from funds received from non-government sources. Additionally, the provision states explicitly that only government funds are subject to government audit.

Therefore, the charitable choice provision protects participating religious organizations from unwarranted governmental oversight, while also holding such organizations financially accountable in the same way as all other non-governmental providers receiving government funding.

There was also a statement made on the House floor that the charitable choice provision ''would seek to enact exemptions from the religious discrimination clauses of the Civil Rights Act of 1964.'' This is a misstatement of what the provision says. Charitable choice does not create an exemption from the Civil Rights Act of 1964. Rather, it states that it preserves the exemption in the law allowing religious organizations to make employment decisions based on religion. The Supreme Court affirmed the constitutionality of this provision in Corporation of the Presiding Bishop v. Amos (1987). Receiving government funds for a secular purpose does not, of course, result in a waiver of this exemption. See, e.g., Siegel v. Truett-McConnell College, 1994 WL 932771 (N.D. Ga. 1994).

If a religious nonprofit organization must hire persons in open disagreement with the religious background and mission of the organization, its religious autonomy would be severely infringed. In fact, many successful faith-based organizations have stated that they would not take government funding if it would require them to hire employees who did not hold the same religious beliefs of the organization. For example, the International Union of Gospel Missions conducted a survey of their missions and found that some of these missions refused government funding if it required them to hire non-Christians.

The Charitable Choice makes clear that a religious organization maintains its Title VII exemption when it receives government funds to provide social services.

There was also an argument made that the charitable choice provision would require the government to consider using fringe religious groups to provide CSBG services. Although I find this to be more of a scare tactic than a legitimate argument, I think it is obvious that the charitable choice provision will not require the government to blindly select any non-governmental organization that applies for CSBG funds. The government may require legitimate, neutral criteria to all who apply. No organization, religious or otherwise, can become a provider unless it can deliver on its grant or contract.

Finally, there was an argument that the charitable choice provision could override the constitutional language of states prohibiting public funds from going to religious organizations. I would simply respond that the charitable choice provisions are in federal law dealing with federal dollars. We do not tell the states how to spend their own state tax funds.

In conclusion, the opponents of the charitable choice concept have not taken into account the latest Establishment Clause jurisprudence. If there is a comprehensive, religiously neutral program, the question is not whether an organization is of a religious character, but how it spends the government funds.

To reject charitable choice is to jeopardize Congress' ability to encourage proven, effective religious organizations to provide social services to our nation's needy with government funds. For years, these organizations have been transforming broken lives by addressing the deeper needs of individuals—by instilling hope and values that help change behavior and attitudes. By contrast, government-run programs have often failed in moving people from dependency and despair to independence. We must continue to find ways to allow private, charitable, and religious organizations to help administer the cultural remedy that our society so desperately needs. The charitable choice provision in the ''Coats Human Services Reauthorization Act of 1998'' is one way of accomplishing this goal.

THE LEGENDARY FRANK YANKOVIC

Mr. DEWINE. Mr. President, I rise today to pay tribute to one of the greatest musicmakers in the history of the Buckeye State, the legenday ''Polka King,'' Frank Yankovic, who died yesterday at age 83.

Frank Yankovic was from Cleveland, OH, but he had fans not just in Ohio but all over America. He brought joy to millions with his lighthearted polka hits—songs whose very titles can occasion a smile—songs like and ''Champagne Taste and a Beer Bankroll'' and ''In Heaven There Is No Beer.''

Frank Yankovic won a Grammy Award, and was nominated for three more. With his passing, the world of music, and indeed all Americans who believe that music is supposed to be fun, have lost a true friend.

The voice of Frank Yankovic resounds through the decades, asking the question that most everyone in northeast Ohio grew up with: ''Who stole the kishkes?''

Mr. President, it is my hope and strong belief that St. Peter is even now answering this question for Frank Yankovic—as he welcomes him to the polka band that used to be known as the heavenly choir.

On behalf of the people of Ohio, let me say thank you to this great Ohioan—for a lifetime of entertainment.

TRIBUTE TO MARIAN BERTRAM

Mr. DASCHLE. Mr. President, as the 105th Congress comes to a close, I take this opportunity to express my appreciation, and I think the appreciation of all Members on our side of the aisle, and particularly the staff of the Democratic Policy Committee, to an individual who has dedicated 27 years to public service and the United States Senate. Marian Bertram, the personable and talented Chief Clerk of the Democratic Policy Committee, is leaving the Senate at the end of this year.

Marian, who began her work at the Democratic Policy Committee in 1971, has served four Democratic Leaders—Mike Mansfield, ROBERT BYRD, George Mitchell and myself. She has an unparalleled knowledge of the legislative process. Since its inception and for many years thereafter, she had the major responsibility of reaching and writing one of the Committee's most popular publications, the Legislative Bulletin. Equally important, she has the vital and demanding responsibility for the production of Voting Records and vote analyses provided to all Democratic members.

In addition to her legislative work, Marian assumed the job of Chief Clerk of the Policy Committee in 1989. Through her competence and dedication and command of every detail of the Committee's operation and budget, she makes a major contribution to the smooth running of the Policy Committee.

Marian handles this broad range of responsibilities with professional skill, equanimity, and unfailing good humor. She will be dearly missed by her friends and colleagues in the Senate.

All of us offer Marian our sincere thanks and every good wish for her continued success. Thank you, Marian Bertram.

NOMINATION OF DR. JANE HENNEY TO THE FDA

Mr. NICKLES. Mr. President, I wish to speak on the nomination of Dr. Jane Henney to be Commissioner of FDA.

Mr. President, the nomination of the FDA commissioner is one of the most important nominations the Senate has considered this year. The FDA regulates products comprising twenty-five cents of every dollar spent by consumers in this country. It deals with literally life and death issues on a daily basis. Given the significant impact the FDA has on the life of every American, it is important that the Senate exercise caution to ensure the next Commissioner is qualified and capable of leading the Agency.

I have let Dr. Henney know, and I let Secretary Shalala know, that I had some concern with FDA as it has been administered for the last few years. The FDA should be a non-partisan science based Agency which focuses solely on its mission to ensure the safety of food and to expeditiously review drugs and medical devices which are intended to save and extend lives. And for this reason I felt I needed personal assurance from Dr. Henney that under

her leadership the FDA would focus on its Congressionally mandated mission.

FDA is supposed to be an agency that works to improve our health, that works to make sure that drugs and other medical devices are safe and effective. What we have found, under Dr. Kessler's regime, particularly during the Clinton administration, was that the FDA was involved in a lot of political activity. Under the leadership of David Kessler, the Agency too often became a tool of the Administration to push its liberal political agenda. One area where this was particularly offensive was the FDA's attempt to regulate tobacco.

Let me give an example of where I believe they exceeded their authority. In my State, just recently—I tell my colleagues, this is going to happen in every State—an FDA talking paper announced that ''FDA Partners With Oklahoma To Protect Children From Tobacco.''

The Food and Drug Administration has contracted with the Oklahoma State Dept. of Health to enforce the FDA's new regulation that prohibits retailers from selling cigarettes and smokeless tobacco to children under 18.

I will go on:

Under the contract, the State of Oklahoma will receive [$312,000] to conduct approximately 4,500 unannounced retail compliance checks over the next 12 months.

It goes on:

The FDA will seek a fine of $250 for the second violation, $1,500 for the third [violation], $5,000 for the fourth, and $10,000 for the fifth.

So, if a convenience store doesn't comply and they don't check IDs—and they have to check IDs up to age 27. In Oklahoma, it is legal to smoke when you are 18—but if a youngster, who is maybe 19, working in a convenience store, doesn't check somebody's identification who might be 26 or 27 years old, they can be fined up to $10,000. Somebody might say, ''Where is this idea originating? It is legal for them to smoke, but if they don't check IDs of somebody up to age 27 they can be fined $10,000?''

This is implementing FDA's regulation. FDA's regulation, in my opinion, is unconstitutional. They don't have the authority to write the law.

The Constitution says in article I, section 1:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Where did this regulation come from? It came from FDA, and it came from the FDA Administrator, working with the Clinton administration, to basically implement a very, I think, political agenda. I might mention that the regulations are being contested in court, and most of those regulations are being thrown out. In fact, on August 14, 1998, the Fourth Circuit Court of Appeals ruled that Congress did not intend to give the U.S. Food and Drug Administration (FDA) the authority to regulate tobacco. In a 2–1 decision the Appeals Court tossed out a 1997 federal district court ruling that gave FDA only limited power to regulate tobacco. ''The FDA has exceeded the authority granted to it by Congress.'' So said Circuit Judge H. Emory Widener Jr., on behalf of the three-member panel.

I happen to favor regulation on tobacco, but I think Congress needs to act on it. The FDA does not have the authority to create it out of whole cloth, which is certainly what they did. I favor some decent regulations. I don't favor the idea of having a team of people making 4,500 unannounced retail compliance checks all over my State and the Federal Government spending over $300,000 implementing this type of plan, or having the regs be so ridiculous we are going to be checking IDs up to age 27. I don t support regulations that allow the FDA to fine people and businesses who don't comply, up to $10,000 per violation, basically, fining them out of existence. That doesn't make sense.

Mr. President, I ask unanimous consent that at the conclusion of my statement, an FDA talking paper, which announces this implementing regulation which has the force and effect of fines up to $10,000, be printed in the RECORD.

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

(See Exhibit 1.)

Mr. NICKLES. Mr. President, another area where I have seen FDA become very involved in the political arena deals with the abortion drug RU–486. I have a press release that is dated May 16, 1994. The headline is: ''Roussel Uclaf Donates U.S. Patent Rights for RU–486 to Population Council.''

The first paragraph says:

HHS Secretary Donna E. Shalala announced today that French pharmaceutical company Roussel Uclaf, at the encouragement of the Clinton administration, is donating, without remuneration, its United States patent rights for mifepristone (RU–486) to the Population Council, Inc., a not-for-profit corporation.

Then further in the press release it says:

''FDA will do all it can to quickly evaluate mifepristone,'' said Shalala.

I ask unanimous consent that this press release be printed in the RECORD at the conclusion of my remarks.

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

(See Exhibit 2.)

Mr. NICKLES. Mr. President, this is an administration that had FDA go out and recruit a company that manufactures RU–486, a French company, to donate its patent rights to a group which is an abortion proponent in the United States and then was doing everything they could to expedite the process.

RU–486 is an abortion pill which terminates the life of a human embryo between FOUR weeks and NINE weeks. It is NOT a contraceptive as some would have us believe. It is a drug which will stop the beating heart of an unborn child.

In January 1993, President Clinton issued a memo to Sec. Shalala directing her to promptly ''assess initiatives by which HHS can promote the testing and manufacturing of RU–486 in the US.''

Thereafter, the FDA engaged in negotiations with Roussel Uclaf, French manufacturer and holder of US Patent rights, regarding the testing and marketing of RU–486 in the US.

In May 1994, Shalala issued this press release, I mentioned, announcing the deal and promising FDA would do everything it could to ''quickly evaluate the drug.'' FDA pushed the drug through the review process in a fraction of time required for most drugs.

FDA's Center for Drug Evaluation and Research reported that the median total review time for new drug applications in 1996 was 14.8 months. FDA review time for RU–486 was only 6 months.

At a time when the agency was struggling to approve drugs which cure diseases and save lives, the Agency was focusing a great deal of time and effort on a political agenda which would end the life of an unborn child.

I am offended by that, and I asked Dr. Henney:

Are you going to be promoting an abortion drug? Is that what an FDA Commissioner is supposed to do? Is that their purpose?

I thought the purpose of FDA was to make sure drugs were safe and effective and that medical devices are safe and effective so people can have some confidence in these products. I didn't know it was the purpose of FDA to recruit companies to bring abortion drugs to into this country. That is clearly not their purpose.

After talking with Dr. Henney, she assured me that wasn't her intention. She gave me a letter, and I ask unanimous consent that it be printed in the RECORD at the conclusion of my remarks.

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

(See Exhibit 3.)

Mr. NICKLES. Mr. President, the concluding sentence of her letter says:

If I am confirmed as Commissioner, I would not solicit a manufacturer for RU–486.

She also says:

As a general matter, I believe the Agency should only solicit product applications in extraordinary circumstances in which there is a clear public health need.

Certainly trying to recruit a manufacturer and provider of abortion drugs doesn't fit in that category, and I appreciate her statement she will not solicit a manufacturer of RU–486.

It bothers me that the Secretary of Health and Human Services and this Clinton administration have done so much to circumvent the process, to use FDA in the process. I think it is politicizing an agency that is supposed to be focused on its mission to protect the public health and to expeditiously review drugs and medical devices that will save and extend life.

Mr. President, I also met with Secretary Shalala a couple of times and

wanted assurances from her that the Department of Health and Human Services would interpret the law as written, would enforce the law as written and not try to rewrite it.

Unfortunately, we found out that the Department of Health and Human Services was trying to redefine the Hyde amendment which Congress defined. They were trying to redefine it to broaden the exceptions.

The Hyde amendment, as most of my colleagues know, says we will not have Federal funding for abortion except for in cases of rape, incest or to save the life of the mother. There is not a mental health exemption in that. Many people have tried to put it in. The administration has. But we clearly defined it, Congress defined it as the Hyde amendment, no mental health exception.

I have a letter from Secretary Shalala that says this activity will cease and they will interpret the Hyde amendment as written.

We also found, Mr. President, that under the Kidcare Program HHS had misinterpreted the abortion language. We made it very clear in three different sections in that law that abortion was not going to be a fringe benefit which we were going to provide for teenagers. We made the language very, very clear.

Much to my consternation, we were contacted by officials of the State of Virginia who said HHS was trying to mandate that they have abortion services covered even though it was certainly their wish and option that they didn't want that to be the case.

After meeting with Secretary Shalala, and after an exchange of several letters, she finally assured me that wasn't the case. I will insert her letters and mine and Representative BLILEY's letter into the RECORD. But we now have assurances from Secretary Shalala. I will read the last part of her letter sent to me on October 15:

> States are not required to provide abortion services, including abortion services for which coverage is permissible under title XXI of the Social Security Act, under any of the S-CHIP—

That is the State Children's Health Insurance Program—

> benefit package options in section 2103. No State will be denied approval of its S-CHIP plan because its benefit package under section 2103 does not include coverage of abortion services, including abortion services for which coverage is permissible under title XXI.
>
> Thank you for your interest in this matter.

I am pleased that Secretary Shalala agreed with us that she would interpret the law as written, and that includes both the Hyde language and language in the Kidcare program dealing with abortion. I am pleased that I have assurances from Dr. Henney that if she is confirmed Commissioner of FDA, she will not recruit manufacturers and providers for an abortion drug, including RU–486.

Mr. President, I ask unanimous consent that this entire set of letters be printed in the RECORD at the conclusion of my remarks.

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

(See Exhibit 4.)

Mr. NICKLES. Mr. President, it is my intent to support the nomination of Dr. Henney. After meeting with her a couple of times, and having discussions on these and other issues, I am confident that she will be a very able administrator who will not play politics. In my opinion, she doesn't have a political agenda, and I believe she will try to administer the Food and Drug Administration as a professional organization to make sure that drugs and medical devices are safe and effective for America's population, and that she won't try to implement legislation through regulation.

Mr. President, I wasn't the only Senator who had reservations about this nominee. I had reservations until we could get certain clarifications. I received those. I have asked they be printed in the RECORD to substantiate the progress that was made, and I urge my colleagues to support her nomination.

I yield the floor.

EXHIBIT 1

[From FDA Talk Paper, Oct. 2, 1998]

FDA PARTNERS WITH OKLAHOMA TO PROTECT CHILDREN FROM TOBACCO

The Food and Drug Administration (FDA) has contracted with the Oklahoma State Dept. of Health to enforce FDA's new regulation that prohibits retailers from selling cigarettes and smokeless tobacco products to children under 18.

Under the contract, the State of Oklahoma will receive $312,386.75 to conduct approximately 4,500 unannounced retail compliance checks over the next 12 months. Minors in typical dress, accompanied by an adult, will attempt to purchase cigarettes or spit tobacco in retail stores throughout the State of Oklahoma.

Information about the compliance checks will be sent to FDA, which will issue a warning for the first violation to retailers found selling to the adolescents. These retailers will be subject to repeat inspections. FDA will seek a fine of $250 for the second violation, $1,500 for the third, $5,000 for the fourth, and $10,000 for the fifth.

The first provisions of FDA's final rule to protect children from tobacco took effect Feb. 28, 1997, making age 18 the national minimum age to purchase tobacco products and requiring retailers to check photo IDs of anyone under age 27. These measures are part of a comprehensive program designed to reduce by half the number of young people who smoke in the next seven years. FDA published the final rule Aug. 28, 1996, with provisions that limit access by children and adolescents to tobacco products and reduce the appeal these products have for underage smokers.

Children and adolescents have long had easy access to tobacco products. In 13 studies reviewed by the Surgeon General, minors were successfully able to buy cigarettes 67 percent of the time.

In fact, 3,000 children and adolescents become regular smokers every day, and nearly 1,000 will die prematurely from a smoking-related disease.

On Aug. 14, 1998, a majority of a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit in Richmond, Va., ruled that FDA lacks the jurisdiction to regulate tobacco products, reversing the decision of the U.S. District Court for the Middle District of North Carolina. However, the Department of Justice is seeking review of this decision by the full Fourth Circuit. Under the court of appeals' rules, unless otherwise directed by the Fourth Circuit, the effect of the decision is automatically stayed, meaning the status quo is maintained until the Court has the opportunity to rule on the government's rehearing request. This means, pending the Court's review, the parts of the FDA tobacco program that have been in effect since February 1997 will remain in effect and that state contracts such as this one with Oklahoma continue to be awarded and implemented.

This case involves an appeal of an April 25, 1997, decision from Judge William Osteen of the U.S. District Court in Greensboro, N.C. He ruled that FDA has jurisdiction under the Food, Drug and Cosmetic Act to regulate nicotine-containing cigarettes and smokeless tobacco. The court upheld all restrictions involving youth access and labeling, including the two provisions that went into effect Feb. 28.

The State of Oklahoma is one of 53 states and territories that are eligible to contract with FDA. FDA will use a portion of the $34 million it has budgeted this year to assist states in enforcing the regulation and to educate retailers and the general public on the new provisions that went into effect in last February. President Clinton has requested $134 million for tobacco regulation in his FY 1999 budget submission to Congress.

EXHIBIT 2

[From Eagle Forum, Oct. 9, 1998]

ROUSSEL UCLAF DONATES U.S. PATENT RIGHTS FOR RU–486 TO POPULATION COUNCIL

HHS Secretary Donna E. Shalala announced today that French pharmaceutical company Roussel Uclaf, at the encouragement of the Clinton administration, is donating, without remuneration, its United States patent rights for mifepristone (RU–486) to the Population Council, Inc., a not-for-profit corporation.

RU–486 has been marketed for non-surgical termination of pregnancies in France, the United Kingdom and Sweden. The drug is also under study for labor induction, contraception, Cushing's syndrome, endometriosis, meningioma and breast cancer.

''We strongly believe that women in America should have access to the full range of safe and effective alternatives to surgical abortion,'' Shalala said. ''The donation announced today is a big step in that direction.''

On Jan. 22, 1993, President Clinton signed a Presidential Memorandum directing the Department of Health and Human Services to assess initiatives to promote the testing and licensing of RU–486 in the United States.

Shalala commended Roussel Uclaf and the Population Council for coming to closure after months of complex negotiations amid repeated urging from the Clinton administration.

Shalala emphasized, however, that the donation does not mean RU–486 has been approved for use in the United States. The Population Council must conduct clinical trials, identify a manufacturer and submit a new drug application to the Food and Drug Administration.

''The FDA will do all it can to quickly evaluate mifepristone,'' said Shalala. ''FDA's decision will be based solely on the scientific and medical evidence as to the safety and efficacy of the drug. That is our responsibility to the women of America.''

HHS FACT SHEET

MIFEPRISTONE (RU–486). BRIEF OVERVIEW, MAY 16, 1994

On Jan. 22, 1993, in one of his first official acts, President Clinton issued a memorandum directing HHS Secretary Donna E. Shalala to assess initiatives to promote the testing and licensing of mifepristone (RU–486) in the United States.

During early 1993, Secretary Shalala and FDA Commissioner David Kessler communicated with senior Roussel Uclaf officials to begin efforts to pave the way for bringing RU–486 into the American marketplace.

In April 1993, representatives of FDA, Roussel Uclaf and the Population Council, a not-for-profit organization, met to discuss U.S. clinical trials and licensing of RU–486. Over the last year, the parties continued their negotiations, culminating in the donation announced today. Roussel Uclaf will transfer, without remuneration, its United States patient rights to mifepristone to the Population Council. In turn, the Population Council will take the necessary steps to bring RU–486 to the American market.

Mifepristone was developed by the French firm Roussel Uclaf. The drug has been marketed for use to non-surgically terminate pregnancy in France, the United Kingdom and Sweden. There are several investigative trials underway with FDA for other uses of the drug, including contraception, labor induction, Cushing's syndrome, endometriosis, meningioma and breast cancer.

It must be recognized that termination of a pregnancy is not a simple medical procedure, whether it is done surgically or through a medical regimen. In France, the United Kingdom and Sweden, where RU–486 has been administered to approximately 150,000 women, the procedure requires several visits to the medical facility, a precisc dosing scheme using two different drugs, and close monitoring to care for women who may experience excessive bleeding or other complications. Any use of mifepristone in the United States would have to follow the same type of strict distribution and use conditions.

EXHIBIT 3

OCTOBER 14, 1998.

Hon. DON NICKLES,
Assistant Majority Leader,
U.S. Senate, Washington, DC.

DEAR SENATOR NICKLES: Thank you for meeting with me and Secretary Shalala concerning my nomination to be Commissioner of the Food and Drug Administration (FDA). I appreciate the time and consideration that you have given to my nomination.

I want to take this opportunity to restate that during my earlier service at FDA (1992–1994) I was not involved either in the solicitation or the review of the RU–486 application. As a general matter, I believe the Agency should only solicit product applications in extraordinary circumstances in which there is a clear public health need.

If I am confirmed as Commissioner, I would not solicit a manufacturer for RU–486.

Thank you again for considering my nomination.

Sincerely,

JANE E. HENNEY, M.D.

EXHIBIT 4

CONGRESS OF THE UNITED STATES,
Washington, DC, October 7, 1998.

Hon. DONNA E. SHALALA,
Secretary, Department of Health and Human Services, Washington, DC.

DEAR MADAM SECRETARY: Last July, the Health Care Financing Administration (HCFA) sent to state Medicaid directors a note correctly interpreting the Hyde Amendment as it was enacted in your Department's appropriations bill for FY 1998.

''The recently enacted Appropriations Act contained new requirements for federally funded abortions. One of those requirements is that, in order to receive federal funding, a physician must certify that a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused or arising from the pregnancy itself, that would place the woman in danger of death unless an abortion is performed.''

That directive forecloses any possible consideration concerning mental health. Yet it now appears that a HCFA departmental meeting has been scheduled to discuss whether some mental problems that have a physical origin might make a patient eligible for a taxpayer-funded abortion. This is the worst kind of bureaucratic loophole-knitting. It must stop.

We, therefore, call upon you to take immediate action to investigate and stop any activities that may be taken by officials at HCFA in an effort to circumvent the Hyde Amendment. We also request that you report back to us, by November 1, 1998, your findings regarding this investigation and the action taken by you to halt these activities.

Sincerely,

DON NICKLES,
Assistant Majority Leader,
U.S. Senate.

HENRY J. HYDE,
Chairman, Committee on the Judiciary,
U.S. House of Representatives.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Washington, DC, October 12, 1998.

Hon. DON NICKLES,
Assistant Majority Leader, U.S. Senate, Washington, DC.

DEAR SENATOR NICKLES: Thank you for the letter from you and Chairman Hyde concerning the Department's interpretation of the Hyde amendment as it affects federally funded abortions. As you know, I take very seriously the Department's obligation to fully implement the law as enacted by the Congress, Nancy Ann DeParle, the Administrator of the Health Care Financing Administration (HCFA), shares this commitment.

Let me assure you that in order for federal funds to be used to cover abortion, a physician must certify that a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused or arising from the pregnancy itself, that would place the woman in danger of death unless an abortion is performed.

We have no intention to instruct states on this issue other than to reiterate the statutory obligation that must be met to utilize federal funds for legally permissible abortions.

I trust this addresses your concerns. Please let me know if I can be of further assistance in this matter. An identical letter has been sent to Chairman Hyde.

Sincerely,

DONNA E. SHALALA.

U.S. SENATE, OFFICE OF ASSISTANT MAJORITY LEADER,
Washington, DC, October 7, 1998.

Hon. DONNA E. SHALALA,
Secretary, U.S. Department of Health and Human Services, Washington, DC.

DEAR MADAM SECRETARY: It has come to our attention that the Health Care Financing Administration (HCFA) is wrongly interpreting provisions included in the Balanced Budget Act of 1997 (BBA) regarding Title XXI of the Social Security Act. Despite the clarity of the law, your agency is seeking to compel States to cover abortions under their State Children's Health Insurance Program (S–CHIP) plans HCFA's actions are in direct contravention of the Balanced Budget Act of 1997.

As you are aware, Congress codified the Hyde language in the new Title XXI language establishing the S–CHIP program (See sections 2105(c)(1), 2105(c)(7) and 2110(a)(16)). This language prohibits the use of funds under this program to pay for any abortion or to assist in the purchase, in whole or in part, of health benefit coverage that includes coverage of abortion except where the abortion is necessary to save the life of the mother or if the pregnancy is the result of an act of rape or incest.

Of particular relevance to the current dispute is the fact that in each of the aforementioned sections, even this limited scope of permissible abortion payment or coverage is triggered by the extent (if any) to which a State elects to include abortion payment or coverage in its S–CHIP State plan. As a result, there exists no requirement that States cover abortions in the case of rape, incest, or life endangerment. Rather, these are the only instances in which a State which chooses to pay for abortions or abortion coverage may do so.

In addition to codifying the Hyde amendment, Congress explicitly distinguished in BBA between abortion and medically necessary services under Title XIX of the Social Security Act (See section 4707(e)(1)). By citing abortion as an exception to the standard of medical necessity, Congress removed the basis upon which Medicaid coverage of abortion was previously required.

Based on these provisions of law, HCFA has no authority to require any State to provide abortion coverage as part of their Title XXI program. As a result, any disapproval of a State plan on these grounds is contrary to law. We request your immediate written assurance that HCFA will no longer require States to cover abortions under their S–CHIP plans.

Sincerely,

DON NICKLES,
Assistant Majority Leader.

TOM BLILEY,
Chairman, Committee on Commerce.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Washington, DC, October 3, 1998.

Hon. DON NICKLES,
Assistant Majority Leader, U.S. Senate, Washington, DC.

DEAR SENATOR NICKLES: Thank you for the letter from you and Chairman Bliley concerning abortion coverage under the Title XXI State Children's Health Insurance Program (S–CHIP). As explained in greater detail below, states do have the discretion to determine whether to provide coverage for permissible abortion services in their S–CHIP programs.

First, let me say that we have gone to great lengths to ensure that the Department's implementation of the S–CHIP program is consistent with congressional intent and flexible to meet the needs and circumstances of individual states. We have consulted frequently with Members of Congress and staff on a bipartisan basis, and have worked with state officials to facilitate the implementation of their programs. To date, we have approved 42 state plans under the Title XXI program.

In addition to the Title XXI Medicaid expansion option, states have three options for insurance coverage under the S–CHIP program, Benchmark, Benchmark-Equivalent, or Secretary-Approved Coverage. States are

free to exclude coverage for permissible abortion services in their Benchmark (provided a state's Benchmark plans does not cover abortions) or Benchmark-Equivalent options.

To ensure as much consistency as possible in our approval process, we have limited the exercise of our discretion under the third option, Secretary-Approved Coverage, to cases in which the benefits offered under a state's S–CHIP program are the same as under its Medicaid plan. This provided state with the flexibility to use their existing Medicaid programs and structures without have to extend an entitlement to new S–CHIP enrollees. Given the substantial flexibility in design their benefit packages that states enjoy under the Benchmark and Benchmark-Equivalent options, this limited approach to Secretary-Approved Coverage does not unduly constrain the benefits options available to states.

Please let me know if I can be of further assistance on these issues. An identical letter has been sent to Chairman Bliley.

Sincerely,

DONNA E. SHALALA.

U.S. SENATE, OFFICE OF ASSISTANT MAJORITY LEADER,
Washington, DC, October 13, 1998.

Hon. DONNA E. SHALALA,
Secretary, U.S. Department of Health and Human Services, Washington, DC.

DEAR MADAM SECRETARY: Thank you for your recent letter. While I appreciate your timely response, I would like specific answers to the concerns that were raised in my earlier letter. On behalf of chairman Bliley and me, I request your direct response to the following questions:

(1) On the basis of your letter dated October 13, 1998, is it the Department's view that the Hyde language contained in the S–CHIP program does not require states to provide abortion coverage in the circumstances where the abortion is necessary to save the life of the mother or if the pregnancy is the result of an act of rape or incest (See section 2105(c)(1), 2105(c)(7), and 2110(a)(16))?

(2) Is it your contention that a state which covers elective abortions under Medicaid and which opts to offer ''Secretary-approved coverage'' under S–CHIP must cover elective abortions for teenage girls under its S–CHIP program?

(3) In light of your letter, is it your contention that abortion is no longer considered a ''medically necessary'' service under the Medicaid program (See section 4707(e)(1)?

(4) In what manner do you view abortion as ''appropriate coverage for the population of targeted low-income children proposed to be provided such coverage'' by Virginia or any other state which submits an application for Secretary-approved coverage (See section 2103(a)(4))?

Again, I request your immediate written response to the questions above. Thank you in advance for your cooperation.

Sincerely,

DON NICKLES,
Assistant Majority Leader.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Washington, DC, October 14, 1998.

Hon. DON NICKLES,
Assistant Majority leader, U.S. Senate, Washington, DC.

DEAR SENATOR NICKLES: Thank you for your most recent letter and the opportunity to clarify our October 13, 1998 response concerning coverage of abortion services under the Title XXI State Children's Health Insurance Program (CHIP).

I would like to clarify my response to you concerning the conditions under which I would approve CHIP benefit packages for Title XXI non-Medicaid state programs (S–CHIP). In general, our policy has been that a state must provide a benefit package that is equal to, or better than, Benchmark or Benchmark-Equivalent Coverage. In my letter to you yesterday, I stated that we have limited the exercise of our discretion under the Secretary-Approved Coverage option to cases in which the benefits offered under a state's S–CHIP program are the same as under its Medicaid plan. Indeed, we decided as a matter of policy in devising our S–CHIP implementation process that this approach provided an important benefit option that states might not otherwise have.

However, after asking staff to review our records yesterday, it appears that in addition to Medicaid plans, we may have considered as Secretary-Approved Coverage other benefit packages. This occurred in instances in which a state provided benefits in excess of the statutorily defined Benchmarks. Apparently, there was discussion in the Department that it might be desirable to use the Secretary-Approved Coverage option for states that want to provide more benefits than required by law without requiring them to submit a formal actuarial estimate.

As a result of this review of our records and staff deliberations, I have decided that as long as a state proposed to provide benefits in excess of Benchmark Coverage, states will not be required to cover permissible abortion services under the Secretary-Approved Coverage option. We have already informed you that states are free to exclude coverage for permissible abortion services in their Benchmark (provided a state's Benchmark plan does not cover abortions) or Benchmark-Equivalent options.

I would like to address the specific questions you raised in your October 13, 1998 letter.

(1) On the basis of your letter dated October 13, 1998, is it the Department's view that the Hyde language contained in the S-CHIP program does not require states to provide abortion coverage in the circumstances where the abortion is necessary to save the life of the mother or if the pregnancy is the result of an act of rape or incest (See Section 2105 (c)(1), 2105 (c)(7), 2110 (a)(16))?

As discussed above, states are not required to provide permissible abortion services under any of the three S-CHIP program options. However, to the extent that a state chooses a package that covers abortion services under the Benchmark option, they must provide these services to the extent they are allowed under the CHIP statute.

(2) Is it your contention that a state which covers elective abortions under Medicaid and which opts to offer ''Secretary-approved coverage'' under S-CHIP must cover elective abortions for teenage girls under its S-CHIP program?

As discussed above, states are not required to cover permissible abortion services in order to receive Secretary-Approved Coverage. States do, however, have to offer at least the scope of benefits provided in their Benchmark plan.

(3) In light of your letter, is it your contention that abortion is no longer considered a ''medically necessary'' service under the Medicaid program (See section 4707(e)(1))?

We do not believe that Section 4707(e)(1) affects whether abortion services are medically necessary services under Medicaid. As a general matter, this section of the law describes the intermediate sanction regime a state must put in place in implementing the law. It does not affect the scope of benefits required under a state plan. Specifically, Section (e)(1)(A) permits states to provide for sanctions against any Medicaid managed care organization contracting with a state if that organization fails substantially to provide medically necessary items and services under the law or the organization's contract. Accordingly, if a managed care entity has agreed by contract to provide those services and does not do so, it may be sanctioned by operation of this section of the law. Notwithstanding that provision, Section (e)(1)(B) instructs that there shall not be any sanction imposed on a managed care entity that has contracted with a state and that fails or refuses to provide abortion services, so long as the contract itself reflects no obligation to provide such services. Moreover, the inclusion of these provisions strongly indicates that abortion services are medically necessary services under the Medicaid program, otherwise an exception to the general rule would not have been included.

(4) In what manner do you view abortion as ''appropriate coverage for the population of targeted low-income children proposed to be provided such coverage'' by Virginia or any other state which submits an application for Secretary-approved coverage (See Section 2103(a)(4))?

Abortion services may be covered under Section 2103(a)(4) to the extent that a state chooses to include coverage for permissible abortion services in its otherwise qualified plan. Limited abortion services qualify as covered services under Section 2110(a)(16) of the CHIP law.

I hope this information addresses your concerns. Please let me know if you would like to discuss this matter further.

Sincerely,

DONNA E. SHALALA.

U.S. SENATE, OFFICE OF ASSISTANT MAJORITY LEADER,
Washington, DC, October 15, 1998.

Hon. DONNAL E. SHALALA,
Secretary, U.S. Department of Health and Human Services, Washington, DC.

DEAR MADAM SECRETARY: Thank you for your letter of October 14. Chairman Bliley and I have analyzed your responses to the questions posed in the October 13 letter and continue to have grave concerns about the manner in which the Department interprets the plain legislative language of Title XXI of the Social Security Act. In particular, your most recent response states, in part, that ''to the extent that a state chooses a package that covers abortion services under the Benchmark option, they *must* provide these services to the extent they are allowed under the CHIP [*sic*] statute.'' (emphasis added)

This interpretation has no basis in the statutory language of the State Children's Health Insurance Program (SCHIP). Section 2103 defines the various options that states have in crafting the benefits package offered through their SCHIP plan. In every instance, states are given the full discretion to establish the specific benefits to be offered to children covered under the state's SCHIP plan. We call your attention to the explicit use of the terms ''equivalent'' in Section 2103(a)(1) relating to Benchmark Coverage and Section 2103(a)(2) relating to Benchmark-Equivalent Coverage. We also call your attention to the ability of states to ''modify'' the benefits package offered through Section 2103(a)(3), as provided in 2103(d)(2).

We appreciate your recognition, as stated in your October 14 response, that ''states are not required to provide permissible abortion services under any of the three S–CHIP program options.'' We also appreciate your recognition, as stated in the same letter, that states are not required to provide abortion coverage under the Secretary-Approved Coverage option (Section 2103(a)(4).

However, your continuing assertion that any requirement exists in Title XXI of the Social Security Act compelling states to

provide abortion coverage or services is unacceptable and contrary to public law.

Once again, we request your immediate written response to the concerns stated above. In addition, I invite your staff to meet with our staff as soon as possible to explain the legal basis for the interpretation presented to us in your October 14 letter. Thank you in advance for your cooperation.

Sincerely,

DON NICKLES,
Assistant Majority Leader.

DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
Washington, DC, October 15, 1998.

Hon. DON NICKLES,
Assistant Majority Leader, U.S. Senate, Washington, DC.

DEAR SENATOR NICKLES: I wanted to provide further information with respect to issues discussed in our recent correspondence.

States are not required to provide coverage of abortion services, including abortion services for which coverage is permissible under Title XI of the Social Security Act, under any of the S–CHIP benefit package options in section 2103. No state will be denied approval of its S–CHIP plan because its benefit package under section 2103 does not include coverage of abortion services, including abortion services for which coverage is permissible under Title XXI.

Thank you for your interest in this matter.

Sincerely,

DONNA E. SHALALA.

TRIBUTE TO SENATOR KEMPTHORNE

Mr. ABRAHAM. Mr. President, I rise to pay tribute to the Junior Senator from Idaho, Mr. KEMPTHORNE. My wife, Jane, and I got to know DIRK and his wife, Pat, soon after I came to Washington, and they have been good friends. Pat and DIRK are simply wonderful people, whose warmth and civility make the Senate a better place.

DIRK KEMPTHORNE has brought his energy and goodwill with him to the Senate every day, making it a better place in which to work and, I am sure, improving our ability to work together to pass constructive legislation. In addition, he has brought tremendous insight and common sense to the legislative process. I am proud to have worked with him in passing Unfunded Mandates legislation in 1995. This bill, which Senator KEMPTHORNE managed on the floor, is an important step forward for American small business and its passage could not have been secured without his able leadership.

Whether as a key member of the Small Business Committee, as Chairman of the Drinking Water, Fisheries, and Wildlife subcommittee of the Environment and Public Works Committee, or as Chairman of the Personnel Subcommittee of the Armed Services Committee, DIRK has brought strong leadership and reasoned argument to our public policy debates. He was instrumental in initiating the Congressional Commission on Military Training. He laid the groundwork for long overdue reforms to the Endangered Species Act; reforms that will protect our wildlife without unduly tampering with America's traditional commitment to private property rights.

DIRK has decided, in the interests of his family, to leave Washington and return to Idaho. While I am certain all of us here will miss him, he leaves a weighty record of achievement and will continue to serve as a model of Senatorial conduct for years to come. I know the people of Idaho will benefit greatly from his coming service as Governor and wish him, his wife and children, all the best in their return home.

ORGAN TRANSPLANT REGULATIONS

Mr. HATCH. Mr. President, I rise to speak on a patient care issue of enormous importance: regulations being promulgated by the Secretary of Health and Human Services (HHS) with respect to organ transplantation.

I have long championed the need for our country to bring the innovations of medical science to the forefront of patient treatment, be it through pharmaceutical development, gene mapping, or artificial organ development. Nowhere has this been more necessary than in the realm of organ transplantation.

Over 14 years ago, with the passage of the National Organ Transplant Act (NOTA), Congress intervened to advance medical science at a time when our health care system was not keeping pace with the tremendous advances medicine had to offer. As a result, we examined the role of the private sector and the Federal government in organ transplantation to formulate an equitable policy for individuals throughout this country to have access to organ transplantation when appropriate and necessary.

We needed a better system than that which existed at the time, and that is what NOTA established. As the author of the National Organ Transplant Act (NOTA) in 1984, which was cosponsored by our colleagues Sentors NICKLES, THURMOND, GRASSLEY and ROTH, I am proud of our accomplishment, and I continue to maintain a very keen interest in our country establishing and operating a viable, effective organ transplant network.

There is no question that passage of NOTA has allowed us to save thousands of lives. The medical community has been transplanting over 4,000 livers each year. We have seen valuable transplant technology and services spread from only a handful of research institutions to hospitals in rural America.

In my home State of Utah, LDS Hospital has been able to increase its liver transplant volume over 15-fold since its inception only 13 years ago. We have aspired to promote a system which allows medical science to reach the people it was meant to serve, and I believe we are in large part achieving that goal, in great measure due to enactment of NOTA.

Today, I stand before the the Senate to urge that we not precipitously reverse that work by allowing implementation of a new system which could threaten to undermine many of the successful organ transplant centers who are doing so much good in this Nation. Utah's own successful transplant center comes to mind, although centers in several other States such as Alabama, Louisiana, and South Carolina would also be jeopardized if this regulation goes into effect.

While we in America are fortunate to enjoy the best health care in the world, we also have concerns about the availability of life saving care should an organ fail. Advances in medicine have made once rare transplants commonplace. Yet, there is a scarcity of organs, despite the hard work of local organ procurement agencies, transplant centers, and, indeed, developers of artificial technology such as the work being done on artificial hearts at the University of Utah.

Added to this concern about the availability of organs is a growing anxiety about the impact of HHS's proposed transplant allocation rules. A large source of this concern is within the hard-working transplant community. In fact, the Department of Health and Human Services has indicated that more than 85% of the almost 18,000 comments received oppose the organ procurement transplant network final rule.

In particular, we are seeing a rising concern about variations in the availability of organs from region to region. The HHS response, which is to, in effect, nationalize distribution, seems logical at first, but upon further reflection is a flawed policy with potentially devastating near-term effects on many transplant centers. By diverting resources from relatively ''organ-rich'' to relatively ''organ-poor'' regions, the HHS rules penalize communities which have worked to build up successful programs, including those which have done so much to improve the harvesting rates of much-needed organs.

I commend Secretary Shalala for bringing the need to further improve the organ transplant system to the forefront. One positive step is the recent rule requiring all 5,200 U.S. acute care hospitals to notify an organ procurement organization of every death as a condition of Medicare participation. Health Care Financing Administrator Nancy Ann Min-Deparle estimates that this step alone will increase organ donations by up to 20 percent.

While this was a widely supported step, the proposed rules governing the Organ Procurement and Transplant Network have not enjoyed the same enthusiasm.

In January, I joined 41 other Senators who wrote to Secretary Shalaha expressing concern that the proposed final rule could be used as vehicle to turn organ allocation into a political process. Her response did not alleviate my concerns, nor those of the transplant community.

We cannot damage the public trust in the organ network, nor in the decisions