospective Attorney General was, first and foremost, a clear and strong commitment to uphold and defend the first amendment. What Eric Holder said fell far short of my expectation.

The so-called ''Fairness Doctrine'' is not a ''toughie'' issue, as it was described by the presumptive Attorney General.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. COBURN. I ask unanimous consent for 3 additional minutes.

Mr. SPECTER. Okay.

Mr. COBURN. As former FCC Chairman James Quello argued shortly after the policy was repealed,

> The fairness doctrine doesn't belong in a country that is dedicated to freedom of the press and freedom of speech.

I agree and am disturbed that our likely next Attorney General apparently does not.

In conclusion, after listening carefully to Eric Holder's testimony, especially regarding each of the issues I raised today, I am forced to conclude that he lacks the judgment, independence, and candor necessary to be Attorney General. I did not reach this conclusion without careful consideration.

When I first came to the Senate, one of the first votes I had to make was on the nomination—to consent and advise—on Attorney General Alberto Gonzalez. I had a catch in my spirit on that nomination. I should not have cast a vote for him. I was the first Republican to suggest that he should resign because he did not display the independence, the candor, or the support for the rule of law. Although hindsight is always 20/20, I reserve my right to do the right thing on this nomination. There is no difference between the lack of independence that has been demonstrated by the testimony of Eric Holder and his past and what we saw in the lack of independence of previous Attorneys General.

Oftentimes, nominees come to the Senate with nearly a blank slate. This was not the case with Eric Holder. His time in public service, specifically his stint as Deputy Attorney General for President Clinton, served as an audition for this position. His role in the pardon and commutations is very troubling. I believe, in summary, independence is lacking, candor is lacking, and judgment is lacking. President Obama deserves some degree of deference in his choices, but no President is entitled to a Cabinet member who will neglect the Constitution and his own sound judgment to facilitate a bad political decision.

I regret I cannot, in good conscience, support his nomination.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Madam President, I know we proposed going with two on the Republican side and with two on the Democratic side. We will next go with Senator BURRIS and then Senator DORGAN.

I would note in this debate—and I apologize for my voice; I am recovering from laryngitis—that, one, the Justice Department is not the Department that handles the fairness doctrine. Out of fairness to Mr. Holder, that is not a matter that comes before the Attorney General.

Secondly, I asked Mr. Holder specifically a question about his views on the Second Amendment—because we do not have in Vermont the restrictive gun laws that the people in Oklahoma have supported or the restrictive gun laws the people of Texas or Pennsylvania have supported. We have less restrictive gun laws than any State in the Union. I own many firearms myself. I asked Mr. Holder specifically if he would, in a State without restrictive gun laws, such as Vermont, seek to replace those State laws with more restrictive Federal gun laws similar to those of the many other States represented on the Judiciary Committee, and he said no.

Madam President, I yield 10 minutes to the Senator from Illinois.

Mr. SPECTER. Madam President, if I could have the attention of the chairman.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. I wish to yield 20 minutes to Senator CORNYN at the conclusion, but do we have an idea as to how long, or when that will be?

Mr. LEAHY. Next will be Senator BURRIS and then Senator DORGAN. I ask the Senator from North Dakota, Madam President, approximately how much time he wants.

Mr. DORGAN. Ten minutes.

Mr. LEAHY. I would seek to yield 10 minutes to the Senator from Illinois and 10 minutes to the Senator from North Dakota, and then yield back time.

Mr. SPECTER. Then I would give 20 minutes to Senator CORNYN.

Mr. CORNYN. Madam President, I ask unanimous consent to that effect.

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

The Senator from Illinois is recognized.

Mr. BURRIS. Madam President, with humility for an honor neither sought nor expected, I rise for the first time as a U.S. Senator.

At a time of great consequence for our country's long march toward justice—and the moral compass we call the Constitution that guides our path—I rise to strongly support President Barack Obama's nominee for the office of U.S. Attorney General, Eric Holder.

As we look toward the future, I begin with a few words about the past. Back in the 1950s, there was a place in my hometown of Centralia, IL, called the pig wobble, and it wasn't hard to figure out why: Pig wobble was the place where the horses, the cows, and, yes, the pigs, from all nearby farms came to drink water. It was also the place where African-American children came to swim in the summertime.

My friends and I swam in the pig wobble until the summer of my 16th birthday, in 1953, when, after previous efforts to integrate the park swimming pool where only white children swam had failed. My dad finally had enough of his children swimming with the farm animals while the White children went off to the nice clean neighborhood pool. My dad and his minister, who ran the local chapter of the NAACP, determined that the time had come for Black children to swim in the community pool. They decided they would need an attorney to represent us. There were no Black lawyers in Centralia, so my father traveled to Chicago seeking legal assistance, but no lawyer was interested in representing us. He returned home, and the following day went to East St. Louis, IL, and retained a Black attorney to represent us.

When the pool opened on Memorial Day, my brother and I, along with three brothers from another family, swam and integrated the pool without incident. Later, we were home celebrating our accomplishments, but when my dad returned home he was very upset. We questioned why, and he explained that the lawyer he had hired did not show up. My father then said these words:

> If we as a race of people are going to get anywhere in our society, we need lawyers and elected officials who are responsible and responsive.

From that conversation with my father when I was 16, I set a goal for myself that I would try in my life and career to be responsible and responsive to the cause of justice.

When President Obama nominated Eric Holder to be Attorney General of the United States, my father's words came to mind. Eric Holder is the embodiment of what my father envisioned on that day. Mr. Holder has been responsible and responsive his entire career. He has been a leader in the long march toward justice, not just for African Americans but for all Americans who treasure our Nation's founding principles of freedom, equality, and personal liberty. Once confirmed, he will open the gates of justice once again to the public interest, not the special interests, and to those who are concerned not with the expansion of power but with the use of power for the common good.

The mission of the Department of Justice is to enforce the law, to ensure the public safety, to prevent crime, and to seek fair, impartial justice for all Americans. Sadly, for the past 8 years, the Department has not lived up to the promise of that sacred mission. Americans, particularly those of us in the legal community, have seen the Justice Department sink further into corruption, cronyism, and gross mismanagement.

I have watched with particular despair as the Federal initiatives to fight violent crimes against women, a program similar to the one I enacted as Attorney General in my State of Illinois, was underfunded, politicized, and largely abandoned. We have the chance today to turn the page by confirming Eric Holder.

At a time when the Department of Justice has lost dozens of competent, effective career attorneys, it is long past time for an Attorney General to put competence first. At a time when the Civil Rights Division, long known as the crown jewel of the Justice Department, has seen its mission undermined and misdirected, it is time for an Attorney General who will keep justice blind and put our Constitution first. At a time when our moral authority in the world is threatened by the immoral acts that were sanctioned from the top, we need an Attorney General who will put civil liberties first. At a time when the threat of terrorism continues to haunt us, we need an Attorney General who will put public safety first. At a time when the crimes of a Wall Street few have spoiled an economy for the Main Street many, we need an Attorney General who will put people first.

We can be certain that Eric Holder will do these things because he has spent his entire career building and broadening a deep well of public trust.

After graduating from Columbia Law School, Eric came to the Justice Department in 1976 to serve in the Attorney General's Honors Program, where his focus was prosecuting corrupt officials at the local, State, and Federal levels. In 1988, he was appointed by President Reagan as an associate judge of the Superior Court of the District of Columbia, where he presided over countless trials of homicides and other violent crimes.

In 1993, President Clinton nominated Eric to become the U.S. Attorney for the District of Columbia, the first African American to hold that post. In that role, he created a domestic violence unit, went after perpetrators of crime with an unmatched intensity, and worked hand in hand with the community to give the people a voice in law enforcement. In 1997, President Clinton promoted Eric Holder to the position of Deputy Attorney General, where he went after crimes against children and cracked down on white-collar crimes.

At every step along the way, Eric Holder has proven there is no conflict between fighting crime and upholding civil liberties; that making America safe and more just must go hand in hand. That is exactly what he will do as U.S. Attorney General.

It is the honor of a lifetime to rise from the desk that previously belonged to our President Barack Obama, and before that to another legend from the land of Lincoln, Senator Paul Simon. As long as this desk is in my care, I will try to honor those who served before me and work to brighten the lives of every citizen of Illinois.

If you look back further through the years, this desk belonged to Senator Robert F. Kennedy, who as U.S. Attorney General breathed life into the flames of justice. I know Eric Holder will do the same in our time. I urge my colleagues to join me in supporting this outstanding nominee.

I thank the Presiding Officer and my colleagues for the opportunity to share my thoughts in supporting the nomination of Eric Holder for Attorney General of the United States of America.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Madam President, I thank the Senator from Illinois for his excellent statement. I was touched by the fact that the Senator from Illinois mentioned he is at the desk once occupied by both Senator Paul Simon and Senator Barack Obama. I had the privilege of serving with both Senators from Illinois, both great people. I know it is safe to say that Senator Obama, now President Obama, will appreciate the statement made by Senator BURRIS today.

Having known Senator Paul Simon, I think it safe to say he also would have

been proud of the statement. Somewhere he is looking down and seeing this.

Last, it was my privilege as a young law student to be recruited by then-Attorney General Robert Kennedy, who made it very clear that the Justice Department was for all Americans and nobody, not even his brother, the President, would be allowed to interfere with criminal or civil rights prosecutions. I knew he meant it. I know the Senator from Illinois shares my feelings in that.

I welcome him to this body, and I thank him for his statement.

I yield to the Senator from North Dakota.

The PRESIDING OFFICER. The Senator from North Dakota is recognized.

Mr. DORGAN. Madam President, let me thank my colleague, the Senator from Vermont, the chairman of the committee, for his work on the Judiciary Committee. I do not serve on that committee, but I come to talk just a bit about the nomination of the new Attorney General and about the Department of Justice.

The reason I say I appreciate the Senator from Vermont is because he waged a relentless struggle at a time when the Justice Department was involved in the long shadow of scandal, at a time when words from the Justice Department, from the Attorney General at that point, seemed to suggest torture was OK. It was a time when the Department of Justice seemed to say that people could be detained on the streets of America and held incommunicado without a right to an attorney. These were things that I believed were far afield from what we expect as basic rights in our country and the Chairman of the Judiciary Committee waged a long and brave battle against them. And, I want to thank him for that.

But, let me talk about Eric Holder in the context of what I just described and why I think this nomination is so important. You have heard a lot about how highly qualified Eric Holder is—about his lifetime of impressive public service, about his history as an independent, tough-as-nails prosecutor, about the long list of organizations that support him as very qualified, and about the many prominent Democrats and Republicans that support him.

But, I want to talk about Eric Holder as a key part of restoring justice to the Department of Justice.

We have been through a long period of difficulty at the Justice Department. I am not talking now about the stewardship of Mr. Mukasey. I am talking about specifically a period when Attorney General Gonzales was in charge.

The Attorney General is the senior person in our country responsible for ensuring that justice is done. That means many things. It means, certainly, evenhandedness; it means justice under the law; it means occasionally saying no to those who want to do the wrong thing, no matter how powerful or important they might be. It means everyone, from the lowest to the highest, gets treated equally and fairly under the law in this country.

The Attorney General is the senior most Government official responsible for justice. That is the person who has to stand for, and stand up for, our country as a nation of laws. That is the person who needs to be the defender of human rights, who must believe in America as a beacon of hope in the world, a beacon that shines from America into the darkest places at the darkest times.

The Attorney General, as the head of the Justice Department, is the one who is involved in that kind of activity and sends that message from our country. An Attorney General should be someone who can say torture is un-American because it is. No splitting hairs, no fancy words, no legal distinctions—just these simple words: Torture is wrong.

Mr. Holder has said that to us in his nomination hearings. He said, ''Torture is wrong'' and ''No one is above the law.'' Those are very simple and straightforward words from this nominee, but I think they are timeless principles, timeless truths that America has exhibited now for nearly 200 years.

Why is that important for us? The most powerful weapon in our country is what we stand for. That has always been the most powerful weapon in America.

We had a long struggle in the Cold War against the Soviet Union and totalitarianism. The Cold War occasionally flared up to a hot war with bombs and bullets. But, it was not the bombs and bullets that won the Cold War with the Soviet Union. It was American values that won that Cold War.

That is why we prevailed. We must never forget that American values were so strong that they shined the light of hope into the darkest cells of the gulag prisons in the outermost reaches of the Soviet Union. Many of those prisoners died in their cells, but some survived and talked about how inspired they were by the ideas and values of what was America. Our country gave them hope. The idea of America, as I said, reached to the farthest and darkest places on this Earth and offered hope to people—people struggling, people in grave difficulty.

There was a very clear and distinct difference between us and the Soviet Union during that Cold War, and everyone knew what it was. It wasn't our military might or the comparison of our military capabilities. It wasn't our bombs or bullets. It was what each country stood for. When the people of the Soviet Union and their client states finally had a choice, they chose democracy and freedom and liberty. That is how powerful the idea of America has become.

This moral ground has always been our country's strength. We must insist on keeping that high moral ground—not only because it is effective, but because it is right and because it is our birthright as Americans.

From the very beginning our country has held itself to a higher standard, as in the story of George Washington and the fight to found America. He led the Continental Army in the war for independence. It is a pretty interesting story, if you go back and read it.

Madam President, 5,000 were in the Continental Army that George Washington commanded, 5,000—but not trained soldiers. They were shopkeepers, farmers and tradesmen going up against a 50,000-man trained army of British soldiers. We know the result, but we don't always remember the battles along the way, military battles and, yes, battles over values and ideals.

There were many difficult periods during that war, and there were some very dark days. During one very difficult period, at a time when a large number of his troops were captured, Gen. Washington and his troops saw the Hessian mercenaries, who at that point were fighting along with the British, slaughtering unarmed prisoners. Washington, when he captured Hessian prisoners, refused to do the same. Washington insisted we were different; we were going to treat people the way they should be treated not the way they treated us.

That was George Washington's notion about who we are and why we are different. That has been America's birthright since the beginning of our country.

It is why this issue of torture is so important. It is why the discussions about detainee treatment and enemy combatants and habeas corpus are so important. These issues are about who we are as a country, as a people, and who we want to be.

I remember reading one day that a man was picked up at a New York City airport and then sent away, not to be heard from for a long while by his family or by anybody. It turns out he was sent to Syria where he was tortured for 8 to 9 months, kept underground in concrete cells in isolation. It turns out it was a huge mistake. This person was not who he was thought to be; he was not a terrorist.

Yet, on American soil, he was detained and then sent away to be tortured. He was a Canadian. The Government of Canada, by the way, has apologized to that citizen for that situation. But it describes why it is so important that the rule of law always be applied.

So this discussion about the Attorney General, about this nomination, about the Department of Justice, is about much more than just nominating someone for a Cabinet position. It is about what do we aspire to for our country and ourselves. What kind of Government do we want? What kind of Government will we allow? What kind of country do we want?

I go back again, as I said, to the long, dark shadow that was cast for a period of time over the Justice Department, when it was engaged in scandals and

scandalous conduct. There were very important questions about what was happening at the Department of Justice. Frankly, there were grave questions of what was happening to justice at the Department of Justice.

The Senate Judiciary Committee was relentless in trying to understand it and hold hearings and get answers. Very few answers, frankly, were forthcoming. Thankfully, those days are over.

We now have the nomination of Eric Holder. The Judiciary Committee voted 17 to 2 to support his nomination. Like them, I believe Eric Holder represents an opportunity for our country to have someone at the Justice Department who does understand what the Department of Justice stands for and where it fits in our value system. I am pleased to come to the floor of the Senate today to say, when we discuss these issues we must discuss what are the values, the ideals, that this country stands for and how those whom we intend to put in very high places—how do they comport to those standards and values? How will they conduct the office for which they are nominated?

I believe strongly in the nomination of Eric Holder. As you have heard, he is highly qualified in experience, skills and temperament. As important, he understands the values of our country and the importance of justice. I have no doubt that Eric Holder will be an excellent Attorney General, will restore justice to the Department of Justice, and will uphold and further the historic values and ideals of our country, which will again be a bright shining light for justice and hope throughout the world.

I yield the floor.

Mr. GRASSLEY. Madam Chairman, I have decided to support Mr. Holder's nomination to be the next Attorney General of the United States. However, I want to make clear that just because I am voting to support Mr. Holder, this nominee does have a few issues that give me some concern.

For example, I am concerned about Mr. Holder's overly restrictive views of the second amendment. In last year's challenge to the District of Columbia's gun ban in the U.S. Supreme Court case District of Columbia v. Heller, Mr. Holder joined an amicus brief arguing that the second amendment does not provide an individual right for citizens to own firearms. However, a majority of the Supreme Court held that the second amendment does indeed guarantee an individual right to keep and bear arms. I am a strong supporter of the second amendment, so I am concerned that Mr. Holder's views may be too limited. I am also concerned about Mr. Holder's reluctance to expand programs that enforce current gun laws, such as ''Project Exile.'' This highly effective initiative started in the 1990s, but was only implemented in a few targeted cities. I don't understand why Mr. Holder is willing to consider the need for new gun laws and regulations, when we could be embracing a nationwide expansion of a proven, successful program enforcing existing gun laws. In my opinion, Mr. Holder should reconsider this position.

I find Mr. Holder's involvement with the FALN clemencies to be troubling. Mr. Holder played a pivotal role in obtaining clemencies for the FALN terrorists. He fired pardon attorney Margaret Love who had issued a report in 1996 against clemency, and instructed the new pardon attorney Roger Adams to issue an ''options'' memo keeping clemency on the table, even though the pardon attorney, U.S. prosecutors, Bureau of Prisons and FBI were all very much against clemency. Mr. Holder met with a number of groups and politicians who supported the clemencies, but never met with the victims. Mr. Holder testified that his recommendation to support the FALN clemencies was ''reasonable'' and ''appropriate.'' This is remarkable, especially since the FALN pardons were criticized by the public and condemned by Congress.

Mr. Holder's handling of the Marc Rich pardon is also problematic. He recommended Mr. Rich's pardon to President Clinton as ''neutral, leaning favorable,'' even though Mr. Rich was the biggest tax cheat in U.S. history, a fugitive of the law, and an individual who traded with the enemy. Mr. Holder did not provide the Judiciary Committee with a good explanation—legal, political or factual—for why he was ''neutral, leaning favorable'' on the pardon. Mr. Holder assisted Jack Quinn—President Clinton's former White House counsel—in bypassing the U.S. prosecutors and other DOJ officials who opposed the pardon, and advised Mr. Quinn on how to deal with the media and other logistics after the pardon was issued. Although Mr. Holder did acknowledge that he made a mistake with respect to the Rich pardon, I am troubled by Mr. Holder's deliberate maneuvering around the established Justice Department pardon processes. Also, I believe that Mr. Holder made statements to the Senate Judiciary Committee about his involvement in the Rich pardon that appear to be at odds with the facts as recorded in documents written at the time and testimony provided by other witnesses. Mr. Holder has indicated that he will be responsive and candid with Judiciary Committee requests, and that he will respect DOJ internal processes and exercise better judgment with respect to DOJ matters. I am hopeful that Mr. Holder will meet that commitment.

The U.S. Constitution requires Senators to fully vet the qualifications and fitness of presidential nominees and to exercise their independent judgment when they decide whether to ultimately consent to them. This has been a difficult decision for me—particularly because of the concerns that I have just outlined. However, Mr. Holder is an experienced individual with extensive credentials. He has very good qualifications. Mr. Holder's a good lawyer. He has a lot of support in the law enforcement community. Moreover, Mr. Holder has acknowledged some of the mistakes he made—even though I believe he could have done a lot more. We had a productive meeting when he came in to talk about his nomination last year, and he seemed to be responsive to the issues that I raised with him. He has committed to work with me on a number of matters that are important to me, such as the False Claims Act. He has pledged to cooperate with my oversight efforts and to be responsive to my document requests. He has pledged to cooperate with Judiciary Committee investigations and requests for information. So I will support Mr. Holder's nomination. But I plan to hold Mr. Holder's feet to the fire to make sure that he leads the Justice Department in the right direction and keeps Americans safe from criminals and terrorists.

Ms. MIKULSKI. Madam President, today I wish to support the nomination of Eric Holder to be Attorney General of the United States. This is an historic nomination—Eric Holder is the first African-American to be nominated to serve as the country's chief law enforcement officer. This is a much needed nomination. The Department of Justice, DOJ, is on life support, plagued with politics and partisanship. Under the previous administration the Department of Justice authored torture memos, fired U.S. Attorneys for their political beliefs, funded pet projects, and spent taxpayer dollars on lavish conferences.

This country needs an Attorney General who will restore confidence and integrity to the Justice Department. We need an independent thinker who is not influenced by politics or fear and who is dedicated to rule of law—not rule of ideology. We need a leader to hold the Department accountable—one who will provide fiscal accountability and stewardship of taxpayer dollars and stand sentry against waste, fraud, and abuse. No more $5 Swedish meatballs.

I have three criteria for nominees to the executive branch: first, the nominee must possess competence; second, the nominee must have a commitment to the mission of the agency; and finally, the nominee must have the highest integrity. Eric Holder passes all of these tests with flying colors.

First, his competence cannot be questioned. He was the No. 2 at the Department of Justice under the Clinton administration; he was U.S. attorney for the District of Columbia; he was nominated by President Reagan and confirmed by the Senate to serve as a Superior Court judge for the District of Columbia; and he was a career prosecutor in DOJ's Public Integrity Section.

Second, he has shown an unwavering commitment to the Justice Department's mission to uphold the Constitution, fight corruption, prosecute criminals, and protect victims. He has fought throughout his career to make

sure our Nation's laws are applied fairly and that everyone gets a fair shake.

Third, Eric Holder possesses strong integrity. He has a history of fighting to root out corruption and prosecute criminals. He is the son of immigrants and has worked hard to get to where he is.

As chairwoman of the Appropriations Subcommittee that funds the Justice Department, I want to make sure that the Department has what it needs to protect this country from predatory attacks by terrorists and predatory attacks in our neighborhood. I have fought to put dollars in the Federal checkbook to support the agency's efforts to combat terrorism and violent crime. I have fought to make sure that hard-working, dedicated individuals who are responsible for carrying out that mission have the resources they need.

The Justice Department needs an Attorney General who supports enforcing our country's laws, will protect the vulnerable, and will restore morale and confidence. I believe Eric Holder is just the right man for the job. For the past 8 years, the previous administration has ignored the Constitution, supported torture, denied basic access to courts for detainees, slashed funding for cops on the beat, and spied on innocent Americans. We need an Attorney General who will restore the rule of law and demand accountability for wrongdoing. We need an independent thinker—not a rubber stamp for the President.

Eric Holder is a heavyweight lawyer. He has vigorously prosecuted corrupt public officials from both parties. He put a mob boss behind bars for trying to bribe a juror. He is willing to take on the strong and powerful because he believes no one is above the law.

Yet the Department of Justice is not only responsible for upholding the Constitution. Part of its core mission is to protect the most vulnerable. As a social worker, I have seen firsthand the despicable crimes committed against children and know how important it is to hold these abusers accountable in order to keep our children safe. Now, new technology puts children at even greater risk. There are sophisticated cyber-predators posing as children on the Internet and are harder to catch. Eric Holder is a career prosecutor who has dedicated his life to protecting the public and getting criminals off the street. As the U.S. Attorney for D.C., Holder created the Domestic Violence Unit, which was a dedicated, one-stop shop for domestic violence survivors; he also spearheaded initiatives to protect children from abuse, sexual predators and cyber stalkers. I am confident that as Attorney General, the country's chief of police, he will protect our children and our neighborhoods from violent and heinous crimes.

Not only does the country need Holder, the Department of Justice does. A recent DOJ Inspector General report found one of the top ten management challenges at the Justice Department is to restore confidence at the Department. The mission of the Justice Department has been sidelined and politics—not evidence—has driven hiring and firing decisions. The prosecution of civil rights violations had dramatically dropped, while claims of workplace discrimination are on the rise. We need a leader to put the Department back on track and restore integrity and independent thinking. It is time to get back to doing business that is free from politics and ideology. Time to enforce our civil rights laws, prosecute financial corruption and cronyism, bolster local law enforcement to fight crime and protect the vulnerable. Eric Holder has served as the Deputy Attorney General at Justice and has experience managing and leading. He knows the challenges the Department faces. He will work with President Obama to restore the Department's reputation.

In conclusion, Eric Holder has spent his legal career protecting the public from dirty public officials, violent criminals and predators, scheming corporate greed. I know as Attorney General, Eric Holder will make sure the Justice Department is working for the American people—not some political agenda. This is why I will vote to confirm Eric Holder to be the next Attorney General of the United States.

Mr. GRAHAM. Madam President, I am pleased to support the nomination of Eric Holder as Attorney General. I am convinced that he understands the threat to our Nation posed by terrorism. In the Judiciary Committee's hearing on the nomination, Mr. Holder agreed with me that the United States is undoubtedly at war with a vicious and shadowy enemy, and that the war began before the attacks of September 11, 2001. Further, Mr. Holder and I agreed that the battlefield in the war on terror is the entire globe—not only the combat zones of Afghanistan and Iraq but also the financial system through which terrorist networks are funded and the Internet through which terrorists communicate and spread their message of violence and hatred. Indeed, the tragic events of 9/11 proved that the battlefield even extends within our Nation's own borders. The question of how best to win the war on terror is the most profound issue facing the next Attorney General. Mr. Holder understands the nature of this enemy and this conflict.

There are some in this body who will argue that Mr. Holder's previous mistakes should bar him from serving as Attorney General. In expressing my support for Mr. Holder, I do not mean to minimize those misjudgments. Indeed, Mr. Holder faces his past mistakes fully—admitting them, learning from them, and promising to exercise better judgment in the future. While I understand concern with Mr. Holder's past errors, it would be a mistake in its own right to reject on that basis this qualified nominee who so comprehends the challenge our Nation faces in defeating terrorism.

I look forward to working with President Obama and Mr. Holder to fashion a system of detention for the war on terror involving all three branches of government and of which all Americans can be proud. Mr. Holder and I agree that in order to maintain the moral high ground in this war, which is critical, we must treat detainees fairly, with more process than they would necessarily provide us. We also agree that we must not release dangerous warriors back to the fight against our Nation. Criminalizing this war would be a terrible mistake, and Mr. Holder understands that.

Four years ago, President Obama, then Senator Obama, stated on the floor of this chamber that the test of a nominee for Attorney General is, ''whether that person is ready to put the Constitution of the people before the political agenda of the President.'' I am confident that Eric Holder meets that test, and I ask my colleagues to support his nomination.

Mr. FEINGOLD. Madam President, this is a momentous day for the Senate. We are about to confirm a nominee for Attorney General of the United States who with two short declarative sentences uttered at his confirmation hearing—without caveats, without parsing words, without equivocation—signaled a new direction for the Department of Justice and a turning of the page in the constitutional history of this country.

''Waterboarding is torture.''

''No one is above the law.''

With these simple words, Eric Holder reassured the Nation that the Department of Justice will be run by someone who believes in the rule of law and in impartial justice. It is sad, of course, that this is something remarkable. But that is where the last 8 years have left us.

The election of 2008 had many consequences. But none is more important than a chance to restore the rule of law and repair the damage to the Department of Justice that has been done by the past administration. Eric Holder is well equipped to take on this important and difficult task for three reasons.

First, he has spent over 25 years pursuing justice in public service, as a trial attorney in the Public Integrity Section of the Department, as a DC Superior Court judge, as U.S. attorney for the District of Columbia, and as Deputy Attorney General. He knows the Department of Justice as well as any person alive, he respects its history, and he has the respect and support of career lawyers in the Department and former Attorneys General and Deputy Attorneys General from both parties.

Second, he appears to have the independence and strength of character needed to fulfill the special role that the Attorney General has in the President's Cabinet. He prosecuted powerful members of his own party when working in the Public Integrity Section and

as U.S. attorney. He recommended expanding the scope of Ken Starr's investigation of President Clinton. This record indicates that Mr. Holder understands the difference between being the people's lawyer and being the President's lawyer.

Third, he understands the need to revitalize the traditional missions of the Department—fighting crime, protecting civil rights, preserving the environment, and ensuring the fairness of the marketplace—while at the same time devoting himself to protecting the American people from a terrorist attack. I am optimistic that he will fight for the resources and the policies needed to do justice. Similarly, he understands that security and liberty shouldn't be balanced or traded off against each other. They must be twin goals, both achievable, together, with hard work and dedication to our national values. I was struck by words from a speech Mr. Holder made in 2005, after he had left the Government:

> Those who tell us that we must engage in warrantless domestic surveillance, ''enhanced interrogation'' or ''extraordinary rendition'' or we cripple ourselves in combating terrorism offer a false choice. There is simply no tension between an effective fight against those who have sworn to harm us and a respect for our most honored civil liberties traditions.

I could not agree more. I am very pleased that a person who so strongly and unapologetically believes in the promise of our Constitution, now more than ever, will soon be the Attorney General of the United States.

Let me say just a word about the Marc Rich pardon controversy, which is one of the areas on which opponents of Mr. Holder's nomination have focused. I thought that pardon was a misuse of the President's power, and I said so at the time. Mr. Holder did not exercise his role in the pardon process with the care or diligence he should have, and I appreciate the concerns that have been expressed about his involvement in this matter. But it is significant that, starting shortly after the pardon and continuing to this day, Eric Holder actually stood up and admitted that he made mistakes.

We have seen far too little of that in the past 8 years from the leadership at the Department of Justice and from the Bush administration as a whole for that matter. Months and months of work on the Judiciary Committee was needed, essentially, because Attorney General Gonzales insisted that nothing he did in connection with the U.S. attorney firings was a mistake. Our country cannot afford leadership like that at the Department any more. The problems we face are too grave and too complicated for our leaders to insist on defending indefensible conduct or continuing with policies that aren't working simply because they don't want to admit they were wrong.

Madam President, just a little under 8 years ago, I voted for the nomination of John Ashcroft to be President Bush's first Attorney General. I did so because despite significant policy differences, and not insignificant criticism of some of his actions as a Senator, I believed that he was qualified for the job, and, most important, because I believed that a President is due great deference in filling his Cabinet. I still believe that today. I am pleased that many of my colleagues on the Republican side have decided to show that same deference to President Obama. Eric Holder is highly qualified for this position, his overall record and testimony suggest he will exercise his responsibilities with care and judgment, and he is the President's choice. He should be confirmed.

Mr. CHAMBLISS. Madam President, I rise to discuss my support for Eric Holder's nomination. When Mr. Holder was first nominated I had serious concerns—concerns about his stance on the second amendment, which is important to me and so many Georgians I represent, concerns about the potential prosecution of those who interrogated detainees in accordance with legal opinions issued by the Department of Justice's Office of Legal Counsel, and concerns about his role as Deputy Attorney General in some of President Clinton's pardons.

I had a long discussion with Mr. Holder last week and we talked extensively about the concerns that I had and that I know many of my constituents have. After our conversation, I was convinced that he will competently serve as our next Attorney General, and will keep the best interests of the American people in mind.

With respect to the second amendment, Mr. Holder recognizes the decision of the U.S. Supreme Court in District of Columbia v. Heller, holding the second amendment to be an individual right, to be the law of the land. With respect to former interrogators, he recognized that it does not make sense to prosecute those clearly acting under the authority of the Office of Legal Counsel. Finally, with respect to his role in President Clinton's pardoning of Marc Rich, Mr. Holder fully recognized his mistakes and stated if he had to do it again, he would have done things differently. I believe he will take that learning experience with him into his role as Attorney General.

Finally, Mr. Holder has been unanimously confirmed by the U.S. Senate on three separate occasions. He was praised by a Georgian and former Attorney General, Griffin Bell, who recently passed away and for whom I had the utmost respect. President Obama deserves great deference in filling out his Cabinet positions, and because of the very candid conversation I had with Mr. Holder, and my belief that he is up for the task before him, I am pleased to support his nomination.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Madam President, I understand the Senator from Texas has a request to make.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mr. CORNYN. Madam President, I understand under the previous order I have been recognized for the next 20 minutes on this side, but I have been asked on this side to ask unanimous consent that the following Republican Senators be recognized in this order during the remaining time, going back and forth, as the distinguished chairman knows: Following my remarks, Senator HATCH for 10 minutes, Senator BUNNING for 5 minutes, Senator SESSIONS for 5 minutes, Senator BOND for 10 minutes, and Senator HUTCHISON for 5 minutes. I ask Republican speakers be recognized in that order on this side.

The PRESIDING OFFICER. Is there objection?

Mr. LEAHY. Madam President, reserving the right to object, and I do not intend to object, but has the distinguished Senator from Texas left time for the ranking member if he wants it?

Mr. CORNYN. It is my understanding we have reserved sufficient time for the ranking member to close.

Mr. LEAHY. I see a nod of affirmation from the staff. Being one who understands that we Senators are merely constitutional necessities to the staff, Madam President, I have no objection to this with the understanding that we follow the usual comity of going from side to side.

The PRESIDING OFFICER. Without objection, it is so ordered. The request is agreed to. The Senator from Texas is recognized.

Mr. CORNYN. Madam President, I come to the floor more with regret than anything else to say I oppose the nomination and confirmation of Eric Holder to be the next United States Attorney General. I say this to my colleagues because I have approached this nomination with an open mind and actually a predisposition to vote for his confirmation. But, of course, we Senators have a constitutional duty—in providing advice and consent to the executive branch's executive nominations like this one—to ask hard questions and to get the answers to those questions so our advice and consent may be an informed consent.

While I approached this nomination with an open mind and a predisposition to vote for Mr. Holder's confirmation, I ultimately concluded that, as a result of the reasons I will detail momentarily, I could not vote for his confirmation in good conscience.

Mr. Holder's experience in many ways uniquely qualifies him for this promotion as Attorney General, but it is that very same experience when he served as Deputy Attorney General that calls into question his independence and judgment, particularly when the President of the United States at the time, President Bill Clinton, basically wanted something out of the Department of Justice. This had to do specifically with two clemency petitions, one for the FALN terrorists and the other for the notorious Marc Rich. These two actions—where President Clinton commuted the sentence of 16

Puerto Rican terrorists and the recommendation to pardon the billionaire fugitive, Marc Rich—raised serious questions about Mr. Holder's independence and judgment.

When Mr. Holder came to my office, I asked him: Is there any reason you would resign rather than carry out the orders of a President if you were Attorney General?

He quickly said: Of course. If the President asked me to do something illegal or unethical, then I would resign rather than carry out those instructions.

Well, no one is suggesting that what Mr. Holder did was illegal, given the fact that the President of the United States solely had the prerogative whether to grant these commutations, but I think any fairminded consideration of Mr. Holder's conduct under these commutations raises some serious questions whether he could hold himself to the very same standard that he articulated in my office.

Two other aspects of Mr. Holder's record concern me. One is his demonstrated lack of seriousness regarding the profound threat posed by radical Islamic terrorism; secondly, as some Senators on my side of the aisle have already pointed out, his apparent hostility to the second amendment, the right to keep and bear arms, under our Constitution.

In the Judiciary Committee, on which I am proud to serve, Mr. Holder failed to answer my questions and the questions of my colleagues in a way that alleviated these concerns. In fact, I found many of his responses to be simply evasive.

As I said earlier, I have four reasons for opposing this nomination: one, Mr. Holder's role in the FALN and Los Macheteros commutations, his role in the Marc Rich pardon, his misjudgments and shifting opinions on the war on terrorism, and his record of hostility to the individual right to keep and bear arms.

I think it is important to point out the facts of the commutations because they really are alarming, and many of our memories may have been dimmed because many of these events occurred long in the past.

In August 1999, President Clinton offered clemency to 16 members of two Puerto Rican separatist terrorist organizations, the FALN and Los Macheteros. Deputy Attorney General Eric Holder made the recommendation that he should do so.

The FALN, in case people do not recall, was a clandestine terrorist group devoted to bringing about the independence of Puerto Rico through violent means. Its members waged open war on America, with more than 150 bombings, arsons, kidnappings, prison escapes, and threats and intimidation, all of which resulted in the deaths of at least 6 people and injuries to many more between 1974 and 1983.

The most gruesome of these attacks occurred in 1975 at a bombing in Lower Manhattan. Timed to explode during lunchtime, the bomb decapitated 1 of the 4 people killed and injured another 60. It is hard for us to imagine what it would be like today if this were to occur, but that, in fact, is what the FALN was found guilty of.

In another attack in Puerto Rico, Los Macheteros terrorists opened fire on a bus full of U.S. sailors, killing two, wounding nine.

Fortunately, much of the leadership of these terrorist groups was captured and brought to justice in the 1970s and 1980s. But by the mid-1980s, thankfully, the worst of their reign of terror was over.

In the early 1990s, sympathetic activists petitioned for clemency on behalf of members of these groups. It was an easy call for the Pardon Attorney. That is the title of the individual whose responsibility it is to screen requests for clemency. These unrepentant terrorists had not even bothered to petition for clemency themselves. So Pardon Attorney Margaret Love, who worked for then-Deputy Attorney General Jamie Gorelick, recommended against clemency for any of these prisoners, and her recommendation was transmitted to the President. But after Eric Holder became Deputy Attorney General, he rescinded that recommendation opposing clemency and he recommended that President Clinton grant clemency to these unrepentant terrorists.

Strangely, and really inexplicably, from my perspective, Mr. Holder now continues to stand by these recommendations as ''reasonable.'' But I do not think the reasons he gives are persuasive.

Mr. Holder, first of all, claims these individuals are not ''linked to violence.'' That is clearly false. These men were active members of terrorist groups that committed dozens of violent crimes, as I described a moment ago. It is true that they individually were not prosecuted for the worst of those crimes, but by that standard, anyone who conspires to commit violence and murder is not linked to violence, only those who actually execute the orders of the higher ups.

These commutations were, at the time, widely believed to be politically linked. Indeed, the Clinton White House discussed how the clemencies would affect then-Vice President Gore's aspirations for higher office, particularly among the Puerto Rican community. For this reason, I believe a full accounting of the individuals Mr. Holder met with, what they discussed, and what went into his decisions in recommending these commutations is in order.

But there is another reason these questions should be answered; that is, it is only fair and just that the victims of the violence of these two terrorist groups be provided answers.

I would encourage all of my colleagues before voting to review the testimony of Joseph Connor, whose father was killed in the bombing in Lower Manhattan. Mr. Connor testified that Mr. Holder did not consult with him, did not contact him or his family or other victims before recommending that the FALN terrorists go free. I cannot vote for Mr. Holder's nomination until I can explain my vote to Joseph Connor.

Less than 2 years after the controversial recommendation for commuting the sentences of these FALN terrorists and Los Macheteros terrorists, on the very last night of the Clinton administration, Mr. Holder made a very similar error in judgment when he recommended that President Clinton pardon the notorious fugitive Marc Rich. At the time, Mr. Rich was No. 6 on the FBI's Most Wanted list.

In 1983, then-U.S. attorney Rudy Giuliani got an indictment of international commodities trader Marc Rich and his business partner Pincus Green. The indictment charged 65 counts of tax evasion, racketeering, and trading with the enemy. Specific charges include illegally trading with the Ayatollah Khamenei's Iranian terrorist regime, in violation of U.S. energy laws and the trade embargo against Iran. Indeed, Mr. Rich made a fortune trading with the Ayatollah's regime at the same time that 52 American diplomats were being held hostage in Tehran. Mr. Rich profited by trading with Cuba, Libya, and South Africa during apartheid, all despite U.S. embargoes.

Rather than face the charges, Mr. Rich fled to Switzerland, where he remained a fugitive for 17 years. Law enforcement, including CIA, the NSA, and other Federal agencies, expended substantial resources in trying to apprehend Mr. Rich. These efforts included extradition requests and attempts by U.S. marshals to seize him abroad.

Mr. Rich refused to return to the United States despite an offer by prosecutors that they would actually drop the racketeering charges in exchange for his return. In a final effort to avoid extradition, Mr. Rich went so far as to renounce his U.S. citizenship. He tried to become a citizen of Bolivia.

It is hard for me to imagine anyone less deserving of clemency by the President of the United States than a fugitive from justice accused of trading with the enemy. Mr. Rich's own lawyer told him that he ''spit on the American flag'' by avoiding the jurisdiction of our courts.

On the last evening of the Clinton administration, White House Counsel called Mr. Holder to solicit his views on the Rich pardon. As Deputy Attorney General, Holder was effectively speaking for the entire Department during this crucial call. Strongly disregarding the views of the hundreds of DOJ prosecutors and FBI agents who had worked nearly two decades to bring Mr. Rich to justice, Holder told White House Counsel Beth Nolan that he was ''neutral, leaning favorable.''

With this recommendation from the Deputy Attorney General in hand, President Clinton granted the Rich pardon, in one of his last and most inexplicable actions.

Senator SPECTER, the distinguished ranking member from Pennsylvania, correctly recounted what former FBI Director Louis Freeh said about that pardon. He called it a ''corrupt act.'' Now, Mr. Holder has, during hearings, accepted fault and admitted that he made a mistake. I do not know how he can do any differently. But never in a full day of hearings and written questions did Mr. Holder offer a good reason for supporting the pardon in the first place. He defends himself by saying he was naive. He admits it was a mistake and promises he will not make the same mistake again. But this is difficult to square with the fact that 2 years earlier, Mr. Holder agreed that the FALN commutations were a reasonable act. It appears to be something of a trend here.

The other area I am very concerned about, as I mentioned earlier, is the questions I asked Mr. Holder about the war on terrorism. Of course, it is hard for us now to recount the horrors of 9/11 when al-Qaida commandeered airplanes and hit here in Washington, DC, and New York, killing 3,000 Americans. It was in the wake of that that, of course, the Congress authorized the use of military force against al-Qaida in Afghanistan and against the Taliban. It is in the wake of that that Congress passed the PATRIOT Act to provide enhanced tools to our law enforcement agencies and our intelligence agencies to try to make sure 9/11 never, ever happened again.

The Department of Justice, particularly in the Office of Legal Counsel, was struggling with new efforts to try to figure out how to protect Americans from future attacks. I believe they struggled in good faith to try to come up with legal guidance for our President, his administration, and the intelligence authorities to make sure they were operating within the limits of the law, which, of course, prohibits torture. But I want to recount what Mr. Holder said in January 2002, which is at stark odds with what he has said now in 2008. He said in January 2002 that captured al-Qaida terrorists ''are not, in fact, people entitled to the protection of the Geneva Conventions. They are not prisoners of war.'' He went on to endorse indefinite detention of terrorists at Guantanamo Bay and argued that such prisoners should not be afforded Geneva Convention protections so that they could be interrogated and provide actionable intelligence that could prevent future attacks. But more recently, taking perhaps a more political or ideological bent, he chastised the Bush administration for policies he now seems to believe defy the law.

I want to quote at length from an Associated Press article entitled ''Obama AG pick defended Guantanamo policy,'' dated November 22, 2008. According to this article, when asked whether terrorism suspects could be held forever, Holder responded:

> It seems to me you can think of these people as combatants and we are in the middle of a war.

Holder said in a CNN interview in January 2002:

> And it seems to me that you could probably say, looking at precedent, that you are going to detain these people until the war is over, if that is ultimately what we wanted to do.

Just weeks later, this article goes on to say, Holder told CNN he did not believe al-Qaida suspects qualified as prisoners of war under the Geneva Conventions.

He said:

> One of the things we clearly want to do with these prisoners is to have an ability to interrogate them and find out what their future plans might be, where other cells may be located. Under the Geneva Conventions, you are really limited in the amount of information that you can elicit from people.

Holder said it was important to treat detainees humanely, but he said they ''are not, in fact, people entitled to the protection of the Geneva Convention. They are not prisoners of war.''

In this article, he also downplayed criticism that these detainees were being mistreated. Now, these were essentially the same arguments being made by the Bush administration in the wake of 9/11. Since then, those arguments, as we all know, have been criticized by human rights groups, leading Democrats, and, surprisingly enough, Mr. Holder himself.

He gave a speech to the American Constitution Society in June of 2008 where he said, ''We must close our detention center at Guantanamo Bay.''

He said:

> A great nation should not detain people, military or civilian, in dark places beyond the reach of law. Guantanamo Bay is an international embarrassment.

He added that he never thought he would see the day where ''The Supreme Court would have to order the President of the United States to treat detainees in accordance with the Geneva Convention.''

Those sharply contrasting positions from 2002 to 2008 make me wonder if this is the same person, the same Eric Holder. Moreover, it makes me wonder what it is he truly believes. In 2008, Mr. Holder, in a speech before the American Constitution Society, attacked many of the positions he once held as ''making a mockery of the rule of law.'' In that speech he called for ''a reckoning'' over the Bush administration's ''unlawful practices in the war on terror.'' He also accused the Bush administration of ''act[ing] in direct defiance of Federal law'' and railed against counterterrorism policies that he claimed ''violate international law and the United States Constitution.'' It is one thing to change your mind; it is another thing to change your mind and attack the very position you once held as one that could only be held in bad faith. It is cynical to characterize a position you once held later as ''making a mockery of the rule of law.''

The recent attacks in Mumbai have reminded Americans of the possibility of another attack, literally anywhere in the world by committed terrorists. On November 26, 2008, Mumbai was ravaged by a gang of terrorists. More than 170 people died as a result of bombings and gunfire, including 6 Americans. If an American city were targeted in the same manner as Mumbai, or worse—let's say these terrorists had a biological, chemical, or nuclear device—it is critical that our laws give law enforcement personnel, intelligence personnel, the President of the United States the very intelligence they need in order to detect and defeat those attacks. Our intelligence officials and those who act consistent with interpretations of the law from the Office of Legal Counsel at the Department of Justice need to know the law is not going to change after they act consistent with what they understand the law to be in order to protect American citizens from future attacks.

I worry about Mr. Holder's shifting opinions on what the law provides for and what it does not. I worry about the chilling effect it will have on future intelligence officials who may decide rather than risk prosecution by shifting opinions on what the law provides or does not, rather than risking everything I have worked a lifetime for, including what I have provided for my family, I am going to play it safe. From what we learned on 9/11, according to the 9/11 Commission, when we treat it safe, when we treat terrorism as a criminal act alone, we invite future attacks against our country.

For all these reasons, I oppose the nomination.

I ask unanimous consent that a letter from a number of hunting groups, anglers, landowners, and conservation groups in my State be printed in the RECORD.

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

FEBRUARY 2, 2009.

Hon. JOHN CORNYN,
Hart Senate Office Bldg.,
Washington, DC.
Hon. KAY BAILEY HUTCHISON,
Russell Senate Office Building,
Washington, DC.

DEAR SENATORS CORNYN AND HUTCHISON: The organizations listed above represent hunters, anglers, landowners, conservationists, natural resource professionals and many law abiding gun owners in Texas. These groups and individuals share a strong interest in sustaining and protecting our current and future conservation initiatives, our long standing hunting heritage, and ensuring our success to effectively manage Texas' fish and wildlife resources. The listed groups want to express their strong opposition to the approval of Eric Holder's nomination as Attorney General of the United States.

Mr. Holder has consistently demonstrated opposition to our Second Amendment Rights and has argued against the individual right to keep and bear arms, as determined by the

U.S. Supreme Court in Washington, D.C. vs Heller. He has advocated for what we consider extreme gun restrictions. We believe that Mr. Holder, as a preeminent legal expert and outspoken advocate on stricter gun laws, would be in a particularly powerful position to implement bureaucratic measures and create procedural mischief that would erode gun ownership rights.

We are forced to logically contend that increased gun control will result in a direct reduction in sales of firearms and ammunition leading to a reduction in Federal Aid funds available through the Sport Fish and Wildlife Restoration Act. This will mean a reduction in funding to financially support state fish and game agencies across the nation and specifically the Texas Parks and Wildlife Department in Texas, thus reducing our ability to conserve our fish, wildlife and natural resources. This is a critical issue for the hunter, angler and conservation community.

While there seems to be a sense that President Obama is still in a ''honeymoon period'' with his appointments that are being reviewed by the Senate, this nomination clearly must be thoroughly vetted and Mr. Holder's positions clearly exposed and challenged. A lopsided vote without direct confrontation over these extreme gun control positions would send the wrong message and certainly erode progress that has been made on Second Amendment issues and the individual right to keep and bear arms.

Thank you in advance for at the least speaking out and highlighting these concerns during the upcoming vote. America must be on record that his actions and decisions will be closely monitored, and we encourage you to vote against the nomination of Mr. Holder to clearly showcase these concerns.

If you have any questions please contact Kirby Brown, Chairman of the Texas Outdoor Partners.

Sincerely,

Anglers Club of San Antonio; Dove Sportsmen's Society; Exotic Wildlife Association; Gulf Coast Chapter of SCI; Houston Safari Club; Kayak Anglers Society of America; National Wild Turkey Foundation—Texas Chapter; Quality Deer Management Association; Recreational Fishing Alliance—Texas; Rocky Mountain Elk Foundation, Texas Chapter.

San Antonio Metropolitan League of Bass Clubs; Safari Club International, Austin Chapter; Sensible Management of Aquatic Resources Team; Texas Association of Bass Clubs; Texas BASS Federation Nation; Texas Black Bass Unlimited; Texas Chapter of The Wildlife Society; Texas Deer Association; Texas Dog Hunters Association; Texas Gulf Coast Stewards.

TexasHuntFish.Com; Texas Organization of Wildlife Management Associations; Texas Outdoor Council; Texas Quail Unlimited Chapters; Texas Sportsman's Association; Texas State Rifle Association; Texas Trophy Hunters Association; Texas Wildlife Association; Wild Boar USA; Wildlife Habitat Federation.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Madam President, I know the distinguished senior Senator from Minnesota, the distinguished only Senator from Minnesota, seeks recognition, the newest member of the Judiciary Committee, an extraordinarily valued addition to the committee. We are especially happy whenever we have a former prosecutor come on the committee.

I yield to the Senator from Minnesota.

Ms. KLOBUCHAR. I thank the Senator from Vermont.

I rise today in support of Eric Holder to be the next Attorney General of the United States.

The next Attorney General will need to hit the ground running, from beefing up civil rights and antitrust enforcement to addressing white-collar crime and drug-related violence, to helping keep our country safe from terrorist attacks. As I told the Judiciary Committee last week when I voted in favor of his nomination, Eric Holder is the right man to do the job. He is the right man to lead the Department of Justice at this critical time. And most importantly, coming from a State that had our own share of problems with a political appointee put in place as U.S. Attorney, he is the right man to get the Department back on course, to put the law first, when it comes to the Department of Justice.

First, as I look at the reasons why I am supporting his confirmation, at a key time in our Nation's history, where we deal with terrorist acts not contemplated in simpler times—from cyber battlefields to sophisticated crimes, from market manipulation to financial fraud—Eric Holder has a clear command of the legal issues confronting our country. That was apparent in the discussions that took place during the nomination hearing. There were a number of Senators, particularly those on the other side of the aisle, who had some very good questions. When you listened to the discussion Eric Holder had with Senator KYL regarding some of the ongoing foreign intelligence issues, from multipoint wiretap authority to lone-wolf surveillance authority, it was obvious that Eric Holder knew what he was talking about. He was convincing to Senator KYL as they discussed this. The discussions he had with Senators HATCH and FEINGOLD regarding executive power and congressional authority and the important back and forth with Senators SESSIONS, GRAHAM, and FEINSTEIN regarding terrorism cases, regarding the unique nature of those cases, regarding the issues facing our agents and soldiers in the field and the prosecution of detainees, despite what we recently heard from my colleague from Texas, it is no surprise to me that after hearing Eric Holder's command of the law and the issues facing the country, the vote on the committee was overwhelming. The vote was 17 to 2. So many of my Republican colleagues who earlier had expressed concerns about Eric Holder ended up supporting him and voting for him and asking that he be the next Attorney General.

The second reason I am glad to support Eric Holder is he is committed to the bread-and-butter work of the Justice Department. As Chairman LEAHY noted, before I came to the Senate I was a prosecutor for 8 years. I ran an office of 400 people. I had some sense of the importance of going after not only the big crimes but also the little crimes. Eric Holder was a pioneer in this area when he was U.S. attorney and established a community prosecution initiative. It is built on the idea of community policing. It goes back to the basics. The idea is instead of a prosecutor sitting in the office looking at a bunch of files, none with any relation to the neighborhood we are supposed to protect, the prosecutor is assigned to a certain area to work with the same police, to work with the same neighborhood groups. While there may be some crimes committed in the government centers in this country, for the most part they are not. This idea of community prosecution connects what goes on in those four walls of the government centers, in those four squares of the centers to the neighborhoods out in the field, to the people out in the field. When we did this in Hennepin County by assigning prosecutors by geographic area to work directly with a set group of police and neighborhood groups, we got better results for liveability crimes. We got stronger sentences, and we saw a 120-percent reduction in crime. Again, Eric Holder, when he was U.S. Attorney in the District of Columbia, which involves not just doing U.S. attorney type prosecution but also the bread-and-butter work of prosecutions in the District because of its unique nature, he was one of the pioneers for community prosecution. It shows his command and explains why he has so much support from law enforcement.

I remember actually during this time we had a visit—this is way back, years ago—from a Presidential candidate to one of our suburban areas. I said to one of the police officers: Do you want to meet this person? He said: Well, not really. I want to know if Terry Froling is here. She was our community prosecutor we had assigned to that suburb of Bloomington, MN, whom he had gotten to know and respect. It brought home to me again how important this program was. You can see the faith that law enforcement has put on Eric Holder by the number of bipartisan endorsements he has received. You also see the endorsements of Republican-appointed prosecutors such as my law school classmate Jim Comey. That means a lot to me, and it should mean a lot to Members of the Senate.

Third, Eric Holder is a humble person who is willing to admit mistakes. From my brief 2 years here, we need a little bit more of that in Washington. As a former prosecutor, I am not a big fan of pardons. I told this to Mr. Holder. But anyone who has worked in the criminal justice system, whether as a police officer or prosecutor or a public defender or a judge, anyone who has worked in the system for any length of time knows that people make mistakes. For 8 years, when I managed our office, I saw the gut-wrenching decisions—and I had to make some myself—that the people have to make on the frontline.

From the momentary decisions that police officers need to make at a fast-moving crime scene, whether to shoot, whether to knock down a door, to the decisions prosecutors need to make about whether to call a certain witness or whether to plea down a case when the case is falling apart and they know their own hope to get someone off the street they consider dangerous is to accept that plea—those are the tough decisions that may not make good television, but they are the true decisions that prosecutors need to make every day.

If you want someone with experience for this job, they are going to have made some decisions you don't like or that I don't like. There is absolutely no doubt about it. People who are in this field have to make literally dozens of decisions a day. They are going to make some decisions you don't like. They will have made some mistakes. I am glad they were discussed and brought up at the nomination hearing and glad that so many of my committee colleagues actually took the time to listen to the nominee. He explained that one thing was a mistake, that he wouldn't have made that decision if he had more information. He admitted that, and we were able to question him at length. He explained some things that he still supported that they didn't agree with or that the times had changed and they had more information and there is reason they didn't agree with it now. Those discussions were had and he was candid.

What we have learned from that committee hearing is that in the end, so many of my colleagues on both sides of the aisle looked at this man as a whole, and they decided that as a whole his experience, while there may have been flaws in his experience, led them to support him for this job, which leads to my last reason.

Eric Holder's background is, first, as a prosecutor in the field. But just as importantly, it is also as a sound, solid, competent manager who is guided by justice, someone who will lead quietly but firmly, someone who will work to build the morale of a department that has suffered for too long. As I mentioned, I saw it in my own State when one bad decision made up on high, when the Attorney General was Alberto Gonzales, putting an inexperienced political appointee into the top spot of a gem of a U.S. Attorney's Office in Minnesota, created absolute havoc in our State and in that office. I had worked with that office for years. I know the people who work there. I know how high quality they are. That one decision wreaked havoc in that office. Thanks to General Mukasey, that office is now steady. I appreciate how he consulted with me about the replacement for that job. I also appreciate how our State's acting U.S. Attorney Frank Magill has skillfully guided the office through a difficult time and restored morale. But that experience with the U.S. Attorney's Office in my State has brought home to me the importance of having an Attorney General who puts the law and not politics at the helm of the Department of Justice. As former Attorney General Dick Thornburg said, Attorney General for Presidents Reagan and George H.W. Bush:

> The next Attorney General will need to restore the image of the Department of Justice as a nonpartisan organization dedicated to the rule of law.

I couldn't agree more. We need to put justice and the law at the helm. I support the Holder nomination to be Attorney General because I believe Eric Holder can steer this big ship and get it back on course and put justice at the helm.

I yield the floor.

The PRESIDING OFFICER (Mr. UDALL of New Mexico). The Senator from Kentucky.

Mr. BUNNING. Mr. President, I need about 7 or 8 minutes.

Mr. LEAHY. Mr. President, point of inquiry. I certainly don't want to interfere with the Senator from Kentucky, but I think Senator CORNYN had locked in a specific amount of time for the Senator from Kentucky; am I correct?

The PRESIDING OFFICER. That is correct, 5 minutes.

Mr. BUNNING. All right. I will not argue with the Senator from Vermont.

I rise today to discuss the nomination of Eric Holder to be U.S. Attorney General. Unfortunately, I cannot support his nomination to this post.

While Mr. Holder certainly has the experience and credentials that one would want to see as head of the Department of Justice, his judgment is lacking. As a Deputy Attorney General in the Clinton administration, Mr. Holder approved several controversial pardons.

First, I wish to mention the case of Marc Rich. At the close of the Clinton administration, a pardon was issued for this infamous fugitive financier. Mr. Rich was charged in the early 1980s with 51 counts of tax fraud for evading more than $48 million in taxes.

He was also indicted for conducting illegal oil deals with the Iranian Government at the time Iran was holding 52 U.S. citizens hostage. Mr. Rich then fled the country and allegedly renounced his U.S. citizenship to avoid extradition. This was enough to land him on the FBI's ''Ten Most Wanted List.''

Mr. Holder's recommendation on this pardon of Mr. Rich was ''neutral, leaning favorable.'' Accounts indicate he did this without consulting the prosecutors handling the Rich case in the Southern District of New York. His willingness to push this pardon ahead is troubling, to say the least.

The second questionable pardon involving Mr. Holder concerns 16 members of the terrorist group, the Armed Forces of National Liberation, better known as FALN. This radical group supports Puerto Rican independence and was labeled as a terrorist group by the FBI. Between 1974 and 1983, FALN claimed responsibility for more than 120 bombings in the United States. These bombings killed six people and injured many more.

Mr. Holder overturned previous denials of clemency for these terrorists. The pardons were also opposed by two U.S. attorneys who prosecuted FALN cases, and by the FBI. According to the Los Angeles Times, Mr. Holder even overruled the Office of the Pardon Attorney at the Department of Justice. In fact, Mr. Holder never reached out to opponents of this clemency or one family of the victims. The son of a man killed in an FALN bombing first learned about the pardons from reading the newspaper.

I am also very concerned about Mr. Holder's views on second amendment rights. During his confirmation hearing before the Senate Judiciary Committee, he was consistently vague and would not answer directly on questions regarding the second amendment.

I find this to be unsettling and unsatisfactory. However, past statements and actions indicate a nominee who has shown hostility toward the right of Americans to keep and bear arms. The Supreme Court decision last year in the Heller case reaffirmed that the second amendment is an individual right, and Mr. Holder opposes this decision. He seems to hold the view that gun possession is not a right, as the Heller case confirmed, but more a privilege or hobby that needs to be strictly regulated.

Mr. Holder is supportive of old ideas for gun control that have never proven to make people safer at the expense of taking away their rights. He has indicated he will favor licensing and registering all gun owners, a policy I do not think will sit well with Americans.

Lastly, the Attorney General of the United States is the Nation's top law enforcement official. He cannot pick and choose which of our rights he will defend and which ones he will overrun. His views on the second amendment make me very wary of his confirmation to this great position he is being considered to be confirmed to. Coupled with his handling of the Clinton era pardons, I think this nomination is very worrisome. It is unfortunate, but I cannot support this nominee. I will be voting against his confirmation, and I urge my colleagues to do the same.

Thank you, Mr. President.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, seeing the Senator from California on the floor, how much time would the Senator wish to have?

Mrs. FEINSTEIN. Mr. President, I do not believe I will use it, but if I might have 10 minutes.

Mr. LEAHY. Mr. President, I yield the distinguished senior Senator from California 10 minutes.

The PRESIDING OFFICER. The Senator from California is recognized for 10 minutes.

Mrs. FEINSTEIN. Thank you very much, Mr. President.

Mr. President, I respectfully strongly disagree with the distinguished Senator.

In my 16 years on the Judiciary Committee, I have never seen a more qualified nominee. Mr. Holder has been a prosecutor in the Public Integrity Section of the Department of Justice; a Superior Court judge for the District of Columbia; the U.S. attorney for the District of Columbia; an attorney in private practice; and the Deputy Attorney General of the United States, the No. 2 position in the Department. I do not think you can beat these credentials.

Now, people find one two decisions out of a multiplicity of decisions Mr. Holder has made with which they disagree—and they are welcome to disagree—but that does not destroy his value or his worth as Attorney General.

President Reagan first appointed Holder to be a Superior Court judge, and President Clinton then named him U.S. attorney and Deputy Attorney General. On all three occasions, he was unanimously confirmed by the Senate.

Today, his nomination is being broadly supported by Members of both parties. We have received letters from people such as the former FBI Director, Louis Freeh; former Deputy Attorneys General Jim Comey, Paul McNulty, and Larry Thompson; former Solicitor General and Republican Ted Olsen; and President George H.W. Bush's Attorney General, William Barr.

Virtually every single law enforcement agency in the country has come out to endorse him: the Fraternal Order of Police, the National Association of Attorneys General, the Attorneys General of over 30 States, the National Criminal Justice Association, and on and on.

He has unified support among the civil rights community: the NAACP, the Asian-American Justice Center, the Mexican-American Legal Defense and Educational Fund, and the Human Rights Campaign.

It is rare to see such bipartisan support for a candidate. In Mr. Holder's case, I believe it is very well deserved. He is a man of integrity, intelligence, humility, and heart.

I remember our prior Attorney General, Mr. Gonzales, making the statement that he wore two hats. At the time he said it, I did not realize what the implication was. He stated, and on the record, that he represented the President of the United States and he represented the people of this Nation.

Well, we saw in spades what a double-hatted Attorney General can do. We saw the politicization of that Department. We saw the top people in the Department acting politically with appointments. We saw the diminution of the Civil Rights Division. We saw at least 9 U.S. attorneys terminated because the administration did not agree with the decision they either refused to make or made. That is not the way the Attorney General should run what is a very large Department.

This is a $25 billion agency. It has over 100,000 employees. It is charged with fighting terrorism, stopping violent crime, upholding our civil rights laws, and enforcing our civil liberties. As those of us on the Judiciary Committee know well, the Department is badly in need of repair.

In January of 2007—as a matter of fact, I remember it well—I came to the floor, and I said someone, a Republican, had called me and said that on a given day in December, seven U.S. attorneys had been fired. Well, I checked, and in fact that was correct. On December 7, seven U.S. attorneys had been fired. What he also told me: It was all for the wrong reasons. And he said: Look into it.

Under the leadership of the chairman of the committee, PAT LEAHY, we did look into it. What we found was a trend in the middle of the term to essentially take certain U.S. attorneys and terminate them for one reason or another: some, I believe, because they would not bring a certain prosecution and some, I believe to this day, because they did bring a certain prosecution.

Last year, Inspector General Glenn Fine released four separate reports documenting violations of civil service laws and politicized hiring throughout the Department. Well, there is a big job to do, and it is going to be Mr. Holder's duty to turn this Department around, to restore its credibility.

This is a proud Department, and I believe Mr. Holder gave every one of us on the committee confidence last month when he stated this:

> [T]he notion that the Justice Department would ever take into account a person's political affiliation or political beliefs in making [career] hiring decisions is antithetical to everything that the Department stands for. Now, that is a substantial commitment, and those of us on the Judiciary Committee will be watching him carry it out. So I am delighted this new Attorney General—I believe will be confirmed at 6:15 tonight—will restore the integrity and the professionalism of this great Department.

In my view, despite differences on certain judgments, there is no one—no one—more qualified to become Attorney General of the United States than Eric Holder, and I will proudly cast my vote for him.

Thank you very much, Mr. President.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, how much time is remaining on the Republican side, and how much time is remaining on the Democratic side?

The PRESIDING OFFICER. The Democratic side has 31 minutes 40 seconds, and the Republican side has 31 minutes 5 seconds.

Mr. LEAHY. Mr. President, I thank the distinguished Presiding Officer. I do not see any Republicans in the Chamber, although it would be their turn to speak next on this confirmation. While we are waiting, I will mention a couple things, and do this on the Democratic time.

There has been a lot of criticism of pardons and clemencies that former President Clinton granted. I would note that it was not Eric Holder who granted any of these clemencies or pardons. It was President Clinton.

Now, I know for the last 8 years, certainly while the Republicans were in charge, we would have one hearing, one investigation after another about the Clinton years, and it seemed to be kind of on automatic pilot. I heard a lot of outrage on the Republican side about pardons granted by President Clinton, and I shared my disappointment in some of those. I have heard them say people should have spoken out immediately. Well, many of us did.

But I was not able to find a single one who spoke out showing any outrage a few months ago when Republican President Bush gave a pass to Scooter Libby, Vice President Dick Cheney's former Chief of Staff, who commuted his prison sentence a very short time before he was about to begin that sentence. That was an extraordinarily serious case that involved leaking the name of a covert CIA operative for a political purpose, and the decision to communicate that leak was made by President Bush, despite objections from the prosecutor, despite objections from the victim, and despite objections from the public. I do not recall any Republicans objecting to President Bush's decision.

Now, they say they are objecting to something President Clinton did. I do not want to suggest in any way that the objections are partisan, but they certainly are not consistent.

I know Republicans set the standard as to who should be Attorney General. They voted unanimously for Attorney General Alberto Gonzales. Afterwards, many quietly talked to the White House about getting rid of Attorney General Gonzales because he was not up to par, but they were not going to vote against him. Now we have somebody far more qualified, and the Republicans talk about voting against him.

On the subject of the FALN, I should not that we have already had many hearings on this issue. I, for one, was critical of the commutations made by President Clinton, but let's look at the record and let's look at the facts. As Deputy Attorney General, Mr. Holder had no final decision-making power to grant clemency or pardons. Mr. Holder's memo to the White House made no recommendation on clemency for the prisoners. It simply provided the analysis that is expected to be provided to the White House with multiple options for each prisoner. None of the FALN members offered clemency by President Clinton were present when individuals were killed or injured. The prisoners who were offered clemency were released under strict supervision by Federal probation authorities. None have caused any future harm. The only ones who were given clemency were

those who announced their willingness to renounce violence and had already served from 17 to 19 years. This was not a get-out-of-jail free card.

The clemency provided by President Clinton was supported by various Members of Congress; numerous religious, human rights, labor, Hispanic, civic and community groups; as well as Archbishop Desmond Tutu, and other Nobel prize recipients. I would note that many of the law enforcement agencies and law enforcement officials who were critical of the FALN clemencies given by former President Clinton are the same prosecutors who had prosecuted those cases and who came forward and strongly and unequivocally endorsed Eric Holder to be Attorney General of the United States.

So we can talk and talk and talk and talk and talk and talk and set up double standards. The fact is, the people most knowledgeable about what happened argued in favor of Eric Holder as Attorney General.

Mr. President, I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Missouri is recognized.

Mr. BOND. Mr. President, I rise today to support the nomination of Eric Holder for the position of Attorney General of the United States.

The PRESIDING OFFICER. The Senator from Missouri is recognized under the previous order for 10 minutes.

Mr. BOND. I thank the Chair.

My decision to support Mr. Holder's nomination does not come easily. Certainly, Mr. Holder has an outstanding reputation as a career prosecutor and an effective litigator, and he has received strong support from prominent government and former government officials on both sides of the aisle. However, I have been concerned about a number of aspects of Mr. Holder's nomination.

First, I have been deeply troubled by Mr. Holder's poor decisionmaking in the case of the pardon of Mr. Rich and the FALN members. Also, I have been concerned about his past comments regarding the second amendment, even after the Supreme Court rendered its pro-individual rights decision earlier this year. Most notably, I have been concerned about some of the comments related to intelligence activities that Mr. Holder made in past public speeches and during his recent confirmation hearing.

As vice chairman of the Intelligence Committee, I want to ensure that the intelligence community has the tools it needs to protect the country, and I want to make sure we will have an Attorney General in place who will help keep America safe.

In an effort to gain some clarity on Mr. Holder's current thinking on these issues and concerns, he met with me privately to discuss them. We discussed, for example, the President's Terrorist Surveillance Program, the FISA Amendments Act, the intelligence community's Detention and Interrogation Program, Guantanamo Bay, various interrogation legislative proposals, the applicability of the writ of habeas corpus to terrorists, renditions, and media leak investigations. A few days later we had a second meeting to discuss further the issues of great concern to me and my position on the Intelligence Committee, notably, the carrier liability provisions in the FISA Amendments Act and the propriety of investigating intelligence officials who acted in good faith and with proper authorization in the conduct of intelligence interrogations.

There have been some confusing press reports about my meetings with Mr. Holder as well as statements from Senators who were not in attendance at those meetings about it. So now is probably a good time to set the record straight.

First, it should go without saying that neither Mr. Holder nor I made any pledges or promises with respect to his nomination. We met, rather, so that we could share our perspectives on these very important issues. In those meetings, Mr. Holder provided me some additional insight that assures me he and the Department of Justice will be looking forward to keeping the Nation safe.

I invite my colleagues' attention to the following written assurance given by Mr. Holder to Senator KYL about a week ago concerning the investigation of intelligence officials conducting interrogation activities. He said:

> Prosecutorial and investigative judgments must depend on the facts and no one is above the law. But where it is clear that a government agent has acted in responsible and good faith reliance on Justice Department legal opinions' authoritatively permitting his conduct, I would find it difficult to justify commencing a full blown criminal investigation, let alone a prosecution.

During our meeting, Mr. Holder expanded on these remarks and explained why he had reached that conclusion—a conclusion with which I happen to agree.

While his public answer to Senator KYL and my main emphasis during our meetings focused on the intelligence officials who followed DOJ legal guidance and not on those who either wrote that legal advice or authorized the intelligence activities based upon such advice, I told him—and I believe he understood—that trying to prosecute these lawyers or political leaders would generate a political firestorm.

Besides interrogation, we focused during both meetings on the issue of carrier liability protection under the FISA Amendments Act. During Mr. Holder's confirmation hearing, Senator HATCH asked him whether he would honor the carrier liability certifications issued by Attorney General Mukasey. Mr. Holder answered that he believed he would honor those certifications unless circumstances changed.

I have asked Mr. Holder if he could explain the ''changed circumstances'' which would cause him to withdraw the existing certifications, noting that it would be difficult for circumstances to change since all this happened in the past, was considered by the Senate and the House, we wrote a bill, and under which the Attorney General made a judgment based on those circumstances. Mr. Holder didn't give any specific examples of changed circumstances, but he planned to review the certifications to which he has not had access if confirmed. Given that those certifications are based upon relatively simple, classified facts, I am certain he will reach the same legal conclusion as Attorney General Mukasey, and I am comfortable with his thinking on the matter as he described it to me.

I cannot stress enough to my colleagues and the American people the importance of the carrier liability protection provisions in the FISA Amendments Act. These provisions not only put an end to the frivolous lawsuits brought against the carriers alleged to have participated in the terrorist surveillance program, they also increase the likelihood of future cooperation with the intelligence community by the carriers as the community strives to keep us safe within the bounds of law. I also stressed the fact that Mr. Holder is not read-in—or given access—either to the terrorist surveillance program or the interrogation program, so it would not be advisable to make any definitive statements about either program without the pertinent facts, and he agreed with me on this point.

I enjoyed my meetings with Mr. Holder. While we did not agree on every issue, I appreciated his stated willingness to keep an open mind until he has had a chance to review the classified facts involved in most of these intelligence issues.

I found Mr. Holder to be a good listener, which is an important prerequisite for any good leader. I believe him when he says he is willing to take good ideas from wherever they come. As his predecessor, General Mukasey, he will, I believe, be an Attorney General more interested in justice than in politics.

Now, I understand a number of my colleagues will not support Mr. Holder's nomination. I respect their legitimate concerns about his unsatisfactory performance in the Rich and FALN pardons. I, too, have real problems in these matters. Pardoning Marc Rich—an international fugitive from justice—was certainly a stain on the Presidency and Mr. Holder's record. Mr. Holder told me, as he said publicly, that his role was a mistake he regrets. I believe he genuinely knows what he did was wrong and would not do such a thing again. Similarly, I suppressed my concerns to Mr. Holder regarding his role with the Puerto Rican FALN group. I disagree with him that granting clemency to such people even after the time they served could ever be appropriate, but he has told me that regardless of whether we agree that it was acceptable in a pre-9/11 world; he would not view similar future requests in the

same manner in our post-9/11 world. In that respect, I believe Mr. Holder fully supports an aggressive stand against terrorists today. I am hopeful he has learned important lessons from these events.

When confirmed, Mr. Holder will be taking over the Department of Justice that is stacked with legal talent. I wish to take a moment to note that the Nation owes a great debt of gratitude to the Department of Justice. During the past several years, we have worked very closely with the Department on many important pieces of national security legislation, including the PATRIOT Act, the Intelligence Reform and Terrorism Prevention Act, the 9/11 Recommendations Implementation Act, the USA Patriot Improvement and Reauthorization Act, the Protect America Act, and of course, the FISA Amendments Act. I am very grateful for the dedicated efforts of the National Security Division, the Office of Legal Policy, the Office of Legal Counsel, and the FBI in assisting us with these various legislative matters. I also commend those on the frontline for their untiring service and efforts to keep us safe from the many and diverse threats against our national security while ensuring that our civil liberties are protected. I expect that Mr. Holder and the Department of Justice will continue this tradition, and I look forward to working with Mr. Holder closely on PATRIOT Act sunset issues and other important national security matters during this Congress to protect our Nation.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Rhode Island is recognized.

Mr. WHITEHOUSE. Mr. President, I thank the Chair, and I thank the distinguished vice chairman of the Intelligence Committee for his words. It is a pleasure to work with him on the committee. I think we are both looking forward to a new relationship with the Department of Justice under a new Attorney General.

I see my friend and colleague, Senator SESSIONS, here waiting to speak, so I just wanted to make two quick points. The first is that this is a man of really exceptional experience. Our distinguished Presiding Officer—who I don't think can be seen on the television right now—is the distinguished Senator UDALL from New Mexico who was an Attorney General himself. He understands the value of experience in these jobs. This is a man who has been a U.S. attorney, who has been a Federal judge, who has been the Deputy Attorney General of the United States—the No. 2 position in this Department, and who, by all standards, has acquitted himself with remarkable distinction during the course of his tenure in those three positions.

It is also noteworthy that the Department of Justice has fallen on very hard times recently. People from both sides of the aisle from recent and distant administrations have come forward to try to be helpful to express their concern and their dismay about what was allowed to happen to this great Department. From all of my experience with the—I guess you could call them group of friends at the Department of Justice, people who served there and who have great affection for that Department, they view Eric Holder as a special person who has a unique capacity to fight for the principles the Department has long prided itself on: independence, talent, pure legal analysis, and courage. I think it is going to be very reassuring for the friends and family of the Department of Justice who have been so concerned about what has happened to it in the last few months to have this man now in charge. There will be a huge sigh of relief. I compliment my colleagues on the bipartisan way in which this has gone forward. Clearly, there were concerns early on and they were addressed fairly. This is a nomination that passed out of the Judiciary Committee 17 to 2, which, in a highly partisan environment in Washington, is as close to a perfect score as I think you are going to get. It continues to receive broad support from both sides of the aisle on the floor. I know many people who are significant in the history of the Department of Justice have spoken in support of Eric Holder, including former Attorneys General Barr and Jim Comer, two of the most distinguished people who have done so.

Without further ado, I will yield the floor so my friend, Senator SESSIONS, can speak. I think this is a great moment of opportunity for the country and the Department of Justice. I hope we can confirm Eric Holder to be Attorney General with a very strong number when we get to the vote.

I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from Alabama is recognized for 5 minutes.

Mr. SESSIONS. Mr. President, I ask to be notified when I have used 3 minutes.

The PRESIDING OFFICER. The Chair will do so.

Mr. SESSIONS. Mr. President, Senator WHITEHOUSE and I both served as U.S. attorneys. Eric Holder also served as a Federal judge supervising prosecutions and tried cases in the District of Columbia as a U.S. attorney. He served 4 years as Deputy Attorney General and did many good things during that time. He also made several serious errors, which I think and believe he has understood. He has committed not to make them again. He was influenced by the President, President Clinton, to do the pardons, and he should not have been influenced. I note that he moved away from that area of judge, prosecutor, and was active in the Kerry and Obama presidential campaigns. I have talked to him, and I believe he will be a responsible legal officer and not a politician as the Attorney General. I intend to support him.

I want to take a minute to express a growing concern I have about my beloved Department of Justice, where I spent 15 years as a prosecutor. It is something I respect highly. We do need to eliminate politics from that office. Some of the nominees coming up disturb me, and the pattern of them is disturbing. One is Elena Kagan, nominated for the Solicitor General. While dean of the Harvard Law School, she barred the U.S. military from coming on campus as long as she could successfully get away with it. She actually filed a brief in the Supreme Court when the Congress got so fed up with the idea that American universities would not allow the U.S. military to come on campus to ask students if they would like to be a part of the American military. She led the fight with an appeal all the way to the Supreme Court to reverse the Solomon amendment, which would require colleges and universities to either allow the military on campus or get no Federal funds. She led that battle. It was voted down in the Supreme Court 8 to 0, as well it should have been.

The PRESIDING OFFICER. The Chair advises the Senator that 3 minutes has elapsed.

Mr. SESSIONS. Mr. President, I ask unanimous consent for 1 more minute.

The PRESIDING OFFICER. Is there objection?

Mr. LEAHY. On the Republican time?

Mr. SESSIONS. Yes.

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

Mr. SESSIONS. Dawn Johnsen, nominated to be assistant Attorney General for the Office of Legal Counsel, was the legal director for NARAL, the National Abortion Rights Action League, one of the most aggressive—probably the most aggressive—pro-abortion group in the country.

David Ogden, nominated for Deputy Attorney General, represented the murder defendants in Roper v. Simmons, which led to the unprincipled decision about defendants and the death penalty.

Thomas Perrelli, who represented Michael Schiavo in the Terry Schiavo case, is nominated for Associate Attorney General, third in command.

D. Anthony West, who is nominated for Assistant Attorney General for Civil Division, represented John Walker Lindh, the American Taliban who has been prosecuted and convicted.

We are heading into problems on some other nominations. We do not need the Department of Justice to become a liberal bastion. It needs to be the cornerstone of defending Americans and our safety.

I yield the floor and reserve the remainder of our time.

The PRESIDING OFFICER. Who yields time?

Mr. ISAKSON. Mr. President, I ask to be recognized for up to 2 minutes of the Republican time.

The PRESIDING OFFICER. The Senator is recognized.

Mr. ISAKSON. Mr. President, I will vote today for Eric Holder. I want to

tell this body why. When he was first nominated, I had concerns—second amendment concerns and Guantanamo interrogation concerns, and about some of the releases that had taken place while he was a deputy U.S. attorney. There are three main reasons I am going to support this nomination. One, when I called him, he was the most forthright, most candid of all the people who have been appointed by the President, and I appreciate very much the time he took.

On the second amendment, he may have had interpretations more strict than mine, but he interpreted the Supreme Court to be the law of the land, and he would enforce the Supreme Court, which has clearly determined that the second amendment is an individual right.

Secondly, on Guantanamo, he acknowledged that those who had done interrogations had done so under the authority of the Department of Justice, and the Department of Justice could not undo what it had done. I respected that.

Third, a great U.S. attorney general from Georgia by the name of Griffin Bell, who died 2 weeks ago, under Jimmy Carter, sang Eric Holder's praises. Also, Larry Thompson of Georgia, deputy U.S. attorney under John Ashcroft—when I called him to ask about Holder, he said he was as good a lawyer and as fine and forthright a man as he knew. With those endorsements and his candid answers to my questions, I will vote for his confirmation in the Senate.

I yield back the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. LEAHY. Mr. President, I thank the distinguished Senator from Georgia, and I appreciate his support. I understood there were going to be other Senators from this side coming to speak. I note that the time is running, and they will lose their time if they do not come to speak soon. I also add, while we are waiting, that I have had a special and significant interest in the Department of Justice from the time I was a law student. I watched so many attorneys general who have served at the Justice Department, some have been very good, but many have not. There is nobody—certainly, since I have been old enough to vote—who has been Attorney General with the potential to be as great an Attorney General as Eric Holder.

Like others in the Senate, I supported him when President Reagan nominated him for a judgeship, and he was unanimously confirmed. With many others in the Senate, I supported him when he was nominated to be a U.S. Attorney. He was unanimously confirmed. I also supported him when he was nominated to be Deputy Attorney General and for weeks he was held up on the floor by an anonymous hold. For some reason, there was an anonymous hold against Eric Holder. When that hold was finally lifted, lo and behold, nobody voted against him. He was again unanimously confirmed.

I see the distinguished Senator from Maryland, one of the most valuable members of the Judiciary Committee, on the floor of the Senate. How much time would the Senator like?

Mr. CARDIN. About 5 minutes.

Mr. LEAHY. I yield 5 minutes to the Senator from Maryland.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Mr. CARDIN. Mr. President, first, I thank the Senator from Vermont, the chairman of the Judiciary Committee, for his work regarding the Eric Holder nomination. I think the confirmation process has been very fair. I must point out that when then-President-elect Obama indicated that his choice for Attorney General would be Eric Holder, I was very excited and supportive of his selection.

The confirmation process of the chairman of the Judiciary Committee has been conducted in a very fair and open manner. It has only made my support for Eric Holder more strong. The documents made available to the committee and the letters we have received from interested parties—many from those who have served in the Department of Justice under Republican administrations—have all strongly endorsed Eric Holder to be the next Attorney General of the United States.

I am convinced he is the right person at the right time for many reasons. First, his experience; he brings a wealth of experience to the position of Attorney General. He was a former judge and a former U.S. attorney. He has been in the Office of the Attorney General in the Department of Justice, and he has been a private attorney. He brings a sense of independence that we need in the Office of the Attorney General. He must be the Attorney General for the people of this country. He doesn't serve one person or just the President; he serves all Americans. We need an Attorney General who is going to be independent and willing to stand for what is right; stand up to a Cabinet Secretary or even the President with independent advice as to what the law states.

We are a nation of laws. The rule of law is extremely important. Eric Holder, throughout his career, has demonstrated that independence. I will give you one example. When Ken Starr, who was investigating former President Bill Clinton, wanted to expand his investigation of the President, it was up to Eric Holder to make that recommendation, and he made that recommendation in favor of the Independent Counsel. So he has shown his ability to do what is right, even if it is not popular to the person who appointed him, the President.

Secondly, I believe Eric Holder will restore the right priorities for the good of justice. When asked about torture, without any equivocation he said torture is illegal and cannot be accepted under any situation. He didn't equivocate. We know when we need to restore the strength of the Civil Rights Division in the Department of Justice, he said he would do that. He clearly will restore to the Department of Justice the priorities that are most important for the Department of Justice.

Let me point out, in short, Eric Holder will restore the reputation of the Department of Justice, and he will retain and recruit the very best legal minds to represent the interests of all of the people of our Nation. I strongly endorse his confirmation and urge my colleagues to do that. With that, I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from Texas is recognized for 5 minutes.

Mrs. HUTCHISON. Mr. President, I rise to speak on the nomination of Eric Holder for the position of Attorney General of the United States. We place enormous trust in the nominee for this position to not only enforce the laws of our land but also to advise the President on legal and constitutional matters. One of the important freedoms that we have in the Constitution is the right to keep and bear arms, guaranteed to us in the second amendment of the Constitution. Many jurisdictions around our country do not have the ability to own a gun, and there are restrictions in jurisdictions all over our country for the use of a gun. Nowhere is it more strict than in Washington, DC.

In 1976, in Washington, DC, the City Council passed the toughest gun control laws in the Nation, banning handguns and requiring rifles and shotguns to be registered, stored unloaded, and either locked or disassembled. These were the most restrictive laws in our Nation regarding gun ownership. I thought they were not only incomprehensible but certainly unconstitutional.

I introduced a bill with a number of my colleagues to repeal these prohibitive measures.

This prohibition, however, was challenged in court before my bill could get through Congress, and the DC Circuit Court of Appeals agreed that the District's ban was unconstitutional.

When the District appealed to the Supreme Court, I filed an amicus brief with our colleague JON TESTER that was supported by 53 Senators and 250 Members of the House of Representatives. This was on the interpretation of the second amendment as preserving an individual right to keep and bear firearms. Our brief contained the most congressional signatures on any amicus brief ever in the history of our country.

In another amicus brief in this same district court opinion that was appealed to the Supreme Court, the nominee before us, Mr. Holder, along with 12 other former Justice Department officials, argued in favor of the gun ban in Washington, DC. His brief stated:

> The second amendment does not protect firearms possession or use that is unrelated to participation in a well-regulated militia.

Fortunately, on June 2, 2008, the Supreme Court affirmed the intent of the Founders: that the right to bear arms is an individual right protected by the Constitution. This was a major ruling on the second amendment because local governments that seek gun control measures have made the argument that Mr. Holder made in his brief. That is the basis for gun control ordinances and laws around our country.

The ruling in the DC case was a victory for the rights of all Americans to protect themselves and their families. The Supreme Court sent a clear message that the law of the land, the individual right to keep and bear arms, cannot be unreasonably infringed.

The Founding Fathers knew what they were doing when they put the right to keep and bear arms in the Constitution. They knew from their experience in the Revolutionary War that a free people must have the right to possess and bear arms. In 1775, the American Revolution started because ordinary farmers decided to fight back against foreign tyranny. Many in George Washington's regiments used their own guns.

I was alarmed to learn that while serving as Deputy Attorney General in the Clinton administration, Mr. Holder said in an appearance on ABC's ''This Week'' that the second amendment ''talks about bearing guns in a well-regulated militia. And I don't think anywhere it talks about an individual.''

This interpretation, while interesting in academic circles, is not mainstream, nor is it reflective of public opinion. Indeed, in our brief that we filed, we cited every congressional action that has happened throughout the history of our country that affirmed that Congress believes the second amendment is an individual right.

Mr. President, I ask unanimous consent for an additional 5 minutes.

The PRESIDING OFFICER. Is there objection?

Mr. LEAHY. Mr. President, I have no objection, but it will have to come from the Republican side, of course.

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

Mrs. HUTCHISON. Mr. President, the Framers did not intend for this right to be collective. If that was their purpose, it would have been satisfied with article I, section 8 of the Constitution, which gives Congress the power ''to provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel Invasions.''

The Framers went further than that. They wanted to ensure that gun ownership was recognized by posterity as an individual right. They put it in the Bill of Rights for that purpose. It is a compilation of individual rights of free speech, freedom of religion, a fair trial, and the right to keep and bear arms.

The Framers looked at the governments of Europe. James Madison said:

> The governments of Europe are afraid to trust the people with arms. If they did, the people would surely shake off the yoke of tyranny, as America did.

Later on, President Madison explained:

> The Constitution preserves the advantage of being armed, which Americans possess over the people of almost every other nation where the governments are afraid to trust the people with arms.

The right to bear arms should not be an issue in the United States. The Constitution is clear, and the Supreme Court has spoken. Our Second Amendment right ensures that our people have the ability to secure all of our rights and defend them, if necessary, from government suppression. It is this right that a government of the people, by the people, and for the people must never extinguish.

I believe that Eric Holder, from everything I have read, is an intelligent, experienced, and thoughtful candidate to be the U.S. Attorney General. But after examination of Mr. Holder's public statements and positions on gun rights, I cannot in good conscience support his nomination for the office of Attorney General, and I, therefore, will vote no.

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

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HATCH. 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. HATCH. Mr. President, I support the nominee. I have known him for a long time. We differ on many issues, but he is a qualified person, and he is a good man. He has the necessary professional qualifications to do this job. I personally believe we ought to support the President and his choice of Cabinet officials if there are no other disqualifying factors, such as ethics or criminal activity or something serious. I have a friendship with the nominee.

In fulfilling my responsibility in the confirmation process, I try to apply the right standard to the whole record about a nominee. The right standard comes from the Constitution, which gives the appointment power to the President, not to the Senate.

Elections have consequences, and Presidents must be given significant latitude when choosing members of their own Cabinet. Differences on issues or whether I would have nominated the individual are not alone enough to overcome that latitude. I have always argued for this standard no matter which party controlled either the Senate or the executive branch. The Senate checks the President's appointment power, but it may not highjack it.

I realize that my friends on the other side of the aisle have at times applied a different standard, a much more partisan standard, when a Republican was in the White House. They got in the habit of putting partisan politics before the process principles the Constitution requires. I am not going to do that. I am going to apply the same standard to President Obama's nominees that I argued should have been applied to President Bush's nominees. In doing that, I believe the right standard must be applied to the whole record.

The record includes the fact that Mr. Holder has been nominated three times before, by both Republican and Democratic Presidents, and he has been confirmed three times before, by both Republican and Democratic Senates. Those confirmations were by voice vote, by unanimous consent, and by a rollcall vote of 100 to 0. Not one member of this body voted against Mr. Holder as he was appointed to be a judge on District of Columbia Superior Court, U.S. Attorney for the District, and Deputy Attorney General.

I think it also matters that the Judiciary Committee last week voted 17 to 2 to approve Mr. Holder's current nomination.

Another part of the record is the breadth of support Mr. Holder has received. This includes the entire law enforcement community. The cops on the beat and the chiefs of police, the troopers and the sheriffs, the district attorneys, the Federal prosecutors, and the State attorneys general, all of these and more support Mr. Holder. Advocates for crime victims also support Mr. Holder. These include my friend John Walsh, Mothers Against Drunk Driving, the National Center for Missing & Exploited Children, and the National Association for Victims of Crime. This really matters to me.

These organizations examined Mr. Holder's qualifications, his record of public service, and concluded that he would make a good Attorney General. Does that mean we should, therefore, set aside our own review and automatically support him? Of course not, but it is part of the whole record and, I believe, an important part.

I have served in this body and on the Judiciary Committee for more than 32 years and do not remember when the law enforcement and victims communities have been this united in support of an Attorney General nominee.

And the record also includes support for Mr. Holder from many legal experts and past Justice Department officials with high standing in conservative and Republican circles.

Former Solicitor General Ted Olson says that Mr. Holder will be a strong, courageous leader who is both a good manager and a good listener.

Former Acting Attorney General Stuart Gerson and Former Deputy Attorney General George Terwilliger write that Mr. Holder is an extraordinary lawyer and an even better person.

Former Deputy Attorney General Larry Thompson says that Mr. Holder will be principled, pragmatic, fair, and tough.

Former Congressman and Federal prosecutor Asa Hatchinson writes that Mr. Holder will be the kind of Attorney General who puts the law first and political considerations second.

And recent Assistant Attorney General Kenneth Wainstein, who headed the Justice Department's National Security Division, says that Mr. Holder is a man of integrity, a strong proponent of law and order, and more concerned with justice than with politics.

That is high praise from very good company.

This does not mean that I have no concerns about Mr. Holder or do not intend to be vigilant about what the Justice Department will be doing in the months and years ahead. I hope, for example, that Mr. Holder will continue some critical initiatives begun in the last several years, such as the protection of religious liberty and the prosecution of human trafficking. These initiatives were part of the work of the Civil Rights Division, which was led at the end of the Bush administration by Grace Chung Becker, who earlier served on my Judiciary Committee staff.

Religious liberty is the first freedom protected by the first amendment. Human trafficking is, to put it bluntly, modern-day slavery. Upholding human dignity and freedom requires both protecting the one and prosecuting the other.

I also am concerned that enforcement of Federal laws regarding child pornography and adult obscenity will suffer and the exploitation and corrosion that this material causes for individuals, families, and communities will worsen. This is a completely nonpartisan issue for me. I was no fan of the Bush administration's enforcement of the obscenity laws and said so in both confirmation and oversight hearings.

The record of the Clinton administration, in which Mr. Holder served, was even worse. On November 4, 1993, this body voted 100 to 0 to condemn the Justice Department's attempt to adopt a novel, weak interpretation of the Federal child pornography statute. The Justice Department had used this distortion of the law to ask the U.S. Court of Appeals to overturn a child pornographer's conviction. This body rarely votes 100 to 0 on anything, but we voted to condemn the Justice Department's action.

I know that was in the first Clinton term, and Mr. Holder did not serve as Deputy Attorney General until the second term. But that is the record of the Justice Department in which he previously served, and I hope that the record of the Justice Department he will now lead will be much different.

Another significant issue which I raised at Hr. Holder's confirmation hearing is the right to keep and bear arms, guaranteed by the second amendment to the Constitution. It continues to baffle me how people can claim to see unwritten rights in our written Constitution but refuse to fully acknowledge those that are right there in plain sight. Mr. Holder has argued that the second amendment protects only a collective right related to service in an organized militia rather than an individual right of citizens. He took this position as Deputy Attorney General during the Clinton administration and since then as a private citizen, most recently before the Supreme Court in the case titled District of Columbia v. Heller.

I believe Mr. Holder is wrong and the Supreme Court rejected Mr. Holder's position in Heller, ruling definitively that the second amendment protects an individual right.

Mr. Holder has also in the past advocated some restrictive gun control proposals that I oppose and which I believe would likely be unconstitutional under Heller.

I asked Mr. Holder about the second amendment and gun control during his hearing and in follow-up written questions. He acknowledged his duty to enforce the Constitution as interpreted in Heller. He said he would respect the right to keep and bear arms as articulated by the Supreme Court in Heller, that is, as an individual constitutional right.

I note that the Senate voted 100 to 0 in July 1997 to allow Mr. Holder to serve as deputy to an Attorney General who was no friend of the second amendment. That was before the Supreme Court ruled that the right to keep and bear arms is an individual right, a ruling Mr. Holder has a duty to follow.

If confirmed, Mr. Holder will take an oath before God to support and defend the Constitution. So while I disagree with his past positions on the second amendment and gun control, I believe and expect that he will take his duty and his oath seriously.

I am also troubled by Mr. Holder's role, while he served as Deputy Attorney General, in the process resulting in President Clinton's clemency for Puerto Rican terrorists and his pardon for international fugitive Marc Rich. In 1999, I joined 94 other Senators in voting to deplore the clemency for the FALN terrorists. Needless to say, I disagree with Mr. Holder's statement at his hearing that he still believes his support of that clemency was reasonable.

I agree with former FBI Director Louis Freeh who said at Mr. Holder's confirmation hearing on January 16 that the pardon of Marc Rich, which happened after avoiding the Justice Department's evaluation process altogether, was a corrupt act. Mr. Holder, however, made neither of those decisions. President Clinton did.

Mr. Holder has acknowledged mistakes and said he has learned from them.

I believe that his actions and decisions in the process leading to those decisions reflect bad judgment but not corrupt character. This confirmation process has certainly focused even more attention on those past mistakes and, I hope, will make Mr. Holder even more diligent in his duties ahead.

I know Eric Holder. My own experience and knowledge of his record and the testimony of so many others whose judgment I respect confirms that he is a man of ability, experience, and integrity.

The issues and concerns I have raised, while not enough to overcome the deference the Constitution requires, do identify areas for work in the future and I hope, when confirmed, Mr. Holder will work with both Republicans and Democrats on these important issues.

Applying the right standard to the whole record leads me to support Eric Holder to become the next Attorney General of the United States.

I reserve the remainder of our time.

The PRESIDING OFFICER (Mr. WARNER). Who yields time? If no side yields time, the time will be charged equally to both sides.

The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, I was withholding saying anything because I thought there were other Republicans coming to speak. I see none.

During the three different times I have been chairman of the Senate Judiciary Committee, I have presided over the confirmations of three Attorneys General. In my 35 years in the Senate, I have voted on many more. No nomination for Attorney General has filled me with greater pride than this one, and it is time for the Senate to complete its consideration of President Obama's historic nomination of Eric Holder to be Attorney General of the United States.

In an article I co-authored with the Judiciary Committee ranking member, Senator SPECTER, before last November's election, we wrote—and we were writing to whomever would be President:

> The Attorney General's duty is to uphold the Constitution and the rule of law, not to circumvent them.

We wrote further:

> The President and the American people are best served by an Attorney General who gives sound advice and takes responsible action, rather than one who develops legalistic loopholes to serve the partisan ends of a particular administration.

We could not have made that job description better for anyone than Eric Holder. That is what kind of an Attorney General he will be.

It was seven score and four years ago that this Nation answered the fundamental question President Lincoln posed in his Gettysburg Address, and the world learned that liberty, equality, and democracy could serve as the foundation for this great and united Nation.

The American people have had cause and occasion to reflect during the past several weeks about our great country. The inauguration of our new President was two weeks ago tomorrow, and two

weeks ago today was the holiday our country has set aside to celebrate and rededicate ourselves to the cause of freedom and equality.

Three and a half weeks ago, the day of Mr. Holder's hearing, was the 80th anniversary of the birthday of the extraordinary man for whom that holiday is named. With this confirmation, we take another step up the path toward the time Dr. King foresaw when people are judged by the content of their character. Eric Holder has the character to serve as the Attorney General of the United States. He passes any fair confirmation standard.

America's diversity when drawn together is the source of our Nation's strength and resilience. Americans have to be able to trust their Justice Department. That trust must not be squandered or taken for granted. We need leaders who are prepared to take up the laboring oars of a Justice Department whose dedicated law enforcement professionals have been misused and even demoralized. Eric Holder is such a leader.

With this confirmation, we mark the distance from when an Attorney General of the United States did not believe that the Constitution of the United States allowed an African American to be considered a citizen of the United States to an Attorney General who knows that the Constitution is our country's great charter of freedom and equality for all people.

It was former Attorney General, Roger Taney, who wrote the Supreme Court's *Dred Scott* decision denying the humanity of slaves, former slaves, and free people. It is perhaps the worst legal opinion ever rendered in this country. That is not what the Constitution said, and it is not the promise of America.

Today, each one of us, acting pursuant to our constitutional responsibilities as U.S. Senators, can, by our votes and by the overwhelming endorsement of this institution for this nomination, demonstrate how far we have come as a nation.

The election of Barack Obama and JOE BIDEN and the President's nomination of Eric Holder to be Attorney General of the United States provide an historic opportunity for the country to move beyond the partisanship of the past decades. We can make a real difference if we come together to solve the Nation's problems, protect against serious threats, and meet the challenge of our time.

Let us honor the wishes of the American people who in November broke through debilitating divisions to join together in record numbers. Let us acknowledge that our inspirational new President has moved forward promptly to assemble an extraordinarily well-qualified and diverse group of Cabinet officers and advisers. And let us move away from petty partisanship in order to serve the greater good.

Of course, any Senator is free to oppose a nomination and vote against confirmation. In this instance, I think they will be on the wrong side of history. I believe that when we take a step back and look at the big picture and the best interests of the country, Eric Holder is someone who deserves our support and merits our votes. In order to serve effectively as Attorney General he will also need our help. The challenges are too great not to join together to confirm Mr. Holder and proceed promptly to consider the entire Justice Department leadership team that President Obama has selected.

I urge all Senators to join together to do what is right and approve this extraordinary public servant to the critical post for which President Obama has nominated him. Go on the right side of history and vote for Eric H. Holder, Jr. to be the 82nd Attorney General of the United States.

Mr. President, I yield the floor, and I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, we are due to vote at 6:15. I believe everybody has spoken for Mr. Holder who chooses, so I ask unanimous consent to be permitted to use the remaining time to talk about the stimulus package.

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

Mr. LEAHY. Mr. President, reserving the right to object, the Senator wants to use the rest of the Republican time; is that what you meant?

Mr. SPECTER. Well, unless—

Mr. LEAHY. How much time remains on both sides, Mr. President?

The PRESIDING OFFICER. The minority has 1 minute 45 seconds; the majority has 8 minutes 25 seconds.

Mr. LEAHY. I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

STIMULUS PACKAGE

Mr. SPECTER. Mr. President, later this evening, we are going to be moving ahead to discuss the stimulus package, and I want to use a few moments now to express my views on the subject. There is no doubt about the need for stimulating the U.S. economy. January figures show 7.2 percent unemployed, 2.8 million jobs lost last year, more layoffs all the time, and more foreclosures. It is my hope that there will be a very strong stimulus package which is directed at putting people to work.

The proposals which have come from the House bill are laudable and in many respects are measures which I have long supported. But on analysis, it seems to me they belong more directly in a budget program where we have targets for spending—discretionary spending—making an evaluation of priorities and moving in that direction. But when the American people are being asked to support a stimulus program of more than $800 billion, which is deficit financing, the programs ought to be directed at job opportunities.

Mr. President, I ask my distinguished colleague, the chairman, if nobody wants his time, if I might use 5 minutes of it.

Mr. LEAHY. I intend to use the rest of my time. If you want another minute or two, I will give you two minutes of my time, but then I intend to use the rest of it.

Mr. SPECTER. I yield the floor.

Mr. LEAHY. How much time remains, Mr. President?

The PRESIDING OFFICER. Eight minutes.

Mr. LEAHY. How much time remains for the Republicans?

The PRESIDING OFFICER. That time has expired.

Mr. LEAHY. Would the Senator like 2 minutes of my remaining time?

Mr. SPECTER. Mr. President, 2 minutes won't do me any good. The chairman wants his time; he has it.

Mr. LEAHY. Mr. President, I have a feeling we are all going to be spending hours talking about the stimulus package. Right now, I am more concerned to talk about the Holder nomination.

I have heard a great deal about the second amendment. I couldn't help but think during the hearing, when he was asked about the second amendment and how he would support the rights of those who are gun owners, and I looked down at some of those asking from the different States. I looked at the States that are represented on the Senate Judiciary Committee—Wisconsin, California, New York, Illinois, Maryland, Rhode Island, Oregon, Minnesota, Delaware, Pennsylvania, Utah, Iowa, Arizona, Alabama, South Carolina, Texas, and Oklahoma, as well as the State of Vermont. There is only one of those States that does not have restrictive gun laws—the State of Vermont. We do not have any gun laws in effect, except during hunting season. We limit the number of rounds you might have in your semiautomatic during deer season. It is supposed to give the deer a chance. Anyone who wanted to carry a loaded concealed weapon without a permit in the State of Vermont, the distinguished Senator from Virginia or anyone else, could.

I mention that only because several of the Senators who have come from States with very restrictive gun laws went after Eric Holder on gun laws. So I asked him: ''Would you, as Attorney General, support legislation that would require Vermont to change its gun laws?'' And thus make Vermont as restrictive as these Senators who were giving him grief on his support of the second amendment. He said: Absolutely not. I asked him if there was any question whether he would steadfastly protect the second amendment rights of law-abiding Americans to purchase, transport, and use guns. He said he would. I asked if he would follow the law, including the Supreme Court decision in the recent case in the District of Columbia versus Heller. He said, of course he would follow the law.

I mention that because I put into the RECORD already 130 or more organizations. Every single law enforcement organization of any significance in this country is supporting Eric Holder. Civil rights groups are supporting Eric Holder. Past prosecutors, including those of the Bush and Reagan administrations, have supported Eric Holder. Current prosecutors, the members of the immediate past President, President Bush's administration, have endorsed him.

I say this because I think we are seeing straw men put up here—straw men who are saying they do not want Eric Holder as Attorney General; yet these same people voted unanimously for Alberto Gonzalez, an Attorney General who left in disgrace.

This man restores the lustre of the Department of Justice. This man will be as independent as the Attorney General I talked with in his office when I was a young law student and we were talking about what it would be like to come to the Department of Justice. I asked that Attorney General if he would allow anybody in the White House, up to and including the President, to interfere with any criminal prosecution or civil rights prosecution. He said absolutely not, and I have told the President that. That Attorney General I was talking with was Robert F. Kennedy. He was talking about his brother John F. Kennedy. And when it came time to prosecute a man who had been critical to his brother's election as President of the United States, Robert Kennedy prosecuted him.

I left as a young law student, tempted to stay in Washington, but my wife Marcelle and I went back to Vermont, where we were both born and where we wanted to be. But I have never forgotten that discussion with Attorney General Kennedy. That has been the touchstone for me. I don't want another Attorney General who sits in the room while others in our government approve secretly wiretapping Americans in violation of our law, or engaging in torture. I want an attorney who stands up for the rule of law and our long cherished American values.

That is the kind of Attorney General Eric Holder would be. Come on the right side of history. Come on the right side of history. Reject what we saw in the past. Vote for Eric Holder.

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

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of Eric H. Holder, Jr., of the District of Columbia, to be Attorney General? On this question, the yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from Alaska (Mr. BEGICH) and the Senator from Massachusetts (Mr. KENNEDY) are necessarily absent.

I further announce that, if present and voting, the Senator from Alaska (Mr. BEGICH) would vote ''yea.''

Mr. KYL. The following Senator is necessarily absent: the Senator from Florida (Mr. MARTINEZ).

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 75, nays 21, as follows:

[Rollcall Vote No. 32 Ex.]

YEAS—75

Akaka	Gillibrand	Merkley
Alexander	Graham	Mikulski
Baucus	Grassley	Murkowski
Bayh	Gregg	Murray
Bennet	Hagan	Nelson (NE)
Bennett	Harkin	Nelson (FL)
Bingaman	Hatch	Pryor
Bond	Inouye	Reed
Boxer	Isakson	Reid
Brown	Johnson	Rockefeller
Burris	Kaufman	Sanders
Byrd	Kerry	Schumer
Cantwell	Klobuchar	Sessions
Cardin	Kohl	Shaheen
Carper	Kyl	Snowe
Casey	Landrieu	Specter
Chambliss	Lautenberg	Stabenow
Collins	Leahy	Tester
Conrad	Levin	Udall (CO)
Corker	Lieberman	Udall (NM)
Dodd	Lincoln	Voinovich
Dorgan	Lugar	Warner
Durbin	McCain	Webb
Feingold	McCaskill	Whitehouse
Feinstein	Menendez	Wyden

NAYS—21

Barrasso	Crapo	McConnell
Brownback	DeMint	Risch
Bunning	Ensign	Roberts
Burr	Enzi	Shelby
Coburn	Hutchison	Thune
Cochran	Inhofe	Vitter
Cornyn	Johanns	Wicker

NOT VOTING—3

Begich	Kennedy	Martinez

The nomination was confirmed.

Mr. LEAHY. I thank all my colleagues who took part in this debate over the past several weeks. It is a historic nomination. And of the last four—I have to check back—the last four attorneys general, Eric Holder had the largest ''aye'' vote of any of them.

I think it is a good sign for the country. It is a good sign for the Department of Justice. And this former prosecutor is very happy.

The PRESIDING OFFICER. Under the previous order, the motion to reconsider is considered made and tabled. The President shall be notified of the Senate's action and the Senate will return to legislative session.

THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009—Resumed

The PRESIDING OFFICER. The Senator from Vermont is recognized.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

The PRESIDING OFFICER. The majority leader.

Mr. REID. 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. REID. Mr. President, we are on the economic stimulus package. We are going to start on that early in the morning, 10 o'clock. The first amendment we are going to offer, I have already told the Republican leader, is going to be an amendment offered by Senators MURRAY, FEINSTEIN, and others dealing with infrastructure.

We look forward to the next amendment. If the Republicans are ready, then they should be ready to offer their amendment. We will try to move through the process as quickly and as fairly as we can.

This is an extremely important piece of legislation. The problems we have economically in the country today are not the problems of Democrats or Republicans, they are problems that American people have. We together have to try to work through this bill. I hope we can have cooperation. There are many things that people have different responsibilities for. We have had a longstanding partial-day conference we are going to have, but we are going to have opportunities during the time we are there listening to Secretary Chu and Secretary Salazar and others to offer amendments here.

There will be a significant number of votes. We hope if the amendments are offered tomorrow and Wednesday, we will have a number of votes all day tomorrow. Starting about 3 o'clock Wednesday afternoon we can do the amendments that have been offered that day. So we have lots of work to do, and it is important we do it as quickly, I repeat, and as fairly as we can.

I ask unanimous consent the following be recognized for the time specified: UDALL of New Mexico, 15 minutes; BROWNBACK, 10 minutes; CASEY, 15 minutes; SNOWE, 20 minutes, KAUFMAN, 15 minutes. This request is for these Senators to speak this evening.

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

The Senator from New Mexico.

Mr. UDALL of New Mexico. Mr. President, as I rise to give this maiden speech in our Chamber, we all know we are living in very difficult times. Our current economic crisis has only accelerated problems that have been growing for years. America's manufacturing sector was declining before this crisis, and when this crisis has passed, we will still need a blueprint for creating high-paying jobs and growing the middle class.

Meanwhile, our energy policies pose a threat to the economic, environmental, and national security of our Nation and the world. I believe these two problems, our economic stagnation and our energy irresponsibility, demand a common solution. We must put Americans to work building the energy economy of the future, and we must do so now.

I often say our energy policies have produced a perfect storm, a combination of three extraordinary challenges

that collectively threaten our future. First, America's dependence on fossil fuels threatens our economy. As natural gas provides a growing share of America's electricity, the price of gas has more than tripled since 1995, and growing demand promises to make matters worse.

Second, America's energy policies threaten our security. America has 3 percent of the world's natural gas reserves, but we consume 25 percent of the world's supply. That increasingly means sending American dollars to Russia and Iran, two countries that sit on more than 43 percent of the world's gas reserves and two countries that have shown their willingness to use energy as an instrument of coercion.

Finally, humans have managed to overwhelm the Earth's carbon cycle. The balance that sustained life on Earth for millennia has been radically altered. In New Mexico, this means fewer farms and more forest fires, more thirst and less water, the end of a unique and treasured way of life.

Some people say the world's demand for fossil fuels has not yet begun to outstrip supply, or that the climate is not changing back that quickly. I look at it this way. We are driving toward the cliff. I do not want to spend a lot of time arguing about how far off the cliff is. I want to stop accelerating.

So what do we do? In the short term, we need to do it all. We need to drill responsibly for domestic energy, we should promote conservation, and nuclear power has to be part of the mix.

But we also need reforms to prepare us for the future. When I was in the other body, I fought for and we passed a renewable electricity standard, an RES. This plan would demand that large utilities generate a portion of their energy from renewable sources and conservation. Thanks in large part to my colleague who is on the floor today, the senior Senator from New Mexico, Mr. BINGAMAN, the Senate has passed this proposal three times. Similar policies have succeeded at the State level. In fact, 28 States have renewable standards, including my home State of New Mexico. But a national RES has never become the law of the land. It is time for Congress to make it so.

There are many reasons to support this plan. To start, it is good for consumers. With a 20-percent standard, utility customers could save $31.8 billion. It will strengthen rural communities and provide new income for farmers and ranchers. This plan will make America safer. The billions of dollars it would generate are dollars that will stay in America and cannot be used to hold our foreign policy hostage. But most importantly, a national renewable standard will create hundreds of thousands of high-paying jobs, jobs that cannot be outsourced. Study after study shows that shifting capital to renewable energy increases job creation.

Not only will this plan stimulate job creation today, it will put us on a path toward dominance in the industries of the future. These benefits will come from the actions of private businesses making the RES a distinctly American solution to a global problem. That is why it will succeed. As one writer has put it, the only thing stronger than Mother Nature is ''father profit.''

Because it works with the private sector, an RES is more than a government program. It is an appeal to the spirit of innovation. I know we have enough of that innovative spirit to tackle any challenge we face. I see it in the people of New Mexico. I see it in the scientists chasing new ideas, in entrepreneurs betting their time and capital on the hope of a better world, in engineers searching blueprint sketches for the submerged outline of a revolution. My constituents are eager to tackle the problems that face our country. I know yours are too. But these citizens have been poorly served by their Government. Just last month, a renewable energy company from my State was forced to lay off most of its workforce. After investing in a new technology, the company could not afford to begin manufacturing. As a result, the progress of their innovations has been delayed, and the dreams of their workers have been deferred.

It did not have to be this way. Countries that have done more to shape their energy markets have created driving green energy industries. With a population roughly a quarter as large as America's, Germany has twice as many workers developing wind energy technologies. Spain has almost 5 times as many workers in the solar thermal industry as America, and China has more than 300 times.

Today our markets do not accurately price the social cost of burning fossil fuels. As a result, the private sector is effectively being told to send American dollars overseas, to ignore the coming decline in fossil fuel supplies, and to radically alter the world's climate. It is a credit to America's energy companies that so many of them have invested in alternative fuels and conservation. But individual acts of responsibility cannot compensate for a market that encourages irresponsibility. If we are going to make the changes we need, conservation cannot be an act of personal virtue, and renewable fuels cannot be luxury alternatives. An RES would structure the marketplace so those decisions that are best for the American people are also the best for the bottom line. This approach will make the market a powerful force for progress because Government cannot tackle this problem alone.

New Mexico contains two of America's preeminent national labs. We know these public institutions have an incredible innovative capacity, but we also know Government needs private sector partners to achieve its goals. From 1970 to 1996, Los Alamos National Lab, the institution that harnessed the power of the atom and launched America's national lab system, developed a technique for cleanly and efficiently using the Earth's heat to generate energy. Estimates indicated that the technique could eventually power the Earth for hundreds of years. But without market incentives to encourage continued development, progress stagnated.

Only recently have American businesses rediscovered the geothermal technologies this country pioneered. Because our markets do not appropriately value renewable energy, we lost more than a decade while the world raced ahead. America cannot afford to let another country become the world's green energy leader. Someday soon, green energy will no longer be an alternative; it will be the standard. The CEO of GE Energy recently testified before Congress that wind and solar energy are likely to be among the largest sources of new manufacturing jobs worldwide during the 21st century. The question is whether these jobs will be in America. That is what I want, and that is what we need to do.

America has always succeeded by being one step ahead. We mass produced the car, and American manufacturing built the middle class. We sparked the IT revolution, and our high-tech industry fueled American prosperity for years. Today being one step ahead means developing the green energy economy of the future before anybody else does. The challenge is huge but so is the payoff if we succeed—a stronger economy, a more secure future, and a chance to reclaim the mantle of world leadership by the force of our example and the unmatched capacity of our people. It is clear these are difficult times. I devoted this speech to a proposal I believe will allow us to meet these difficulties head on and to emerge a safer, stronger, more prosperous Nation. I believe the American people are ready for change, and they are ready for the change this plan represents. It is up to us to rise to the challenge.

Should we do so—and I am confident we will—we will remember today as a time when America again turned a global threat into a national opportunity. We will remember the day when our Government set free the power of American industry to tackle one of the world's toughest problems, and we will celebrate the time when American businesses and American workers rose and together rebuilt a newer world, a clean energy world.

I also wish to thank today a number of my colleagues and friends: My cousin, MARK UDALL, from the great State of Colorado; Senator BINGAMAN, whom I mentioned, who has been a leader on these renewable technologies and has gotten this proposal that I talked about today through the Senate three times. I see JEANNE SHAHEEN, who is also in my class; JEFF MERKLEY, DEBBIE STABENOW, SHERROD BROWN, BOB CASEY, many Members who are here. I am grateful.

I yield the floor.

The PRESIDING OFFICER. Under a previous order, the Senator from Kansas is recognized for 10 minutes.

Mr. BROWNBACK. I welcome my colleague from New Mexico, Senator UDALL, a great name in U.S. politics. I am sure he will do a great job in this body, and I appreciate his comments talking about green expansion and what we can do to create jobs and opportunities. We certainly need to do that, and I welcome him.

I rise to speak on the stimulus bill in front of us. Our economy is certainly in great difficulty. The American people are suffering. Look at the numbers. They don't tell what is in people's hearts or what is happening to their pocketbooks, but it does paint a bleak picture. Real gross domestic product declined 3.8 percent in the fourth quarter this past year. Consumer spending, which is nearly 70 percent of the economy, was down 3.5 percent. We had weak consumer spending, weak exports, weak investment. That translates into a bad job market. I don't think anybody questions but that we are in difficult economic times.

For the past 12 months, the economy has lost nearly 2.6 million payroll jobs. From Friday's forecast, the estimates ahead are looking at another 500,000-plus jobs lost during the month of January. Ouch. That is bad. It is hard. It is difficult. The economy is in very difficult shape, and people are suffering.

I wish to see President Obama succeed in helping to move the economy forward. I wish to see Congress be a constructive part of the process. I believe we can do both. If we could slow down a little bit and work together, we could come up with an economic stimulus package that could get 80 votes out of this body. Unfortunately, the bill in front of us is neither prudent nor responsible. I don't think it is going to get us out of the hole we are in. It just digs the hole deeper. There is an old saying that if you are in a hole, stop digging. Unfortunately, the bill we are considering resembles too much the one that passed the House of Representatives, ignores that advice, and supplies bigger shovels to dig the hole deeper and faster. That is not the way we should go.

My hope and prayer for this week is that we will work as a body; if we can't work as a body and work together to fashion something on a bipartisan basis that actually stimulates the economy, that we simply send this back to the committee to start over again. I am on the Appropriations Committee. We got the bill on our side 24 hours ahead of voting on it in committee. The committee held no hearings on this bill whatsoever. We voted within 1 hour 40 minutes to appropriate and spend $350 billion, basically creating another fiscal year between 2009 and 2010 and then pouring a wad of money into a number of different segments without rhyme or reason for how it would stimulate the economy. That is what gets everybody so upset about this bill. It is spending a lot of money, and it is not going to stimulate the economy.

This notion about what we want to do is just get a lot of money out the door or maybe use a crisis to spend money in places that people wanted to do for some time may be more of what is at stake. The White House Chief of Staff, Rahm Emanuel, stated:

> You never want a serious crisis to go to waste. What I mean by that is an opportunity to do things that you think you could not do before.

Unfortunately, what I think is in this package is too much of that idea, that we have a crisis, let's use this crisis to put a lot of money into different places that we wanted to all along to get it out the door and get it passed. You can do it that way, but that doesn't stimulate the economy. That stimulates the Government and Government spending and expands the Government to the point that some economists are looking at the Federal Government becoming 30 percent of the economy, where normally we run at about 20 percent of the economy. You are looking at doing that on a permanent basis. We cannot afford that. We particularly cannot afford that, given the first wave of the baby boomers who retire in large measure by 2012. Three years from now, you start hitting that big pool of retirees getting Medicare and Social Security instead of paying into it. At the same time, you have ratcheted up your size of Government under this crisis mode to the point that you could get a mammoth sized Federal Government that cannot be sustained on the backs of taxpayers, under the idea of you don't want to waste a good crisis, you want to use it to spend in areas that you wish you could have all along.

What these packages deliver, unfortunately, is an increasing amount of debt and a plethora of big Government spending increases masquerading as a fiscal stimulus. It is a grab bag of different spending programs with the hope that it would somehow chase the recession away. Instead, it adds to the debt. This bill will cost American taxpayers close to $900 billion. That is on top of an already projected deficit of $1.2 trillion.

It is also interesting that when President Clinton came into office, he put forward an economic stimulus package that was defeated as being too big and too costly and that one was priced at $16 billion. We are looking at $900 billion. That was $16 billion. It was too much and too expensive. It added to the debt too much at a time that we had a difficult economy as well.

Here, it appears, billions of dollars are being spent on all kinds of programs that should be addressed in the normal appropriations process. We have a process, and we can use that, but now we are putting in money, and people have heard this litany: $400 million for the prevention of sexually transmitted diseases, $6 billion for clean water revolving funds, $6 billion to convert Federal buildings to ''green buildings,'' $1 billion for the 2010 census, $400 million to replace the Social Security Administration's National Computer Center. Now, all this may be fine—$600 million for new vehicles for the Government, $50 million for the National Endowment for the Arts—all of it may be fine, but that is not a stimulus package. That is a spending package. That is an appropriations bill that should go through in the normal process.

Economists and members of the President's economic team have stressed the need for funds to be targeted, timely, and temporary. However, over $250 billion of the spending in this bill is for income-transfer payments that will put the Federal Government on the hook for long-term spending as far as the eye can see—and just when the baby boomers start to retire in 2012 in large numbers. That is not wise.

We will also hear some rhetoric about how spending is a more effective means of stimulating the economy than tax reductions. I do not agree with that. I do not believe that. I do not think economic theory nor the practice of what we have seen in the past supports it.

Research by the President's own Chairman of the Council of Economic Advisors suggests $3 of economic activity per $1 reduction in taxes. The economy needs some gas in the tank, not sugar. We should focus on creating an environment and incentives for businesses and individuals to invest and create real jobs, not illusory jobs created by a big Government handout that will not be permanent in a competitive global economy and will load too much burden on future generations by debt and taxes. We should provide real and permanent tax reduction accompanied by truly timely, targeted, and temporary spending. I could support an expansion for roads and bridges because we need the roads and bridges. That is not what is in this grab bag.

I would like to list another example of a tax cut that we could do that could put as much and would probably put as much as $545 billion into the U.S. economy—$545 billion. This is from an article written by Alan Sinai last week. It is something we have done in the past, where we have lowered the taxes on repatriation of foreign-earned dollars. The last time we did that, we reduced the corporate tax rate of 5.25 percent for 1 year. We brought back into the United States nearly $360 billion of money.

That is money that is earned by companies such as Hill's pet food in Topeka, KS, which has pet food plants in Europe and Asia. They make money there, but they cannot bring it home because they are subject to this 5.25 corporate tax rate. So they leave it there. But for a 1-year time period, you could take that down to 1 percent, or a low number, and they will say: I am going to bring it home. Then it puts gas in the tank and not sugar in the

tank. That is a tax cut that will help us. This is capital our economy needs and needs badly. I cannot see a single rational reason why we would not take action to encourage American companies to bring capital home.

Let me close by saying there are a number of worthwhile spending programs that need to be addressed but not under the guise of fiscal stimulus. We do need to address infrastructure issues, and I could support a substantial amount of infrastructure spending, but the lag time on these is difficult and it is long. On the other hand, there is defense spending that could take place even now and the pipeline is not as long and, importantly, that is money we are already scheduled to spend. It simply would be advancing the timetable, not expanding the amount.

My point is, as I started off, if we would spend a little more time here and in committee and work together, we could get 80 votes for this bill. If this bill is forced through this week and we end up with the size of Government of 30 percent of GDP, then this will be mostly on a partisan-line vote. That is not the way we should start. It is not the way we should go.

I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from Pennsylvania is recognized for 15 minutes.

Mr. CASEY. Thank you, Mr. President.

Mr. President, I rise tonight to speak as well on the challenge we have ahead of us with regard to the legislation we are debating this week. We will be considering a lot of amendments to that legislation; that is, the Economic Recovery and Reinvestment Act.

I want to speak, first of all, in a broad way about the challenge ahead of us. I sent a letter toward the end of last year to both our majority leader Senator REID, as well as to Senator MCCONNELL, outlining priorities, as I saw them, from the vantage point of Pennsylvania's challenges as well as the country's.

I used a phrase that we have heard often, the last word of which might be a little different than we have heard. We have heard summaries of this strategy where the priorities of any kind of recovery bill should be focused on being timely, targeted, and transformative. I believe all three are essential: Timely, meaning we cannot sit on this for too long; we have to act. I think that is essential; targeted, in the sense we cannot have broad spending. We have to make sure we target the dollars to strategies that work; transformative, in the sense that as we are making investments in infrastructure or in people to get them through the recession, and also to generate spending, we also have a chance to be transformative, to change our economy for the better and to transform people's lives.

In Pennsylvania—and it is true of virtually any State in the country; we just saw the data that unemployment went up in every single State in the month of December, and I know the Presiding Officer understands this from his work as a Governor and now as a Senator—in a State like ours in Pennsylvania—whether it is the Commonwealth of Pennsylvania or the Commonwealth of Virginia—we are seeing challenges all around. We have had record job loss. Even foreclosure rates, which have been a lot lower than the rest of the country, are now spiking up. Families have been hit with a kind of economic trauma we have not seen in more than a generation. The same is true of businesses. Their bottom lines have been decimated by the downturn in this economy, principally because businesses and families have not had access to credit to borrow money for a small business or to borrow money for student loans or for the purchase of an automobile or something that a family wants to spend money on but cannot do it without credit.

So we know the trauma that has been visited upon the American people. We also know that just as that has been happening, there has also been a real crisis of confidence, some of this emanating from the way the Troubled Asset Relief Program, the so-called TARP, was implemented by the Treasury Department in the prior administration.

One of the obligations we have in the Senate in this debate, but even beyond this debate, is to do everything we can to restore that confidence. You could express it as confidence, you could express it as trust. However you describe it, a good bit of that—too much of that—was lost in the last couple months. As people were feeling the trauma of this economy on their own lives or on their own families or on their own communities, there was also a loss of trust and confidence in what the Federal Government did or did not do and what the Federal Government can do going forward. So as we consider this legislation, this is not just about a program and dollars and whether the strategy will work. This will be a test of the Senate, a test of the Congress and the administration, in terms of our ability to restore some of that confidence and literally to restore trust in our Government.

One of the ways we can begin to repair that relationship between the American people and the Congress, between the people who pay the taxes and the Government that spends those dollars, is to work on a couple of areas of oversight. It is not the whole answer, but it goes a long way to helping. So I have two amendments I will be offering this week on oversight.

The first amendment will allow for a comprehensive assessment through the creation of a joint select committee on economic recovery oversight. This oversight committee will be made up of Members of the House and the Senate and will be required to submit reports to every Member of the House and the Senate but, more importantly, to the American people every 3 months. The reports will focus on, first, the success of this act in creating jobs and the details behind that; and, no. 2, any instances of waste, fraud, and abuse in programs funded by this act.

Membership on the panel will break down as follows: 10 Members of the Senate, including the chairmen and ranking members of the Committees on Finance and Appropriations, 4 Members appointed from the majority party by the majority leader of the Senate, and 2 Members from the minority party appointed by the minority party itself; secondly, 10 Members of the House, including the chairmen and ranking members of the Committee on Ways and Means and the Committee on Appropriations; and it goes on from there in the same way as the Senate.

While I recognize the administration has pushed for and the bill before us includes a new Recovery Act Accountability and Transparency Board, I want to make sure the legislative branch is in a position to carry out our oversight responsibilities. Congress has not always done a good job on that, and we have to ensure that a good job is done in this instance for this kind of oversight.

The second amendment I have would direct the Government Accountability Office, known by the acronym GAO, to compile reports of the Offices of the Inspectors General in each of the Federal Departments or agencies that expend or obligate funds under the Recovery Act. The GAO would in turn submit reports to Congress that would contain the following: No. 1, a summary of oversight activities of the Offices of Inspectors General relating to expenditure of recovery funds; and, No. 2, an evaluation of the effectiveness of this act. So you have the GAO, an independent entity, reviewing what has been happening under this legislation.

The aim of these GAO reports would be to assess which provisions of the act have been effective at creating jobs. The whole intent of this legislation is to create jobs. We better make sure that happens. The reports would be submitted no later than 120 days from enactment of the act, with followup reports submitted at 180 days after enactment as well as 240 days, again, after enactment.

Both of these amendments are focused on oversight. That is the language we use to make sure the bill and to make sure the Government is doing its job to carry out the purposes of this recovery and reinvestment act.

But we have to do more than that. This effort with the two amendments is a way to very specifically begin to rebuild the confidence the American people must have in what the Congress does and to recover and reinvigorate some of that trust we should have in our Government, especially at this time. No piece of legislation can do that on its own. No Senator or Member of the House can do that on his or her

own. But we have to try collectively to do all we can to rebuild confidence because if we do not have that kind of confidence going forward for the effectiveness of this legislation, then we cannot expect the American people to support this legislation and the programs infused with capital by this legislation over a long period of time. So we have much work to do to strengthen oversight, and by doing that to begin to increase the confidence the American people have in our Government and in this legislation.

Mr. President, I yield the floor and note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Under the previous order, the Senator from Maine is recognized for 20 minutes.

Ms. SNOWE. Mr. President, I rise today, at this most consequential of times, and as a member of the Senate Committee on Finance, to speak to the issue of the economic stimulus we have begun to consider here in the U.S. Senate.

We are deliberating on this legislation because the gravity of our economic circumstances is the most dire we have witnessed since the Great Depression, and in just three months, this recession will officially become the longest and quite possibly the deepest since the 1930s. We lost 2.6 million jobs last year, the most since 1945. The U.S. Department of Labor has reported the number of Americans receiving unemployment benefits has reached 4.8 million, an all-time high since record-keeping began in 1967—and that doesn't include the nearly 1.7 million getting benefits through an extension last summer.

Mark Zandi—chief economist for Moody's Economy.com, who has advised both Senator MCCAIN and President Obama—has stated, ''without stimulus, unemployment will rise well into the double digits by this time next year.'' And then we learned last Friday that the economy shrank at its fastest pace in nearly 27 years in the fourth quarter of 2008. Our gross national product dropped at a 3.8-percent annual rate, worst since 1982.

So, indisputably, the grave nature of the current landscape dictates the urgency of passing a substantial and comprehensive economic stimulus package. I want to support a stimulus package. But I cannot support just any package. This Chamber cannot support just any package.

We have a responsibility—an obligation—to apply a rigorous standard to determine whether this approach will help extricate our Nation from this crisis.

And yet, even the best economic minds are not in agreement or accord on what is the optimal stimulus to pursue—and what it would achieve. Business Week, in its January 28 issue, asks ''how much does boosting government spending or cutting taxes help the private sector? Can massive fiscal stimulus . . . create lobs and increase economic output?''

David Leonhardt, economics columnist for The New York Times, stipulated in an article on January 29, 2009, that such a ''bill should help the economy in both the near term and the long term. But the government doesn't go out and spend about $800 billion every day. The details matter.'' He is absolutely right—the details do matter—and that is why this amendment process is so fundamental. Current CBO Director Douglas Elmendorf testified before the House Budget Committee on January 27, 2009, and said, ''stimulative policies, if well designed, could hasten the economy's recovery and reduce the overall loss of output during the recession.'' That is precisely the test of how effective a fiscal stimulus is—does it help bring us out of recession?

In that light, we must not confuse stimulus with omnibus. For those who say we cannot burden this bill with provisions that are not within the strictures of economic stimulus, I couldn't agree more. And to do otherwise would only compromise the credibility of any package that may ultimately be enacted.

This is a multidimensional crisis that requires a multidimensional approach, and it is critical we get this right. Already Congress passed the Troubled Asset Relief Program, which as we all know has had its own significant problems. Already the Federal Reserve has essentially exhausted its options to improve the economy through monetary policy, having reduced interest rates to zero—something else that hasn't happened since the 1930s—and lent more than $1 trillion to stabilize the financial and credit markets. So as I said during the mark-up of the Senate Finance Committee's portion of this package, we ought to remember that for us, in crafting fiscal policy to meet this historic challenge, there are no ''do-overs.'' We only have so many arrows in our fiscal quiver.

And so this debate shouldn't be about how much we label as ''tax relief'' and how much we label as ''spending.'' We must not retreat into our ideological corners or comfort zones. Rather, it should be about the merits of the individual measures in this legislation and whether the totality of the package can—in the timely, temporary, and targeted fashion we have employed on stimulus measures in the past—deliver job creation and assistance to people in need—who also will spend funds quickly, further bolstering economic recovery. We must ask, does this package fit the times—because in the words of an editorial in the Lewiston Sun-Journal in my home State of Maine: ''right now, there's a country, an economy and a basic way of life that needs rescuing. Most of all, though, the country needs a program that works . . .''

I ask unanimous consent the entire editorial be printed in the RECORD.

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

SENATORS, BRING SENSE TO STIMULUS

In economic stimulus, numbers have ceased to matter. The current package before Congress is $819 billion, but it could be a quadrillion, for all it matters. What's been proposed is stimulus at any cost, because continued lagging of American economic output is a failure beyond comfortable calculation.

Sens. OLYMPIA SNOWE and SUSAN COLLINS are center stage this debate, by virtue of their center-right leanings. Their lobbies are filled with lobbyists and their ears are filled with pleas, suggestions and threats, perhaps, of what their vote on the stimulus means, either way.

Stakes are high. So are the costs. But Maine's senators must ignore both of those, we think, in favor of the simplest approach, to evaluating the merits of the stimulus: Prove to us it is going to work, they should say, and soon. Shortcomings or delays need not apply.

Praise and damnation for the stimulus from the right and left are both steeped in truth. The country does need targeted programs to strengthen safety nets, help states stem red ink and put people to work through infrastructure and other investments,

But It doesn't need a wish list, the rush to fulfill an ideological agenda that's been stewing for eight years under the former administration. There's time for that later. Right now, there's a country, an economy and a basic way of life that needs rescuing.

Most of all, though, the country needs a program that works. Fast. This is where SNOWE and COLLINS can hold sway, by bringing common sense to the stimulus legislation through the application of basic, pragmatic principles.

The country has already spent in haste. The 2007 stimulus cut checks to every American, which felt great, but flopped. The 2008 rescue for banks on their eves of destruction is looking like the money was thrown into a gaping maw, never to be seen again.

That Congress is now pressuring banks to lend their bailout funds, instead of hoarding them, is testimony to the contradictory nature of that bailout/rescue/stimulus. The $700 billion was meant to stabilize the economy, not those institutions that acted so recklessly to destroy it.

So here we are, as Americans, burned twice by major spending packages that haven't spurred the desired effect—staunching our economic bleeding and injecting fiscal penicillin to kill the diseases spreading through our markets. Two strikes. We can't afford a third.

President Barack Obama has presented the most thoughtful package to date. There's little question that expertise and intellect replaced emotion and paranoia as the sentiments driving its creation. The questions that remain are basic: Does it work, and how soon?

These are what Senators COLLINS and SNOWE should have answered to their satisfaction before deciding which way to vote. The numbers and stakes are high, obviously.

What matters is that this stimulus package makes sense, and that it works. Quickly.

Ms. SNOWE. Moreover, we must calibrate even more carefully the imperative for speed against the ironclad necessity of getting this legislation right—given this bill in its current

form would add nearly $900 billion to our national debt—and that is before any interest payments—on top of the $10.6 trillion debt that exists. And that means, we cannot open the door to permanent spending that exceeds the life and purpose of what is before us today.

In fact, Alice Rivlin, former Director of the Office of Management and Budget in the Clinton administration, offered the following fiscal reality-check in her testimony before the House Budget Committee last week, ''because we're doing this outside the budget process, it means no one has to talk about what the long-term effects of any of this might be.'' Well, let us talk about the long term effects here and now.

As my colleagues are well aware, CBO has projected a staggering $3.1 trillion budget deficit over the next 10 years, and that's before we pass this bill that will add $900 billion to that total. And as we all know, CBO assumes that any additional funding levels added for Federal spending will be added to the budget baseline and extended in perpetuity with an inflation adjustment. In other words, this bill may exist entirely outside the normal budget process, but it will now be in CBO's baseline—meaning any future reductions will be considered by some to be ''cuts.''

Therefore, we must ensure that programs that may well be great policy but not economic stimulus are not considered in this package and instead are vetted through the regular budget and legislative process. And that spending authorized in this bill ends when its emergency, stimulative function ends—with any continuation again only considered in the future through the normal process. As the Concord Coalition among others has called for, we must have an exit strategy to ensure that we don't create unintended consequences down the road that will cause additional economic hardship and harm.

On that note, I believe that we deserve from the proponents of this bill a breakdown in each of the different titles of this legislation such as what are the job-creation expectations for each, or how precisely will they assist those displaced by the current recession and will that assistance itself also bolster our economy in the near term? Further, I am working on an amendment that will require the new Recovery Accountability and Transparency Board created in this legislation to include, in its quarterly reports, a specific listing of the numbers of jobs being created by each title in this act. But most critically, the amendment will direct the Board to recommend for rescission the unobligated balances of any program in the Act that are not currently creating—or cannot be reasonably expected to create—jobs or help those displaced by the current recession. These provisions will hopefully shine a spotlight on the efficacy of the new law in creating badly needed jobs.

Again, the bottom line question for us must not be exclusively whether a particular proposal in this package is a good idea. The bottom line question is, as I conveyed to Vice President Biden in a conversation between us recently, will this package work in terms of jump-starting the economy?

Columnist Robert Samuelson spoke directly to that challenge when he wrote in The Washington Post today, ''...the immediate need is for the stimulus package to stimulate—now. It needs to be frontloaded.'' I do think it is positive that the legislation contains some measures to move money out quickly and effectively, such as shortening the normal deadline for Federal agencies to commit funds, and setting deadlines on Federal awarding of formula grants, among others, so States, communities, or agencies are not sitting on the money. They will be required to expend it within a given period of time in order to impact the economy.

In addition, as we heard last year from CBO, extending unemployment benefits is a preeminent stimulus tool, as it concluded its cost-effectiveness is ''large'' . . . the length of time for impact is ''short'' . . . and the uncertainty about the policy's effects is ''small.'' Now we have Moody's Economy.com estimating that every dollar spent on unemployment benefits generates $1.63 in near term GDP. So I am pleased the finance package I supported in committee included about $39 billion to extend unemployment insurance. And I thank the Finance Committee Chair BAUCUS for including my measure to exclude the first $2,400 of unemployment benefits from taxation, to further maximize the provision's stimulative effect.

On the tax side, the Finance package also includes a payroll tax credit, known as the making work pay tax credit for more than 95 percent of working families in the United States—which Mark Zandi has said will be ''particularly effective, as the benefit will go to lower income households...that are much more likely to spend any tax benefit they receive.''

I am also pleased that Senator GRASSLEY was able to insert an absolutely vital provision to middle-income taxpayers in America that addresses the alternative minimum tax, which is an egregious and onerous tax on so many millions of taxpayers across this country, and, if left applied, would make the tax credit of $500 and $1,000 less effective. I am very pleased that was included to add another $70 billion worth of tax relief to middle-income America.

The finance portion also includes increasing eligibility for the refundable portion of the child tax credit that Senator LINCOLN and I have advocated and championed over the years. We have included this child tax credit going back to 2001 in the Economic Growth and Tax Relief Reconciliation Act. This incentive would reach low-income families earning between $6,000 and $12,667 a year.

I have heard arguments before about refundability, and people will say we should not provide funding to those families who don't have a Federal income tax liability. I would point out that although these people may not earn enough to have a Federal income tax liability, they do work and contribute to local taxes and payroll taxes and, the refundable child credit will get additional money into the pockets of those most likely to spend it.

After all, I don't think that anybody would deny that low-income families earning between $6,000 and $12,667 on an annual basis should have some benefits under this legislation. I don't think anybody can deny that they will not be spending that money and that it will not be stimulative in the final analysis. I do believe they deserve to be part of this stimulus plan.

I also believe that preserving and creating jobs over the short term that will also endure for the long term are not mutually exclusive goals. To the contrary. As ranking member of the Small Business Committee, I am very pleased the Finance Committee package included tax provisions to assist small businesses to sustain operations and employees. In particular, we extend small business expensing to $250,000 to promote investment. After all, small businesses are going to be the lifeline to job creation, as they have been in the past. In fact, small businesses create two-thirds of all net new jobs in America. They will be the lifeblood of this economic recovery. It is important to extend the expensing provision of $250,000, as well as provide a 5-year net operating loss carryback to firms, giving them an immediate tax refund they can use to sustain operations and hire new employees, among other priorities.

But above all—and I underscore this point—those receiving Federal money under the rescue plan under TARP will not have access or be allowed to take advantage of these additional taxpayer resources.

In addition, we must neither neglect nor forget our Nation's distressed and rural communities. Our bill recognizes that imperative by including an additional $1.5 billion in 2008 and 2009 allocation authority for the New Markets Tax Credit. I am told that the community development financial institutions fund, which administers the incentive, can allocate this 2008 credit authority within 60 days, which will create 11,000 permanent jobs and 35,000 construction jobs.

Since the only thing we don't want to be temporary in this package is the jobs it creates, this legislation will place Americans on the vanguard of the jobs of the future with the extension of the renewable energy tax credit to promote green technology, which will be absolutely crucial as nations compete to emerge from this global economic downturn. In fact, if we had not dithered last year and opted to

pass the extension of the renewable tax credits at the beginning of 2008, we would have already been on the road to creating 100,000 new jobs.

I have heard a lot of arguments against renewable energy tax credits, saying they are not stimulative. We are in the midst of a global downturn, and every country on Earth is going to be competing for jobs in the 21st century. Determining what is the best path to creating those jobs and investments in green technology is on the forefront of job creation. I want to be sure this country is in the vanguard when it comes to creating jobs of the future.

Certainly making investments in renewable energy sources is going to be so critical and so essential to job creation and to competing with other nations as they attempt to emerge as well from this global downturn.

In fact, these renewable tax credits will create more than 89,000 more jobs by giving certainty to companies that can start now on projects and count on these important incentives to take risks and grow. In fact, there are a number of projects in my own State of Maine that have been postponed and placed on hold because they cannot receive the benefits from the tax credits or financial institutions have suspended their loans and their lending opportunities. That has prevented these companies from moving forward on projects that they have wanted to pursue over the last few months. These are major projects that will create thousands of jobs in my State, and the same is true in so many States across the country. That is why this investment in renewables is going to be essential to job creation.

Considering the entirety of the stimulus package, both tax and spending, and its ability to have an immediate impact, CBO has now reported that of the current $884 billion size of the bill, $694 billion, or 78 percent, spends out in 2009 and 2010. That is a significant portion of this stimulus plan. Yet on the purely appropriations side, the spendout over the next 2 years is only 49 percent, and I believe we can and must do better.

Furthermore, I must say that there are allocations that simply do not belong in the stimulus package. Do we need to include $575 million for renovation and research at the National Institute of Standards and Technology in this legislation? Or $2 billion for advanced battery manufacturing? Or $135 million for the management of lands and resources?

Again, there are many more examples in this legislation that certainly should be identified as ones that should go through the normal budgetary process.

There are other provisions that are unequivocally worthy of strong support. But again, we have to identify them as to whether this is the appropriate vehicle for their consideration, and I would say not.

I am hopeful in the final analysis that we can further address this pivotal matter of nonstimulative provisions through the amendment process over the coming days. As the New York Times columnist David Brooks recently wrote, the package, as currently constituted, ''is part temporary and part permanent, part timely and part untimely, part targeted and part untargeted.'' And he also deftly pointed out, ''leadership involves prioritizing.'' I think we will have to work in the days ahead on both sides of the political aisle to offer amendments to bring accountability to this process, to bring both sides together, and to develop the kind of consensus that is going to restore the integrity and confidence in the package we ultimately pass.

Mr. President, finally, as ranking member of the Senate Committee on Small Business, I am pleased that the Senate Appropriations Committee also included multiple small business lending provisions that I think are critical to the overall objective of this legislation which, of course, is to create jobs.

Let me also address one provision that I think is critical and that has been part of the finance package—and that is expanding the Medicaid Program to assist States all across this country. I have heard that many have suggested that somehow this is not stimulative, and that it is not appropriate to include additional funding for Medicaid assistance to the States.

There are 45 States that are facing significant budget shortfalls with a combined budgetary gap of $350 billion. Are we suggesting it would not have a profound impact on our national economy if all 45 States, which are going to have to make some drastic decisions under any circumstances, had to make even more difficult choices if we did not provide the $87 billion that is included in the Finance Committee package to assist them?

In fact, I think it is going to be critically important that we do so because otherwise they will have to raise taxes and cut spending dramatically, which obviously will have a tremendous and consequential impact on the state of the economy, leading to more job losses and a more severe downturn.

As we know, States are required by their constitutions to balance their budgets. So, obviously, they will have to resort to raising taxes or reducing spending. I think we have an obligation to be a strong Federal partner and provide assistance when it comes to Medicaid because, after all, not only are States having difficulty with their existing caseloads and increases in cost, but they are also facing a burgeoning caseload due to job losses. In fact, for every 1 percent increase in unemployment, an additional 1 million Americans will qualify for Medicaid or the children's health insurance program under the current enrollment criteria.

All that said, I also think we should impose some conditions on the States. First, they should not be able to expand their current benefits. They should maintain their existing benefits coverage. Second, we should require prompt payment, so that states cannot sit on payments, but rather within a timely fashion of 30 days have to reimburse providers for care because delays in payments to providers ultimately threaten their operations, limit their ability to make investments to take care of their patients, or put them at risk of ultimately having to cut back substantially, which will have a tremendous impact on the overall economy.

Time is of the essence and so is the obligation to get this right to the best of our ability. Hopefully, we can achieve a bipartisan bill, one that is going to achieve the legitimate objectives of job creation, of stimulus and assisting those who have been displaced as a result of the downturn in this economy. These goals are not mutually exclusive. In fact, I think they are ones that could easily be accomplished as we go through this process, if we all agree in the final analysis that we need to move forward with a package that will meet the times and to accommodate the enormity of the challenge we are facing in this country today.

I yield the floor.

The PRESIDING OFFICER (Mr. MERKLEY). The Senator from Delaware.

Mr. KAUFMAN. Mr. President, I am fortunate to have heard the remarks of the Senator from Maine. They are excellent, and I find so much of it I agree with.

I am a brandnew Senator, but I have been around the Senate for 36 years. I think in those 36 years, this is truly one of the historic moments in all the years I have been following the Senate. We are about to embark on a task that will test this institution, as we begin the debate on the response to the profound economic crisis we face.

Last Monday, as my first full week as a U.S. Senator began, thousands of American workers lost their jobs. In a single day, tens of thousands of families lost their breadwinners, men and women lost the dignity that comes with work, and States and cities across the country lost the productive labor and the tax revenues those workers have provided.

This was just a single bad day. But over the last couple years, the news from our economy has been increasingly disturbing. American payrolls shrank by over 2.5 million jobs last year, including 524,000 in December alone, touching every corner of this country. The accelerating pace of unemployment tells us there is more bad news to come. Along with laid-off workers, we have unused productivity capacity. Thirty percent of our manufacturing strength is idle.

It is no wonder that Americans are cautious about spending. But their caution, as we know, is reinforcing the slowdown.

With that decline in consumer spending, our retailers are shutting their doors, laying off sales staff and management. With declining sales, manufacturers are laying off workers and shutting down assembly lines. Responses that are perfectly rational for individuals making their own decisions only add to our problems, making us all worse off.

Our jobs, our savings, our homes, our credit—all are under siege. Left alone, we know things will only get worse. We have to break that vicious cycle.

I remind my colleagues of these troubling trends because as bad as things are, they can get worse. Because we have failed to revive employment, consumer spending—the key to today's economy—and consumer confidence—the key to tomorrow's economy—remain in a slump. Because we failed to restore stability in home prices, foreclosures continue to spread. Because we have failed so far to clean up our banking system, lending and borrowing are drying up.

That is the real urgency behind the task of building an effective economic recovery plan because if we fail to act, we can be sure that we will lose more jobs, lose more homes, and reduce the value of our economy.

Because so much has gone wrong, our recovery plan must tackle many different problems at the same time. Because so much of our economic value has been lost, the scale of our response must be equal to that challenge. Because of the risk of further decline, our response must be rapid.

That is why the Senate is beginning debate today on a historic economic recovery investment program for America. We must do something dramatic to turn our economy around. At the same time, the American people will rightly judge whether we have used this moment wisely, whether we have invested these hundreds of billions of dollars of their hard-earned dollars in ways that will improve their lives.

Job creation and job preservation must be our goal. Jobs, jobs, jobs. Every job lost is another blow to our economy, losing productive work, spending power, and the revenue that supports the education, health care, roads, water, police, and fire protection provided by our State and local governments. Every job lost is truly a human tragedy, for the man and woman who loses the dignity of work, and the families thrown into turmoil.

One important way to create jobs is make more investments that will make our economy more productive—clearly, roads, bridges, clean water. A smart power grid, as we discussed with former Vice President Al Gore last week in the Senate Committee on Foreign Relations, could become to our economy what the railroads were in the 19th century, what the highways were to postwar America, and what the Internet has meant to our digital age. And as we discussed last week in the Judiciary Committee, we can revolutionize health care records and at the same time save billions of dollars while digitizing paper records, making sure we have appropriate privacy safeguards. We can improve health care, save money, help protect our patients, and create jobs. We will need to install new computers, routers, and software and educate and train the people with the skills to make the system work.

Listen, as jobs are created, consumers will be able to spend, homeowners will be able to keep up with their mortgages, families will be able to keep their kids in college. That is what economic recovery means, and that is what we have to do.

Finally, just as important as the jobs we create will be jobs preserved by keeping State and local governments able to provide the schools, the health care, the police and fire protection that we cannot do without. They will need teachers, nurses, firemen, policemen, and health inspectors on the job. Just today our congressional delegation from Delaware met with the Governor of Delaware. This crisis, just in Delaware alone, has slashed our revenue projections by $.5 billion in just 6 months. We face a $600 million deficit, which will require shutting down services and laying off workers. This will add to the economic slowdown and reduce the services on which our citizens depend.

Support directly to State and local governments will get out to where it is needed. We know that because we know those governments are now forced to cut back in the face of declining economic activity and revenues. They need the money and they will use it. We have to get it to them.

This crisis has knocked a big hole in our economy, and it is essential we fill it quickly. Because of the size and speed of this task, we must also have extraordinary oversight and transparency to assure Americans that we are doing this right and that we are doing it openly. We must have additional resources and people dedicated to the sole purpose of auditing and investigating economic recovery spending. We must have transparency. We must make public all of the grants, contracts, and the oversight activities themselves. This is a historic undertaking, and we must have a historic level of transparency and oversight.

During my years of experience with the Senate, I have developed a deep respect for this very unique institution. I have seen it tested in war and peace, in good times and bad. The debate on our economic recovery plan this week is precisely the task for which this body, the Senate, was created. This is a moment that will test this institution. We must deliberate, we must debate, we must decide. There are no easy choices this week. There will be no easy votes. But I am convinced the Senate will meet this test, just as I am convinced our country will meet the test of these extraordinary times.

Mr. President, I yield the floor.

MORNING BUSINESS

Mr. KAUFMAN. Mr. President, I ask unanimous consent the Senate proceed to a period of morning business with Senators permitted to speak up to 10 minutes each.

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

TRIBUTE TO GRAYSON COUNTY DECA

Mr. McCONNELL. Mr. President, I rise today to pay tribute to the accomplishments of the Grayson County DECA from my home State of Kentucky and their efforts of promoting entrepreneurship through education and community awareness.

DECA is a high school association of marketing students which promotes the development of professionalism especially with regards to entrepreneurship and is the high school equivalent to the college association of Delta Epsilon Chi.

The Grayson County chapter works under the advisement of Cynthia Smith and Diane Horne, and comprised of dedicated young men and women, including two juniors from Grayson County High School, Tyler Lewis and Alex Henderson, who recently participated in the Entrepreneurship Promotion Project for organization.

The project has integrated its ideals into the local Grayson County schools with ventures such as developing different business ideas and creating sales presentations. They have reached out to the community with public service announcements on the radio and editorials in the local newspaper.

The Entrepreneurship Promotion Project earned the group a sixth place honors in their category at the spring 2008 International DECA competition.

In addition to the promotion of entrepreneurship, DECA requires that its members participate in many hours of community service.

Recently, DECA has organized a job shadowing program for the senior advanced marketing class at Grayson County High School. The program allows students to explore a career of their choice and gain professional experience by pairing them with local businesspeople.

The students explored careers at the Grayson County News Gazette, the Grayson County Sheriff's Department, the Leitchfield Police Department, the County Courthouse, CPA firms, law offices and the Chamber of Commerce.

The members of DECA have worked to raise awareness and have successfully obtained a proclamation from Grayson County Judge Executive Gary Logsdon and Governor Steve Beshear designating the last week in February as Entrepreneurship Week in the Commonwealth of Kentucky and in Grayson County. The group was also honored with a citation from the Kentucky House of Representatives.

DECA is a wonderful example of students striving for excellence both in

education and community. Mr. President, I ask my colleagues to join with me in recognizing Grayson County DECA's hard work and dedication to education, community, and Kentucky.

(At the request of MR. REID, the following statement was ordered to be printed in the RECORD.)

TRIBUTE TO LARRY TREMBLAY

● Mr. KENNEDY. Mr. President, today I am pleased to introduce a resolution acknowledging the outstanding achievement of an extraordinary high school athletic coach. On January 21 this year, Larry Tremblay achieved his 500th career victory as coach of the wrestling team at Winchester High School in Winchester, MA. After 29 years of success, Coach Tremblay's outstanding career reached that milestone, with his victory over Carver High School.

Mr. Tremblay is one of only three Massachusetts coaches who have ever accomplished this feat. Coming off two back-to-back State championship years, and his induction to the National High School Wrestling Coaches Hall of Fame, the Winchester High Wrestling team is riding high under the remarkable leadership of Coach Tremblay. Appropriately the nickname of the school's beloved coach is ''Larry legend'' for his latest incredible milestone, and I commend Coach Tremblay for his skill and dedication and hard work throughout his years as Winchester High Wrestling Coach. A recent article will be of interest to all my colleagues in the Senate, and I ask unanimous consent that it may be printed in the RECORD.

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

''LARRY LEGEND'' LIVES ON

[From the Winchester Star, Jan. 22, 2009]

Winchester, MA—Winchester High wrestling Coach Larry Tremblay entered Wednesday night's home match against Carver with 499 career victories.

Sachem alumni, fans and friends packed the gym to witness Tremblay achieve a feat only two other Massachusetts high school wrestling coaches have accomplished—500.

His 2008-09 squad made sure he left with the elusive, impressive and historic number.

With five scheduled matches remaining on the night, Sachem 152-pound grappler Mike Greco pinned Carver's Mike Babbin in the second period. That win sealed up not only a convincing 53-6 victory for the Sachems, but it also gave Tremblay the milestone.

''You don't get into to coaching to win 500 matches or games,'' said Tremblay. ''But one day I looked up and I had 100 wins, and then I looked up another day and it was 300. I've had a lot of fun coaching here.''

Despite being undermanned, Tremblay credited Carver—a program that won the New England championship in 1994—with wrestling a strong match.

''My hat goes off to them,'' said the coach. ''They made the long trip up here, and they wrestled hard.''

The 160-pound, 171, 112 and heavyweight classes were all ruled ''no contests.''

Tremblay began coaching wrestling at North Reading 29 years ago. He spent one season there before moving on to Winchester, where he has been ever since.

''When I started coaching I had curly brown hair,'' joked Tremblay. ''Now look at me. They call me the 'silver fox.'''

Tremblay's passion and knowledge of the sport of wrestling, as well as coaching in general, makes him stand out and places him into an elite group.

''He has such a love for the sport,'' said Tremblay's son Travis, who grappled for his father for four years before graduating in 2005. ''It's all he talks about. He loves it.''

The night began at 103, where, despite putting up a big fight, Nick Cashion was pinned by Carver's Paul Walsh.

Although it would have been hard for anyone to steal Tremblay's thunder on this night, Sachem 119-pound grappler Connor Gregory managed to receive some well-deserved recognition as well. Gregory earned a 14-3 major over Carver's Matt Walsh, giving him 100 career victories.

Mike Barber (125) pinned Carver's Steve Mayne; Winchester's Fernando Monroy (130) pinned James Blankship.

Ryan Connolly (135) earned a first-period pin over Carver's Brandon English, and Winchester grappler Dan O'Connell (140) earned a 14-4 major decision by defeating Steve Scampoli.

Sachem John Williams (145) pinned Carver's Mike Cabral in the second period, and at 189, Winchester's Greg Kelley pinned Corey Ellis at 1:06 of the first period.

The match officially concluded when Andrew Moranian pinned Carver's Sean Mahoney in 1:31.

''These are special kids, and considering what the previous two teams did there is a lot of pressure on them,'' said Tremblay. ''They're trying to build their own niche. They wrestle to the best of their ability. Not only have they done a good job on the mat, but they've done a good job representing the town of Winchester.''

After the match, Tremblay received recognition for his accomplishment on the place he knows best—the wrestling mat.

''This really isn't a glamorous sport, but the whole wrestling community is like a family,'' said Tremblay. It's a special thing. Tonight, when I saw all the parents and the alumni in the stands, I got a little emotional. This has been a great ride.''●

IDAHOANS SPEAK OUT ON HIGH ENERGY PRICES

Mr. CRAPO. Mr. President, in mid-June, I asked Idahoans to share with me how high energy prices are affecting their lives, and they responded by the hundreds. The stories, numbering well over 1,200, are heartbreaking and touching. While energy prices have dropped in recent weeks, the concerns expressed remain very relevant. To respect the efforts of those who took the opportunity to share their thoughts, I am submitting every e-mail sent to me through an address set up specifically for this purpose to the CONGRESSIONAL RECORD. This is not an issue that will be easily resolved, but it is one that deserves immediate and serious attention, and Idahoans deserve to be heard. Their stories not only detail their struggles to meet everyday expenses, but also have suggestions and recommendations as to what Congress can do now to tackle this problem and find solutions that last beyond today. I ask unanimous consent to have today's letters printed in the RECORD.

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

As a small business owner, the price of gas is close to putting me out of work. The economy is a little slow right now but only because of the price of fuel. If fuel prices were to drop a buck a gallon, the country would see a huge increase in spending. At this moment, I am unsure if I will be able to even pay my bills this month to keep my business open or a roof over my head. The burden of fuel prices and the lack of work for me have begun to put a huge stress on my relationship at home. She will now have to cover my share of the bills and will leave us both to figure out how to feed the kids, pay bills and buy fuel.

I am 41 years old and have been in the same profession for over 17 years. The thought of having to start over and train for a new job is very tough. I have looked for part-time work in hopes something will be done about fuel prices allowing me to save my business. There is very little work out there, and the work that is there pays so little it would cost more in fuel to get to work then you would make at work. This country is in need of something to be done about fuel prices, if they continue to rise we are going to see a lot of people homeless, stealing, or worse to just get by. It is time for this government to take charge and save its people before it is too late.

KEN, *Kuna.*

I work at the border of Idaho and Canada. Eastport, Idaho to be exact. This is 33 miles from Bonners Ferry. Many of us work here, at Customs and at the brokerages as well as a hand full of other businesses. Some of us carpool when we can.

I want to ask you to help us get public transportation in this northernmost area of Idaho. We need it. It will help all of us through this crippling gas price debacle as well as create a needed resource for everyone in Boundary and Bonner County. If I take time to write out a plan, will you seriously look at it and help us with grants and resources if feasible? The plan would be an idea of course, as I am not a grant writer, but I am banking on you to have that kind of resource.

I think it is feasible and needs to be. We should all have a focus on the future instead of cowering in fear because we do not know how to move ahead, simply because we cannot afford to live as we did, driving the biggest most powerful cars and trucks, without regard to the future, instead of conserving and investing in alternatives. It is not too late.

First things first. We all need to get to work and I think public transportation would be something people would pay taxes for in these parts.

I am including an email sent to me about alternative ''air'' cars. It seems other countries have found solutions in alternative means for transportation public and private. Why is it that our country does not ''approve'' these vehicles that run on ''air''? It does not make any sense, other than the government is protecting the profits of corporations.

AMAZING AIR CAR

The Compressed Air Car developed by Motor Development International (MDI) Founder Guy Negre might be the best thing to have happened to the motor engine in years.

The $12,700 CityCAT, one of the planned Air Car models, can hit 68 mph and has a range of 125 miles. It will take only a few minutes for the CityCAT to refuel at gas stations equipped with custom air compressor

units. MDI says it should cost only around $2 to fill the car up with 340 liters of air.

The Air Car will be starting production relatively soon, thanks to India's TATA Motors. Forget corn! There is fuel, there is renewable fuel, and then there is user-renewable fuel! What can be better than air?

I am not sure, I would like to think our government had what is good for all, not just the rich.

I would buy one of these ''air'' cars in a minute. I commute 33 miles each way to the Idaho/Canadian border everyday. It is a struggle as I am a single mom and every penny is spent to keep body and soul together in my family. Nothing is left as it is; it just galls me to see my local gas stations (seems like) daily gas price hike. One gas station even got an digital sign, I assume because he had to go out there so often to change the numbers; now he just presses buttons from his office to make the price go up.

I am afraid of what is to come, if our government does not really focus on alternatives. Why go after oil reserves in our country when that is not a long-term solution? Why not really hit hard and support alternatives that are sustainable? I get no security out of new oil finds. It is a short-term solution. I would think we should think about future generations, our own children, and their children. What will they do? We need to solve it now, not put off the inevitable.

LEAH.

How this Idaho family deals with high energy prices:

We drive less and slower. We have changed out incandescent bulbs for compact florescent bulbs, and turn them off when not in the room. We focused on increasing the energy efficiency of our house this winter.

Nothing this Congress, or any Congress since the 70s has done or appears to be planning helps us with the costs of energy. Quit promoting legislation helping big oil. Poking a few more holes in obscure, sensitive or scenic areas will not provide immediate or long term relief. Pandering to the automobile lobby will not improve automobile fuel efficiency needed by the average person. Get in front of the quickly forming parade of common people advocating real solutions.

As usual, if I get any reply to this, it will be a form letter that completely ignores the fact that there are opinions in Idaho that do not match yours.

MICHAEL.

First, I would like to express my thanks for your seeking comments on the energy mess. These are my thoughts:

There should be a windfall tax on oil that is produced from older domestic wells. These wells have been producing—say over 10 years and the cost of production has been recouped. I own stock in several oil companies; yet, I feel it is important that the profits from these wells are put to better use than dividends to me. The windfall profit should go to help fund alternative fuels, hydrogen infrastructure, and public transportation. You are correct when you say that people in the west will suffer more from the high cost of gasoline because of distance and the need to drive more.

I am new to the nuclear industry and my personal experience has opened my eyes to this untapped resource. I believe congress should support nuclear and help educate the public to how much energy is produced by nuclear, the safety record of the industry, and the progress in managing the waste. Power plants that use natural gas and other hydrocarbon based fuels should be the first to be replaced with nuclear. Politically, it would be wise to incorporate wind and solar with the nuclear effort to help offset some to the negative press. The negative press needs to be offset with an educational program to help change the paradigms of the public when it comes to nuclear power.

Reinstate the rebates on hybrid vehicles.

Allow tax incentives for renewable forms of energy.

As for me, my expenditures for fuel have gone from $200 a month to $400 a month. Combine this with increased food costs, increases in my housing expenses, and other oil-related costs and my personal life style has changed dramatically. Fortunately, I live in a community that is very close to the recreational activities that I enjoy.

STEVEN.

It became apparent to me on vacation this year that many of the world's hard-to-reach locations (i.e. most islands such as Hawaii) are diesel-powered. The thought of powering an entire island or island chain on diesel power alone is sickening, and this is just one of the many hydrocarbon dependent locations. My recommendation is to get nuclear power off the cutting room floor and get the U.S. government to build an infrastructure of power-supplying plants across the nation. With a large nuclear energy source we would be able to implement electromagnetic ''bullet trains'' between major U.S. cities cutting down on highway and sky-way travel making business commutes shorter and less carbon dependent.

This endeavor would be 1,000 times larger and more expensive than the U.S. interstate program but it is important to streamline this country rather than go down the path that we have been going for years.

I have many more ideas but would like to keep things short. Thanks for your time and for asking for citizen input.

REESE.

Please get us off of oil dependency. That is what alternative energy is all about. How stupid can we be to only have 1–2% alternative energy?

GARY.

Everyone is affected by the high prices of fuel; even people that do not drive cars are affected by this. Costs for shipping, because of fuel prices, have risen dramatically and that cost is passed to the consumer.

The short-term solution to our oil dependence is to drill here, offshore and ANWR, until a long-term alternative is provided.

ANGIE.

Thank you very much for taking the time to seek input from Idaho citizens on the current energy crisis.

I live with my wife and three children in Meridian but work at the Air Force Base in Mountain Home. Even though I drive a fuel-efficient car, my weekly commute cost has risen by over $100 a month. With the associated rise in grocery costs, it has become necessary for me to take a second job just to afford transportation to work and put food on my family's table. I know that this has become a serious quality of life issue, not just for my family but for many Idahoans.

I realize that even if drilling were begun immediately it would not have that great of an effect on current prices and that it could take several years for an impact to be felt in homes across America, but it makes much more sense than waiting even longer. Oil is not an infinite resource but by expanding drilling we can help to give ourselves a buffer to make the transition to other energy sources easier and more economical.

Again, thank you for your efforts on our behalf.

JAMES, *Meridian*.

I do not even know how to begin with what this has done to our family. I will start by letting you know that we are a single income family. My husband works a commission-based job at RC Willey, and I stay home and raise our two children, ages 7 and 4. Since the prices of gas and groceries have gone up, people have reduced their spending considerably. The last thing anyone is going to do is go into RC Willey and spend money on home furnishings or electronics. Since my husband installs home theater systems, and services furniture repairs, this directly affects him, and with him being commission, our paychecks has shrunk considerably. We went from being able to pay all of our bills, and have a couple of extra hundred dollars left over to now wondering how we are going to pay the house payment on the first, much less any of the other bills. We have to decide what is more important to pay. The stimulus package was spent on paying our bills, to keep us afloat. It did not go back into the economy.

One possibility we are looking at is for me to go back to work. Two problems with that, we are not okay with someone else raising our kids and we should not have to be forced into that, and second we would probably spend more on gas than I would make in an income so now it is not worth it. Now we look at the possibility of my husband taking a second job, which now means even less time with his family. Forget about the financial suffering this is bringing on most people, but let us take a look at what it is doing to the family unit. It is hurting most families emotionally, and time wise, which means the kids suffer. Why should my children or anyone else's suffer because the oil companies want to get richer.

Oil company's report record profits, and are giving their retiring CEOs outrageous severance packages (Lee Raymond chairman of Exxon given $400 million), while the rest of us suffer horrible at their hands. Please explain to me why someone needs that kind of money to retire on and my kids face the possibility of losing their home? And to add insult to injury, they have the nerve to make the statement that they are only making pennies on every dollar. It is not just the gas either, because it is affecting everyone (other than the super rich) now other companies are forced to raise their prices just to maintain a minimal profit, which further hurts the general public, and now everything has become unaffordable, not just gas.

We try to do our best at buying cheap, and we buy the off-brands, and we shop sales ads, and we limit how much we drive. But again you run into problems there. When you buy cheap you get exactly that—cheap. Stuff breaks, groceries are going bad quicker (we bought a head of lettuce on Friday, and by Monday it was rotted, along with the onions we bought, and the bagels. The cheap brand of ziplock baggies we bought did not even close, so we have had to use a whole box of baggies that did not zip close.), and over all the quality is just poor. Prices keep going up, but the quality keeps going down, which in the end costs you even more money. I stay home 90 percent of the time, and when I do go out I drive my car which is a Chevy Malibu Maxx, and it still costs me $50 to $60 to fill up. My husband drives his motorcycle every single day to work to save on gas, and we are still sinking financially, and we do not have a lot of bills. Where is the fairness in the super rich getting even richer at the detriment of the middle class, to poor class families? That is not the America I was raised and taught about.

If the powers to be that are supposed to be running this country would do their job, we would not be in this position. Stop ignoring the United States Constitution. It was put in

place for a reason, and I am sick and tired of it being violated. The Constitution is the foundation of this country, and anyone with common sense will tell you, that when you chip away at the very foundation of something, then the entire structure will crumble. That is what is happing to the USA. Stop letting the environmentalist run and control everything. If it were not for them, and the idiots running this country we would have already drilled in ANWR Alaska. Or better yet our own, gulf instead of China/Cuba/India. By the way, these are two suggestions for you to use.

Let us make this country back into what it was meant to be, a great place to live, and raise your children in. Stop selling out the United States of America.

NICK and KASEY, *Boise*.

I hope you do not mind, but I am an avid Glenn Beck listener, and I heard on his show yesterday that one of Senator Orrin Hatch's secretaries or spokespeople told one of his constituents that he would not support offshore drilling. The constituent was calling because he wanted to tell Senator Hatch that he supported it.

I am glad to see you asking directly for people's opinion and actually using some of the stories on your site.

Let me just say that right now my wife, our baby, and I do not have a car. Well, not one in working condition. See, I have a '94 Geo Metro, but it threw a rod earlier in the year and we just do not have the money to get a new car. I did find an engine for my Geo, though, so everything should work out once we get our economic stimulus check, except for the whole skyrocketing gas prices thing.

Right now we have to borrow my parents' truck if we need a car, which is very frequently. We are trying to get my wife into school to become a paramedic, but without transportation, we cannot do anything. Back when gas prices were cheaper, I had less of a problem borrowing people's vehicles, but these days I cannot stand to borrow somebody's car because a lot of the time I do not have the cash to put gas back into it.

Luckily I live really close to where I work, so I walk every day. My wife mostly just stays home with our baby, and both sets of our parents live close by. The only thing is, just the short distances that our parents have to drive to pick us up or take us to the store or whatever they do is too much. Even having smaller vehicles, like my Geo, does not seem to help that much. Before the thing broke down I was putting $40–50 in to fill the thing, and it only has an 8-gallon tank.

Let me be frank. I like that you have asked people's opinions on this subject. High gas prices affect everything, as you can probably see. Food prices are going up because of the money it takes to transport. Anything that is made with petroleum (which is something that people rarely think about) like paint products and plastics are going up. Everything is going up because everybody uses gas to get from point A to B, so businesses let customers make up the difference by raising prices.

It is a pretty simple economic concept, but something that should be even simpler is supply and demand. I do not know why anybody at this point is against offshore drilling. And, I do not know why anybody is against nuclear energy. Sure, plenty of environmentalists are all bonkers about nuclear meltdowns and all that, but how many times in history has that ever happened? Nuclear waste from reactors is even becoming less of a factor.

The long and short of it is really that I support Senators that listen to the people. I think that you should try to get on the news yourself and let people know that you want their opinion.

PHIL, *Boise*.

ADDITIONAL STATEMENTS

140TH ANNIVERSARY OF ST. MARK'S A.M.E. CHURCH

• Mr. KOHL. Mr. President, I wish to honor St. Mark's A.M.E. Church, which has been a part of Milwaukee's faith community for 140 years and serves as a shining example for the entire State of Wisconsin.

In 1869, eight eager Christian men and women envisioned a ''Church of Allen.'' This church would uphold the ideals of Richard Allen, a freed slave who became the first free African to be ordained in the Methodist Church. The church's eight founders were led by Ezekiel Gillespie, a prominent figure involved in the Underground Railroad and the fight for suffrage for African-Americans in Wisconsin. The founding members became an official congregation on April 5, 1869, but the church was still missing a building to call home.

Within 2 months, a plot of land was purchased and the church embraced its new house of worship. Unfortunately, expenses mounted for nearly a decade and the founders were forced to sell a portion of their land in order to cover the debt. After a city condemnation required the razing of St. Mark's original church, both the clergy and laity insisted that a new edifice be erected in its place. In 1887, they began construction of a church which would last into the 20th century.

As the city of Milwaukee continued to grow and thrive, so too did the membership of St. Mark's. The increase in size prompted the creation of new churches in 1914 and again in 1953. After the Milwaukee Redevelopment Program of the 1960s, the construction of a highway ushered in the demolition of their 1953 structure. The congregation grew only stronger and its current church truly represents its lasting success.

Given the moniker, ''The Friendly Church,'' St. Mark's has continually proven both its friendliness and its faith within Milwaukee. St. Mark's A.M.E. Church holds a special place in our State's history as Wisconsin's oldest African-American chartered church. St. Mark's leaders and parishioners have stalwartly defended their home and shared their devotion with our Milwaukee community, and this historic church will continue to thrive in the future. On this occasion of St. Mark's 140th anniversary, I want to offer my heartfelt congratulations.•

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second times by unanimous consent, and referred as indicated:

By Ms. SNOWE (for herself, Mr. ROCKEFELLER, and Mr. CONRAD):

S. 363. A bill to make determinations by the United States Trade Representative under title III of the Trade Act of 1974 reviewable by the Court of International Trade and to ensure that the United States Trade Representative considers petitions to enforce United States trade rights, and for other purposes; to the Committee on Finance.

ADDITIONAL COSPONSORS

S. 132

At the request of Mrs. FEINSTEIN, the name of the Senator from Texas (Mrs. HUTCHISON) was added as a cosponsor of S. 132, a bill to increase and enhance law enforcement resources committed to investigation and prosecution of violent gangs, to deter and punish violent gang crime, to protect law-abiding citizens and communities from violent criminals, to revise and enhance criminal penalties for violent crimes, to expand and improve gang prevention programs, and for other purposes.

S. 322

At the request of Mr. SCHUMER, the name of the Senator from Alaska (Mr. BEGICH) was added as a cosponsor of S. 322, a bill to amend the Internal Revenue Code of 1986 to equalize the exclusion from gross income of parking and transportation fringe benefits and to provide for a common cost-of-living adjustment, and for other purposes.

S. 333

At the request of Ms. MIKULSKI, the name of the Senator from Kansas (Mr. BROWNBACK) was added as a cosponsor of S. 333, a bill to amend the Internal Revenue Code of 1986 to allow an above-the-line deduction against individual income tax for interest on indebtedness and for State sales and excise taxes with respect to the purchase of certain motor vehicles.

S. 354

At the request of Mr. WEBB, the name of the Senator from Hawaii (Mr. INOUYE) was added as a cosponsor of S. 354, a bill to provide that 4 of the 12 weeks of parental leave made available to a Federal employee shall be paid leave, and for other purposes.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Ms. SNOWE (for herself, Mr. ROCKEFELLER, and Mr. CONRAD):

S. 363. A bill to make determinations by the United States Trade Representative under title III of the Trade Act of 1974 reviewable by the Court of International Trade and to ensure that the United States Trade Representative considers petitions to enforce United States trade rights, and for other purposes; to the Committee on Finance.

Ms. SNOWE. Mr. President, the devastating job losses we are currently seeing across our economy have reaffirmed my conviction that Congress must redirect U.S. international trade policy toward preserving American jobs through stringent enforcement of

U.S. trade rights, rather than endlessly pursuing new free trade agreements. Shifting the focus of U.S. trade strategy to job preservation is particularly essential in the manufacturing sector, which since 1994—the year NAFTA came into effect—has lost over 4.2 million jobs. The economic downturn over the past year has further decimated U.S. manufacturers, which have shed over 600,000 jobs in 2008 alone.

It is no coincidence that this withering of our country's once-unparalleled manufacturing base took place during a decade-and-a-half of record trade liberalization and increases in imports from large, often poorly regulated low-cost producers like China and India. In Maine, my constituents have seen this down-side of trade, with over 20,000 manufacturing jobs lost since 2000, mainly in paper and wood-working industries that have suffered from unfair competition from Asian imports.

To stem the outflow of American manufacturing jobs due to trade competition with countries that manipulate their currencies, exploit their workers or wantonly degrade their environment, it is essential that we decisively enforce the trade agreements we already have in place. Yet our Government has often failed to take this basic but crucial step when confronted with egregiously unfair trade practices. While foreign governments engage in market-distorting currency manipulation, refuse to protect intellectual property rights and turn a blind eye to labor exploitation—each a violation of trade obligations to the United States—ours all too frequently demurs with communiqués and consultations, rather than formal enforcement action. What makes this abdication of duty to defend the U.S. economy from unfair foreign practices especially troubling is that the tools to do so already exist in the dispute resolution provisions of various trade agreements.

The distressing reality is that U.S. industry and labor groups are often rebuffed in attempts to petition the United States Trade Representative to initiate a formal investigation or bring a dispute resolution action under the relevant multilateral or bilateral trade agreement, as there seems to be considerable institutional momentum among senior officials at USTR and elsewhere in the bureaucracy against bringing formal enforcement action against key trade partners. Indeed, it is a troubling fact that every single one of the petitions brought by business or labor groups in the last 8 years under Section 301 of the Trade Act of 1974—the statute setting forth the process by which members of the public can request that the government enforce of U.S. trade rights—has been rejected by USTR, in some instances on the same day they were filed!

It is to prevent further disregard for U.S. businesses and workers seeking a fair and consequential hearing of their concerns with foreign trade practices that Senators ROCKEFELLER and CONRAD and I today introduce the Trade Complaint and Litigation Accountability Improvement Measures Act, or the Trade CLAIM Act.

The Trade CLAIM Act would amend the Section 301 process to require the United States Trade Representative to act upon an interested party's petition to take formal action in cases where a U.S. trade right has been violated, except in instances where: the matter has already been addressed by the relevant trade dispute settlement body; the foreign country is taking imminent steps to end or ameliorate the effects of the practice; taking action would do more harm than good to the U.S. economy; or taking action would cause serious harm to the national security of the United States.

The bill would also grant the U.S. Court of International Trade jurisdiction to review de novo USTR's denials of Section 301 industry petitions to investigate and take enforcement action against unfair foreign trade laws or practices. Such jurisdiction would include the ability to review USTR determinations that U.S. trade rights have not been violated as alleged in industry petitions, and the sufficiency of formal actions taken by USTR in response to foreign trade laws or practices determined to violate U.S. trade rights.

The Trade CLAIM Act would thus give U.S. businesses and workers a greater say in whether, when and how U.S. trade rights should be enforced. As Ranking Member of the Committee on Small Business and Entrepreneurship, I believe this bill would also be particularly beneficial to small businesses, which—like other petitioners in Section 301 cases—currently have no avenue to formally challenge the merits of USTR's decisions, and are often drowned out by large business interests in industry-wide Section 301 actions initiated by USTR.

By providing for judicial review of USTR decisions not to enforce U.S. trade rights, the bill provides for impartial third party oversight by a specialty court not subject to political and diplomatic pressures. In de-linking discreet trade disputes from the mercurial machinations of USTR's trade liberalization agenda, this Act would end the sacrifice of individual industries on the negotiating table, and allow trade enforcement claims to be decided on their merits. We owe no less to the millions of American workers whose jobs depend on the level international playing field that can only be guaranteed by their Government consistently standing up for them against unfair foreign trade practices.

AMENDMENTS SUBMITTED AND PROPOSED

SA 99. Mr. CASEY submitted an amendment intended to be proposed by him to the bill H.R. 1, making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, and for other purposes; which was ordered to lie on the table.

SA 100. Mr. CASEY (for himself and Mr. VOINOVICH) submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, supra; which was ordered to lie on the table.

SA 101. Mr. SPECTER submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, supra; which was ordered to lie on the table.

SA 102. Ms. LANDRIEU (for herself, Mr. GRASSLEY, and Mr. HARKIN) submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, supra; which was ordered to lie on the table.

SA 103. Ms. LANDRIEU submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, supra; which was ordered to lie on the table.

SA 104. Ms. MIKULSKI (for herself and Mr. BROWNBACK) submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, supra; which was ordered to lie on the table.

SA 105. Mr. CASEY submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, supra; which was ordered to lie on the table.

TEXT OF AMENDMENTS

SA 99. Mr. CASEY submitted an amendment intended to be proposed by him to the bill H.R. 1, making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, and for other purposes; which was ordered to lie on the table; as follows;

At the appropriate place, insert the following:

SEC. ___. JOINT SELECT COMMITTEE ON ECONOMIC RECOVERY.

(a) ESTABLISHMENT AND COMPOSITION.—

(1) IN GENERAL.—There is established a Joint Select Committee on Economic Recovery (referred to in this section as the ''joint committee'') to be composed of 20 members as follows:

(A) 10 Members of the House of Representatives, including the Chairman and Ranking Member of the Committee on Ways and Means and the Committee on Appropriations, or their designee, 4 members appointed from the majority party by the Speaker of the House, and 2 members from the minority party to be appointed by the minority leader.

(B) 10 Members of the Senate, including the Chairman and Ranking Member of the Committee on Finance and the Committee on Appropriations, or their designee, 4 members appointed from the majority party by the majority leader of the Senate, and 2 members from the minority party to be appointed by the minority leader.

(2) VACANCY.—A vacancy in the joint committee shall not affect the power of the remaining members to execute the functions of the joint committee, and shall be filled in the same manner as the original selection.

(3) LEGISLATIVE AUTHORITY.—The joint committee shall not have any legislative authority.

(b) OVERSIGHT.—

(1) IN GENERAL.—The joint committee shall conduct continuing oversight over the implementations of this Act with a particular focus on—

(A) the success of this Act in creating jobs; and

(B) any instances of waste, fraud, and abuse in programs funded by this Act.

(2) REPORTS.—The joint committee shall submit reports to the committees of jurisdiction, the Senate and House of Representatives, and the general public not less than every 3 months after the date of enactment of this Act.

(c) RESOURCES AND DISSOLUTION.—

(1) RESOURCES.—The joint committee may utilize the resources of the House of Representatives and Senate.

(2) DISSOLUTION.—The joint committee shall cease to exist 30 days after September 30, 2010.

SA 100. Mr. CASEY (for himself and Mr. VOINOVICH) submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, and for other purposes; which was ordered to lie on the table; as follows:

On page 36, between lines 3 and 4, insert the following:

SEC. ___. ASSISTANCE FOR COSTS OF DISTRIBUTING BONUS COMMODITIES.

(a) PURPOSES.—The purposes of this section are—

(1) to encourage States and food assistance agencies to accept commodities acquired by the Secretary of Agriculture for farm support and surplus removal activities; and

(2) to offset the costs of the States and food assistance agencies for the intrastate transportation, storage, and distribution of the commodities.

(b) COSTS OF DISTRIBUTING BONUS COMMODITIES.—Section 202 of the Emergency Food Assistance Act of 1983 (7 U.S.C. 7502) is amended by inserting after subsection (a) the following:

''(b) COSTS OF DISTRIBUTING BONUS COMMODITIES.—

''(1) IN GENERAL.—The Secretary shall use funds made available under section 32 of the Act of August 24, 1935 (7 U.S.C. 612c), to provide funding described in paragraph (2) to eligible recipient agencies to offset the costs of the agencies for intrastate transportation, storage, and distribution of commodities described in subsection (a).

''(2) FUNDING.—The Secretary shall provide funding described in paragraph (1) to an eligible recipient agency at a rate equal to the lower of $0.05 per pound or $0.05 per dollar value of commodities described in subsection (a) that are made available under this Act to, and accepted by, the eligible recipient agency.''.

SA 101. Mr. SPECTER submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, and for other purposes; which was ordered to lie on the table; as follows:

On page 129, line 10, strike ''$2,700,000,000'' and insert ''$9,200,000,000''.

On page 129, line 11, strike ''$1,350,000,000'' and insert ''$7,850,000,000''.

SA 102. Ms. LANDRIEU (for herself, Mr. GRASSLEY, and Mr. HARKIN) submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, and for other purposes; which was ordered to lie on the table; as follows:

On page 251, lines 13 and 14, strike ''housing:'' and insert the following: ''housing: *Provided further*, That funding used for section 2301(c)(3)(E) of the Act shall also be available to redevelop demolished, blighted, or vacant properties, including those damaged or destroyed in areas subject to a disaster declaration by the President under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.):''

SA 103. Ms. LANDRIEU submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, making supplemental appropriations for job preservation and creation, infrastrucutre investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, and for other purposes; which was ordered to lie on the table; as follows:

On page 194, beginning on line 22, strike ''$637,875,000'' and all that follows through ''equipment):'' on line 13 and insert: ''$757,875,000, to remain available until September 30, 2013, of which $84,100,000 shall be for child development centers; $481,000,000 shall be for warrior transition complexes; $42,400,000 shall be for health and dental clinics (including acquisition, construction, installation, and equipment); and $120,000,000 shall be for the Secretary of the Army to carry out at least three pilot projects to use the private sector for the acquisition or construction of military unaccompanied housing for all ranks and locations in the United States:''.

SA 104. Ms. MIKULSKI (for herself and Mr. BROWNBACK) submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, and for other purposes; which was order to lie on the table; as follows:

On page 570, after line 8, insert the following:

SEC. —. ABOVE-THE-LINE DEDUCTION FOR INTEREST ON INDEBTEDNESS WITH RESPECT TO THE PURCHASE OF CERTAIN MOTOR VEHICLES.

(a) IN GENERAL.—Paragraph (2) of section 163(h) of the Internal Revenue Code of 1986 is amended—

(1) by striking ''and'' at the end of subparagraph (E),

(2) by striking the period at the end of subparagraph (F) and inserting '', and'', and

(3) by adding at the end the following new subparagraph:

''(G) any qualified motor vehicle interest (within the meaning of paragraph (5)).''.

(b) QUALIFIED MOTOR VEHICLE INTEREST.—Section 163(h) of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

''(5) QUALIFIED MOTOR VEHICLE INTEREST.—For purposes of this subsection—

''(A) IN GENERAL.—The term 'qualified motor vehicle interest' means any interest which is paid or accrued during the taxable year on any indebtedness which—

''(i) is incurred after November 12, 2008, and before January 1, 2010, in acquiring any qualified motor vehicle of the taxpayer, and

''(ii) is secured by such qualified motor vehicle.

Such term also includes any indebtedness secured by such qualified motor vehicle resulting from the refinancing of indebtedness meeting the requirements of the preceding sentence (or this sentence); but only to the extent the amount of the indebtedness resulting from such refinancing does not exceed the amount of the refinanced indebtedness.

''(B) DOLLAR LIMITATION.—The aggregate amount of indebtedness treated as described in subparagraph (A) for any period shall not exceed $49,500 ($24,750 in the case of a separate return by a married individual).

''(C) INCOME LIMITATION.—The amount otherwise treated as interest under subparagraph (A) for any taxable year (after the application of subparagraph (B)) shall be reduced (but not below zero) by the amount which bears the same ratio to the amount which is so treated as—

''(i) the excess (if any) of—

''(I) the taxpayer's modified adjusted gross income for such taxable year, over

''(II) $125,000 ($250,000 in the case of a joint return), bears to

''(ii) $10,000.

For purposes of the preceding sentence, the term 'modified adjusted gross income' means the adjusted gross income of the taxpayer for the taxable year increased by any amount excluded from gross income under section 911, 931, or 933.

''(D) QUALIFIED MOTOR VEHICLE.—The term 'qualified motor vehicle' means a passenger automobile (within the meaning of section 30B(h)(3)) or a light truck (within the meaning of such section)—

''(i) which is acquired for use by the taxpayer and not for resale after November 12, 2008, and before January 1, 2010,

''(ii) the original use of which commences with the taxpayer, and

''(iii) which has a gross vehicle weight rating of not more than 8,500 pounds.''.

(c) DEDUCTION ALLOWED ABOVE-THE-LINE.—Section 62(a) of the Internal Revenue Code of 1986 is amended by inserting after paragraph (21) the following new paragraph:

''(22) QUALIFIED MOTOR VEHICLE INTEREST.—The deduction allowed under section 163 by reason of subsection (h)(2)(G) thereof.''.

(d) REPORTING OF QUALIFIED MOTOR VEHICLE INTEREST.—

(1) IN GENERAL.—Subpart B of part III of subchapter A of chapter 61 of the Internal

Revenue Code of 1986 is amended by adding at the end the following new section:

"SEC. 6050X. RETURNS RELATING TO QUALIFIED MOTOR VEHICLE INTEREST RECEIVED IN TRADE OR BUSINESS FROM INDIVIDUALS.

''(a) QUALIFIED MOTOR VEHICLE INTEREST.—Any person—

''(1) who is engaged in a trade or business, and

''(2) who, in the course of such trade or business, receives from any individual interest aggregating $600 or more for any calendar year on any indebtedness secured by a qualified motor vehicle (as defined in section 163(h)(5)(D)),

shall make the return described in subsection (b) with respect to each individual from whom such interest was received at such time as the Secretary may by regulations prescribe.

''(b) FORM AND MANNER OF RETURNS.—A return is described in this subsection if such return—

''(1) is in such form as the Secretary may prescribe,

''(2) contains—

''(A) the name and address of the individual from whom the interest described in subsection (a)(2) was received,

''(B) the amount of such interest received for the calendar year, and

''(C) such other information as the Secretary may prescribe.

''(c) APPLICATION TO GOVERNMENTAL UNITS.—For purposes of subsection (a)—

''(1) TREATED AS PERSONS.—The term 'person' includes any governmental unit (and any agency or instrumentality thereof).

''(2) SPECIAL RULES.—In the case of a governmental unit or any agency or instrumentality thereof—

''(A) subsection (a) shall be applied without regard to the trade or business requirement contained therein, and

''(B) any return required under subsection (a) shall be made by the officer or employee appropriately designated for the purpose of making such return.

''(d) STATEMENTS TO BE FURNISHED TO INDIVIDUALS WITH RESPECT TO WHOM INFORMATION IS REQUIRED.—Every person required to make a return under subsection (a) shall furnish to each individual whose name is required to be set forth in such return a written statement showing—

''(1) the name, address, and phone number of the information contact of the person required to make such return, and

''(2) the aggregate amount of interest described in subsection (a)(2) received by the person required to make such return from the individual to whom the statement is required to be furnished

The written statement required under the preceding sentence shall be furnished on or before January 31 of the year following the calendar year for which the return under subsection (a) was required to be made.

''(e) RETURNS WHICH WOULD BE REQUIRED TO BE MADE BY 2 OR MORE PERSONS.—Except to the extent provided in regulations prescribed by the Secretary, in the case of interest received by any person on behalf of another person, only the person first receiving such interest shall be required to make the return under subsection (a).''.

(2) AMENDMENTS RELATING TO PENALTIES.—

(A) Section 6721(e)(2)(A) of such Code is amended by striking ''or 6050L'' and inserting ''6050L, or 6050X''.

(B) Section 6722(c)(1)(A) of such Code is amended by striking ''or 6050L(c)'' and inserting ''6050L(c), or 6050X(d)''.

(C) Subparagraph (B) of section 6724(d)(1) of such Code is amended by redesignating clauses (xvi) through (xxii) as clauses (xvii) through (xxiii), respectively, and by inserting after clause (xii) the following new clause:

''(xvi) section 6050X (relating to returns relating to qualified motor vehicle interest received in trade or business from individuals),''.

(D) Paragraph (2) of section 6724(d) of such Code is amended by striking the period at the end of subparagraph (DD) and inserting '', or'' and by inserting after subparagraph (DD) the following new subparagraph:

''(EE) section 6050X(d) (relating to returns relating to qualified motor vehicle interest received in trade or business from individuals).''.

(3) CLERICAL AMENDMENT.—The table of sections for subpart B of part III of subchapter A of chapter 61 of such Code is amended by inserting after the item relating to section 6050W the following new item:

''Sec. 6050X. Returns relating to qualified motor vehicle interest received in trade or business from individuals.''.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

SEC. —. ABOVE-THE-LINE DEDUCTION FOR STATE SALES TAX AND EXCISE TAX ON THE PURCHASE OF CERTAIN MOTOR VEHICLES.

(a) IN GENERAL.—Subsection (a) of section 164 of the Internal Revenue Code of 1986 is amended by inserting after paragraph (5) the following new paragraph:

''(6) Qualified motor vehicle taxes.''.

(b) QUALIFIED MOTOR VEHICLE TAXES.—Subsection (b) of section 164 of the Internal Revenue Code of 1986 is amended by adding at the end the following new paragraph:

''(6) QUALIFIED MOTOR VEHICLE TAXES.—

''(A) IN GENERAL.—For purposes of this section, the term 'qualified motor vehicle taxes' means any State or local sales or excise tax imposed on the purchase of a qualified motor vehicle (as defined in section 163(h)(5)(D)).

''(B) DOLLAR LIMITATION.—The amount taken into account under subparagraph (A) for any taxable year shall not exceed $49,500 ($24,750 in the case of a separate return by a married individual).

''(C) INCOME LIMITATION.—The amount otherwise taken into account under subparagraph (A) (after the application of subparagraph (B)) for any taxable year shall be reduced (but not below zero) by the amount which bears the same ratio to the amount which is so treated as—

''(i) the excess (if any) of—

''(I) the taxpayer's modified adjusted gross income for such taxable year, over

''(II) $125,000 ($250,000 in the case of a joint return), bears to

''(ii) $10,000.

For purposes of the preceding sentence, the term 'modified adjusted gross income' means the adjusted gross income of the taxpayer for the taxable year increased by any amount excluded from gross income under section 911, 931, or 933.

''(D) QUALIFIED MOTOR VEHICLE TAXES NOT INCLUDED IN COST OF ACQUIRED PROPERTY.—The last sentence of subsection (a) shall not apply to any qualified motor vehicle taxes.

''(E) COORDINATION WITH GENERAL SALES TAX.—This paragraph shall not apply in the case of a taxpayer who makes an election under paragraph (5) for the taxable year.''.

(c) CONFORMING AMENDMENTS.—Paragraph (5) of section 163(h) of the Internal Revenue Code of 1986, as added by section 1, is amended—

(1) by adding at the end the following new subparagraph:

''(E) EXCLUSION.—If the indebtedness described in subparagraph (A) includes the amounts of any State or local sales or excise taxes paid or accrued by the taxpayer in connection with the acquisition of a qualified motor vehicle, the aggregate amount of such indebtedness taken into account under such subparagraph shall be reduced, but not below zero, by the amount of any such taxes for which a deduction is allowed under section 164(a) by reason of paragraph (6) thereof.'', and

(2) by inserting '', after the application of subparagraph (E),'' after ''for any period'' in subparagraph (B).

(d) DEDUCTION ALLOWED ABOVE-THE-LINE.—Section 62(a) of the Internal Revenue Code of 1986, as amended by section 1, is amended by inserting after paragraph (22) the following new paragraph:

''(23) QUALIFIED MOTOR VEHICLE TAXES.—The deduction allowed under section 164 by reason of subsection (a)(6) thereof.''.

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2008.

SA 105. Mr. CASEY submitted an amendment intended to be proposed to amendment SA 98 proposed by Mr. INOUYE (for himself and Mr. BAUCUS) to the bill H.R. 1, making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, and for other purposes; which was ordered to lie on the table; as follows:

On page 428, between lines 11 and 12, insert the following:

Subtitle D—Reports by the Government Accountability Office

SEC. 1551. REPORTS BY THE GOVERNMENT ACCOUNTABILITY OFFICE.

(a) REPORTS BY INSPECTORS GENERAL.—The inspector general of each agency that receives funds appropriated under this Act, shall submit reports on the oversight activities of that inspector general with respect to such funds to the Government Accountability Office in a form, containing such information, and at such times as the Comptroller General of the United States may determine to enable the Comptroller General to submit the reports required under subsection (b).

(b) REPORTS BY THE GOVERNMENT ACCOUNTABILITY OFFICE.—

(1) IN GENERAL.—The Comptroller General of the United States shall submit 3 reports to Congress that contain—

(A) a summary of the oversight activities of the offices of inspectors general described under subsection (a) relating to funds appropriated under this Act; and

(B) an evaluation of the effectiveness of this Act.

(2) SUBMISSION DATES.—The reports under this subsection shall be submitted not later than—

(A) 120 days after the date of enactment of this Act;

(B) 180 days after that date of enactment; and

(C) 240 days after that date of enactment.

PRIVILEGES OF THE FLOOR

Mr. BAUCUS. Mr. President, I ask unanimous consent that the following fellows, detailees, and interns of the Finance Committee be allowed floor privileges during the consideration of the America Recovery and Reinvestment Act: Mary Baker, Randy Debastiani, Pete Harvey, Laura

Hoffmeister, Matt Kazan, Michael London, Bridget Mallon, Vincent Mascia, Toni Miles, Aris Prosetiyo, Leslee Soudrette, Dan Stein, and Kelly Whitener.

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

Mr. REID. Mr. President, I ask unanimous consent that legislative fellows in the office of Senator KENNEDY, Lauren Gilchrist, Craig Martinez, Stephanie Hammonds, Taryn Morrissey, Joe Hutter, and Elisabeth Jacobs be granted floor privileges during the consideration of H.R. 1.

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

USERRA REGULATIONS

Mr. KAUFMAN. Mr. President, I ask unanimous consent that a communication to Senator BYRD from the Office of Compliance related to the USERRA regulations be printed in the RECORD.

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

OFFICE OF COMPLIANCE,
Washington, DC, January 26, 2009.

Re USERRA regulations.

Hon. ROBERT C. BYRD,
President pro tempore, U.S. Senate, Hart Office Building, Washington, DC.

DEAR SENATOR BYRD: Section 304(b)(3) of the Congressional Accountability Act of 1995 (CAA), 2 U.S.C. 1384(b)(3), requires that, with regard to substantive regulations under the CAA, after the Board has published a general notice of proposed rulemaking as required by subsection (b)(1), and received comments as required by subsection (b)(2), ''the Board shall adopt regulations and shall transmit notice of such action together with a copy of such regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the Congressional Record on the first day on which both Houses are in session following such transmittal.''

The Board of Directors of the Office of Compliance has adopted the proposed regulations in the Notice of Adoption of Substantive Regulations and Transmittal for Congressional Approval which accompany this transmittal letter. The Board requests that the accompanying Notice, ''S'' and ''C'' versions of the Adopted Regulations, and the Numbering Index be published in the Senate version of the Congressional Record on the first day on which both Houses are in session following receipt of this transmittal. The Board also requests that Congress approve the proposed Regulations, as further specified in the accompanying Notice.

Any inquiries regarding the accompanying Notice should be addressed to Tamara E. Chrisler, Executive Director of the Office of Compliance, 110 2nd Street, S.E., Room LA–200, Washington, D.C. 20540; 202–724–9250, TDD 202–426–1912.

Sincerely,

SUSAN S. ROBFOGEL,
Chair of the Board of Directors.

Text of USERRA Regulations

"S " Version

When approved by the Senate for the Senate, these regulations will have the prefix "S."

Subpart A: Introduction to the Regulations

§ 1002.1 What is the purpose of this part?

This part implements certain provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or "the Act"), as applied by the Congressional Accountability Act ("CAA"). 2 U.S.C. 1316. USERRA is a law that establishes certain rights and benefits for employees, and duties for employers. USERRA affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services. There are five subparts to these regulations. Subpart A gives an introduction to the USERRA regulations. Subpart B describes USERRA's anti-discrimination and anti-retaliation provisions. Subpart C explains the steps that must be taken by a uniformed service member who wants to return to his or her previous civilian employment. Subpart D describes the rights, benefits, and obligations of persons absent from employment due to service in the uniformed services, including rights and obligations related to health plan coverage. Subpart E describes the rights, benefits, and obligations of the returning veteran or service member. Subpart F explains the role of the Office of Compliance in administering USERRA as applied by the CAA.

§ 1002.2 Is USERRA a new law?

USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was commonly referred to as the Veterans' Reemployment Rights Act ("VRRA"), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. In enacting USERRA, Congress emphasized USERRA's continuity with the VRRA and its intention to clarify and strengthen that law. Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA. USERRA authorized the Department of Labor to publish regulations implementing the Act for State, local government, and private employers. USERRA also authorized the Office of Personnel Management to issue regulations implementing the Act for Federal executive agencies, with the exception of certain Federal intelligence agencies. For those Federal intelligence agencies, USERRA established a separate program for employees. Section 206 of the CAA requires the Board of Directors of the Office of Compliance to issue regulations to implement the statutory provisions relating to employment and reemployment rights of members of the uniformed services. The regulations are required to be the same as substantive regulations promulgated by the Secretary of Labor, except where a modification of such regulations would be more effective for the implementation of the rights and protections of the Act. The Department of Labor issued its regulations, effective January 18, 2006. The regulations set forth herein are the substantive regulations that the Board of Directors of the Office of Compliance has promulgated for the legislative branch, for the implementation of the USERRA provisions of the CAA. All references to USERRA in these regulations, means USERRA, as applied by the CAA.

§ 1002.3 When did USERRA become effective?
USERRA, as applied by the CAA, became effective for employing offices of the legislative branch on January 23, 1996. These regulations will become effective upon approval by Congress.

§ 1002.4 What is the role of the Executive Director of the Office of Compliance under the USERRA provisions of the CAA?
(a) As applied by the CAA, the Executive Director of the Office of Compliance is responsible for providing education and information to any covered employing office or employee with respect to their rights, benefits, and obligations under the USERRA provisions of the CAA.
(b) The Office of Compliance, under the direction of the Executive Director, is responsible for the processing of claims filed pursuant to these regulations. More information about the Office of Compliance's role is contained in Subpart F.

§ 1002.5 What definitions apply to these USERRA regulations?
(a) **Act or USERRA** means the Uniformed Services Employment and Reemployment Rights Act of 1994, as applied by the CAA.
(b) **Benefit, benefit of employment, or rights and benefits** means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues to the employee because of an employment contract, employment agreement, or employing office policy, plan, or practice. The term includes rights and benefits under a pension plan, health plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and, where applicable, the opportunity to select work hours or the location of employment.
(c) **Board** means Board of Directors of the Office of Compliance.
(d) **CAA** means the Congressional Accountability Act of 1995, as amended (Pub. L. 104-1, 109 Stat. 3, 2 U.S.C. §§ 1301-1438).
(e) **Covered employee** means any employee, including an applicant for employment and a former employee, of (1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Government Accountability Office; (9) the Library of Congress; and (10) the Office of Compliance.
(f) **Eligible employee** means a covered employee performing service in the uniformed services, as defined in 1002.5 (t) of this subpart, whose service has not been terminated upon occurrence of any of the events enumerated in section 1002.135 of these regulations. For the purpose of defining who is covered under the discrimination section of these regulations, "performing service" means an eligible employee who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services.
(g) **Employee of the Office of the Architect of the Capitol** includes any employee of the Office of the Architect of the Capitol, the Botanic Gardens, or the Senate Restaurants.
(h) **Employee of the Capitol Police** includes any member or officer of the Capitol Police.
(i) **Employee of the House of Representatives** includes an individual occupying a position for which the pay is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not

any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.
(j) **Employee of the Senate** includes an individual occupying a position for which the pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.
(k) **Employing office** means (1) the personal office of a Senator; (2) a committee of the Senate or a joint committee of the House of Representatives and the Senate; (3) any other office headed by a person with the final authority to appoint, or be directed by a Member of Congress to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the Senate.
(l) **Health plan** means an insurance policy, insurance contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.
(m) **Notice**, when the eligible employee is required to give advance notice of service, means any written or oral notification of an obligation or intention to perform service in the uniformed services provided to an employing office by the employee who will perform such service, or by the uniformed service in which the service is to be performed.
(n) **Office** means the Office of Compliance.
(o) **Qualified**, with respect to an employment position, means having the ability to perform the essential tasks of the position.
(p) **Reasonable efforts**, in the case of actions required of an employing office, means actions, including training provided by an employing office that do not place an undue hardship on the employing office.
(q) **Seniority** means longevity in employment together with any benefits of employment that accrue with, or are determined by, longevity in employment.
(r) **Service in the uniformed services** means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. Service in the uniformed services includes active duty, active and inactive duty for training, National Guard duty under Federal statute, and a period for which a person is absent from a position of employment for an examination to determine the fitness of the person to perform such duty. The term also includes a period for which a person is absent from employment to perform funeral honors duty as authorized by law (10 U.S.C. 12503 or 32 U.S.C. 115). The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107– 188, provides that service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System (NDMS) or as a participant in an authorized training program is deemed "service in the uniformed services." 42 U.S.C. 300hh– 11(d)(3).
(s) **Undue hardship**, in the case of actions taken by an employing office, means an action requiring significant difficulty or expense, when considered in light of—
(1) The nature and cost of the action needed under USERRA and these regulations; (2) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (3) The overall financial resources of the employing office; the overall size of the business of an employing office with respect to the number of its employees; the number, type, and location of its facilities; and, (4) The type of operation or operations of the employing office, including the composition, structure, and functions of the work force of such employing office; the geographic

separateness, administrative, or fiscal relationship of the State, District, or satellite office in question to the employing office.

(t) **Uniformed services** means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the National Disaster Medical System (NDMS) when federally activated or attending authorized training in support of their Federal mission is deemed "service in the uniformed services," although such appointee is not a member of the "uniformed services" as defined by USERRA.

§ 1002.6 What types of service in the uniformed services are covered by USERRA?

The definition of "service in the uniformed services" covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.

§ 1002.7 How does USERRA, as applied by the Congressional Accountability Act, relate to other laws, public and private contracts, and employing office practices?

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employing office may provide greater rights and benefits than USERRA requires, but no employing office can refuse to provide any right or benefit guaranteed by USERRA, as applied by the CAA.

(b) USERRA supersedes any contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an office policy that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not supersede, nullify or diminish any Federal law, contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employing office to pay an eligible employee for time away from work performing service, an employing office policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employing office provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employing office may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employing office to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.

Subpart B: Anti-Discrimination and Anti-Retaliation

PROTECTION FROM EMPLOYER DISCRIMINATION AND RETALIATION

§ 1002.18 What status or activity is protected from employer discrimination by USERRA?
An employing office must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.

§ 1002.19 What activity is protected from employer retaliation by USERRA?
An employing office must not retaliate against an eligible employee by taking any adverse employment action against him or her because the eligible employee has taken an action to enforce a protection afforded any person under USERRA; testified or otherwise made a statement in or in connection with a proceeding under USERRA; assisted or participated in a USERRA investigation; or exercised a right provided for by USERRA.

§ 1002.20 Does USERRA's prohibitions against discrimination and retaliation apply to all employment positions?
Under USERRA, as applied by the CAA, the prohibitions against discrimination and retaliation apply to eligible employees in all positions within covered employing offices, including those that are for a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. However, USERRA's reemployment rights and benefits do not apply to such brief, non-recurrent positions of employment

§ 1002.21 Does USERRA protect a covered employee who has not actually performed service in the uniformed services?
USERRA's provisions, as applied by Section 206 of the CAA, prohibit discrimination and retaliation only against eligible employees. Section 207(a) of the CAA, however, prohibits retaliation against all covered employees because the employee has opposed any practice made unlawful under the CAA, including a violation of USERRA's provisions, as applied by the CAA; or testified; assisted; or participated in any manner in a hearing or proceeding under the CAA.

Subpart C – Eligibility for Reemployment

GENERAL ELIGIBILITY FOR REEMPLOYMENT

§ 1002.32 What criteria must an employee meet to be eligible under USERRA for reemployment after service in the uniformed services?
(a) In general, if an eligible employee has been absent from a position of employment in an employing office by reason of service in the uniformed services, he or she will be eligible for reemployment in that same employing office, if that employing office continues to exist at such time, by meeting the following criteria:
(1) The employing office had advance notice of the eligible employee's service; (2) The eligible employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employing office; (3) The eligible employee timely returns to work or applies for reemployment; and, (4) The eligible employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.
(b) These general eligibility requirements have important qualifications and exceptions, which are described in detail in §§ 1002.73 through 1002.138. If the employee meets these eligibility criteria, then he or she is eligible for reemployment unless the employing office establishes one of the defenses described in § 1002.139. The employment position to which the eligible employee is entitled is described in §§ 1002.191 through 1002.199.

§ 1002.33 Does the eligible employee have to prove that the employing office discriminated against him or her in order to be eligible for reemployment?
No. The eligible employee is not required to prove that the employing office discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment

COVERAGE OF EMPLOYERS AND POSITIONS

§ 1002.34 Which employing offices are covered by these regulations?
(a) USERRA applies to all covered employing offices of the legislative branch as defined in 2 U.S.C. § 1301(9) and 2 U.S.C.§ 1316(a)(2)(C).

§ 1002.40 Does USERRA protect against discrimination in initial hiring decisions?
Yes. The definition of employer in the USERRA provision as applied by the CAA includes an employing office that has denied initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employing office need not actually employ an individual to be liable under the Act, if it has denied initial employment on the basis of the individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Similarly, the employing office would be liable if it denied initial employment on the basis of the individual's action taken to enforce a protection afforded to any person under USERRA, his or her testimony or statement in connection with any USERRA proceeding, assistance or other participation in a USERRA investigation, or the exercise of any other right provided by the Act. For example, if the individual has been denied initial employment because of his or her obligations as a member of the National Guard or Reserves, the employing office denying employment is liable under USERRA. Similarly, if an employing office withdraws an offer of employment because the individual is called upon to fulfill an

obligation in the uniformed services, the employing office withdrawing the employment offer is also liable under USERRA.

§ 1002.41 Does an eligible employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?
USERRA rights are not diminished because an eligible employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employing office is not required to reemploy an eligible employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employing office bears the burden of proving this affirmative defense.

§ 1002.42 What rights does an eligible employee have under USERRA if he or she is on layoff or on a leave of absence?
(a) If an eligible employee is laid off with recall rights, or on a leave of absence, he or she is protected under USERRA. If the eligible employee is on layoff and begins service in the uniformed services, or is laid off while performing service, he or she may be entitled to reemployment on return if the employing office would have recalled the employee to employment during the period of service. Similar principles apply if the eligible employee is on a leave of absence from work when he or she begins a period of service in the uniformed services.
(b) If the eligible employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she still remains an eligible employee for purposes of the Act. Therefore, if the employee is otherwise eligible, he or she is entitled to reemployment following the conclusion of the period of service, even if he or she did not respond to the recall notice.
(c) If the eligible employee is laid off before or during service in the uniformed services, and the employing office would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is an eligible employee. Reemployment rights under USERRA cannot put the eligible employee in a better position than if he or she had remained in the civilian employment position.

§ 1002.43 Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?
Yes. USERRA applies to all eligible employees. There is no exclusion for executive, managerial, or professional employees.

§ 1002.44 Does USERRA cover an independent contractor?
No. USERRA, as applied by the CAA, does not provide protections for an independent contractor.

COVERAGE OF SERVICE IN THE UNIFORMED SERVICES

§ 1002.54 Are all military fitness examinations considered "service in the uniformed services?"
Yes. USERRA's definition of "service in the uniformed services" includes a period for which an eligible employee is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services. Military fitness examinations can address more than physical or medical fitness, and include evaluations for

mental, educational, and other types of fitness. Any examination to determine an eligible employee's fitness for service is covered, whether it is an initial or recurring examination. For example, a periodic medical examination required of a Reserve component member to determine fitness for continued service is covered.

§ 1002.55 Is all funeral honors duty considered "service in the uniformed services?"

(a) USERRA's definition of "service in the uniformed services" includes a period for which an eligible employee is absent from employment for the purpose of performing authorized funer honors duty under 10 U.S.C. 12503 (members of Reserve ordered to perform funeral honors duty) or 32 U.S.C. 115 (Member of Air or Army National Guard ordered to perform funeral honors duty).

(b) Funeral honors duty performed by persons who are not members of the uniformed servic such as members of veterans' service organizations, is not "service in the uniformed services.'

§ 1002.56 What types of service in the National Disaster Medical System are considered "service in the uniformed services?"

Under a provision of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42 U.S.C. 300hh 11(d)(3), "service in the uniformed services" includes service performed as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or participation in an authorized training program, even if the eligible employee is not a member of the uniformed services.

§ 1002.57 Is all service as a member of the National Guard considered "service in the uniformed services?"

No. Only Federal National Guard Service is considered "service in the uniformed services." The National Guard has a dual status. It is a Reserve component of the Army, or, in the case of the Air National Guard, of the Air Force. Simultaneously, it is a State military force subject to call-u by the State Governor for duty not subject to Federal control, such as emergency duty in cases of floods or riots. National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.

(a) National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty performed under Title 10 of the United States Code. Service under Federal authority also includes duty under Title 32 of the United States Code, su as active duty for training, inactive duty training, or full-time National Guard duty.

(b) National Guard service under authority of State law is not protected by USERRA. However, many States have laws protecting the civilian job rights of National Guard members who serve under State orders. Enforcement of those State laws is not covered by USERRA or these regulations.

§ 1002.58 Is service in the commissioned corps of the Public Health Service considered "service in the uniformed services?"

Yes. Service in the commissioned corps of the Public Health Service (PHS) is "service in the uniformed services" under USERRA.

§ 1002.59 Are there any circumstances in which special categories of persons are considered to perform "service in the uniformed services?"

Yes. In time of war or national emergency, the President has authority to designate any category of persons as a "uniformed service" for purposes of USERRA. If the President exercises this authority, service as a member of that category of persons would be "service in the uniformed services" under USERRA.

§ 1002.60 Does USERRA cover an individual attending a military service academy?

Yes. Attending a military service academy is considered uniformed service for purposes of USERRA. There are four service academies: The United States Military Academy (West Point, New York), the United States Naval Academy (Annapolis, Maryland), the United States Air Force Academy (Colorado Springs, Colorado), and the United States Coast Guard Academy (New London, Connecticut).

§ 1002.61 Does USERRA cover a member of the Reserve Officers Training Corps?

Yes, under certain conditions:

(a) Membership in the Reserve Officers Training Corps (ROTC) or the Junior ROTC is not "service in the uniformed services." However, some Reserve and National Guard enlisted members use a college ROTC program as a means of qualifying for commissioned officer status. National Guard and Reserve members in an ROTC program may at times, while participating in that program, be receiving active duty and inactive duty training service credit with their unit. In these cases, participating in ROTC training sessions is considered "service in the uniformed services," and qualifies a person for protection under USERRA's reemployment and anti-discrimination provisions.

(b) Typically, an individual in a College ROTC program enters into an agreement with a particular military service that obligates such individual to either complete the ROTC program and accept a commission or, in case he or she does not successfully complete the ROTC program, to serve as an enlisted member. Although an individual does not qualify for reemployment protection, except as specified in (a) above, he or she is protected under USERRA's anti-discrimination provisions because, as a result of the agreement, he or she has applied to become a member of the uniformed services and has incurred an obligation to perform future service.

§ 1002.62 Does USERRA cover a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?

No. Although the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) is a "uniformed service" for some purposes, it is not included in USERRA's definition of this term. Service in the Civil Air Patrol and the Coast Guard Auxiliary similarly is not considered "service in the uniformed services" for purposes of USERRA. Consequently, service performed in the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA), the Civil Air Patrol, and the Coast Guard Auxiliary is not protected by USERRA.

ABSENCE FROM A POSITION OF EMPLOYMENT NECESSITATED BY REASON OF SERVICE IN THE UNIFORMED SERVICES

§ 1002.73 Does service in the uniformed services have to be an eligible employee's sole reason for leaving an employment position in order to have USERRA reemployment rights?
No. If absence from a position of employment is necessitated by service in the uniformed services, and the employee otherwise meets the Act's eligibility requirements, he or she has reemployment rights under USERRA, even if the eligible employee uses the absence for other purposes as well. An eligible employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services, although such uniformed service must be the main reason for departure from employment. For example, if the eligible employee is required to report to an out of state location for military training and he or she spends off-duty time during that assignment moonlighting as a security guard or visiting relatives who live in that State, the eligible employee will not lose reemployment rights simply because he or she used some of the time away from the job to do something other than attend the military training. Also, if an eligible employee receives advance notification of a mobilization order, and leaves his or her employment position in order to prepare for duty, but the mobilization is cancelled, the employee will not lose any reemployment rights.

§ 1002.74 Must the eligible employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?
No. At a minimum, an eligible employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning service in the uniformed services:
(a) If the eligible employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the eligible employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the eligible employee can report for uniformed service fit for duty.
(b) If the eligible employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.
(c) If the eligible employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.

§ 1002.85 Must the eligible employee give advance notice to the employing office of his or her service in the uniformed services?
(a) Yes. The eligible employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employing office that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an eligible employee is employed by more than one employing office, the employee, or an appropriate officer of the uniformed service in which

his or her service is to be performed, must notify each employing office that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.

(b) The Department of Defense USERRA regulations at 32 CFR 104.3 provide that an "appropriate officer" can give notice on the eligible employee's behalf. An "appropriate officer" is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.

(c) The eligible employee's notice to the employing office may be either oral or written. The notice may be informal and does not need to follow any particular format.

(d) Although USERRA does not specify how far in advance notice must be given to the employing office, an eligible employee should provide notice as far in advance as is reasonable under the circumstances. In regulations promulgated by the Department of Defense under USERRA, 32 CFR 104.6(a)(2)(i)(B), the Defense Department "strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so."

§ 1002.86 When is the eligible employee excused from giving advance notice of service in the uniformed services?

The eligible employee is required to give advance notice of pending service unless giving such notice is prevented by military necessity, or is otherwise impossible or unreasonable under all the circumstances.

(a) Only a designated authority can make a determination of "military necessity," and such a determination is not subject to judicial review. Guidelines for defining "military necessity" appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by "military necessity." See 42 U.S.C300hh–11(d)(3)(B).

(b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the eligible employee's employing office or the employing office's representative, or a requirement that the eligible employee report for uniformed service in an extremely short period of time.

§ 1002.87 Is the eligible employee required to get permission from his or her employing office before leaving to perform service in the uniformed services?

No. The eligible employee is not required to ask for or get the employing office's permission to leave to perform service in the uniformed services. The eligible employee is only required to give the employing office notice of pending service.

§ 1002.88 Is the eligible employee required to tell the employing office that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the eligible employee leaves the employment position to begin a period of service, he or she is not required to tell the employing office that he or she intends to seek reemployment after completing uniformed service. Even if the eligible employee tells the employing office before entering or completing uniformed service that he or she does not intend to seek

reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The eligible employee is not required to decide in advance of leaving the position with the employing office, whether he or she will seek reemployment after completing uniformed service.

PERIOD OF SERVICE

§ 1002.99 Is there a limit on the total amount of service in the uniformed services that an eligible employee may perform and still retain reemployment rights with the employing office?

Yes. In general, the eligible employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employing office. The exceptions to this rule are described below.

§ 1002.100 Does the five-year service limit include all absences from an employment position that are related to service in the uniformed services?

No. The five-year period includes only the time the eligible employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the eligible employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

§ 1002.101 Does the five-year service limit include periods of service that the eligible employee performed when he or she worked for a previous employing office?

No. An eligible employee is entitled to a leave of absence for uniformed service for up to five years with each employing office for whom he or she works or has worked. When the eligible employee takes a position with a new employing office, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an eligible employee is employed by more than one employing office, a separate five-year period runs as to each employing office independently, even if those employing offices share or co-determine the employee's terms and conditions of employment. For example, an eligible employee of the legislative branch may work part-time for two employing offices. In this case, a separate five-year period would run as to the eligible employee's employment with each respective employing office.

§ 1002.102 Does the five-year service limit include periods of service that the eligible employee performed before USERRA was enacted?

It depends. Under the CAA, USERRA provides reemployment rights to which an eligible employee may become entitled beginning on or after January 23, 1996, but any uniformed service performed before January 23, 1996, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA's five-year limit.

§ 1002.103 Are there any types of service in the uniformed services that an eligible employee can perform that do not count against USERRA's five-year service limit?

(a) USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the eligible employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the eligible employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault;

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and, (ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the eligible employee's professional development, or to complete skill training or retraining;

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:

(i) 10 U.S.C. 688 (involuntary active duty by a military retiree);

(ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);

(iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);

(iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);

(v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);

(vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);

(vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);

(viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);

(ix) 14 U.S.C. 359 (involuntary active duty by retired Coast Guard enlisted member);

(x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);

(xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty); and

(xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service performed in a uniformed service if the eligible employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(6) Service performed in a uniformed service if the eligible employee was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304, as determined by a proper military authority;

(7) Service performed in a uniformed service if the eligible employee was ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned; and,

(8) Service performed as a member of the National Guard if the eligible employee was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States.

(b) Service performed in a uniformed service to mitigate economic harm where the eligible employee's employing office is in violation of its employment or reemployment obligations to him or her.

§ 1002.104 Is the eligible employee required to accommodate his or her employing office's needs as to the timing, frequency or duration of service?

No. The eligible employee is not required to accommodate his or her employing office's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employing office cannot refuse to reemploy the eligible employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employing office is permitted to bring its concerns over the timing, frequency, or duration of the eligible employee's service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.

APPLICATION FOR EMPLOYMENT

§ 1002.115 Is the eligible employee required to report to or submit a timely application for reemployment to his or her pre-service employing office upon completing the period of service in the uniformed services?

Yes. Upon completing service in the uniformed services, the eligible employee must notify the pre-service employing office of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the eligible employee is required to report to work or submit a timely application for reemployment depends upon the length of service, as follows:

(a) Period of service less than 31 days or for a period of any length for the purpose of a fitness examination. If the period of service in the uniformed services was less than 31 days, or the eligible employee was absent from a position of employment for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the eligible employee must report back to the employing office not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the eligible employee's residence. For example, if the eligible employee completes a period of service and travel home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employing office until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six o'clock the next morning. If it is impossible or unreasonable for the eligible employee to report within such time period through no fault of his or her own, he or she must report to the employing office as soon as possible after the expiration of the eight-hour period.

(b) Period of service more than 30 days but less than 181 days. If the eligible employee's period of service in the uniformed services was for more than 30 days but less than 181 days, he or she must submit an application for reemployment (written or oral) with the employing office not later than 14 days after completing service. If it is impossible or unreasonable for the eligible

employee to apply within 14 days through no fault of his or her own, he or she must submit the application not later than the next full calendar day after it becomes possible to do so.
(c) Period of service more than 180 days. If the eligible employee's period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or oral) not later than 90 days after completing service.

§1002.116 Is the time period for reporting back to an employing office extended if the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?
Yes. If the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an application for reemployment to the employing office at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the eligible employee's control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employing office, and is not applicable following reemployment.

§ 1002.117 Are there any consequences if the eligible employee fails to report for or submit a timely application for reemployment?
(a) If the eligible employee fails to timely report for or apply for reemployment, he or she does not automatically forfeit entitlement to USERRA's reemployment and other rights and benefits. However, the eligible employee does become subject to any conduct rules, established policy, and general practices of the employing office pertaining to an absence from scheduled work.
(b) If reporting or submitting an employment application to the employing office is impossible or unreasonable through no fault of the eligible employee, he or she may report to the employing office as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to the employing office by the next full calendar day after it becomes possible to do so (in the case of a period of service from 31 to 180 days), and the eligible employee will be considered to have timely reported or applied for reemployment.

§ 1002.118 Is an application for reemployment required to be in any particular form?
An application for reemployment need not follow any particular format. The eligible employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employing office. The eligible employee is permitted but not required to identify a particular reemployment position in which he or she is interested.

§ 1002.119 To whom must the eligible employee submit the application for reemployment?
The application must be submitted to the pre-service employing office or to an agent or representative of the employing office who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor.

§ 1002.120 If the eligible employee seeks or obtains employment with an employer other than the pre-service employing office before the end of the period within which a reemployment application must be filed, will that jeopardize reemployment rights with the pre-service employing office?

No. The eligible employee has reemployment rights with the pre-service employing office provided that he or she makes a timely reemployment application to that employing office. The eligible employee may seek or obtain employment with an employer other than the pre-service employing office during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employing office. However, such alternative employment during the application period should not be of a type that would constitute a cause for the employing office to discipline or terminate the employee following reemployment. For instance, if the employing office forbids outside employment, violation of such a policy may constitute a cause for discipline or even termination.

§ 1002.121 Is the eligible employee required to submit documentation to the employing office in connection with the application for reemployment?

Yes, if the period of service exceeded 30 days and if requested by the employing office to do so. If the eligible employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employing office, provide documentation to establish that:

(a) The reemployment application is timely;

(b) The eligible employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,

(c) The eligible employee's separation or dismissal from service was not disqualifying.

§ 1002.122 Is the employing office required to reemploy the eligible employee if documentation establishing the employee's eligibility does not exist or is not readily available?

Yes. The employing office is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The eligible employee is not liable for administrative delays in the issuance of military documentation. If the eligible employee is re-employed after an absence from employment for more than 90 days, the employing office may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the eligible employee is not entitled to reemployment, the employing office may terminate employment and any rights or benefits that the employee may have been granted.

§ 1002.123 What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?

(a) Documents that satisfy the requirements of USERRA include the following:

(1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;

(2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;

(3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;

(4) Certificate of completion from military training school;

(5) Discharge certificate showing character of service; and,
(6) Copy of extracts from payroll documents showing periods of service;
(7) Letter from NDMS Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.
(b) The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.

CHARACTER OF SERVICE

§ 1002.134 What type of discharge or separation from service is required for an eligible employee to be entitled to reemployment under USERRA?
USERRA does not require any particular form of discharge or separation from service. However, even if the employee is otherwise eligible for reemployment, he or she will be disqualified if the characterization of service falls within one of four categories. USERRA requires that the employee not have received one of these types of discharge.

§ 1002.135 What types of discharge or separation from uniformed service will make the employee ineligible for reemployment under USERRA?
Reemployment rights are terminated if the employee is:
(a) Separated from uniformed service with a dishonorable or bad conduct discharge;
(b) Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;
(c) A commissioned officer dismissed as permitted under 10 U.S.C. 1161(a) by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or,
(d) A commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

§ 1002.136 Who determines the characterization of service?
The branch of service in which the employee performs the tour of duty determines the characterization of service.

§ 1002.137 If the employee receives a disqualifying discharge or release from uniformed service and it is later upgraded, will reemployment rights be restored?
Yes. A military review board has the authority to prospectively or retroactively upgrade a disqualifying discharge or release. A retroactive upgrade would restore reemployment rights providing the employee otherwise meets the Act's eligibility criteria.

§ 1002.138 If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to claim back wages and benefits lost as of the date of separation from service?
No. A retroactive upgrade allows the employee to obtain reinstatement with the former employing office, provided the employee otherwise meets the Act's eligibility criteria. Back pay and other benefits such as pension plan credits attributable to the time period between

discharge and the retroactive upgrade are not required to be restored by the employing office in this situation.

EMPLOYER STATUTORY DEFENSES

§ 1002.139 Are there any circumstances in which the pre-service employing office is excused from its obligation to reemploy the eligible employee following a period of uniformed service? What statutory defenses are available to the employing office in an action or proceeding for reemployment benefits?

(a) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if the employing office establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employing office may be excused from re-employing the eligible employee where there has been an intervening reduction in force that would have included that employee. The employing office may not, however, refuse to reemploy the eligible employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee;

(b) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if it establishes that assisting the eligible employee in becoming qualified for reemployment would impose an undue hardship, as defined in § 1002.5(s) and discussed in § 1002.198, on the employing office; or,

(c) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if it establishes that the employment position vacated by the eligible employee in order to perform service in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

(d) The employing office defenses included in this section are affirmative ones, and the employing office carries the burden to prove by a preponderance of the evidence that any one or more of these defenses is applicable.

Subpart D—Rights, Benefits, and Obligations of Persons Absent from Employment Due to Service in the Uniformed Services

FURLOUGH AND LEAVE OF ABSENCE

§ 1002.149 What is the eligible employee's status with the employing office while performing service in the uniformed services?

During a period of service in the uniformed services, the eligible employee is deemed to be on leave of absence from the employing office. In this status, the eligible employee is entitled to the non-seniority rights and benefits generally provided by the employing office to other employees with similar seniority, status, and pay that are on leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employing office characterizes the eligible employee's status during a period of service. For example, if the employing office characterizes the employee as "terminated" during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on leave of absence, and therefore, entitled to the non-seniority rights and benefits generally provided to employees on leave of absence.

§ 1002.150 Which non-seniority rights and benefits is the eligible employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an eligible employee is entitled during a period of service are those that the employing office provides to similarly situated employees by an agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the eligible employee's employment and those established after employment began. They also include those rights and benefits that become effective during the eligible employee's period of service and that are provided to similarly situated employees on leave of absence.

(b) If the non-seniority benefits to which employees on leave of absence are entitled vary according to the type of leave, the eligible employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employing office to an eligible employee on a military leave of absence only if the employing office provides that benefit to similarly situated employees on comparable leaves of absence.

(d) Nothing in this section gives the eligible employee rights or benefits to which the employee otherwise would not be entitled if the employee had remained continuously employed with the employing office.

§ 1002.151 If the employing office provides full or partial pay to the eligible employee while he or she is on military leave, is the employing office required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

Yes. If the employing office provides additional benefits such as full or partial pay when the eligible employee performs service, the employing office is not excused from providing other rights and benefits to which the employee is entitled under the Act.

§ 1002.152 If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the eligible employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

If employment is interrupted by a period of service in the uniformed services and the eligible employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those non-seniority rights and benefits. The eligible employee's written notice does not waive entitlement to any other rights to which he or she is entitled under the Act, including the right to reemployment after service.

§ 1002.153 If employment is interrupted by a period of service in the uniformed services, is the eligible employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employing office require the eligible employee to use accrued leave during a period of service?

(a) If employment is interrupted by a period of service, the eligible employee must be permitted upon request to use any accrued vacation, annual, or similar leave with pay during the period of service, in order to continue his or her civilian pay. However, the eligible employee is not entitled to use sick leave that accrued with the employing office during a period of service in the uniformed services, unless the employing office allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. Sick leave is usually not comparable to annual or vacation leave; it is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.

(b) The employing office may not require the eligible employee to use accrued vacation, annual, or similar leave during a period of service in the uniformed services.

HEALTH PLAN COVERAGE

§ 1002.163 What types of health plans are covered by USERRA?

(a) USERRA defines a health plan to include an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or arrangement under which the employee's health services are provided or the expenses of those services are paid.

(b) USERRA covers group health plans as defined in the Employee Retirement Income Security Act of 1974 (ERISA) at 29 U.S.C. 1191b(a). USERRA applies to group health plans that are subject to ERISA, and plans that are not subject to ERISA, such as those sponsored by the Federal Government.

(c) USERRA covers multi-employer plans maintained pursuant to one or more collective bargaining agreements between employers and employee organizations. USERRA applies to

multi-employer plans as they are defined in ERISA at 29 U.S.C. 1002(37). USERRA contains provisions that apply specifically to multi-employer plans in certain situations.

§ 1002.164 What health plan coverage must the employing office provide for the eligible employee under USERRA?

If the eligible employee has coverage under a health plan in connection with his or her employment, the plan must permit the employee to elect to continue the coverage for a certain period of time as described below:

(a) When the eligible employee is performing service in the uniformed services, he or she is entitled to continuing coverage for himself or herself (and dependents if the plan offers dependent coverage) under a health plan provided in connection with the employment. The plan must allow the eligible employee to elect to continue coverage for a period of time that is the lesser of:

(1) The 24-month period beginning on the date on which the eligible employee's absence for the purpose of performing service begins; or,

(2) The period beginning on the date on which the eligible employee's absence for the purpose of performing service begins, and ending on the date on which he or she fails to return from service or apply for a position of employment as provided under sections 1002.115–123 of these regulations.

(b) USERRA does not require the employing office to establish a health plan if there is no health plan coverage in connection with the employment, or, where there is a plan, to provide any particular type of coverage.

(c) USERRA does not require the employing office to permit the eligible employee to initiate new health plan coverage at the beginning of a period of service if he or she did not previously have such coverage.

§ 1002.165 How does the eligible employee elect continuing health plan coverage?

USERRA does not specify requirements for electing continuing coverage. Health plan administrators may develop reasonable requirements addressing how continuing coverage may be elected, consistent with the terms of the plan and the Act's exceptions to the requirement that the employee give advance notice of service in the uniformed services. For example, the eligible employee cannot be precluded from electing continuing health plan coverage under circumstances where it is impossible or unreasonable for him or her to make a timely election of coverage.

§ 1002.166 How much must the eligible employee pay in order to continue health plan coverage?

(a) If the eligible employee performs service in the uniformed service for fewer than 31 days, he or she cannot be required to pay more than the regular employee share, if any, for health plan coverage.

(b) If the eligible employee performs service in the uniformed service for 31 or more days, he or she may be required to pay no more than 102% of the full premium under the plan, which represents the employing office's share plus the employee's share, plus 2% for administrative costs.

(c)USERRA does not specify requirements for methods of paying for continuing coverage. Health plan administrators may develop reasonable procedures for payment, consistent with the terms of the plan.

§ 1002.167 What actions may a plan administrator take if the eligible employee does not elect or pay for continuing coverage in a timely manner?

The actions a plan administrator may take regarding the provision or cancellation of an eligible employee's continuing coverage depend on whether the employee is excused from the requirement to give advance notice, whether the plan has established reasonable rules for election of continuation coverage, and whether the plan has established reasonable rules for the payment for continuation coverage.

(a) No notice of service and no election of continuation coverage:

If an employing office provides employment-based health coverage to an eligible employee who leaves employment for uniformed service without giving advance notice of service, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service. However, in cases in which an eligible employee's failure to give advance notice of service was excused under the statute because it was impossible, unreasonable, or precluded by military necessity, the plan administrator must reinstate the employee's health coverage retroactively upon his or her election to continue coverage and payment of all unpaid amounts due, and the employee must incur no administrative reinstatement costs. In order to qualify for an exception to the requirement of timely election of continuing health care, an eligible employee must first be excused from giving notice of service under the statute.

(b) Notice of service but no election of continuing coverage:

Plan administrators may develop reasonable requirements addressing how continuing coverage may be elected. Where health plans are also covered under the Consolidated Omnibus Budget Reconciliation Act of 1985, 26 U.S.C. 4980B (COBRA), it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding election of continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule. If an employing office provides employment-based health coverage to an eligible employee who leaves employment for uniformed service for a period of service in excess of 30 days after having given advance notice of service but without making an election regarding continuing coverage, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service, but must reinstate coverage without the imposition of administrative reinstatement costs under the following conditions:

(1) Plan administrators who have developed reasonable rules regarding the period within which an employee may elect continuing coverage must permit retroactive reinstatement of uninterrupted coverage to the date of departure if the eligible employee elects continuing coverage and pays all unpaid amounts due within the periods established by the plan; (2) In cases in which plan administrators have not developed rules regarding the period within which an employee may elect continuing coverage, the plan must permit retroactive reinstatement of uninterrupted coverage to the date of departure upon the eligible employee's election and payment of all unpaid amounts at any time during the period established in section 1002.164(a).

(c) Election of continuation coverage without timely payment:

Health plan administrators may adopt reasonable rules allowing cancellation of coverage if timely payment is not made. Where health plans are covered under COBRA, it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding payment for continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule.

§ 1002.168 If the eligible employee's coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?
(a) If health plan coverage for the eligible employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service.
(b) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that are not service-related (or for the employee's dependents, if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section.

§ 1002.169 Can the eligible employee elect to delay reinstatement of health plan coverage until a date after the date he or she is reemployed?
USERRA requires the employing office to reinstate or direct the reinstatement of health plan coverage upon request at reemployment. USERRA permits but does not require the employing office to allow the employee to delay reinstatement of health plan coverage until a date that is later than the date of reemployment.

§ 1002.170 In a multi-employer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?
Liability under a multi-employer plan for employer contributions and benefits in connection with USERRA's health plan provisions must be allocated either as the plan sponsor provides, or, if the sponsor does not provide, to the eligible employee's last employer before his or her service. If the last employer is no longer functional, liability for continuing coverage is allocated to the health plan.

§ 1002.171 How does the continuation of health plan benefits apply to a multi-employer plan that provides health plan coverage through a health benefits account system?
(a) Some employees receive health plan benefits provided pursuant to a multi-employer plan that utilizes a health benefits account system in which an employee accumulates prospective health benefit eligibility, also commonly referred to as "dollar bank," "credit bank," and "hour bank" plans. In such cases, where an employee with a positive health benefits account balance elects to continue the coverage, the employee may further elect either option below:
(1) The eligible employee may expend his or her health account balance during an absence from employment due to service in the uniformed services in lieu of paying for the continuation of coverage as set out in § 1002.166. If an eligible employee's health account balance becomes depleted during the applicable period provided for in § 1002.164(a), the employee must be permitted, at his or her option, to continue coverage pursuant to § 1002.166. Upon reemployment, the plan must provide for immediate reinstatement of the eligible employee as required by § 1002.168, but may require the employee to pay the cost of the coverage until the employee earns the credits necessary to sustain continued coverage in the plan.

(2) The eligible employee may pay for continuation coverage as set out in § 1002.166, in order to maintain intact his or her account balance as of the beginning date of the absence from employment due to service in the uniformed services. This option permits the eligible employee to resume usage of the account balance upon reemployment.

(b) Employers or plan administrators providing such plans should counsel employees of their options set out in this subsection.

Subpart E—Reemployment Rights and Benefits

PROMPT REEMPLOYMENT

§ 1002.180 When is an eligible employee entitled to be reemployed by the employing office?
The employing office must promptly reemploy the employee when he or she returns from a period of service if the employee meets the Act's eligibility criteria as described in Subpart C of these regulations.

§ 1002.181 How is "prompt reemployment" defined?
"Prompt reemployment" means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the eligible employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employing office may have to reassign or give notice to another employee who occupied the returning employee's position.

REEMPLOYMENT POSITION

§ 1002.191 What position is the eligible employee entitled to upon reemployment?
As a general rule, the eligible employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the eligible employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the eligible employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service. Depending upon the specific circumstances, the employing office may have the option, or be required, to reemploy the eligible employee in a position other than the escalator position.

§ 1002.192 How is the specific reemployment position determined?
In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the eligible employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employing office may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the eligible employee's length of service, qualifications, and disability, if any. The actual reemployment position may be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions.

§ 1002.193 Does the reemployment position include elements such as seniority, status, and rate of pay?
(a) Yes. The reemployment position includes the seniority, status, and rate of pay that an eligible employee would ordinarily have attained in that position given his or her job history, including

prospects for future earnings and advancement. The employing office must determine the seniority rights, status, and rate of pay as though the eligible employee had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the eligible employee's service, and any changes that may have occurred during the period of service. In particular, the eligible employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.

(b) If an opportunity for promotion, or eligibility for promotion, that the eligible employee missed during service is based on a skills test or examination, then the employing office should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the eligible employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.

§ 1002.194 Can the application of the escalator principle result in adverse consequences when the eligible employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the eligible employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an eligible employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an eligible employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employing office to assess what would have happened to such factors as the eligible employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

§ 1002.195 What other factors can determine the reemployment position?

Once the eligible employee's escalator position is determined, other factors may allow, or require, the employing office to reemploy the employee in a position other than the escalator position. These factors, which are explained in §§ 1002.196 through 1002.199, are:

(a) The length of the eligible employee's most recent period of uniformed service;
(b) The eligible employee's qualifications; and,
(c) Whether the eligible employee has a disability incurred or aggravated during uniformed service.

§ 1002.196 What is the eligible employee's reemployment position if the period of service was less than 91 days?

Following a period of service in the uniformed services of less than 91 days, the eligible employee must be reemployed according to the following priority:
(a) The eligible employee must be reemployed in the escalator position. He or she must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position after reasonable efforts by the employing office, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible employee is not qualified to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employing office, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

§ 1002.197 What is the reemployment position if the eligible employee's period of service in the uniformed services was more than 90 days?

Following a period of service of more than 90 days, the eligible employee must be reemployed according to the following priority:
(a) The eligible employee must be reemployed in the escalator position or a position of like seniority, status, and pay. He or she must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position or a like position after reasonable efforts by the employing office, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began or in a position of like seniority, status, and pay. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible employee is not qualified to perform the duties of the escalator position, the pre-service position, or a like position, after reasonable efforts by the employing office, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

§ 1002.198 What efforts must the employing office make to help the eligible employee become qualified for the reemployment position?

The eligible employee must be qualified for the reemployment position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position. The employing office is not required to reemploy the eligible employee on his or her return from service if he or she cannot, after reasonable efforts by the employing office, qualify for the appropriate reemployment position.

(a)(1) "Qualified" means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.

(2) Whether a task is essential depends on several factors, and these factors include but are not limited to:

(i) The employing office's judgment as to which functions are essential;

(ii) Written job descriptions developed before the hiring process begins;

(iii) The amount of time on the job spent performing the function;

(iv) The consequences of not requiring the individual to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(b) Only after the employing office makes reasonable efforts, as defined in § 1002.5(p), may it determine that the otherwise eligible employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.

§ 1002.199 What priority must the employing office follow if two or more returning employees are entitled to reemployment in the same position?

If two or more eligible employees are entitled to reemployment in the same position and more than one employee has reported or applied for employment in that position, the employee who first left the position for uniformed service has the first priority on reemployment in that position. The remaining employee (or employees) is entitled to be reemployed in a position similar to that in which the employee would have been re-employed according to the rules that normally determine a reemployment position, as set out in §§ 1002.196 and 1002.197.

SENIORITY RIGHTS AND BENEFITS

§ 1002.210 What seniority rights does an eligible employee have when reemployed following a period of uniformed service?

The eligible employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. The eligible employee is not entitled to any benefits to which he or she would not have been entitled had the employee been continuously employed with the employing office. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employing office and those required by statute. For example, under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601–2654 (FMLA), if the number of

months and the number of hours of work for which the service member was employed by the employing office, together with the number of months and the number of hours of work for which the service member would have been employed by the employing office during the period of uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.

§ 1002.211 Does USERRA require the employing office to use a seniority system?
No. USERRA does not require the employing office to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the eligible employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

§ 1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?
A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:
(a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;
(b) Whether it is reasonably certain that the eligible employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,
(c) Whether it is the employing office's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employing office's actual custom or practice is different from what is written in the contract or handbook.

§ 1002.213 How can the eligible employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?
A reasonable certainty is a high probability that the eligible employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The eligible employee does not have to establish that he or she would have received the benefit as an absolute certainty. The eligible employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employing office cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the eligible employee from gaining the right or benefit.

DISABLED EMPLOYEES

§ 1002.225 Is the eligible employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?
Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the eligible employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employing office must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the eligible employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employing office to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employing office must make reasonable efforts to accommodate the eligible employee's disability and to help him or her to become qualified to perform the duties of one of these positions:
(a) A position that is equivalent in seniority, status, and pay to the escalator position; or,
(b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the eligible employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.

§ 1002.226 If the eligible employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employing office make to help him or her become qualified for the reemployment position?
(a) USERRA requires that the eligible employee be qualified for the reemployment position regardless of any disability. The employing office must make reasonable efforts to help the eligible employee to become qualified to perform the duties of this position. The employing office is not required to reemploy the eligible employee on his or her return from service if he or she cannot, after reasonable efforts by the employing office, qualify for the appropriate reemployment position.
(b) "Qualified" has the same meaning here as in § 1002.198.

RATE OF PAY

§ 1002.236 How is the eligible employee's rate of pay determined when he or she returns from a period of service?
The eligible employee's rate of pay is determined by applying the same escalator principles that are used to determine the reemployment position, as follows:
(a) If the eligible employee is reemployed in the escalator position, the employing office must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the eligible employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employing office may examine the returning eligible employee's own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. For example, if the eligible employee missed a merit

pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed. If the merit pay increase that the eligible employee missed during service is based on a skills test or examination, then the employing office should give the employee a reasonable amount of time to adjust to the reemployment position and then give him or her the skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. The escalator principle also applies in the event a pay reduction occurred in the reemployment position during the period of service. Any pay adjustment must be made effective as of the date it would have occurred had the eligible employee's employment not been interrupted by uniformed service.
(b) If the eligible employee is reemployed in the pre-service position or another position, the employing office must compensate him or her at the rate of pay associated with the position in which he or she is reemployed. As with the escalator position, the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the eligible employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service.

PROTECTION AGAINST DISCHARGE

§ 1002.247 Does USERRA provide the eligible employee with protection against discharge?
Yes. If the eligible employee's most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause –
(a) For 180 days after the eligible employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,
(b) For one year after the date of reemployment if the eligible employee's most recent period of uniformed service was more than 180 days.

§ 1002.248 What constitutes cause for discharge under USERRA?
The eligible employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.
(a) In a discharge action based on conduct, the employing office bears the burden of proving that it is reasonable to discharge the eligible employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.
(b) If, based on the application of other legitimate nondiscriminatory reasons, the eligible employee's job position is eliminated, or the eligible employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employing office bears the burden of proving that the eligible employee's job would have been eliminated or that he or she would have been laid off.

PENSION PLAN BENEFITS

§ 1002.259 How does USERRA protect an eligible employee's pension benefits?
On reemployment, the eligible employee is treated as not having a break in service with the employing office for purposes of participation, vesting and accrual of benefits in a pension plan, by reason of the period of absence from employment due to or necessitated by service in the uniformed services.
(a) Depending on the length of the eligible employee's period of service, he or she is entitled to take from one to ninety days following service before reporting back to work or applying for reemployment (See § 1002.115). This period of time must be treated as continuous service with the employing office for purposes of determining participation, vesting and accrual of pension benefits under the plan.
(b) If the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, service, he or she is entitled to report to or submit an application for reemployment at the end of the time period necessary for him or her to recover from the illness or injury. This period, which may not exceed two years from the date the eligible employee completed service, except in circumstances beyond his or her control, must be treated as continuous service with the employing office for purposes of determining the participation, vesting and accrual of pension benefits under the plan.

§ 1002.260 What pension benefit plans are covered under USERRA?
(a) The Employee Retirement Income Security Act of 1974 (ERISA) defines an employee pension benefit plan as a plan that provides retirement income to employees, or defers employee income to a period extending to or beyond the termination of employment. USERRA also covers certain pension plans not covered by ERISA, such as those sponsored by the Federal Government.
(b) USERRA does not cover pension benefits under the Federal Thrift Savings Plan; those benefits are covered under 5 U.S.C. 8432b.

§ 1002.261 Who is responsible for funding any plan obligation to provide the eligible employee with pension benefits?
With the exception of multi-employer plans, which have separate rules discussed below, the employing office is required to ensure the funding of any obligation of the plan to provide benefits that are attributable to the eligible employee's period of service. In the case of a defined contribution plan, once the eligible employee is reemployed, the employing office must ensure that the amount of the make-up contribution for the employee, if any; the employee's make-up contributions, if any; and the employee's elective deferrals, if any; in the same manner and to the same extent that the amounts are allocated for other employees during the period of service. In the case of a defined benefit plan, the eligible employee's accrued benefit will be increased for the period of service once he or she is reemployed and, if applicable, has repaid any amounts previously paid to him or her from the plan and made any employee contributions that may be required to be made under the plan.

§ 1002.262 When must the plan contribution that is attributable to the employee's period of uniformed service be made?
(a) Employer contributions are not required until the eligible employee is reemployed. For employer contributions to a plan in which the eligible employee is not required or permitted to

contribute, the contribution attributable to the employee's period of service must be made no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later. If it is impossible or unreasonable for the contribution to be made within this time period, the contribution must be made as soon as practicable.

(b) If the eligible employee is enrolled in a contributory plan, he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions, or elective deferrals, must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the eligible employee's immediate past period of uniformed service, with the repayment period not to exceed five years. Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employing office.

(c) If the eligible employee's plan is contributory and he or she does not make up his or her contributions or elective deferrals, he or she will not receive the employer match or the accrued benefit attributable to his or her contribution. This is true because employer contributions are contingent on or attributable to the employee's contributions or elective deferrals only to the extent that the employee makes up his or her payments to the plan. Any employer contributions that are contingent on or attributable to the eligible employee's make-up contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions.

(d) The eligible employee is not required to make up the full amount of employee contributions or elective deferrals that he or she missed making during the period of service. If the eligible employee does not make up all of the missed contributions or elective deferrals, his or her pension may be less than if he or she had done so.

(e) Any vested accrued benefit in the pension plan that the eligible employee was entitled to prior to the period of uniformed service remains intact whether or not he or she chooses to be reemployed under the Act after leaving the uniformed service.

(f) An adjustment will be made to the amount of employee contributions or elective deferrals that the eligible employee will be able to make to the pension plan for any employee contributions or elective deferrals he or she actually made to the plan during the period of service.

§ 1002.263 Does the eligible employee pay interest when he or she makes up missed contributions or elective deferrals?

No. The eligible employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service.

§ 1002.264 Is the eligible employee allowed to repay a previous distribution from a pension benefits plan upon being reemployed?

Yes, provided the plan is a defined benefit plan. If the eligible employee received a distribution of all or part of the accrued benefit from a defined benefit plan in connection with his or her service in the uniformed services before he or she became reemployed, he or she must be allowed to repay the withdrawn amounts when he or she is reemployed. The amount the eligible employee must repay includes any interest that would have accrued had the monies not been withdrawn. The eligible employee must be allowed to repay these amounts during a time period starting with the date of reemployment and continuing for up to three times the length

of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years (or such longer time as may be agreed to between the employing office and the employee), provided the employee is employed with the post-service employing office during this period.

§ 1002.265 If the eligible employee is reemployed with his or her pre-service employing office, is the employee's pension benefit the same as if he or she had remained continuously employed?

The amount of the eligible employee's pension benefit depends on the type of pension plan.

(a) In a non-contributory defined benefit plan, where the amount of the pension benefit is determined according to a specific formula, the eligible employee's benefit will be the same as though he or she had remained continuously employed during the period of service.

(b) In a contributory defined benefit plan, the eligible employee will need to make up contributions in order to have the same benefit as if he or she had remained continuously employed during the period of service.

(c) In a defined contribution plan, the benefit may not be the same as if the employee had remained continuously employed, even though the employee and the employer make up any contributions or elective deferrals attributable to the period of service, because the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period or periods of service.

§ 1002.266 What are the obligations of a multi-employer pension benefit plan under USERRA?

A multi-employer pension benefit plan is one to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. The Act uses ERISA's definition of a multi-employer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multi-employer plans, as follows:

(a) The last employer that employed the eligible employee before the period of service is responsible for making the employer contribution to the multi-employer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the eligible employee.

(b) An employer that contributes to a multi-employer plan and that reemploys the eligible employee pursuant to USERRA must provide written notice of reemployment to the plan administrator within 30 days after the date of reemployment. The returning service member should notify the reemploying employer that he or she has been reemployed pursuant to USERRA. The 30-day period within which the reemploying employer must provide written notice to the multi-employer plan pursuant to this subsection does not begin until the employer has knowledge that the eligible employee was re-employed pursuant to USERRA.

(c) The eligible employee is entitled to the same employer contribution whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same multi-employer plan, provided that the pre-service employer and the post-service employer share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

§ 1002.267 How is compensation during the period of service calculated in order to determine the eligible employee's pension benefits, if benefits are based on compensation?

In many pension benefit plans, the eligible employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.

(a) Where the eligible employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service.

(b) (1) Where the rate of pay the eligible employee would have received is not reasonably certain, the average rate of compensation during the 12-month period prior to the period of uniformed service must be used.

(2) Where the rate of pay the eligible employee would have received is not reasonably certain and he or she was employed for less than 12 months prior to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded service.

Subpart F—Compliance Assistance, Enforcement and Remedies

COMPLIANCE ASSISTANCE

§ 1002.277 What assistance does the Office of Compliance provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

The Office of Compliance provides assistance to any person or entity who is covered by the CAA with respect to employment and reemployment rights and benefits under USERRA as applied by the CAA. This assistance includes responding to inquiries, and providing a program of education and information on matters relating to USERRA.

INVESTIGATION AND REFERRAL

§ 1002.288 How does an eligible employee initiate a claim alleging a violation of USERRA under the CAA?

(a) If an eligible employee is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employing office has failed or refused, or is about to fail or refuse, to comply with the Act, the eligible employee may file a complaint with the Office of Compliance, after a required period of counseling and mediation.

(b) To commence a proceeding, an eligible employee alleging a violation of the rights and protections of USERRA must request counseling by the Office of Compliance no later than 180 days after the date of the alleged violation. If an eligible employee misses this deadline, the claim may be time barred under the CAA.

(c) The following procedures are available under subchapter IV of the CAA for eligible employees who believe their rights under USERRA as made applicable by the CAA have been violated:

(1) counseling;

(2) mediation; and

(3) election of either -

(A) a formal complaint filed with the Office of Compliance (which must meet the requirements as set forth in the Office of Compliance Procedural Rules, Section 5.01(c)), and a hearing before a hearing officer, subject to review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit; or

(B) a civil action in a district court of the United States.

(d) Regulations of the Office of Compliance describing and governing these procedures can be found at 141 Cong. Rec. H15645-H15655 (daily ed. December 30, 1995) and 141 Cong. Rec. S19239-19249 (daily ed. December 22, 1995), 143 Cong. Rec. H8316-H8317 (daily ed. October 2, 1997)(as amended, applying USERRA to the Government Accountability Office and the Library of Congress).

ENFORCEMENT OF RIGHTS AND BENEFITS AGAINST AN EMPLOYING OFFICE

§ 1002.303 Is an eligible employee required to bring his or her USERRA claim to the Office of Compliance?

Yes. All eligible employees who file claims under Section 206 of the CAA, are required to go through counseling and mediation before electing to file a civil action or a complaint with the Office of Compliance

§ 1002.308 Who has legal standing to bring a USERRA claim under the CAA?
An action under Section 206 of the CAA may be brought by an eligible employee, as defined by Section 1002.5 (f) of Subpart A of these regulations. An action under 207(a) of the CAA may be brought by a covered employee, as defined by section 1002.5 (e) of Subpart A of these regulations. An employing office, prospective employing office or other similar entity may not bring an action under the Act.

§ 1002.309 Who is a necessary party in an action under USERRA?
In an action under USERRA, only the covered employing office or a potential covered employing office, as the case may be, is a necessary party respondent. Under the Office of Compliance Procedural Rules, a hearing officer has authority to require the filing of briefs, memoranda of law, and the presentation of oral argument. A hearing officer also may order the production of evidence and the appearance of witnesses.

§ 1002.310 How are fees and court costs awarded in an action under USERRA?
If an eligible employee is a prevailing party with respect to any claim under USERRA, the hearing officer, Board, or court may award reasonable attorney fees, expert witness fees, and other litigation expenses.

§ 1002.311 Is there a statute of limitations in an action under USERRA?
USERRA does not have a statute of limitations. However, Section 402 of the CAA requires a covered employee to bring a request for counseling alleging a violation of the CAA no later than 180 days after the date of the alleged violation. A claim by an eligible employee alleging a USERRA violation as applied by the CAA would follow this requirement .

§ 1002.312 What remedies may be awarded for a violation of USERRA?
In any action or proceeding the following relief may be awarded:
(a) The court and/or hearing officer may require the employing office to comply with the provisions of the Act;
(b) The court and/or hearing officer may require the employing office to compensate the eligible employee for any loss of wages or benefits suffered by reason of the employing office's failure to comply with the Act;
(c) The court and/or hearing officer may require the employing office to pay the eligible employee an amount equal to the amount of lost wages and benefits as liquidated damages, if the court and/or hearing officer determines that the employing office's failure to comply with the Act was willful. A violation shall be considered to be willful if the employing office either knew or showed reckless disregard for whether its conduct was prohibited by the Act.
(d) Any wages, benefits, or liquidated damages awarded under paragraphs (b) and (c) of this section are in addition to, and must not diminish, any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employing office).

DOL SECTIONS

Subpart A

Sec. 1002.1 What is the purpose of this subpart?
Sec. 1002.2 Is USERRA new law?
Sec. 1002.3 When did USERRA become effective?
Sec. 1002.4 What is the role of the Secretary of Labor under USERRA?
Sec. 1002.5 What definitions apply to USERRA?
Sec. 1002.6 What types of service in the uniformed services are covered by USERRA?
Sec. 1002.7 How does USERRA relate to other laws, public and private contracts, and employer practices?

Subpart B

Sec. 1002.18 What status or activity is protected from employer discrimination by USERRA?
Sec. 1002.19 What activity is protected from employer retaliation by USERRA?
Sec. 1002.20 Does USERRA protect an individual who does not actually perform service in the uniformed services?
Sec. 1002.21 Do the Act's prohibitions against discrimination and retaliation apply to all employment positions?
Sec. 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?
Sec. 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

OOC SECTIONS

Subpart A

Sec. 1002.1 What is the purpose of this part?
Sec. 1002.2 Is USERRA new law?
Sec. 1002.3 When did USERRA become effective?
Sec. 1002.4 What is the role of the Executive Director of the Office of Compliance under the USERRA provisions of the CAA?
Sec. 1002.5 What definitions apply to these USERRA regulations?
Sec. 1002.6 What types of service in the uniformed services are covered by USERRA?
Sec. 1002.7 How does USERRA as applied by the CAA relate to other laws, public and private contracts, and employer practices?

Subpart B

Sec. 1002.18 What status or activity is protected from employer discrimination by USERRA?
Sec. 1002.19 What activity is protected from employer retaliation by USERRA?
Sec. 1002.20 Does USERRA's prohibitions against discrimination and retaliation apply to all employment positions?
Sec. 1002.21 Does USERRA protect a covered employee who has not actually performed service in the uniformed services?

Sections 1002.22-23 are deleted from OOC regulations.

DOL SECTIONS	OOC SECTIONS
Subpart C **Sections 1002.32-34 and 1002.40-139** are the same in DOL and OOC regulations.	Subpart C **Sections 1002.32-34 and 1002.40-139** are the same in DOL and OOC regulations. **Sections 1002.35-39** are deleted from OOC regulations.
Subpart D **Sections 1002.149-171** are the same in DOL and OOC regulations.	Subpart D **Sections 1002.149-171** are the same in DOL and OOC regulations.
Subpart E **Sections 1002.180-267** are the same in DOL and OOC regulations.	Subpart E **Sections 1002.180-267** are the same in DOL and OOC regulations.
Subpart F **Section 1002.277** What assistance does the Department of Labor provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?	Subpart F **Section 1002.277** What assistance does the Office of Compliance provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?
Section 1002.288 How does an individual file a USERRA complaint?	**Section 1002.288** How does an eligible employee initiate a claim alleging a violation of USERRA under the CAA?
Section 1002.289 How will VETS investigate a USERRA complaint? **Section 1002.290** Does VETS have the authority to order compliance with USERRA? **Section 1002.291** What actions may an individual take if the complaint is not resolved by VETS? **Section 1002.292** What can the Attorney General do about the complaint?	**Sections 1002.289-292** are deleted from OOC regulations.
Section 1002.303 Is an individual required to file his or her complaint with VETS?	**Section 1002.303** Is an eligible employee required to bring his or her USERRA claim to the Office of Compliance?
Section 1002.304 If an individual files a complaint with VETS and VETS' efforts do not resolve the complaint, can the individual pursue the claim on his or her own? **Section 1002.305** What court has jurisdiction in an action against a State or private employer? **Section 1002.306** Is a National Guard civilian technician considered a State or Federal employee for purposes of USERRA? **Section 1002.307** What is the proper venue in an action against a State or Private employer?	**Sections 1002.304-307** are deleted from OOC regulations.

OFFICE OF COMPLIANCE: NOTICE OF ADOPTION OF SUBSTANTIVE REGULATIONS, AND SUBMISSION FOR CONGRESSIONAL APPROVAL

Adoption of the Office of Compliance Regulations Implementing Certain Substantive Employment Rights and Protections for Veterans, as Required by 2 U.S.C. 1316, the Congressional Accountability Act of 1995, as Amended

Procedural Summary:

Issuance of the Board's Initial Notice of Proposed Rulemaking:

On April 21, 2008 and May 8, 2008, the Office of Compliance published a Notice of Proposed Rulemaking ("NPR") in the Congressional Record (154 Cong. Rec. S3188 (daily ed. April 21, 2008) H3338 (daily ed. May 8, 2008))

Why did the Board propose these new Regulations?

Section 206 of the Congressional Accountability Act ("CAA"), 2 U.S.C. §1316, applies certain provisions of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Title 38, Chapter 43 of the United States Code. Section 1316 of the CAA provides protections to eligible employees in the uniformed services from discrimination, denial of reemployment rights, and denial of employee benefits. Subsection 1316(c) requires the Board not only to issue regulations to implement these protections, but to issue regulations which are "the same as the most relevant substantive regulations promulgated by the Secretary of Labor . . ." This section provides that the Board may only modify the Department of Labor regulations if it can establish good cause as to why a modification would be more effective for the application of the protections to the legislative branch. In addition, Section 1384 provides procedures for the rulemaking process in general.

What procedure followed the Board's April 16 Notice of Proposed Rulemaking?

The May 8, 2008 Notice of Proposed Rulemaking included a thirty day comment period, which began on May 9, 2008. A number of comments to the proposed substantive regulations were received by the Office of Compliance from interested parties. The Board of Directors has reviewed the comments from interested parties, made a number of changes to the proposed substantive regulations in response to comments, and on December 3, 2008 adopted the amended regulations.

What is the effect of the Board's "adoption" of these proposed substantive regulations?
Adoption of these substantive regulations by the Board of Directors does not complete the promulgation process. Pursuant to section 304 of the CAA, 2 U.S.C. 1384, the procedure for promulgating such substantive regulations requires that:

(1) the Board of Directors issue proposed substantive regulations and publish a general notice of proposed rulemaking in the *Congressional Record*;
(2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking; and
(3) after consideration of comments by the Board of Directors, that the Board adopt regulations and transmit notice of such action together with the regulations and a recommendation regarding the method for Congressional approval of the regulations to the Speaker of the House and President pro tempore of the Senate for publication in the *Congressional Record*.

This **Notice of Adoption of Substantive Regulations and Submission for Congressional Approval** completes the third step described above.

What are the next steps in the process of promulgation of these regulations?
Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to "include a recommendation in the general notice of proposed rulemaking and in the regulations as to whether the regulations should be approved by resolution of the Senate, by resolution of the House of Representatives, by concurrent resolution, or by joint resolution." The Board of Directors recommends that the House of Representatives adopt the "H" version of the regulations by resolution; that the Senate adopt the "S" version of the regulations by resolution; and that the House and Senate adopt the "C" version of the regulations applied to the other employing offices by a concurrent resolution.

Which employment and reemployment protections are applied to eligible employees in 2 U.S.C. 1316?
USERRA was enacted in December 1994, and the Department of Labor final regulations for the executive branch became effective in 2006. USERRA's provisions ensure that entry and re-entry into the civilian workforce are not hindered by participation in military service. USERRA provides certain reemployment rights; protection from discrimination based on military service, denial of an employment benefit as a result of military service; and protection from retaliation for enforcing USERRA protections.

The selected statutory provisions which Congress incorporated into the CAA and determined "shall apply" to eligible employees in the legislative branch include nine sections: sections 4303(13), 4304, 4311(a)(b), 4312, 4313, 4316, 4317, 4318, and paragraphs (1), (2)(A), and (3) of 4323(c)[1] of title 38.

The first section, section 4303(13), provides a definition for "service in the uniformed services."

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[1] As written in Section 206 of the CAA, reference is made to application of paragraphs (1), (2)(A), and (3) of section 4323(c) (Venue). However, in USERRA, section 4323(c) is not comprised of paragraphs (1), (2)(A), and (3) - - section 4323(d) (Remedies) is comprised of those paragraphs. Because of this apparent typographical error, where the CAA references paragraphs (1), (2)(A), and (3) of section 4323(c), the Board refers to section 4323(d).

This is the only definition in USERRA that Congress made applicable to the legislative branch. Section 4303(13) references Section 4304, which describes the "character of service" and illustrates situations which would terminate eligible employees' rights to USERRA benefits.

Congress applied section 4311 to the legislative branch in order to provide discrimination and retaliation protections, respectively to eligible and covered employees. Interestingly, although Congress adopted these protections, it did not adopt the legal standard by which to establish a violation of this section of the regulations.

Sections 4312 and 4313 outline the reemployment rights that are provided to eligible employees. These rights are automatic under the statute, and if an employee meets the eligibility requirements, he or she is entitled to the rights provided therein.

Sections 4316, 4317, and 4318 provide language on the benefits given to eligible employees.

Are there veterans' employment regulations already in force under the CAA?
No. The Board has issued to the Speaker of the House and the President Pro Tempore of the Senate its Notice of Adoption of Substantive Regulations and Transmittal for Congressional Approval for Veterans Employment Opportunities Act (VEOA). The Board is awaiting Congressional approval of those regulations.

Why are there substantive differences in the proposed regulations for the House of Representatives, the Senate, and the other employing offices?
As the Board of Directors has identified "good cause" to modify the executive branch regulations to implement more effectively the rights and protections for veterans, there are some differences in other parts of the proposed regulations applicable to the Senate, the House of Representatives, and the other employing offices. Therefore, the Board is submitting three separate sets of regulations: an "H" version, an "S" version, and a "C" version, each denoting those provisions in the regulations that are applicable to the House, Senate, and other employing offices, respectively.

Are these proposed regulations also recommended by the Office of Compliance's Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives?
Yes, as required by section 304(b)(1) of the CAA, 2 U.S.C. 1384(b)(1), these regulations have also been recommended by the Executive Director and Deputy Executive Directors of the Office of Compliance.

Are these proposed CAA regulations available to persons with disabilities in an alternate format?
This Notice of Adoption of Substantive Regulations, and Submission for Congressional Approval is available on the Office of Compliance web site, www.compliance.gov, which is compliant with section 508 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. 794d. This Notice can also be made available in large print or Braille. Requests for this Notice in an alternative format should be made to: Annie Leftwood, Executive Assistant, Office of Compliance, 110 2nd Street, S.E., Room LA-200, Washington, D.C. 20540; 202-724-9250; TDD:

202-426-1912; FAX: 202-426-1913.

Supplementary Information: The Congressional Accountability Act of 1995 (CAA), PL 104-1, was enacted into law on January 23, 1995. The CAA applies the rights and protections of 12 federal labor and employment statutes to covered employees and employing offices within the Legislative Branch of Government. Section 301 of the CAA (2 U.S.C. 1381) establishes the Office of Compliance as an independent office within the Legislative Branch.

The Board's Responses to Comments

SUMMARY OF MAJOR COMMENTS

General Comments

The Board noted in the Notice of Proposed Regulations (NPR) that it had not identified any "good cause" for issuing three separate sets of regulations and that if the regulations were approved as proposed, there would be one text applicable to all employing offices and covered employees. During the notice and comment period, the Board received comments from the Committee on House Administration ("CHA"), Senate Employment Counsel ("Counsel"), and the United States Capitol Police ("Capitol Police"). All of the commenters noted, in different places throughout the regulations, the need for modifications that would apply specifically to the House, Senate or other employing offices. Although the Board has not found "good cause" to vary the Department of Labor (DOL) regulations in all instances where requested, there are a number of places where such variances are warranted. In light of that and the comment by the CHA that the Congressional Accountability Act (CAA) requires the publication of separate regulations for the Senate, House and other covered employees and employing offices, the Board has made that change and put forward three separate sets of regulations, an "H" version, an "S" version, and a "C" version, each denoting the provisions that are included in the regulations that are applicable to the House, Senate, and other employing offices, respectively.

Eligible Employees

In its comments, CHA maintains that the definition of "eligible employee" in the regulations is overly broad. Pointing to Section 206(a)(2)(A) of the CAA, which defines an "eligible employee" as "a covered employee performing service in the uniformed service, within the meaning of section 4303(13) of title 38, whose service has not been terminated upon occurrence of any of the events enumerated in section 4304 of title 38," the CHA notes that the definition references only the present tense of the verb "performing" and makes no mention of the past tense. CHA also notes the Section 206 does not define eligible employee to include an individual who was previously a member of the uniformed services or one who applies or has applied to perform service in the uniformed services. CHA acknowledges that this "stands in marked contrast to the general USERRA statute's protection of individuals who currently serve as well as to those who have previously served, to those who have an obligation to serve, and to those who have applied to serve in the uniformed services (regardless of whether they actually served)." CHA further recognizes "that USERRA's intent is to provide broad protections for those who serve and have served in the uniformed services..." CHA comments that the regulations are inappropriately broad, notwithstanding language in Section 206(a)(2)(A) that strongly suggests inclusion of an individual who has been honorably discharged and is therefore not currently serving, but who has served in the past.

The Board acknowledges the tension in the language in Section 206(a)(2)(A), but does not agree with the conclusions reached by the CHA, that, absent a statutory amendment revising the

definition in Section 206(a)(2)(A), the proposed regulations should be revised to reflect that, "as applied by the CAA, USERRA only protects employees who are currently 'performing service in the uniformed services.'"

The Board's authority to promulgate substantive regulations is found in Section 206 of the CAA, 2 U.S.C. §1316, which applies certain provisions of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Title 38, Chapter 43 of the United States Code. Section 1316 of the CAA provides protections to eligible employees in the uniformed services from discrimination, denial of reemployment rights, and denial of employee benefits.

Subsection 1316(c) of the CAA requires the Board not only to issue regulations to implement these protections, but to issue regulations which are "the same as the most relevant substantive regulations promulgated by the Secretary of Labor . . ." This section provides that the Board may modify the Department of Labor regulations only if it can establish good cause as to why a modification would be more effective for application of the protections to the legislative branch. The Board chooses to apply a broad definition of "eligible employee".

The Board does not read the "performing service" language in Section 206(a)(2)(A) as limiting the discrimination protection of USERRA to only those employees who are currently serving in the uniformed services. Rather, we interpret the phrase "performing service" in this context to refer to covered employees who have some form of military status (i.e., those who have performed service or who have applied or have an obligation to perform military service, as well as those who are currently members of or who are serving in the uniformed services) as distinguished from covered employees who do not have this military status.

This application of the phrase "performing service" is supported by several indicia of Congressional intent. First, Section 206(a)(2)(A) prohibits discrimination against eligible employees "within the meaning of" subsection (a) of section 4311 of Title 38, which states: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." Most, if not all, of these protections would be lost if the phrase "performing service" were applied to exclude covered employees who are not currently performing service at the moment of the alleged violation. It would vitiate the reemployment rights under USERRA because employees would lose their statutory rights at the moment of discharge, whether honorable or not. Similarly, had Congress intended to so limit the coverage of USERRA, it could have said that "any" discharge was a disqualifying condition, not those that are other than honorable.

Congressional intent is also reflected in the USERRA statute itself, passed in 1994, which states, "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 USC 4301(b). A narrow application of the phrase "performing service" would be directly contrary to this statement of the sense of Congress.

Finally, we note that after the CAA was enacted, Congress enacted the Veteran Employment Opportunities Act and thereby granted certain preferences in hiring and retention during layoffs to *all* covered employees who are "veterans" as defined in 5 U.S.C. § 2108, or any superseding legislation. We conclude that Congress intended a broad application of the phrase "performing service" so that covered employees who will or have performed service are also protected against discrimination and the improper denial of reemployment or benefits.

In light of the above, the Board has found "good cause" to modify the Department of Labor's definition of "eligible employee". Further, in order to avoid any confusion as to the application of the regulations to "eligible" employees, the Board has made the appropriate editorial changes throughout the adopted regulations.

Other Definitions

Section 1002.5 contains the definitions used in the regulations. Several commenters have recommended that some of the definitions in this section be edited to be consistent with the CAA. Where appropriate, the Board has made those changes.[2]

Section 1002.5(i) defines an employee of the House of Representatives. The Committee on House Administration noted that because there may be some joint employees of the House and Senate, the definition of an employee of the House of Representatives should also include individuals employed by the Senate. We agree and have made the necessary revisions.

Section 1002.5(k) defines employing office. CHA commented that the definition in 1002.5(k)(4) was broader than the definition of "employing office" in Section 101(9) of the CAA. We note that during the rulemaking procedures for the Veterans Equal Opportunities Act (VEOA), the Board determined that in view of the selection process for certain Senate employees, the words "or directed" would be added to the definition of "covered employee" to include any employee who is hired at the direction of a Senator, but whose appointment form is signed by an officer of either House of Congress. Although we included such language in the proposed rules on USERRA, it appears that this language would be overreaching for the House and other employing offices. As the House has different methods of making appointments and selections, this language is unnecessary and may create confusion given the practices of the House. Accordingly, the Board has deleted this provision from the House and other employing offices version, but will include it in the Senate version.

Section 1002.5(l) defines health plan. The Capitol Police has recommended that the language in the definition of health care plans be limited to the FEHB program. As discussed more fully below, the Board is mandated to follow, as closely as possible, the regulations applied to the executive branch. In view of the fact that the DOL regulations apply to federal employees in the executive branch who are also only covered under the Federal Employees Health Benefits (FEHB) program, the Board finds that there is no good cause to limit the definition.

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[2] On October 20, 2008, Congress passed the Capitol Visitor Center Act (PL 110-437) amending Sections 101(3)(C) and 101(9)(D) of CAA to substitute "the Office of Congressional Accessibility Services" for both "the Capitol Guide Service" and "the Capitol Guide Board". The Board has modified its regulations to reflect this change in §1002.5(e)(3) in all versions and in §1002.5(k)(1) in the "C" version.

Section 1002.5(q) defines seniority. The Capitol Police has also recommended that this definition of seniority be deleted because of potential conflict with definitions of seniority in various collective bargaining agreements. The Board has determined that there is no good cause for such a change. The definition in the adopted regulations are not limiting and are consistent with §4316 of USERRA. Further, as DOL indicated in its notice to the final USERRA regulations, section 4316(a) of USERRA is not a statutory mandate to impose seniority systems on employers. Rather, USERRA requires only that those employers who provide benefits based on seniority restore the returning service member to his or her proper place on the seniority ladder. Because each employing office defines and determines how seniority is to be applied, the definition of seniority in the adopted regulations should not conflict with collective bargaining agreements.

Section 1002.5(s) defines undue hardship. The CHA has noted that in setting out the standards for considering when an action might require significant difficulty or expense, the proposed regulations did not include the language from §1002.5(n)(2) of the DOL's regulations. In the DOL's regulations, §1002.5(n)(2) provides that an action may be considered to be an undue hardship if it requires significant difficulty or expense when considered in light of: the overall financial resources of the *facility or facilities* involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility. Section 1002.5(s)(2) of the proposed regulations similarly referred to the overall financial resources of the *employing office*. However, in view of the fact that employing offices also may have multiple facilities, the Board agrees with the CHA comments and finds that there is no "good cause" to delete what was §1002.5(n)(2) of the DOL regulations. Therefore, what was §1002.5(n)(2) of the DOL regulations has been included in the adopted regulations as §1002.5(s)(2) and subsequent sections have been renumbered accordingly.

The Relationship Between USERRA and Other Laws, Contracts and Practices

Section 1002.7 states that USERRA supersedes any state and local law, contract, or policy that reduces or limits any rights or benefits provided by USERRA, but does not supersede those provisions that are more beneficial. Senate Employment Counsel has commented that reference to the fact that USERRA supersedes any state and local laws is superfluous and does not apply to legislative offices. Further, Counsel has recommended that the section referring to the fact that USERRA does not supersede more beneficial state or local laws be omitted. The Board acknowledges that state and local laws do not apply to federal employees or the employing offices covered under the CAA. Therefore, in order to avoid any confusion, the Board has made the appropriate changes.

Anti-Discrimination and Anti-Retaliation Provisions

As a general comment, the Capitol Police has raised questions about the Board's reference in the notice to *Britton v. Office of the Architect of the Capitol*. The Capitol Police maintains that *Britton* is not applicable to §4311(a) or (b) and that the USERRA regulations should not be changed to include substantive regulations under section 207 of the CAA. The Board notes that

the reference to the *Britton* case and retaliation under Section 207 of the CAA is merely explanatory and not a part of the substantive regulations. In the NPR, there is a typographical error and the correct statement is that the Board does not propose a particular standard for claims of discrimination or retaliation brought by eligible employees under section 206. Any discussion referring to Section 207 retaliation was for explicative purposes only. Accordingly, it should be noted that in these regulations, the Board is not discussing claims of retaliation under Section 207 and that references to Section 207 have been omitted from the adopted regulations.

Section 1002.20, as set out in the proposed regulations, discussed the extent of the coverage of USERRA's prohibitions against discrimination and retaliation. Several commenters noted that §1002.20 and §1002.21 were confusing and did not clearly differentiate discrimination and retaliation protections as applied by §206 and §207 of the CAA. The Board agrees and has modified section 1002.20 and replaced section 1002.21 with a new section to reflect that USERRA protects eligible employees in all positions with covered employing offices. Thus, because Section 206 of the CAA only covers "eligible employees" as defined in §1002.5(f), "covered employees" would only be protected by the anti-retaliation provisions under Section 207 of the CAA.

Additionally, in its comments, the Capitol Police asks why the numbering of §1002.20 and §1002.21 was reversed and why §1002.22 covering the burden of proving discrimination or retaliation was excluded. The Board notes that it had good cause to delete §1002.22 as Congress specifically did not adopt the "but for" test (38 U.S.C 4311 (c) (1) and (2)) and therefore it was confusing and unnecessary to include this provision. In view of the revisions to sections 1002.20 and 1002.21 noted above, the Board has kept the order as it was in the proposed regulations to be more consistent with these edits.

Eligibility for Reemployment

As a general comment, the CHA notes that with respect to employees in the House, the statement in the NPR that "it is not permitted for an employee to work for a Member office and a Committee at the same time" is incorrect. Although this statement is not part of the substantive regulations, where there are variations in the employment requirements of different employing offices, the Board has made the necessary changes to each of the versions of the adopted regulations.

Section 1002.32 sets out the criteria that an employee must meet to be eligible under USERRA for reemployment after service in the uniformed services. The CHA has recommended that this section be changed to be consistent with the definition of eligible employee in section 206(a)(2)(A) of the CAA, and for clarity as applied to individual employing offices which may cease to exist while an eligible employee is performing service. The Board agrees and has changed the House and Senate versions to reflect that generally, if an eligible employee is absent from a position in an employing office by reason of service in the uniformed services, he or she will be eligible for employment in the same employing office if that employing office continues to exist at such time.

Section 1002.34 of the proposed regulations established that USERRA applies to all covered employing offices of the legislative branch as defined in Subpart A, section 1002.5(e). Both the Capitol Police and Senate Employment Counsel commented that the definition of "employing office" should be changed to track the CAA, rather than the definition in the proposed regulations. Thus, Counsel notes that any regulation the Office of Compliance issues for an "employing office" should track 2 U.S.C. §1301(9), and include the General Accounting Office and Library of Congress, as required under 2 U.S.C. §1316(a)(2)(C). The Board agrees and has changed the definition to more closely follow the CAA.

Section 1002.40 states that in protecting against discrimination in initial hiring decisions, an employing office need not actually employ an individual to be his or her employer. The CHA commented that it is not correct to say that "[a]n employing office need not actually employ an individual to be his or her 'employer'." The CHA notes that while the result is the same-- an applicant who is otherwise an eligible employee cannot be discriminated against in initial employment based on his or her performing service in the uniformed service, to say that the employing office is his or her employer is incorrect. The Board agrees and has made the change to reflect that while an employing office may not technically be the "employer" of an applicant, the result is the same -- the employing office is *liable* under the Act if it engages in discrimination against an applicant based on his or her performing service in the uniformed service.

Section 1002.120 allows an employee to seek or obtain employment with an employer other than the pre-service employing office during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employing office. The proposed regulations stated that such alternative employment during the application period should not be of a type that would constitute a cause for the employing office to discipline or terminate the employee following reemployment. The CHA has noted that because employees of the House are "at-will", reference to termination and/or discipline for "cause" in this section is inapplicable and could be confusing. While the Board recognizes that employees of the House are "at-will", the same issues raised by the CHA can apply to many executive branch and private sector employees, as well. In view of the fact that the DOL regulations contain the same provision, notwithstanding the different employment arrangements in the private sector and executive branch agencies, the Board finds no good cause to make the change.

Health and Pension Plan Coverage

USERRA ensures that eligible employees are provided with health and pension plan coverage on a continuing basis in certain circumstances and reinstatement of coverage upon reemployment. All of the commenters have raised concerns over the inclusion of provisions concerning health and pension plan benefits and ask that these provisions be withdrawn or limited specifically to the specific health and pension plans covering federal employees. For example, the CHA notes that House employing offices do not provide health or retirement benefits to their employees and do not pay or administer contributions and/or premiums for such plans. Similarly, Senate Employment Counsel explains that while employees of Senate employing offices are entitled to health plan coverage and pension benefits under the FEHB and Civil Service Retirement System

(CSRS) or the Federal Employment Retirement System (FERS), their respective employing offices do not provide the "employer contribution" for such coverage and do not determine when such coverage starts or is reinstated or any terms or conditions of the coverage. Moreover, while the Senate appropriates monies for any agency contribution to such plans, these contributions do not come from the monies appropriated to individual employing offices.

The Board recognizes that the role of the Senate and House employing offices, in administering health and pension plans is somewhat attenuated. With the caveat in mind that it is the U.S. Office of Personnel Management that controls not only federal employee health plans, but pension plans as well, the Board nonetheless does not find good cause to exclude these provisions from the adopted regulations. In support of this, the Board notes that the DOL regulations cover federal employees in the executive branch who are also covered under the FEHB, CSRS and FERS. Moreover, USERRA itself states in Section 4318 that a right provided under any Federal or State law governing pension benefits for governmental employees (except for benefits under the Thrift Savings Plan) is covered. The Board is not aware of every employment relationship in the legislative branch and there is always the possibility that there may be situations where employees are not covered under the FEHB or CSRS/FERS, or may be covered under craft union or multi-employer plans. The Board further notes that to the extent that an employing office does not control nor is responsible for assuring that eligible employees are properly covered under health and pension plans, these provisions would not apply. Although employing offices may not have direct control over health and pension plans, they are responsible for ensuring that eligible employees are covered by facilitating or requesting that the necessary contribution or funding is made. Rather than deleting sections of the regulations, the Board has revised the regulations to reflect the responsibility of the employing offices and where appropriate, has made changes to reflect that while employing agencies may not have control over the plans, they do have some responsibility in assuring that eligible employees are covered as required under USERRA.

Protection Against Discharge

Section 1002.247 protects an employee against discharge. Rather than state that a discharge except for cause is prohibited if an employee's most recent period of service was for more than 30 days, the proposed regulations stated that, because legislative employees are at will, a discharge without cause could create a rebuttable presumption of a violation. In its comments, the CHA notes that in modifying this section, the explanation regarding the discharge of a returning employee was unclear. The Board agrees that there is no "good cause" for making the revisions originally contained in the proposed regulations and has changed this section to be consistent with DOL regulations.

Enforcement of Rights and Benefits Against an Employing Office

Section 102.303 requires that employees who file claims under USERRA are required to go through counseling and mediation before electing to file a civil action or a complaint with the Office of Compliance. The proposed regulations contained language that provided for "covered" rather than "eligible" employees to bring claims under USERRA to the Office of Compliance. The CHA commented that to be consistent with Section 206(a)(2)(A) of the CAA, this provision

should be modified to make clear that only "eligible employees" may bring claims under Section 206. The Board agrees and because only eligible employees are covered under Section 206 discrimination and retaliation provisions, this section has been modified.

Section 1002.312 provides for the various remedies that may be awarded for violations of USERRA, including liquidated damages. The CHA comments that because of a technical error in the CAA, there is no statutory authority to provide for liquidated damages remedies under USERRA. In its notice of rulemaking, the Board noted the same error. Thus, as written in Section 206 of the CAA, reference is made to the application of paragraphs (1), (2)(A), and (3) of section 4323(c). However, in USERRA, section 4323(c), which refers to venue, is not comprised of paragraphs (1), (2)(A), and (3). Rather, section 4323(d), which does address remedies, is comprised of those paragraphs. Because of this apparent typographical error, the Board noted that where the CAA references paragraphs (1), (2)(A), and (3) of section 4323(c), it would read it as referring to section 4323(d). The Board disagrees with CHA's position that because of this technical error, the liquidated damages remedy section of USERRA is not incorporated into the CAA. There is no question from the context and the express language of §206(b) which specifically provides that the remedy for a violation of §206(a) of the CAA shall be the same as remedies awarded under USERRA, that there has been a waiver of sovereign immunity sufficient to provide for all the remedies covered in paragraphs (1), (2)(A), and (3) of section 4323(d). Contrary to the CHA's observations, it does not require a court to look beyond the express language of the statute to understand Congress's intent that the liquidated damages provision of USERRA be applied under the CAA.

Under sections 1002.310 and 1002.314 of the proposed regulations, respectively, fees and court costs may not be charged against individuals claiming rights under the CAA and courts and/or hearing officers may use their equity powers in actions or proceedings under the Act. The CHA commented that because § 1002.314 and the first sentence of § 1002.310 are based on sections of USERRA that are not incorporated by the CAA (§4323(e) and §4323(h) respectively), these provisions should be deleted from the adopted regulations. The Board has reviewed these comments and while we would find that, notwithstanding any "technical" error, the CAA does incorporate the remedies set out in §1002.314 (a)-(c), we agree that the CAA does not include the remedies articulated in §4323(e) and §4323(h) of USERRA. As the first sentence in §1002.310 of the proposed regulations does appear to mirror §4323(h) of USERRA and §1002.314 of the proposed regulations similarly mirrors §4323(e), in order to avoid any confusion, the Board has found good cause to delete these provisions. The Board has retained the part of §1002.310 pertaining to the awarding of fees and costs. As discussed in the NPR, the Board found that the DOL regulations permitting an award of fees and court costs for an individual who has obtained counsel and prevailed in his or her claim against the employer was consistent with Section 225(a) of the CAA, permitting a prevailing covered employee to be awarded reasonable fees and costs. To be more fully consistent with the CAA, the Board has kept its modification of the language removing the requirement that the individual retain private counsel as a condition of such an award.

Text of USERRA Regulations

"C" Version

When approved by Congress for the other employing offices covered by the CAA, these regulations will have the prefix "C."

Subpart A: Introduction to the Regulations

§ 1002.1 What is the purpose of this part?

This part implements certain provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or "the Act"), as applied by the Congressional Accountability Act ("CAA"). 2 U.S.C. 1316. USERRA is a law that establishes certain rights and benefits for employees, and duties for employers. USERRA affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services. There are five subparts to these regulations. Subpart A gives an introduction to the USERRA regulations. Subpart B describes USERRA's anti-discrimination and anti-retaliation provisions. Subpart C explains the steps that must be taken by a uniformed service member who wants to return to his or her previous civilian employment. Subpart D describes the rights, benefits, and obligations of persons absent from employment due to service in the uniformed services, including rights and obligations related to health plan coverage. Subpart E describes the rights, benefits, and obligations of the returning veteran or service member. Subpart F explains the role of the Office of Compliance in administering USERRA as applied by the CAA.

§ 1002.2 Is USERRA a new law?

USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was commonly referred to as the Veterans' Reemployment Rights Act ("VRRA"), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. In enacting USERRA, Congress emphasized USERRA's continuity with the VRRA and its intention to clarify and strengthen that law. Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA. USERRA authorized the Department of Labor to publish regulations implementing the Act for State, local government, and private employers. USERRA also authorized the Office of Personnel Management to issue regulations implementing the Act for Federal executive agencies, with the exception of certain Federal intelligence agencies. For those Federal intelligence agencies, USERRA established a separate program for employees. Section 206 of the CAA requires the Board of Directors of the Office of Compliance to issue regulations to implement the statutory provisions relating to employment and reemployment rights of members of the uniformed services. The regulations are required to be the same as substantive regulations promulgated by the Secretary of Labor, except where a modification of such regulations would be more effective for the implementation of the rights and protections of the Act. The Department of Labor issued its regulations, effective January 18, 2006. The regulations set forth herein are the substantive regulations that the Board of Directors of the Office of Compliance has promulgated for the legislative branch, for the implementation of the USERRA provisions of the CAA. All references to USERRA in these regulations, means USERRA, as applied by the CAA.

§ 1002.3 When did USERRA become effective?
USERRA, as applied by the CAA, became effective for employing offices of the legislative branch on January 23, 1996. These regulations will become effective upon approval by Congress.

§ 1002.4 What is the role of the Executive Director of the Office of Compliance under the USERRA provisions of the CAA?
(a) As applied by the CAA, the Executive Director of the Office of Compliance is responsible for providing education and information to any covered employing office or employee with respect to their rights, benefits, and obligations under the USERRA provisions of the CAA.
(b) The Office of Compliance, under the direction of the Executive Director, is responsible for the processing of claims filed pursuant to these regulations. More information about the Office of Compliance's role is contained in Subpart F.

§ 1002.5 What definitions apply to these USERRA regulations?
(a) **Act or USERRA** means the Uniformed Services Employment and Reemployment Rights Act of 1994, as applied by the CAA.
(b) **Benefit, benefit of employment, or rights and benefits** means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues to the employee because of an employment contract, employment agreement, or employing office policy, plan, or practice. The term includes rights and benefits under a pension plan, health plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and, where applicable, the opportunity to select work hours or the location of employment.
(c) **Board** means Board of Directors of the Office of Compliance.
(d) **CAA** means the Congressional Accountability Act of 1995, as amended (Pub. L. 104-1, 109 Stat. 3, 2 U.S.C. §§ 1301-1438).
(e) **Covered employee** means any employee, including an applicant for employment and a former employee, of (1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Government Accountability Office; (9) the Library of Congress; and (10) the Office of Compliance.
(f) **Eligible employee** means a covered employee performing service in the uniformed services, as defined in 1002.5 (t) of this subpart, whose service has not been terminated upon occurrence of any of the events enumerated in section 1002.135 of these regulations. For the purpose of defining who is covered under the discrimination section of these regulations, "performing service" means an eligible employee who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services.
(g) **Employee of the Office of the Architect of the Capitol** includes any employee of the Office of the Architect of the Capitol, the Botanic Gardens, or the Senate Restaurants.
(h) **Employee of the Capitol Police** includes any member or officer of the Capitol Police.
(i) **Employee of the House of Representatives** includes an individual occupying a position for which the pay is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not

any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.
(j) **Employee of the Senate** includes an individual occupying a position for which the pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.
(k) **Employing office** means (1) the Office of Congressional Accessibility Services; (2) the Capitol Police Board; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Government Accountability Office; (7) the Library of Congress; or (8) the Office of Compliance.
(l) **Health plan** means an insurance policy, insurance contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.
(m) **Notice**, when the eligible employee is required to give advance notice of service, means any written or oral notification of an obligation or intention to perform service in the uniformed services provided to an employing office by the employee who will perform such service, or by the uniformed service in which the service is to be performed.
(n) **Office** means the Office of Compliance.
(o) **Qualified**, with respect to an employment position, means having the ability to perform the essential tasks of the position.
(p) **Reasonable efforts**, in the case of actions required of an employing office, means actions, including training provided by an employing office that do not place an undue hardship on the employing office.
(q) **Seniority** means longevity in employment together with any benefits of employment that accrue with, or are determined by, longevity in employment.
(r) **Service in the uniformed services** means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. Service in the uniformed services includes active duty, active and inactive duty for training, National Guard duty under Federal statute, and a period for which a person is absent from a position of employment for an examination to determine the fitness of the person to perform such duty. The term also includes a period for which a person is absent from employment to perform funeral honors duty as authorized by law (10 U.S.C. 12503 or 32 U.S.C. 115). The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107– 188, provides that service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System (NDMS) or as a participant in an authorized training program is deemed "service in the uniformed services." 42 U.S.C. 300hh– 11(d)(3).
(s) **Undue hardship**, in the case of actions taken by an employing office, means an action requiring significant difficulty or expense, when considered in light of—
(1) The nature and cost of the action needed under USERRA and these regulations; (2) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (3) The overall financial resources of the employing office; the overall size of the business of an employing office with respect to the number of its employees; the number, type, and location of its facilities; and, (4) The type of operation or operations of the employing office, including the composition, structure, and functions of the work force of such employing office; the geographic separateness, administrative, or fiscal relationship of the State, District, or satellite office in question to the employing office.

(t) **Uniformed services** means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the National Disaster Medical System (NDMS) when federally activated or attending authorized training in support of their Federal mission is deemed "service in the uniformed services," although such appointee is not a member of the "uniformed services" as defined by USERRA.

§ 1002.6 What types of service in the uniformed services are covered by USERRA?
The definition of "service in the uniformed services" covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.

§ 1002.7 How does USERRA, as applied by the Congressional Accountability Act, relate to other laws, public and private contracts, and employing office practices?
(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employing office may provide greater rights and benefits than USERRA requires, but no employing office can refuse to provide any right or benefit guaranteed by USERRA, as applied by the CAA.
(b) USERRA supersedes any contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an office policy that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.
(c) USERRA does not supersede, nullify or diminish any Federal law, contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employing office to pay an eligible employee for time away from work performing service, an employing office policy, plan, or practice that provides such a benefit is permissible under USERRA.
(d) If an employing office provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employing office may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employing office to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.

Subpart B: Anti-Discrimination and Anti-Retaliation

PROTECTION FROM EMPLOYER DISCRIMINATION AND RETALIATION

§ 1002.18 What status or activity is protected from employer discrimination by USERRA?
An employing office must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.

§ 1002.19 What activity is protected from employer retaliation by USERRA?
An employing office must not retaliate against an eligible employee by taking any adverse employment action against him or her because the eligible employee has taken an action to enforce a protection afforded any person under USERRA; testified or otherwise made a statement in or in connection with a proceeding under USERRA; assisted or participated in a USERRA investigation; or exercised a right provided for by USERRA.

§ 1002.20 Does USERRA's prohibitions against discrimination and retaliation apply to all employment positions?
Under USERRA, as applied by the CAA, the prohibitions against discrimination and retaliation apply to eligible employees in all positions within covered employing offices, including those that are for a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. However, USERRA's reemployment rights and benefits do not apply to such brief, non-recurrent positions of employment

§ 1002.21 Does USERRA protect a covered employee who has not actually performed service in the uniformed services?
USERRA's provisions, as applied by Section 206 of the CAA, prohibit discrimination and retaliation only against eligible employees. Section 207(a) of the CAA, however, prohibits retaliation against all covered employees because the employee has opposed any practice made unlawful under the CAA, including a violation of USERRA's provisions, as applied by the CAA; or testified; assisted; or participated in any manner in a hearing or proceeding under the CAA.

Subpart C – Eligibility for Reemployment

GENERAL ELIGIBILITY FOR REEMPLOYMENT

§ 1002.32 What criteria must an employee meet to be eligible under USERRA for reemployment after service in the uniformed services?
(a) In general, if an eligible employee has been absent from a position of employment in an employing office by reason of service in the uniformed services, he or she will be eligible for reemployment in that same employing office by meeting the following criteria:
(1) The employing office had advance notice of the eligible employee's service; (2) The eligible employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employing office; (3) The eligible employee timely returns to work or applies for reemployment; and, (4) The eligible employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.
(b) These general eligibility requirements have important qualifications and exceptions, which are described in detail in §§ 1002.73 through 1002.138. If the employee meets these eligibility criteria, then he or she is eligible for reemployment unless the employing office establishes one of the defenses described in § 1002.139. The employment position to which the eligible employee is entitled is described in §§ 1002.191 through 1002.199.

§ 1002.33 Does the eligible employee have to prove that the employing office discriminated against him or her in order to be eligible for reemployment?
No. The eligible employee is not required to prove that the employing office discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment

COVERAGE OF EMPLOYERS AND POSITIONS

§ 1002.34 Which employing offices are covered by these regulations?
(a) USERRA applies to all covered employing offices of the legislative branch as defined in 2 U.S.C. § 1301(9) and 2 U.S.C.§ 1316(a)(2)(C).

§ 1002.40 Does USERRA protect against discrimination in initial hiring decisions?
Yes. The definition of employer in the USERRA provision as applied by the CAA includes an employing office that has denied initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employing office need not actually employ an individual to be liable under the Act, if it has denied initial employment on the basis of the individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Similarly, the employing office would be liable if it denied initial employment on the basis of the individual's action taken to enforce a protection afforded to any person under USERRA, his or her testimony or statement in connection with any USERRA proceeding, assistance or other participation in a USERRA investigation, or the exercise of any other right provided by the Act. For example, if the individual has been denied initial employment because of his or her obligations as a member of the National Guard or Reserves, the employing office denying employment is liable under USERRA. Similarly, if an employing office withdraws an offer of employment because the individual is called upon to fulfill an

obligation in the uniformed services, the employing office withdrawing the employment offer is also liable under USERRA.

§ 1002.41 Does an eligible employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?
USERRA rights are not diminished because an eligible employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employing office is not required to reemploy an eligible employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employing office bears the burden of proving this affirmative defense.

§ 1002.42 What rights does an eligible employee have under USERRA if he or she is on layoff or on a leave of absence?
(a) If an eligible employee is laid off with recall rights, or on a leave of absence, he or she is protected under USERRA. If the eligible employee is on layoff and begins service in the uniformed services, or is laid off while performing service, he or she may be entitled to reemployment on return if the employing office would have recalled the employee to employment during the period of service. Similar principles apply if the eligible employee is on a leave of absence from work when he or she begins a period of service in the uniformed services.
(b) If the eligible employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she still remains an eligible employee for purposes of the Act. Therefore, if the employee is otherwise eligible, he or she is entitled to reemployment following the conclusion of the period of service, even if he or she did not respond to the recall notice.
(c) If the eligible employee is laid off before or during service in the uniformed services, and the employing office would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is an eligible employee. Reemployment rights under USERRA cannot put the eligible employee in a better position than if he or she had remained in the civilian employment position.

§ 1002.43 Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?
Yes. USERRA applies to all eligible employees. There is no exclusion for executive, managerial, or professional employees.

§ 1002.44 Does USERRA cover an independent contractor?
No. USERRA, as applied by the CAA, does not provide protections for an independent contractor.

COVERAGE OF SERVICE IN THE UNIFORMED SERVICES

§ 1002.54 Are all military fitness examinations considered "service in the uniformed services?"
Yes. USERRA's definition of "service in the uniformed services" includes a period for which an eligible employee is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services. Military fitness examinations can address more than physical or medical fitness, and include evaluations for

mental, educational, and other types of fitness. Any examination to determine an eligible employee's fitness for service is covered, whether it is an initial or recurring examination. For example, a periodic medical examination required of a Reserve component member to determine fitness for continued service is covered.

§ 1002.55 Is all funeral honors duty considered "service in the uniformed services?"

(a) USERRA's definition of "service in the uniformed services" includes a period for which an eligible employee is absent from employment for the purpose of performing authorized funeral honors duty under 10 U.S.C. 12503 (members of Reserve ordered to perform funeral honors duty) or 32 U.S.C. 115 (Member of Air or Army National Guard ordered to perform funeral honors duty).

(b) Funeral honors duty performed by persons who are not members of the uniformed services, such as members of veterans' service organizations, is not "service in the uniformed services."

§ 1002.56 What types of service in the National Disaster Medical System are considered "service in the uniformed services?"

Under a provision of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42 U.S.C. 300hh 11(d)(3), "service in the uniformed services" includes service performed as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or participation in an authorized training program, even if the eligible employee is not a member of the uniformed services.

§ 1002.57 Is all service as a member of the National Guard considered "service in the uniformed services?"

No. Only Federal National Guard Service is considered "service in the uniformed services." The National Guard has a dual status. It is a Reserve component of the Army, or, in the case of the Air National Guard, of the Air Force. Simultaneously, it is a State military force subject to call-up by the State Governor for duty not subject to Federal control, such as emergency duty in cases of floods or riots. National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.

(a) National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty performed under Title 10 of the United States Code. Service under Federal authority also includes duty under Title 32 of the United States Code, such as active duty for training, inactive duty training, or full-time National Guard duty.

(b) National Guard service under authority of State law is not protected by USERRA. However, many States have laws protecting the civilian job rights of National Guard members who serve under State orders. Enforcement of those State laws is not covered by USERRA or these regulations.

§ 1002.58 Is service in the commissioned corps of the Public Health Service considered "service in the uniformed services?"

Yes. Service in the commissioned corps of the Public Health Service (PHS) is "service in the uniformed services" under USERRA.

§ 1002.59 Are there any circumstances in which special categories of persons are considered to perform "service in the uniformed services?"

Yes. In time of war or national emergency, the President has authority to designate any category of persons as a "uniformed service" for purposes of USERRA. If the President exercises this authority, service as a member of that category of persons would be "service in the uniformed services" under USERRA.

§ 1002.60 Does USERRA cover an individual attending a military service academy?

Yes. Attending a military service academy is considered uniformed service for purposes of USERRA. There are four service academies: The United States Military Academy (West Point, New York), the United States Naval Academy (Annapolis, Maryland), the United States Air Force Academy (Colorado Springs, Colorado), and the United States Coast Guard Academy (New London, Connecticut).

§ 1002.61 Does USERRA cover a member of the Reserve Officers Training Corps?

Yes, under certain conditions:

(a) Membership in the Reserve Officers Training Corps (ROTC) or the Junior ROTC is not "service in the uniformed services." However, some Reserve and National Guard enlisted members use a college ROTC program as a means of qualifying for commissioned officer status. National Guard and Reserve members in an ROTC program may at times, while participating in that program, be receiving active duty and inactive duty training service credit with their unit. In these cases, participating in ROTC training sessions is considered "service in the uniformed services," and qualifies a person for protection under USERRA's reemployment and anti-discrimination provisions.

(b) Typically, an individual in a College ROTC program enters into an agreement with a particular military service that obligates such individual to either complete the ROTC program and accept a commission or, in case he or she does not successfully complete the ROTC program, to serve as an enlisted member. Although an individual does not qualify for reemployment protection, except as specified in (a) above, he or she is protected under USERRA's anti-discrimination provisions because, as a result of the agreement, he or she has applied to become a member of the uniformed services and has incurred an obligation to perform future service.

§ 1002.62 Does USERRA cover a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?

No. Although the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) is a "uniformed service" for some purposes, it is not included in USERRA's definition of this term. Service in the Civil Air Patrol and the Coast Guard Auxiliary similarly is not considered "service in the uniformed services" for purposes of USERRA. Consequently, service performed in the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA), the Civil Air Patrol, and the Coast Guard Auxiliary is not protected by USERRA.

ABSENCE FROM A POSITION OF EMPLOYMENT NECESSITATED BY REASON OF SERVICE IN THE UNIFORMED SERVICES

§ 1002.73 Does service in the uniformed services have to be an eligible employee's sole reason for leaving an employment position in order to have USERRA reemployment rights?
No. If absence from a position of employment is necessitated by service in the uniformed services, and the employee otherwise meets the Act's eligibility requirements, he or she has reemployment rights under USERRA, even if the eligible employee uses the absence for other purposes as well. An eligible employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services, although such uniformed service must be the main reason for departure from employment. For example, if the eligible employee is required to report to an out of state location for military training and he or she spends off-duty time during that assignment moonlighting as a security guard or visiting relatives who live in that State, the eligible employee will not lose reemployment rights simply because he or she used some of the time away from the job to do something other than attend the military training. Also, if an eligible employee receives advance notification of a mobilization order, and leaves his or her employment position in order to prepare for duty, but the mobilization is cancelled, the employee will not lose any reemployment rights.

§ 1002.74 Must the eligible employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?
No. At a minimum, an eligible employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning service in the uniformed services:
(a) If the eligible employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the eligible employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the eligible employee can report for uniformed service fit for duty.
(b) If the eligible employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.
(c) If the eligible employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.

§ 1002.85 Must the eligible employee give advance notice to the employing office of his or her service in the uniformed services?
(a) Yes. The eligible employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employing office that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an eligible employee is employed by more than one employing office, the employee, or an appropriate officer of the uniformed service in which

his or her service is to be performed, must notify each employing office that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.
(b) The Department of Defense USERRA regulations at 32 CFR 104.3 provide that an "appropriate officer" can give notice on the eligible employee's behalf. An "appropriate officer" is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.
(c) The eligible employee's notice to the employing office may be either oral or written. The notice may be informal and does not need to follow any particular format.
(d) Although USERRA does not specify how far in advance notice must be given to the employing office, an eligible employee should provide notice as far in advance as is reasonable under the circumstances. In regulations promulgated by the Department of Defense under USERRA, 32 CFR 104.6(a)(2)(i)(B), the Defense Department "strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so."

§ 1002.86 When is the eligible employee excused from giving advance notice of service in the uniformed services?
The eligible employee is required to give advance notice of pending service unless giving such notice is prevented by military necessity, or is otherwise impossible or unreasonable under all the circumstances.
(a) Only a designated authority can make a determination of "military necessity," and such a determination is not subject to judicial review. Guidelines for defining "military necessity" appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by "military necessity." See 42 U.S.C300hh–11(d)(3)(B).
(b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the eligible employee's employing office or the employing office's representative, or a requirement that the eligible employee report for uniformed service in an extremely short period of time.

§ 1002.87 Is the eligible employee required to get permission from his or her employing office before leaving to perform service in the uniformed services?
No. The eligible employee is not required to ask for or get the employing office's permission to leave to perform service in the uniformed services. The eligible employee is only required to give the employing office notice of pending service.

§ 1002.88 Is the eligible employee required to tell the employing office that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?
No. When the eligible employee leaves the employment position to begin a period of service, he or she is not required to tell the employing office that he or she intends to seek reemployment after completing uniformed service. Even if the eligible employee tells the employing office before entering or completing uniformed service that he or she does not intend to seek

reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The eligible employee is not required to decide in advance of leaving the position with the employing office, whether he or she will seek reemployment after completing uniformed service.

PERIOD OF SERVICE

§ 1002.99 Is there a limit on the total amount of service in the uniformed services that an eligible employee may perform and still retain reemployment rights with the employing office?

Yes. In general, the eligible employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employing office. The exceptions to this rule are described below.

§ 1002.100 Does the five-year service limit include all absences from an employment position that are related to service in the uniformed services?

No. The five-year period includes only the time the eligible employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the eligible employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

§ 1002.101 Does the five-year service limit include periods of service that the eligible employee performed when he or she worked for a previous employing office?

No. An eligible employee is entitled to a leave of absence for uniformed service for up to five years with each employing office for whom he or she works or has worked. When the eligible employee takes a position with a new employing office, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an eligible employee is employed by more than one employing office, a separate five-year period runs as to each employing office independently, even if those employing offices share or co-determine the employee's terms and conditions of employment. For example, an eligible employee of the legislative branch may work part-time for two employing offices. In this case, a separate five-year period would run as to the eligible employee's employment with each respective employing office.

§ 1002.102 Does the five-year service limit include periods of service that the eligible employee performed before USERRA was enacted?

It depends. Under the CAA, USERRA provides reemployment rights to which an eligible employee may become entitled beginning on or after January 23, 1996, but any uniformed service performed before January 23, 1996, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA's five-year limit.

§ 1002.103 Are there any types of service in the uniformed services that an eligible employee can perform that do not count against USERRA's five-year service limit?

(a) USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the eligible employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the eligible employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault;

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and, (ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the eligible employee's professional development, or to complete skill training or retraining;

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:

(i) 10 U.S.C. 688 (involuntary active duty by a military retiree);

(ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);

(iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);

(iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);

(v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);

(vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);

(vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);

(viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);

(ix) 14 U.S.C. 359 (involuntary active duty by retired Coast Guard enlisted member);

(x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);

(xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty); and

(xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service performed in a uniformed service if the eligible employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(6) Service performed in a uniformed service if the eligible employee was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304, as determined by a proper military authority;

(7) Service performed in a uniformed service if the eligible employee was ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned; and,

(8) Service performed as a member of the National Guard if the eligible employee was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States.

(b) Service performed in a uniformed service to mitigate economic harm where the eligible employee's employing office is in violation of its employment or reemployment obligations to him or her.

§ 1002.104 Is the eligible employee required to accommodate his or her employing office's needs as to the timing, frequency or duration of service?

No. The eligible employee is not required to accommodate his or her employing office's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employing office cannot refuse to reemploy the eligible employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employing office is permitted to bring its concerns over the timing, frequency, or duration of the eligible employee's service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.

APPLICATION FOR EMPLOYMENT

§ 1002.115 Is the eligible employee required to report to or submit a timely application for reemployment to his or her pre-service employing office upon completing the period of service in the uniformed services?

Yes. Upon completing service in the uniformed services, the eligible employee must notify the pre-service employing office of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the eligible employee is required to report to work or submit a timely application for reemployment depends upon the length of service, as follows:

(a) Period of service less than 31 days or for a period of any length for the purpose of a fitness examination. If the period of service in the uniformed services was less than 31 days, or the eligible employee was absent from a position of employment for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the eligible employee must report back to the employing office not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the eligible employee's residence. For example, if the eligible employee completes a period of service and travel home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employing office until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six o'clock the next morning. If it is impossible or unreasonable for the eligible employee to report within such time period through no fault of his or her own, he or she must report to the employing office as soon as possible after the expiration of the eight-hour period.

(b) Period of service more than 30 days but less than 181 days. If the eligible employee's period of service in the uniformed services was for more than 30 days but less than 181 days, he or she must submit an application for reemployment (written or oral) with the employing office not later than 14 days after completing service. If it is impossible or unreasonable for the eligible

employee to apply within 14 days through no fault of his or her own, he or she must submit the application not later than the next full calendar day after it becomes possible to do so.
(c) Period of service more than 180 days. If the eligible employee's period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or oral) not later than 90 days after completing service.

§1002.116 Is the time period for reporting back to an employing office extended if the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?
Yes. If the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an application for reemployment to the employing office at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the eligible employee's control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employing office, and is not applicable following reemployment.

§ 1002.117 Are there any consequences if the eligible employee fails to report for or submit a timely application for reemployment?
(a) If the eligible employee fails to timely report for or apply for reemployment, he or she does not automatically forfeit entitlement to USERRA's reemployment and other rights and benefits. However, the eligible employee does become subject to any conduct rules, established policy, and general practices of the employing office pertaining to an absence from scheduled work.
(b) If reporting or submitting an employment application to the employing office is impossible or unreasonable through no fault of the eligible employee, he or she may report to the employing office as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to the employing office by the next full calendar day after it becomes possible to do so (in the case of a period of service from 31 to 180 days), and the eligible employee will be considered to have timely reported or applied for reemployment.

§ 1002.118 Is an application for reemployment required to be in any particular form?
An application for reemployment need not follow any particular format. The eligible employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employing office. The eligible employee is permitted but not required to identify a particular reemployment position in which he or she is interested.

§ 1002.119 To whom must the eligible employee submit the application for reemployment?
The application must be submitted to the pre-service employing office or to an agent or representative of the employing office who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor.

§ 1002.120 If the eligible employee seeks or obtains employment with an employer other than the pre-service employing office before the end of the period within which a reemployment

application must be filed, will that jeopardize reemployment rights with the pre-service employing office?

No. The eligible employee has reemployment rights with the pre-service employing office provided that he or she makes a timely reemployment application to that employing office. The eligible employee may seek or obtain employment with an employer other than the pre-service employing office during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employing office. However, such alternative employment during the application period should not be of a type that would constitute a cause for the employing office to discipline or terminate the employee following reemployment. For instance, if the employing office forbids outside employment, violation of such a policy may constitute a cause for discipline or even termination.

§ 1002.121 Is the eligible employee required to submit documentation to the employing office in connection with the application for reemployment?

Yes, if the period of service exceeded 30 days and if requested by the employing office to do so. If the eligible employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employing office, provide documentation to establish that:

(a) The reemployment application is timely;

(b) The eligible employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,

(c) The eligible employee's separation or dismissal from service was not disqualifying.

§ 1002.122 Is the employing office required to reemploy the eligible employee if documentation establishing the employee's eligibility does not exist or is not readily available?

Yes. The employing office is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The eligible employee is not liable for administrative delays in the issuance of military documentation. If the eligible employee is re-employed after an absence from employment for more than 90 days, the employing office may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the eligible employee is not entitled to reemployment, the employing office may terminate employment and any rights or benefits that the employee may have been granted.

§ 1002.123 What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?

(a) Documents that satisfy the requirements of USERRA include the following:

(1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;

(2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;

(3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;

(4) Certificate of completion from military training school;

(5) Discharge certificate showing character of service; and,

(6) Copy of extracts from payroll documents showing periods of service;

(7) Letter from NDMS Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.
(b) The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.

CHARACTER OF SERVICE

§ 1002.134 What type of discharge or separation from service is required for an eligible employee to be entitled to reemployment under USERRA?
USERRA does not require any particular form of discharge or separation from service. However, even if the employee is otherwise eligible for reemployment, he or she will be disqualified if the characterization of service falls within one of four categories. USERRA requires that the employee not have received one of these types of discharge.

§ 1002.135 What types of discharge or separation from uniformed service will make the employee ineligible for reemployment under USERRA?
Reemployment rights are terminated if the employee is:
(a) Separated from uniformed service with a dishonorable or bad conduct discharge;
(b) Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;
(c) A commissioned officer dismissed as permitted under 10 U.S.C. 1161(a) by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or,
(d) A commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

§ 1002.136 Who determines the characterization of service?
The branch of service in which the employee performs the tour of duty determines the characterization of service.

§ 1002.137 If the employee receives a disqualifying discharge or release from uniformed service and it is later upgraded, will reemployment rights be restored?
Yes. A military review board has the authority to prospectively or retroactively upgrade a disqualifying discharge or release. A retroactive upgrade would restore reemployment rights providing the employee otherwise meets the Act's eligibility criteria.

§ 1002.138 If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to claim back wages and benefits lost as of the date of separation from service?
No. A retroactive upgrade allows the employee to obtain reinstatement with the former employing office, provided the employee otherwise meets the Act's eligibility criteria. Back pay and other benefits such as pension plan credits attributable to the time period between discharge and the retroactive upgrade are not required to be restored by the employing office in this situation.

EMPLOYER STATUTORY DEFENSES

§ 1002.139 Are there any circumstances in which the pre-service employing office is excused from its obligation to reemploy the eligible employee following a period of uniformed service? What statutory defenses are available to the employing office in an action or proceeding for reemployment benefits?

(a) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if the employing office establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employing office may be excused from re-employing the eligible employee where there has been an intervening reduction in force that would have included that employee. The employing office may not, however, refuse to reemploy the eligible employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee;

(b) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if it establishes that assisting the eligible employee in becoming qualified for reemployment would impose an undue hardship, as defined in § 1002.5(s) and discussed in § 1002.198, on the employing office; or,

(c) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if it establishes that the employment position vacated by the eligible employee in order to perform service in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

(d) The employing office defenses included in this section are affirmative ones, and the employing office carries the burden to prove by a preponderance of the evidence that any one or more of these defenses is applicable.

Subpart D—Rights, Benefits, and Obligations of Persons Absent from Employment Due to Service in the Uniformed Services

FURLOUGH AND LEAVE OF ABSENCE

§ 1002.149 What is the eligible employee's status with the employing office while performing service in the uniformed services?

During a period of service in the uniformed services, the eligible employee is deemed to be on leave of absence from the employing office. In this status, the eligible employee is entitled to the non-seniority rights and benefits generally provided by the employing office to other employees with similar seniority, status, and pay that are on leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employing office characterizes the eligible employee's status during a period of service. For example, if the employing office characterizes the employee as "terminated" during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on leave of absence, and therefore, entitled to the non-seniority rights and benefits generally provided to employees on leave of absence.

§ 1002.150 Which non-seniority rights and benefits is the eligible employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an eligible employee is entitled during a period of service are those that the employing office provides to similarly situated employees by an agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the eligible employee's employment and those established after employment began. They also include those rights and benefits that become effective during the eligible employee's period of service and that are provided to similarly situated employees on leave of absence.

(b) If the non-seniority benefits to which employees on leave of absence are entitled vary according to the type of leave, the eligible employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employing office to an eligible employee on a military leave of absence only if the employing office provides that benefit to similarly situated employees on comparable leaves of absence.

(d) Nothing in this section gives the eligible employee rights or benefits to which the employee otherwise would not be entitled if the employee had remained continuously employed with the employing office.

§ 1002.151 If the employing office provides full or partial pay to the eligible employee while he or she is on military leave, is the employing office required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

Yes. If the employing office provides additional benefits such as full or partial pay when the eligible employee performs service, the employing office is not excused from providing other rights and benefits to which the employee is entitled under the Act.

§ 1002.152 If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the eligible employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

If employment is interrupted by a period of service in the uniformed services and the eligible employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those non-seniority rights and benefits. The eligible employee's written notice does not waive entitlement to any other rights to which he or she is entitled under the Act, including the right to reemployment after service.

§ 1002.153 If employment is interrupted by a period of service in the uniformed services, is the eligible employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employing office require the eligible employee to use accrued leave during a period of service?

(a) If employment is interrupted by a period of service, the eligible employee must be permitted upon request to use any accrued vacation, annual, or similar leave with pay during the period of service, in order to continue his or her civilian pay. However, the eligible employee is not entitled to use sick leave that accrued with the employing office during a period of service in the uniformed services, unless the employing office allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. Sick leave is usually not comparable to annual or vacation leave; it is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.

(b) The employing office may not require the eligible employee to use accrued vacation, annual, or similar leave during a period of service in the uniformed services.

HEALTH PLAN COVERAGE

§ 1002.163 What types of health plans are covered by USERRA?

(a) USERRA defines a health plan to include an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or arrangement under which the employee's health services are provided or the expenses of those services are paid.

(b) USERRA covers group health plans as defined in the Employee Retirement Income Security Act of 1974 (ERISA) at 29 U.S.C. 1191b(a). USERRA applies to group health plans that are subject to ERISA, and plans that are not subject to ERISA, such as those sponsored by the Federal Government.

(c) USERRA covers multi-employer plans maintained pursuant to one or more collective bargaining agreements between employers and employee organizations. USERRA applies to

multi-employer plans as they are defined in ERISA at 29 U.S.C. 1002(37). USERRA contains provisions that apply specifically to multi-employer plans in certain situations.

§ 1002.164 What health plan coverage must the employing office provide for the eligible employee under USERRA?

If the eligible employee has coverage under a health plan in connection with his or her employment, the plan must permit the employee to elect to continue the coverage for a certain period of time as described below:

(a) When the eligible employee is performing service in the uniformed services, he or she is entitled to continuing coverage for himself or herself (and dependents if the plan offers dependent coverage) under a health plan provided in connection with the employment. The plan must allow the eligible employee to elect to continue coverage for a period of time that is the lesser of:

(1) The 24-month period beginning on the date on which the eligible employee's absence for the purpose of performing service begins; or,

(2) The period beginning on the date on which the eligible employee's absence for the purpose of performing service begins, and ending on the date on which he or she fails to return from service or apply for a position of employment as provided under sections 1002.115–123 of these regulations.

(b) USERRA does not require the employing office to establish a health plan if there is no health plan coverage in connection with the employment, or, where there is a plan, to provide any particular type of coverage.

(c) USERRA does not require the employing office to permit the eligible employee to initiate new health plan coverage at the beginning of a period of service if he or she did not previously have such coverage.

§ 1002.165 How does the eligible employee elect continuing health plan coverage?

USERRA does not specify requirements for electing continuing coverage. Health plan administrators may develop reasonable requirements addressing how continuing coverage may be elected, consistent with the terms of the plan and the Act's exceptions to the requirement that the employee give advance notice of service in the uniformed services. For example, the eligible employee cannot be precluded from electing continuing health plan coverage under circumstances where it is impossible or unreasonable for him or her to make a timely election of coverage.

§ 1002.166 How much must the eligible employee pay in order to continue health plan coverage?

(a) If the eligible employee performs service in the uniformed service for fewer than 31 days, he or she cannot be required to pay more than the regular employee share, if any, for health plan coverage.

(b) If the eligible employee performs service in the uniformed service for 31 or more days, he or she may be required to pay no more than 102% of the full premium under the plan, which represents the employing office's share plus the employee's share, plus 2% for administrative costs.

(c)USERRA does not specify requirements for methods of paying for continuing coverage. Health plan administrators may develop reasonable procedures for payment, consistent with the terms of the plan.

§ 1002.167 What actions may a plan administrator take if the eligible employee does not elect or pay for continuing coverage in a timely manner?

The actions a plan administrator may take regarding the provision or cancellation of an eligible employee's continuing coverage depend on whether the employee is excused from the requirement to give advance notice, whether the plan has established reasonable rules for election of continuation coverage, and whether the plan has established reasonable rules for the payment for continuation coverage.

(a) No notice of service and no election of continuation coverage:

If an employing office provides employment-based health coverage to an eligible employee who leaves employment for uniformed service without giving advance notice of service, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service. However, in cases in which an eligible employee's failure to give advance notice of service was excused under the statute because it was impossible, unreasonable, or precluded by military necessity, the plan administrator must reinstate the employee's health coverage retroactively upon his or her election to continue coverage and payment of all unpaid amounts due, and the employee must incur no administrative reinstatement costs. In order to qualify for an exception to the requirement of timely election of continuing health care, an eligible employee must first be excused from giving notice of service under the statute.

(b) Notice of service but no election of continuing coverage:

Plan administrators may develop reasonable requirements addressing how continuing coverage may be elected. Where health plans are also covered under the Consolidated Omnibus Budget Reconciliation Act of 1985, 26 U.S.C. 4980B (COBRA), it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding election of continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule. If an employing office provides employment-based health coverage to an eligible employee who leaves employment for uniformed service for a period of service in excess of 30 days after having given advance notice of service but without making an election regarding continuing coverage, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service, but must reinstate coverage without the imposition of administrative reinstatement costs under the following conditions:

(1) Plan administrators who have developed reasonable rules regarding the period within which an employee may elect continuing coverage must permit retroactive reinstatement of uninterrupted coverage to the date of departure if the eligible employee elects continuing coverage and pays all unpaid amounts due within the periods established by the plan; (2) In cases in which plan administrators have not developed rules regarding the period within which an employee may elect continuing coverage, the plan must permit retroactive reinstatement of uninterrupted coverage to the date of departure upon the eligible employee's election and payment of all unpaid amounts at any time during the period established in section 1002.164(a).

(c) Election of continuation coverage without timely payment:

Health plan administrators may adopt reasonable rules allowing cancellation of coverage if timely payment is not made. Where health plans are covered under COBRA, it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding payment for continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule.

§ 1002.168 If the eligible employee's coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?

(a) If health plan coverage for the eligible employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service.

(b) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that are not service-related (or for the employee's dependents, if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section.

§ 1002.169 Can the eligible employee elect to delay reinstatement of health plan coverage until a date after the date he or she is reemployed?

USERRA requires the employing office to reinstate or direct the reinstatement of health plan coverage upon request at reemployment. USERRA permits but does not require the employing office to allow the employee to delay reinstatement of health plan coverage until a date that is later than the date of reemployment.

§ 1002.170 In a multi-employer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?

Liability under a multi-employer plan for employer contributions and benefits in connection with USERRA's health plan provisions must be allocated either as the plan sponsor provides, or, if the sponsor does not provide, to the eligible employee's last employer before his or her service. If the last employer is no longer functional, liability for continuing coverage is allocated to the health plan.

§ 1002.171 How does the continuation of health plan benefits apply to a multi-employer plan that provides health plan coverage through a health benefits account system?

(a) Some employees receive health plan benefits provided pursuant to a multi-employer plan that utilizes a health benefits account system in which an employee accumulates prospective health benefit eligibility, also commonly referred to as "dollar bank," "credit bank," and "hour bank" plans. In such cases, where an employee with a positive health benefits account balance elects to continue the coverage, the employee may further elect either option below:

(1) The eligible employee may expend his or her health account balance during an absence from employment due to service in the uniformed services in lieu of paying for the continuation of coverage as set out in § 1002.166. If an eligible employee's health account balance becomes depleted during the applicable period provided for in § 1002.164(a), the employee must be permitted, at his or her option, to continue coverage pursuant to § 1002.166. Upon reemployment, the plan must provide for immediate reinstatement of the eligible employee as required by § 1002.168, but may require the employee to pay the cost of the coverage until the employee earns the credits necessary to sustain continued coverage in the plan.

(2) The eligible employee may pay for continuation coverage as set out in § 1002.166, in order to maintain intact his or her account balance as of the beginning date of the absence from employment due to service in the uniformed services. This option permits the eligible employee to resume usage of the account balance upon reemployment.

(b) Employers or plan administrators providing such plans should counsel employees of their options set out in this subsection.

Subpart E—Reemployment Rights and Benefits

PROMPT REEMPLOYMENT

§ 1002.180 When is an eligible employee entitled to be reemployed by the employing office?
The employing office must promptly reemploy the employee when he or she returns from a period of service if the employee meets the Act's eligibility criteria as described in Subpart C of these regulations.

§ 1002.181 How is "prompt reemployment" defined?
"Prompt reemployment" means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the eligible employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employing office may have to reassign or give notice to another employee who occupied the returning employee's position.

REEMPLOYMENT POSITION

§ 1002.191 What position is the eligible employee entitled to upon reemployment?
As a general rule, the eligible employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the eligible employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the eligible employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service. Depending upon the specific circumstances, the employing office may have the option, or be required, to reemploy the eligible employee in a position other than the escalator position.

§ 1002.192 How is the specific reemployment position determined?
In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the eligible employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employing office may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the eligible employee's length of service, qualifications, and disability, if any. The actual reemployment position may be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions.

§ 1002.193 Does the reemployment position include elements such as seniority, status, and rate of pay?
(a) Yes. The reemployment position includes the seniority, status, and rate of pay that an eligible employee would ordinarily have attained in that position given his or her job history, including

prospects for future earnings and advancement. The employing office must determine the seniority rights, status, and rate of pay as though the eligible employee had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the eligible employee's service, and any changes that may have occurred during the period of service. In particular, the eligible employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.

(b) If an opportunity for promotion, or eligibility for promotion, that the eligible employee missed during service is based on a skills test or examination, then the employing office should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the eligible employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.

§ 1002.194 Can the application of the escalator principle result in adverse consequences when the eligible employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the eligible employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an eligible employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an eligible employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employing office to assess what would have happened to such factors as the eligible employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

§ 1002.195 What other factors can determine the reemployment position?

Once the eligible employee's escalator position is determined, other factors may allow, or require, the employing office to reemploy the employee in a position other than the escalator position. These factors, which are explained in §§ 1002.196 through 1002.199, are:

(a) The length of the eligible employee's most recent period of uniformed service;
(b) The eligible employee's qualifications; and,
(c) Whether the eligible employee has a disability incurred or aggravated during uniformed service.

§ 1002.196 What is the eligible employee's reemployment position if the period of service was less than 91 days?

Following a period of service in the uniformed services of less than 91 days, the eligible employee must be reemployed according to the following priority:
(a) The eligible employee must be reemployed in the escalator position. He or she must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position after reasonable efforts by the employing office, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible employee is not qualified to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employing office, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

§ 1002.197 What is the reemployment position if the eligible employee's period of service in the uniformed services was more than 90 days?

Following a period of service of more than 90 days, the eligible employee must be reemployed according to the following priority:
(a) The eligible employee must be reemployed in the escalator position or a position of like seniority, status, and pay. He or she must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position or a like position after reasonable efforts by the employing office, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began or in a position of like seniority, status, and pay. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible employee is not qualified to perform the duties of the escalator position, the pre-service position, or a like position, after reasonable efforts by the employing office, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

§ 1002.198 What efforts must the employing office make to help the eligible employee become qualified for the reemployment position?

The eligible employee must be qualified for the reemployment position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position. The employing office is not required to reemploy the eligible employee on his or her return from service if he or she cannot, after reasonable efforts by the employing office, qualify for the appropriate reemployment position.

(a)(1) "Qualified" means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.

(2) Whether a task is essential depends on several factors, and these factors include but are not limited to:

(i) The employing office's judgment as to which functions are essential;

(ii) Written job descriptions developed before the hiring process begins;

(iii) The amount of time on the job spent performing the function;

(iv) The consequences of not requiring the individual to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(b) Only after the employing office makes reasonable efforts, as defined in § 1002.5(p), may it determine that the otherwise eligible employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.

§ 1002.199 What priority must the employing office follow if two or more returning employees are entitled to reemployment in the same position?

If two or more eligible employees are entitled to reemployment in the same position and more than one employee has reported or applied for employment in that position, the employee who first left the position for uniformed service has the first priority on reemployment in that position. The remaining employee (or employees) is entitled to be reemployed in a position similar to that in which the employee would have been re-employed according to the rules that normally determine a reemployment position, as set out in §§ 1002.196 and 1002.197.

SENIORITY RIGHTS AND BENEFITS

§ 1002.210 What seniority rights does an eligible employee have when reemployed following a period of uniformed service?

The eligible employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. The eligible employee is not entitled to any benefits to which he or she would not have been entitled had the employee been continuously employed with the employing office. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employing office and those required by statute. For example, under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601–2654 (FMLA), if the number of

months and the number of hours of work for which the service member was employed by the employing office, together with the number of months and the number of hours of work for which the service member would have been employed by the employing office during the period of uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.

§ 1002.211 Does USERRA require the employing office to use a seniority system?
No. USERRA does not require the employing office to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the eligible employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

§ 1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?
A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:
(a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;
(b) Whether it is reasonably certain that the eligible employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,
(c) Whether it is the employing office's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employing office's actual custom or practice is different from what is written in the contract or handbook.

§ 1002.213 How can the eligible employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?
A reasonable certainty is a high probability that the eligible employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The eligible employee does not have to establish that he or she would have received the benefit as an absolute certainty. The eligible employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employing office cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the eligible employee from gaining the right or benefit.

DISABLED EMPLOYEES

§ 1002.225 Is the eligible employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?
Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the eligible employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employing office must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the eligible employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employing office to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employing office must make reasonable efforts to accommodate the eligible employee's disability and to help him or her to become qualified to perform the duties of one of these positions:
(a) A position that is equivalent in seniority, status, and pay to the escalator position; or,
(b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the eligible employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.

§ 1002.226 If the eligible employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employing office make to help him or her become qualified for the reemployment position?
(a) USERRA requires that the eligible employee be qualified for the reemployment position regardless of any disability. The employing office must make reasonable efforts to help the eligible employee to become qualified to perform the duties of this position. The employing office is not required to reemploy the eligible employee on his or her return from service if he or she cannot, after reasonable efforts by the employing office, qualify for the appropriate reemployment position.
(b) "Qualified" has the same meaning here as in § 1002.198.

RATE OF PAY

§ 1002.236 How is the eligible employee's rate of pay determined when he or she returns from a period of service?
The eligible employee's rate of pay is determined by applying the same escalator principles that are used to determine the reemployment position, as follows:
(a) If the eligible employee is reemployed in the escalator position, the employing office must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the eligible employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employing office may examine the returning eligible employee's own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. For example, if the eligible employee missed a merit

pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed. If the merit pay increase that the eligible employee missed during service is based on a skills test or examination, then the employing office should give the employee a reasonable amount of time to adjust to the reemployment position and then give him or her the skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. The escalator principle also applies in the event a pay reduction occurred in the reemployment position during the period of service. Any pay adjustment must be made effective as of the date it would have occurred had the eligible employee's employment not been interrupted by uniformed service.
(b) If the eligible employee is reemployed in the pre-service position or another position, the employing office must compensate him or her at the rate of pay associated with the position in which he or she is reemployed. As with the escalator position, the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the eligible employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service.

PROTECTION AGAINST DISCHARGE

§ 1002.247 Does USERRA provide the eligible employee with protection against discharge?
Yes. If the eligible employee's most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause –
(a) For 180 days after the eligible employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,
(b) For one year after the date of reemployment if the eligible employee's most recent period of uniformed service was more than 180 days.

§ 1002.248 What constitutes cause for discharge under USERRA?
The eligible employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.
(a) In a discharge action based on conduct, the employing office bears the burden of proving that it is reasonable to discharge the eligible employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.
(b) If, based on the application of other legitimate nondiscriminatory reasons, the eligible employee's job position is eliminated, or the eligible employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employing office bears the burden of proving that the eligible employee's job would have been eliminated or that he or she would have been laid off.

PENSION PLAN BENEFITS

§ 1002.259 How does USERRA protect an eligible employee's pension benefits?
On reemployment, the eligible employee is treated as not having a break in service with the employing office for purposes of participation, vesting and accrual of benefits in a pension plan, by reason of the period of absence from employment due to or necessitated by service in the uniformed services.
(a) Depending on the length of the eligible employee's period of service, he or she is entitled to take from one to ninety days following service before reporting back to work or applying for reemployment (See § 1002.115). This period of time must be treated as continuous service with the employing office for purposes of determining participation, vesting and accrual of pension benefits under the plan.
(b) If the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, service, he or she is entitled to report to or submit an application for reemployment at the end of the time period necessary for him or her to recover from the illness or injury. This period, which may not exceed two years from the date the eligible employee completed service, except in circumstances beyond his or her control, must be treated as continuous service with the employing office for purposes of determining the participation, vesting and accrual of pension benefits under the plan.

§ 1002.260 What pension benefit plans are covered under USERRA?
(a) The Employee Retirement Income Security Act of 1974 (ERISA) defines an employee pension benefit plan as a plan that provides retirement income to employees, or defers employee income to a period extending to or beyond the termination of employment. USERRA also covers certain pension plans not covered by ERISA, such as those sponsored by the Federal Government.
(b) USERRA does not cover pension benefits under the Federal Thrift Savings Plan; those benefits are covered under 5 U.S.C. 8432b.

§ 1002.261 Who is responsible for funding any plan obligation to provide the eligible employee with pension benefits?
With the exception of multi-employer plans, which have separate rules discussed below, the employing office is required to ensure the funding of any obligation of the plan to provide benefits that are attributable to the eligible employee's period of service. In the case of a defined contribution plan, once the eligible employee is reemployed, the employing office must ensure that the amount of the make-up contribution for the employee, if any; the employee's make-up contributions, if any; and the employee's elective deferrals, if any; in the same manner and to the same extent that the amounts are allocated for other employees during the period of service. In the case of a defined benefit plan, the eligible employee's accrued benefit will be increased for the period of service once he or she is reemployed and, if applicable, has repaid any amounts previously paid to him or her from the plan and made any employee contributions that may be required to be made under the plan.

§ 1002.262 When must the plan contribution that is attributable to the employee's period of uniformed service be made?
(a) Employer contributions are not required until the eligible employee is reemployed. For employer contributions to a plan in which the eligible employee is not required or permitted to

contribute, the contribution attributable to the employee's period of service must be made no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later. If it is impossible or unreasonable for the contribution to be made within this time period, the contribution must be made as soon as practicable.

(b) If the eligible employee is enrolled in a contributory plan, he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions, or elective deferrals, must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the eligible employee's immediate past period of uniformed service, with the repayment period not to exceed five years. Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employing office.

(c) If the eligible employee's plan is contributory and he or she does not make up his or her contributions or elective deferrals, he or she will not receive the employer match or the accrued benefit attributable to his or her contribution. This is true because employer contributions are contingent on or attributable to the employee's contributions or elective deferrals only to the extent that the employee makes up his or her payments to the plan. Any employer contributions that are contingent on or attributable to the eligible employee's make-up contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions.

(d) The eligible employee is not required to make up the full amount of employee contributions or elective deferrals that he or she missed making during the period of service. If the eligible employee does not make up all of the missed contributions or elective deferrals, his or her pension may be less than if he or she had done so.

(e) Any vested accrued benefit in the pension plan that the eligible employee was entitled to prior to the period of uniformed service remains intact whether or not he or she chooses to be reemployed under the Act after leaving the uniformed service.

(f) An adjustment will be made to the amount of employee contributions or elective deferrals that the eligible employee will be able to make to the pension plan for any employee contributions or elective deferrals he or she actually made to the plan during the period of service.

§ 1002.263 Does the eligible employee pay interest when he or she makes up missed contributions or elective deferrals?

No. The eligible employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service.

§ 1002.264 Is the eligible employee allowed to repay a previous distribution from a pension benefits plan upon being reemployed?

Yes, provided the plan is a defined benefit plan. If the eligible employee received a distribution of all or part of the accrued benefit from a defined benefit plan in connection with his or her service in the uniformed services before he or she became reemployed, he or she must be allowed to repay the withdrawn amounts when he or she is reemployed. The amount the eligible employee must repay includes any interest that would have accrued had the monies not been withdrawn. The eligible employee must be allowed to repay these amounts during a time period starting with the date of reemployment and continuing for up to three times the length

of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years (or such longer time as may be agreed to between the employing office and the employee), provided the employee is employed with the post-service employing office during this period.

§ 1002.265 If the eligible employee is reemployed with his or her pre-service employing office, is the employee's pension benefit the same as if he or she had remained continuously employed?

The amount of the eligible employee's pension benefit depends on the type of pension plan.

(a) In a non-contributory defined benefit plan, where the amount of the pension benefit is determined according to a specific formula, the eligible employee's benefit will be the same as though he or she had remained continuously employed during the period of service.

(b) In a contributory defined benefit plan, the eligible employee will need to make up contributions in order to have the same benefit as if he or she had remained continuously employed during the period of service.

(c) In a defined contribution plan, the benefit may not be the same as if the employee had remained continuously employed, even though the employee and the employer make up any contributions or elective deferrals attributable to the period of service, because the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period or periods of service.

§ 1002.266 What are the obligations of a multi-employer pension benefit plan under USERRA?

A multi-employer pension benefit plan is one to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. The Act uses ERISA's definition of a multi-employer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multi-employer plans, as follows:

(a) The last employer that employed the eligible employee before the period of service is responsible for making the employer contribution to the multi-employer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the eligible employee.

(b) An employer that contributes to a multi-employer plan and that reemploys the eligible employee pursuant to USERRA must provide written notice of reemployment to the plan administrator within 30 days after the date of reemployment. The returning service member should notify the reemploying employer that he or she has been reemployed pursuant to USERRA. The 30-day period within which the reemploying employer must provide written notice to the multi-employer plan pursuant to this subsection does not begin until the employer has knowledge that the eligible employee was re-employed pursuant to USERRA.

(c) The eligible employee is entitled to the same employer contribution whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same multi-employer plan, provided that the pre-service employer and the post-service employer share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

§ 1002.267 How is compensation during the period of service calculated in order to determine the eligible employee's pension benefits, if benefits are based on compensation?

In many pension benefit plans, the eligible employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.

(a) Where the eligible employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service.

(b) (1) Where the rate of pay the eligible employee would have received is not reasonably certain, the average rate of compensation during the 12-month period prior to the period of uniformed service must be used.

(2) Where the rate of pay the eligible employee would have received is not reasonably certain and he or she was employed for less than 12 months prior to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded service.

Subpart F—Compliance Assistance, Enforcement and Remedies

COMPLIANCE ASSISTANCE

§ 1002.277 What assistance does the Office of Compliance provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

The Office of Compliance provides assistance to any person or entity who is covered by the CAA with respect to employment and reemployment rights and benefits under USERRA as applied by the CAA. This assistance includes responding to inquiries, and providing a program of education and information on matters relating to USERRA.

INVESTIGATION AND REFERRAL

§ 1002.288 How does an eligible employee initiate a claim alleging a violation of USERRA under the CAA?

(a) If an eligible employee is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employing office has failed or refused, or is about to fail or refuse, to comply with the Act, the eligible employee may file a complaint with the Office of Compliance, after a required period of counseling and mediation.

(b) To commence a proceeding, an eligible employee alleging a violation of the rights and protections of USERRA must request counseling by the Office of Compliance no later than 180 days after the date of the alleged violation. If an eligible employee misses this deadline, the claim may be time barred under the CAA.

(c) The following procedures are available under subchapter IV of the CAA for eligible employees who believe their rights under USERRA as made applicable by the CAA have been violated:

(1) counseling;

(2) mediation; and

(3) election of either -

(A) a formal complaint filed with the Office of Compliance (which must meet the requirements as set forth in the Office of Compliance Procedural Rules, Section 5.01(c)), and a hearing before a hearing officer, subject to review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit; or

(B) a civil action in a district court of the United States.

(d) Regulations of the Office of Compliance describing and governing these procedures can be found at 141 Cong. Rec. H15645-H15655 (daily ed. December 30, 1995) and 141 Cong. Rec. S19239-19249 (daily ed. December 22, 1995), 143 Cong. Rec. H8316-H8317(daily ed. October 2, 1997)(as amended, applying USERRA to the Government Accountability Office and the Library of Congress).

ENFORCEMENT OF RIGHTS AND BENEFITS AGAINST AN EMPLOYING OFFICE

§ 1002.303 Is an eligible employee required to bring his or her USERRA claim to the Office of Compliance?

Yes. All eligible employees who file claims under Section 206 of the CAA, are required to go through counseling and mediation before electing to file a civil action or a complaint with the Office of Compliance

§ 1002.308 Who has legal standing to bring a USERRA claim under the CAA?
An action under Section 206 of the CAA may be brought by an eligible employee, as defined by Section 1002.5 (f) of Subpart A of these regulations. An action under 207(a) of the CAA may be brought by a covered employee, as defined by section 1002.5 (e) of Subpart A of these regulations. An employing office, prospective employing office or other similar entity may not bring an action under the Act.

§ 1002.309 Who is a necessary party in an action under USERRA?
In an action under USERRA, only the covered employing office or a potential covered employing office, as the case may be, is a necessary party respondent. Under the Office of Compliance Procedural Rules, a hearing officer has authority to require the filing of briefs, memoranda of law, and the presentation of oral argument. A hearing officer also may order the production of evidence and the appearance of witnesses.

§ 1002.310 How are fees and court costs awarded in an action under USERRA?
If an eligible employee is a prevailing party with respect to any claim under USERRA, the hearing officer, Board, or court may award reasonable attorney fees, expert witness fees, and other litigation expenses.

§ 1002.311 Is there a statute of limitations in an action under USERRA?
USERRA does not have a statute of limitations. However, Section 402 of the CAA requires a covered employee to bring a request for counseling alleging a violation of the CAA no later than 180 days after the date of the alleged violation. A claim by an eligible employee alleging a USERRA violation as applied by the CAA would follow this requirement .

§ 1002.312 What remedies may be awarded for a violation of USERRA?
In any action or proceeding the following relief may be awarded:
(a) The court and/or hearing officer may require the employing office to comply with the provisions of the Act;
(b) The court and/or hearing officer may require the employing office to compensate the eligible employee for any loss of wages or benefits suffered by reason of the employing office's failure to comply with the Act;
(c) The court and/or hearing officer may require the employing office to pay the eligible employee an amount equal to the amount of lost wages and benefits as liquidated damages, if the court and/or hearing officer determines that the employing office's failure to comply with the Act was willful. A violation shall be considered to be willful if the employing office either knew or showed reckless disregard for whether its conduct was prohibited by the Act.
(d) Any wages, benefits, or liquidated damages awarded under paragraphs (b) and (c) of this section are in addition to, and must not diminish, any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employing office).

APPOINTMENT

The PRESIDING OFFICER. The Chair, on behalf of the Republican leader, pursuant to Public Law 105–83, announces the appointment of the following individual to serve as a member of the National Council of the Arts: The Honorable ROBERT BENNETT of Utah.

ORDERS FOR TUESDAY, FEBRUARY 3, 2009

Mr. KAUFMAN. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until 10 a.m. Tuesday, February 3; that following the prayer and the pledge the Journal of proceedings be approved to date, the morning hour be deemed expired, the time for the two leaders be reserved for their use later in the day, and the Senate then resume consideration of H.R. 1, the Economic Recovery and Reinvestment Act; further, that the Senate stand in recess from 12:30 p.m. to 2:15 p.m. to allow for the weekly caucus luncheons.

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

PROGRAM

Mr. KAUFMAN. Mr. President, Senators should be prepared for a long day tomorrow, with votes on numerous amendments throughout the day.

ADJOURNMENT UNTIL 10 A.M. TOMORROW

Mr. KAUFMAN. If there is no further business to come before the Senate, I ask unanimous consent that it stand adjourned under the previous order.

There being no objection, the Senate, at 8:07 p.m., adjourned until Tuesday, February 3, 2009, at 10 a.m.

CONFIRMATION

Executive nomination confirmed by the Senate Monday, February 2, 2009:

DEPARTMENT OF JUSTICE

ERIC H. HOLDER, JR., OF THE DISTRICT OF COLUMBIA, TO BE ATTORNEY GENERAL.

EXTENSIONS OF REMARKS

IN HONOR OF JEAN BOOTH MITCHELL

HON. SAM FARR

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Monday, February 2, 2009

Mr. FARR. Madam Speaker, I rise today to honor the memory of Jean Booth Mitchell of Carmel, California. Jean was a remarkable woman who enlivened everybody and everything she touched. Jean passed away on January 19, 2009 at age 91, leaving the world a brighter and better place.

Jean was born in 1917 in Oakland, California, and was raised in nearby Piedmont. She received her education at the prestigious UC Berkeley, where she was a member of the sorority Delta Gamma. The university is also where she met William F. Mitchell, who she married in the Piedmont Community Church garden in 1940.

Jean had the greenest of green-thumbs. She was a member of the Piedmont Garden Club, Piedmont Beautification Foundation, and Garden Club of America. Jean was also a founder of the Carmel-by-the-Sea Garden Club and its first president. She found great fulfillment in the Club's campaign to ''save'' Carmel's Piccadilly Park, home to a host of rare and unique plant species. Jean's personal garden was also one of the earliest featured on the Garden Club of America website at the Smithsonian.

Though gardening was her passion, Jean also involved herself in high-end real estate. She and her family established a real-estate firm in Carmel known as The Mitchell Group. In real estate sales, Jean was described as ''dynamic, convincing, and indefatigable.'' Before being sold to Sotheby's International Realty in 2005, the company had expanded to five offices and 140 agents.

Madam Speaker, Jean Booth Mitchell planted seeds not only in soil, but in the hearts of everybody who had the good fortune of knowing her. I am certain that I speak for the entire House in extending our heartfelt sympathies towards Jean's three children, three granddaughters, and six great grandchildren, including Bill and Vicki Mitchell of Pebble Beach, Sheri Mitchell of San Francisco, Shelly and Dan Lynch of Carmel, John and Karen Mitchell of St. Helena, Sarah and Chris Hansen of Napa, and Hallie Mitchell Dow and Brad Dow of Carmel.

TARP REFORM AND ACCOUNTABILITY ACT OF 2009

SPEECH OF

HON. RUSH D. HOLT

OF NEW JERSEY

IN THE HOUSE OF REPRESENTATIVES

Wednesday, January 21, 2009

The House in Committee of the Whole House on the State of the Union had under consideration the bill (H.R. 384) to reform the Troubled Assets Relief Program of the Secretary of the Treasury and ensure accountability under such Program, and for other purposes:

Mr. HOLT. Mr. Chair, I rise today to reiterate my support for H.R. 384, The TARP Reform and Accountability Act of 2009. President Obama supported the release the second $350 billion in funds authorized by the Emergency Economic Stabilization Act (Public Law 110–343), and it is incumbent upon us both to provide him with the same level of resources the outgoing Administration had to tackle this economic crisis, and to improve and strengthen the terms under which those resources will be deployed as compared to the terms under which the previous Administration was operating.

The legislation we approved would make many important improvements to the Emergency Economic Stabilization Act, EESA, and the Troubled Asset Relief Program, TARP. For example, the TARP Reform and Accountability Act focuses on the mortgage foreclosure crisis, which is central to the broader economic crisis, by requiring the Treasury immediately to commit no less than $40 billion and as much as $100 billion on foreclosure mitigation efforts. The bill would mandate that at least $20 billion be applied directly to a systematic program to guarantee loan modifications for families in danger of losing their homes, and requires that a foreclosure mitigation plan be developed and implemented quickly.

In addition, it would increase the availability of credit to consumers, municipalities and businesses. It would clarify that TARP authority includes authority to support the availability of consumer loans, including auto loans and student loans, and authority to support state and local governments through the purchase of or provision of credit enhancement for municipal securities. It would also provide additional assistance to auto manufacturers under the TARP as an extension of the emergency assistance provided by the outgoing Administration. Finally, it would add restrictions on executive compensation for institutions receiving TARP funding, and strengthen and expand accountability and oversight by requiring assisted organizations to report to Congress on a quarterly basis on their use of TARP funding, and requiring FDIC-insured depository institutions to report on changes in lending activity related to TARP funding.

For these reasons, I supported H.R. 384, which passed overwhelmingly in the House on January 21. I proposed a number of amendments to the bill, simply to strengthen it even further, and I was very pleased that one of those amendments was included in the Manager's Amendment before the bill went to the floor. My amendment went to the heart of the TARP program—the troubled assets—defined by the TARP as ''residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages'' issued on or before March 14, 2008. These troubled assets are hard to value. An auction is one way to value them. My amendment would help us finally establish values for the troubled assets, liquidate them, and free up the credit markets, without using taxpayer dollars.

Indeed, even two weeks ago, the Treasury Department had little positive to say about lending activity. In his statement of January 13, 2009, Interim Assistant Secretary for Financial Stability Neel Kashkari noted that ''we are still at a point of low confidence—both due to the financial crisis and the economic downturn. As long as confidence remains low, banks will remain cautious about extending credit . . . we should not be surprised that lending and borrowing will be lower during this current economic downturn [but we] absolutely need our banks to continue to make credit available.''

My amendment would require the Treasury Secretary to facilitate an auction of troubled assets, not using TARP funds for the purchase, but by soliciting bids from institutions that volunteer to participate. If the auction does not take place within three months of the enactment of the TARP Reform and Accountability Act, the Treasury Secretary is required to report to Congress with an explanation as to why, and a description of the mechanism by which the Secretary feels the troubled assets could most expeditiously be valued and liquidated. My amendment protects taxpayer dollars because while the auction of troubled assets is required, no TARP funds would be used for the purchase. Further my amendment will give Treasury and Congress much needed information to help develop better-informed plans for addressing the issue going forward.

I would like to thank Chairman Frank, again, for including this simple but important measure in the TARP Reform and Accountability Act. I would also like to thank Chairman FRANK for promising to work with me to implement another reform, which we both agree is needed to ensure fairness in the allocation of TARP funds. That measure would provide that an institution that has applied for but been denied TARP funding could appeal the denial to the Financial Stability Oversight Board. Such a measure would be valuable to banks such as the National City Bank of Cleveland, which had applied for TARP funds, had not received them, and was then taken over by another bank which had received TARP funds. The public is outraged that takeovers of that nature can occur on the government's dime. I thank Chairman FRANK for agreeing to work with me to provide additional protections for viable banks which applied for but have been denied TARP funds.

I supported the TARP Reform and Accountability Act, and if the Senate does not promptly take up and complete the measure, I will be eager to work with President Obama to address our economic crisis under terms and conditions that provide much better taxpayer protections than those that had been in operation under the outgoing Administration.

● This ''bullet'' symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.
Matter set in this typeface indicates words inserted or appended, rather than spoken, by a Member of the House on the floor.

INTRODUCTION OF THE GEORGES BANK PRESERVATION ACT

HON. EDWARD J. MARKEY

OF MASSACHUSETTS

IN THE HOUSE OF REPRESENTATIVES

Monday, February 2, 2009

Mr. MARKEY. Madam Speaker, today I am reintroducing the Georges Bank Preservation Act in the 111th Congress because Georges Bank, America's most valuable fishery and one of our nation's most important marine areas, remains in the crosshairs of the oil and gas industry. Last year, as a result of opposition from the Bush Administration, the longstanding protections against drilling off the east and west coasts expired. As a result, the American people could now begin to see drill rigs as close as three miles to our beaches and in fragile ecosystems like Georges Bank. Allowing oil and gas drilling in Georges Bank would forever destroy this fragile ecosystem and our nation's most important fishery.

In its final days in office, the Bush Administration issued a draft proposal to conduct offshore oil and gas leasing in the entire North Atlantic Planning area in 2013. This area comprises all federal waters off the coast of New England, including Georges Bank. We know that Georges Bank remains a top target of the oil industry and that is why we must take action to restore the longstanding protections for this special place.

The Georges Bank Preservation Act would prohibit the federal government from allowing exploration, development, or production of oil or natural gas in Georges Bank. Protecting Georges Bank from drilling would affect less than 2 percent of federal land on the outer Continental Shelf. The legislation would also protect any areas designated as marine national monuments or national marine sanctuaries, such as the Gerry E. Studds Stellwagen Bank National Marine Sanctuary off the coast of Massachusetts. The language in the Georges Bank Preservation Act has already passed the House last year in an overwhelming, bipartisan vote of 236–189 as part of H.R. 6899.

Georges Bank is the heart of the New England fishery and a key economic engine for the region. The Northeast fishery landings are valued at approximately $800 million annually and Georges Bank is the key to the region. New Bedford, Massachusetts is by far the most productive fishing port in the United States, in terms of value of catch, and has held that distinction for the last eight years. Its $268 million catch in 2007 was almost as much as catches from the second and third most valuable ports combined. New Bedford has been the number one fishing port for eight straight years.

We must not let Big Oil claim one of New England's most important economic and environmental treasures. The Georges Bank Preservation Act will prevent the oil and gas industry from destroying this special habitat that is the heart of America's most precious fishery and a uniquely vital marine habitat.

CERVICAL CANCER AWARENESS MONTH

HON. ROSA L. DeLAURO

OF CONNECTICUT

IN THE HOUSE OF REPRESENTATIVES

Monday, February 2, 2009

Ms. DELAURO. Madam Speaker, I rise today to recognize January as Cervical Cancer Awareness Month. According to the National Cancer Institute, approximately 11,000 women are diagnosed with cervical cancer each year in the U.S., resulting in nearly 3,900 deaths. At a time when proven prevention tools are available, it is especially tragic that any woman should die from this disease, yet cervical cancer is the second most common cancer in women worldwide. Even for women who survive this disease, it often causes a significant emotional burden and can lead to early menopause and loss of fertility among women in their child-bearing years. And it affects women of all ages: While the majority of cervical cancers are detected in women between 35 and 64, more than 30 percent of cases are diagnosed in women younger than 34 and women over 65.

Despite these sobering statistics, we have made significant progress in this country in reducing the burden of cervical cancer. Since the mid-20th century, deaths from cervical cancer have declined by an estimated 70 percent, due to the Papanicolaou (Pap) screening test. In 1990, Congress created the National Breast and Cervical Cancer Early Detection Program to improve timely access to screening and diagnostic services for low-income, uninsured, and underserved women. According to the Centers for Disease Control, since 1991 NBCCEDP-funded programs have diagnosed 2,161 invasive cervical cancers and 114,390 precursor cervical lesions, of which 42 percent were high-grade. More recently, researchers have identified HPV as the main cause of cervical cancer, and an HPV vaccine and screening test have been developed.

The simple fact is that cervical cancer is almost completely preventable through vaccinations, Pap testing, and testing for the human papillomavirus (HPV). Yet, as with so many other diseases, cervical cancer often strikes those who are least able to take advantage of these tools: Those who have either never had a screening test (either a Pap test alone, or in combination with an HPV test), or have gone many years without one, are the most likely to be diagnosed with cervical cancer. Unfortunately, in both the U.S. and around the world, this means that poor women, and those who face barriers to obtaining quality health care, are disproportionately affected by cervical cancer. And the disparities are huge: Hispanic women are twice as likely as white women to be diagnosed with cervical cancer, and African-American women are twice as likely as white women to die of the disease. Asian-Americans, Native Americans, and women in certain areas of the U.S. are also at increased risk. Cervical cancer is an even greater burden outside of this country, with about 500,000 women diagnosed with cervical cancer every year, more than half of whom will die from this preventable disease.

Let us redouble our commitment to ensuring that all women are educated about cervical cancer and have access to proven screening and diagnostic tools so that one January, we can look back and say that we have won the fight against cervical cancer.

DTV DELAY ACT

SPEECH OF

HON. PETER WELCH

OF VERMONT

IN THE HOUSE OF REPRESENTATIVES

Tuesday, January 27, 2009

Mr. WELCH. Mr. Speaker, the question of whether to delay the transition to digital television is important and deserves thoughtful consideration. But today's debate misses a key point that will affect many Vermonters, many Americans, living in rural areas: once the transition to digital television is completed, even if every household in America has a DTV converter box, many TVs simply will not work.

Reception of a digital television signal is an ''all-or-nothing'' proposal: rural areas that currently receive a weak analog TV signal may receive no digital signal at all. For many people across Vermont and across the country, this transition does not represent a step forward, but a step backward. I am particularly concerned about the many elderly viewers living in rural areas; for them, television is a lifeline that provides information and entertainment.

We know that this problem is out there. In order to ensure that all our constituents have access to broadcast television, we need to do one or all of three things: increase digital television broadcast signal range; increase the ability of viewers to receive the signal through antennae; or increase access to low-cost cable or satellite television.

If there were an easy answer, this problem would most likely have already been solved. But the problem persists, and it must be addressed. I look forward to working with Chairman WAXMAN as well as you, Chairman BOUCHER, to ensure that rural Americans maintain access to television broadcast over the public airwaves.

AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

SPEECH OF

HON. RUSH D. HOLT

OF NEW JERSEY

IN THE HOUSE OF REPRESENTATIVES

Wednesday, January 28, 2009

The House in Committee of the whole House on the State of the Union had under consideration the bill (H.R. 1) making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, and for other purposes:

Mr. HOLT. Mr. Chair, I rise today in support of Nadler, DeFazio, Lipinski, McMahon, Ellison Amendment to the American Recovery and Reinvestment Act. This amendment would increase the overall capital transit funding in H.R. 1 to $12 billion by adding an additional $1.5 billion to the Rail Modernization formula program and an additional $1.5 billion to the transit New Starts program.

According to the American Public Transportation Association, the $12 billion provided by

this bill could help to fund 736 worthy, needed, and fully-screened transit projects that could be started in less than 90 days. Increasing funding for capital transit systems will help states to create new jobs quickly, the precise goal that H.R. 1 seeks to accomplish.

Additionally, this funding will help local transit agencies meet increased demand for public transit nationwide. In the first half of 2008, demand for public transit rose 4.4 percent over the record highs of 2007. In New Jersey, NJ Transit is providing more than 900,000 weekday trips on its trains, buses and light-rail vehicles. Public transit agencies are struggling to keep up with demand, and many of them are considering raising their fares in order to afford necessary improvements to their facilities. This amendment would provide this much needed funding to keep public transportation moving and affordable.

Supporting public transportation, especially passenger rail, should be a central element of our national strategy to slow the rate of global climate change and reduce our dependence on foreign fuels. Passenger rail consumes 21 percent less energy per passenger mile than automobiles and 17 percent less than airplanes. It releases half the amount of greenhouse gases per passenger mile as either air or car travel. Public transportation is an essential component of easing traffic congestion, reducing wear and tear on roads, protecting our environment, and preserving open space in New Jersey and across the country.

This amendment will create jobs, protect our environment, and aid struggling public transit agencies, and I urge my colleagues to support it.

IN HONOR OF BILL MELDRUM

HON. FRANK PALLONE, JR.

OF NEW JERSEY

IN THE HOUSE OF REPRESENTATIVES

Monday, February 2, 2009

Mr. PALLONE. Madam Speaker, I rise today to honor the life of Bill Meldrum, 53, captain of the trawler Lydia J, who tragically passed away on the morning of January 27 in a deck accident. Captain Meldrum, the secretary of the Board of Directors of the Point Pleasant Fisherman's Dock Cooperative, had been a fisherman in New Jersey for over 30 years—20 years out of the Belford Seafood Co-Op in my district, and 10 years out of Point Pleasant. He is described by the Fisherman's Dock Cooperative as ''having a heart of gold'' and ''one of their best.'' Captain Meldrum is survived by his wife, Isabel, whom he wed in August of 2008.

Captain Meldrum purchased the Lydia J in 1989 with his friend Gary Traczyk. Already an experienced seaman, the purchase of the Lydia J allowed Captain Meldrum to continue sweeping the New Jersey coast for summer flounder, scallops, black flounder, whiting, and squid. The Lydia J was his pride and joy, and Captain Meldrum was known to stand tall and proud whenever he approached the 65 foot dragger.

Recreational and commercial fishing is not only essential to the economy of New Jersey's sixth district, but is a way of life for many of its residents. A fisherman through and through, Captain Meldrum exemplified the blue-collar strength of New Jersey's coastal community. Not only was he able to live his dream and fish for a living, he was constantly giving back to his community. Captain Meldrum donated toys to children every Christmas and always took special care of his fellow fishermen.

Madam Speaker, I sincerely hope that my colleagues will join me in remembering the late Captain Meldrum. Everyday fishermen risk their lives on the open water to put food on our tables, and on Tuesday morning they lost one of their best in Bill Meldrum.

''ON THE RECORD INAUGURAL SPEECH CONTEST''

HON. JOHN P. SARBANES

OF MARYLAND

IN THE HOUSE OF REPRESENTATIVES

Monday, February 2, 2009

Mr. SARBANES. Madam Speaker, I rise today to share the award winning entry from the Meritalk ''On the Record Inaugural Speech Contest.'' Meritalk is an online community that seeks to promote civic discussion and serve as the crossroads for IT and public policy. This contest challenged American authors to write a speech highlighting what they would like to hear from the President-elect on Inauguration day. This a wonderful example of how the Internet can help Americans become more aware of and involved in government. I would like to congratulate the winner, Ms. Katherine Grayson, on writing a very eloquent speech and I hope she remains engaged in the important issues facing our country. I'd also like to share her contest entry with you today.

''My fellow citizens of the world. I cannot greet you today using the phrase ''My fellow Americans,'' for though, assuredly, America is facing its greatest challenges in half a century, we now are part of a much vaster order with challenges that put even our own, here at home, into proper perspective.

We stand at the precipice of a New Age; an age in which we clearheadedly acknowledge that the world has become a network as intricately intertwined as a web. In ways too numerous to count, we now are connected to one another across this land, across the seas, across the airwaves, across cyberspace. The era of rattling sabers at one another or constructing foreign policy as though we dwell inside fortresses, is long over. Our world today is indeed a complex and inexorably interwoven network of threads, and to survive and flourish within it, no successful international policy will ever again be identified as ''foreign.'' Once we only dreamt of such connectedness with the world; now we truly are a global network of nations, states, citizens, and the children everywhere who are our hope for the future.

Yet by clinging to attitudes of the past, we have been slashing away at this fragile new mesh of mankind and weakening it, the world at large, and our own position in that world. Shall we continue to allow this planet to become a more and more dangerous place, with aggression, resentment, and even silence between countries expanding as rapidly as their arsenals do? Or shall we at last—and with the determination of what has long been the greatest nation on this Earth—seek to strengthen the ties between the world's nations, and help to construct, finally, a lasting fabric of world peace and understanding?

All of you who hear me today, wherever you may be, must be partners in this quest to make the world a refuge for all. We are now inextricably tied to one another, wherever we are, and rather than curse the condition of our connectedness, we must protect that connectedness at all cost.

Now we are partners in the mission to end the scourge of terrorism and the outrageous inequities of life that feed it: poverty, powerlessness, the daily struggle to survive. It is just too easy for us to think of ourselves as separate ''constituencies'' of the world, nameless people lost in faceless masses hoping to be served by their leadership. From today, henceforth, we are partners in the mandate to make the world a much less dangerous place; to bring a New Age of peace and understanding to our fellow men and women, wherever they may reside on our planet. We are partners in the challenge to bring the peoples of the world together, rather than shut them out through our fear and our ignorance.

These are no small challenges. But neither are they dreams.

How shall we set about to change the world as it must change, if we are to endure in the decades and centuries to come?

First, by re-forging and strengthening the fabric of our lives here at home. To put it plainly, right now we are no example for the other nations of the world. Through a long series of misjudgments and missteps, wrong-headed international decisions and self-interested actions here at home, our nation has come to forfeit that position and that privilege. We must face the fact that we have lost our way; that in the cycles of history, we have suffered a downward turn.

Clearly, our economy—once the envy of the world—is in trouble. We must confront this truth head-on. And while quick fixes and mammoth infusions of capital are bandaids designed to temporarily stabilize floundering financial vessels like Fannie Mae and AIG, as in most critical financial downturns we need to look to the core of these very serious problems and re-examine, re-tool, and rebuild the fundamentals of our economic structure, if necessary. And I strongly believe it is necessary.

Yet what are the fundamentals of that system? They are capitalistic, to be sure. But that term, capitalism—which once had the sweet ring of democracy to it—has come to take on a sour taste indeed.

Since when do the tenets of capitalism dictate that company CEOs can become robber barons? Where is it written that employees can lose their pensions to the senior management of the corporations they have dutifully served for decades? Which principles decreed that hardworking, law-abiding folks should lose their homes and life savings because the mortgages they took out were based upon Wall Street hocus-pocus of which they could have no knowledge or understanding whatsoever? Why does capitalism preclude a government's ability to ensure that all citizens are provided adequate health care and social security so that they neither succumb to illness nor die homeless on the street? And which founding father (who had himself fled from the tyranny of taxation without representation) declared that the best way to build a financially able and resilient society was to tax the working backbone of the nation until it collapsed

under the weight of those taxes—all the while giving tax cuts and breaks to the wealthiest citizens, corporations, and conglomerates?

No nation on Earth has ever flourished for any length of time by bleeding the lifeforce of its own inception. We should know this; our nation was born out of rebellion against such tyranny; we have supported other nations of the world in their quests for similar freedoms; we have railed against such injustices thrust upon other peoples of the world.

We must return—with haste and urgency—to those principles we have fought and died for, and which we know to be just, fair, and right. We must return—without a moment's hesitation—to those principles, which we know from centuries of proof, build a strong nation of happy, prosperous, contributing citizens; that backbone that is the framework upon which any free and thriving nation must be built.

I have not been brought to this moment today, here at this podium before you, to tell you this because I believe it is what you want to hear. I am here today, telling you this, because on November 4th, you knew in your hearts that a swift, decisive return to the principles of America for all its citizens—not an America for only the wealthiest citizens—is the way to rebuild our nation, and to begin to rebuild our relationships with the other nations of the world.

Let this be the moment in history when the phrase, ''The Rich and Powerful'' is relegated to its proper, smaller place in the world scheme, and the phrase ''Power to the People'' returns to its rightful position, above all else. For it was not until the people took back their power through a fair and just democratic process—as you did this past November—that ''power'' in this country could regain perspective at last. In the world today, ''power'' simply cannot denote the right of some to profit at the expense of others. ''Power'' must stand for the ability to make change happen for the long-term health and survival of our nation, and as a model for making change happen for the health and survival of our planet and the nations of our world.

We know that it was the driving need for change that brought us here today. I did not spend these past two years chanting ''Change!'' because I thought it was the best way to get elected. I have fought for that change and will continue to fight for it because only through fearless, courageous, unmitigated change can we right our foundering ship quickly, decisively, with long-lasting results that must not be delayed. There is not one moment to waste. The need is critical, pervasive, and non-partisan, and we cannot tolerate time spent for political parties to bicker or equivocate.

You are the partners in this change. This is not Congress's change; it is yours, and your voices must be heard. My question to you is: How quickly do you need this change?

How quickly—and most importantly, how effectively, for lasting benefit—do you want your jobs, homes, livelihoods restored? How quickly and solidly do you want the United States of America to be respected in the world theater once more? How soon do you want your sons and daughters to return from wars which should never have been waged? How rapidly do you want the fear between nations to de-escalate, and fear of terrorism and nuclear arms buildups to dissipate? How soon do you want to fling wide the doors of misunderstanding between cultures that fear each other, and let in the fresh clean air of tolerance and acceptance? In what timeframe do you want to see the nations of the world cooperate with each other for mutual benefit, and thus remove the very need for state-driven or state-supported terrorism? And when is it that you would you like to see our planet's environment begin to recover from the ravages and ills which now place it in peril of ecological collapse?

I ask you now: Which day do you want to be a safer day for your children? The tomorrow after tomorrow?

Well, I have children too, and I need that day to be today.

So, today is the day that—together—we will set about to change our world. And though we will begin here at home at once, we will aggressively and immediately pursue our new international initiatives simultaneously. These next 100 days may be dizzying for Congress here on Capitol Hill, but we will expect nothing less from its members than their full and intensive attention to every new idea, every new plan, every new proposal put before them. I promise you that I will compel democrats and republicans to work together with me, hand in hand, with blind eyes to red or blue, and eyes only on the target ahead. I promise you that we will use our new connectedness with each other and the world, in ways that have never been seen before, to make change happen. And we will not rest until we make serious, impactful, and lasting headway.

I call upon you—not just the people of America, but the peoples of the world—to make your voices heard; to see these needs are met; to convey your sense of urgency for the triumph of our country, our world, this beloved planet. This time, broad, bold, far-reaching measures are needed, and we will not be held at bay by the petty prevarication or self-interest of the few, or by the endless squabbling over minutiae—not when there is so much, and the lives of so very many, at stake. Tomorrow I lead the charge, full-throttle toward our next decade in this Brave New Age. But it is together that we will make it reality. Let no man or woman on Earth stand up before us and say it cannot be done. Yes, it can.''

AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

SPEECH OF

HON. CLIFF STEARNS

OF FLORIDA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, January 28, 2009

The House in Committee of the Whole House on the State of the Union had under consideration the bill (H.R. 1) making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, and for other purposes:

Mr. STEARNS. Mr. Chair, with America facing a 7.2 percent unemployment rate, record low consumer confidence, and country's worst economic downturn since the beginning of World War II, our nation needs a real economic stimulus that will give tax relief to hurting American businesses, create long term sustainable job growth, and provide real permanent tax relief to American families. What this country does not need is the federal government increasing our national debt to record levels, burying our children and our grandchildren under a mountain of debt.

This Democrat spending plan is simply not stimulative. According to CBO, the plan includes $604 billion in new spending and $212 billion in tax cuts for a total cost of $816 billion over the 2009 to 2019 period. While this plan is aimed at quickly injecting government cash into the economy, only 15 percent, or $93 billion, of the spending will occur during this fiscal year and only 37 percent of the spending would occur in fiscal year 2010. This means that over half of the plan's spending will occur starting in 2011, hardly a quick injection into the lagging economy as promised by the Democrat authors. What is clearly evident is that much of this money will not be spent in the next two years to stimulate the economy and that billions of dollars in pork barrel spending will go to constituencies important to the Democrat party. This is far too important of an economic time to play political games and return election favors in the form of government funding. Our country needs a real economic stimulus package.

Included in this Democrat spending spree are longstanding liberal spending priorities. What does $50 million for the National Endowment for the Arts, $400 million for climate change research, $650 million for the Digital-to-Analog Converter Box Program and $1 billion for the Census have to do with creating jobs? The Democrat bill won't stimulate anything but more government and more debt. The slow and wasteful spending in the House Democrat bill is a disservice to millions of Americans who want to see this Congress take immediate action to get this economy moving again.

Many have looked to our economic history to provide guidance during this difficult time, particularly to the New Deal instituted by President Franklin Roosevelt. Unfortunately, what many economists have found is that New Deal principles are stale ideas that do not translate into economic stimulus in the 21st century.

First, the Great Depression began in 1929 and did not end until 1940. And the stock market did not return to the level of September 3, 1929 until 1954. If today's economy were to go through a similar ''recovery,'' we would not fully escape the current recession until 2018 and the Dow would not reach its high of 2007 until sometime in 2032.

Secondly, many economists note that during the Great Depression the U.S. did not actually have much of an expansionary fiscal policy. As Tyler Cowen stated in the New York Times article, The New Deal Didn't Always Work, Either, ''under President Herbert Hoover and continuing with Roosevelt, the federal government increased income taxes, excise taxes, inheritance taxes, corporate income taxes, holding company taxes and 'excess profits' taxes. When all of these tax increases are taken into account, New Deal fiscal policy didn't do much to promote recovery.''

This legislation is also an unprecedented expansion of the nation's debt burden. The U.S. is projected to have a $1.2 trillion deficit in FY 2009 even without the enactment of any stimulus legislation. As a percentage of GDP,

the projected FY 2009 deficit, 8.3 percent of GDP, is considerably larger than any deficit during the Great Depression, the highest was 5.9 percent of GDP in 1934. The federal debt grew by more than $2 trillion in the last two years, and may grow by another $2 trillion in 2009.

The year 2008 could easily be defined as the year of the bailout. The months have passed in a torrent of troubling government ''rescues'' of private sector financial firms. Those bailouts have come at a great price and have exposed American taxpayers to vast financial risk. And in a financial crisis, such as the one we are now facing, bailout after bailout is quite simply not a good strategy for recovery.

The cascade of bailouts began in March of 2008 with the collapse of investment bank Bear Stearns. The Federal Reserve stepped in when Bear Stearns lost significant liquidity and lent another large investment firm—JPMorgan—$29 billion to buy up Bear Stearns and its liabilities. This was quickly followed by legislative recognition of the housing and foreclosure crisis and, subsequently, the Treasury's forced rescue of out-of-control GSEs Fannie Mae and Freddie Mac which has put taxpayers on the hook for trillions worth of risk.

Since October of 2008, the U.S. Treasury has committed $350 billion in public funds to private financial institutions, many of which have utilized reckless investment strategies, through the Troubled Asset Relief Program, TARP. Specifically, insurance giant MG has received $40 billion, Citigroup—which just tried to spend $50 billion on a luxury corporate jet—has received $20 billion, an additional $20 billion has been given to the Federal Reserve, and $250 billion has gone to large national banks in the form of direct capital injections. Even more troubling is the $23.4 billion of these TARP funds, which has been allocated to bail out automobile manufacturers such as General Motors and Ford. This type of government intervention in the private sector is unprecedented and has put us on a precarious path to socialism.

The new Secretary of the Treasury, Tim Geithner, is now poised to spend an additional $350 billion as part of a second installment of TARP funds as reports are coming out that executives such as John Thain, have used these funds to hand out $4 billion in bonuses to fellow executives, $1 million to renovate his office, and $1,400 for the purchase a new personal waste basket. Due to the lack of transparency and accountability of how the first $350 billion was spent, and the fact that banks have not made it easier to get loans and the credit markets have not thawed as expected, I voted against the TARP Reform and Accountability Act, H.R. 384, and in favor of a resolution, H.J.RES.3, disapproving of the release of these additional funds.

Given the massive amount of money the federal government has spent on bailouts since March of 2008 along with the ever-rising debt level, it is unconscionable to continue committing good money after bad. This money belongs to the American taxpayer and now, more than ever, we must rein in this out-of-control government spending for our future generations who will have to pay back this irresponsible debt accumulation.

Mr. Chair, enough is enough, turn off the government spigot of federal funding into nonsimulative debt spending. It is time for this Congress to pass a real economic stimulus that will give tax relief to hurting American businesses, create long term sustainable job growth, and provide real permanent tax relief to American families.

AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

SPEECH OF

HON. RUSH D. HOLT

OF NEW JERSEY

IN THE HOUSE OF REPRESENTATIVES

Wednesday, January 28, 2009

The House in Committee of the Whole House on the State of the Union had under consideration the bill (H.R. 1) making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, and for other purposes:

Mr. HOLT. Mr. Chair, I rise this evening in support of the American Recovery and Reinvestment Act of 2009 (H.R. 1). America is in the midst of the worst economic storm since the Great Depression. Millions of people are hurting across the United States and in my home state of New Jersey. New Jersey's unemployment rate has risen to 7.1 percent from 4.2 percent just a year ago. Our nation's economy is in recession, and we must respond with every tool in our tool box to help put Americans back to work and rebuild our struggling economy.

We could let the free market continue to spiral downward or we could pass a bill with a smaller price tag, ignoring the lessons learned from Congress's previous attempt at stimulating the economy through rebate sent out in spring of 2008. We can no longer wait to act. The time has come for a bold, national, response. Economists have predicted that the unemployment rate will skyrocket to over 12 percent this year. The package we are considering today has the potential to create 3 to 4 million much needed new jobs in the short term.

The House approved the American Recovery and Reinvestment Act, comprehensive legislation that through targeted, job-creating spending, responsible investments in the nation's social safety net to help Americans weather the difficult months ahead, and tax cuts for 95 percent of Americans will help the United States climb out of the current recession. Importantly, this bill includes critical investments in research and development, which lay the ground work for innovation and sustainable, long-term economic growth. It is unfortunate that not one member of the minority saw fit to approve this important bill.

In the short term, the American Recovery and Reinvestment Act would help create up to 1.5 million new construction jobs by providing $30 billion to states for transportation, infrastructure, and energy efficiency improvements. This would translate to approximately $777 million for ready-to-go road and bridge modernization projects in my home state of New Jersey. Infrastructure improvements would serve a dual purpose; creating 835,000 jobs and helping to address the backlog of needed improvements to our nation's transportation network that total $61 billion, according to the U.S. Department of Transportation. This bill would also invest $10 billion in public transportation, $333 million to relieve congestion on our roadways in New Jersey. This bill would also create an additional 375,000 jobs by investing $19 billion for clean water, environmental restoration, and flood control projects.

H.R. 1 will fund a number of additional projects that my Central New Jersey constituents refer to as ''green stimulus.'' Investment in ''green stimulus'' can create good American jobs that cannot be outsourced, while reducing our reliance on foreign fuels, protecting our environment and slowing the rate of global warming. Specifically, this legislation would provide $32 billion to transform the nation's energy transmission, distribution, and production system so they can handle renewable energy sources. This legislation includes more than $26 billion in incentives to promote renewable energy and help low and middle income Americans weatherize their homes. These incentives include the renewable energy production tax credit, the energy research and development tax credit, and the consumer energy-efficiency tax credits.

Responding to the nation's rising unemployment rate, this bill would devote $4 billion to job training programs and would extend unemployment benefits through December 31, 2009, increasing benefits by $25 per week for individuals looking for work.

The current economic downturn has hit hard public school districts, which are being forced to make painful cuts in services. The American Recovery and Reinvestment Plan makes sound investments in public education. The legislation would provide $20 billion to states to rebuild the nation's crumbling schools. In particular, the bill includes a provision from a bill that I authored, the School Building Enhancement Act, which would give schools grants to increase their energy efficiency helping them to save thousands of dollars annually on their energy costs.

Additionally, to ensure that families can send their children to college, this bill would increase the maximum Pell Grant by $500, to $5,350 and would help 4 million more students attend college with a new $2,500 college tuition tax credit for families.

I am deeply gratified that the Economic Recovery and Reinvestment Act reflects a profound commitment to renewing our nation's innovation infrastructure. In crafting this package, Congress has recognized that research and innovation are not merely luxuries to be undertaken only in time of economic prosperity. The truth is that scientific research is perhaps the most powerful economic engine, creating jobs in the short-term and building our economy for the long-term.

All together, the recovery package includes nearly $16 billion to support scientific research and facilities, including $3 billion for the National Science Foundation, $2 billion for the Department of Energy's Office of Science, and $3.5 billion for the National Institutes of Health. There is no doubt that these funds will create jobs. Lab technicians will be hired to carry out projects that previously went unfunded. Electricians will be put to work wiring new laboratory equipment. And construction workers will begin refurbishing our neglected laboratories and building the facilities that will transform science for the twenty-first century.

Of course, the ideal project is one that keeps on giving, and that is exactly what scientific research does. The innovation and discoveries that come from research form the

roots from which our economy grows and prospers. For too long, we have underinvested in science, and we will never know the resulting costs to our prosperity. But we know that science will be the foundation of our nation's future economic vitality. In his inaugural address, President Obama said, "We will restore science to its rightful place." That place is at the very heart of our nation's progress. The American Recovery and Reinvestment Act acknowledges this fact and provides an important first step toward the sustained investment that will prevent the need for future recovery packages.

As American workers lose their jobs, more and more face losing their health insurance coverage as well. Job losses have boosted Medicaid and SCHIP rolls, straining state budgets already stretched thin due to lower tax revenues. To address these problems, this bill would allow states to temporarily cover their unemployed workers under Medicaid and would increase temporarily the federal government's contribution to Medicaid. For workers able to continue their health coverage through COBRA, the bill would subsidize COBRA premiums by 65 percent. The Joint Committee on Taxation and Congressional Budget Office estimate that these two provisions will provide health insurance to more than eight million people.

In addition to helping families maintain their health insurance coverage, the American Recovery and Reinvestment Act seeks to improve health care quality and its value. This bill would promote Health Information Technology systems, which could help reduce medical errors while lowering administrative costs, and accelerate their adoption and usage among doctors and hospitals.

The American Recovery and Reinvestment Act of 2009 would also address the struggling economy by putting money back in the pockets of American families, workers, students and businesses through $285 billion worth of tax cuts. Ninety-five percent of working Americans would receive a tax cut through a refundable tax credit of up to $500 per worker that will be quickly distributed by reducing tax withholding from workers' paychecks. It will lower the taxes of more than 16 million families by increasing the child tax credit and expanding the earned income tax credit.

This bill includes a number of provisions that will help businesses to create new jobs in this difficult economy. It will allow businesses to improve cash flow by allowing businesses to write off 90 percent of losses incurred in 2008 and 2009 against taxes assessed over the previous five years. In addition, it will help businesses expand by extending the increased bonus depreciation for businesses making investments in new plants and equipment in 2009. This legislation will help small businesses by doubling the amount they can deduct on their taxes for capital investments and new equipment.

Through this comprehensive approach, we can begin to put the American economy back on the right track. We must approve the American Recovery and Reinvestment Act. We need to get America back to work and rebuild our economy.

STATEMENT ON H. RES. 34 AND THE MIDDLE EASTERN CONFLICT

HON. LAURA RICHARDSON

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Monday, February 2, 2009

Ms. RICHARDSON. Madam Speaker, today I voted to support H. Res. 34, "Recognizing Israel's right to defend itself against missile attacks from Gaza, reaffirming the United States' support for the Israeli-Palestinian peace process."

Likewise, I strongly believe that humanitarian relief must be allowed to reach innocent Palestinian citizens, restore Gaza's electrical power and water infrastructure to prevent the outbreak of a greater humanitarian disaster. Every effort must be made to lessen civilian casualties and international aid organizations should be given consistent access to Gaza.

Hamas and Israel must return and commit to the peace process. I look forward to significant progress with the incoming Obama Administration, and pray for a lasting cease-fire is reached.

TRIBUTE TO THE VIRGINIA SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

HON. ERIC CANTOR

OF VIRGINIA

IN THE HOUSE OF REPRESENTATIVES

Monday, February 2, 2009

Mr. CANTOR. Madam Speaker, I rise today to honor the Virginia Society of Certified Public Accountants as they celebrate 100 years of service to the Commonwealth of Virginia.

The Virginia Society of Certified Public Accountants (VSCPA) was established on October 6, 1909. It now represents more than 8,300 CPAs working in private businesses, government agencies, nonprofit organizations, and educational institutions, to name just a few. The VSCPA has 10 chapters across the Commonwealth of Virginia that offer networking, education and other opportunities to get involved in local communities.

They created an Educational Foundation in 1984 to attract future CPAs and promote accounting careers to Virginia students through undergraduate and graduate scholarships, financial literacy grants and other awards and recognition programs.

CPAs play a unique and vital role in the success and growth of business, the soundness of government operations, the excellence of higher education and the protection and confidence of investors in the Commonwealth of Virginia, as well as the rest of the United States.

Because of their contribution to the accounting profession, we are honored to recognize the VSCPA as they commemorate their centennial year.

HONORING THE KENSINGTON VALLEY COMMUNITY CREDIT UNION

HON. THADDEUS G. McCOTTER

OF MICHIGAN

IN THE HOUSE OF REPRESENTATIVES

Monday, February 2, 2009

Mr. McCOTTER. Madam Speaker, today I rise to honor and acknowledge the Kensington Valley Community Credit Union, a financial institution based in Highland, Michigan, upon the 50th anniversary of the Credit Union's establishment.

Founded on January 29, 1959 as the Huron Valley Schools Employees Credit Union, the Kensington Valley Community Credit Union has grown substantially since its first 200 members. Originally a small, member-run institution, the Credit Union expanded its membership opportunities in 1985 to school district retirees, parents of students in the school district, credit union employees, and immediate family members. In 1996 the Credit Union further expanded its services to add students in the school district, family members, and persons age 55 receiving retirement benefits. Importantly, as a service to its community, from 1995 to 1999 the Credit Union operated the first student run elementary savers club program at all eleven elementary schools within the Huron Valley School district.

The Kensington Valley Community Credit Union has become a landmark in the community it serves by providing important financial services to its members. On February 16, 2000, with 4,500 members, over $16 million in assets, and 12 employees, the Credit Union moved into an expanded facility on the same property it originally purchased 20 years ago.

Madam Speaker, the Kensington Valley Community Credit Union has had a long and distinguished history in the Detroit area community. I ask my colleagues to join me in congratulating the Kensington Valley Community Credit Union on its 50th anniversary and honoring the institution's devoted service to the community and our country.

SENATE COMMITTEE MEETINGS

Title IV of Senate Resolution 4, agreed to by the Senate on February 4, 1977, calls for establishment of a system for a computerized schedule of all meetings and hearings of Senate committees, subcommittees, joint committees, and committees of conference. This title requires all such committees to notify the Office of the Senate Daily Digest—designated by the Rules Committee—of the time, place, and purpose of the meetings, when scheduled, and any cancellations or changes in the meetings as they occur.

As an additional procedure along with the computerization of this information, the Office of the Senate Daily Digest will prepare this information for printing in the Extensions of Remarks section of the CONGRESSIONAL RECORD on Monday and Wednesday of each week.

Meetings scheduled for Tuesday, February 3, 2009 may be found in the Daily Digest of today's RECORD.

MEETINGS SCHEDULED

FEBRUARY 4

2 p.m.
Foreign Relations
To receive a closed briefing on North Korea.
SVC–217

3 p.m.
Banking, Housing, and Urban Affairs
To hold hearings to examine the United States financial regulatory system.
SD–538

FEBRUARY 5

Time to be announced
Foreign Relations
Organizational business meeting to consider committee's rules of procedure, and subcommittee membership and jurisdiction for the 111th Congress.
S–116, Capitol

10 a.m.
Agriculture, Nutrition, and Forestry
To hold an oversight hearing to examine federal food safety relative to the peanut products recall.
SH–216

Banking, Housing, and Urban Affairs
To hold hearings to examine the Troubled Asset Relief Program (TARP), focusing on oversight of the financial rescue package.
SD–538

Health, Education, Labor, and Pensions
To hold hearings to examine implementing best patient care practices.
SD–430

Judiciary
To hold hearings to examine the nomination of David W. Ogden, of Virginia, to be Deputy Attorney General.
SD–226

11 a.m.
Indian Affairs
Organizational business meeting to consider the committee's selection of Chairman and Vice Chairman, rules of procedure for the 111th Congress, and funding resolution; to be followed by an oversight hearing to examine advancing Indian health care.
SD–628

2:30 p.m.
Intelligence
To hold hearings to examine the nomination of Leon Panetta, to be Director of the Central Intelligence Agency.
SD–G50

4:30 p.m.
Foreign Relations
To hold closed hearings to examine Iran status report, focusing on nuclear and political issues.
SVC–217

FEBRUARY 11

9:30 a.m.
Veterans' Affairs
To hold hearings to examine veterans' disability compensation, focusing on the appeals process.
SR–418

FEBRUARY 24

10 a.m.
Banking, Housing, and Urban Affairs
To hold hearings to examine the semiannual monetary policy report to the Congress.
SH–216

2 p.m.
Veterans' Affairs
To hold joint hearings to examine the legislative presentation of the Disabled American Veterans.
345, Cannon Building

MARCH 5

10 a.m.
Veterans' Affairs
To hold joint hearings to examine the legislative presentations of veterans' service organizations.
SD–106

MARCH 12

10 a.m.
Veterans' Affairs
To hold joint hearings to examine legislative presentations of veterans' service organizations.
SD–106

MARCH 18

9:30 a.m.
Veterans' Affairs
To hold joint hearings to examine the legislative presentation of the Veterans of Foreign Wars.
334, Cannon Building

Daily Digest

HIGHLIGHTS

See Résumé of Congressional Activity.

Senate

Chamber Action

Routine Proceedings, pages S1235–S1369

Measures Introduced: One bill was introduced, as follows: S. 363. **Page S1276**

Measures Considered:

American Recovery and Reinvestment Act: Senate began consideration of H.R. 1, making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for fiscal year ending September 30, 2009, taking action on the following amendments proposed thereto: **Pages S1237–43, S1266–73**

Pending:

Reid (for Inouye/Baucus) Amendment No. 98, in the nature of a substitute. **Pages S1237–43, S1266–73**

A unanimous-consent agreement was reached providing for further consideration of the bill at 10 a.m., on Tuesday, February 3, 2009. **Page S1369**

Appointments:

National Council of the Arts: The Chair, on behalf of the Republican Leader, pursuant to Public Law 105–83, announced the appointment of the following individual to serve as a member of the National Council of the Arts: Senator Bennett. **Page S1369**

Nomination Confirmed: Senate confirmed the following nomination:

By 75 yeas 21 nays (Vote No. EX. 32), Eric H. Holder, Jr., of the District of Columbia, to be Attorney General. **Pages S1243–66, S1369**

Additional Cosponsors: **Page S1276**

Statements on Introduced Bills/Resolutions: **Pages S1276–77**

Additional Statements: **Page S1276**

Amendments Submitted: **Pages S1277–79**

Privileges of the Floor: **Pages S1279–80**

Record Votes: One record vote was taken today. (Total—32) **Page S1266**

Adjournment: Senate convened at 2 p.m. and adjourned at 8:07 p.m., until 10 a.m. on Tuesday, February 3, 2009. (For Senate's program, see the remarks of the Acting Majority Leader in today's Record on page S1369.)

Committee Meetings

(Committees not listed did not meet)

No committee meetings were held.

House of Representatives

Chamber Action

Public Bills and Resolutions Introduced: 7 public bills, H.R. 786–792; and 1 resolution, H. Res. 102 were introduced. **Page H875**

Additional Cosponsors: **Page H875**

Reports Filed: There were no reports filed today.

Speaker: Read a letter from the Speaker wherein she appointed Representative Edwards (MD) to act as Speaker pro tempore for today. **Page H783**

Chaplain: The prayer was offered by the guest Chaplain, Dr. Alan N. Keiran, Chief of Staff, Office of the Senate Chaplain. **Page H783**

Senate Message: Message received from the Senate by the Clerk and subsequently presented to the House today appears on page H783.

Senate Referral: S. 352 was held at the desk.

Quorum Calls Votes: There were no yea-and-nay votes, and there were no recorded votes. There were no quorum calls.

Adjournment: The House met at 2 p.m. and adjourned at 2:03 p.m.

Committee Meetings

No committee meetings were held.

Joint Meetings

No joint committee meetings were held.

COMMITTEE MEETINGS FOR TUESDAY, FEBRUARY 3, 2009

(Committee meetings are open unless otherwise indicated)

Senate

No meetings/hearings scheduled.

House

Committee on Agriculture, hearing to review derivatives legislation, 1 p.m., 1300 Longworth.

Committee on Financial Services, hearing entitled ''Promoting Bank Liquidity and Lending Through Deposit Insurance, Hope for Homeowners, and other Enhancements,'' 2 p.m., 2128 Rayburn.

Committee on Rules, to consider the following: S. 352, DTV Delay Act; and a resolution providing for consideration of the Senate amendment to H.R. 2, Children's Health Insurance Program Reauthorization Act of 2009, 5 p.m., H–313 Capitol.

Résumé of Congressional Activity

FIRST SESSION OF THE ONE HUNDRED ELEVENTH CONGRESS

The first table gives a comprehensive résumé of all legislative business transacted by the Senate and House. The second table accounts for all nominations submitted to the Senate by the President for Senate confirmation.

DATA ON LEGISLATIVE ACTIVITY

January 6 through January 31, 2009

	Senate	*House*	*Total*
Days in session	18	15	..
Time in session	118 hrs., 54′	82 hrs., 7′	..
Congressional Record:			
Pages of proceedings	1233	781	..
Extensions of Remarks	..	170	..
Public bills enacted into law	2	..	..
Private bills enacted into law	..	..	..
Bills in conference	1	..	..
Measures passed, total	28	53	81
Senate bills	6	1	..
House bills	1	7	..
Senate joint resolutions	1	1	..
House joint resolutions	..	1	..
Senate concurrent resolutions	2	2	..
House concurrent resolutions	1	3	..
Simple resolutions	17	38	..
Measures reported, total*	3	9	12
Senate bills	3	..	..
House bills	..	3	..
Senate joint resolutions	..	..	..
House joint resolutions	..	..	..
Senate concurrent resolutions	..	..	..
House concurrent resolutions	..	..	..
Simple resolutions	..	6	..
Special reports	2	..	..
Conference reports	..	..	..
Measures pending on calendar	16	3	..
Measures introduced, total	387	932	1,319
Bills	352	777	..
Joint resolutions	7	19	..
Concurrent resolutions	3	35	..
Simple resolutions	25	101	..
Quorum calls	1	1	..
Yea-and-nay votes	31	29	..
Recorded votes	..	16	..
Bills vetoed	..	..	..
Vetoes overridden	..	..	..

*These figures include all measures reported, even if there was no accompanying report. A total of 3 written reports have been filed in the Senate, 9 reports have been filed in the House.

DISPOSITION OF EXECUTIVE NOMINATIONS

January 6 through January 31, 2009

Civilian nominations, totaling 43, disposed of as follows:	
Confirmed	23
Unconfirmed	20
Air Force nominations, totaling 139, disposed of as follows:	
Confirmed	136
Unconfirmed	3
Army nominations, totaling 436, disposed of as follows:	
Confirmed	436
Navy nominations, totaling 18, disposed of as follows:	
Confirmed	9
Unconfirmed	9
Marine Corps nominations, totaling 74, disposed of as follows:	
Confirmed	74

Summary

Total nominations carried over from the First Session	0
Total nominations Received this Session	710
Total confirmed	678
Total unconfirmed	32
Total withdrawn	0
Total Returned to the White House	0

Next Meeting of the SENATE

10 a.m., Tuesday, February 3

Senate Chamber

Program for Tuesday: Senate will continue consideration of H.R. 1, American Recovery and Reinvestment Act.

(Senate will recess from 12:30 p.m. until 2:15 p.m. for their respective party conferences.)

Next Meeting of the HOUSE OF REPRESENTATIVES

12:30 p.m., Tuesday, February 3

House Chamber

Program for Tuesday: To be announced.

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