# SENATE—*Thursday, April 14, 1994*

*(Legislative day of Monday, April 11, 1994)*

The Senate met at 9 a.m., on the expiration of the recess, and was called to order by the Honorable HERB KOHL, a Senator from the State of Wisconsin.

## PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray:

*Behold, how good and how pleasant it is when we dwell together in unity!*—Psalm 133:1.

Gracious Father in Heaven, we ask for a very special touch of God upon the Senators today and throughout this weekend as they meet in their party conferences to do whatever their agenda may be. Grant to them safety in travel going and coming, a sense of Your presence in the conference, and a desire to be servants of God as well as of the people. Grant them guidance as their agenda unfolds, wisdom in approaching whatever issues arise, a fresh sense of the desperate need of the world for American leadership, and the desperate need in America for strong leaders who will guide the Nation in its vital responsibility to the world.

May the weekend be a time of strengthening family relationships for those families present, to deepen personal relationships between the Senators, and enlarge their vision to comprehend the strategic position in which they serve the people, the Nation, and the world.

We pray in His name who is the King of Kings and the Lord of Lords. Amen.

## APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore [Mr. BYRD].

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
*Washington, DC, April 14, 1994.*

*To the Senate:*

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable HERB KOHL, a Senator from the State of Wisconsin, to perform the duties of the Chair.

ROBERT C. BYRD,
*President pro tempore.*

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

## RESERVATION OF LEADER TIME

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

## MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of morning business not to extend beyond the hour of 9:30 a.m. with Senators permitted to speak therein for not to exceed 5 minutes each.

In my capacity as a Senator from Wisconsin, I suggest the absence of a quorum.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. GORTON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. GORTON. Mr. President, is the Senate in morning business?

The ACTING PRESIDENT pro tempore. That is correct.

## AIRSTRIKES IN GORAZDE

Mr. GORTON. Mr. President, one of the bitter lessons of the Vietnam war was that before engaging in any military conflict, the United States should be clear in its objectives and assure that it has the support of the American people. This lesson served us well in the Gulf war, but was forgotten during our operations in Somalia.

Over the last several days, the Clinton administration seems again to have ignored that lesson, this time in an area that could be far more dangerous to American servicemen than was Somalia. Our airstrikes in Gorazde pursue vague goals, which by themselves do not seem worthy of American lives.

Earlier this week, President Clinton said that the United States provided airstrikes in order to protect endangered peacekeepers, but peacekeepers have been endangered in a number of earlier instances, and neither the United States or any other country has provided air support. Instead, it appears that the administration has begun a wider campaign to use airstrikes to bring a peace settlement in Bosnia, and may be on the verge of increasing our engagement in a conflict in which victory is likely to be elusive, and in which we can discern no vital national interest.

Last weekend's strikes appear to have increased Serb aggression in Gorazde. The Washington Post reported one Gorazde city official as saying, "As a result of the NATO airstrikes, the Serbs are destroying everything * * * this is the worst day since the offensive started." Many military analysts predicted this outcome. A week ago, the Chairman of the Joint Chiefs of Staff, John Shalikshavili, warned that the threat of airstrikes may not be as effective in U.N.-mandated safe havens as they were in Sarajevo.

This raises the question of how the United States, or United Nations, should respond. Does the Clinton administration increase the number of airstrikes, or should it avoid a larger engagement, in the face of increasing hostilities? If we have, in fact, worsened the fighting, can we simply leave? These are questions that we hope the administration has considered.

The administration openly admits, however, that it has not done so. Rather, it has abdicated these decisions to the United Nations. So far, it has used airstrikes only at the request of the British lieutenant general in charge, Michael Rose. The Secretary of State has said that he is comfortable with General Rose's abilities, and will execute any of his requested airstrikes. He had better be comfortable, because apparently he is not only deciding logistics, but other foreign policy issues as well; for example, whether we should continue in the face of worsening hostilities, or how the United States or NATO will end their engagement. This circumstance bears an uncomfortable resemblance to the situation 10 months ago when the administration left its foreign policy in the hands of the United Nations and lost nearly two dozen marines in Mogadishu.

Also as in Somalia, it is unclear that we are risking our servicemen for a worthwhile goal. If we are to take the administration at its word, we are protecting peacekeepers that the Bosnians themselves would prefer be absent if it afforded them the ability to defend themselves. In Gorazde, we are hoping only to stop the siege; we have no plans of removing the troops surrounding the city. And we have no plan at all to help the Bosnians gain the lands that have been stolen from them in this 2-year civil war. At our most optimistic, we hope that the airstrikes will bring the Serbs to agree to a partition that will ratify the gains of their aggression.

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

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Mr. President, this operation is indicative of many of the foreign affairs problems of this administration: we have relinquished much of our decisionmaking to the United Nations, and have not explained how the operation relates to our national interests.

But it also appears to be the sort of incrementalism that we most hoped to avoid after the Vietnam war. With our support the United Nations has taken intermediate steps, and is now considering expanding its role. It has not defined a clear objective and it does not understand how this conflict will end. The United States, for its part, has offered its services without knowing whether the American people support its risks and its expense. All we really know is that a great majority of the American people oppose our direct intervention in this conflict.

It is perhaps just because of this, that the U.N.-arms embargo represents such bad policy, that it approaches and surpasses the boundary between pure policy and immorality. As recently as the Soviet invasion of Afghanistan we provided billions of dollars in aid to people expressing ideas with which we did not agree, except for their desire to be free and to be independent. Yet, almost from the time that the United Nations recognized Bosnia, we have accepted the notion that its citizens were not entitled to fight for their own independence with arms secured, not just from the United States, but from anyplace in the world.

Rather than begin these misplaced and dangerous efforts at ending aggression through airstrikes, the United States should lift this embargo, through the United Nations or unilaterally if necessary, and give the people of Gorazde, and other besieged towns, the opportunity to defend themselves, and the hope for a lasting and just peace.

Mr. HARKIN addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Iowa [Mr. HARKIN] is recognized.

## THE TAXPAYER EMPOWERMENT ACT

Mr. HARKIN. Mr. President, tomorrow is tax day—the infamous April 15. Millions of Americans will be working through the night today and tomorrow working through the annual rite of preparing their taxes. For most Americans, it is a day they would rather do without. Nobody likes paying taxes. And filling out your tax returns is often not only time consuming and annoying but frustrating. People are frustrated not just over the amount of taxes they pay—they know we need to fund education, training, health, defense, and other things—but more because they feel they do not have any real control over how their tax dollars are spent.

Well, legislation I plan to introduce will begin to change that.

The Taxpayer Empowerment Act will put power directly in the hands of the American people by giving them a real say over how their tax dollars are spent. It says to the American taxpayer it is your money and you deserve to participate directly in how and on what it is spent.

Certainly today people have a voice in how tax dollars are spent through the democratic election process. If they are unhappy with the actions of their representatives, they can vote their Congressman or Senator out of office, and that is the way it ought to be. But the people's control over the budget is at best indirect and often really nonexistent.

Elected officials like to talk about mandates they have from the vote of the people who elected them. In fact, Mr. President, campaigns are often without a great deal of substance. At the congressional level and the senatorial level, they can come down to opposing 30-second TV ads with all too few voters actually understanding the positions of the candidates. Even where there is understanding, the voters in the system face two real choices and only two, of the two major parties. Assuming a vote is made with full knowledge there is considerable likelihood any elected official's view is not going to be the full embodiment of the views of the people that elected that official.

Of course, we live in a representative democracy. In high school and college we learned about Athenian democracy and why this kind of direct democracy cannot work in a more populated and complex society. Certainly it cannot. But I do believe that it would be very beneficial if American citizens had a more direct role and a little bit more power in deciding some issues, particularly in the budget area.

Most taxpayers, of course, do not want to spend hours trying to develop an in-depth understanding of the complex details of the Federal budget. None of us do. But I do believe that people would take the time to carefully consider how major parts of the budget are allocated and how their tax dollars are spent by those of us here in Washington.

So, Mr. President, what I am proposing is a departure from the past, a change, if you will. I am proposing that every American citizen age 18 and older be given an opportunity to express their views in a meaningful way in how their tax dollars are spent. And this should be done at the time they fill out their tax forms every year.

The Taxpayer Empowerment Act is simple and straightforward. Under my proposal, every year, with the tax returns, taxpayers would get one additional form, a single page. On it would be four columns. I have a mock up here of what that single page might look like.

First, there would be a listing of all of the various major spending areas of the budget, what is called the budget functions here in Washington. Again, I want to point out I have taken this from what the President sends to Congress. So these are the kinds of areas that the President will send to Congress indicating what the President's choices are in terms of where money should be allocated.

The next column over here would be the spending in billions of dollars in each one of those categories for that year. In the third column over here would be the percent of the budget, the total percent of the budget that each one of these functions is allocated to. And the last column would be what counts, a blank column. In that blank column we would like taxpayers to fill out what she or he believes we ought to be spending within each of these areas in the next year's budget.

Again, the taxpayers would get this. He or she would be able to see that national defense was $263.7 billion. It was 16.68 percent of the budget. And they are asked how much do you believe we ought to be spending in a percent of the budget? Should it be 16 percent? Should it be 17 percent? Should it be 15 percent?

Here is national resources and environment; 1.37 percent of the budget. We ask the taxpayers do they believe that is where the money ought to be? Do you think it ought be lower? Let us have the taxpayers vote every year when they fill out the tax returns to find out how they would like to have their tax dollars spent.

Now, a few of the categories where people have been investing their own funds and which are in trust funds are listed here: Medicare, Social Security, Government, and other separate pensions like railroad workers pensions. I have included veterans pensions here as well. We filled these columns out to show how much money is spent and what percent of the budget it is. We have not left those blank because those are things that we should not adjust.

So Social Security should not be part of the budget anyway because that is the trust fund that people pay into. Of course, pensions are contracts we made with people. We cannot reduce people's pension because that is a contractural agreement. Nor can we decrease the interest on the national debt and say we are just going to cut it and not pay the interest that is due to bondholders.

So we set these out as an indication of what we spend and what the percent is. But obviously we cannot leave that up to being changed.

There is nothing we can do about interest. We have to pay it.

Again, Mr. President, what I am saying under the Taxpayers Empowerment Act I believe every year when the taxpayer fills out his or her form they ought to give us their idea of how they

wish their hard-earned tax dollars are spent.

Now, accompanying this chart would be a detailed explanation of what programs and activities are funded so people would have some basic information. This could be an informational sheet, for example, saying what is Commerce, what are the programs funded under Commerce, or what are the programs funded under education, income security, or veterans benefits. There could be separate informational sheets that could go out so they could have that kind of information. And I would hope that newspapers, magazines, TV, and radio would all increase their discussion of these budget issues recognizing that Americans would be facing this issue and that Americans would have a real say in how their taxpayers' dollars are going to be spent and, therefore, I think it would engender a broader more in-depth public debate.

I think using the main budget functions with some adjustment is a good starting point for discussion. The division of the budget should be sufficiently detailed to give people a real say. But again, we should not make the list so minute that a taxpayer would have to hire an accountant to figure it out.

Obviously, under each one of these divisions there are subdivisions. We can get into hundreds, probably thousands of different programs.

There are those that might say, "Well, I do not want to spend anything on national defense, I want to zero it out, I want to spend zero percent," we all know too well we cannot do that. We cannot make huge changes in 1 year, in defense or energy or transportation or any of these. We can make changes, but obviously we could not zero out a program or make a 50-percent increase or 50-percent decrease. The dislocation would be too great. What I suggest is that the maximum amount any one of these could be shifted either up or down in the single year would be 10 percent. Again, it is difficult to do more than that without causing some serious dislocation. Some areas of the budget could, let us say, over a 5-year period be greatly expanded or reduced if the taxpayers indicated by a great preponderance that they want these decreased or increased by 10 percent a year for 5 years. It is an indication from the taxpayers where they want us to start spending the money.

People should also have the opportunity, Mr. President, to reduce or increase the total amount of spending as well. Again, the amount would be a maximum of 10 percent of the budget subject to the people's choice.

So what I am saying is they would fill out the percent. If it was less than 100 percent that would indicate they want the budget reduced. They say I want 90 percent—I want 90 percent of my tax dollars allocated a certain way, and 10 percent not allocated. That would be 10 percent for deficit reduction. In other words, reduce the overall budget subject to the people's choice by 10 or 5 or 3 percent, or whatever they might suggest.

Mr. President, some might suggest that it is not reasonable that these types of decisions be left to the people as a whole. Some would say they do not have the knowledge or the understanding to do this. I think that is just the kind of inside-the-beltway thinking that has led to the deterioration in public confidence in Government. I believe that Americans would take the responsibility seriously. I think the existence of the process would create a substantive broad public debate about how public funds are really spent.

Some have told me that if we use such a system some crucial areas of the budget like the funds we use for what is called general Government, the money for IRS, some parts of the General Services Administration, the Congress—our salaries and pay—some say that these would be slashed to a point that the Government could not function. Others might say foreign aid is very important to the international standing of our Nation and fear that international affairs would be drastically cut because people are opposed to foreign aid. If that happened it would undermine our position in the world and would hurt various important humanitarian efforts abroad. Well, let us just take a look at that one function, international affairs, listed as the second item up here. The estimated obligations of the Government in that area is $18.8 billion for 1995. That translates into 1.19 percent of the total budget.

Now, the common view is that the public would really slash spending in that area. That is what I have heard. But last year, the Harris poll asked people what percent of the budget was foreign aid. The median person asked said it was 20 percent. Well, 20 percent, I think, would be outrageous. How would taxpayers react if they saw it is 1.2 percent of the total budget? Well, I trust them with this knowledge. I trust the taxpayers with this knowledge. If they saw that, they might want to increase it or decrease it, but I do not think they would slash it to zero and pull us out of the world community.

Again that is sort of inside-the-beltway thinking. I think the more power we give people and the more information they have on which to act, the more responsibly they will act.

So I believe that people will seriously read the summaries that would be provided. As I said before, the existence of this system would result in considerable increases in both printed and media discussion of the pros and cons of spending in various areas. People will look at the percentage devoted to each budget area. And I expect people will, overall, make a reasonable set of choices.

My proposal specifically calls for the President's budget sent to Congress to incorporate the people's choices within this limit of a 10-percent shift in each functional area. The President would propose the precise account-by-account modification within the broad budget area to reach the decreases or increases determined by the people. If the President desires, alternative options could be displayed by the President, if he wanted an alternative. A point of order would stand against the Congress passing budget spending that would not meet the people's choice, as indicated on their tax returns.

Now, of course, that point of order could be overturned by the Congress. And, again, Members of Congress who vote to overturn that would have an opportunity to make their point at that time and in the next election campaign.

Taxpayers, as I said, Mr. President—and I want to make this point very clearly—could call for an overall increase or decrease in spending, as well. Again, if they set their priorities and it added up to 90 percent of the spending, then the total budget would be cut by that much. If on average, taxpayers called for spending of 97 percent of last year's level, that would mean that there was a call for a reduction in projected spending for the following year of 3 percent. But, like the change in the amount that could be spent on a budget function, there would be a limit of a 10-percent shift, 10 percent of the amount subject to the people's choice.

This week, when income taxes are due, it is the appropriate time to begin the drive to give Americans a direct say at how their money is spent and towards the passage of a Taxpayers Empowerment Act.

I ask that those who are interested in this proposal to please contact me, contact my office. Please let me know your thoughts and your specific ideas on how to make this proposal better.

This is an initial proposal. It is subject to change. There may be others who have different views, other better thoughts than I have come up with on how to delineate this and how better to do it. But I do believe it ought to be incorporated in our tax returns every year.

The taxpayers, when they file their tax returns, ought to be able to indicate to us how they want their tax dollars spent. I believe we have an obligation to pay attention to that.

So I am going to try to incorporate new ideas into my proposal prior to introduction. I hope to be introducing this legislation within the next few weeks. I hope that those who are interested in this effort will please let me know and give me the benefit of their advice and their consultation and their suggestions.

Mr. President, tomorrow is tax day, the day when the American citizens stand up in line and pay their taxes to keep our country running. I say it is time to give them a little bit more power and a little bit more choice in saying how those taxpayer dollars are spent.

Finally, I would like to note some miscellaneous points that I think should be included in legislation that I am developing.

The decisions will be based on a one-person, one-vote basis. The vote will be done through a form to be attached to the Federal individual income tax form. Filing of the form would not be mandatory. But, there would be a requirement that a certain percentage of the eligible population fill out the forms in order for the process to be used.

Those who do not otherwise need to file a tax form may file this form without filing a 1040. They would need to list their Social Security number.

The IRS would not be allowed to make any use of the informational forms submitted under this legislation except for the purposes of doing the calculations and cross checking of Social Security numbers to assure that there is not double voting.

Forms by those who are less than 18 years of age on April 15 of the year the tax form is due would not be counted. Similarly, those who are not citizens, have been deemed to be mentally incompetent or who are convicted felons would not be able to have their ballots counted.

In order to reduce costs, the development of a listing of who is mentally incompetent and who is a convicted felon will only be determined by the acquisition of computerized records, the providing of which would be of minimal cost to State and local governments.

For purposes of calculations, I believe that budget authority should be used. The chart I have been using is in budget authority. That is the amount that the Government can obligate, not actually how much is spent. Money might be obligated to build a bridge in 1995. For example, money might not be paid out for several years. The numbers in the chart are not precise because I have not shown offsetting receipts, allowances and other factors in creating the numbers because the chart taxpayers would receive would not need to list those technical points. OMB would accurately prepare the chart.

Areas of the budget that are paid for by trust funds would be included in the calculations. Those that equal more than $1 billion in a year would be noted in the explanatory materials.

The Congress could consider a bill that would overcome the budget allocation requirements. But, it would be subject to a point of order in each House.

The timing would be such that forms filled out in 1995 would use numbers based on fiscal year 1995 budget estimates made on the latest date in 1994 that would allow the smooth printing of the forms. The President's budget request using the people's choices would be made in early 1996. The Congress would consider the details through 1996. And, the people's priorities would be in the fiscal year 1997 budget starting in October 1996. That is a very tight time line. Some would argue that it needs to be more drawn out. But, I believe that the Congress could meet the goal.

Mr. DOLE addressed the Chair.

The ACTING PRESIDENT pro tempore. The Chair recognizes the Senator from Kansas.

Mr. DOLE. Was leader time reserved?

The ACTING PRESIDENT pro tempore. That is correct.

(The remarks of Mr. DOLE, Mr. HARKIN, and Mr. BIDEN pertaining to the introduction of legislation are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

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## INS DECISION TO HALT IMMIGRANT FINGERPRINT PROCESSING

Mr. ROTH. Mr. President, the Washington Post reported today that despite administration pledges to crack down on criminals and terrorists slipping into the country as immigrants, the Federal Government has stopped running routine fingerprint checks on immigrants. I find this outrageous.

During the past year, as ranking member of the Permanent Subcommittee on Investigations, I conducted a lengthy investigation of criminal aliens in the United States. Our investigation found that criminal aliens are a serious threat to our public safety that is costing Federal, State, and local criminal justice systems hundreds of millions of dollars. The very last thing this country needs to do is import more criminals—we have more than enough of our own.

The INS decision to stop immigrant fingerprint processing will allow criminals and terrorists to immigrate to our country. Last year fingerprint processing prevented some 9,000 criminals from immigrating to the United States. The INS claims that this is only 1 percent of the total numbers fingerprinted, but that 1 percent still represents 9,000 criminals, a very significant number. Nine thousand more criminals can ruin the lives of an enormous number of law-abiding citizens.

What the INS apparently does not realize is that fingerprint processing deters criminals from even attempting to immigrate to the United States.

Who knows how many criminals have been deterred from applying for visas because of the fingerprint check? INS might as well post a big billboard at the border that says "Criminals and Terrorists Welcome: No Background Check Required."

The Post report quoted an INS official stating that this action is necessary due to the current budget situation. What the INS does not say is that only the INS is to blame for this so-called budget situation.

Immigrant fingerprint processing is paid for out of the examination fee account. The account is funded by fees the INS charges to those who immigrate to the United States. These fees have not been raised in over a decade.

The fees for fingerprint processing, on the other hand, have been raised. The so-called budget situation is due to the fact that the INS has not raised its fees along with rising costs for processing immigrant applicants. The simple solution is to raise immigration fees. The taxpayers should not have to pay more.

But due to the INS' action, the taxpayers will have to pay more. While the INS claims that it will save $3 million by eliminating this program. Nine thousand additional criminal aliens will cost the taxpayers a lot more; not only the additional costs to the justice system, where these criminal aliens commit more crimes, but also the cost of the social welfare programs these criminal aliens will be eligible for. The INS decision may be penny wise, but it is surely pound foolish.

In short, this is bureaucracy at its worst.

Our country is facing a serious crime problem. It is facing a serious terrorist threat from abroad. We need only point to the World Trade Center bombing in New York, or the wanton murders of CIA employees outside CIA Headquarters. It is time for the administration and the INS to wake up to reality. The American public is fed up with crime and wants terrorism stopped. Eliminating fingerprint checks is the wrong way to go.

I ask unanimous consent that the Washington Post article by Roberto Suro be included in the RECORD.

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

[From the Washington Post, Apr. 14, 1994]

U.S. HALTS IMMIGRANT FINGERPRINT CHECKS

(By Roberto Suro)

Despite administration pledges to crack down on criminals and terrorists slipping into the country as immigrants, the federal government has stopped running routine fingerprint checks on immigrants, a procedure that has blocked thousands of people a year from entering the United States because of criminal records.

In a policy change effective April 1, the Immigration and Naturalization Service (INS) now will send only a handful of fingerprints from prospective immigrants to the FBI for a criminal record check and only in exceptional cases.

Applicants for a wide range of immigration benefits including citizenship, permanent residence and political asylum will continue to submit fingerprints to the INS.

An internal memorandum from INS headquarters here to offices around the world states that although the agency "is taking this action reluctantly, it is necessary due to the current budget situation."

Richard Kenney, an INS spokesman, said the agency hopes to save $3 million the remaining six months of the fiscal year by drastically reducing what he termed "an expensive, labor-intensive process."

In 1993 nearly 890,000 sets of prints were sent to the FBI for criminal record check, and less than 1 percent had applications turned down, Kenney said.

That amounts to nearly 9,000 people who were kept from acquiring immigrant status here last year because they had been convicted of a felony or had some other serious criminal matter on record with the FBI.

In the wake of the shooting outside the CIA headquarters in Langley, the World Trade Center bombing in New York and other recent violent incidents, there has been growing public concern that terrorists and other malefactors are too readily entering the United States as immigrants.

The costs of incarcerating immigrants who commit crimes once they are in this country has been a further cause of concern, lawmakers say.

With Congress demanding action, President Clinton unveiled a package of proposals July 27 which he said would deal with "the growing problems of immigrant smuggling and international terrorists hiding behind immigrant status."

Among the measures promised was greater coordination among federal agencies.

Attorney General Janet Reno complained at the announcement ceremony that the INS "too often did not communicate with law enforcement and vice-versa." She said, "It is imperative that we bring everyone together to communicate to do everything that we can to address the critical issue of terrorism."

Demetrios Papademetriou, director of the immigration policy program at the Carnegie Endowment, said, "On the face of it giving up this form of cooperation with the FBI seems rather inconsistent with the administration's law-and-order body language on immigration."

The memorandum ordering the new policy makes clear budget constraints are behind the change. Aside from cases involving orphans coming into the United States, the memorandum calls for a 95 percent cut in FBI fingerprint checks and requires senior regional officials to submit a written justification for every request to INS headquarters.

Kenney of the INS said no specific criteria had been developed for determining what would now justify a fingerprint check. He said adequate screening would be accomplished by checking applicants' names in data bases with the identities of known criminals.

## THE 38TH AIRLIFT SQUADRON

Mr. FORD. Mr. President, this past winter, stepped up violence and harsh weather in Bosnia required an increase in United States aircraft, missions, and personnel. This increase resulted in the reactivation of the famous 38th Airlift Squadron, better known as the Delta Squadron.

This squadron was an active duty last response airlift unit that could be called up for any mission during the early cold war years, until it was finally deactivated in 1977.

For the first time in history, this entire airlift squadron is made up entirely of Guard and Reserve personnel and aircraft. And I am proud to say, its flight commander is Lt. Col. Rick Ash of the Kentucky Air National Guard.

A recent article from the National Guard magazine chronicles many of the accomplishments of the Delta Squadron in Bosnia and exemplifies the large role the National Guard and Air Reserve play in crucial tactical airlift missions. I ask unanimous consent that the article be printed in the RECORD immediately after my remarks.

Mr. President, I urge my colleagues to read this article, because the Senate will soon consider the fiscal year 1995 Defense Department authorization legislation.

In that authorization is an effort by the active duty Air Force to place more reliance on their own forces, which have older and less cost-efficient C–130's, and less on the Guard and Reserve forces.

I firmly believe this decision would be casting aside a more cost-effective alternative.

Clearly, the Air National Guard's ability to perform is unquestionable. We need only look to their performance in Desert Storm, Somalia, and Bosnia for proof. And clearly, emphasizing integration of all forces with heavy reliance on the Guard is more cost effective and in no way jeopardizes our Air Force readiness.

That is why a Senate Armed Services Committee report recommended a provision directing the Secretary of Defense to transfer the tactical airlift mission exclusively to the Air National Guard and Air Force Reserve.

Because the Air Force chose to follow a very different course, I have sent a letter to Armed Services chairman SAM NUNN, asking that as we look at possible reductions we reject the Active Duty Air Force proposal and instead approve a stepped-up role for the Guard and Reserve.

The Air National Guard/Reserve role in tactical airlift should be expanded because the quality of the Air Guard and Reserve's readiness, personnel, and equipment has never been at a higher level. The Air Guard and Air Reserve already represents over 65 percent of the total tactical force structure. And Bosnia is only one example of their stellar performance.

Mr. President, in closing, I once again urge my colleagues to read this article and to support a solution that takes into consideration both our pressing fiscal restraints and the need for a national security force with the highest quality tactical airlift capabilities.

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

FLYING THE BOMB-RIDDEN SKIES OVER BOSNIA AND HERZEGOVINA—KENTUCKY AIR GUARD OFFICER COMMANDS FAMOUS REACTIVATED DELTA SQUADRON AS MISSION GROWS DANGEROUS

(By Lt. Col. Edward W. Tonini, HQ, Kentucky Air National Guard)

The historic Berlin Airlift, which took place in 1948 and 1949, had been the longest sustained relief effort in U.S. Air Force history until Operation Provide Promise. Today's humanitarian relief operation, which has been providing the basics of life to the people of war-torn Bosnia-Herzegovina, surpassed Berlin's milestone on October 8, 1993—last year!

By the end of February, Provide Promise had been in operation for 605 days, which dwarfs the Berlin Airlift record of 462 days. The humanitarian relief operation is conducted by the United States, Germany and France as part of the multinational United Nations (UN) effort to provide food, clothing, equipment and medical supplies to the victims—Muslim and Christian—of the Serb-Croat-Bosnian war.

Almost two years ago, on July 3, 1992, the Air Force began flying in food supplies and equipment into Sarajevo. However, the war ravaged the citizenry so much that Provide Promise required Air Guard and Air Force Reserve volunteer units and equipment to work with the U.S. Air Force in Europe (UI07 SAFE) and other active duty units from the Continental United States (CONUS) to deliver the much needed food and supplies.

As of February 1, 1994, the Air National Guard and the Air Force Reserve have airlifted more than 34,423 tons of supplies, food and equipment into Sarajevo, and airdropped 14,567.8 tons of food, 192 tons of medical supplies and 280.2 tons of winterization bundles into eastern Bosnia-Herzegovina.

As the conflict increased in violence and the winter weather grew harsher, the Air National Guard and Air Force Reserve mission requirements were increased from six to 15 C–130s, with aircrews doubling to 24 and more than 200 maintenance personnel. The increase in aircraft, missions and personnel turned into the reactivation of the famed 38th Airlift Squadron (AS)—better known as the Delta Squadron.

The Delta Squadron was an active duty fast response airlift unit on the ready for any requirement during the early Cold War years from Rhine-Main, Germany, until 1977, when it was deactivated. For the first time in history, this fast response airlift squadron is entirely made up of Guard and Reserve personnel and aircraft.

With Delta Squadron's reactivation came Lt Col Rick Ash, a flight commander of the Kentucky Air National Guard's 123d Airlift Wing (AW), the first Air National Guard commander of the Delta Squadron. Ash, an American Airlines pilot, is commanding the unit for three months from February to the end of this month. But in all actuality, it's not a new mission. In fact, it is quite familiar because he spent 30 days last August as the mission commander of Provide Promise's Guard and Reserve elements. During that first tour of duty, he commanded six C–130s, their crews and the support personnel.

Of his newest command responsibilities, he said: "The job is very similar, just on a much larger scale. American Airlines has been very supportive of the Guard and Reserve commitment by its employees. They were great during Desert Storm, and they are continuing their support throughout Restore Hope and now Provide Promise. The chief pilot at American believes this is a unique

leadership opportunity that will be advantageous to me and to American Airlines."

Delta Squadron's normal schedule is four C-130 aircraft flying multiple shuttles into Sarajevo daily. Each mission, originating from Rhein-Main Air Base (AB), and the full length of a single mission, to include stops, is 11 hours. Most important is the fact that each flight varies, not all flights fly the same route and up to three landings in Sarajevo are scheduled for each aircraft.

An average of 12 C-130s, one French and three German C-160 Transalls fly each day to identified areas that UN convoys cannot reach to deliver the much needed food or medical supplies. To make the airdrops and simultaneously avoid ground fire, the C-130s must complete high altitude airdrops—well over 10,000 feet. Even though a C-130 presents itself as a very large, relatively slow flying target to potential hostile fire, its airdrop precision is just as accurate as those from altitudes less than a third as high. Kentucky completed its first high altitude drop on March 17, 1993.

Another declared first was accomplished 10 days later, when the Kentucky Air Guard joined in airdrop operations with the French and the Germans. The Air Force has called this the first joint formation airdrop of allied forces in flying history in a combat environment.

Landing at the Sarajevo Airport is no easy task. The C-130s come down at up to 2,000 feet a minute, twice as fast as a normal decent. Their pace must slow during final descent, however. The takeoffs also are much steeper than normal. This is done to limit the aircraft's exposure to small arms fire from the ground. Involved since February 26, 1993, two of Kentucky's C-130H2s were assigned to the mission and, at this time, 90 percent of the unit has either performed or is performing the mission.

Nor is the mission getting any easier, according to the Guard members. On January 19, while the C-130 was being unloaded of 31,000 pounds of flour on the ground, a Kentucky aircrew experienced exploding mortar rounds within 200 yards of it on the Sarajevo airport runway. When the plane later landed at Split, Croatia, four holes were discovered in the aircraft.

While on the ground, the Kentucky crew, consisting of Maj Mark Heininger, Capt Steven Cochran, MSgt Jose Fernandez and SrAm Robert Allen, that was flying an Air Force Reserve C-130, kept the engines running as loadmasters unloaded the vital cargo through the rear door with help from UN ground crews. Unloading taking an average of 12 minutes. But for the anxious aircrew members, that 12 minutes is like eternity because of the potential of being hit by mortars and snipers from the surrounding hills.

The Kentucky crew discovered its battle damage on the ground in Split, with holes in its left wing near the engine, the left wing near the fuel tank, the tip of the right wing and the fourth hole in the fuselage toward the rear of the cargo bay. A day earlier, a German cargo plane also had been hit by gunfire at the airport. No one was injured in either incident, but UN officials suspended aid flights to the Bosnian capital until the situation had stabilized.

Heininger and his crew returned to Kentucky over varying times and they all said they have no qualms about going back. The reason: The humanitarian aid flights are the main lifeline for the almost 400,000 residents of Sarajevo, who are enduring their second winter under Serb siege. "We never want to lose sight of what this is all about," Ash said. "We're helping keep a lot of innocent people alive."

Today, two Kentucky C-130s and about 40 unit members are attached to the Delta Squadron and operating out of Rhein-Main AB under the command of the 435th Airlift Wing, U.S. Air Force. All are volunteers; since whole units are not being activated for the mission. The length of the individual tours depend upon their personal availability. Some Guard members are serving as little as two weeks and others have been on duty for more than four months.

Ultimately, most of the Guard units participating in Provide Promise have all their unit members at one time or another participate in a deployment outside of the United States. With the situation as it is now in Bosnia-Herzegovina, it doesn't look like there will be any let up from the demand of C-130 airlift support.

The Kentucky Guard unit has the newest equipped C-130H2 aircraft, which enables it to meet the high accuracy rate that it does at the high altitude airdrops. The accurate drops are achieved through the satellite-derived global positioning, inertial navigation systems, coupled with the adverse weather aerial delivery systems (AWADS). These systems enable the bundles to drop with almost pinpoint accuracy. The parachutes bring the bundles to earth at about 60 miles per hour and special packaging techniques ensure the survival of the contents. On one occasion, 4,000 glass vials of penicillin were dropped near a hospital and not one was broken.

New procedures developed during Provide Promise have revolutionized airdrops. They include the 10,000-plus-foot drop and the Tri-Wall Aerial Delivery System. Better known as TRIADS, the system has proved to be an effective way of ensuring large numbers of people receive food without the strongest controlling or hoarding what is delivered. The C-130s also are equipped with the latest in self-contained navigation systems (SCNS) and aircraft defense systems (ADS).

Besides the supply delivery mission, the Delta Squadron also has been called upon to perform medevac missions since February 2, last year. The Air Force flies a C-9 medevac twice a month into the former Yugoslavia. Kentucky Air National Guard C-130s were used to evacuate injured Bosnians, Serbs and Croats to Ramstein AB, Germany, after the recent downtown market bombing that has since promoted the allied no-fly zone restrictions and other increased UN involvement.

The outcome, of course, is not over. The negotiations continue. The battle weary citizens continue to face death daily. Serbian aircraft are being shot down by U.S. F-16s to ensure that the no-fly zone policy is being met. It doesn't look like an ending to Provide Promise any time soon. The totals in sorties and flying hours keep mounting.

There are no regrets, like Ash said, keeping the mission in perspective: They are saving lives at 10,000 feet high.

## U.S. DISTRICT JUDGE SAM B. HALL, JR.

Mr. GRAMM. Mr. President, this week, U.S. district judge Sam B. Hall, Jr., a dear friend who served the people of Texas for most of his adult life, passed away. Sam Hall, a lifetime resident of Marshall, TX, was my mentor in the House of Representatives, and it was my distinct honor and privilege to have served with him during my tenure there from 1979 to 1985. I was further honored to recommend him to President Reagan for a Federal judgeship, in the eastern district of Texas, which he assumed upon leaving Congress. He has left a legacy of public service that has seldom been duplicated and will be long remembered by those of us who knew and loved him.

This past Monday, I, with Senator HUTCHISON, introduced a bill to rename the Federal building and U.S. courthouse in Marshall, TX, the "Sam B. Hall, Jr. Federal Building and United States Courthouse."

This is an appropriate memorial for a man who devoted his life to serving the people of Marshall and east Texas, by practicing, making, and applying the law with remarkable ability and compassionate concern.

Sam was an archetypal Texan: honest, courageous, and tough. It is no exaggeration to say that without Sam Hall, much of the good we accomplished in the 1980's in Washington would not have happened. He was a man who placed principle above party, and service to God, country, and family above all else.

Sam will be deeply missed by the community he loved so well and so ably served. But his good deeds and fine example will be a model of public service for generations to come. I am proud to call him my friend.

## AS THEY SAY BACK HOME, HOW 'BOUT THEM LADY TAR HEELS

Mr. HELMS. Mr. President, it was about this time a year ago that I did some bragging in the Senate about University of North Carolina's men's basketball team that had just won the NCAA championship. Many college basketball fans expected a repeat performance from that team this year. It didn't happen—but whatta you know? The UNC Lady Tar Heels basketball team earned the championship spotlight this time around.

While a lot of folks in Washington are celebrating the championship of a university from another southern State—the name escapes me—the remarkable accomplishments of UNC's Lady Tar Heels, in winning the 1994 NCAA Women's National Basketball Championship, are at least as thrilling as those of the guys from Arkansas.

Consider this: On April 3, just down the road in Richmond, the poised, unflappable young women from UNC-CH defeated Louisiana Tech University, 60-59.

Talk about a thriller! Charlotte Smith's heart-stopping three point basket with seven-tenths of a second—repeat; second—remaining, the Lady Tar Heels completed their astonishing drive to their first-ever national title. No doubt, Miss Smith was inspired by her uncle, David Thompson, who—remember?—led the N.C. State Wolfpack to the NCAA men's championship in 1974—20 years ago.

Miss Smith's stunning three-pointer provided an appropriate climax to UNC–CH's amazing 33–2 season. Led by Coach Sylvia Hatchell, these young women captured the Atlantic Coast Conference title, then marched onward to Richmond and the national crown—all from a team that finished last in the ACC just 3 years ago.

Mr. President, this Tar Heel victory continues the importance of the Old North State in the NCAA basketball championships. I would be remiss if I didn't take note of the splendid performance by Coach Mike Krzyzewski and his Duke Blue Devils who almost made it two for two. The Blue Devils were edged out in a fine effort, losing 76–72 in Charlotte, to that talented team from the University of Arkansas.

Allow me also to congratulate the folks in Charlotte who did such a tremendous job in hosting this year's NCAA Final Four. It is a measurement of North Carolina's hospitality that this event was such a success.

So, Mr. President, it is on behalf of Dot Helms—a UNC–CH alumna—and all of the many other thousands who have been graduated from, or who have attended the University of North Carolina at Chapel Hill, that I express my pride in, and extend my best wishes to, UNC–CH's Lady Tar Heels. This Wake Forest alumnus is delighted that one of the two NCAA national basketball championship trophies will remain in the State of North Carolina for the fourth straight year.

## CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is closed.

## EXECUTIVE SESSION

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will now go to executive session to consider the nomination of Rosemary Barkett, of Florida, to be U.S. circuit judge for the eleventh circuit.

## NOMINATION OF ROSEMARY BARKETT, OF FLORIDA, TO BE U.S. CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT

The assistant legislative clerk read the nomination of Rosemary Barkett, of Florida, to be U.S. circuit judge for the eleventh circuit.

The ACTING PRESIDENT pro tempore. Time for this nomination is limited to 6 hours, to be equally divided between the chairman and ranking member of the Judiciary Committee or their designees.

The Chair recognizes Senator BIDEN.

Mr. BIDEN. Mr. President, speaking of never complain and never explain, I think we should move to the nomination of Rosemary Barkett and confirm her. I think there is really no need for lengthy explanation as to the qualifications of this woman to be on the court.

Mr. President, I rise in support of the nomination of Rosemary Barkett, chief justice of the Florida Supreme Court, to become a judge in the U.S. court of appeals for the eleventh circuit.

I see my distinguished colleague from Florida, the main sponsor and supporter and friend of Rosemary Barkett, is here, Senator GRAHAM, and my colleague, the ranking Republican on the Judiciary Committee, Senator HATCH. For purposes of allowing people to plan at least the initial scheduling, I intend on speaking at the outset here for about 20, 25 minutes and then I will yield the floor.

But I think it is important for me to lay out why I feel so strongly that Rosemary Barkett is supremely qualified to be on the U.S. court of appeals for the eleventh circuit. It seems to me there can be no doubt that she is qualified for the position for which she has been nominated. Her educational background and her career as a lawyer and a judge demonstrate a commitment to service, a depth of experience, and a strength and character that makes her an excellent choice for the Federal bench.

Justice Barkett, as a young woman, joined the order of the Sisters of St. Joseph. I know something about the Sisters of St. Joseph as well since for 8 years they were my primary teachers, and I probably learned more from them than any other group of people with whom I have been associated my entire life.

As a sister she maintained her vocation from 1956 until 1967. During this time, while she taught in the elementary and secondary schools, she earned her BS degree summa cum laude from Spring Hill College. The nominee then entered the law school at the University of Florida. She finished at the top of her law school class in 1970, earning the award for the outstanding graduate.

After Justice Barkett had worked for 9 years as a lawyer in private practice, then-Governor BOB GRAHAM, now U.S. Senator BOB GRAHAM, appointed her to fill an unexpired term as a trial judge in 1979, and in 1984 elevated her to the State court of appeals. One year later, Governor GRAHAM appointed Rosemary Barkett to the Florida Supreme Court, making her the first woman to sit on that court.

Facing an election to retain her seat—and that is how they do it in Florida. You get appointed, as I understand it, but then after a set amount of time you stand before the people of Florida and say what do you think of the job I did and are you going to retain me or do you want me to move on. And facing her election to retain her seat on the supreme court in 1992, Justice Barkett garnered an impressive 61 percent of the vote cast, I expect a percentage that any Member of this body would be overwhelmingly pleased with being able to generate in their home States, although I do know some of my colleagues do better than that on occasion and we all envy that ability.

Following that election, her colleagues on the court named her chief justice. Justice Barkett has observed the practice of law from the perspective of a litigator and as a trial judge, ultimately undertaking the task of appellate review. Her more than 20 years in the legal profession, her thousands of cases on the courts, the supreme court, the court of appeals, the trial court, and in private practice, provide her with a wealth and breadth of experience that make her an excellent choice in my view for the eleventh circuit. This history must be considered. The laudatory comments of her peers in her profession, both practicing lawyers and her colleagues on the bench, as well as the overwhelming confidence placed in her by the people in Florida, I think should be taken into account by our colleagues as they vote today.

The American Bar Association gave her its highest rating of well qualified by a unanimous vote. All these factors indicate that Rosemary Barkett is a woman possessing the outstanding character necessary for service as a Federal judge.

I might add that State court judges in my State, a majority of whom are Republican because our judges are appointed; they do not stand for election, I have had a handful of them come up to me and ask me about Rosemary Barkett. And we are very proud, by the way, as all States are, we are very proud of the quality of our bench in the State of Delaware. It has been for 150 years viewed as one of the outstanding benches of all the State courts, and these are very, very solid Republicans who have come up to me who, in fact, are suggesting to me strongly, I hope there is no problem with Rosemary Barkett; she is such a fine judge. They have worked with her. They know her and they support her.

Given her outstanding qualifications and commitment to service, some of my colleagues wonder why this nomination is commanding so much of the Senate's attention. The fact is that Justice Barkett's critics object to some of her decisions and therefore her confirmation on ideological grounds. Far be it for me to suggest that ideological grounds in certain circumstances are not appropriate things for Senators to consider. This ideological attack on the nominee for the court of appeals, though, in my view, is inappropriate for reasons I will explain in a moment.

I am not suggesting it is malevolent. I am just suggesting it is inappropriate. It is not at all inappropriate, when the President of the United States

nominates a Justice for the Supreme Court, which he will be doing in the coming months, for my Republican or Democratic colleagues to take issue with the ideology of whomever the President appoints because a Supreme Court Justice can, in fact, change the law.

An appellate court judge and a trial court judge, though, are bound by Supreme Court precedent. I have long maintained that a nominee's judicial philosophy is an appropriate consideration for a person seeking a seat on the Supreme Court. The reason for this view is really quite simple. Supreme Court Justices cannot be reversed. Supreme Court Justices, other than by constitutional amendment, are the final arbiters of the law and the meaning of the Constitution. For this reason, their judicial philosophies are a proper focus for the Senate, I think a necessary focus for the Senate.

(Mrs. FEINSTEIN assumed the chair.)

Mr. BIDEN. By contrast, judges in the lower Federal courts are bound by precedents of the Supreme Court. Notwithstanding their personal views, their obligation is to follow and interpret the law in a manner consistent with the Supreme Court's precedents.

Moreover, lower court justices can be reversed when they err. As a member, and for the last 7 years as chairman, of the Judiciary Committee, I have relied on a three-pronged standard that has traditionally guided the Senate in evaluating lower court nominees. Again, I do not presume that because this is my standard there is nothing in the Constitution that says that under the advise-and-consent clause any Senator has to adopt a particular standard. I want to make that very clear. But what I also want to make clear is that is a standard which I have adopted, which has been a standard which I believe and understand the vast majority of the Members of the Senate in the 22 years I have been here have adopted as well. It is a three-pronged standard:

First, that the nominee has the capacity, competence, and temperament to be on the court of appeals or a trial court.

Second, is the nominee of good character and free of conflict of interest?

Third, would the nominee faithfully apply the Constitution and the precedents of the Supreme Court?

If they meet those three tests, assuming they are not on the ideological fringe and they are not someone who is so out of the mainstream that you either question their competence, you question their character, you question their temperament as a consequence of where they sit, then it seems to me they should be given the opportunity to fulfill the seat for which they have been named.

Using this test through 12 years of Republican nominees, I voted to confirm numerous lower court judges who were far more conservative than I am. Because I view the Supreme Court and the lower courts differently, I supported the nominations of Robert Bork and Clarence Thomas for the court of appeals, while I opposed their nominations for the Supreme Court for the very reasons which I have stated. They swore that they would uphold the Constitution as interpreted by the Supreme Court. I took them at their word. They honored their word.

So on the court of appeals, it did not matter to me that they had such divergent views on how to interpret the Constitution from what I thought was an appropriate way. But once they are going to be moved to the Supreme Court where they are no longer bound by stare decisis, where they are no longer bound by prior Supreme Court decisions, and the Constitution was in the eye of the beholder, the beholder being those two individuals in question, I disagreed with their philosophy. Therefore, I opposed them on that circumstance for the Supreme Court, but voted for them for the lower court.

Justice Barkett's critics seem to apply to Justice Barkett a standard previously applied only to Supreme Court nominees. In my view, this effort is unwise, and I urge my colleagues to reject this ideological test for nominees for the lower court while again emphasizing that I do not criticize and I would suggest that it is appropriate and necessary for Senators to apply such an ideological test for the Supreme Court.

I outlined, a moment ago, Justice Barkett's sterling personal history and professional background, including her reputation within the legal profession. Thus, it is clear that she satisfies the first two prongs of this inquiry. She unquestionably possesses the competence and character essential in a nominee for the court of appeals.

Let me speak for a moment about the third prong, respect for precedent, or stated another way, respect for the role of a court of appeals judge and an understanding of what that role is.

I am convinced that Justice Barkett understands the job for which she is nominated. At her hearing, I asked Justice Barkett about the differences between what she does now in the Florida Supreme Court and what she seeks to do; that is, sit on an intermediate Federal court of appeals.

Justice Barkett currently sits on the court of last resort in the State of Florida. She and her colleagues are the final arbiters of questions arising under the Constitution and laws of the State of Florida. Because the Florida court is required to evaluate both State and Federal claims, some results that would not follow through if from Federal precedent are mandated by State law and the State constitution. In other words, as a State judge, Justice Barkett is bound to follow Federal precedent only to the extent that she is interpreting the Federal Constitution and Federal law. She is not required to adhere to the U.S. Supreme Court precedents when she interprets State law, in almost all instances.

In fact, as a State court judge, she should not follow Federal precedent when the State constitution commands a result different from Federal law so long as the State result is not proscribed by Federal law. This principle flows from the fundamental notion of federalism based within our constitutional system.

By contrast, a judge on the eleventh circuit is bound by Federal precedent. When interpreting questions arising under the Federal constitutional laws, the eleventh circuit judge must look for guidance to the decisional law of the U.S. Supreme Court. I am satisfied that Justice Barkett fully appreciates the distinction between the State supreme court and the Federal courts of appeal. She testified as follows and I quote:

> As a member of the court of last resort in the State, it is the State supreme court's job to look and act in our State (Florida) within the context of Florida's Constitution and Florida's laws and Florida's precedent, which in some cases may be different from that of Federal precedent or the Federal Constitution. In the Federal system of courts, you would not be looking at a case in front of you when in the context or ambit of the Florida Constitution or Florida law. You will, of course, be looking only to Federal laws and be guided by the precedent that the U.S. Supreme Court has established, and I, of course, would do that.

Thus, Justice Barkett, under oath, quite clearly stated that she, in fact, understands the distinction and, from my perspective, satisfies my three-pronged inquiry into a nominee's competence, character, and respect for precedent. For this reason, I support her nomination enthusiastically.

Let me repeat. Were Justice Barkett before us here today as the President's nominee for the Supreme Court vacancy that has just been announced, I think I would still support her because philosophically I do not have a problem with her position as a supreme court justice in Florida. But, it would be totally appropriate for Members of this body to stand before the Presiding Officer this morning and say, "I oppose this nominee because of her ideology and her philosophy." It would be totally appropriate. It might be misguided. It may be in disagreement with me. But it would be constitutionally, I think, dictated if they had a different philosophy and a different point of view than Justice Barkett.

But she is not here for the Supreme Court of the United States of America, although someday, who knows, maybe she would be. But she is here today for the eleventh circuit court of appeals.

So let me repeat again: Justice Barkett enjoys the competence, char-

acter, and respect for precedent essential in any nominee for a Federal court of appeals. Justice Barkett has written some 3,000 opinions and participated in more than 12,000 cases since her appointment to the Florida court. I am aware the critics have raised some questions about some of those opinions, and I wish to address just a few of those at the outset because I am sure my distinguished and learned colleague—and he is learned in the law—Senator ORRIN HATCH will raise a number of cases with which he has disagreement as do others on the Republican side of the aisle.

First, there is a suggestion that Justice Barkett is unwilling to uphold the death penalty. We do not know what Justice Barkett thinks about the death penalty as a personal, moral matter. In fact, her personal views at this point, for the job she is seeking, are irrelevant. Justice Barkett's record belies any notion that she is unwilling to uphold the State's ultimate punishment.

Justice Barkett has voted to affirm the death sentence of well over 100 separate defendants during her tenure on the Florida Supreme Court. I will say that again. You will hear about how she is not willing to uphold the death penalty, because they say she opposes it. We do not have it anywhere in the record where she has said that. But we do have a record, notwithstanding some individual cases—and the Presiding Officer, as a member of the Judiciary Committee has already heard what was presented by her.

The Senate and the Presiding Officer will hear today, from our colleagues, individual cases where Justice Barkett did not uphold the death penalty. That will be read to the Senate as an unwillingness to uphold the death penalty. But there are 100 times, or more, that she has sat as a judge in the Florida Supreme Court and affirmed—affirmed—the death penalty of the lower court. She said: Yes, if that is the will and the decision of the jury in the lower court, based on Florida law, it is appropriate.

In the vast majority of cases in which she has voted to reverse a sentence of death, she has not, as some critics have suggested, voted to "spare the killer." Instead, she has voted to lock up the killer for life. Of relevance here is the fact that Justice Barkett has demonstrated a willingness to apply the law. If the question is whether Justice Barkett has voted to affirm the death penalty in every case to come before her, the answer is clearly: No, she has not.

I think this is fortunate, quite frankly. I am a supporter, as the Presiding Officer is—we both sit on the Judiciary Committee. I have, for 22 years, been involved in criminal justice matters. I am the primary author of the bill being considered in the U.S. Congress today called the crime bill. I am the original author of that bill; I sat down and wrote it. There are over 50 different death penalties in it. I am a supporter of the death penalty. I also think that when you apply the death penalty, you better darn certain be right, and all the procedures and safeguards that are reasonably necessary under our Constitution should be built in before you reach that decision.

Well, I looked at Justice Barkett's record, and although I may have disagreed with her on some of her votes, the fact is that she, in some cases, has reversed the sentence of death and made it life in prison. I do not think it is an unhealthy thing to have a judge who discriminates between the imposition of the death penalty and the imposition of life in certain circumstances where it may be warranted.

Again, I emphasize that what is relevant here is the fact that Justice Barkett demonstrated the willingness to apply the law. If the question is whether she voted to affirm the death penalty in every case before her, the answer is "no." Again, I say that I think that is fortunate, for if she had, I would have serious questions about her capacity for judging, because I find it difficult to think that every single solitary death case that came before a justice in the entirety of his or her career with hundreds of them, there is not a single one where there was reversible error. That would make me worry a little bit.

If the question is whether Justice Barkett applies the laws to the facts and circumstances of a particular case, giving due consideration to the fundamental fairness of the proceedings and weighing carefully those factors in aggravation and mitigation of the death sentence, the answer is clearly that she does.

It is this exercise, carefully applied to the law of Florida, that allows the State of Florida to carry out its death penalty in accordance with the U.S. Constitution and the rulings of the U.S. Supreme Court.

Keep in mind, as my learned colleague in the chair knows, the reason why the death penalty was, for a fair amount of time in our recent history, viewed by the Supreme Court as not reasonably able to be applied, was because States were not applying it fairly. The courts—without going into them—in some famous landmark cases in the last 15 years, have sent out guidelines for States and said: "Look, it is OK to have the death penalty. It is constitutional to have the death penalty. But you have to go by certain rules, certain procedures, and there are certain ways to apply it."

So quite frankly, the reason why Florida has been able to apply the death penalty as often as it has, in my view, is because of the discriminating judgment as applied by their supreme court, including Justice Barkett. It is this existence of carefully applying the law that allows the State of Florida to carry out its death penalty.

In every murder case, the law requires consideration of the mitigating circumstances. Thus, even where heinous facts exist, mitigating evidence must be considered under the Florida law and, in some cases, may still outweigh the factors supporting the death penalty.

Granted, this is a judgment call; but it is one that a judge is required to enter into. A judge cannot merely say: "Under Florida law, by the way, this is a heinous crime. It is such a heinous crime that I am not considering what the law says I must consider, which are any mitigating factors. I am just not going to do that. It is just so bad—death."

If they did that, in all probability, the Supreme Court of the United States would say: Wrong, you cannot apply that death penalty. You have to show us you are applying the law.

So, granted, it comes down to literally what judging is about; applying judgment.

My friend from Utah and I may disagree with Judge Barkett in a handful of cases where we say our judgment would have concluded that the mitigating factors did not outweigh the nature and the heinous nature of the crime and, therefore, the death penalty should be applied. But to suggest that because Judge Barkett may have reached the conclusion that what she was required to consider, added up to a sufficient grounds to say, no, life in prison as opposed to death, does not go to whether or not she is willing to apply the death penalty. It is in those handful of cases where her judgment may be different from the judgment of Members of this body as to what constitutes sufficient mitigating evidence to, in effect, be required to withhold the death penalty and put the person in jail for life.

Reasonable judges may, and do, differ about what is appropriate in particular cases. Thus, when a judge has heard literally hundreds of death penalty appeals, as Justice Barkett has, there is little value in looking at cases out of their context within her entire record.

In all these cases, Justice Barkett has demonstrated the willingness to apply the law meticulously. Such rigorous adherence to the law is, in my view, a qualification, not a disqualification, for service on the Federal Court of Appeals for the Eleventh Circuit.

As a matter of fact, Madam President, it makes me realize that she is going to apply the precedents of the Supreme Court of the United States. She understands fully the requirements of a lower court judge, that they cannot wander the landscape even when philosophically they do not like a Supreme Court ruling. This should give

my friends who worry she is going to go off on a toot of her own, they should be reading the opposite way. They should say: Here is a woman, here is a person, here is a judge who meticulously applies the law, as opposed to disregarding the law, because the murder was so heinous that every instinct in you says, death notwithstanding, the law says you must consider these other questions.

Similar objections were raised in an effort to defeat Justice Barkett in a retention election for the Supreme Court of Florida. I am not expert on that election, but a man who is expert on that election, as expert as anyone, is sitting here. I suspect before the day is over our distinguished colleague, Senator GRAHAM of Florida, will speak to this issue.

My understanding is that those opponents of the retention of Justice Barkett in Florida raised all of the issues for all the people of Florida, and 61 percent of them said: Not only do we think that she applied the law, at least in a figurative sense, but we think her judgment was good.

Who are we up here in the U.S. Senate, assuming we agree, as I think is inescapable—we must agree—with the fact that she applied the law, but maybe we disagree with her judgment, who are we to say that 61 percent of the people of Florida are wrong about her judgment? They debated it. They campaigned on it. They discussed it. It was written about. And it was finally voted on. And 61 percent of the people of Florida said: Her judgment we do not disagree with.

They may have said: We do not like the law. They may have said: We do not like the law that says you have to consider mitigating circumstances. But since that is the law, she did it, and we do not disagree with how she, in fact, did it.

As I have noted earlier, she won the election overwhelmingly. And then after she won the election, her colleagues on the bench, some of whom voted against her on the particular cases that my friend from Utah is going to mention, where she ruled that the death penalty should not be applied, turned around and said: By the way, Rosemary, why not be our chief while you are at it? Why not be the chief justice?

During that retention campaign, Justice Barkett was endorsed by the Florida Police Benevolent Association, not known for their opposition to the death penalty; the Fraternal Order of Police, both groups with which I work very closely, as does my friend from Utah, not known for their opposition to the death penalty; and the Florida Police Officers Association, not known as some radical liberal group running around the country deciding that the death penalty is the bane of freedom in America.

I am not suggesting those who think it is the bane of freedom in America are radical. Decent, honorable people can disagree on whether or not the death penalty is moral or immoral.

But here, police organizations endorsed her. Again, they know her well. And we are here going to second-guess a handful of cases that she decided on, and say we can draw a conclusion from that that this is a woman opposed to the death penalty and she will not apply the death penalty, will not apply the law.

In addition, her retention was endorsed by Florida's attorney general, Bob Butterworth, with whom I have worked. Bob is a Democrat, but he is also, if I am not mistaken, a relatively strong supporter of the death penalty; and former Attorney General Jim Smith, a Republican. I might also add there are two Senators from Florida, as we all know, one a Republican and one a Democrat. Both of them endorse Judge Barkett, and I may be mistaken, but I think both of them are supporters of the death penalty.

There is a man sitting here who has, as Governor, had to see executed the death penalty. I think it occurred during his tenure.

So here we are going, all of sudden, to say: By the way, this person is not qualified because she is ideologically so far to the somewhere, and she is against the death penalty, and we should vote her down. That is one of the arguments you are going to hear. When you hear it, just put it in focus. A Republican Senator and Democratic Senator—I have never heard BOB GRAHAM labeled a liberal on criminal justice issues. I have never heard CONNIE MACK labeled a liberal on criminal justice issues, or for that matter, on any other issues. I have never heard the Fraternal Order of Police, the Police Benevolent Association, nor the Florida Police Officers Association labeled a liberal anti-death-penalty group.

I imagine former Attorney General Republican Jim Smith will be surprised to learn that he was supporting someone who would not apply the death penalty and apply the law; and I know from my discussions with Bob Butterworth, the present attorney general, a Democrat, that he would be surprised, since he is such a strong supporter.

So you are going to hear a lot of specifics, and it is relevant, it is not unimportant, and it is appropriate that we hear it. But when it is all said and done, as my old senior partner—he is not much older than I am, but my former senior partner, one of the best trial lawyers in the State of Delaware, Sidney Balick—used to say: Keep your eye on the ball. When he talked to the jury, he started his summation: You have heard all this from the prosecutor, but I want you to keep your eye on the ball. The issue is not would you want to invite this person home for dinner. The issue is did this person commit the crime. Keep your eye on the ball.

Here I would like you all to keep your eye on the ball. Listen to what my friends have to say, but keep your eye on the ball. Is this a person who will not apply Federal precedent as it relates to the death penalty, in particular? Because the implication will be, the assertion will be, she did not do it in Florida and, therefore, she will not do it as a Federal appeals court judge. In fact, the police; former attorneys general, Republican and Democrat; a Republican Senator; a Democratic Senator—all of whom support the death penalty, along with 61 percent of the people of the State of Florida who had this issue aired, among others, not too long ago—all concluded that she does, has, and will.

It is difficult for me to believe that all these folks can be wrong. In my view, most of the remaining questions about Justice Barkett's record may be answered by reference to the distinction between State judges interpreting State constitution and Federal judges applying Federal law.

Let me illustrate by discussing two areas of criticism—privacy analysis and equal protection analysis. Justice Barkett has been criticized for some of her opinions, or opinions in which she has joined, that construed the constitutionality requirement of privacy overly generously, from the perspective of my friends who will criticize her. Regardless of the merits of these opinions, as a matter of Federal constitutional law, these cases, I think, have to be understood in the proper and legal context.

These were decisioned arising under both Federal and State law. Justice Barkett reached her conclusions by applying the State constitution and State law. The people of Florida approved a privacy amendment to the Florida Constitution in 1980. Even former Judge Bork could not deny the existence of the right to privacy in the Florida Constitution. It is expressly stated.

I spend time with my students. I teach a course in constitutional law at Widener Law School on separation of powers issues, trying to explain the distinction between, when the Founding Fathers came up with a Bill of Rights, how it comported with or did not comport with State constitutions.

And when you go back and try to interpret the second amendment or the first amendment or the fifth amendment, what you do in trying to determine the original intent of the Founders—and granted the Bill of Rights was not ratified at the same time the Constitution was originally ratified, it came along later—but you go back and look what the State constitutions did to try to give meaning to the intent of the Framers, and it is interesting.

Students sometimes are perplexed and surprised to realize that States have gone further than the Federal Government in protecting individual rights.

Under our form of Government, our separated powers, separated among the three branches at the Federal level, between the Federal and State level, and between Government and individuals, there is the ability of States, and always has been, to grant greater protection. They cannot grant less protection since the incorporation doctrine, they cannot apply less protection than the Federal Government does, but they can apply greater protection. And the State of Florida, in its wisdom, made a judgment about the right of privacy. The people of Florida approved a privacy amendment to the Constitution of Florida in 1980.

Let me get my glasses out to make sure I absolutely read that date. Yes, 1980. I was able to read that date without my glasses. But the Florida amendment was amended in 1980.

That amendment provides, and I will quote it:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life.

Now, we have, and I predict my distinguished friend from Utah and I will debate the concept embodied in that amendment all through the month of August and September and maybe July, June, whenever we get an appointment, because that is always a central issue of debate and a difference between my distinguished friend and I, whether the Federal Constitution embodies by implication such a right, an unenumerated right of privacy.

But here I want my colleagues to understand when they come to debate this issue, this is not a Scalia debate, this is not a Bork debate, this is not a Kennedy debate about privacy, which was raised in every recent Supreme Court nomination. This is a different debate. This is black and white.

As I said, even Judge Bork would have to acknowledge that there is a constitutional right of privacy enumerated in the Florida Constitution. It is an important point to keep in mind, I think.

Unlike the Federal Constitution, it includes this expressed privacy guarantee. The drafters of the amendment, Florida legal scholars, and the entire Florida Supreme Court agree that this amendment was designed to be more expansive than the Federal right to privacy, as recognized by, and to the extent it has been recognized by, the U.S. Supreme Court. Nobody disagrees with that that I am aware of, even those who may have opposed the inclusion of that right of privacy in the Florida Constitution.

It was this State right of privacy upon which Justice Barkett relied in finding that Florida's Constitution protected behavior that would not be protected under the Federal Constitution.

Likewise, she has been criticized for opinions in which the Florida Supreme Court struck down State laws on the grounds that those laws were violative of equal protection guarantees.

Let me put these opinions in context. In these equal protection cases, the Florida court struck down the laws in question based upon Florida law, not Federal law. Although the court made references in the opinions to the Florida Constitution, the precedent cited to support the court's conclusions were all Florida cases.

Before the Judiciary Committee, Justice Barkett testified that Florida law requires a stronger legislative rationale than does the Federal Constitution when the legislature makes distinctions among people.

And I know my distinguished colleague knows but the public may not have focused on it as much, what we mean by "equal protection," when we talk about the equal protection clause, we are almost always, in the Federal context, talking about whether or not the law is able to constitutionally, whether legislators like us can get together and discriminate between and among the treatment of women as opposed to men, or blacks as opposed to whites, or Hispanics, or any categorization of people. And the overwhelming notion adopted by the American people, I think embodied in the 14th amendment, but there is disagreement about this among us, is that the law is the law and it should not be applied in a discriminatory manner. It should be applied equally.

Now, in Florida, whatever disagreements my friend and I and others who will come and speak on this issue might have about how expansive the 14th amendment is, how expansive the equal protection clause of the U.S. Constitution is, there seems to be little doubt that the Florida Constitution is more expansive; that is, under Florida law and the Florida decisions, at least, Justice Barkett believes that the Florida court was applying a more stringent Florida standard.

As this review of privacy cases and equal protection cases reveals, Justice Barkett, in some of these cases joined by a large majority of the Florida Supreme Court and, I might add, never alone, applied the law as called for in each case. When litigants raised both Federal and State constitutional claims, she resolved the cases under State law, where appropriate.

Reasonable judges might disagree with her conclusions in one case or another, but it seems clear that she performed the job of judging with due prudence and respect for the applicable law, and the most controversial cases that is Florida law.

For all these reasons, her high integrity, her unquestionable competence, her respect for precedent, I am pleased to support Rosemary Barkett's nomination for the eleventh circuit. Based on the standards this body has long applied to the court of appeals nominees, she deserves to be confirmed.

Let me conclude this portion of my remarks, Madam President, by saying that someone's personal journey to this point of being considered is, in my opinion, often used as a cover to keep us from looking at their competence and how good they are. So I have not dwelt at all on what I will at a later time, the extraordinary character of this woman, the extraordinary gains she has made, the absolutely admirable and almost enviable familial ties she has with numerous brothers and sisters, having been born in Mexico, emigrating to the United States, having made her way through her first language to her new language to her present language, to all the impediments that were in her way, never having lost for a moment this incredible optimism she has; absolutely incredible optimism.

I know it is overused and so I even hesitate to say it here, but talk about the American dream, talk about the personal qualities that Americans admire, talk about the story that says anything can be overcome, you have it all written in the journey of this woman's life to this point.

But I have not gone into that because I think we need not even look at that to go by every objection as to why she should not be in the court. It is flatout integrity, commitment to your job, superior intellectual and educational credentials that qualify this woman to sit on this court at this moment in our history—or, I might add, any moment in our history.

But I will return to speak to some of these issues later. I thank my colleagues for their indulgence and I now yield the floor to my distinguished friend and ranking member of the committee.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Madam President, I have really enjoyed listening to the distinguished Senator from Delaware, the chairman of the Judiciary Committee, explain his reasons for supporting this rather extraordinary woman.

I want to say at the outset I do not think anybody would find fault with her as a person. She is a lovely person, a good person. I have a great deal of admiration for her life and what she has done with it. I like her personally very much. I have expressed that both in committee and outside of committee. So it is not a question of her individuality—she is a good person and she has proven that throughout all these years. I like her family. I have met many members of her family. I feel badly, in a sense, having to oppose this nomination because I do like her so much and I like her family so much.

But let me just mention a few things. Senator BIDEN mentioned the 61 percent vote down there in Florida, where she ran unopposed. That is an important issue. He mentioned the support of various people in Florida, including police organizations. There were plenty who were opposed to her, too. Those may be good points, but this is not an election we are talking about. This is not a forum for voting, in the sense of rubberstamping whatever the people of Florida did. More important, the argument that her 61 percent vote in Florida proves that she is very well qualified to be on the Federal Circuit Court of Appeals for the Eleventh Circuit, I think, is faulty. Let me begin by noting that success in a retention election, where a person is unopposed, may say something about a judge's skills as a politician but it often says little or nothing about a judge's ability as a judge.

In addition, the standard for retaining a judge may understandably be much lower than the standard for elevating a judge to the Federal appellate bench. That is, the standard for retaining a judge in any State may be much lower than the standards for elevating a judge to the Federal bench. I will note that Chief Justice Barkett's supporters in the retention election emphasized that there should be a strong presumption in favor of retaining a sitting justice.

Justice Barkett's supporters speak as though this 61 percent vote was a ringing endorsement. In fact, it was the second-lowest vote ever in a retention election in the State of Florida, for retaining a Florida Supreme Court Justice, even though, according to press reports, Chief Justice Barkett outspent those opposing her retention by a factor of 3 to 1. Let me note that a justice in a retention election is not running against anybody. Yet she only got 61 percent of the vote and outspent her opponents 3 to 1. Let me say, voters vote only on whether or not to retain that justice in that Florida election.

So what is remarkable is that 2 out of 5 Florida voters have sufficiently strong dislike for Justice Barkett's record that they, in effect, regarded any replacement for her as an improvement over her tenure on the court. That point has to be made because it is important.

Somehow, when 2 out of 5 Americans voted for him, President Clinton claimed that he had a mandate. When 2 out of 5 Floridians voted against Justice Barkett, the White House considers their opposition insignificant. It was not insignificant, nor should that point be made as though we should rubberstamp this appointment because 61 percent, the second-lowest number in the history of Florida, voted to retain her in an election where she had no opponent other than people who were upset with her standards of judging.

The Senate has an obligation under the Constitution to provide its independent advice and consent on this nomination. That means that we have to examine the nominee's record. Although she is a very fine person and a good person and a person I like, if you look at the record—I do not care who you are—you have to be concerned. To defer instead to the 1992 retention election would be nothing less than a dereliction of our constitutional duty. So do not raise that with me as though that is what we should do just because of that.

Another argument the distinguished Senator from Delaware made, basically, is that Justice Barkett's role as a Federal appellate judge would be fundamentally different from her role as a State supreme court judge and that you cannot make judgments on the latter based on the former.

That just is not true. This argument cannot be taken seriously. In the first place, the role of a State supreme court justice and the role of a Federal appellate court judge are identical, absolutely identical, in terms of their obligation to follow the U.S. Supreme Court precedent on issues involving Federal constitutional law. As I have discussed and shown at length in prior speeches on the floor, Justice Barkett has not been faithful to U.S. Supreme Court precedent while on the Florida supreme court. There is no reason to believe that she will be any more faithful to Supreme Court precedent once she reaches the Federal bench.

Second, State court judging and Federal judging have a common core. At bottom, they turn on legal reasoning. A judge who shows excessive sympathy for criminals, as Justice Barkett does, or who engages in sloppy reasoning in one court, can be expected to display the same flaws on any other court. And that is one of the problems.

Finally, Justice Barkett's supporters cannot have it both ways. They cannot claim on the one hand that her record as a State supreme court justice somehow shows that she would make a good Federal appellate judge, yet contend on the other that her record as a State supreme court justice cannot be used to show that she would be a poor Federal judge.

I noticed in the discussion of the distinguished Senator from Delaware on this issue he did not cite many of her cases. In fact, I do not recall him citing one of her cases.

On this matter of softness on crime, which pervades Justice Barkett's opinions, her opinions are filled with soft versions of judging. It should be noted President Clinton is meeting today with hundreds of police officers. This may make good public relations, but if the President continues to appoint judges who handcuff the police, then all of the President's anticrime rhetoric is just empty talk—just plain empty talk. Unfortunately, I am coming to the conclusion that most of his rhetoric on the issue is empty talk, especially when you notice he has cut prisons again. The last budget cut them $500 million plus. This budget cuts them $73 million. He has cut 1,500 positions—almost 1,600 positions out of the FBI, Drug Enforcement Administration, Drug Task Force, prosecutors down at Justice; he has cut basic grants to the States—all at a time he is saying, "I want my crime bill passed through the Senate and through the House," and meeting with all these police people today, very ironically while we are debating Justice Barkett's record.

For those who think this is a debate over capital punishment, or who believe we are only raising the death penalty issue—they are important in her decisions, because you are going to find her death penalty approaches, or at least one, would completely outlaw the death penalty. It would completely make it impossible to ever implement it or enforce it. She would have to be a pretty poor justice not to go along with an awful lot of the opinions that upheld the death penalty—it used to be 250, now it is down to 100, according to the Senator from Delaware; I am sure it is between 100 and 150—but you almost have to. Most of the decisions made by these people are decisions that are matter of course decisions. But it is where she gets down to the nitty-gritty and expresses her own opinion or opinions with regard to the death penalty that you will find that she is wanting.

But it is not just the death penalty, which the media tends to make these debates turn on.

That is important, and that is an important part of the opposition, but it is not the most important part.

Upon review of her judicial record and of her testimony before the Judiciary Committee, I have to oppose this nomination, even though I like her, even though I would like to put her on the bench and even though I wish her well and even though I recognize the travails of her lifetime.

I just do not think she should be a judge on the U.S. Court of Appeals for the Eleventh Circuit, and I do this with regret, as I say, because I like her and I consider her to be a fine person, and her family as well. But I do so with a firm view that her record establishes that she will substitute her own policy views for the written law and take too soft an approach to criminal law enforcement. At a time when we are awash in drugs, awash in crime, awash in all kinds of difficulties, I do not think we should be putting people on the bench who do not hold fealty to the law and who are not going to be tough on crime.

In reaching this conclusion, I stress that no judicial nominee needs to agree with my reading of the law or any

other Senator's reading in all or nearly all cases. But there just are too many cases, across too wide a range of subjects, where I believe that this nominee stepped well past the line of responsible judging. I and other Senators inquired about many of these cases at her hearing before the Senate Judiciary Committee. Incidentally, I notified Chief Justice Barkett in advance of the cases that would be the subject of inquiry that I intended to raise with her. I gave her time to look at them. I was not reassured by her testimony even though she had adequate time to look at them. Indeed, Chief Justice Barkett ultimately admitted that she overreached or was careless in a number of important opinions.

For example, in her dissent in the University of Miami versus Echarte, Chief Justice Barkett voted to strike down statutory caps on noneconomic damages in medical malpractice cases. In addition to a variety of State law grounds, her dissent also relied on the Federal equal protection clause, and without citing any legal precedent or any Federal precedent, she asserted:

> I fail to see how singling out the most seriously injured medical malpractice victims for less than full recovery bears any rational relationship to the legislature's stated goal of alleviating the financial crisis in the medical liability insurance industry.

In fact, the rational relationship between the means and the goal is self-evident and was clearly spelled out by the legislature. One might well disagree with caps on noneconomic damages as a policy matter. But Chief Justice Barkett's purported application of rational-basis review is a stark overreach and a flagrant misuse of the Federal equal protection clause. At her hearing, she acknowledged that she should not have relied on that clause.

In another case, Shriner's Hospital versus Zrillic, the nominee again relied on the rational basis standard under the Federal equal protection clause—as well as on a variety of State law grounds—in again striking down a statute. In her opinion, she took the remarkable position that "underinclusive or overinclusive classifications fail to meet even the minimal standards of the rational basis test." This distortion of rational basis review into something akin to strict scrutiny clearly flies in the face of equal protection principles set forth in nearly 50 years of U.S. Supreme Court precedent.

Now, neither of these cases, though extremely important cases, are death penalty cases, and I hope the media understands that, because this type of judging is pervasive and could cross all kinds of constitutional lines.

Justice Barkett's misreliance on the Federal equal protection clause in those two cases is all the more striking to me in light of her partial dissent in Foster versus State. There, in seeking to rely on a theory of statistical racial discrimination in a challenge to the death penalty, she expressly acknowledged that the Federal equal protection clause was unavailable to her in light of a Supreme Court decision, McCleskey versus Kemp, which rejected her view under the Constitution.

McCleskey versus Kemp squarely rejected her position and her view under the U.S. Constitution. She admits that. Accordingly, in her Foster opinion, she only relied on the Florida equal protection clause. Yet she did not recognize the error of relying on the Federal Constitution when she wrote her opinions in Echarte and Zrillic. Her failure to appreciate in these two opinions that a Supreme Court precedent foreclosed her reliance on the U.S. Constitution deeply troubles me. Supreme Court precedent governs lower courts not only when the claim presented is identical to that previously rejected by the Supreme Court but also when the basic doctrinal principles enunciated by the Supreme Court are applicable to a case.

The failure to appreciate this opens the door to judicial activism—a door, I regret to add, I believe this nominee has repeatedly walked through.

I do not think anybody doubts that I have been as fair to judicial nominees through my history in the Senate of 18 years as anybody could be. I have certainly bent over backwards to try to help any judge and certainly any President who has appointed a judge. So I reluctantly oppose this person for this particular position but not because I am unsure of what I am talking about.

I also find Chief Justice Barkett's reliance on Federal substantive due process very troubling. In State versus Saiez, she wrote an opinion holding that a State law criminalizing the possession of embossing machines capable of counterfeiting credit cards "violated substantive due process under the 14th amendment to the U.S. Constitution."

Briefly, let me just say here this expansive, substantive use of the due process clause is insupportable under Supreme Court precedent. The nominee testified that she was really relying on State due process grounds and her inclusion of the Federal due process clause was, to put it in her words, "careless."

Now, I can accept that, on occasion, a sitting judge may wish to phrase an opinion differently, in hindsight, or even believe that he or she got an opinion wrong. But tossing into her opinion the Federal equal protection clause and the Federal due process clause, on occasions where they very clearly do not belong, raises concerns that I do not find assuaged by testimony acknowledging this was erroneous. These two clauses are among the most powerful tools a judge can use, if so inclined, to legislate from the bench—or put it another way, to be a "superlegislator" in black robe on the bench.

In the case of the equal protection clause, virtually every law classifies people into at least two classes on some basis. Congress might enact limits on medical or product liability, which are subject to equal protection analysis as a component of the due process clause of the fifth amendment. States or Congress may seek to remove recipients from welfare rolls after a time limit of 2 years. A misreliance of Federal equal protection in reviewing these laws would lead to their erroneous invalidation. In the case of the due process clause, there is a tendency by some judges and commentators to read almost anything into it. This is all the more troubling because the misuse of these two clauses is not subject to limiting principles of judging but only to the whim of the judge. So they can really be misused.

There will be many cases of first impression before the eleventh circuit court of appeals, the court to which she aspires. There will also be many times when precedents must be construed, and they may be construed broadly or narrowly. Most appellate decisions are not reviewed by the Supreme Court. These errors then are not merely technical or academic. They could be errors that could stand for years and hurt an awful lot of people because of the misjudging by people who use the logic that this judge has.

My concern about the nominee's approach to judging is heightened by other cases. For example, in a redistricting case [In re Constitutionality of Senate Joint Resolution 2G], the Florida Supreme Court selected from among six different modifications to a state legislative redistricting plan. Writing "dubitante," Justice Barkett stated that she was—

> loath to agree to any of the convoluted plans submitted under these hurried circumstances * * * If I had to choose only among those presented, however, I would choose the plan submitted by the NAACP simply because this is the organization that has traditionally represented and promoted the position that advances all minority interests.

At her hearing, Justice Barkett recognized that this opinion gave a clear appearance of partiality, as it expressed a preference for a party based on who the party was rather than the merits of that party's argument. She stated that she wished she had written her opinion differently.

In any case, I am willing to give the benefit of the doubt to a nominee. But there are just too many instances in Justice Barkett's judicial record—the principal basis for evaluating her nomination—of overreaching, and on very significant issues, to leave me comfortable with elevating her to the eleventh circuit.

There are many other cases that concern me. For example, in Stall versus State, Chief Justice Barkett joined a dissent striking down a state obscenity statute on State law grounds. She also

wrote separately in an opinion that, again, is sweeping and overbroad.

There are several problems with this dissent.

First, her statement that, "A basic legal problem with the criminalization of obscenity is that it cannot be defined" is flatly contradicted by the U.S. Supreme Court's landmark opinion in *Miller* v. *California* [413 U.S. 15 (1973)], which Chief Justice Barkett does not even acknowledge, much less discuss.

The fact is that obscenity can be defined, and it has been defined by the court.

Second, she sweepingly claims that an obscenity law such as the one in Florida violates "every principle of notice and due process in our society"—not, I might add, a statement limited to State law principles, and, again, contradicted by the Miller decision.

Third, Chief Justice Barkett's opinion mischaracterizes the Florida law in the case: that law does not turn on the "subjective" view of a handful of law enforcement people and jurors or judges, as she incorrectly suggests. The Florida law incorporates the standard set forth by the U.S. Supreme Court in Miller. The law bans materials that, judged by contemporary community standards, appeal to the prurient interest, that depict or describe, in a patently offensive way, specifically defined sexual conduct, and that lack serious literary, artistic, political, or scientific value. Thus, the role of jurors or judges under this law would not be to make their own "subjective definition" of what is obscene, but rather to discern and apply existing community standards.

Incidentally, while I am pleased that she voted to uphold a Florida child pornography statute in a different case, I make two observations. First, this does not mitigate her sweeping views about the more general subject of obscenity. Second, contrary to her testimony, the child pornography statute is a different statute from the one she voted to strike down in Stall.

I have all of these concerns, and have yet to reach the issue of criminal law enforcement generally and the issue of the death penalty specifically. There is much to say on these subjects.

With respect to criminal law issues aside from the death penalty, I believe that the nominee has too often erroneously come down on the side of lawbreakers and against police officers and law enforcement. She has exhibited an unduly restrictive view of the fourth amendment that would handcuff the police, especially with regard to controlling drugs. [See, e.g., *Bostick* v. *State*, 554 So.2d 1153 (Fla. 1989), rev'd, 111 S.Ct. 2382 (1991), on remand, 593 So.2d 494 (Fa. 1992); *State* v. *Riley*, 511 So.2d 282 (Fla. 1987), rev'd, 488 U.S. 445 (1989), on remand, 549 So.2d 673 (Fla. 1989); *Cross* v. *State*, 560 So.2d 228 (Fla. 1990); *Sarantopoulos* v. *State* (Fla. Dec 9, 1993)].

For example, in Bostick, a case involving cocaine trafficking, Justice Barkett adopted an across-the-board, per se ban on passenger searches on intercity buses even though Supreme Court precedent clearly called for an analysis of a search's legality based on all of the particular circumstances of the search. Justice Barkett even saw fit to compare the police search method at issue to methods used by "Nazi Germany, Soviet Russia, and Communist Cuba." The U.S. Supreme Court reversed her.

The U.S. Supreme Court also reversed her in the Riley case, where her misapplication of precedent would have led to dismissal of charges against criminals growing marijuana. In yet another drug case, the Court criticized her overbroad reading of precedent.

In her dissent in a case called Cross, Justice Barkett refused to credit the testimony of police officers that they had seen cocaine packaged in the same peculiar way on hundreds of occasions in their combined 20 years of law enforcement. In so doing, she ignored Florida precedent cited by the majority that provided that the observation of an experienced policeman of circumstances associated with drugs could provide probable cause for an arrest.

In another dissent, she ignored settled principles enunciated in U.S. Supreme Court precedent in finding that someone who was growing marijuana in his backyard had his Fourth Amendment rights violated when police, acting on a tip, looked over a six-foot fence, spotted the marijuana plants and then obtained a search warrant. Rather than inquiring whether the defendant had an expectation of privacy that was objectively reasonable, Chief Justice Barkett simply displayed her personal opposition toward what she regarded as overly intrusive law enforcement.

That is amazing because we just heard the distinguished Senator from Delaware talk about how important this law of privacy is that is not enumerated right in the Constitution, he claims. Normally, when liberals talk about privacy, they are talking about abortion, they are talking about homosexual rights, they are talking about obscenity and pornography and the rights to them, and any number of other things, mainly dealing with sexual aberrations.

(Mr. GRAHAM assumed the chair.)

Mr. HATCH. But in this case, she held that the privacy right to stop the police operating on a tip from looking over a fence making sure there was marijuana there and then going and getting a lawful search warrant. That bothers me quite a bit.

Justice Barkett has also written opinions striking down narrowly drawn laws that ban loitering for the purpose of prostitution and drug dealing. Think about that. These opinions are badly flawed and misapply precedent. Moreover, they seriously disable communities from preventing harmful crime.

Keep in mind as I am discussing these matters that she is appointed by a President who is claiming that he is going to be as tough on crime as anybody in history while at the same time his Office of Management and Budget is cutting criminal law enforcement by leaps and bounds and at the same time he is appointing judges like this one to higher positions in the Federal court system where they can decide opinions that may never be decided by the Supreme Court to become followed by other circuits and by other people who at least in this case—and I believe we will find others—are really soft on crime. This bothers me a lot.

In my view, there are too many other instances where she unjustifiably construed criminal statutes in favor of criminals. [See, e.g., *State* v. *Bivona*, 460 So.2d 469 (Fla. DCA 1984), rev'd, 496 So.2d 130 (Fla. 1986); *Gayman* v. *State*, 616 So.2d 17 (Fla. 1993).]

With regard to the death penalty, I appreciate that the nominee has voted to uphold the death penalty a number of times. And as the distinguished Senator from Delaware has said, I would expect as much in a state with a lawful death penalty and, unfortunately, a great deal of violent crime. But as I stated at Justice Barkett's hearing, a proper inquiry into a nominee's judicial outlook on the death penalty is not ended merely by noting that the nominee has upheld the death penalty in a number of cases, where even the most activist of judges cannot avoid its imposition.

If a nominee exhibits a clear tendency to strain for unconvincing escapes from the imposition of the death penalty, as this one does, in cases where that penalty is appropriate, then that raises concerns in my mind about the nominee's fidelity to the law, no matter how many times the nominee may have upheld the death penalty in other cases.

From my review of Justice Barkett's record, I have concluded that Justice Barkett clearly exhibits such a tendency.

Let me further note at this point that one of Justice Barkett's dissenting opinions would render the death penalty virtually unenforceable, unless imposed on the basis of racial quotas. Her partial dissent in Foster versus State, had it been the law in Florida when she joined the Florida Supreme Court, would likely have led to a different outcome in many, if not virtually all, of the cases where she voted to uphold the death penalty. Indeed, the theory she embraced in Foster, until its rejection by the Supreme Court in 1987, had become a principal

weapon in the anti-death-penalty movement's arsenal and will be a principal weapon in the anti-death-penalty arsenal of those arguing against the death penalty in the House of Representatives this week, and probably next week, as they discuss the crime bill.

It is all right to differ on whether you believe or disbelieve in the death penalty. People have sincerely held beliefs there, I understand, and I do not have any problem with people in the legislative bodies debating whether or not we should impose the death penalty in American constitutional and criminal law. But I do have problems where it is imposed and is currently the state of the law of the land, where judges like Justice Barkett find every excuse they can to try not to impose it and, in this particular case, would impose it only by racial quotas. That bothers me.

Overall, I believe Justice Barkett, in reviewing death penalty sentences, views aggravating circumstances much too narrowly; construes mitigating circumstances much too broadly; creates unjustified categorical exclusions from death penalty eligibility; subjects the death penalty to racial statistical analysis that would paralyze its implementation, as I have just discussed; and creates various procedural anomalies.

Let me mention two of the many cases that concern me. They were mentioned in the hearings.

Dougan versus State was a 1992 Florida Supreme Court case. Dougan was the leader of a group that called itself the "Black Liberation Army," which, according to the trial judge, had as its "apparent sole purpose"—this is the trial judge speaking—"to indiscriminately kill white people and thus start a revolution and a race war."

One evening in 1974, Dougan and four other members of his group, armed with a pistol and a knife, went in search of victims. They picked up a white hitchhiker, Steven Orlando.

I am quoting:

They picked up a white hitchhiker, Steve Orlando, drove him to an isolated trash dump, stabbed him repeatedly, and threw him to the ground.

Continuing:

As Orlando writhed in pain and begged for his life, Dougan put his foot on Orlando's head and shot him twice—once in the chest and once in the ear—killing him instantly. Subsequent to the murder, Dougan made several tape recordings bragging about the murder, and mailed them to the victim's mother, as well as to the media.

The following excerpt from one of the tapes aptly illustrates the content:

"He was stabbed in the back, in the chest and the stomach; ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes."

The Florida Supreme Court upheld the death penalty for Dougan, as it should have. Justice Barkett and another justice joined a remarkable and very disturbing dissent by Justice McDonald in which she voted to reduce the death penalty to life imprisonment, with eligibility for parole in 25 years.

I rarely fault a nominee about an opinion the nominee has joined rather than written. I do not hold a nominee to every word or phrase in an opinion he or she joins. There is an outlook which pervades this dissenting opinion, however, which is so striking and disturbing that I believe it is appropriate to consider that outlook in evaluating this nomination. This is especially so in light of the fact that in many other cases Justice Barkett has written separately, or merely stated that she concurred in, or dissented from, the result, when another opinion had not suited her.

Normally, I would summarize this dissent, but I do not want anyone listening to think that I am distorting it. Accordingly, I am going to read verbatim excerpts from the dissent in which she joined:

This case is not simply a homicide case, it is also a social awareness case. Wrongly, but rightly in the eyes of Dougan, this killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection.

I am sorry, but I have to interpolate here for a minute. Tell that to the victim's mother to whom he sent that tape, saying how much he enjoyed seeing the blood gush from her son's eyes.

Continuing on in the direct quote from the dissent, and that is remarkable language:

This case is not simply a homicide case, it is also a social awareness case. Wrongly, but rightly in the eyes of Dougan—

That is the murderer—

this killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection. Throughout Dougan's life, his resentment to bias and prejudice festered. His impatience for change, for understanding, for reconciliation, matured—

Note the word "matured"—

to taking the illogical and drastic action of murder. His frustrations, his anger, and—

Get this—

his obsession of injustice overcame reason. The victim was a symbolic representation of the class causing the perceived injustices.

Let me go on:

To some extent, Dougan's emotions were parallel to that of a spouse disenchanted with marriage, full of discord and disharmony which, because of frustration or rejection, culminates in homicide. We seldom uphold a death penalty involving husbands and wives, or lovers, yet the emotions of that hate-love circumstance are somewhat akin to those which existed in this case.

Such a sentence reduction should aid in an understanding and at least a partial reconciliation of the wounds arising from discordant racial relations that have permeated our society. To a large extent, it was this disease of racial bias and discrimination that infected an otherwise honorable person and contributed to the perpetration of the most horrible of crimes. An approval of the death penalty would exacerbate rather than heal those wounds still affecting a large segment of our society.

This is a man who was trying to foment revolution by going out and finding whites and killing them. And she went along with this dissent. This opinion reeks of moral relativism and excuse-making that I find shocking and unacceptable.

Again, as much as I personally like Chief Justice Barkett, I find it disturbing that President Clinton would nominate someone to a judgeship who would apply these views to judicial decisions.

In the October 11, 1992, Sunshine magazine, the following reactions to this Dougan dissent are quoted:

"How can they compare a cold-blooded, premeditated, torturous crime that's motivated by racial hate and equate that to the emotional circumstances in domestic murders?" asks prosecutor Chuck Morton, himself a black man, after rereading the Dougan case.

Adds Tallahassee prosecutor Ray Markey: "To say that this white victim was a sacrificial lamb and call it a social awareness case—that's scary."

The Dougan majority had this to say in response to the dissent that Justice Barkett joined:

We disagree with the dissent that this pitiless murder should be equated with the emotional circumstances often existent in homicides among spouses. While Dougan may have deluded himself into thinking murder justified, there are certain rules by which every civilized society must live. One of these rules must be that no one may take the life of another indiscriminately, regardless of what that person may perceive as a justification.

Our review must be neutral and objective. This Court recently upheld the death penalty in the indiscriminate killing of two blacks by a white defendant. The circumstances of this case merit equal punishment. To hold that death is disproportionate here would lead to the conclusion that the person who put the bomb in the airplane that exploded over Lockerbie, Scotland, or any other terrorist killer should not be sentenced to death if the crimes were motivated by deepseated philosophical or religious justifications.

Let me explain why the general attitude and outlook adopted by Justice Barkett in that dissent concern me so much. The approach taken in that dissent is certainly applicable to others besides Dougan, including criminals of all races. Let me note that we have many cases in our country of racially motivated, disgusting, violent crimes against racial minorities. I do not view the perpetrators of such violence as worthy of a lesser penalty on account of their backgrounds or personal histories either.

If a person of any race, ethnic background, or social class considering violent or other crimes comes to believe that the judicial system views past mistreatment or discrimination against them as mitigating the seriousness of the crimes they commit or the

penalties they face, I believe you undermine the principle of neutral justice and seriously reduce the deterrent value of the law. You create, frankly, an environment or atmosphere of permissiveness if these kinds of reasons can be used to justify lesser sentences. And I am not only talking about murder cases, such as the recent Colin Ferguson case on a Long Island commuter train. I mean other crimes as well, assault, robbery, carjackings. Do not view this as just a murder case or just a capital punishment matter or a death penalty matter. It is a lot more than that.

Before Senators cast their votes on this nominee, they should read the opinions in this Dougan case, along with any other opinions they deem relevant.

In another case, *LeCroy* v. *State* [533 So.2d 750 (Fla. 1988)], the Florida Supreme Court, by a vote of six to one, affirmed a death sentence for two brutal first-degree murders by LeCroy, who was 17 years and ten months old when he committed the murders. The court noted, among other things, that the sentencing judge gave great weight to LeCroy's youth but found him mentally and emotionally mature. It also noted that Florida statutes clearly provided for some decades that 17-year-olds charged with capital crimes should be punished as adults. Construing U.S. Supreme Court precedent, it ruled that there was no constitutional bar to the imposition of the death penalty on those who were 17 at the time of the capital offense.

In her lone dissent, Justice Barkett concluded that the eighth amendment of the Federal Constitution prohibited Florida from executing those who were under 18 at the time of the crime. Reaching out to overturn this death sentence seems to be another clear instance of the nominee injecting her own policy preferences for the law because that is not what the Florida law was. It is an unfortunate fact that 16 and 17-year-olds are committing the most vicious of adult crimes, including much-noted murders of tourists in Florida and elsewhere around this country. If a State wishes to treat them as adults when they commit such crimes, then the substitution of a judge's personal views for the legislature's enactment under Supreme Court precedent is clearly wrong. Not surprisingly, the U.S. Supreme Court later confirmed that it was the majority in LeCroy, rather than Justice Barkett, who had correctly read the Federal Constitution. That is in the Stanford versus Kentucky case.

I have many other concerns about this nominee—including, for example, her openness to pervasive quotas—and many other opinions of hers that trouble me. These concerns are outlined in some detail in three memoranda on Justice Barkett's cases that I attached to my March 22 floor statement on this nomination. I urge my colleagues to review those memoranda.

Some may claim that those of us who have concerns over this nomination have focused on a relatively small number of cases and that this is not an appropriate way to evaluate the nominee. I have a three-part response to this concern.

First, a large number of cases of any appellate court are, frankly, routine, and I would expect that virtually all judges would rule unobjectionably in most cases before them.

Second, and more importantly, if a small number of cases gives rise to large concerns, it is appropriate to base a vote on those cases. For example, the flagrant misuse of the Federal equal protection clause and the Federal due process clause may have occurred in just a handful of cases. But these two constitutional provisions are far too powerful, far too open to picking and choosing among democratically enacted statutes based on the policy preferences of a judge, for me to be much comforted by unobjectionable decisions in numerous other, routine cases. A single dissent that would sweepingly invalidate obscenity laws, notwithstanding clear U.S. Supreme Court precedent to the contrary, is tremendously significant for what it says about a nominee's legal outlook in a very important area of law. And it gives rise to doubts about whether the nominee will properly apply that Supreme Court precedent, especially in light of other opinions that give cause for the same concern in other contexts. A series of search and seizure opinions, improperly hamstringing the police in significant ways—especially in the war on drugs—has an importance beyond the mere number of these cases. An opinion, like her partial dissent in Foster, that would paralyze enforcement of the death penalty counts more than scores of routine death penalty cases. Joinder in an opinion like the Dougan dissent speaks volumes about a nominee's outlook on crime and personal responsibility, and you cannot just limit it to the death penalty.

I could go on and on, but this leads me to my third point:

The concerns about this nominee arise from more than a handful of cases, and they arise across numerous areas of the law, not just the death penalty, although that is important as well.

I therefore have concluded with regret that I cannot in good conscience support this nomination.

I will close by noting that all of the tough-on-crime rhetoric the President is serving up these days means less than his actions, including selection of judges. Placing more police officers on the street will avail us little if judges hamstring them in their work and hamstring them in their constitutional duties; if these judges construe our criminal laws in an unduly narrow fashion that will hamstring criminal law enforcement; or if they sentence criminals they do convict with unwarranted sympathy for the criminal, which will hamstring Federal criminal law enforcement and frankly law enforcement across the country. And in this judge's case that is what she has done and has a propensity to do and I believe will do if she is placed on the eleventh circuit court of appeals.

So I am extremely concerned about putting judges like this on the higher courts of the Federal courts of this land where they have lifetime tenure, where they can do whatever they want to, where they can allow all the emotional predilections to take over and where most of their cases are not going to be heard by the Supreme Court because the Supreme Court can only hear about 100 or 200 cases a year and where other judges can start to follow this type of soft-headed, soft-on-crime judicial analysis. So I am very concerned about it.

Again, I will close by saying that I like this person as a human being. She is a good person. She came up the hard way. She has a good family. I like them. I grieve having to make these points, but I have to place my responsibilities as a person who loves and upholds the Constitution above my personal likes or predilections and frankly ahead of my likes or dislikes.

In this case, I like this person, but I do not believe that she has exhibited the type of judicial analysis that justifies appointing her for this lifetime position in this very, very important circuit court of appeals under these circumstances.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The absence of a quorum having been suggested, 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.

## THE 25TH ANNIVERSARY OF SENATOR DOLE'S MAIDEN SPEECH

Mr. HATCH. Mr. President, I would like to take a brief time out from the debate on the nomination of Judge Barkett to salute our distinguished Republican leader, BOB DOLE, on the silver anniversary of his maiden speech in the Senate.

On April 14, 1969, the Senator from Kansas delivered a speech that was both moving and substantive on the difficulties faced by Americans with disabilities. If you read that speech today, you find that it is in many ways, still very relevant.

While it took us 22 years from the date of that speech to enact the Americans With Disabilities Act, the speech of the Senator from Kansas taught us that no legislation can restore physical ability. He helped us view the handicap through the eyes of the individual who copes with it every day.

While the ADA and other Federal programs have been enacted over the years since that speech, programs that I have been proud to support since I have served in this body, the speech of the Senator from Kansas helped us understand that our focus ought to be on people, not programs.

Too often, I believe, we concentrate on the impact of regulations, appropriations, legislative changes, or judicial decisions on the programs, not on the people. We listen to program administrators, not to the individuals who we expect to benefit from these efforts. Senator DOLE observed in his 1969 speech:

> When more of this emphasis on the individual better influences the agencies and professions dealing with the handicapped, I believe we can begin to open new, more meaningful vistas for more persons with handicaps.

In my view, this advice for all of us involved in disability policy is as good today as it was in 1969.

I congratulate the distinguished Republican leader on the anniversary of his maiden speech, an occasion that has special significance for anyone who has served in this body.

I congratulate him for being an advocate for persons with disabilities all those years he has served in the Senate and for being one of the principal reasons why the Americans With Disabilities Act passed. There are very few people in my life that I have as much respect for. But I have to say I certainly have it for the distinguished Senator from Kansas, our leader, who everyone here knows is one of the all-time great Senators.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. BYRD. Mr. President, I ask unanimous consent I may speak out of order for not to exceed 5 minutes.

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

## A SPECIAL ANNIVERSARY FOR SENATOR DOLE

Mr. BYRD. Mr. President, I call attention to an historic moment that the Senate experienced today. Twenty-five years ago today—on April 14, 1969—our friend and colleague, the Senate Republican leader, Senator ROBERT DOLE, delivered his maiden speech to the United States Senate.

We are living in times, now, when Senators who come to the Senate, the first day they are sworn in, speak. They do not wait. They speak at the drop of a hat. If the hat drops the first day, they go to it.

I can remember when Senators who came to the Senate waited for weeks before they made what we referred to as their maiden speech. And the word would go out to the offices that Senator So-and-So was going to make a speech tomorrow, or on a certain day next week. And Senators would come over and listen to that freshman Senator make his speech. They gathered to hear him. It was an event.

Those days are gone. But our friend and colleague, Senator ROBERT DOLE, delivered his maiden speech to the United States Senate on April 14, 25 years ago.

Not too many of us are still present who were Senators on that day a quarter century ago.

And not many Senators throughout the history of the Congress have played as momentous a role in the affairs of the United States Senate—indeed, in the affairs of the United States itself—as has our esteemed friend and colleague from Kansas. So I congratulate Senator DOLE on this informal commemoration of an important milestone in his life.

Further, I commend Senator DOLE for the personal contributions, as well as the professional contributions, that he has made to his country.

Most of us are familiar with Senator DOLE's war record and with the long, painful, and poignant struggle that was his to recapture his strength and to embark on the inspiring saga that has been his career in public life.

Mr. President, I have no doubt that I speak for all of our colleagues in saluting Senator DOLE on the occasion of an important anniversary in his very distinguished career, and I take advantage of this opportunity once again to express to him my personal appreciation for our association and friendship over the more than a quarter of a century that we have been yoked in service to this Senate and to this Nation.

Erma and I join in our congratulations to my friend today. I hope I am around when Senator DOLE speaks again to us on the half-century mark, 25 years from now. I expect to be here. I am sure STROM THURMOND will be here. I have a strong feeling that Senator BIDEN will be here, as will Senator HATCH and Senator GRAHAM.

Mr. President, I thank Senators for their patience and I yield the floor.

## THE 25TH ANNIVERSARY OF SENATOR DOLE'S FIRST SENATE STATEMENT

Mr. MITCHELL. Mr. President, and Members of the Senate, today is the 25th anniversary of Senator DOLE's maiden statement on the Senate floor. On April 14, 1969, a young, newly elected BOB DOLE rose to address the Senate for the first time.

The subject of his statement then says a lot about BOB DOLE then and now. It was a topic of enduring and personal interest to him, and one to which he has devoted an immense amount of time and energy in his 25 years of Senate service.

BOB DOLE spoke, of course, about the abilities of those who were in 1969 generally called handicapped Americans.

It was not just Senator DOLE's first Senate statement; it was more than that. It was a groundbreaking event in the Senate as well, because for the first time this body was asked to focus its attention in a systematic manner on the broad issue of national policy toward disabled Americans.

He addressed the full spectrum of disability issues in that first statement.

He spoke of the rights of persons with disabilities to receive a complete education, to hold a job, to get health insurance, to participate in recreational activities.

He presented a compelling case for the Federal Government's responsibilities in this area and offered a legislative proposal to that end.

He spelled out, in 1969, much of the legislative agenda which he subsequently and successfully pursued with other Senators over many years.

Senator DOLE has never made much of the fact that he, himself, has a disability as a result of serious war injuries.

Instead, he has used his very formidable abilities to make it possible for all disabled Americans to achieve to the peak of their potential, as every American should have the right to do.

His voice remains today uniquely persuasive on the subject, because he has always been able to speak of disabled Americans as "us," not "them."

On the anniversary of that statement, I wish to draw the Senate's attention to it and to congratulate my colleague and friend, BOB DOLE, for his many successes in working for the rights of disabled Americans and to wish him success in his future endeavors in every area.

## THE 25TH ANNIVERSARY OF SENATOR DOLE'S MAIDEN SPEECH IN THE SENATE

Mr. MOYNIHAN. Mr. President, as the majority leader and others have noted this afternoon it was 25 years ago today that the distinguished Republican leader, Senator DOLE, delivered his maiden speech to the Senate. He spoke eloquently on that day, April 14, 1969, about persons with disabilities. And it has been in no small measure due to Senator DOLE'S energies in this area that America has made such great

progress in ridding itself of the various forms of exclusion to which disabled persons were once so widely subjected.

The Senator from Kansas brings those same remarkable energies to everything he does, making him an inimitable ally, and, on occasion, a fearsome opponent. He is a revered colleague to many of us, and a great friend indeed to the Senator from New York. I congratulate the distinguished Republican leader on a quarter century of incomparable service in the U.S. Senate.

## THE 25TH ANNIVERSARY OF SENATOR DOLE'S MAIDEN SPEECH

Mr. DODD. Mr. President, it was 25 years ago today that one of our colleagues gave a maiden speech on the floor of the U.S. Senate. I speak of our distinguished friend and colleague, the minority leader, Senator BOB DOLE.

On that day, Mr. President, Senator DOLE chose as the subject of his remarks the issue of disabilities, and the problems that people face in this country who were afflicted with various disabilities.

I rise this afternoon to join with others to pay tribute to our friend from Kansas. We have our differences from time to time, as we all do in this body on various issues. But it was that speech and his commitment to this issue, bringing a unique perspective, obviously, of someone who could speak about this issue not in the abstract but in very real and personal terms because of his own affliction as a result of a war-related injury.

Twenty-five years ago people who suffered from disabilities faced mountains of obstacles in order to become part of the mainstream in our society. BOB DOLE gave a speech on that April 14, 1969, and raised the awareness of people in this body. As a result of actions taken by Congress during this past quarter of a century, today the plight of our fellow citizens who suffer from disabilities has been significantly improved.

A great deal of that effort, a great deal of that progress is due to BOB DOLE. I wanted to join with others today in recognizing that landmark of a quarter of a century ago, to commend him for it and to wish him well. I know he will continue his fight on behalf of people who have suffered from disabilities, be they physical or otherwise, to see to it that every American in this country has an opportunity to make a contribution to the maximum of his or her potential and possibilities.

BOB DOLE made a great speech on that day. His service and his words on behalf of his constituency have made us a richer, a stronger, and a better country. I commend him for it.

Mr. DOLE. Mr. President, I thank my good friend and colleague from Connecticut. When I made comments this morning, I talked about the efforts by Senator DODD and Senator JEFFORDS as far as special education is concerned. We made a promise years ago to fund that. We have not done it yet. We have to find a way to do that because many people expect us to keep our promise.

But I thank him for his kind comments. I also thank the others of my colleagues on both sides who have made statements today, particularly the President of the United States who was gracious enough to come to a little luncheon we had in my office. I thank very much Tony Coelho and Justin Dart, the former chairman of the President's Commission on Disabilities, and the present chairman. I thank everyone who has participated. And I do believe, not because of anything I may have done, but I do think there has been a big, big change the past 25 years and there has finally been a recognition that disabled Americans can fit into the mainstream. It has been in large part because of the strong bipartisan efforts made in Congress. I thank my colleagues.

## A TRIBUTE TO THE REPUBLICAN LEADER, SENATOR ROBERT DOLE

Mr. THURMOND. Mr. President, it is with the greatest pleasure that I rise today to pay tribute to the Republican leader, the Honorable Senator ROBERT DOLE, who is celebrating his 25th year of service in this body.

As anyone who has been fortunate enough to meet Senator DOLE knows, he is a man who has selflessly dedicated his life to serving his State and Nation. From his days as a fearless young infantryman during World War II to his brilliant leadership in the U.S. Senate, BOB DOLE has never shied away from a challenge or compromised his beliefs. Such integrity and dedication has ensured his success as a county attorney; a State legislator; a Member of the U.S. House of Representatives; as chairman of the Republican National Committee; and as a U.S. Senator.

Mr. President, as I am sure you are aware, I was present when Senator DOLE first arrived in this House and he immediately impressed me as an individual of great ability and candor. I have always had complete faith in Senator DOLE'S abilities and I have been pleased to witness both his rise to the most important leadership position in the Senate, and his emergence as one of our Nation's most prominent and respected statesmen. In 1988, I believed that Senator DOLE's strong personal characteristics made him ideally suited to serve as our Nation's Chief Executive and I was proud to endorse his candidacy. While I am sorry that he did not win our party's nomination, I cannot say that I am disappointed that he did not leave the Senate.

Mr. President, I know that all of my colleagues join me in congratulating Senator DOLE on marking a quarter century of service in the U.S. Senate. I look forward to continuing to serve with him—and most importantly, sharing his friendship—for many years to come.

The PRESIDING OFFICER. The Senator from Delaware.

## TRADITION

Mr. BIDEN. Mr. President, I would, as usual, like to salute my leader, the chairman of the Appropriations Committee, Senator BYRD, as he spoke to what tradition used to be. I am reminded that in my first very inconsequential speech before the Senate—but my maiden speech before the Senate—I recall coming on the floor—and at the time we still had our temporary assignments. That was in the good old days when there were 64 Democrats in the U.S. Senate—good old days from my partisan perspective. And I remember not having my permanent seat. I was number 100 in seniority. My permanent seat ended up being the one nearest the rolltop desk at the back row, but at the time, my temporary seat was, I believe, the second or third seat in the back row, in the main section.

And I recall coming over to speak and being told by a person in the Cloakroom that I should wait a few moments. I initially thought that I had already breached protocol in some way unknown to me, because a staff person in the Cloakroom asked me to wait. And to my great surprise—and I might add to my not little, not embarrassment, but I guess the best way to say it is it made me a little nervous—a distinguished U.S. Senator, one of the finest men whom I have ever served around—I expect Senator BYRD would share my view—Senator John Stennis, came over. He had called the Cloakroom to tell the Cloakroom that he wanted to hear my speech.

And he sat in, if I am not mistaken, this row, and he turned his chair so that his back was not quite to the Presiding Officer, but looked intently at me throughout my speech. And I must say, it was one of the few times when I stood to speak—maybe I would be better off if it occurred more often—but it was one of the few times I stood to speak that I was actually nervous about what I was going to say. Because at the moment I stood up, I can recall, and I hope the Senate will excuse my personal references here, forgive me for reminiscing, but I stood up and I thought to myself, "My gosh, I am 30 years old, and "I am standing." And at the time I was standing next to Senator McIntyre's desk.

Senator McIntyre had the desk that the senior Senator from the State of New Hampshire was always given the honor of having, one of the great, great, famous Senators and speakers in

the history of the United States. I stood there and I thought to myself, my Lord, I am standing in the spot that men like Daniel Webster stood to speak, and looking at John Stennis watching me, and I froze. I could not remember how to begin my inconsequential speech.

But I remember one other thing. I received a letter from one of the most powerful Members of the Senate then and now congratulating me on how I comported myself in my maiden speech. That letter was from ROBERT C. BYRD of West Virginia, who was the whip of the Senate when I arrived, and a letter that I appreciated then and treasure now.

So I wish to make the point that not only did the tradition exist, that we used to come over and listen, that those of us who were newly elected waited a moment before we spoke, but once we spoke senior Members who were considerably more busy than we were took the time and the courtesy and the interest in listening to what we had to say and responded.

My friend from West Virginia is not only a man of the Senate and a man who knows more about the Senate than I suspect any man or woman who has ever served in the Senate, but he is also a man who honored those traditions and spent time with a 30-year-old kid from Delaware making his first speech, and making me feel as though the speech I made really made a difference, when in reflection I know it was of little or no consequence other than that I was able to muster the courage to stand in the spot where women and men—men, in that case at that time in our lives—stood, of much greater significance than me, then and now.

It was a great honor to have heard my colleague this morning paying tribute to ROBERT DOLE, as I did a moment earlier, but also an honor to have been treated with the respect and decorum that I was, almost 22 years ago this month, by the distinguished senior Senator from West Virginia.

I yield the floor.

Who yields time?

Mr. HATCH. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The absence of a quorum having been suggested, the clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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## NOMINATION OF ROSEMARY BARKETT, OF FLORIDA, TO BE U.S. CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT

The Senate continued with the consideration of the nomination.

Mr. THURMOND. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Who yields time?

Mr. HATCH. I yield such time as the distinguished Senator may need.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. Mr. President, I rise today to speak on the nomination of Justice Rosemary Barkett to serve on the U.S. Court of Appeals for the Eleventh Circuit.

During her courtesy call to my office and her nomination hearing, I found Justice Barkett to be an engaging and talented individual. However, I cannot support her nomination to serve on the eleventh circuit.

I have serious concerns with a number of her opinions as a Florida Supreme Court Justice. Her responses during the nomination hearing did not alleviate my concerns regarding her decision making process in constitutional law, particularly in capital cases, criminal law, and the equal protection clause.

My concerns rise in a number of areas—in capital cases and others—where she dissented from the majority and engaged in result-oriented jurisprudence. Her consistent pattern of judicial activism was influential in my decision to oppose her nomination to serve on the eleventh circuit.

For example, she narrowly construed aggravating factors time and time again which would prohibit imposition of a death sentence if her opinion had been adopted. In Cruse versus State, the defendant went on a brutal and calculated shooting spree which left six people dead, including two police officers, and 10 wounded. By a 6-to-1 vote the Florida Supreme Court affirmed the convictions and death sentences given to the defendant, Cruse. In her lone dissent, Justice Barkett voted to reverse the convictions and believed in any event that the death sentence was not appropriate for Cruse. Justice Barkett did not believe that the brutal murder of the two police officers met the cold-calculated-and-premeditated aggravator requirement. This was her view despite evidence that Cruse had loaded his car with a rifle, a shotgun, a pistol and 180 rounds of ammunition, and drove to a shopping center where he killed two shoppers and wounded a third. When approached by a police officer, Cruse inserted a new clip into his rifle and fired eight times into the car, killing Officer Grogan. Then Cruse wounded another police officer, searched out this wounded man in a parking lot, found him and killed him with several more shots. It was for the murder of these two gallant policemen that the trial court imposed the death penalty and that Justice Barkett would reverse for lack of aggravating factors.

In another case Hodges versus State, Hodges was convicted of killing a 20-year-old clerk who had previously complained of indecent exposure by Hodges. The Florida Supreme Court affirmed Hodges conviction and death sentence by a 6-to-1 vote. In her lone dissent to overturn the death penalty, Justice Barkett again gave what I believe was a strained and narrow construction of the aggravating factors involved in the killing. At her nomination hearing, Justice Barkett claimed that her dissent followed Cherry versus State, even though she did not cite that case in her opinion in the Hodges case. In any event, the Cherry opinion also cited precedent which would be interpreted as favorable to the prosecution in the Hodges case concerning aggravating factors counted separately where they relate to "separate analytical concepts."

These are but two examples of Justice Barkett's approach in a number of capital cases. It is my belief that Justice Barkett has broadly construed plain statutes and case law to avoid imposition of the death penalty.

Also, Justice Barkett has invoked the Federal equal protection and Federal substantive due process clauses in cases where they need not be used. In fact, at her hearing, Justice Barkett conceded that she misused the Federal equal protection clause in her dissent in University of Miami versus Echarte. Senator Hatch has adequately addressed the cavalier manner in which the Federal equal protection and Federal substantive due process clauses have been used in Justice Barkett's opinions. I urge my colleagues to review Senator HATCH's remarks which are printed in the March 22, 1993 CONGRESSIONAL RECORD on page S3380.

Mr. President, there are other areas where Justice Barkett's opinions give me concerns. Particularly in the area of criminal law where I see a pattern of opinions which would restrict law enforcement in their fight against drugs and violent crime. I believe that her interpretation of the fourth amendment would unnecessarily retard the legitimate and reasonable efforts by law enforcement as they work to rid our communities of drug dealing and violent crime.

In conclusion, Mr. President, I give much deference to the President in choosing a nominee to fill vacancies in the Federal courts. However, I must rely on my own judgment as the Senate exercises its advice and consent responsibility under the Constitution when reviewing these nominees. Justice Barkett is a fine woman but I firmly believe that her record establishes a precedent of judicial activism which is not advisable on such an important court as the court of appeals for the eleventh circuit.

President Clinton has denounced the growing wave of violent crime across the Nation and clearly the American people deserve our most sincere efforts in fighting crime. Federal judges have an important role in maintaining a

peaceable society while ensuring that constitutional protections are not ignored in the process. Yet, I believe that this particular nominee submitted by President Clinton would be too soft on crime, hamper the efforts of law enforcement, and substitute her own policy views for the written law.

I encourage my colleagues to review the hearing transcript and study the opinions of Justice Barkett for themselves. In the end, I believe we will reach the same conclusion.

I yield the floor.

Mr. President, I yield the floor.

Mr. HEFLIN addressed the Chair.

The PRESIDING OFFICER (Mr. DORGAN). The Chair recognizes Senator HEFLIN.

Mr. HEFLIN. Mr. President, I will vote to confirm the nomination of Florida Chief Justice Rosemary Barkett for a seat on the U.S. Court of Appeals for the Eleventh Circuit. Having reviewed Justice Barkett's overall record—I emphasize "overall record"—as well as her responses to questions asked of her at her confirmation hearing before this committee, I believe that Justice Barkett possesses all of the necessary qualities to warrant her confirmation to this distinguished appellate court which comprises the States of Florida, Georgia, and Alabama.

I am convinced that she possesses the intelligence, integrity, and temperament necessary to be a fair and impartial judge. It appears to me that her overall record demonstrates that the vast majority of her judicial decisions are within the judicial mainstream and reflect that she will attempt to faithfully apply precedent established by the U.S. Supreme Court.

Justice Barkett has been a trial judge and an appellate judge for over 15 years in the State of Florida, and she has the full support of both Florida Senators, as well as its distinguished Governor Lawton Childs who was a former member of this body. Furthermore, she has been endorsed by a vast number of newspapers and organizations within her State and throughout the Nation. Most of these State newspapers have even gone so far as to say that Justice Barkett is "hardly soft on crime." In a retention election in the State of Florida in 1992, she won reelection to her post by over 60 percent of the total vote from the people of the State of Florida. The American Bar Association has given Justice Barkett its highest rating of being well qualified.

I do acknowledge that there are some philosophical matters in which Justice Barkett and I may differ. The confirmation hearing record before the committee demonstrates a troubling aspect that State courts can often encounter when following Supreme Court requirements in death penalty cases regarding the weighing of mitigating versus aggravating factors. While I might have taken a different position on some of the individual cases discussed at her hearing, I respect her judgment in these specific cases as she attempted to apply Supreme Court precedent as faithfully as possible.

I agree that fine philosophical lines can often be drawn when trying to balance the legal rights of a defendant with the Government's interest in punishing an individual for a particular crime. The key to being a good judge, in my opinion, is the ability of that judge not to let his or her personal opinions outweigh his or her diligence in seeking a correct interpretation of precedent handed down by a higher court. Justice Barkett's record has displayed this ability.

In reviewing her hearing record, I particularly noted a statement that she made to Chairman BIDEN in this regard in which she said, and I quote, "And I neither flinch from applying it when the death penalty is called for, nor do I flinch from vacating it when I think the law requires it." Justice Barkett has voted to enforce the death penalty in cases that involved at least 125 individuals, and while I know there may be some disagreement on that figure I do not think it really makes any difference what the figure is, if it has been applied in a manner of say, 60, 70, 80, or 100.

I think it does demonstrate that she will not flinch from her duties to make decisions in these difficult areas of the law when necessary. I will, therefore, vote in favor of Justice Barkett's nomination for a seat on the U.S. court of appeals for the eleventh circuit.

Mr. President, I yield the floor.

Mr. GRAHAM addressed the Chair.

The PRESIDING OFFICER. The Senator from Florida is recognized.

Mr. GRAHAM. Mr. President, I also rise to support the nomination of Rosemary Barkett as a member of the eleventh circuit court of appeals. I do so for a variety of reasons. First, I do so from personal knowledge.

I have known Ms. Barkett for the better part of 15 years. She is an outstanding human being. She would bring to this court a unique and valuable personal set of life experiences and the values formed from those life experiences.

I believe that in a collegial court, a court of multiple judges, it is valuable to have a diversity of backgrounds so that the full experience of the American people can be brought to bear in rendering judicial opinions.

Rosemary Barkett has a unique personal background. Her parents were immigrants from the area of Syria and Lebanon. They sought to come to the United States of America, but at the same time, they were unable to secure the legal right to enter this country because of limitations in our immigration law. So they migrated to Mexico, and it was in Mexico that Rosemary Barkett was born. While still a child, her family was able to realize its ambition and come to the United States. She and her parents and siblings migrated to the United States, eventually settling in the State of Florida.

Ms. Barkett grew up in a very religious family and decided at an early age to commit her life to one of religious service and thus became a nun in the Roman Catholic Church. As such, she served in a variety of positions, particularly as teacher. As a person in her late twenties, she decided that there were other areas in which she could render service to the people, particularly through the law. And so as an adult, she left her religious order and went to the University of Florida to attend law school. She graduated at the top of her class in law school and returned to her home in West Palm Beach, FL to engage in the private practice of law.

While I was Governor, a vacancy occurred in the circuit court, the basic trial court, in her community. Under Florida law, there is a rigorous process by which judicial vacancies are filled. A judicial nominating commission made up of three persons appointed by the Florida bar among the legal profession, three persons appointed by the Governor, and three persons selected by those six, who have the responsibility of reviewing and interviewing candidates for vacancies in the court and making a recommendation of three persons to the Governor.

Rosemary Barkett went through that process, was recommended, and I had the privilege of appointing her to the circuit court.

A few years thereafter, a vacancy occurred in the intermediate appellate court in our State that had jurisdiction over the area of her home community. Again, there was the same process of judicial nomination and screening by a carefully selected group of individuals, and a recommendation to the Governor, which gave me the opportunity to appoint her a second time to the intermediate court of appeals.

Then, in 1985, a vacancy occurred on the Florida Supreme Court. A special judicial nominating committee has singular responsibility for recommending those persons who are considered to be most qualified to sit on Florida's highest court.

I provide this background because it indicates that Justice Barkett was not casually appointed to any of the judicial positions that she held. She was analyzed by persons from the community, from the State, persons both trained in the law, and concerned lay people.

For a third time, she was recommended—this time for the highest position in Florida's judiciary—as a member of the Florida Supreme Court. And for a third time, applying the procedures that I did, which included rig-

orous analysis of background and a personal interview, I recommended and appointed Justice Barkett to the Florida Supreme Court.

She is a person who has been consistently analyzed in terms of her intellect, her judicial quality, her demeanor, her capacity for personal growth, and the qualities that she would bring, whether it was judging at the trial level, at the intermediate trial level, or at the highest level in our State judicial system.

She has been subjected to other analyses. Under our system, after a judge has served a period of years, they are subject to a retention election at which they stand on their record before the people of Florida. Justice Barkett was subject to that retention election in 1992. She faced virtually the same arguments against her retention by the people of Florida as had been made on the floor today, and in previous forums, against her record. She rallied to her support a wide array of concerned Floridians, including the major law enforcement agencies, the Benevolent Association and the Fraternal Order of Police, who both supported her retention as a member of the Florida Supreme Court.

I suggest, Mr. President, that if those organizations, who are closest to the criminal justice system and its proper enforcement, had felt that she had the characteristics described about her, they would hardly have recommended to the people of Florida that she be retained in her position. But they did, as did virtually every other legal organization and major opinion commentator in our State.

The result of that retention election—probably the most contested retention election for a Supreme Court justice in our State's history—was that Justice Barkett received 61 percent of the vote of the people of Florida. I believe that is a strong statement of the people's attitude as to whether she has properly enforced the law, applied the law as a judge is called upon to do, and it has reflected what the people of Florida expect from a member of their highest court.

She has had another election since that. She was elected by her colleagues on the Florida Supreme Court to be its chief justice, the position that she currently holds.

So in a whole variety of forums—judicial nomination on three occasions, by the people of Florida, and by her colleagues on the Florida Supreme Court—she has received the strongest commendation for her judicial qualities.

She brings all of this background to her current nomination to serve on the eleventh circuit court of appeals. I believe that she will be an outstanding justice there as she has been in the Florida judicial system.

Mr. President, I would like to comment on a few of the criticisms that have been made about Rosemary Barkett and reserve time to comment further as this debate proceeds.

It has been suggested that she is unwilling to uphold the death penalty. Again, I submit the fact that she has had the strong support of law enforcement in our State for her continued service on the Florida Supreme Court and how she has the support of national law enforcement organizations for her confirmation to serve on the eleventh circuit is evidence that those who are closest to the enforcement of the law place their confidence in Rosemary Barkett. As a member of the Florida Supreme Court, she has participated in some 500 to 600 opinions which relate to the imposition of the death penalty. Many of those opinions related to multiple defendants or defendants who had multiple cases before the Florida Supreme Court.

Approximately 125 to 150 individuals have had their death penalty affirmed in an opinion in which Rosemary Barkett concurred in that affirmance. She is not a judge who by demonstrated record has been unwilling where appropriate to enforce the death penalty. She has been admittedly a rigorous judge in terms of assuring that the law was properly applied in death penalty cases.

As one who supports the death penalty, as a member of the State legislature who voted for its reimposition in Florida in the 1970's, as a Governor who signed over 100 death warrants, as a Member of the Senate today who supports expanded Federal use of the death penalty, I believe it is critical that we have judges of Rosemary Barkett's temper who are willing to rigorously review cases and are willing to see that the law is applied. None of us want to see the death penalty utilized against an innocent person. None of us want to see the death penalty utilized where it does not fulfill its legal purposes. There would be no greater attack against the continuation of the death penalty than its casual application.

I believe that Justice Barkett has served the ends of justice and specifically served the ends of justice appropriate to the death penalty by the rigorous way in which she has conducted her office.

A second criticism of Justice Barkett has been that she has inappropriately enforced due process and equal protection standards in the U.S. Constitution. Mr. President, I would point out the obvious. The United States is a Federal system. Part of that Federal system is a dual system of justice. We have State laws; we have Federal laws. Federal laws are supreme, but States have the authority to adopt State standards that go beyond the protections of the Federal Constitution. No State can fall below those standards, but States can augment the protection of individuals.

We have done so in Florida in a number of instances. I would cite as illustrative a provision that was adopted to our State constitution in 1980 by a very strong majority of the people of Florida voting to amend our Constitution to insert this provision. It is article 1, section 23 of the Florida Constitution entitled "Right of Privacy." And that provision reads:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

That is the Florida constitutional provision that ensures the right of privacy, the right to be left alone, to be free from governmental intrusion.

That goes beyond the right of privacy as has been found not in its words but by its meaning to be in the U.S. Constitution. That provision was in the Florida Constitution some 5 years before Rosemary Barkett became a member of the Supreme Court of Florida. That provision had been interpreted by Supreme Courts of the State of Florida prior to her service. She has been a faithful member of the Florida Supreme Court in terms of carrying out that as well as the other provisions of our State Constitution.

In doing so, yes, she has provided protections for privacy that go beyond the U.S. Constitution but for her now to be criticized as having done so because of fidelity to her oath of office to enforce the Constitution both of the United States of America and of the State of Florida I think is to turn one of her great assets, her fidelity to the law, to become an apparent weakness.

She also understands that in the area of due process and equal protection of the law there are areas in which the State constitution as interpreted by this and previous Florida Supreme Courts provides protections to Floridians that go beyond those that are provided under the U.S. Constitution as Americans. She has been rigorous in the enforcement of those State due process provisions.

One of the cases that was cited to her detriment is the case of Foster versus State. I might say, parenthetically, Mr. President, I know this case well. I signed the death warrant that led in part to this opinion.

In this case, the defendant had raised the issue that he had been denied due process not under the Federal Constitution, but under the State of Florida's Constitution. It was the opinion of Justice Barkett in a dissent in which she was joined by two of the other members of a seven-person Florida Supreme Court that that claim of denial of due process under the Florida Constitution had not been adequately adjudicated. Her disposition in the dissent of this was to the effect that there had

been a charge that a particular judicial officer had applied the death penalty in a racially discriminatory way. She did not resolve whether that allegation had a factual basis or not but rather said that it was a legitimate claim under the Florida due process provision of our State constitution and deserved to have an appropriate judicial resolution.

Whether you agree or do not agree with her dissent, it is not an unreasonable position that she was advocating. It was not a position which indicates that she was soft on crime or unwilling to enforce the death penalty.

Third, Mr. President, it has been suggested that she will not enforce the law and, therefore, will hamstring the criminal justice system. The very criticisms that have been made against her is the fact that she is so faithful in enforcing the law in applying the precedents and the special provisions of the Florida Constitution and she has said, including on numerous occasions during her appearance before the Judiciary Committee, that she understands that as a member of the Federal eleventh circuit court of appeals that she will have a different set of responsibilities than she has had as a justice and now chief justice of the Florida Supreme Court. She understands the significance of a judge's responsibility to enforce the law and to follow the precedents, particularly the precedents of the United States Supreme Court.

I believe, Mr. President, that her demonstrated extended career, a career of distinction and faithfulness to the law, qualifies her to be a member of the Eleventh Circuit Court of Appeals. She will bring to that court a very special and valuable personal background. The people of America and the system of justice in America have been enriched by her service to date and will be further enriched by her elevation to this important Federal judicial post.

I thank the Chair.

The PRESIDING OFFICER. Who seeks recognition?

Mr. HATCH. Mr. President, how much time does the Senator need?

Mr. SMITH. Ten minutes.

Mr. HATCH. I yield 10 minutes to the distinguished Senator from New Hampshire.

The PRESIDING OFFICER. The Senator is recognized for 10 minutes.

Mr. SMITH. Thank you, Mr. President. And I thank my colleague from Utah for his leadership in regard to the opposition to Judge Barkett.

I rise to oppose this nomination of Rosemary Barkett to be the circuit judge of the U.S. court of appeals for the eleventh circuit.

The President of the United States has used a great deal of rhetoric in the last several days, several weeks, several months, since he has been President. He used it also in the campaign about his being a tough anticrime candidate, and later as President. He even favors the death penalty, he says.

Well, as a President of the United States, one has a great opportunity to back up that rhetoric with action by the judicial nominations that he makes. Talking tough on crime is one thing, but appointing tough judges against crime is another. And in this case, the action does not equate in any way with the rhetoric. In fact, there is the trite expression "actions speak louder than words," and this action of making this nomination speaks very loudly, a lot louder than the words.

The nomination of judges is one of the most important actions that any President can take on anything. But in this case, especially in the area of fighting crime, the President's nomination of Judge Barkett speaks volumes. Long after a President leaves office, long, long after a President leaves office, that judge continues in that position to make decisions which affect all of our lives.

I ask my colleagues, if they are tough against crime, to take that into consideration as they evaluate this nomination.

Judge Barkett has a long record as a judge on the Florida Supreme Court. On a wide range of criminal law issues, she established a record of unabashed liberalism—opposite, directly opposite, of the President's tough-on-crime rhetoric.

On the Florida Supreme Court, Judge Barkett has voted in favor of series of unduly restrictive fourth amendment search-and-seizure decisions that would hamstring police fight against crime. In fact, two of her opinions have been reversed by U.S. Supreme Court.

Likewise, Barkett was voted to strike down carefully crafted antiloitering laws—including laws proscribing loitering for purpose of drug dealing and loitering for purpose of prostitution. Once again, this judge's liberal view of constitutional law hinders police in fight against crime.

Judge Barkett believes criminal obscentiy laws "run counter to every principle of notice and due process in our society." she argues that obscenity "cannot be defined," even though the U.S. Supreme Court has set forth how it can be defined. Barkett's soft-on-obscenity view is sadly consistent with the Clinton Justice Department's notorious soft-on-child-pornography position that Senate denounced by 100 to 0 vote last fall.

But by far most disturbing aspect of this judge's criminal law record is with respect to the death penalty—again, the death penalty that this President says he supports, that this Congress says it supports, that the American people support. And yet, we get a judge who is by far the most militantly anti-death-penalty member of the Florida Supreme Court, maybe in the whole country let alone the Florida Supreme Court.

In case after case, this judge has strained—strained—to find a way, anyway she can, to avoid voting to uphold the death penalty, even in the most outrageous and violent murder cases, the most outrageous. We are not talking about marginal murder cases here with marginal evidence. We are talking about the most violent.

Let me give you an example, the Dougan case. We heard a lot about it today, but we ought to hear more about it. We ought to hear it again and again and again. Our colleagues should understand what kind of a judge we are talking about here. It is no wonder. It is a case that illustrates most clearly Judge Barkett's antideath penalty, criminal-as-victim-of-society philosophy.

Murderer Dougan was leader of group called "Black Liberation Army." The group's avowed goal, said trial judge in case, was "to indiscriminately kill white people and thus start a revolution and a race war." That was the stated goal.

One evening in 1974, Dougan and four other members of group picked up white hitchhiker, drove him to trash dump, stabbed him repeatedly, and threw him to ground. As youth writhed in pain and pleaded for his life, Dougan put his foot on youth's head and shot him twice—once in chest and once in ear.

After brutal murder, Dougan made several tape recordings bragging about murder and mailed them to victim's mother. In the tape, Dougan made this unspeakably grotesque and disgusting statement—

> He [the youth] was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes.

That is the quote from this person. This person deserves the death penalty and this country deserves a judge and judges who have the guts to administer it, not the opposite.

Although the Florida Supreme Court commendably and understandably upheld the death penalty in Dougan's case, Barkett dissented. She joined a dissent written by one of her fellow anti-death-penalty justices. That dissent made the following remarkable statement, which I will quote at length because it so clearly illustrates Barkett's blame-society-first, not-the-criminal's-fault, coddle-the-criminals philosophy of judging: Here is what they said:

> This case is not simply a homicide case, it is also a social awareness case. Wrongly, but rightly in the eyes of Dougan, this killing was effectuated to focus attention on a chronic and pervasic illness of racial discrimination and of hurt, sorrow, and rejection. Throughout Dougan's life his resentment turned to bias and prejudice festered. His impatience for change, for understanding, for reconciliation matured to taking the illogical and drastic action of murder. His

frustrations, his anger, and his obsession of injustice overcame reason. The victim was a symbolic representation of the class causing the perceived injustices.

This is the person this President wants to put on this court, this anticrime President? Actions speak louder than words.

The Dougan case says it all, Mr. President. Barkett is soft on crime, to say it nicely. She has a right to her opinion; absolutely. This is America. But we have a right to ours. And if you are an anticrime President, you have no business putting her on the circuit court. If you are pro-death penalty, you have no business appointing this judge, Mr. President, with all due respect. Back up your rhetoric with action.

Barkett subscribes to the blame-society, blame-anybody-but-the-criminal philosophy of criminal law. She epitomizes the kind of judge the American people do not want. But we are going to get her. Do not kid yourself. The votes are here. We are going to get her. The American people do not want her, but we are going to get her. The American people are sick and tired of these liberal judges who coddle the criminals and find any way they can to allow the most vicious killers, the most vicious, despicable people to escape the consequences of their acts and blame everybody else.

We have societal problems. That is another issue. But when you break the code and you do what Dougan did, and people like Dougan did, you deserve to pay the price. No other victim, no other person in our society should ever have to face this animal again.

Poll after poll after poll shows that the American people have grave doubts about this President and some of his policies. The Barkett nomination is a prime nomination of why. As I said earlier, actions do speak louder than words. The President is talking tough on crime and then serves up an endless parade of these liberal judicial nominees who are soft on crime.

It is more than being soft on crime. As I said, any judge has a right to her position. Many judges oppose the death penalty. That is their right.

But again, when you are the President and you say you are for the death penalty, why do you appoint judges who are not? Why? Maybe the American people would have some explanation for this. I think it is pretty obvious. You do not mean what you say.

The American people are not going to be fooled by this. They are not going to be fooled. No President who would nominate a person like this to the circuit court, like Rosemary Barkett, means a word he says when he claims he is tough on crime. That is the conclusion. He does not mean what he says.

I urge the people who might be looking at this debate, or hearing this debate, frankly—and I do not do this often on the floor of the Senate—but I urge you to call your Senators and urge them to vote "no" on the nomination. I will give you the number. It is 202-224-3121. That is how important I feel this is. Call your Senators.

While you are at it give the White House a call. Say, "Mr. President, I do not understand. I do not understand how you can be anticrime and be in favor of the death penalty and give us a judge like this. I do not understand, Mr. President." Let me give you that number: 202-456-1414. Let him know how you feel.

I hope and I pray—and my colleague from Utah may know more about this than I do at this point—we are not going to see this type of nomination appear on the Supreme Court of the United States with the pending Blackmun vacancy.

Let me conclude. I think I have made my point. My colleague has been very generous with his time. I commend Senator HATCH for his leadership. He has done this so many times. I know how he feels. He feels a President does have a right to make his appointments, but he feels very strongly, as I do, that this is just simply inconsistent with the stated policies of this President, it is inconsistent with what is in the best interests of the anticrime feeling of this country right now and the disgust with it. He has had the courage to stand up and lead opposition to this nomination.

I have seen him also on the floor of this Senate stand up and support strongly the nomination of other judicial appointments by this President. So it is not political. This is a moral issue with him, one he feels very strongly about. I say to my colleague from Utah, he has performed a great service to his country in exposing the true nature of this nomination, and I know he will continue to keep up the good fight.

Again, I compliment the Senator for making this known to the American people. I hope the American people will express those views as I have outlined to their Senators and to the President, and somehow by the grace of God, we could stop this very, very bad nomination.

I thank my colleague.

The PRESIDING OFFICER. Time of the Senator has expired.

The Chair recognizes the Senator from Utah.

Mr. HATCH. I thank my dear colleague from New Hampshire for his kind remarks, but also for his remarks about the nominee. No one here wants to find fault with the nominee as a human being. But if you look at these opinions and you read them, you really have to be concerned. Especially at the time when we are awash in drugs, awash in crime, awash with all kinds of difficulties in this society, we do not need another person who ignores the laws and starts to put his or her own emotional predilections into the law instead of interpreting the laws made by elected representatives, who are elected to make them. Judges are not elected. If she gets this position she will be confirmed for life. If she continues to operate in the way she has on the Florida Supreme Court, I can predict a lot of difficulties in the fight against crime, not only in Florida, now, but throughout the country.

I thank my colleague and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SIMON. 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. SIMON. Mr. President, I just want to put in a word or two.

Judge Barkett, from every evidence I have seen—and I have gone through the record, I was there for part of the hearing—is eminently well qualified. The charge that she is soft on crime, or does not favor the death penalty—that really should not be a consideration. The reality is the soft on crime stuff just does not hold up under examination. And if someone happens to be opposed to the death penalty and is a judge, or favors some change, other change in the law, that judge is not there to make the law. That judge is there to enforce the law.

She has indicated that she will do that.

I think it is interesting the Orlando Sentinel concluded that the "soft on crime" attacks by Justice Barkett's opponents are, "reckless and unfair." The Sun-Sentinel called the charges false.

The Miami Herald concluded that the President, "could not have found anyone better prepared."

The Orlando Sentinel called it a "top notch choice."

The reality is this is a good nominee. I am pleased our colleagues, Senator GRAHAM and Senator MACK, are supporting the nomination. I think we are making a mountain out of a molehill here. I think she ought to be approved, and approved quickly, and I hope we get on about our other business.

If no one else seeks the floor, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SPECTER. 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. SPECTER. Mr. President, I oppose the confirmation of Chief Justice Rosemary Barkett of the Florida Su-

preme Court to the court of appeals for the eleventh circuit. I do so with some reluctance because I know that both of our colleagues from Florida, Senator MACK and Senator GRAHAM, support this nomination.

I have also received very strong words of support from constituents of mine in Pennsylvania and from the people whom I know in Florida.

In opposing Chief Justice Barkett's nomination, I am not unmindful of the fact that her confirmation is virtually assured. But I want to register my vote in opposition perhaps more as a protest vote on the nominee's judicial philosophy and reasoning, which I believe go beyond the appropriate bounds of judicial activism, which I think ought to be minimized, to a judicial philosophy which is very strongly result oriented.

In casting this vote, which I plainly denominate as a protest vote, I think to the extent that the activities of the Judiciary Committee on which I serve or the Senate which has the ultimate responsibility for confirmation can provide a forum for our views for whatever guidance they might be for the State judges and lawyers of America who aspire to be on the Federal bench, that it does have some value. Of course, people will take it for what it is worth. I am glad for what they think it is worth.

I am glad to see that this issue is coming before the full Senate for a vote on the merits without a filibuster requiring 60 votes for cloture to bring the nomination to a vote. Had there been a filibuster or an effort to stop this issue—Chief Justice Barkett's nomination—from coming to a vote, I would have opposed a filibuster. I think that a filibuster—that is where Senators refuse to conclude the debate until at least 60 Senators vote in favor of concluding the debate—is a procedure which ought to be used very, very sparingly, and not in this sort of a case.

I will refer to some of the nominee's decisions somewhat briefly, as I made a full statement in the Judiciary Committee, which is a matter of record. Some of the cases which illustrate Chief Justice Barkett's result orientation are found, illustratively, in her dissenting opinion in the case of Foster versus Florida. This case challenged the constitutionality of a death penalty under the equal protection clause where there is an effort, through a statistical analysis, to show that there is unfairness in the imposition of the death penalty.

At the outset on my analysis of this case, I wish to be as emphatic as I can that while I favor the death penalty—and have done so consistently since my days as an assistant district attorney and then as district attorney of Philadelphia many years ago—I believe it has to be very carefully applied. I believe that the essence of justice is individualized justice. I believe that we have moved too far in the direction of mandatory sentencing, generally, which takes away discretion from judges to apply justice on an individualized basis.

I think that in following the decision of the Supreme Court of the United States, in Furman versus Georgia in 1972, prohibiting the imposition of the death penalty unless imposed by juries after very careful consideration and analysis of the aggravating circumstances and the mitigating circumstances of each particular case, we have moved a long way in terms of seeing to it that there is individualized justice in death penalty cases.

During my tenure as district attorney of Philadelphia, where my city had some 500 homicides a year, the death penalty was requested in the very limited number of cases which I, as the district attorney, approved personally. I believe that the death penalty is going to have to be very carefully applied if we are to keep it in our society. While the vast majority of the American people favor the death penalty—something in excess of 70 percent—and while I believe there is very strong evidence that the death penalty is a deterrent, it is not being applied in America today.

Thirty-seven States have the death penalty. There are approximately 2,800 men and women on death row, and last year there were 38 cases where the death penalty was carried out. So, as a society, I think we have failed to utilize the death penalty as a deterrent and as an effective weapon in the fight against violent crime. But it is very necessary to apply it in a very careful and in a very precise way. The lengthy appeals process which goes on in the Federal courts—some taking as long as 17 years, the average between 8 and 9 years—has very substantially reduced the impact of the death penalty. I think each case has to be individually analyzed, and the kind of statistical analysis that some seek to apply—that is, to show that there is, on a statistical equation, more application of the death penalty for minorities than for others—is unsound as a matter of legal principle.

The Supreme Court of the United States took up this issue at some length in a landmark decision called McCleskey versus Kemp, and ruled that statistical analysis was not a fair or an appropriate basis to challenge the imposition of a particular death sentence. This issue has been considered in the Senate in our 1990 crime legislation. The Senate voted to follow the rule set out in McCleskey versus Kemp—where the Supreme Court rejected this statistical analysis.

In the dissenting opinion in Foster versus Florida, Chief Justice Barkett says the following:

> Accordingly, because the majority has applied a Federal constitutional standard in Foster's case that is impossible to me, and has missed the opportunity to craft a State constitutional standard, such as that discussed above, I dissent.

It may be that the Constitution of the State of Florida differs from the Constitution of the United States. On its face, I do not think that is so. But as I read this opinion in its totality, there is very definitely an effort by Chief Justice Barkett to reach a result in a line of reasoning that is result oriented and is not based—at least in my opinion—on a sound analysis of the cases.

Another case which draws the same sort of an inference, as I see it, is the case of University of Miami versus Echarte, where Chief Justice Barkett again dissented, saying that the equal protection clauses of the Florida and U.S. Constitutions were violated. When Chief Justice Barkett had her hearing in the Judiciary Committee, under questioning—not by this Senator, but by others—she backed away from her assertion that a violation of the U.S. Constitution on equal protection grounds had occurred, but she continued to assert that there was a violation of the Florida Constitution on equal protection grounds. She cited as authority Kluger versus White. Without going into a detailed analysis of that case, it simply does not stand for that proposition and does not govern University of Miami versus Echarte on an interpretation of the equal protection clause of the Florida Constitution. Again, I submit that her decision in this case is a reflection of the nominee's result-oriented jurisprudence.

Perhaps the most troubling opinion of Chief Justice Barkett was a reapportionment case in which she wrote that she would support a reapportionment plan simply because it was submitted by the NAACP, "an organization that has always had the best interests of minorities at heart." I firmly reject using any categorization, of whatever group it may be, as a basis for accepting their judgment. You can listen to and you can analyze what a party has to say, but I think that it is a judicial responsibility not to rely on labels, reputations, or the identity of the parties before the court, but to go to the underlying legal issues. I thought this case was especially problemsome, because there were very substantial other interests, such as Hispanic interests, involved in that case.

Mr. President, I do know that Chief Justice Barkett has a commendable academic record, a commendable record as a practicing lawyer, and many recommend her as a jurist. I have not read all of her cases on the death penalty, and without having done so I will not quarrel with any of her decisions, which others say have been too lenient. I believe that a very careful analysis in death penalty cases is warranted. There is substantial lati-

tude for judicial discretion in applying and weighing the standards of aggravating circumstances and mitigating circumstances in each case.

As I survey Chief Justice Barkett's record, I believe that it shows more than judicial activism; there is a very heavy tilt in her decisions toward result orientation. For this reason I will cast a vote against her nomination. As I say, knowing the tenor of the Senate and the support she has from her home State Senators, I recognize that her confirmation is a virtual certainty. This, in effect, is just a protest vote.

I thank the Chair.

I see no other Senator on the floor, so I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

The Senator from West Virginia is recognized.

## PUBLIC SERVICE INCARNATE

Mr. BYRD. Mr. President, more than four decades ago, a young 14-year-old boy arrived in Washington, DC, from Florida. He came here to serve as a Senate page under the patronage of the late colleague and friend of some of us who are still here, Senator Spessard Holland.

That young Florida boy literally grew up in the U.S. Senate, graduating from our Page School, attending George Washington University for his undergraduate degree, and finally earning his law degree from the American University, most of the time simultaneously serving in some capacity here in the Senate.

During the same period and subsequently, that young man matured into a very gifted, qualified, and helpful nonelected official.

Mr. President, with much regret and with sincere gratitude, I want on this occasion to acknowledge the announced retirement from our ranks of Walter Joseph Stewart, the current Secretary of the Senate.

To his legion of friends and associates, Joe Stewart is known simply and affectionately as just that—"Joe" Stewart, and I shall presume thus to call him in my following remarks, both from habit and from choice.

In truth, as I indicated, Joe Stewart grew up in the United States Senate.

With a quick wit and an almost uncanny ability to grasp the relative significance of details great and small, Joe Stewart mastered the advice of Ralph Waldo Emerson, who, when asked the secret of success, responded, "Make yourself necessary to somebody."

Indeed, Joe Stewart has made himself necessary to legions of people during his various tenures here in the U.S. Senate by guiding the confused and the inquiring individuals through the shoals and rapids of arcane Senate practice, lo, these several decades.

Joe Stewart is, in short, a marvel. He speaks quickly, moves quickly, and thinks quickly. He is one of the busiest staffers on Capitol Hill. Yet, he always has time to attend to the smallest of details. He always remembers the thoughtful gesture, the human touch, the personal note. Joe Stewart is a unique combination of efficient capability and thoughtful, empathetic kindness. He has helped many people over the years, and his generous spirit will be long remembered by hundreds of current and former employees of the Senate. His gracious assistance to my wife and me, and to members of my family and staff has very often made difficult situations much more tolerable. For this I personally thank him and will remain forever in his debt.

Joe Stewart is a problem solver. He has a gift for thinking clearly and seeing a solution when one is not readily at hand.

Providence crossed my path with Joe Stewart's not too long after I assumed a position on the Senate Appropriations Committee and he assisted me, as I served as a member of that committee.

He later joined my own staff, and after I was elected Senate majority leader, Joe Stewart served as Secretary for the majority from 1979 until January 1981, and as Secretary for the minority from January 1981 until August 1981. He was an outstanding employee in both very difficult and very different positions.

At that point, Joe Stewart temporarily departed Capitol Hill to serve as Vice President for Government Affairs for Sonat, Inc., a private firm involved in energy-related matters.

But in January 1987, I was successful in convincing Joe Stewart to return to the U.S. Senate as Secretary of the Senate, a position in which he has served with notable distinction ever since.

Mr. President, to borrow from the vernacular, Joe Stewart is "a Class Act," Joe Stewart has brought to every position in which he has served on my staff and in related responsibilities a degree of dedication and perfection that might have impressed even Zeus on Mount Olympus. Joe Stewart has an uncanny ability to gage almost exactly the result one desires and then to produce of that ideal a finished product of triumphant proportions.

Moreover, Joe Stewart has been motivated by a sense of patriotism—a patriotism of the private citizen and of the public servant that has been marked by selflessness in behalf of his country and in behalf of the Senate and by unstinting service for the sake of this institution and causes that magnify our American heritage.

What was he doing? Well, he decided to sacrifice hours and hours of his personal time when others were off enjoying the weather or the weekend to see to essential details of this or that, and always with the benefit of the Senate first in his heart. His unceasing efforts in service to the United States Capitol Preservation Commission and the Commission Advisory Board must also be noted here. As Co-Chairman of the Commission with Speaker of the House TOM FOLEY, I have witnessed personally the energies and efforts that Joe Stewart has expended in behalf of the restoration and enhancement of this great Capitol building—the "People's Palace"—efforts aimed at making this shrine of American Democracy an unforgettable experience for the thousands upon thousands of Americans who visit this vast building every year. For Joe Stewart, I know this particular endeavor has been a labor of love. I believe that Joe still feels as I do, even after all these many years, when he looks up at that gleaming, resplendid white marble dome in the bright blue air above this fair city.

My friend ROBERT DOLE often speaks in jest of a view from the White House as being the "best view in town." Well, I must say facetiously, and yet very seriously, that the White House is not the best view in town. The best view in this town or anywhere in the world is from this Capitol, this great Capitol, this great palace of the people. This is the best view in this town and the best view in any town across this land—the Capitol Building of the United States, where the people's branch sits, where the House and the Senate sit.

I believe that Joe still feels the fresh wonder of a boy filled with awe and expectation as he gazes upon this symbol of the greatest nation on Earth and realizes that he, too, has played a part—that he, too, has made a contribution, that he, too, has made a difference. And, indeed, what a part he has played, what a difference that young page boy has made.

Mr. President, Joe Stewart will be remaining here in Washington, re-entering the private sector and making himself further available to those who need the borrowed wisdom of a seasoned, serious, and perceptive veteran of the legislative process.

I know that I speak for all of our colleagues and for the army of staff people who have been fortunate enough to know Joe Stewart as a friend and coworker, in wishing for Joe Stewart the best of Destiny's favors and every fulfillment possible in the years ahead.

Mr. President,

It isn't enough that we say in our hearts
That we like a man for his ways;
It isn't enough that we fill our minds
With psalms of silent praise;

Nor is it enough that we honor a man
As our confidence upward mounts;
It's going right up to the man himself
And telling him so that counts.

If a man does a work that you really admire,
Don't leave a kind word unsaid.
In fear to do so might make him vain
And cause him to lose his head.
But reach out your hand and tell him, "Well done."
And see how his gratitude swells.
It isn't the flowers that we strew on the grave,
It's the word to the living that tells.

I yield the floor.

The PRESIDING OFFICER. Who seeks recognition? The Chair recognizes the Senator from North Carolina.

Mr. HELMS. Mr. President, before I proceed, let me say that I always dislike following the Senator from West Virginia. He is, by all odds, the most eloquent Member of this Senate. On top of that, I say to him here that he is my friend.

Mr. BYRD. Mr. President, will the able Senator allow me to interrupt him?

Mr. HELMS. Certainly.

Mr. BYRD. I thank the Senator for his kind felicitations. The aisle, may I say, separates us. But friendship is not separated by an aisle, and he and I do not always vote together, as no other Senator and I vote together always. But there are many times when I do vote with the Senator and I have an admiration for him. He is my friend. And he contributes a great service to the Senate.

Sometimes he makes us vote on matters we do not want to vote on, but I honor him for that. And that is what we need. Sometimes we need to screw up the courage to vote on tough issues, and I am proud that he makes us do it.

Mr. HELMS. Mr. President, I thank the Senator very much. He is my role model. I find myself wishing that I knew as much as he does—or half as much. Nobody who has ever served in this Senate has upheld the traditions of the Senate more highly than he has.

And besides that, the distinguished Senator from West Virginia and the Senator from North Carolina were both born in the same State.

## NOMINATION OF ROSEMARY BARKETT, OF FLORIDA, TO BE U.S. CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT

The Senate continued with the consideration of the nomination.

Mr. HELMS. Mr. President, all my life I have heard, as the distinguished occupant of the chair has heard, that everybody talks about the weather but nobody does anything about it. I have been in the Senate going on 22 years, and I think every year I have been here—maybe minus 1 or 2—there has been a crime bill and there have been all sorts of assurances that this is going to take care of the crime problem once and for all. The crime bill is going to stop the crime in the streets. It is going to put an end to drug trafficking. It is going to stop the murders.

I know these statements were made by men and women in good faith. But I have come to the conclusion—now that I am older than I have ever been before and have thought much about the crime situation and crime legislation—that we are not going to solve the crime problem in America until we solve one or two other problems first.

Namely, we have to make up our minds, as Americans, that we are going to restore some fundamental principles in this country, principles on which and for which this country was founded.

I do not mean to sermonize, but as a society we have drifted so far away from being a good Nation. Of course, I am referring implicitly to Alexis de Tocqueville, the great French diplomat and scholar who came to this country in the middle of the 19th century in search of the genius of this relatively new country.

Every school boy knows that story. Alexis de Tocqueville went everywhere in America. He went to the seaports and he went to the cities and he went to the towns and he went to the farms, and he said: They are not substantially different from what I have seen in my own homeland of France.

And then he went to one other place. And when he got back to France he recounted and recited all of the other trips he had made around America and he said: It was not until I went into the churches of America that I discovered the genius of America. Because there I found that these Americans, they seek to be good. They are not perfect, but they are trying to be good. And as long as America and Americans try to be good, America is going to be great. But when America stops being good, America will stop being great.

Mr. President, let us contrast that with the psychological attitude that is so prevalent today. Look at what we see on television. And, yes, there are some of us who have been ridiculed and mocked because we contend that traditional values such as prayer in school ought to be restored. School prayer, and the respect for morality that it engenders, was taken away back in the 1960's by an unwise Supreme Court that completely misinterpreted history and the U.S. Constitution. But school prayer ought to be restored. And fundamental civil and personal decency ought to be restored, as well as concern for one's fellow human beings.

Mr. President, no crime bill can substitute for that.

I was struck by these thoughts 2 or 3 months ago when President Clinton came up for his State of the Union Address. My soul, I have heard few more eloquent human beings in my life. He can look you right in the eye and tell you something that you know is not so, and you halfway believe it. He is without question a charming man in the podium. And he was certainly charming that night.

I remember his exhortation to the American people—and he held up his hand—"Let us reclaim our streets from violent crime and drugs and gangs." And they stood up as one in the House of Representatives and cheered. And well they should, because we should reclaim our streets.

Then he said, "While Americans are more secure from threats abroad, I think we all know that in many ways we are less secure from threats here at home. Every day the national peace is shattered by crime * * *"

And at that point, Members stood up again and cheered. If you watched it on television, you got sick and tired of people getting up and sitting down, getting up and sitting down, every time the President finished a sentence.

The President continued, "Violent crime and the fear it provokes are crippling our society, limiting personal freedom, and fraying the ties that bind us."

That is pretty good rhetoric, Mr. President. I wish I had thought of it myself. As Ronald Reagan said afterward, "Imitation is the sincerest form of flattery, but this is wholesale robbery."

And then Mr. Clinton said, "The crime bill before Congress gives you a chance to do something about it, a chance to be tough and smart. And what does that mean? Let me begin by saying I care a lot about this issue."

Well, I remember thinking—knowing that Mr. Clinton had nominated the chief justice of Florida's Supreme Court to sit on the U.S. Court of Appeals for the Eleventh Circuit—I thought mercy, is he really going to put this lady on the U.S. Court of Appeals feeling as he says he does about crime?

Mr. Clinton continued his speech and said, "My fellow Americans, the problem of violence is an American problem. It has no partisan nor philosophical element. Therefore, I urge you to find ways as quickly as possible to set aside partisan differences and pass a strong, smart, tough crime bill."

Tough words. Tough words, I say to the distinguished occupant of the chair. And this is what the American people heard from their President. It was an impressive flow of rhetoric. That is what he said and continues to say, and it is what the American people approve of.

But you have to look and see what actions he is really taking on the issue of crime. For instance, today, the Senate is spending much of the day considering Mr. Clinton's nominee to sit on the Eleventh Circuit Court of Appeals the lady I just mentioned, namely, Rosemary Barkett. If confirmed, she

will have lifetime tenure and will henceforth be accountable to no one. If she conducts herself as other liberal activists have on the bench, she will allow her liberal philosophy to permeate her decisions, using her judicial power to override the actions of the elected representatives of the people.

That is why I am here. I am no lawyer, and I sometimes brag about it. But I have the greatest faith and hope that the judicial system in this country will return to its proper constitutional role of interpreting and not rewriting the Constitution.

But let us examine Judge Rosemary Barkett's record.

During her tenure on the Supreme Court of Florida, she has tried to prevent the enactment of laws to ban obscenity and preserve community order and decency, laws which I think everybody should acknowledge are important to community policing, which Mr. Clinton says he so strongly supports.

She has issued a series of search and seizure decisions which if implemented, would severely hamper the ability of the police to enforce laws against drug trafficking and other crimes, the kind of crimes about which the President says he is so concerned and he said so eloquently a few short months ago in January.

This liberal lady judge has also endorsed a capital punishment theory that would make it impossible to impose the death penalty unless it is carried out according to racial quotas. She has attempted at every turn to make excuses for the acts of brutal criminals based on the fallacious liberal philosophy that criminals are the victims of society—you know, the old society-is-to-blame game.

So I am inclined to say so much for Mr. Clinton's appeals regarding crime and punishment when he sends this Senate a judicial nominee more interested in making excuses for criminals than in having them held responsible for their actions—a judge that believes that the criminals are the victims.

Mr. President, I am not going to take up much more of the Senate's time. I am shortly going to ask to have inserted in the RECORD an analysis of the nominee's record and a number of her judicial opinions. But before I do that, I do want to discuss a few of the cases which may help reveal to those watching on C-SPAN the kind of nominee Mr. Clinton has submitted to the Senate to sit on the U.S. Court of Appeals.

In the case of *Stall* v. *State* (570 So. 2d 257 (Fla. 1990), for example, Chief Justice Barkett joined a dissent that called for striking down a State obscenity statute. She stated, "A basic legal problem with the criminalization of obscenity is that it cannot be defined." I say to the lady, with all respect, you are crazy as the devil. It can and has been defined by the U.S. Supreme Court—I do not know why she could not find the case. It is called Miller versus California and was decided way back in 1973.

She went on to say in that opinion that the Florida obscenity law violated "every principle of notice and due process in our society."

Senators may also be aware of Barkett's decision in *Bostick* v. *State*, which is cited as 544 So.2d 1153 (Florida 1989). In that case, the Broward County Sheriff's Department had tried to combat the flow of illegal drugs by randomly boarding, at scheduled stops, buses traveling interstate. Once on the buses, officers would ask the passengers for permission to search their luggage for drugs.

Now, a fellow named Bostick was a passenger on such a bus. The sheriffs boarded the bus. They announced they were narcotics agents. They asked Bostick for permission to search his luggage. Bostick consented to the search, and during the search, what do you know, the sheriffs discovered illegal drugs.

Now, in finding this search to be illegal—and how she arrived at that conclusion baffles me—Barkett wrote an opinion completely prohibiting the police from ever using this means of combatting drug trafficking again.

And I say again, President Clinton was so eloquent in his address to the Joint Session of Congress. Oh, he was so eloquent. And then he sends up a nominee like this.

In her opinion in the Bostick case—which was subsequently overturned by the U.S. Supreme Court (*Florida* v. *Bostick*, 111 S.Ct. 2382 (1991))—Barkett wrote: "This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa."

How does this mesh, I ask the presiding officer, with President Clinton's appeal to the American people to support the honorable and difficult work of our law enforcement officers?

Mr. President, there is more. As Senator HATCH concluded after her confirmation hearings: "Judge Barkett exhibits a clear tendency to strain for unconvincing escapes from the imposition of the death penalty."

One of Justice Barkett's dissenting opinions would render the death penalty virtually unenforceable—unless imposed on the basis of racial quotas. She laid out her theory in a dissent in *Foster* v. *State* (No. 76,639 (Florida, April 1, 1993)). This theory has been used in Senate debate by Senator KENNEDY and others opposed to the death penalty.

Before voting on this nomination, Senators may wish to review a 1992 Florida Supreme Court case, *Dougan* v. *State* (595 So. 2d 1 (Florida 1992)). Dougan was the leader of a group that called itself the Black Liberation Army. According to the trial judge, its "apparent sole purpose * * * to indiscriminately kill white people and thus start a revolution and a race war." One evening in 1974, Dougan and four other members of his group went in search of victims. They picked up a white hitchhiker, Steven Orlando, drove him to an isolated trash dump, and stabbed him repeatedly. Dougan then put his foot on Orlando's head and shot him twice. In one of several tape recordings he made bragging about the murder, Dougan said: "* * * it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes."

Justice Barkett and one of her colleagues joined in a dissent calling for Dougan's death sentence to be reduced to life imprisonment, with eligibility for parole in 25 years, which stated:

> This case is not simply a homicide case, it is also a social awareness case. This killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection. Throughout Dougan's life his resentment to bias and prejudice festered. * * * His frustration, his anger, and his obsession of injustice overcame reason. The victim was a symbolic representation of the class causing the perceived injustices.

Mr. President, the dissent concluded that giving Dougan a life sentence instead of the death penalty would be:

> * * * a partial reconciliation of the wounds arising from discordant racial relations that have permeated our society. To a large extent, it was this disease of racial bias and discrimination that infected an otherwise honorable person and contributed to the perpetration of the most horrible of crimes.

Mr. President, is this what President Clinton meant 3 months ago, when he told the American people that "those who commit crimes should be punished?"

Adds Tallahassee prosecutor Ray Markey: "To say that this white victim was a sacrifice and call it a social awareness case—that's scary."

Mr. President, the outrageous rationale Judge Barkett agreed with in this opinion would justify killings by terrorists, and Mr. Clinton wants to elevate this woman to the Federal Court of Appeals. Has she not done enough damage in Florida already?

Mr. President, the bottom line is that Congress can—as called upon by President Clinton—pass history's toughest crime bill—but that will not make any difference in the world if the President turns around and appoints to the Federal bench individuals such as Rosemary Barkett, the pending nominee.

If this lady is confirmed and brings these points of view to the Federal judgeship to which she has been nominated, she is not going to help crime in the streets. She is going to help build up the incidence of crime in the streets and everything else.

That is the reason I shall not and cannot support her nomination.

Mr. President, I ask unanimous consent that an analysis of this nominee prepared by Mr. Thomas L. Jipping of

the judicial selection monitoring project and a copy of a column printed in the Washington Times of October 15, 1993, and written by Sam Francis, titled "Rosemary Barkett: Clinton Nominee," be printed in the RECORD at the conclusion of my remarks.

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

BEYOND JUDICIAL ACTIVISM

(By Thomas L. Jipping, M.A., J.D.[1])

President Bill Clinton has exercised his power under Article II, Section 2 of the United States Constitution[2] and nominated Rosemary Barkett to be a judge on the United States Court of Appeals for the Eleventh Circuit, which includes Florida, Alabama, and Georgia. The U.S. Senate Judiciary Committee voted 11–7 to approve the nomination on March 17, 1994, the narrowest approval margin of any Clinton judicial nominee to date. This analysis is provided by the Judicial Selection Monitoring Project[3] to assist the U.S. Senate in fulfilling its constitutional role of "advice and consent" and in considering the Barkett nomination.

I. PERSONAL INFORMATION

Rosemary Barkett was born in Mexico in 1939 and moved with her family to Miami in 1944. A former nun in the St. Joseph order, Barkett graduated from Spring Hill College (Mobile, AL) in 1967 and the University of Florida School of Law in 1970. She has experience as a trial lawyer (8 years) and state circuit judge (6 years). Governor (now Senator) Bob Graham appointed her to the Supreme Court of Florida in 1985. Floridians voted to retain her in 1986 and 1992, when she was named chief justice.

II. THE NOMINEE'S RECORD

Rosemary Barkett has been a member of the Supreme Court of Florida for nearly a decade and has amassed a sizable judicial record. Perhaps the most striking thing about Barkett's supporters, therefore, is that they simply refuse to defend or even talk about that record. This is not an overstatement. There exists in Barkett's record dozens and dozens of very controversial opinions which demonstrate her aggressively activist approach to judging and views on important issues that are far outside the mainstream. Her supporters never defend those decisions.

Instead, Barkett's supporters use two strategies. First, they simply claim that these radical opinions are a small fraction of the opinions Barkett has written and the cases in which she has participated over the years. This observation, of course, leaves these many controversial opinions entirely undefended. Second, Barkett's supporters retreat behind a smokescreen of statistical arguments and number-crunching. This approach also ignores, much less defends or justifies, the many decisions across a range of issues that clearly identify Barkett as an aggressive judicial activist with views far outside the mainstream.

This analysis, in contrast, will examine the actual opinions that this nominee has written and for which she is responsible. Neither the nominee nor her supporters can avoid, run from, or ignore the public record she has compiled. The real issue, after all, is judicial philosophy and the best place to determine the nominee's judicial philosophy is the nominee's judicial record.

*A. Rule by empathy*

As Senator Arlen Specter (R–PA) put it when voting against Barkett's nomination in the Judiciary Committee on March 17, 1994, her record shows a "result-oriented approach that goes beyond judicial activism." One scholarly analysis of Barkett's record concluded that she makes decisions on the basis of personal "empathy." The author observed that "[c]riminal defendants, especially those on death row, are often subjects of her empathy."[4] Her approach "allows her . . . to empathize with each capital defendant."[5] This analysis concluded that "Barkett has great empathy for capital defendants."[6]

The real issue is judicial philosophy. Judges are not philosopher kings, cultural commentators, or social therapists. Their sworn duty is to apply the law, not to rule by empathy. It is possible that her supporters might again tell the author of this scholarly analysis that the many opinions she examined were merely a fraction of the total, but the conclusion is the same nonetheless. The review that follows will examine many of Barkett's decisions across a range of issues to clearly identify this pattern.

*B. Criminal law*

Barkett's empathy for criminals and her aggressive judicial activism is evident at every point in the process of our society's attempt to address crime: The passage of criminal laws, the enforcement of criminal laws, and the implementation of criminal penalties. First, she tries to prevent legislative bodies from enacting laws for preserving community order and decency. Second, she tries to impose Draconian rules that hamstring the police in their efforts to enforce criminal laws that are enacted. Third, she goes out of her way to excuse even the most heinous crimes and to keep criminals from receiving the just punishment for their crimes.

1. Striking down laws for preserving community order and decency

Barkett's aggressive judicial activism is evident at each stage of society's attempt to maintain order and protect its citizens. She attempts to prevent legislative bodies from passing laws or ordinances to combat community problems.

*Wyche* v. *State* (1993).[7] Wyche was convicted of violating a Tampa ordinance prohibiting loitering by a street or public place "in a manner and under circumstances manifesting the purpose of" prostitution or other sexual acts. The ordinance lists specific circumstances "which may be considered in determining whether this purpose is manifested." These include specific actions by persons known to be prostitutes or pimps. The Supreme Court of Florida voted 4–3 to strike down the statute.

Barkett wrote the court's principal opinion, though it was joined in part or in full by only two other justices. She found three basic flaws with the ordinance. First, she considered the ordinance "overbroad" because it could potentially be used to punish innocent conduct by known prostitutes such as "chatting on a public street, and simply strolling aimlessly." There are a least two fundamental problems with this position.

The correct standard is not merely whether the language of a statute is "overbroad." Rather, to avoid mistaking an over-active imagination for a sound constitutional argument, the U.S. Supreme Court requires showing "substantial" overbreadth.[8] Barkett provided little that even arguably meets this correct standard.

In addition, Barkett refused to interpret the statute in a way that will avoid finding a constitutional defect. Justice McDonald's dissent emphasized this point and, citing U.S. Supreme Court precedent, argued that the overbreadth doctrine "is to be employed as a last resort, and it is not to be applied when a limiting construction can be placed on the statute or ordinance to narrow it." The Supreme Court of Florida has explicitly held that courts "have a duty to avoid a holding of unconstitutionality if a fair construction of the legislation will so allow."[9] Barkett ignored this duty.

Barkett's second problem with the Tampa ordinance was that it was vague, failing to give "adequate notice of what is prohibited" and inviting "arbitrary and discriminatory enforcement." She said that it did not require a finding that the defendant intended to engage in prostitution. Arriving at this conclusion required completely ignoring the plain language of the ordinance, which plainly states that conviction requires providing loitering "in a manner and under circumstances manifesting the purpose of" prostitution or other sexual acts. How can any judge read a statute that requires showing a specific purpose and claim that the statute does not require showing intent? Justice McDonald also cited numerous court decisions from other states offering the same conclusion about similar ordinances.

Barkett's third problem was that the ordinance violated "substantive due process" because it intruded upon "individual rights and liberties." She made this amazing constitutional assertion with no hint of what rights and liberties were supposedly involved. As discussed more fully below, this use of the due process clause is a favorite tool of judicial activists for striking down legislation they do not personally support.

Barkett's position would probably invalidate any regulation of public behavior, including disorderly conduct. Indeed, in cases decided along with Wyche, Barkett struck down as facially unconstitutional ordinances prohibiting loitering for the purpose of engaging in drug-related activity.[10] The Supreme Court of Florida previously had upheld a general anti-loitering statute[11] and Barkett's opinion, though never citing her own court's perhaps most relevant precedent, appears to overrule this previous holding.

Stall v. State (1990).[12] Stall was convicted of violating Florida's anti-obscenity law and challenged the constitutionality of the statute. The trial court concluded that the statute violated the Florida Constitution. The appeals court reversed. The Supreme Court of Florida voted 5–2 to uphold the statute.

Even though this case involved the state constitution, it is very important to accurately describe Barkett's position. In voting to strike down Florida's anti-obscenity law, Barkett focused not on any constitutional provision, but on obscenity itself. In so doing, she took a much broader position that would apply if the U.S. Constitution were also involved. She wrote: "A basic legal problem with the criminalization of obscenity is that it cannot be defined . . . . [T]his crime, unlike all other crime, depends, not on an objective definition obvious to all, but on the subjective definition."[13]

Barkett's dissent appears to rest on the Florida Constitution, though she insisted that the anti-obscenity statute violated "every principle of notice and due process in our society."[14] Since the statute's definition of obscenity tracks the U.S. Supreme Court's definition of Miller v. California,[15] Barkett's position appears to apply in the federal context as well. The U.S. Supreme Court has never held that some subjectivity in defining obscenity creates a constitutional barrier to

Footnotes at end of article.

state's attempts at regulating it. Curiously, Barkett never even cited Miller.

Barkett insisted that operation of the Florida anti-obscenity statute required a completely subjective individual judgment "first, of those who happen to be enforcing the law at the time, and, second, of the particular jury or judges reviewing the case."[16] This characterization may help create the feeling of subjectivity that is central to Barkett's argument, but it is flatly false and is contradicted by the plain language of the statute itself. The statute, again tracking the U.S. Supreme Court's decision in Miller, required determination and application of contemporary community standards, not the subjective individual judgment of prosecutors, jurors, or judges. In a recent celebrated case, for example, the U.S. Court of Appeals for the 11th Circuit—the very court to which Barkett has been nominated—reversed a decision that the rap group 2 Live Crew had violated the state's anti-obscenity statute because the trial judge had relied on his personal judgment rather than on objective evidence of community standards.[17]

Barkett also specifically joined what she called the "correct legal analysis"[18] in Justice Kogan's dissent which focused on the right to privacy in the Florida Constitution. That opinion recognized a constitutional "right of discreet access to entertainment."[19] Barkett also agreed with Kogan's statement that anti-obscenity laws are merely vehicles "for restricting individual autonomy."[20]

"At her confirmation hearing, Barkett insisted that Stall involved 'the very same statute' as another case in which she voted to uphold a conviction under Florida's child pornography statute.[21] She repeatedly said that 'in both those cases, the same statute was being decided, the same statute was being considered.'"

"This is not true. Stall involved the definition of obscenity[22] while Schmitt v. State involved the definition of child pornography.[23] The definitions are different and the breadth of Barkett's position in Stall makes it even more surprising that she did not take the same approach in Schmitt."

2. Hobbling law enforcement

Barkett goes out of her way to strike down legitimate legislative efforts to preserve community order and decency. Her activism goes further, however, and includes efforts to impose onerous and unwarranted restraints on effective law enforcement. She seeks to impose per se rules restricting the tools available to the police, particularly in the war on drugs. A few examples follow.

Cross v. State (1990).[24] Detectives saw Cross in the Miami Amtrak station boarding an interstate train with only a small tote bag. They asked permission to search her bag, advising her that she need not consent to the search. She consented and they observed a round object wrapped in brown tape. The officers later testified at trial that they had seen cocaine packaged this way in literally hundreds of cases. They arrested Cross and later found cocaine in the package. A divided court of appeals concluded that there was no probable cause for the arrest. The Supreme Court of Florida reversed, voting 5-2 that the officers had probable cause. Past decisions by the court make clear that police officers' training and experience must be considered in deciding whether probable cause exists for an arrest.[25]

Barkett dissented for the reasons expressed by the author of the appellate court's decision.[26] That judge argued that the object observed by the officers was "not an inherently suspect item."[27] This kind of per se rule completely ignores judicial precedent mandating consideration of police officers' experience and neither the appellate judge nor Barkett offered any legal authority for this radical new rule. Would Barkett have found probably cause if the object had been wrapped in clear plastic rather than brown tape? Does that make it an "inherently suspect item" or could it still be a container of sugar or a white ball? Must the package literally be labeled "COCAINE" for it to be inherently suspect as the Barkett rule would require?

Bostick v. State (1989).[28] To battle the flood of drugs through Florida, the Broward County sheriff's department began a practice of randomly boarding interstate buses at scheduled stops and asking passengers for permission to search their luggage for drugs. In this case, police boarded a bus bound from Miami to Atlanta, announced they were narcotics agents, asked Bostick for permission to search his luggage, and advised him of his right to refuse permission. Bostick consented to the search and the officers found drugs. Bostick was convicted of drug trafficking and appealed, claiming the cocaine had been illegally seized in violation of the Fourth Amendment to the U.S. Constitution. The Supreme Court of Florida voted 4-3 that the search was illegal.

Barkett wrote the majority opinion and created an automatic per se rule against police boarding buses to search for drugs, even with the travelers' permission. She wrote: "This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa."[29] After Barkett wrote these words, the St. Petersburg Times (1/23/90) reported that Florida Attorney General Robert Butterworth gave a speech to the Florida Sheriffs Association and said that in this opinion Barkett "compared the searches conducted by Broward County sheriff's deputies on commercial buses with the roving patrols and arbitrary searches conducted in Nazi Germany, Soviet Russia and communist Cuba. It is an insult to the 36,000 police officers in our state to be likened to Nazis."

"At her confirmation hearing, Barkett denied ever writing these words: 'I would never compare the conduct of any of our police officers in this country to those of Nazi Germany or Soviet Russia.'"

The U.S. Supreme Court reversed Barkett by a 6-3 margin.[30] The Court criticized Barkett's "per se rule" that essentially prohibited police officers from utilizing exactly the same kind of search-with-permission approach on buses that they may legitimately use in public places.[31]

3. Empathy for criminals

In addition to her attempts to block passage of criminal laws and to limit enforcement of those laws, Barkett also attempts to prevent convicted criminals from receiving the due penalty for their crimes. Her record is full of examples of her "rule by empathy" approach justifying the conclusion offered by the University of Miami Law Review. There is no better way of understanding this nominee's judicial philosophy than by examining this nominee's judicial decisions. Examination immediately reveals a clear pattern. Here are just some of the decisions that Barkett's supporters refuse to defend or even discuss. A few cases will receive more extensive review because they particularly reflect Barkett's judicial philosophy.

Dougan v. State (1992).[32] Dougan was the "unquestioned leader" of the Black Liberation Army (BLA), a group "whose apparent sole purpose was to indiscriminately kill white people and thus start a revolution and racial war."[33] In 1974, he and three other BLA members set out armed to kill a "devil" (any white person) they could find. They picked up a hitchhiking teenager and drove him to a trash dump, where they first stabbed and then shot him. Dougan made several tape recordings describing and bragging about the killing[34] and sent them to the victim's mother and the media. One tape included the following: "He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes."[35]

Dougan was convicted of murder. The jury found three aggravating factors and no mitigating factors[36] and Dougan was sentenced to death. He repeatedly appealed, and the Supreme Court of Florida repeatedly affirmed his conviction and sentence. On this latest visit, the court voted 4-3 to affirm the death sentence.

Barkett voted to spare Dougan. She joined Justice McDonald's dissent in its entirety. Her supporters repeatedly try to avoid attributing the very disturbing views in that opinion to Barkett. They know, however, that Barkett could have voted and written her own opinion. She could have voted without joining any opinion. She could have joined a portion of an opinion. In fact, she is regularly very deliberate about these choices. If she disagreed with anything in McDonald's opinion, she could and should have said so. By concurring fully in that opinion, she claims those views as her own.

Barkett admitted that "[t]here is evidence to support the conclusions of the trial judge on the aggravating factors"[37] yet she still voted against the death penalty. The evidence did not matter. Her "great empathy for capital defendants"[38] led her to focus instead on "the environment in which the events" took place as well as on "Dougan's mind-set" during "tumultuous times" in race relations across America.[39] She chose to look at the facts through "the eyes of the defendant, his friends, and most of those situated in [his] circumstances."[40] The opinion she joined stated:

"This case is not simply a homicide case, it is also a social awareness case. Wrongly, but rightly in the eyes of Dougan, this killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection. Throughout Dougan's life his resentment to bias and prejudice festered. His impatience for change, for understanding, for reconciliation matured to taking the illogical and drastic step of murder. His frustration, his anger, and his obsession of injustice overcame reason. The victim was a symbolic representation of the class causing the perceived injustices."[41]

The choice was clear: "Understandably, in the eyes of the victim, or potential victims, the aggravating factors clearly outweigh the mitigating; in the eyes of the defendant, his friends, and most of those situated in the circumstances of Dougan, the death penalty is not warranted."[42] Barkett's "great empathy for capital defendants" led her to reject the evidence and to side with the killer rather than the victim and the potential victims (society).

Barkett believed Dougan did not deserve the death penalty because he had "redeeming values" such as education and leadership in the black community.[43] Never mind that Dougan manifested these values by leading others to kill people whose only crime is being white. Barkett believed that this was a

"racially caused homicide" not because Dougan and his fellow BLA thugs went about "indiscriminately kill[ing] white people" but because "it was this disease of racial bias and discrimination [throughout society] that . . . contributed to the . . . crime[]."[44]

In Barkett's view, Dougan's punishment should be determined by what will "aid in an understanding of the wounds arising from discordant racial relations which have permeated our society. . . . An approval of the death penalty would exacerbate rather than heal those wounds."[45]

Wickham v. State (1991).[46] When a woman companion flagged down a passing motorist, Wickham shot him in the back, chest, and head and robbed his corpse of $4.05. The trial court found six aggravators and no mitigators and sentenced Wickham to death. The Supreme Court of Florida voted 4–2 to affirm the death sentence.

In Dougan, Barkett had said the death penalty was inappropriate because the killer was intelligent and a community leader. In this case, Barkett agreed that Wickham was guilty, but insisted that the death penalty was inappropriate because Wickham was "mentally deficient" and "socially maladjusted."[47] She voted to spare the killer, blaming this murder on the "milieu of violence" in which he grew up[48] and the fact that inadequate provision of social services had left him "unable to function in an appropriate manner."[49]

LeCroy v. State (1988).[50] LeCroy was 17 years and 10 months old when he killed a man, robbed him and killed the man's wife to silence her as a witness. The trial court found three aggravators and two mitigators, including the killer's age. "The trial court gave great weight to [this] mitigating factor but found that the evidence showed that [LeCroy] was mentally and emotionally mature and that he understood the distinction between right and wrong and the nature and consequences of this actions."[51] Noting this finding and that Florida law "mandates that a child of any age charged with a capital crime 'shall be tried and handled in every respect as if he were an adult,'"[52] the Supreme Court of Florida voted 6–1 to affirm the death sentence.

Barkett again agreed that the killer was guilty but voted to spare him. She insisted that executing anyone under the age of 18 violates the U.S. and Florida Constitutions, something the U.S. Supreme Court has never done. She blamed all youth crime on "a failure of family, school, and the social system."[53]

Hall v. State (1993).[54] Hall and a companion raped, beat, and shot to death a woman who was seven months pregnant. The trial court found seven aggravating factors and sentenced Hall to death. The Supreme Court of Florida voted 5–2 to affirm the death sentence, concluding that "this cruel, cold-blooded murder clearly falls within the class of killings for which the death penalty is properly imposed."[55]

Barkett voted to spare the killer because he had an IQ of 60, a learning disability, and a speech impediment and had experienced "emotional deprivation" during his life.[56] She had no choice but to admit the holding of the U.S. Supreme Court that the U.S. Constitution's ban on cruel and unusual punishment "does not categorically prohibit execution of the mentally retarded."[57] While "evolving standards of decency" have not forged a national consensus on this subject, "Floridians' attitudes" have indeed "evolved significantly" so that execution of even the mildly retarded is both "cruel" and "unusual" under Article I of the Florida Constitution.

It remains virtually impossible to extract Barkett's theory of constitutional interpretation. Here, she felt confident articulating something as subjective as "evolving standards of decency." Yet in Stall v. State,[58] discussed above, she believed that Florida's anti-obscenity statute was unconstitutional because defining obscenity involves a subjective judgment!

Porter v. State (1990).[59] Porter left his live-in-lover but returned three months later, stalked her for two days, stole a gun, and murdered her and her new boyfriend. The trial court found five aggravators and no mitigators and sentenced Porter to death. The Supreme Court of Florida voted 5–2 to affirm the death sentence.

Barkett again agreed that the killer was guilty but voted to spare him. Even though Porter's relationship with the victim had ended three months earlier, Barkett said that this case arose from "a lovers' quarrel" and that Porter was not capable of premeditation because of his "emotionally charged, desperate, frustrated desire to meet with his former lover."[60]

Hudson v. State (1989).[61] Hudson left his girlfriend but returned two months later and broke into her house. He was surprised by her roommate and stabbed her to death, stuffed her body in the trunk of her car, and dumped her in a tomato field drainage ditch. The trail court convicted Hudson of first-degree murder and sentenced him to death. The Supreme Court of Florida voted 6–1 to affirm the death sentence.

Barkett cast the lone vote to spare the killer. She believed that since Hudson "was apparently surprised by the victim during [his] burglarizing of the home," he was "unable . . . to conform his behavior to the requirements of the law."[62] She offered nothing to explain this amazing conclusion, that "surprise" by the rightful occupant of a home should warrant a more lenient punishment for a murdering intruder.

Adams v. State (1989).[63] Adams was convicted in 1978 of murdering an 8-year-old girl with whom he tried, unsuccessfully, to have sexual relations. State and federal courts ruled nearly a dozen times against his attempts to avoid the death penalty. The Supreme Court of Florida finally voted 5–2 to again affirm the sentence. Barkett voted to spare the killer and thought he should have had even more opportunity to present evidence of "learning problems" while growing up.

Cruse v. State (1991).[64] Cruse loaded his car with guns and ammunition and headed for a shopping center. On the way, he attempted to kill a 14-year-old boy, as well as the boy's parents and brother, with a shotgun. At the shopping center, he killed two shoppers and wounded a third while they were leaving a grocery store. He then killed another customer, wounded another, killed two police officers, killed one more shopper, wounded several more, and held two women hostage for several hours. The Supreme Court of Florida voted 6–1 to affirm Cruse's multiple convictions of first-degree murder and his death sentence.

Barkett cast the lone vote to spare the killer, insisting that this was not a cold, calculated, or premeditated killing spree. She said Cruse was "acting in response to his delusions that people were trying to harm him." The consensus of expert testimony did not support this conclusion.

Hayes v. State (1991).[65] Hayes and two of his drinking and drugging friends decided to rob a taxi driver for more money to buy cocaine. Hayes shot a driver in the back of the neck and robbed the corpse of $40.00. The Supreme Court of Florida voted 5–2 to affirm his conviction for first-degree murder as well as his death sentence. Barkett voted to spare the killer because of evidence that he had a neglectful, abusive, and deprived upbringing.

4. Reflexive activism

The cases reviewed above are but a few in which Barkett goes out of her way to construe aggravating factors narrowly and mitigating factors expansively. Her "great empathy for capital defendants" leads her to make excuses for heinous crimes and to treat criminals as the victims of society. These decisions are often reflexive, without any explanation or analysis, even when Barkett is alone in dissent.

White v. State (1990).[66] The Supreme Court of Florida affirmed White's conviction for murder as well as his death sentence and voted 5–2 to deny his petition, claiming ineffective assistance of counsel, for post-conviction relief. Barkett voted to spare the killer.

"Barkett's dissent read in its entirety: 'I cannot concur in the majority's conclusion that appellant received a fair trial with effective assistance of counsel.'"

"At her confirmation hearing, Barkett was asked why she did not provide any further explanation or analysis for disputing a sentence rendered after trial and reviewed and upheld on appeal. She responded that 'our court is an extremely busy court . . I would have liked to have had, I am sure, the opportunity to have expanded here. But time constraints sometimes preclude you from amplifying any further than that.'"

Engle v. Florida (1987).[67] Engle and another man robbed a convenience store and killed the female cashier. The interior of her vagina was severely lacerated, probably by a fist. The trial judge rejected the jury's recommendation of life in prison and, finding four aggravators and no mitigators, sentenced Engle to death. The Supreme Court of Florida voted 6–1 to affirm the death sentence. Barkett cast the lone vote to spare the killer. Her dissent stated, without any explanation, her conclusion that "the record adequately supports the jury's recommendation of life imprisonment."

*C. Constitutional law*

The power of judicial review, of literally invalidating the actions of the elected political branches, is an awesome power indeed. As such, it is vital to determine whether a judicial nominee is properly respectful of the political process by faithfully and dispassionately applying the Constitution as written and intended or shows a willingness to substitute her own policy preferences or ideas in place of the law. Just as Barkett's "great empathy for criminal defendants" drives her jurisprudence in the criminal context, her aggressive activism leads her to use constitutional provisions to legislate from the bench.

Two constitutional provisions, the due process clause and the equal protection clause, have proven to be favorites of those judges seeking an activist vehicle for legislating from the bench. Barkett's record puts her squarely in this category.

1. Due process clause[68]

One of the most powerful weapons at an activist judge's disposal is the due process clause, which requires "due process" when a state deprives persons of life, liberty, or property. This provision allows a judge both to determine substantive ends (especially by defining the word "liberty") and to assess

the means for achieving those ends (whether the process was "due"). Particularly when a judge engages in "substantive due process," she can literally declare constitutional rights to exist when no such rights exist in the text, history, or intended meaning of the Constitution. By so doing, she creates her own mechanism for eliminating policies she does not support.

The U.S. Supreme Court has rejected the substantive due process approach. Justice Hugo Black once wrote that "we refuse to sit as a 'superlegislature' to weight the wisdom of legislation."[69] Legislative judgments are presumptively valid and assumed to rest upon a rational basis unless proved otherwise.[70] As long as government regulation not violating a separate constitutional provision is rationally related to a legitimate state interest, it is valid under the due process clause.[71]

Barkett has repeatedly demonstrated her willingness to sit as a superlegislature. Her aggressive judicial activism, evidenced through her use of the due process clause, is a way for her to achieve her preferred policy goals.

State v. Saiez (1986).[72] In an attempt to combat trade in counterfeit credit cards, Florida law criminalizes possession of the kind of embossing machine capable of manufacturing fake cards. Barkett's opinion in this case held that the statute "violate[d] substantive due process under the fourteenth amendment to the United States Constitution"[73] because it was not "reasonably related to achieving [the] legitimate legislative purpose" of combatting credit card fraud. Without citing a single authority, she simply declared that "[i]t is unreasonable to criminalize the mere possession of embossing machines when such a prohibition clearly interferes with the legitimate personal and property rights of a number of individuals who use embossing machines in their businesses and for other non-criminal activities."

Observing that criminalizing possession interferes with personal liberty is merely to state the obvious. Barkett turns this observation into her conclusion. Yet the question for the court is whether this interference with personal liberty is nonetheless reasonable because it is related to a permissible state goal. Barkett fails to answer this question with such irrational circularity.

Simply because an object (or controlled substance, for that matter) can conceivably be used for non-criminal purposes does not mean that the state is constitutionally prohibited from regulating or prohibiting its possession. No legitimate constitutional principle disables society from weighing benefits and costs and determining that possession of some objects must be prohibited. This, indeed, is the point—Barkett's aggressive judicial activism operates on the basis of her personal policy choices and cites manipulable constitutional theories such as substantive due process to create the impression that there is some sound legal basis for her decisions.

Wyche v. State (1993).[74] The case is discussed more fully above. Barkett wrote the opinion for a narrow majority of the Supreme Court of Florida striking down a Tampa ordinance prohibiting loitering for the purpose of prostitution. One of her three fundamental problems with the ordinance was that it violated "substantive due process" because it intruded upon "individual rights and liberties." Barkett completely ignored the proper standard courts should follow, gave no hint of what "rights and liberties" were supposedly involved, and simply struck down a legislative enactment she did not think wise or desirable.

"At her confirmation hearing, Barkett was asked why she invoked the due process clause of the U.S. Constitution rather than simply relying on the Florida Constitution. She replied that 'I can accept that in a body of law there are going to be occasions when you are going to be careless.'"

2. Equal protection clause[75]

Another favorite tool for judicial activism is the equal protection clause. Every statute or ordinance imaginable uses classification, categories, or distinctions. It does not treat everything or everyone in exactly the same way. Sound and clear guidelines are, therefore, essential to avoid invalidating virtually all legislative actions and choices. Fortunately, those guidelines are well-established. Justice Clarence Thomas, writing for a nearly unanimous U.S. Supreme Court, succinctly described it this way:

"[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is a reasonably conceivable state of facts that could provide a rational basis for the classification . . . This standard of review is a paradigm of judicial restraint."[76]

Justice Harry Blackmun also wrote for the Court that unless a statutory classification "jeopardizes exercise of a fundamental right to categorize on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest."[77] There only needs to be a "plausible policy reason for the classification" and the statute need only be "rationally" related to that reason.[78] This standard, in most cases, is very deferential to legislative judgments.

The real test is whether a judge who personally disapproves of a legislative scheme equates "rational" or "plausible" with "to my liking." Barkett's record shows that she has succumbed to this approach. She has not been content with upholding legislative enactments using classifications that, while rational, she does not like. She has instead attempted to use the equal protection clause to eliminate legislative actions she thinks unwise or undesirable.

University of Miami v. Echarte (1993).[79] Florida law provides for an investigation process prior to filing malpractice claims,[80] a voluntary arbitration process to encourage settlement of claims,[81] and a cap on noneconomic damages in medical malpractice cases.[82] Noneconomic damages include pain and suffering, inconvenience, mental anguish, and loss of capacity for enjoying life. Those damages are capped at $250,000 when the parties opt for arbitration and at $350,000 when they refuse arbitration and go to trial. In this case, parents suing for allegedly negligent treatment of their child challenged the constitutionality of this statutory scheme.

The Supreme Court of Florida voted 4-2[83] to uphold the statutory scheme, finding that the statute provided "commensurate benefits" to offset the limitation on damages, as required by relevant judicial precedents. Barkett dissented and did not even address the basis for the majority's decision. She instead addressed the equal protection question.

That task seems simple. A judge evaluating an equal protection challenge to this statutory scheme must decide whether it is a "rational" means of addressing a "legitimate" end. In this case, Barkett herself saw the statute's goal as addressing the "financial crisis in the medical liability insurance industry." Addressing this crisis is certainly a "legitimate" end. A legislative task force had found that "the dramatic increase in the size or amounts of paid claims" was at the root of the liability insurance crisis. The statute, which limits the "size or amount of paid claims," appears self-evidently to be more than "rationally" related to its purpose.

Barkett, however, concluded that the statutory scheme violates "the equal protection clauses of the Florida and United States Constitutions" by "creating two classes of medical malpractice victims, those with serious injuries whose recovery is limited by the caps and those with minor injuries who receive full compensation." She wrote: "I fail to see how singling out the most seriously injured medical malpractice victims for less than full recovery bears any rational relationship to the Legislature's stated goal."

It is Barkett's opinion that is irrational. The statutory scheme is not based on some distinction between those with "serious" or "minor" injuries. While it is true that the more serious injury will likely be accompanied by a higher claim for damages, this is not always the case. In any event, actual or compensatory damages—which will certainly be higher in cases of more serious injury—are not capped. Barkett's deliberate choice of this dichotomy to describe the statutory scheme clearly signals her personal distaste for the policy but is entirely irrelevant to proper analysis of the legal question before her.

Just as she had in Saiez above, Barkett invoked the U.S. Constitution, yet cited no federal judicial precedents for her bizarre conclusion and did not even attempt to explain its obvious conflict with settled U.S. Supreme Court doctrine in this area.

"At her confirmation hearing, Barkett was again asked about her invocation of the U.S. Constitution when state constitutional grounds were sufficient for her conclusion. She again admitted this was error, saying 'I should not have done that.'"

Shriners Hospitals v. Zrillic (1990).[84] Barkett wrote the opinion for the Supreme Court of Florida striking down a state law allowing an heir to cancel a charitable contribution made in a will that was executed less than six months before the testator's death. The obvious purpose of the law was to prevent undue pressure to make such contributions in a will.

Barkett held that the state law in this case was both underinclusive and overinclusive and again cited the equal protection clause of the U.S. Constitution, claiming that "underinclusive or overinclusive classifications fail to meet even the minimal standards of the rational basis test." She cited no federal authority for this proposition. Indeed, the U.S. Supreme Court has held exactly the opposite, namely, that a classification does not violate the equal protection clause simply because it "is to some extent underinclusive and overinclusive."[85] She faulted the statute for drawing a line at six months when some gift provisions added to a will earlier might be coerced, while others added later might be made knowingly and willingly.

"At her confirmation hearing, Barkett was again asked about her citing the U.S. Constitution when state constitutional grounds

were sufficient for her conclusion. She actually denied that equal protection was 'at all the focus of what concerned me in Zrillic.' Even though she explicitly cited the federal equal protection clause in Zrillic, she claimed at her hearing that 'when I am thinking equal protection, generally I am thinking in terms of the prior case law of my own court in my own State.'"

Barkett's opinion fails the rationality test and is another example of her cloaking her own policy preferences in legal-sounding language. Very little legislation could survive the kind of test that Barkett created in this case, since most statutes draw lines (many involving specific time limits). Again, she chose to invoke the U.S. Constitution when state law grounds were fully sufficient to reach her desired result.

*D. Civil rights and quotas*

Barkett served on the Florida Commission on the Status of Women. This group's February 1993 report recommended legislation mandating that 50% of the members on all state boards, commissions, and other decisionmaking bodies be women. Most rational people would identify this as a quota. Black's Law Dictionary similarly defines "quota" as "a proportional part or share. . . . An assigned goal . . . a limiting number of percentage."[86] Barkett was quoted in the St. Petersburg Times as insisting this was "not in the context of a quota system. It is simply an acknowledgement that women make up one-half of the population of this state." This is utter nonsense. The percentage of women in the Florida population may be the way the commission arrived at its quota, but its recommendation was for a quota system nonetheless. The Orlando Sentinel Tribune reported that even Democratic Governor Lawton Chiles opposed the commission's proposal because he said it would indeed create a quota system.

Foster v. State (1993).[87] Foster killed a white man by slitting his throat, dragging him into some bushes, and slitting his spine. He then robbed the corpse. Foster's lawyers delayed his execution for nearly two decades, finally arguing that killers of white victims were more likely to receive the death penalty than killers of black victims. The U.S. Supreme Court had already rejected this statistically manipulative way of avoiding the merits of individual cases, saying that convicted killers claiming racial discrimination must actually prove racial discrimination in their own case.[88] In *Foster*, the Supreme Court of Florida followed this common sense course.

Barkett dissented. Referring repeatedly to "unconscious racism" pervading the criminal justice system, Barkett opposed any "standard that requires showing . . . purposeful discrimination" and would recognize a constitutional equal protection claim by convicted murderers based on statistical evidence alone. This includes evidence about the disposition of murder cases—the extent of the theory rejected by the U.S. Supreme Court—but "also other information that could suggest discrimination, such as the resources devoted to the prosecution of cases . . . and the general conduct of a [prosecutor]'s office, including hiring practices and the use of racial epithets and jokes."

*D. Partiality*

Pursuing an aggressively activist approach to judging, Barkett often turns from judge to legislator. She also turns from judge to advocate. This raises very disturbing questions about her ability to render impartial justice.

Burr v. State (1987).[89] Barkett's activism goes even beyond reaching out to construe a case as it is brought to her in any way that will treat a killer with empathy. Her empathy also leads her to decide cases on grounds not even raised by a killer appearing before her. In this case, Burr was convicted of first degree murder and robbery with a firearm. The Supreme Court of Florida affirmed his death sentence and Burr filed a motion for post-conviction relief, claiming ineffective assistance of counsel. The court voted 6–1 to reject this argument.

Barkett again cast the lone vote to void the death sentence, but for a reason the killer never even raised! She wrote that "I am deeply troubled . . . and cannot see the sense in waiting for a formal petition for writ of habeas corpus to argue a point I believe should have been argued on direct appeal."[90] This clearly crosses the line between judge and advocate; because Barkett thinks an argument "should have" been raised but was not by the lawyer actually representing the convicted killer, Barkett sees no problem taking up his cause and doing the work herself. It is one thing to display the kind of empathy and aggressive activism, as Barkett clearly does, regarding the cases that are actually brought before the court. It is something even more egregious to attempt literally to create a case that does not actually exist because it would be more favorable to the convicted killer!

In re Constitutionality of Senate Joint Resolution 2G (1992).[91] The Supreme Court of Florida approved a legislative resolution reapportioning the state for electoral purposes. The U.S. Department of Justice objected to the plan regarding one county because "there are no districts in which minority persons constitute a majority of the voting age population." The legislature refused to modify the plan so the court invited interested parties to submit proposals, choosing a plan that "gives minority voters in the [county] the greatest opportunity to elect a senator of their choice."

The entire substance of Barkett's separate opinion reads: "I am loath to agree to any of the convoluted plans submitted under these hurried circumstances. . . . If I had to choose only among those presented, however, I would choose the plan submitted by the NAACP simply because this is the organization that had traditionally represented and promoted the position that advances all minority interests." In so doing, Barkett chose to decide this case not on the basis of the arguments and evidence presented on the legal questions involved, but by the identity of the parties before her. This is the antithesis of equal justice under law.

"At her confirmation hearing, Barkett admitted that her words were 'very inartful.'"

University of Miami v. Echarte (1993). This case is reviewed more thoroughly above. In October 1991, the Academy of Florida Trial Lawyers submitted an amicus brief in this case arguing that statutory caps on noneconomic damages in medical malpractice cases are unconstitutional. In 1992, the Academy established the Rosemary Barkett Award end, in November 1992, Barkett agreed to present the first award at the organization's annual convention. That gathering took place one week after Barkett won her retention election, after significant contributions of time and money from the state's trial lawyers. In May 1993, Barkett wrote her dissent in Echarte arguing that statutory caps on noneconomic damages in medical malpractice cases are unconstitutional.

This kind of involvement with an organization then involved in litigation before her raises a serious question of impropriety.

III. THE DEFENDERS' ARGUMENTS

Perhaps the most significant thing about Barkett's supporters is that they never defend her actual record, the dozens and dozens of very controversial opinions that express the substance of the nominee's real views. They prefer instead to make three statistical arguments. They remind us, first, that Barkett won her last retention election in 1992; second, that she votes with the majority on her court a majority of times; and third, that she has voted for the death in a number of cases.

*A. She won her retention election*

First, Barkett's supporters note that she was retained by a 61% vote in 1992. They never mention that this is the second-lowest level of support of any justice ever sitting for retention. They also never mention that no justice in Florida history has ever failed to win retention for an obvious reason. Political scientist Stuart Rothenberg, Ph.D. says: "Retention elections aren't like other elections. Voters are far less likely to vote out an incumbent when the alternative is a vacancy than when they have competing candidates to choose from."

Neither Barkett nor her supporters mention the unprecedented level of opposition to her retention, reflecting deep dissatisfaction about the Supreme Court of Florida in general and Justice Barkett in particular.

Complaints about the Supreme Court of Florida's leniency in death penalty cases also came from the judiciary itself. Circuit Judge Richard Eade said last year that "if I sentenced Adolf Hitler and imposed the death penalty, the Supreme Court would say there is some mitigating factor. They'd probably overturn the death penalty because he made sure the trains ran on time and he wasn't lazy."[92]

State Attorney General Robert Butterworth publicly supported Barkett during her 1992 retention election. Yet just two years before, he said that "the Florida Supreme Court has begun to show itself substantially more liberal on crime issues than the U.S. Supreme Court."[93] Two of three cases Butterworth singled out for particular criticism were authored by Barkett. Both were later reversed by the U.S. Supreme Court.

Other expressions of opposition to retaining Justice Barkett in 1992 include:

28 assistant state attorneys in the First Judicial Circuit signed a letter dated October 20, 1992 "strongly opposed to Rosemary Barkett's retention. . . . [O]ur opposition stems as much from her judicial activism as it does from our dissatisfaction with her judicial opinions. She has repeatedly sided with criminals and defense lawyers on issues ranging from the death penalty, double jeopardy, statutory constructions, to search and seizure. . . . Simply stated, Justice Barkett is a judicial activist whose beliefs and agenda are not consistent with those of main stream citizens."

The Fraternal Order of Police Lodge #69 in Vero Beach voted to oppose Barkett's retention because of "her preferential treatment being given to criminals and the lack of concern shown for victims." They noted that in more than 150 criminal cases, Barkett voted in favor of law enforcement just five times.

The Polk County Chiefs Association voted unanimously to oppose Barkett's retention, stating that "[h]er record as it relates to criminal justice matters and the manner in which she has undermined an already troubled system were cause for shock and concern to all present." The Dade County Association of Chiefs of Police also voted to oppose Barkett.[94]

Writing in the Orlando Sentinel, the state attorney for the Ninth Judicial Circuit, stated that "I do not stand alone in my opposition to Barkett. A number of other state attorneys have publicly stated their opposition, as well as at least 16 sheriffs, dozens of police chiefs and hundreds of police officers."[95]

A full 21 percent of Florida lawyers opposed her, the highest negative tally of the four state supreme court justices considered for retention in 1992[96] and "the second-lowest in the 18 Supreme Court retention elections since they began in 1980."[97] The only supreme court justice who received a lower rating "was tainted by scandal and nearly impeached."[98]

A newspaper ad listed 49 chiefs of police, 18 country sheriffs, and six state attorneys opposing Barkett's retention. By letter dated October 29, 1992, Jerry Blair, state attorney for the Third Judicial Circuit, confirmed that five more country sheriffs in his jurisdiction had formally announced their opposition as well. By letter of the same date, Tom Tramel, Sheriff of Columbia County, announced a list of 21 county sheriffs opposed to Barkett.

Announcing his opposition to Barkett's retention on October 29, 1992, Bruce Colton, state attorney for the Nineteenth Judicial Circuit, stated that she "has demonstrated that she will not follow precedent, and has led the charge to change the law in several areas so that it provides a greater benefit to those convicted of crimes. The truth is that her rulings have adversely affected the ability of the officer on the street and the prosecutor in the trenches to do their job effectively, and she has never demonstrated a care for victims of crimes. . . . Barkett has a judicial philosophy that embraces a social agenda that is clearly out of touch with the legitimate needs of all law abiding citizens in this state."

William Meggs, state attorney for the Second Judicial Circuit, announced his opposition to Barkett's retention by a letter dated August 11, 1992, which stated that "the decisions of Justice Barkett hinder and defeat the efforts of our law enforcement officers on the front lines of [the drug] war . . . Those of us who labor in the criminal justice arena are very concerned with protecting the rights of those accused of crimes. However, the pendulum has swung so far protecting the accused that our streets are not safe for law abiding citizens."

B. She votes with the majority most of the time

Second, Barkett's supporters claim that she votes with the majority the majority of times. Yes, and on the U.S. Supreme Court, conservative Justice William Rehnquist and liberal Justice William Brennan often voted together as well. In April 1987, the Washington Post speculated that Justice Antonin Scalia, the Court's most conservative member, would actually strengthen the liberal wing of the Court because he was voting with Justice Brennan so often.

The Supreme Court of Florida decides two-thirds of its cases by unanimous votes, meaning only that liberal activists vote with their more restrained colleagues on relatively easy cases. Senator Orrin Hatch, ranking member of the Judiciary Committee, stated in a Senate floor speech on March 22, 1994, that "a large number of cases of any appellate court are, frankly, routine, and I would expect that virtually all judges would rule unobjectionably in most cases before them."[99] This also means most judges will vote the same way in most of those cases.

Just as Barkett's supporters ignore her actual record, they also exalt form over substance. Where it counts, Barkett stakes out clearly activist positions placing her outside the mainstream of what is required for the federal courts. Looking at the easy cases, where Barkett or any other judge would vote with the majority, still ignores—as Barkett's supporters routinely do—the many controversial opinions she has written.

C. She has voted for the death penalty

The heart of the case for this nomination is a single number. In an attempt to overcome the nominee's activist record, Barkett's supporters claim that she has "voted for the death penalty" in 275 cases. This number comes from Professor Stephen Gey of Florida State University School of Law and is offered by the White House as supposed proof that Barkett is "tough on crime." The media outlets which quickly repeated—but did not examine—this statistical claim, make similar statements. Responding to a column in the Wall Street Journal,[100] Professor Gey wrote that Barkett "has voted to uphold the death penalty more than 200 times."[101] A reporter for the St. Petersburg Times wrote that "she has voted to uphold the death penalty many times."[102] The Wall Street Journal reported that Barkett "has voted more than 200 times to affirm capital sentences."[103]

None of these statements is true. The list of cases in which Barkett's supporters claim she has "voted for the death penalty"' is so full of misrepresentation as to constitute an attempt deliberately to mislead the U.S. Senate.

This analysis offers a brief overview of how deceptive and unreliable this list is. Each case discussed below is on the Gey/White House list and represented by Barkett's supporters as a "vote for the death penalty." Even this cursory review shows that the foundation for the most critical argument in favor of the Barkett nomination is fundamentally flawed and inaccurate. As such, the case for her nomination collapses and the Senate is left with the many controversial opinions reflecting aggressive activism and views far outside the mainstream that remain undefended because they are indefensible.

1. Cases not properly counted as "votes for the death penalty"

The claim that Barkett has "voted for the death penalty" in 275 cases leaves the impression that the vote in each of these cases was actually on the death penalty. This is not true at all. In fact, the list includes many cases where Barkett actually voted against the death penalty. Many of the cases on the list should not be there at all. Barkett's supporters, for example, count the following as "votes for the death penalty":

Cases in which Barkett voted for the conviction but explicitly voted against the death sentence.[104]

Cases in which the court refused, but Barkett would grant, a stay of execution.[105]

Cases in which the court refused, but Barkett would grant, some post-conviction relief for the killer.[106]

Cases in which the court refused, but Barkett would grant, a stay of execution and other post-conviction relief for the killer.[107]

Cases in which Barkett joined the court in granting a stay of execution.[108]

Cases in which Barkett joined the court in vacating a death sentence.[109]

Cases in which Barkett joined the court in granting post-conviction relief for the killer.[110]

Cases in which Barkett would grant more post-conviction relief for the killer than the court.[111]

Cases in which Barkett joined the court in reducing a sentence from death to life.[112]

Cases in which Barkett dissented from the court's denial of post-conviction relief and a stay of execution for the killer.[113]

None of these cases, or many others like them, properly belongs on any list of "votes for the death penalty."

Believe it or not, Barkett's supporters are attempting to persuade the U.S. Senate, the media, and the American people that a vote to vacate a death sentence is a "vote for the death penalty." They claim that a vote against a death sentence is nonetheless a "vote for the death penalty." How can they possibly justify this?

First, the list includes many cases in which the merits of a killer's conviction and death sentence had already been decided, but the killer was still trying to avoid execution by making motions for a variety of post-conviction relief. Barkett's supporters sometimes refer to these as votes "to enforce" the death penalty rather than votes "for" the death penalty. Any time, for example, the court denies a motion for post-conviction relief—no matter how frivolous or repetitious—the case would go on the list because that decision's effect was to allow implementation of the death penalty.

Second, the list includes many cases in which Barkett, either with or against the court, would oppose some form of post-conviction relief (justifying its placement on the list as a vote to "enforce" the death penalty) but would grant some other relief (dictating the actual outcome in the case).

2. Gimmicks for inflating Barkett's "votes for the death penalty"

In addition to including many cases which do not properly belong on any legitimate list of "votes for the death penalty," Barkett's supporters also use various gimmicks to inflate the number even further. The first is multiple counting of cases reviewing the merits of a killer's conviction and death sentence and all subsequent efforts by the same killer to avoid execution.[114]

A second gimmick is multiple counting the very same case when the court denies different kinds of post-conviction relief at the same time. Death-row inmates can pursue two different avenues of relief after the Supreme Court of Florida rules against them on the merits of their conviction and sentence. The first is under Florida Rule of Criminal Procedure 3.850 and the other is a petition for a writ of habeas corpus. Convicted killers often file a Rule 3.850 motion in the trial court and add a habeas petition when appealing that motion's denial. The Supreme Court of Florida will often consider both requests for post-conviction relief together and decide both matters in the same opinion. Barkett's supporters count such cases at least twice.[115]

As Senator Orrin Hatch put it: "This doublecounting has the predictable effect of padding the list of cases in which the White House says that Justice Barkett has voted to enforce the death penalty. Even more remarkably, it has the perverse effect of including in this list of supposed votes to enforce the death penalty numerous cases in which Justice Barkett has in fact voted to grant relief to the petitioning convicted murderer."[116]

Consider, for example, that in Adams v. State,[117] the Supreme Court of Florida affirmed the conviction and death sentence, affirmed the trial court's denial of Adams' mo-

tion to vacate the judgment, denied Adams' motion for a writ of habeas corpus, and affirmed the trial court's denial of Adams' motion to vacate the judgment two more times. In Professor Gey's analysis, any justice voting with the majority in these decisions would receive five "votes for the death penalty." Yet each of these rulings—on the merits of a conviction and sentence, reviewing a trial court's denial of a motion to vacate, and considering a motion for a writ of habeas corpus—has a different legal standard, raises different issues, and requires a different method of analysis. None but the substantive review on the merits actually considered the conviction of a death-eligible crime or the death sentence itself.

A third gimmick is counting decisions on purely procedural issues as "votes for the death penalty."[118]

A fourth gimmick is counting decisions where Barkett explicitly states opposition to precedent which precludes post-conviction relief as "votes for the death penalty." In Hamblen v. State,[119] the Supreme Court of Florida held that a trial court is not automatically required to appoint counsel to present evidence against imposing the death penalty on someone convicted of a capital crime when that individual chooses not to present such evidence. Barkett dissented. In several subsequent cases, she appeared to join the majority in one of those "votes for the death penalty," but specifically said that she adhered to her dissent in Hamblen, meaning that she really opposed imposition of the death penalty in those cases.[120]

As usual, it is what Barkett's supporters do not say that tells the real story. As Senator Bob Dole put it in his Senate floor speech on February 24, 1994:

"Yes, it is true that Justice Barkett has, on numerous occasions, joined with her colleagues on the Florida Supreme Court in voting to uphold the imposition of the death penalty. But it's also true that she is the most anti-death penalty member of the Florida court, having dissented more than one hundred times—and often without explanation—from the court's decision to enforce a capital sentence. By contrast, Justice Barkett has never—not once—dissented from a majority decision of the Florida Supreme Court that granted relief to a convicted capital murderer."

In other words, she has dissented from the majority to argue that the court should be more lenient on a convicted killer, but has never dissented from the majority to argue that the court should be more harsh.

IV. BARKETT'S RECORD IS FAR OUTSIDE THE MAINSTREAM

In many areas, Barkett's stated positions are at odds with clear holdings of the U.S. Supreme Court, congressional decisions, and views of criminal justice officials around the country. Here are just a few examples.

Executing Minors. In LeCroy above, Barkett was alone in stating that executing anyone under the age of 18 violates the U.S. Constitution. Her position would prevent the states as well as the federal government from ever executing minors, no matter how brutal the crime or how mature the criminal. The U.S. Supreme Court has rejected this blanket position.[121] On November 8, 1993, the U.S. Senate rejected a proposal to prohibit even the states from executing anyone under the age of 18. The following Senators voted against the measure:

Baucus (MT), Bennett (UT), Bond (MO), Breaux (LA), Brown (CO), Bryan (NV), Burns (MT), Byrd (WV), Cochran (MS), and Craig (ID).

D'Amato (NY), Daschle (SD), Dole (KS), Domenici (NM), Exon (NE), Faircloth (NC), Feinstein (CA), Ford (KY), Gorton (WA), and Graham (FL).

Gramm (TX), Grassley (IA), Hatch (UT), Heflin (AL), Helms (NC), Johnston (LA), Kassebaum (KS), Kempthorne (ID), Kerrey (NE), and Lieberman (CT).

Lugar (IN), Mack (FL), Mathews (TN), McCain (AZ), McConnell (KY), Murkowski (AK), Nickles (OK), Nunn (GA), Packwood (OR), and Pressler (SD).

Pryor (AR), Reid (NV), Riegle (MI), Roth (DE), Sasser (TN), Simpson (WY), Smith (NH), Specter (PA), Stevens (AK), Thurmond (SC), Wallop (MY), and Warner (VA).

Pornography and Obscenity. In Stall above, Barkett insisted that all obscenity laws are unconstitutional. The U.S. Supreme Court has rejected this position for decades, holding instead that obscenity is not protected by the Constitution at all.[122] On November 4, 1993, the U.S. Senate voted 100–0 to repudiate the Reno Justice Department's effort to weaken interpretation of the federal child pornography statute and, six days later, President Clinton also called for "the broadest possible protection against child pornography." The Supreme Court has held that child pornography is similarly unprotected by the Constitution.

Racial Statistics and the Death Penalty. In Foster above, Barkett argued that statistical ratios comparing the race of murders and victims to society at large can establish an equal protection constitutional claim against implementation of the death penalty. As Senator Hatch put it, this position "would virtually paralyze implementation of the death penalty."[123]

When it debated the 1990 crime bill, Congress considered the "Racial Justice Act" which would have established this kind of numbers game. It would have allowed by defense lawyer with a calculator to void the death penalty. The Los Angeles Times (4/23/90) concluded that "the practical effect may be to abolish the death penalty nationwide." In a letter dated March 12, 1990, the attorneys general of 23 states with death penalty statutes stated their opposition to this measure which, they wrote, "is designed to do nothing less than end the death penalty in this country." Barkett's statistical theory goes far beyond the Racial Justice Act by allowing consideration of a much broader universe of statistics, including budget allocations, hiring practices, and intra-office humor.

The following presently serving U.S. Senators were in the majority that rejected the Racial Justice Act in 1990:

Baucus (MT), Bingaman (NM), Bond (MO), Breaux (LA), Bryan (NV), Bumpers (AR), Burns (MT), Byrd (WV), and Coats (IN).

Cochran (MS), D'Amato (NY), Dole (KS), Domeninci (NM), Exon (NE), Ford (KY), Gordon (WA), Graham (FL), and Gramm (TX).

Grassley (IA), Hatch (UT), Heflin (AL), Helms (NC), Hollings (SC), Johnston (LA), Kassebaum (KS), Lieberman (CT), and Lott (MS).

Lugar (IN), Mack (FL), McCain (AZ), McConnell (KY), Murkowski (AK), Nickles (OK), Nunn (GA), Pressler (SD), and Pryor (AR).

Robb (VA), Roth (DE), Shelby (AL), Simpson (WY), Specter (PA), Stevens (AK), Thurmond (SC), Wallop (WY), and Warner (VA).

Senator Robert Dole (R–KS) announced his opposition to Barkett on the Senate floor on February 24, 1994. In his floor speech, he noted the Supreme Court of Florida's rejection of the "statistical-evidence defense" in Foster and the similarity of Barkett's position in that case to the Racial Justice Act which the Senate, let by Senator Bob Graham (D–FL), rejected in 1990. He quoted Senator Graham from the debate on the Racial Justice Act as saying: "The very nature of the criminal justice [system] does not lend itself to statistical precision. . . . The Constitution requires an individualized determination as to the appropriateness of the death penalty."

Senator Graham was obviously in a difficult position, having led the opposition to legislation in 1990 embodying this radical theory while supporting a judicial nominee in 1994 who embraces an even more radical version of the same theory. He gave a floor speech hours after Senator Dole's remarks in which he tried to draw a clear distinction between the two. He insisted that the Racial Justice Act dealt with broad "statistical evidence as to a wide variety of cases" covering "an entire judicial jurisdiction."[124] In contrast, he argued that Barkett's theory in Foster related to "a specific act of racial discrimination"[125] by "a specific Florida State prosecutorial official."[126] Senator Graham said, simply put, that the Racial Justice Act's theory was broad while Barkett's theory in Foster was narrow.

To prove his point, Senator Graham asked that Barkett's opinion in Foster be included in the public record. In so doing, he acknowledged that Barkett's own words answer the question about her views on this issue. That opinion appears at pages S1838–39 in the February 24, 1994, edition of the Congressional Record. It omits the three most important paragraphs demonstrating that Barkett's theory goes far beyond the Racial Justice Act. One of those paragraphs reads:

"Statistical" evidence should be construed broadly to include not only historical analysis of the disposition of first-degree murder cases in a particular jurisdiction, but also other information that could suggest discrimination, such as the resources devoted to the prosecution of cases involving white victims as contrasted to those involving minority victims, and the general conduct of a [prosecutor]'s office, including hiring practices and the use of racial epithets and jokes.

Senator Graham said that Barkett's theory related only to specific acts by a specific prosecutor in a specific jurisdiction. Barkett's opinion says that relevant evidence goes beyond "the disposition of . . . cases in a particular jurisdiction." The Racial Justice Act dealt only with statistical evidence derived from analyzing the disposition of actual murder cases. Barkett's theory says that relevant evidence goes completely beyond such evidence to include budget allocations, hiring decisions, and intra-office humor. Senator Graham offered Barkett's opinion but eliminated the very portion that proved him dead wrong.

Senator Graham's chief of staff said that the mysteriously missing paragraphs were "contained on a single missing facsimile page that may have been omitted by the staff who assembled the Record."[127] He said that they would know for sure by Monday, February 28. As of March 29, 1994, Senator Graham's office had not produced any missing facsimile page or any other evidence to explain how the very three paragraphs most critical to the dispute between Senator Graham and Senator Dole not only ended up cleanly isolated on one facsimile page, but also were the only paragraphs to be omitted from the opinion Senator Graham entered into the Congressional Record. It also remains a mystery why Senator Graham's of-

fice had to receive Barkett's opinion in Foster suddenly by facsimile since that opinion had been the focus of controversy for at least four months and Senator Graham has been Barkett's leading Senate supporter. Senator Graham has issued no clarification or admission that the paragraphs he omitted prove him wrong.

V. CONCLUSION

The proper way to evaluate a judicial nominee is by examining her judicial philosophy as reflected in her substantive record. Rosemary Barkett's aggressive judicial activism is evident throughout her record, across a range of issues. She goes out of her way to block attempts to enact criminal laws, to limit enforcement of criminal laws, and to prevent implementation of criminal laws. Barkett uses constitutional provisions such as the due process and equal protection clauses to legislate from the bench, all the while ignoring judicial precedent, wrongly citing the U.S. Constitution, and failing to properly defer to legislative judgments. Barkett's record clearly shows sympathy for rigid numerical quotas based on gender or race. That record also raises serious questions about her ability or commitment to dispense impartial justice—the very essence of the judicial function.

Barkett's supporters never defend the many controversial opinions and positions she has adopted over the years. Rather, they retreat to three basic statistical arguments. The most important of these is that Barkett has voted for the death penalty in many cases. In what can only be called a scandal, however, the list offered by the White House of these cases contains so many misrepresentations as to constitute an attempt deliberately to mislead the Senate, the media, and the American people.

Finally, Barkett has embraced positions on important issues, including execution of murderers under the age of 18, the "statistical evidence defense" to the death penalty, and obscenity laws that are far outside the mainstream. The U.S. Supreme Court and U.S. Senate have repeatedly rejected these positions.

[1] Director, Judicial Selection Monitoring Project, Free Congress Research & Education Foundation. B.A. with honors, Calvin College (1983); J.D. cum laude, State University of New York (SUNY) at Buffalo (1987); M.A., SUNY-Buffalo (1989). Law clerk, U.S. Court of Appeals, Third Circuit (1988-89).

[2] Article II, Section 2 states in part that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States."

[3] A project of the Free Congress Foundation's Center for Law & Democracy, the Judicial Selection Monitoring Project is supported by a coalition of more than 50 national and state organizations. It was launched in August 1992 to expand the Foundation's participation in the discussion over judicial nominations.

[4] Comment, "Justice Barkett's Feminist Jurisprudence," 46 *Univ. of Miami Law Review* 1161, 1162 (1992).

[5] *Id.* at 1175.

[6] *Id.* at 1178.

[7] 619 So.2d 231 (Fla. 1993).

[8] See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973).

[9] *State* v. *Ecker*, 311 So.2d 104, 109 (Fla. 1975).

[10] *Holliday* v. *City of Tampa*, 619, So.2d 244 (Fla. 1993); *E.L.* v. *State*, 619 So.2d 252 (Fla. 1993).

[11] *State* v. *Ecker*, 311 So.2d 104 (Fla. 1975).

[12] 570 So.2d 257 (Fla. 1990).

[13] *Id.* at 263 (Barkett, J., dissenting) (emphasis added).

[14] *Id.* at 263.

[15] 413 U.S. 15 (1973).

[16] *Stall*, 570 So.2d at 263.

[17] *Luke Records, Inc.* v. *Navarro*, 960 F.2d 132 (11th Cir. 1992).

[18] *Stall*, 570 So.2d at 263.

[19] *Id.* at 264 (Kogan, J., dissenting).

[20] *Id.* at 268.

[21] *Schmitt* v. *State*, 590 So.2d 404 (Fla. 1991).

[22] Florida Statutes § 827.001.

[23] Florida Statutes § 827.071.

[24] 560 So.2d 228 (Fla. 1990).

[25] See, e.g., *P.L.R.* v. *State*, 455 So.2d 363 (Fla.1984), *cert. denied*, 469 U.S. 1220 (1985); *Palmer* v. *State* 467 So.2d 1063 (Ct. App. 1985); *State* v. *Ellison*, 455 So.2d 424 (Ct. App. 1984); *State* v. *Redding*, 362 So.2d 170 (Ct. App. 1978).

[26] *Cross*, 50 So.2d at 231 (Barkett, J., dissenting).

[27] *Florida* v. *Cross*, 535 S.2d 282, 283 (Ct. App. 1988).

[28] 554 So.2d 1153 (Fla. 1989).

[29] *Id.* at 1158.

[30] *Florida* v. *Bostick*, 111 S.Ct. 2382 (1991).

[31] *Id.* at 2385.

[32] 595 So.2d (Fla. 1992).

[33] *Id.* at 2, quoting the trial judge who "accurately set forth the fact of this murder."

[34] A transcript of the tapes is available upon request from the Judicial Selection Monitoring Project.

[35] *Dougan*, 595 So.2d at 3, quoting the trial judge.

[36] Under Florida law, a jury convicting someone of a capital crime must separately consider whether to impose the death penalty. The death penalty is warranted if the "aggravating" circumstances outweigh the "mitigating" circumstances. Florida law lists 11 aggravators and seven mitigators. See Florida Statutes § 921.141. The U.S. Supreme Court has held that a jury may choose only from the aggravators listed in the statute but may consider any mitigators, whether listed or not. See *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *Lockett* v. *Ohio*, 438 U.S. 586 (1978) (plurality opinion).

[37] *Dougan*, 595 So.2d at 6 (McDonald, J., dissenting).

[38] Comment, *supra* note 4, at 1178.

[39] *Id.* at 7.

[40] *Id.*

[41] *Dougan*, 595 So.2d at 7-8 (emphasis added).

[42] *Id.* at 7.

[43] *Id.* at 8.

[44] *Id.*

[45] *Id.*

[46] 593 So.2d 191 (Fla. 1991).

[47] Id. at 195 (Barkett, J., concurring in part and dissenting in part).

[48] Id.

[49] Id.

[50] 533 So.2d 705 (Fla. 1988).

[51] Id. at 755-56 (emphasis added).

[52] Id. at 756, quoting Florida Statutes § 39.02(5)(c).

[53] Id. at 759.

[54] 614 So.2d 473 (Fla. 1993).

[55] Id. at 479.

[56] Id. (Barkett, J., dissenting).

[57] Id. at 480, citing Penry v. Lynaugh, 492 U.S. 302 (1989).

[58] 570 So.2d 257 (Fla. 1990).

[59] 564 So.2d 1060 (Fla. 1990).

[60] Id. at 1065 (Barkett, J., concurring). This is an example of how the label attached to an opinion written by a single justice can be very misleading. Here, Barkett agreed with the conviction but disagreed with the sentence, yet her separate opinion is labeled a "concurrence."

[61] 538 So.2d 829 (Fla. 1989).

[62] Id. at 832 (Barkett, J., concurring in part and dissenting in part). This opinion, in which Barkett agrees with the conviction but not the sentence, is labeled a partial concurrence/dissent. As noted above, her opinion in Porter, in which she also agreed with the conviction but not the sentence, is labeled a concurrence.

[63] 543 So.2d 1244 (Fla. 1989).

[64] 588 So.2d 983 (Fla. 1991).

[65] 581 So.2d 121 (Fla. 1991).

[66] 559 So.2d 1097 (Fla. 1990).

[67] 510 S.2d 881 (Fla. 1987).

[68] The 14th Amendment to the U.S. Constitution reads in part that "nor shall any State deprive any person of life, liberty, or property, without due process of law." State constitutions have a parallel provision.

[69] *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963).

[70] *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938).

[71] See *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

[72] 489 So.2d 1125 (Fla. 1986).

[73] She also held the provision violated the Florida Constitution.

[74] 619 So.2d 231 (Fla. 1993).

[75] The 14th Amendment to the U.S. Constitution states in part that "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

[76] *FCC* v. *Beach Communications*, 113 S.Ct. 2096, 2101-02 (1993) (emphasis added).

[77] *Nordlinger* v. *Hahn*, 112 S.Ct. 2326, 2331-32 (1992).

[78] *Id.* at 2332.

[79] 618 So.2d 189 (Fla. 1993).

[80] Florida Statutes § 766.203-206.

[81] Florida Statutes § 766.207.

[82] Florida Statutes § 766.207(7).

[83] Justice Kogan recused himself from this case.

[84] 563 So2d 64 (Fla. 1990).

[85] *Vance* v. *Bradley*, 440 U.S. 93,108 (1979).

[86] *Black's Law Dictionary*, Fifth Edition (St. Paul: West Publishing Co., 1979), at 1130.

[87] No. 76,639 (Fla. April 1, 1993).

[88] *McKleskey* v. *Kemp*, 481 U.S. 279 (1987).

[89] 518 So.2d 903 (Fla. 1987).

[90] *Id.* at 908 (Barkett, J., dissenting).

[91] 601 So.2d 453 (Fla. 1992).

[92] Associated Press, "Judge Says Hitler Could Avoid Death Penalty in Florida," *Tallahassee Democrat*, May 29, 1992.

[93] See Morgan, "State High Court's Rulings Called an Insult to Police," *St. Petersburg Times*, January 23, 1990.

[94] See O'Neal, "Barkett Camp Disputes Foes' Claims," *Orlando Sentinel*, September 30, 1992, at B-5.

[95] Lamar, "Lamar Responds to Editorial on Rosemary Barkett," *Orlando Sentinel*, September 10, 1992, at A-15.

[96] Associated Press, "Florida Bar Endorses Justice Barkett, But 21 Percent Oppose Her," *Miami Herald*, September 12, 1992, at 5B.

[97] Halldin & Reardon, "Barkett's Support Lags Behind Others in Poll of Lawyers," *Tampa Tribune*, September 12, 1992, at 1.

[98] Rado, "Barkett's Support in Bar Poll is Low," *Times*, September 12, 1992, at 6B.

[99] *Congressional Record*, March 22, 1994, at S3383.

[100] See Gigot, "Crime Choice: She's No Hanging Judge," *Wall Street Journal*, October 15, 1993.

[101] "Unjust Criticism of a Chief Justice," *Wall Street Journal*, November 9, 1993, at A19 (emphasis added).

[102] Dahl, "Florida's Ex-Nun Chief Justice Challenged as Appeals Choice," *Washington Times*, October 19, 1993, at A4 (emphasis added).

[103] Barkett, "Conservatives Tear a Page from Liberals' Book, 'Borking' Clinton's Nominees for Legal Positions," *Wall Street Journal*, November 29, 1993, at A14 (emphasis added).

[104] See, e.g., *Stewart* v. *State*, 549 So.2d 171,177 (Fla. 1989), where Barkett's opinion states: "I concur in the conviction, but dissent as to the sentence." Her supporters count this as a "vote for the death penalty."

[105] See, e.g., *Kennedy* v. *Wainwright*, 483 So.2d 424,428 (Fla. 1986) (Barkett "would grant the application for stay of execution"); *Kight* v. *Dugger*, 574 So.2d 1066, 1073 (Fla. 1990) (Barkett wrote that one of the killer's claims "requires an evidentiary hearing"); *Thomas* v. *Wainwright*, 486 So.2d 574, 577 (Fla. 1986) (Barkett "would grant the motion for stay of execution"); *Adams* v. *Wainwright*, 484 So.2d 1211, 1213 (Fla. 1986).

[106] See, e.g., *Kight* v. *Dugger*, 574 So.2d 1066, 1073 (Fla. 1990).

[107] See, e.g., *White* v. *State*, 565 So.2d 322, 323 (Fla. 1990) (Barkett "would grant a stay of execution and relief"); *Hamblen* v. *State*, 565 So.2d 320, 322 (Fla. 1990) (Barkett "would grant a stay of execution and relief").

[108] See, e.g., *Breedlove* v. *Singletary*, 595 So.2d 9 (Fla. 1992) (court denied habeas corpus relief but granted post-conviction relief and stay of execution); *Smith* v. *Dugger*, 565 So.2d 1293 (Fla. 1990), (court denied habeas corpus relief but granted stay of execution).

[109] See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990) (court denied post-conviction relief but granted habeas relief, vacated death sentence and remanded for new sentencing hearing).

[110] See, e.g., Harich v. Dugger, 542 So.2d 980 (Fla. 1989) (court granted post-conviction relief and remanded the case for an evidentiary hearing); Scott v. Dugger, 604 So.2d 465 (Fla. 1992).

[111] See, e.g., Heiney v. Dugger, 558 So.2d 398, 400 (Fla. 1990); O'Callaghan v. State, 542 So.2d 1324, 1327 (Fla. 1989).

[112] See, e.g., Cherry v. State, 544 So.2d 184 (Fla. 1989).

[113] See, e.g., Thomas v. State, 486 So.2d 577, 578 (Fla. 1986) (Barkett dissented from decision to deny post-conviction relief and stay of execution).

[114] See, e.g., Sims v. Singletary, 622 So.2d 980 (Fla. 1993); Johnston v. Dugger, 583 So.2d 657 (Fla. 1991); Mitchell v. Dugger, 595 So.2d 942 (Fla. 1992);

Ponticelli v. State, 618 So.2d 154 (Fla. 1993); Happ v. State, 618 So.2d 205 (Fla. 1993); Breedlove v. State, 595 So.2d 8 (Fla. 1992); Davis v. State, 620 So.2d 152 (Fla. 1993); Medina v. State, 586 So.2d 317 (Fla. 1991); Kelley v. State, 597 So.2d 262 (Fla. 1992).

[115] See, e.g., Turner v. Dugger, 614 So.2d 1075 (Fla. 1992) (Barkett on result only); Henderson v. Singletary, 617 So.2d 313 (Fla. 1993) (second motion for post-conviction relief, Barkett on result only); Parker v. Dugger, 550 So.2d 459, 461 (Fla. 1989) (second motion for post-conviction relief, first motion for habeas); Scott v. Dugger, 550 So.2d 459, 461 (Fla. 1989) (second motion for post-conviction relief, first motion for habeas); Scott v. Dugger, 604 So.2d 465 (Fla. 1992); Puiatti v. Dugger, 589 So.2d 231 (Fla. 1991); Mendyk v. State, 592 So.2d 1076 (Fla. 1992); Jennings v. State, 583 So.2d 316 (Fla. 1991); Johnston v. Dugger, 583 So.2d 657 (Fla. 1991) (Barkett on result only); Koon v. Dugger, 619 So.2d 246 (Fla. 1993); Kight v. Dugger, 574 So.2d 1066, 1073 (Fla. 1990).

[116] Congressional Record, March 22, 1994, at S3394.

[117] 543 So.2d 1244 (Fla. 1989).

[118] See, e.g., Gaskin v. State, 615 So.2d 679 (Fla. 1993); Mills v. Singletary, 606 So.2d 623 (Fla. 1992).

[119] 527 So.2d 800 (Fla. 1988).

[120] See, e.g., Clark v. State, 613 So.2d 412, 415 (Fla. 1992); Henry v. State, 613 So.2d 429, 434 (Fla. 1992); Durocher v. State, 604 So.2d 810, 812 (Fla. 1992); Henry v. State, 586 So.2d 1033, 1038 (Fla. 1991).

[121] See Thompson v. Oklahoma, 487 U.S. 815 (1988). Not surprisingly, Barkett insists in her lone dissent in LeCroy that the Supreme Court has "left this question open."

[122] See Miller v. California, 413 U.S. 15 (1973).

[123] Congressional Record, March 22, 1994, at S3394.

[124] Congressional Record, February 24, 1994, at S1835.

[125] Id.

[126] Id. at S1834.

[127] Roman, "Judicial Nominee's Missing Words Hit," Washington Times, February 26, 1994, at A5.

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[From the Washington Times, Oct. 15, 1993]

ROSEMARY BARKETT: CLINTON NOMINEE

(By Samuel Francis)

In his weekly radio address to the nation last week, President Clinton chose for his theme the subject of what a tough guy he is on crime. He seized the opportunity to plug his crime bill now before Congress and struck postures on the need to catch criminals, convict criminals, and—sometimes—kill criminals.

"This bill," preached the president, "will help to restore a system where those who commit crimes are caught, those who are found guilty are convicted, those who are punished—sometimes by imposition of the death penalty for especially serious crimes."

Well, no it won't. Whatever the merits of Mr. Clinton's crime bill, it will have no effect whatsoever on catching, convicting and punishing criminals. To do that, you have to have tough judges, and at the same time Mr. Clinton is blustering about his own toughness on crooks, he's sending to the federal bench some of the sorriest substitutes for judges since Joseph Stalin held the Moscow Show Trials.

One recent Clinton judicial appointment is Rosemary Barkett, now a justice of the Florida Supreme Court, whose name the administration sent up to the Senate Judiciary Committee last month. Her hearings for a seat on the 11th U.S. Circuit Court of Appeals haven't been scheduled yet, and if Mr. Clinton were wise, the hearings would never take place. Judge Barkett will be to the Clinton administration what Lani Guinier was to the Clinton administration.

In 1992, Judge Barkett joined in a dissent to a Florida capital punishment case that involved one of the most brutal racial murders in that state's history. The defendant, Jacob Dougan, was the leader of a group styling itself the Black Liberation Army, the "apparent sole purpose of which" the trial judge described as being to "indiscriminately kill white people and start a revolution and a race war."

In 1974 Dougan and four of his liberators kidnapped an 18-year-old white man at random, took him to a trash dump and stabbed him repeatedly. When their victim pleaded for his life, Dougan himself shot him twice. Dougan then made tape recordings of his boasting of the murder and sent one to his victim's mother. "Ah, it was beautiful," exulted the killer on the tape, "You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes."

After 18 years in what passes for a criminal justice system in this country, Dougan's death sentence was affirmed by the state supreme court, but not without one last gurgle from Judge Barkett about love and understanding. "This case," reads the dissenting opinion in which she joined, "is not simply a homicide case, it is also a social awareness case."

Dougan, you see, thought he was doing the right thing when he decided to slaughter white people, and that makes it different. "His frustrations, his anger, and his symbolic obsession of injustice overcame reason," Judge Barkett's dissent blathers. "The victim was a symbolic representation of the class causing the perceived injustices." Dougan shouldn't be executed, she concluded.

In other words, Judge Barkett endorsed the quackery that committing murder as a response to purported injustices, even if the victim himself had nothing to do with them, justifies a lighter sentence. That kind of reasoning is consistent with some of her other dissents as well.

In yet another death penalty dissent in 1991, Judge Barkett concluded that the killer, one Jerry Wickham, didn't merit death because at the time of the crime, he was a "mentally deficient, socially maladjusted individual." Wickham and his family were about to run out of gas, so he robbed and killed a passing motorist, taking $4.05 from his pockets.

"If the death penalty is supposed to be reserved for the most heinous of crimes and the most culpable of murderers," Judge Barkett herself wrote in dissent from the court's affirmation of the death sentence, "Jerry Wickham does not seem to qualify." You have to wonder. Just what sort of crime, in this woman's learned opinion, would be sufficiently heinous to qualify for a two-minute snuggle with Old Sparky?

There are several other such cases of Judge Barkett's dissents in death penalty cases, almost always on the most specious and subjective grounds. It's neither the law nor justice that guides her gavel but whatever feelings and heartthrobs flutter in her attic that day.

If Judge Barkett makes it through the Senate to a federal judgeship, she'll be within easy reach of a future seat on the U.S. Supreme Court, whence she could shoot her judicial poison into the jugular of the Constitution itself. Mr. Clinton knows that, so when he tells you how tough on crime he is, he's simply lying. With generals like Judge Barkett in charge of his war on crime, you can place your bets on the enemy.

Mr. HATCH. Mr. President, I yield 6 minutes to the distinguished Senator from Delaware.

The PRESIDING OFFICER (Mr. KERREY). The Senator from Delaware is recognized for 6 minutes.

Mr. ROTH. Mr. President, among the most serious responsibilities that the Constitution entrusts to those of us in this body is to provide our advice and consent regarding nominees to the Federal Bench. Every nominee, if confirmed, will potentially have a broadbased lifetime influence on the law. While we should be prepared to defer to the President's judgment in most cases, these nominees must be reviewed with careful scrutiny.

Based upon her judicial record and her testimony before the Judiciary Committee, I must oppose the confirmation of Florida Chief Justice Rosemary Barkett to be a judge of the U.S. Court of Appeals for the Eleventh Circuit. In a number of cases, Chief Justice Barkett has gone well beyond the proper judicial role into that more properly occupied by the legislature, ignoring precedent and well-settled principles of law in the process.

While I am troubled, for example, by Chief Justice Barkett's misuse of the Federal equal protection clause and of Federal substantive due process, which the nominee herself testified as being "careless," I am most disturbed by her philosophy regarding criminal law issues. At a time when violent crime has reached epidemic proportions throughout our Nation, I do not believe the American people will abide us confirming a nominee who has consistently and mistakenly accorded greater concern to those who break the law than to their victims or to those who enforce the law.

Let me provide some examples of Justice Barkett's troubling criminal law decisions. In the case of Stall versus State, Justice Barkett joined a dissent striking down a State obscenity statute, stating that, "A basic legal problem with the criminalization of obscenity is that it cannot be defined." That statement is contradicted by the U.S. Supreme Court's landmark obscenity decision in Miller versus California, which the nominee failed to even mention in her dissent.

Another important area of criminal law in which I believe Chief Justice Barkett goes beyond the acceptable limits of a judge's responsibility to fairly apply the law concerns death penalty cases.

One of the most disturbing of Chief Justice Barkett's opinions was the dissent she joined in the death penalty case of Dougan versus State. This case has been much discussed during the course of this nomination process. Briefly, this involved a grotesque murder of a hitchhiker, following which the killer sent tapes bragging about the murder to the victim's mother. The nominee joined a very troubling dissent that would have reduced the death penalty to life imprisonment, with eligibility for parole in 25 years. The dissent compared this cold-blooded, premeditated murder—which the evidence indicated was motivated by racial hatred—with the emotional conditions of a disenchanted marriage that results in

domestic homicide. That was the basis on which she voted to not impose the death penalty. I believe this is an unacceptable standard for judges to use. We rely on judges to apply the law evenly and to objectively apply penalties based on the facts of the case. To expect less is to badly distort our criminal justice system.

There are many other criminal cases which could be cited in which this nominee has shown an untoward concern for criminal defendants and only perfunctory concern for criminal victims.

Judges have the ability to either enforce or reverse the efforts of legislators, police and prosecutors in fighting our Nation's violent crime problem. It does little good for Congress to pass tough crime bills if our efforts are thwarted by judges motivated more by sympathy for criminals than by an understanding of the fear honest citizens face each day on the streets of our Nation. What kind of message is the administration sending when it talks tough on crime in town meetings but sends up judicial nominees who are squishy soft on crime? I would urge my colleagues to reject this nomination.

Mr. President, I yield the floor.

Mr. HATCH. Mr. President, I yield 9 minutes to the distinguished Senator from Iowa.

The PRESIDING OFFICER. The Senator from Iowa [Mr. GRASSLEY], is recognized for 9 minutes.

Mr. GRASSLEY. Mr. President, I thank Senator HATCH for his leadership on this matter and taking the time to make sure that this issue is fully discussed. This nomination is important from the standpoint of the signal that it sends about the real predilection of this administration on judicial appointments. It is quite contrary to the direction that they want us to believe that they are taking, of being tough on crime. That aspect of this debate is as important as the personal qualifications of their nominee.

So because of the importance of this nominee, as well as very substantive reasons for disagreeing with this nominee's qualifications to be on the eleventh circuit court of appeals, I rise to talk for a few moments about this nomination, and to say why I oppose Justice Rosemary Barkett for the U.S. court of appeals for the eleventh circuit.

When the Judiciary Committee considered this nomination—that was just last month—I voted against her. I want to explain the reasons why I will vote against her again today when the full Senate votes.

First, I share the concerns that many of my colleagues have expressed regarding her theories on criminal law. Many of her decisions are quite inconsistent with President Clinton's stated stance of being tough on crime and wanting to do everything he can to fight crime. This nominee substitutes her own subjective sense of fairness, often finding defendants who have committed outrageously violent murders to be victims of their own circumstances.

Second, in my discussions with her, she conceded that she had made mistakes in some of her opinions, or that they were "inartfully drafted." Those last two words are her words.

Mr. President, we must demand of people who are being placed on the judiciary, particularly on the highest courts of this land, the highest, and most rigorous standards.

There can be no place for a judge on this court, or any court, who says that she "mistakenly" cited the U.S. Constitution in an obscenity case as a basis for her own reasoning that there was no standard under which obscenity can be defined. In making that statement, she ignored the Miller test and again applied her own standard of fairness.

Third, I have very serious doubts about her impartiality. In a reapportionment case, among many that I could cite, she asserted that she would choose a specific reapportionment plan just because it was submitted by a particular party—the NAACP. In her words: "because it is the organization that has traditionally represented the position that advances all minority interests."

Will she decide other cases on the basis of who the litigant is instead of what the law is? And in the Echarte case, she wrote a dissent adopting the position of the Florida Trial Lawyers, stating that a cap on noneconomic damages in medical malpractice cases was unconstitutional. It just happens that that group had just named an award for her. She presented the award at the Florida Trial Lawyers Annual Dinner.

Let us look at the ABA code of judicial conduct, canon 2, in regard to this. It states:

> A judge should not lend the prestige of her office to advance the private interests of others, nor should she convey or permit others to convey the impression that they are in a special position to influence her.

Then in canon 3, the ABA code states that:

> A judge should disqualify herself in a proceeding in which her impartiality might reasonably be questioned.

The Judicial Conference has interpreted these canons and applied them in situations involving Federal judges. There is a 1975 advisory opinion which states the following:

> Judges who have achieved a preeminence such as to prompt public recognition [as in a public testimonial or award] should ordinarily be able to accept such honors.

It goes on to say:

> Before accepting such recognition, however, a judge should take certain factors into consideration.

> Notwithstanding the spirit in which the award was proffered, it should not be accepted from an organization whose public image embodies a clearly defined point of view on controversial legal, social, or political issues. Neither should [it] be accepted from an organization which is apt to be before the court as a litigant.

Canon 5 cautions against a judge being a speaker or guest of honor at an organization's fundraising events. The canon states:

> In addition to the nature of the organization involved, the judge should be concerned that his presence is not merely a device to promote publicity and the sale of tickets.

I am not familiar enough with the trial lawyers' dinner in this specific case to know if it was in fact a fundraiser. But I do not think there can be any disagreement about the legal and political positions of the trial lawyers, and they were before the Florida Supreme Court in the Echarte case at the time Justice Barkett lent her name to the award.

For these reasons, I cannot support elevating Justice Barkett to the eleventh circuit.

I yield the floor and the remainder of the time allotted to me.

Mr. HATCH. Mr. President, how much time does the distinguished Senator from Idaho need?

Mr. CRAIG. Five minutes.

Mr. HATCH. I yield 5 minutes to the Senator from Idaho [Mr. CRAIG].

The PRESIDING OFFICER. The Senator from Idaho [Mr. CRAIG], is recognized.

Mr. CRAIG. Mr. President, I thank my colleague from Utah, the ranking senior Republican on the Judiciary Committee, for yielding me time to speak in relation to the nomination of Chief Justice Rosemary Barkett to a seat on the U.S. court of appeals of the eleventh circuit.

Some today have called literally any opposition to this confirmation politically motivated. However, as my colleagues know, in the past I have voted to confirm even when political beliefs of the nominee differed radically from my own.

Frankly, not all of my advisers have thought that wise. In fact, some of my constituents would prefer me to make political beliefs a litmus test for judicial nominees. My respect for the Constitution, though, frankly, Mr. President, prohibits me from doing that.

If the President's powers to nominate a judge means anything, it must mean the power to nominate one of the President's own philosophical bent or political views. But, just as important, if the Senate's power to confirm means anything, it must mean the responsibility to disagree with the President when the nominee is unqualified for reasons other than political beliefs.

My decision on a judicial nominee is based on my evaluation of his or her character, competence, and judicial philosophy; that is, how the nominee

views the duty of the court and its scope and authority. It is my strong belief that members of the Federal judiciary should neither rubberstamp legislative decisions nor overreach to act as a substitute legislator.

In this case, character is not in question. On the contrary, there is much to admire about a nominee who overcame language and cultural barriers to become the first woman to serve on the Florida Supreme Court, whose background includes service as a nun and a school teacher, who is a highly regarded and awarded achiever for the Florida bar.

As to competence, I know this nominee received the American Bar Association's highest rating. Even so, I am aware that some members of the legal profession believe Justice Barkett's very unusual handling of constitutional and other issues puts her competency in reasonable question. While that may be a legitimate and important subject to debate among lawyers and judges trained in legal theory, I am not going to attempt to enter into that scholarly debate—except to note in passing that competence does not appear to be a question in this instance.

Some of those unusual opinions do, however, concern me because of what they reveal about the nominee's judicial philosophy. In short, this judge does not appear to be constrained by constitutional limits or on judicial decisionmaking, and instead has given every indication that she is likely to pursue a political activist agenda if appointed to a position on the Federal bench.

An example that I found particularly striking was her opinion on the LeCroy case. The perpetrator in the case was 17 years and 10 months old at the time of the crime. The sentencing judge found that this was no constitutional bar in imposing a death penalty. Although he gave careful consideration to the age factor, he found the individual in question was mentally and emotionally mature enough to have realized the difference between right and wrong in the brutal killing of another human being. Furthermore, it was a longstanding principle of Florida law that a child of any age charged with a capital crime must be tried and handled in every respect as if he or she were an adult.

The Florida Supreme Court voted 6 to 1 to affirm the death penalty, with Judge Barkett the lone dissenter. Remarkably, her view was that imposing the death penalty violated both the Florida law and the eighth amendment to the U.S. Constitution, a position the U.S. Supreme Court later rejected.

This Senator was one of the majority in this body who voted 6 months ago to table a proposal banning the death penalty for juveniles. I can understand the discomfort some have with this issue, and I can even understand why Justice Barkett may have personally abhorred the decision of the sentencing judge. However, that does not justify ignoring State law forcing Federal jurisprudence to conform to her own sociological theory.

There are clearly other issues that question whether this person, if properly placed, will stay within the bounds of the Constitution or move on as she has throughout her career on her political philosophy in rendering decisions based on that. It is for that reason that I stand in opposition to her confirmation and will vote accordingly.

I yield back the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. HATCH. I yield 5 minutes to the minority whip.

The PRESIDING OFFICER. The Senator from Wyoming is recognized.

Mr. SIMPSON. Thank you, Mr. President. I want to make a very brief comment about this nomination. Mr. President, Justice Barkett and I had a long visit in my office to discuss some of her cases, as well as her background and qualifications for the circuit court of appeals position to which she has been nominated. It was a very good visit. I was very impressed by her as a person, and I enjoyed very much my time with her.

We discussed a few of Justice Barkett's more controversial cases, and she explained her position and the reasons for her decisions or dissents. I thought that was very important.

Mr. President, in most cases she attributed the controversy over her decisions to the critics lack of understanding of "capital punishment jurisprudence." Justice Barkett pointed out that the Supreme Court requires justice's "to look behind every case—considering aggravating factors as well as mitigating factors."

That is indeed the law of the land, but I do not agree with Justice Barkett's application of that law in certain cases during the years she has served on the Supreme Court of Florida.

Mr. President, I want to point out here that Justice Barkett obviously has the legal and judicial experience for the Federal bench, and I have no doubt that her judicial temperament is fully acceptable and appropriate.

However, I am very disturbed when she finds it necessary during her hearing before the Judiciary Committee to retract or explain that she mis-spoke—"mis-wrote" actually would be the term—when she cited the U.S. Constitution as the basis for a decision she authored in a particular case. That simply should not occur.

I am also concerned that Justice Barkett may too quickly, and too often, see the criminal as a "victim of society," and argue that the criminal's illegal activity should somehow be mitigated because of the perceived injustices that he or she has suffered at the hands of our society, a convenient scapegoat in our times.

I do not believe that the courts should somehow attempt to excuse criminal activity by placing a share of responsibility for heinous crimes on society.

I am also concerned that Justice Barkett seems, in some instances at least, to stretch far in efforts to reach a position that I fear may represent her personal views more than it represents existing law and precedent.

That constitutes judicial activism, one of the most important disqualifications for a Federal judgeship, as far as I am concerned.

Mr. President, I firmly believe that the President has not only the duty, but also the right, to choose nominees to the Federal judiciary who share his views. We must expect that he will nominate persons who share his philosophy and ideology.

And when the nominee is qualified by education, experience and judicial temperament, he or she should not be opposed because I, or any other senator, disagree with the ideology of the nominee.

However, the ideology and the social values of the nominee must be within the "mainstream" of American views and values.

At a time when crime, particularly violent crime, is viewed by the American public as the most serious problem facing our country, and at a time when the Congress is debating legislation to deal in a firm and serious way with violent crime, and at a time when the President of the United States is calling for congressional action to address violent crime, I believe we must look closely at the thinking and the social values of judicial nominees who will be dealing with this very serious problem.

I have reluctantly decided that Justice Barkett's views of the criminal and the causes of criminal activity, and her record on and the application of the criminal laws and sentencing are not within the mainstream of American thinking on this issue.

This, combined with Justice Barkett's tendency toward judicial activism, has brought me to the conclusion that I must vote against the confirmation of Justice Barkett to the U.S. Court of Appeals.

I thank the Chair, and I thank my colleague from Utah and commend him on his fine work as the ranking member of the Senate Judiciary Committee.

I thank the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. HATCH. Mr. President, I yield 15 minutes to the distinguished Senator from Mississippi.

The PRESIDING OFFICER. The Senator from Mississippi is recognized.

Mr. LOTT. Mr. President, I thank the distinguished Senator from Utah for

yielding me this time. I am sorry I have not been able to be here for all of the discussion. But I do think this is a very important nomination, and it goes way beyond just this particular nomination to a circuit court.

I rise in opposition to the nomination of Judge Rosemary Barkett, currently the chief justice of the Florida Supreme Court, to be judge on the U.S. circuit court for the eleventh circuit.

Before I present my objections to this nomination, I want to talk briefly about the state of things in this country. Recently the issue of crime has overtaken the economy and, yes, even health care as the number one issue of Americans. There is a national sense of unease.

I just spent 2 weeks back in my State, and I found that people have gone, when it comes to crime, from being concerned and worried and scared, to mad. They really do not understand the type of crime that we are having now—crack cocaine in our schools, shootings in our schools, children carrying guns in our schools, senseless, motiveless drive-by shootings, and they really are angry about it and they want some action.

They know the Federal Government cannot totally control it, but they know the Federal Government has a role, they know the States have a role, and the local governments and, yes, the individuals in the communities have a responsibility.

But the main thing they want is some results. The American people want to stop the mayhem they see on our streets, not only in our big cities but in the suburban areas and in rural areas. Crime is everywhere.

We have an executive or Presidential commitment to crack down on crime. The President has been having some events just this week to emphasize his concern about crime, and many of the things he talks about that we need to do, certainly I agree with. I offered the amendment in the Senate last year for three strikes and you are out: commit three violent felonies, and you get life. And the President stood in the well of the House of Representatives in his State of the Union Address this year, and he endorsed that concept.

Now we have Harvard lawyers and social reformers and others saying, oh, well, the three-strikes-and-you-are-out amendment, it might fill up our jails.

The only thing I run into when I have spoken to different groups from New York City to Mississippi, is why do you give them three violent crimes?

So it makes good sense, and the President has endorsed it. So, we have a Presidential resolve of sorts. We have a legislative resolve because the Senate passed a very comprehensive crime package last year. The other body is having some difficulty getting its act together passing little slithers of the crime package. But today they are trying to get a bigger package together. I hope they do not follow their usual rule, which has been to be soft on the criminal and not worried at all about the victim. That is what has been basically the crime legislation that has come out of the House over the past 20 years.

But we do have movement in this legislative area and that is important.

But Americans are very uneasy about the third branch of Government. A recent Gallup Poll showed 83 percent of Americans felt that the judicial system is not harsh enough—not harsh enough—on criminals.

I do not want to put down the thousands of State and Federal judges who deal with wave after wave of criminal depravity every day. The American people appreciate it. It is a tough job. A lot of these judges do a wonderful job and they have innovative ideas for dealing with criminals and for trying to rehabilitate them where it may be possible. So you do not indict them all.

But the problem with some judges is that they put their personal politics before the law, and the rights of society and the people upholding the law. There are judges who forget the first duty of Government is to protect life and property. There are judges in the Federal judiciary of this country who for the past 20 or 30 years have twisted the law and precedents to protect the thug, making the criminal a victim and leaving the real victim with no recourse.

That went on for part of 1950's and 1960's and 1970's. In the 1980's, we started to slowly turn that around a little bit by getting, yes, if you will, strong law-enforcement lawyers and judges on the bench and moving them up the line.

Judge Rosemary Barkett is an activist judge. She is one of those who has been worried about the criminal, sometimes appearing to forget about the victims. She has called criminals the victims of society. I have heard that somewhere before, usually in articles written by certain liberal groups and lawyers.

Judge Barkett has written against curbs on obscenity and against curbs on unseemly public conduct. She backs organized labor instead of the rights of the working man or woman. And these are the reasons why I oppose her nomination to the U.S. Court of Appeals. I think she epitomizes, she is a perfect example of the problem with the Federal judiciary over the past 30 years, and she has indicated that time after time after time.

Maybe she did go along with the death penalty sometime, but other times she dissented. I will not go over all the Florida cases that the Judiciary Committee has already looked at. Perhaps they have been mentioned on the floor.

But I ask unanimous consent that a summary of Judge Barkett's questionable decisions be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 1.)

Mr. LOTT. Let me point out what Judge Barkett has said about criminals. In 1991, in the Wickam versus State case, Wickam shot a man in the back, chest, and head and stole $4.05 from the corpse. Can you believe that—kill a man for $4?

The Florida Supreme Court voted to affirm the death sentence, but Judge Barkett dissented, blaming the "milieu of violence" that the killer grew up in. He had a rough life, therefore there were mitigating circumstances. Judge Barkett said the killer was "mentally deficient" and "socially maladjusted"—thus, he should be spared.

In the Dougan versus State case, 1992, the judge voted to overturn the death sentence of Jacob Dougan, who brutally murdered a teenager, and sent a tape describing the killing to the victim's mother.

Now that is pretty heinous; worse than just about anything I ever heard of. You kill someone and then you send a tape of the killing to the victim's mother. Judge Barkett called the case a "social awareness case" and blamed the killing on "discordant racial relations which have permeated our society." I wonder what the victim's mother would have called it.

In the Hall versus State case in 1993, Hall and an accomplice raped, beat, and shot to death a woman who was 7 months pregnant. The Florida Supreme Court again affirmed the death penalty, but Judge Barkett dissented. She said the killer had had "emotional deprivation" in his life.

In Hudson versus State, in 1989, Hudson broke into his former girlfriend's house, killed her roommate when the roommate surprised him. The Florida Supreme court voted 6 to 1 to affirm the death penalty. Judge Barkett dissented, saying the fact that the killer had been "surprised by the victim during his burglarizing of the home" meant that he was "unable, to a certain extent, to conform his behavior to the requirements of law."

That is a new one. How can burglarizing and murder ever confirm to "the requirements of the law?"

There is more, but I will not take up that much more of the Senate's time. Judge Barkett was very evasive. And from what I saw during her hearing, Senators got very little information out of her. What we do know is what we have read of her opinions. This is a case where she has voted, she has ruled, she has written and her opinions are out of the mainstream.

Over the past few weeks, I have been reading some of the comments of Senators here on the floor about possible Supreme Court nominees, and why they would not support this nominee or

that nominee. One of the phrases I have heard is, he or she was out of the mainstream. Well, Judge Barkett is a nominee who is out of the mainstream.

Maybe intentionally or absentmindedly, the administration has sent to this legislative body judicial nominees from the lower courts whose political philosophy overrules their duties of impartiality in judging the law. The political philosophy of some of these nominees also has been contrary to what the administration has been saying about crime in this country. Some of these past, present, and future nominees, not bound by State or local precedent, might use their Federal offices to further erode the protections that Americans should enjoy by right.

The right to walk the streets safely at night, the right to see justice done, the right of victims to have redress—all of these Americans are entitled to. Only a triple resolve of all three branches of Government—the executive, the legislative, and, yes, especially the judiciary—to make tough laws, to execute them faithfully, and to interpret them fairly—only this would ensure the security that we deserve in this country.

And when I talk to citizens and when I talk to law enforcement people, they say, without the cooperation of the courts, what use is there? If policemen arrest a criminal and they get out on a technicality because the policemen did not read them their rights just so, because they did not have the proper arrest papers, and the criminals' appeals go on, people get tired of that. The only way to stop this is to change the law, or change the judges who are misinterpreting the law in my opinion.

President Clinton talks a lot about security, and he should. Some of his judicial nominees, though, undermine his message and undermine the law. Judge Barkett is one of these nominees.

I believe the President has a right to choose whomever he wants for a post, but the Senate has a right, under the Constitution, to reject that nominee. The President is not the only one that is responsible. We have a very high responsibility, especially when it comes to the judiciary.

And I put a greater emphasis on the judiciary than I do other executive branch appointments. I really am going to give the President the benefit of the doubt on a Federal Maritime Commission appointment or an Assistant Secretary of Education, unless there is some really debilitating problems.

But when it comes to the judiciary and lifetime appointment to these appellate courts, the Senate really needs to ask questions, and we need to pursue their record with great relish.

If we say to the American people that we want to get tough on crime, we should not be confirming some of these nominees. Anyone who seeks to undermine the law and public order should not become a Federal judge.

This is not about politics. This is not about partisan politics. This is about the safety and security of the American people.

It is time for Senators to not only talk the talk but walk the walk. This vote is not about the nominee; it is about her record.

The question for us today is, will our rhetoric match our actions? We talk tough on crime and yet if we let a judge go through confirmation with this long history of voting to let criminals off the death penalty and a whole myriad of other areas, then we are not going to pass muster.

A vote for this nominee—for this philosophy—says to the American people that all we have to offer them is rhetoric, not judges who will help make the streets safe by rightly interpreting the law.

Judge Barkett is an activist judge who will sabotage this Nation's fight against criminals. Let me say again that she has been the most antideathpenalty member of the Florida Supreme Court. She has a record. She believes antiobscenity laws are unconstitutional. She has struck down antiloitering laws used against drugdealing and prostitution.

Judge Barkett believes cold-blooded murderers are victims of society, and has voted to restrict police powers.

Tell me, is this a judge who will be tough on crime? Obviously, no. From now on, the standard judicial nominees will have to meet is whether they have been tough on crime. I think the American people are demanding that.

If these nominees have not been tough on crime, then they should not be confirmed. Judge Barkett has been soft on criminals in many, many instances.

Oh, perhaps you could say she voted for the death penalty here or there. But in many, many instances she voted against it. In many instances, she voted what most people would say were soft-on-crime positions, "Because of society."

So I urge my colleagues to vote against her confirmation.

I yield the floor.

EXHIBIT 1

MEMORANDUM: CONFIRMATION HEARINGS ON JUDGE ROSEMARY BARKETT

President Clinton has nominated Rosemary Barkett, currently chief justice of the Supreme Court of Florida, to the U.S. Court of Appeals for the 11th Circuit (FL, GA, AL). Her hearing before the Judiciary Committee begins Thursday, February 3.

I. BARKETT BLAMES EVERYONE BUT THE CRIMINAL

*Dougan* v. *State* (1992). Barkett voted to overturn the death sentence of Jacob Dougan, the leader of the Black Liberation Army who slaughtered a teenager and sent a tape describing the killing to the victim's mother. The court voted 4–3 to affirm the death sentence. Barkett joined an opinion saying that the case was "a social awareness case. * * * The victim was a symbolic representation of the class causing the perceived [racial] injustice." Barkett blamed the killing on "discordant racial relations which have permeated our society" and found "redeeming values" in the killer that meant the death penalty was inappropriate.

*Wickham* v. *State* (1991). Wickham shot a man in the back, chest, and head, and robbed his corpse of $4.05. The court voted 4–2 to affirm the death sentence. Barkett voted again to spare the killer, this time blaming this murder on the "milieu of violence" in which the killer grew up. Here, she said the death penalty was inappropriate because the killer was "mentally deficient" and "socially maladjusted."

*LeCroy* v. *State* (1988). LeCroy was 17 years old when he killed a man, robbed him, and killed the man's wife to silence her as a witness. The trial judge found LeCroy mature. The court voted 6–1 to affirm the death sentence. Barkett alone voted to spare the killer, blaming all youth crime on "a failure of family, school, and the social system." She said executing anyone under 18—no matter what their crime—violates the U.S. Constitution.

*Hall* v. *State* (1993). Hall and a companion raped, beat, and shot to death a woman who was seven months pregnant. The supreme court voted 5–2 to affirm the death sentence. Barkett voted to spare the killer because he had an IQ of 60 and had experienced "emotional deprivation" during his life.

*Porter* v. *State* (1990). Porter stalked his former lover for two days, and then murdered her and her new boyfriend. The court voted 5–2 to affirm the death sentence. Barkett voted to spare the killer. She said that this case arose from "a lovers' quarrel" and that Porter was not capable of premeditation because of his "emotionally charged, desperate, frustrated desire to meet with his former lover."

*Hudson* v. *State* (1989). Hudson broke into his former girlfriend's home. Her roommate surprised him and he killed her. The court voted 6–1 to affirm the death sentence. Barkett alone voted to spare the killer. The fact that he had been "surprised by the victim during [his] burglarizing of the home" meant that he was "unable, to a certain extent, to conform his behavior to the requirements of the law."

*Adams* v. *State* (1989). Adams was convicted in 1978 of murdering an 8-year-old girl with whom he tried, unsuccessfully, to have sexual relations. State and federal courts ruled nearly a dozen times against his attempts to avoid the death penalty. The court finally voted 5–2 to again affirm the sentence. Barkett voted to spare the killer and thought he should have had more opportunity to present evidence of "learning problems" while growing up.

II. BARKETT TIES THE HAND OF LAW ENFORCEMENT

*Cross* v. *State* (1990). With Cross' permission, detectives searched her bag and found a round object wrapped in brown tape, a common way of transporting drugs. They arrested her and later found cocaine. Barkett said the search was illegal and wanted a per se rule that an object must be an "inherently suspect item" for probable cause to exist.

*Bostick* v. *State* (1989). With Bostick's permission, police searched his bag on a bus and found drugs. Barkett wrote the opinion establishing a per se rule against police searching for drugs on buses, even with permission. "This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa." The Supreme Court reversed her 6–3.

III. BARKETT OPPOSED LAWS AGAINST OBSCENITY AND PROSTITUTION

*Stall* v. *State* (1990). The court upheld Florida's anti-obscenity law. Barkett dissented: "A basic legal problem with the criminalization of obscenity is that it cannot be defined." She joined an opinion recognizing a constitutional right of access to entertainment and condemning anti-obscenity laws as vehicles "for restricting individual autonomy."

*Wyche* v. *State* (1993). The court upheld Wyche's conviction for loitering for the purpose of prostitution. Barkett dissented; her position would probably invalidate any regulation of public behavior, including disorderly conduct.

IV. BARKETT OPPOSES THE RIGHT TO WORK

*United Teacher of Dade* v. *Dade County School Board* (1986). Barkett joined a dissenting opinion holding that Florida could not give bonuses to outstanding teachers because it would infringe on the teachers' union's bargaining power. She admitted this was a "liberal construction" of state law.

*Florida Bar re Amendment to Rule 2-9.3 (Legislative Policies).* Barkett joined in approving a rebate scheme that denied procedural protections for members of the Florida Bar who objected to use of their compulsory union dues for political purposes. The U.S. Supreme Court has held that these protections are constitutionally necessary.

The PRESIDING OFFICER. Who yields time?

Mr. LOTT. Mr. President, I suggest the absence of a quorum and I ask the time be equally divided.

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

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. GRAHAM. 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. GRAHAM. Mr. President, I ask unanimous consent that the vote on the confirmation of Rosemary Barkett to be U.S. circuit judge for the eleventh circuit court of appeals be set for 3:15 p.m.

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

Mr. GRAHAM. Mr. President, I suggest the absence of a quorum and ask that the time under the quorum call be equally divided.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The bill 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, some have suggested that the Foster case is not as broad as some of the critics say. I believe the distinguished Senator from Florida has made that suggestion.

Let me just say this.

Justice Barkett's partial dissent in the Foster case adopts an approach that is akin to the so-called Racial Justice Act that the Senate has repeatedly rejected, and rightly so. As I have pointed out, Justice Barkett's approach in Foster would effectively paralyze enforcement of the death penalty.

Now, Senator GRAHAM of Florida has defended Justice Barkett's Foster opinion. In particular, he has claimed that her approach was highly specific compared to that proposed by the so-called Racial Justice Act, which Senator GRAHAM has opposed. Senator GRAHAM attached to his remarks a purported copy of Justice Barkett's Foster opinion.

Curiously, for one reason or another, the copy of Justice Barkett's Foster opinion that is attached to Senator GRAHAM'S comments omits three key paragraphs from that opinion—paragraphs that conclusively rebut the contention that Justice Barkett's approach in that case is highly specific or indeed significantly different in any respect from the so-called Racial Justice Act. In particular, Justice Barkett asserts in these missing paragraphs:

> I believe that statistical evidence of discrimination in capital sentencing should * * * establish a violation of article I, section 2 of the Florida Constitution. "Statistical" evidence should be construed broadly to include not only historical analysis of the disposition of first-degree murder cases in a particular jurisdiction, but also other information that could suggest discrimination, such as the resources devoted to the prosecution of cases involving white victims as contrasted to those involving minority victims, and the general conduct of a state attorney's office, including hiring practices and the use of racial epithets and jokes.

So much for the claim that Justice Barkett's approach in Foster was limited to allegations of specific acts of racial discrimination.

This is hardly the first time that the supporters of Justice Barkett have made false claims in her defense. Indeed, the strategy of her supporters—especially of the White House—appears to be one of misstatements and misdirection. This is not surprising, since a candid assessment of Justice Barkett's record shows that she is starkly at odds with the President's tough-on-crime rhetoric.

The standard for reviewing judicial nominees must be less deferential than the standard for reviewing executive branch nominees.

Federal judges have lifetime tenure and are unaccountable to the political branches.

If the President nominates liberal activist judges, they will override the political branches and impose their own agenda in the guise of constitutional and statutory interpretation. The second point I would like to make here is the basic measure of any lower court nominee's fitness for the Federal bench is whether that nominee will faithfully apply Supreme Court precedent and will construe the Constitution and the Federal laws as they are written, or whether that nominee will instead attempt to impose his or her own policy or ideological preferences.

In the constitutional arena, this standard has important application with regard, for example, to the equal protection and due process clauses, which, if misused, can become completely unconstrained tools of judicial activism.

This standard is also particularly important in a broad array of criminal law matters. For example: Search-and-seizure law: The fourth amendment strikes a careful balance between the interests of the community in detecting crime and the interests of suspects in not being subjected to unreasonable searches and seizures. Overly expansive readings of search-and-seizure protections cripple the police battle against drug dealing and other crimes. Will the nominee be faithful to Supreme Court precedent in this area? Or will the nominee evade or misconstrue Supreme Court precedent and find new ways to hamstring the police?

Maintaining community standards: The Constitution and Supreme Court cases leave local communities substantial leeway to combat such scourges as obscenity, drug dealing, and prostitution. Will the nominee respect the rights of communities to regulate these illegal activities? Or will the nominee twist the Constitution to interfere with communities' ability to protect themselves from these crimes?

Holding criminals accountable: Criminals can and should be held full accountable for their crimes. Does the nominee recognize that society is victimized by criminals? Or does the nominee believe that the criminal is the victim of society?

Death penalty. Will the nominee consistently apply Supreme Court precedent? Or will the nominee strain for unconvincing escapes from imposing the death penalty?

Florida Chief Justice Rosemary Barkett, President Clinton's nominee to the important eleventh circuit seat, does not measure up to this minimal standard. Justice Barkett believes that a "basic problem with the criminalization of obscenity is that it cannot be defined"—even though the Supreme Court has set forth in unmistakable terms how it can be defined. She believes that laws against obscenity "run counter to every principle of notice and due process in our society."

That is important stuff. I do not see how anybody on this floor can misconstrue it.

Justice Barkett has voted to strike down narrowly tailored antiloitering laws that are essential to community policing, including laws prohibiting loitering for the purposes of drug dealing and loitering for the purpose of prostitution.

Justice Barkett has a pattern of unduly restrictive fourth amendment search and seizure decisions that would hamstring police in their battle against drugs. Two of her opinions have been reversed by the Supreme Court, another has been criticized, and two others have been dissents.

Justice Barkett too often subscribes to criminal-as-victim-of-society rhetoric. This is illustrated by the extraordinary dissent she joined in the Dougan case, which involved an extremely vicious and heinous murder. Senators voting on this nomination should read cases like Dougan.

While it is true that Justice Barkett has voted to enforce the death penalty on a substantial number of cases, she has clearly been the single most anti-death-penalty member of the Florida Supreme Court. Moreover, she has exhibited a clear tendency to strain for unconvincing escapes from the death penalty in numerous cases. She has also adopted a position—akin to the Racial Justice Act that the Senate has repeatedly rejected—that would virtually paralyze implementation of the death penalty unless it is imposed on a quota basis.

Concerns over Justice Barkett's nomination for the Federal appellate bench extend beyond her criminal law record. Her constitutional decisionmaking reflects a clear failure to follow precedent. For example, she took the position in a dissent that a statutory cap on noneconomic damages in medical malpractice cases violates the Federal equal protection clause—a conclusion that simply ignored longstanding equal protection principles.

Justice Barkett similarly misused the Federal equal protection clause and the Federal due process clause in other cases. Her record also raises a serious concern that she would be prone to impose her basic race and gender quotas.

Certain actions that Justice Barkett has taken also raise certain questions about her impartiality and her adherence to the canons of judicial ethics. For example, in the medical malpractice case, she refused to recuse herself even though a trial lawyers group that had named an award after her was participating as an amicus—and then she voted with the trial lawyers. In a redistricting case, she stated that she would favor one plan not on its inherent merits but simply on the organization that had proposed it.

Justice Barkett's supporters say that she will follow Supreme Court precedent, but the simple fact is that she has not followed Supreme Court precedent: She has not followed Supreme Court precedent on the equal protection clause. She has not followed Supreme Court precedent on the due process clause. She has not followed Supreme Court precedent on fourth amendment search and seizure law. She has not followed Supreme Court precedent on obscenity. She has not followed Supreme Court precedent on the death penalty. She has not followed Supreme Court precedent in all of these very important fundamental areas.

This is an important thing. I think none of us want to go against somebody we personally like, we personally think is a good person, but in all honesty she has not followed the precedents in all of these areas, and it is a dangerous thing to trust her, suddenly, that she is going to get on the court and follow Supreme Court precedents.

In all these other areas she has, instead, pursued a liberal judicial activist agenda, and there is every reason to believe that she will do so if confirmed to the eleventh circuit court of appeals.

Mr. President, this is really important. We have at this time a President who is saying that he is going to be tough on crime; he is going to do everything he can to stop crime; he is challenging us up on Capitol Hill to provide him with his crime bill. I do not think the rhetoric matches the actions, while at the same time we have seen judge after judge up here who seems to be softer on crime than his rhetoric would imply, and this one in particular not only seems to be, she is, and that is one of the problems we have.

Mr. President, I have to say that, again, this is a fine person. None of my remarks should have any bearing on that. I think she is a good person. I think she is well intentioned. But those are not the issues.

The issues are, will she follow the law as it is written or is she going to use her own social and ideological preferences and enact those into laws as a supermajority legislator from the bench?

Frankly, I have not seen many judges in my 18-year history that really meet that qualification of being a legislator from the bench or a judicial activist in the worst sense of that term any more than this one has. And so I have to vote against her.

I understand that she will be confirmed here today. The fact is, I hope we do not have judges who have ignored the law as much as she has, come up here in the future.

Mr. MITCHELL. Mr. President, I wish to state just briefly that I strongly support the pending nomination. This is an outstanding person, an outstanding jurist, an outstanding judge, and someone who will serve with distinction on the Federal court.

Now, an argument has been made about the President appointing people who are soft on crime. That is a popular political slogan. Someone is soft on crime. What does that mean? Are we supposed to believe that someone who is serving as a judge tolerates crime, condones crime, likes crime? The answer is, of course, "no" to all of those.

What it does do is to create what I believe to be a false impression, that somehow in America if you believe in the Constitution, if you believe in the Bill of Rights, and if you believe in the rights of individual freedom and the limitations on the power of the government, you are somehow soft on crime.

Mr. President, I served as a prosecutor at the State level and at the Federal level, and I daresay I am probably responsible for more criminals going to prison than most other Senators and, perhaps, all combined.

And I say to you that here in America we can enforce the law and we can be tough on criminals without ignoring constitutional rights of law-abiding Americans.

It is a false choice to suggest that adherence to, commitment to, and a deep conviction in favor of the Bill of Rights, which preserves the liberties of individual Americans and limits the power of Government, somehow makes one soft on crime. How often we have heard this argument about technicalities being used to let criminals off. Frequently, those "technicalities" are rights that are included in the Constitution, in the Bill of Rights.

Mr. President, I want to say that the most eloquent, most concise, and most effective statement of the individual liberties of human beings that has ever been devised and written down is the American Bill of Rights, the first 10 amendments to the Constitution.

They set forth in a very brief, yet eloquent, way the values and principles which motivated the men who wrote the Constitution and the Americans who founded this great land. And it was this: that Americans are free people. And in order to ensure their freedom and to provide the broadest measure of individual liberty, we will restrain the power of Government. And that Bill of Rights is not a technicality. It is the essence of what makes Americans free.

And I think we ought to have judges who honor the Bill of Rights. I think we ought to have judges who recognize that we can be tough on crime, that we can prosecute criminals, that we can punish criminals without violating the individual liberties of law-abiding Americans.

It is a false choice to think that we must choose one or the other. We do not have to. We can do both. And I think this kind of judge will do both.

I encourage the Members of the Senate to vote for this nomination.

I want to say that we are going to get a crime bill this year, a comprehensive crime control bill. And we are going to get it because of the leadership of President Clinton and Senator BIDEN, who is the chairman of the committee. And I thank Senator HATCH for the work he has done on that as well.

We ought to do it in a way that meets both objectives—tough on crime and observing and adhering to and re-

vering rights guaranteed to every American under our Constitution. They are not inconsistent. They both can be attained, and we should attain them.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Who yields time?

The Senator from Florida.

Mr. GRAHAM. Mr. President, I yield such time as I might require.

Mr. President, we have a unique responsibility today, the responsibility to place on one of the highest courts of the United States a person who will serve for the balance of her natural life. I am very honored to have the opportunity to urge my colleagues to vote for the confirmation of Rosemary Barkett to the eleventh circuit court of appeals.

This is a person who, by virtue of her personal life experience, by virtue of her preparation and education, by virtue of her experience, is especially uniquely qualified to serve as a Federal appellate judge; the daughter of immigrants, an immigrant herself, a nun, a teacher, a private practitioner, a trial judge, an appellate judge, and now the Chief Justice of the Florida Supreme Court, a background, a wellspring of personal preparation, development and experience now being made available to the people of America.

Those qualifications, Mr. President, are not just written on a résumé on paper. They have been regularly, arduously, and consistently and affirmatively reviewed by the people of our State and now by the President of the United States of America.

She has three times been recommended for appointment to the judicial positions in our State through a rigorous judicial selection process. She has three times been appointed by Governors of our State to the highest positions of judicial responsibility.

She has received the support of the broadest possible range of the people of our State, including the major law enforcement and police agencies.

Most significantly, when she was placed before the people of Florida for a vote as to whether she should be retained in her position as a justice of the Florida Supreme Court, when she was subjected to exactly the same types of charges that have been made on this floor today, 61 percent of the people of Florida voted to retain this fine woman as a member of the Florida Supreme Court.

I believe, Mr. President, that those repeated affirmative approvals of Rosemary Barkett indicate the respect in which she is held, the admiration and the confidence by those who know her best.

Mr. President, I ask unanimous consent to submit for the RECORD a series of endorsements by organizations, law enforcement, legal and others, and editorial boards in support of the nomination of Rosemary Barkett for the eleventh circuit court of appeals.

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

THE FLORIDA BAR,
OFFICE OF THE PRESIDENT,
*Miami, November 16, 1993.*

Re: The Honorable Rosemary Barkett.

Sen. JOSEPH R. BIDEN, JR.,
*Chair, Senate Judiciary Committee, Washington, DC.*

DEAR SENATOR BIDEN: It is with pleasure that I forward to you, on behalf of the Board of Governors of The Florida Bar, a resolution in support of the nomination of Chief Justice Rosemary Barkett by President William J. Clinton to serve as Judge of the United States Circuit Court of Appeals for the Eleventh Circuit. By this resolution, the Board of Governors of The Florida Bar urges the United States Senate to confirm Chief Justice Barkett's nomination. If I, or The Florida Bar, can be of any further assistance to the United States Senate in this regard, please do not hesitate to call.

Sincerely yours,

PATRICIA A. SEITZ,
*President, The Florida Bar.*

RESOLUTION

Whereas, Chief Justice Rosemary Barkett has served the legal profession as a member of The Florida Bar for over 23 years;

Whereas, Chief Justice Rosemary Barkett has always been an example and an inspiration to others in the legal profession to live up to the highest standards of ethics and professionalism;

Whereas, Chief Justice Rosemary Barkett, the first female Supreme Court Justice in Florida, has served the judicial branch with intelligence, wisdom and professional distinction for 14 years;

Whereas, Chief Justice Rosemary Barkett served as trial Judge for five years, having been appointed to the Fifteenth Judicial Circuit in 1979, appointed administrative judge of the Fifteenth Circuit Civil Division in 1982, and elected Chief Judge of the Fifteenth Judicial Circuit in 1983;

Whereas, Chief Justice Rosemary Barkett has served as an appellate judge for nearly nine years, having been appointed to the Fourth District Court of Appeals in 1984, appointed Justice on the Supreme Court of Florida in 1985 and elected Chief Justice in 1992;

Whereas, Chief Justice Rosemary Barkett was retained as Justice of the Supreme Court of Florida by a majority vote of the electorate in Florida in the merit retention election of 1992;

Whereas, Chief Justice Rosemary Barkett has served the justice system as a member of the American Judicature Society Board of Directors, faculty member of the National Judicial College, faculty member of the Florida Judicial College, and holds seven honorary Doctorate of Laws degrees;

It is, Therefore, Resolved, that Chief Justice Rosemary Barkett is hereby congratulated and commended by the Board of Governors of The Florida Bar upon her nomination by President William J. Clinton to serve as Judge, United States Circuit Court of Appeals for the Eleventh Circuit. The Board of Governors urges her confirmation by the United States Senate for that office.

Dated, this 9th day of November, 1993.

PATRICIA A. SEITZ,
*President.*
JOHN F. HARKNESS, JR.,
*Executive Director.*

DECEMBER 7, 1993.

Re: Nomination of Rosemary Barkett, Eleventh Circuit Court of Appeals.

Sen. JOSEPH BIDEN,
*Chairperson, Senate Judiciary Committee, Washington, DC.*

DEAR SENATOR BIDEN: We, the undersigned, are all former Presidents of The Florida Bar.

The purpose of this letter is to advise you and your distinguished Committee, of our total support of the nomination of Chief Justice Rosemary Barkett to the Office of Circuit Judge of the Eleventh Circuit Court of Appeals.

We know and attest to Chief Justice Barkett's commitment to the rule of law. As both a trial and appellate judge, she has compiled a brilliant record of dispensing justice without fear or favor.

The nominee has a proven record of judicial excellence. Her opinions are scholarly and reflective of her keen analytical mind. We hold Justice Barkett in high esteem. Her brilliance and her high integrity are recognized throughout our State.

Chief Justice Barkett possesses every attribute required for exemplary service as a United States Circuit Judge.

The undersigned unqualifiedly and enthusiastically support the President's nomination of Rosemary Barkett to the Federal appellate bench.

Respectfully,

Marshall M. Criser, Alan T. Dimond, Robert M. Ervin, Robert L. Floyd, Leonard H. Gilbert, William O.E. Henry, Benjamin H. Hill, III, Mark Hulsey, Rutledge R. Liles, James Fox Miller, Joe Reiter, Gerald F. Richman, James C. Rinaman, Jr., Fletcher G. Rush, L. David Shear, Chesterfield Smith, Samuel S. Smith, Wm. Reece Smith, Jr., Russell Troutman, Burton Young.

TRIAL LAWYERS SECTION,
THE FLORIDA BAR,
*January 20, 1994.*

Sen. JOSEPH BIDEN,
*Chairman, Senate Judiciary Committee, Washington, DC.*

DEAR SENATOR BIDEN: Enclosed please find a resolution passed by the Executive Council of the Trial Lawyers Section of The Florida Bar. The Trial Lawyers Section represents over 6,000 lawyers regularly appear and try cases in both the state and federal courts in Florida.

The Executive Council urges the Senate Judiciary Committee and the full Senate to consider their resolution on behalf of Chief Justice Barkett.

Further the Trial Lawyers Section requests that a representative of the trial lawyers of Florida be allowed to address your committee during hearings on Chief Justice Rosemary Barkett's confirmation.

Very truly yours,

BILL HOPPE.

[From the Trial Lawyers Section of the Florida Bar, Tallahassee, FL]

RESOLUTION IN SUPPORT OF CONFIRMATION OF ROSEMARY BARKETT

Whereas, Chief Justice Rosemary Barkett has served as a trial judge in the 15th Judicial Circuit, Appellate in the 4th District Court of Appeals and for the last fourteen years as a Florida Supreme Court Justice.

Whereas, Chief Justice Rosemary Barkett is well known to the trial lawyers of Florida for her intelligence, knowledge of the law and judicial temperament.

Whereas, Chief Justice Rosemary Barkett has been nominated to serve as judge of the United States Court of Appeals for the 11th Circuit.

Whereas, opposition to Chief Justice Barkett's nomination comes from organizations and persons whose opposition is not to the chief justice's qualifications, but to the chief justice's position on certain legal issues.

It is therefore resolved that the executive council of the Trial Lawyers Section of the Florida Bar which as representatives of over 6,000 trial lawyers in Florida, urges the chief justice's confirmation by the United States Senate. The executive council is opposed to single issue opposition to judicial nominations and believes that such opposition is contrary to the concept of an independent judiciary. The executive council finds that Justice Barkett is highly qualified to serve as judge of the United States Court of Appeals for the 11th Circuit and endorses her nomination for that position.

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HISPANIC NATIONAL BAR ASSOCIATION,
*Melville, NY, October 25, 1993.*

Hon. JOSEPH R. BIDEN, Jr.,
*Chairman, Senate Judiciary Committee, U.S. Senate, Washington, DC.*
Hon. ORRIN G. HATCH,
*U.S. Senate, Washington, DC.*

GENTLEMEN: The Hispanic National Bar Association has reviewed the qualifications of Florida Supreme Court Chief Justice Rosemary Barkett for the United States Eleventh Circuit Court of Appeals, and find her highly qualified to serve. Accordingly, we urge the Senators' confirmation of her to fill the vacancy on this court.

Justice Barkett has served on the Florida Supreme Court since 1985, and as Chief Justice since 1992. Before serving on the Supreme Court, she served on the Fourth District Court of Appeals, State of Florida, from 1984–1985. From 1979 to 1984, Justice Barkett served on the Fifteenth Judicial Circuit, State of Florida, as a circuit judge (appointed 1979), administrative judge in the civil division (appointed 1982), and as chief judge (elected 1983). Before becoming a judge, Justice Barkett was in private practice in West Palm Beach, Florida, from 1971 to 1979.

Justice Barkett received her Juris Doctor in 1970 from the University of Florida Law School. She received a Bachelor of Science, Summa Cum Laude, from Spring Hill College in Mobile, Alabama, in 1967. Justice Barkett has been bestowed with Honorary Doctorates of Laws, Civil Laws, and Humane Letters, from Nova University, Rollins College, Spring Hill College, University of South Florida, John Marshall Law School, Florida International University and Stetson University.

Justice Barkett has demonstrated her commitment to the legal community and the state of Florida by serving on various committees of the American and Florida Bar Associations; Florida Bar Foundation; Child Welfare Study Commission; Child Support Study Commission; Study Commission on Guardianship Law; Juvenile Justice Center; Palm Beach Marine Institute, Inc.; American Judicature Society; and Court Statistics and Workload Committee. Additionally, she is a member of several other associations and organizations, including Children, Families, and the Law Judicial Council; Florida Kids Count Advisory Council; National Association of Women Judges; Florida Commission on the Status of Women; Gender Bias Study Implementation Commission; Florida Association of Women Lawyers; National Association for Court Management; Sentencing Guidelines Commission; and Statewide Prosecution Function Commission; and Statewide Prosecution Function Commission; and is a fellow of the Academy of Matrimonial Lawyers.

Justice Barkett has been the recipient of numerous awards, including "Breaking the Glass Ceiling Award," presented by the Palm Beach Chapter of the National Association of Women Business Owners; Latin Business and Professional Women Lifetime Achievement Award; ABA Minority Justice Award Honoree; Judge Matties Belle Davis Award, presented by the Florida Association for Women Lawyers, Dade County; Hannah G. Solomon Award, presented by the National Council of Jewish Women; an Achievement Award presented by the Academy of Florida Trial Lawyers; Judicial Achievement Award for the State of Florida, presented by the Association of Trial Lawyers of America; Woman of Achievement Award, presented by the Palm Beach County Commission on the Status of Women; American Academy of Matrimonial Lawyers Award; and the J. Hillis Miller Memorial Award from the University of Florida Law School. Justice Barkett has been inducted into Florida Women's Hall of Fame, and the Academy of Florida Trial Lawyers has established the Rosemary Barkett award to be presented annually.

Justice Barkett is a faculty member of several colleges, universities, and seminars, including National Judicial College, Florida Judicial College, American Bar Association Appellage Judges Continuing Education Seminars, and Institute of Judicial Administration, New York University, appellage Judges Seminars. She is an adjunct professor, Constitutional Law Class, for Florida State University College of Law. Justice Barkett also serves several institutions of higher education in an advisory capacity.

The legal and professional abilities Justice Barkett has exhibited in her distinguished career as a Florida state jurist and private practitioner make her an excellent choice for appointment to the Eleventh Circuit Court of Appeals. For these reasons, the Hispanic National Bar Association strongly supports her prompt confirmation.

If I may be of any assistance to you in answering questions you may have about Justice Barkett, please do not hesitate to contact me.

Sincerely,

CHRISTOPHER A. MIRANDA,
*Chair, Judiciary Committee.*

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NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS,
*Edenton, NC., November 23, 1993.*

Re: The Hon. Rosemary Barkett 11th Circuit Court of Appeals.

Hon. JOSEPH R. BIDEN,
*U.S. Senate, Washington, DC.*

DEAR SENATOR BIDEN: President Clinton has nominated Chief Justice Rosemary Barkett of the Florida Supreme Court for a position on the 11th Circuit Court of Appeals. The Board of the National Conference of Women's Bar Associations, which represents several hundred voluntary bar associations across the United States, has endorsed her appointment and urges you to recommend approval to the Senate.

Justice Barkett brings to the Judiciary a background rich in diversity and based on a strong family work ethic. Justice Barkett was born of Syrian parents in Ciudad Victoria, Mexico. At age six, when she entered school in Miami, Florida, she did not speak English; nevertheless, she excelled. Her life has also been one of public service. At age 17 she became a Catholic nun, devoted for eight years primarily to teaching children. Justice Barkett has long advocated children's issues and the improvement of juvenile justice.

When she left the convent, she continued her education by obtaining her undergraduate degree summa cam laude, and was the outstanding law graduate at the University of Florida College of Law. In 1979, after practicing civil and criminal law for nine years, she was appointed as a circuit court judge in the Fifteenth Judicial Circuit of Florida. She has since served on the Florida Fourth District Court of Appeals and is presently the Chief Judge of the Florida Supreme Court.

Justice Barkett is not "soft on crime" contrary to the allegations in some letters you may be receiving from opponents of her confirmation. She has voted with a majority of the Florida Supreme Court 89 percent of the time. Furthermore, she voted to uphold the death penalty in more than 200 cases.

Justice Barkett is a woman of experience, scholarship, and high moral principles who deserves your support. Her opinions are well reasoned and in the best interest of fairness and justice for all citizens. She would be a tremendous asset to the bench of the 11th Circuit and an inspiration to all of our citizens whose family language was not English.

Thank you for you consideration.

Very truly yours,

KATHERINE H. O'NEIL,
*President.*

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FLORIDA ASSOCIATION FOR WOMEN LAWYERS,
*Tallahassee, FL., October 26, 1993.*

Hon. JOSEPH R. BIDEN, Jr.,
*Chairman, U.S. Senate, Washington, DC.*

DEAR SENATOR BIDEN: As president of the 3,000 member-strong Florida Association for Women Lawyers, I want to encourage you to give positive consideration to the nomination of Florida Supreme Court Justice Rosemary Barkett to the federal bench. Justice Barkett is a jurist of the highest caliber. Her intellect and her integrity are an inspiration to the many lawyers who seek clear legal reasoning and just results consistent with the law.

In supporting Justice Barkett, I realize that Florida will lose a great jurist. But the nation will realize a great gain, and those of us in Florida who will miss her keen legal insight and her dedication to our system of law, cannot stand in the way—indeed must hardily support—her ascension to the federal arena.

Sincerely,

VIRGINIA DAIRE.

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THE GOVERNOR OF THE STATE OF FLORIDA,
*November 4, 1993.*

Hon. JOSEPH R. BIDEN, Jr., Chairman,
*Russell Senate Office Building, Washington, DC.*

DEAR SENATOR BIDEN: Your committee will soon take up the confirmation of Rosemary Barkett, Chief Justice of the Florida Supreme Court and President Clinton's nominee for appointment to the 11th U.S. Circuit Court of Appeals. The nomination has the enthusiastic support of our citizens, who know that the interests of justice and the people of the 11th circuit will be well served by the confirmation of this extraordinary Floridian.

The selection of Justice Barkett is another significant milestone in a life that dem-

onstrates a modern day version of the American Dream. The daughter of immigrants who came to the United States when she was a child, Rosemary Barkett is an exemplary individual whose record of success is a direct result of hard work, determination and a commitment to fairness. The zeal with which she pursued her education is typical of the energy she has brought to her other diverse experiences—as nun, teacher, community leader, lawyer and judge. All have been marked by a singular dedication to excellence and service.

Justice Barkett has served the people of Florida with distinction during a career that has consistently won her respect, admiration and praise. She has offered a strong and steady voice for justice and reason in Florida through her long record of leadership that resonates with integrity. Her judicial colleagues are continually impressed by her scholarship, intellect, temperament and focused sense of fairness.

Last year, during the statewide merit retention election for Florida Supreme Court justices, some splinter groups waged a nasty and shallow campaign that unfairly attempted to portray Justice Barkett as soft on crime. Floridians, familiar with the truth about Justice Barkett's long and strong record of protecting public safety, were not fooled. Not surprisingly, voters overwhelmingly cast their ballots—by nearly a two-to-one margin—to return their Chief Justice to the state's highest court. I am concerned that any similarly misguided effort to misrepresent the facts and the record of Justice Barkett be identified for what it is.

Rosemary Barkett's example of leadership in Florida is one that surely reflects all that is best about America today. We are proud of her achievements and commend her to you and your committee. I personally offer my highest recommendation for Justice Barkett. She deserves timely consideration and action in the confirmation process. The people of the 11th U.S. Circuit Court of Appeals deserve her service, strength and humanity.

I know that you are being inundated by recommendations and criticisms about each nominee whom you review. In this case, however, I believe you will find that Rosemary Barkett is an outstanding nominee who is fully deserving of your support.

With kind regards, I am,

Sincerely,

LAWTON CHILES.

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AMERICAN JEWISH CONGRESS,
*Miami Beach, FL, December 27, 1993.*

Hon. JOSEPH R. BIDEN, Jr.,
*Chairman, Committee on the Judiciary, Washington, DC.*

DEAR MR. CHAIRMAN: We are writing on behalf of the 50,000 members of the American Jewish Congress to voice our strong support for the nomination of Florida Supreme Court Chief Justice Rosemary Barkett to the United States Court of Appeals for the 11th Circuit. The American Jewish Congress advocates for a federal judicial system whose members are vigorously independent and committed to equal justice for all. Rosemary Barkett has made the dispensation of justice in support of these values the foundation of her legal career.

We would like to respectfully request that a confirmation hearing date be set for Chief Justice Barkett as soon as possible after the Senate reconvenes in January. We are aware of the fact that a small number of extreme special interest groups have attempted to distort Chief Justice Barkett's judicial record in an effort to scuttle the nomination and deny her a hearing before the Committee. We believe these actions amount to nothing more than an irresponsible and repugnant effort to smear the reputation of a distinguished and respected jurist.

Chief Justice Barkett's nomination enjoys strong bipartisan support because her judicial record and philosophy are well within the mainstream of American jurisprudence. She has been endorsed for confirmation by Senator Bob Graham and Senator Connie Mack of Florida, and in last year's merit retention election Chief Justice Barkett received the approval from nearly two-thirds of Florida's diverse electorate. She deserves nothing less than swift confirmation so she might serve our nation as ably as she has served the people of Florida.

Sincerely,

RABBI RALPH P. KINGSLEY,
*President, Southeast Region.*

RICHARD F. WOLFSON,
*Chairman, Commission on Law and Social Action, Southeast Region.*

MARK S. FREEDMAN,
*Executive Director, Southeast Region.*

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[From the American Jewish Congress, Washington, DC, Dec. 28, 1993]

AMERICAN JEWISH CONGRESS ENDORSES ROSEMARY BARKETT FOR APPEALS COURT NOMINATION AND CALLS FOR CONFIRMATION HEARINGS

The American Jewish Congress today endorsed the nomination of Florida Supreme Court Chief Justice Rosemary Barkett to the United States Court of Appeals for the 11th Circuit, and called upon Senate Judiciary Committee Chairman Joseph R. Biden, Jr. to schedule a confirmation hearing date as soon as possible after the Senate reconvenes in late January.

Rabbi Ralph P. Kingsley, president of the Southeast Region of the AJCongress, said that setting an early hearing date is important to counteract the campaign orchestrated by those who have attempted to distort Chief Justice Barkett's judicial record in an effort to scuttle the nomination.

In a letter to Senator Biden written by Rabbi Kingsley, AJCongress' Southeast Region Commission on Law and Social Action Chairman Richard F. Wolfson, and Regional Director Mark S. Freedman, AJCongress asserts, "We believe these actions amount to nothing more than an irresponsible and repugnant effort to smear the reputation of a distinguished and respected jurist."

Rabbi Kingsley also praised Republican Senator Connie Mack for joining his Democratic Florida colleague, Senator Bob Graham, in endorsing the nomination. Mack concluded his own independent review of Justice Barkett's judicial record and announced his support in advance of any confirmation hearing.

The AJCongress letter notes, "Chief Justice Barkett's nomination enjoys strong bipartisan support because her judicial record and philosophy are well within the mainstream of American jurisprudence. . . . She deserves nothing less than swift confirmation so she might serve our nation as ably as she has served the people of Florida."

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.,
*Washington, DC, October 22, 1993.*

Hon. JOSEPH R. BIDEN, Jr.,
*Chairman, Committee on the Judiciary, Senate Office Building, Washington, DC*

DEAR SENATOR BIDEN: The National Association of Police Organizations ("NAPO") which represents over 143,000 sworn law enforcement officers in more than 2000 associations throughout the United States wholeheartedly supports the nomination of Florida Chief Justice Rosemary Barkett to the Federal Judiciary. The 26,000 NAPO members in Florida are represented by Area Vice Presidents who have unanimously voted for this endorsement.

During the recent retention election in Florida there was much debate and rhetoric. Representatives of the Florida PBA reviewed Justice Barkett's record and the Florida PBA Board of Directors, as well as most mainstream law enforcement associations, voted unanimously to endorse Justice Barkett's retention. She subsequently won a resounding victory indicating the electorate's support for her efforts on behalf of the citizens of Florida.

It is our hope that after careful consideration of her record you will agree that Justice Barkett has the professional experience, personal integrity and judicial temperament to serve as a Federal Judge. We respectfully request that you support and vote for this nomination.

Sincerely,

ROBERT T. SCULLY,
*Executive Director.*

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[From the News-Journal, Sept. 28, 1993]

FINE CHOICE FOR APPEALS COURT

Florida Supreme Court Justice Rosemary Barkett would be an excellent addition to the 11th Circuit Court of Appeals in Atlanta. Her nomination by President Clinton announced Friday deserves swift Senate confirmation.

Justice Barkett has been an outstanding jurist. Appointed to the state's high court in 1985 by then-Gov. Bob Graham, she became Florida's first female justice. The other members of the state high court voted her the state's first female chief justice in 1992.

The child of immigrants, she was a nun and teacher before becoming a lawyer. Her experiences in overcoming a humble background, her intellect, integrity and scholarship have combined to produce a first-rate judge.

Because Florida's high court judges face an in-or-out merit retention vote every six years, Justice Barkett was on the ballot in 1992. She faced a negative campaign from groups which distorted her record and tried unsuccessfully to paint her as an out-of-control left-wing judicial activist.

Most of these complaints came from a few activists who want to outlaw abortion in Florida and nullify the state's privacy amendment.

The labels these groups peddled during the campaign were nonsense and the voters rejected them. Justice Barkett stayed on the bench by a 2-1 margin.

The same talents Justice Barkett brought to the Florida courts would serve the country well, particularly on the Circuit Court of Appeals. This is the court which has the final say in all appeals not heard by the U.S. Supreme Court. Because the high court hears relatively few cases, the federal appellate courts are powerful arbiters of constitutional issues.

A judge on such a court must possess rigor of intellect tempered by broad sympathies

for litigants. In this regard, Justice Barkett is an unusually strong candidate.

The Senate should take note and vote to confirm her.

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[From the Miami Herald, Sept. 28, 1993]

A BOON FOR THE BENCH

To those who say that it can't be done and feel like quitting: Rosemary Barkett has just done it—again.

The only woman ever to sit on the Florida Supreme court, she has been nominated to the 11th U.S. Circuit Court of Appeals, one rung below the Supreme Court. What a triumph!

Her Syrian family emigrated from Mexico to Miami when she was 6. At 18 she became a U.S. citizen and a nun. After nine years of teaching, she entered the University of Florida Law School. She became a top-notch trial lawyer in West Palm Beach. Appointed a trial judge in 1979, she moved to the Fourth District Court of Appeal, then to the Supreme Court.

True, some critics don't like her for holding that the Florida Constitution's privacy section protects a woman's right to abortion, or for her opinion declaring unconstitutional the Broward sheriff's random drug searches of interstate bus passengers. Others like her decisions but find her writing murky.

Florida voters looked seriously at Justice Barkett's "liberal" record in 1992. Up for merit retention, she was "targeted" for removal by abortion opponents and conservative organizations, which called her "soft on crime." Justice Barkett, who has voted 200 times to uphold the death penalty, was re-elected easily.

The best measure of a judge is not splendid writing but fair decisions. By that measure, Justice Barkett stands tall on merit and on the full range of her life's experience. That experience, of course, is different from that of her male predecessors on the bench. The judiciary ought to welcome that diversity.

Maybe somewhere in the 11th Circuit there's a "better qualified" nominee. But President Clinton could hardly have found anyone better prepared.

"I'd like to think that I've made a contribution and a difference in terms of protecting the people of this state, and in terms of caring," says Justice Barkett, 54. She has made a difference. More important, she has more to contribute.

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[From the Orlando Sentinel, Sept. 29, 1993]

BARKETT RIGHT FOR U.S. BENCH

For eight years, Rosemary Barkett has served Florida with distinction and quiet aplomb—her integrity beyond reproach.

It was no surprise that such a solid record of fairness on the state Supreme Court bench would catch the attention of President Clinton.

Last week, Mr. Clinton nominated Florida's chief justice to serve on the federal appeals court in Atlanta, which hears cases from Florida, Georgia and Alabama.

Ms. Barkett, Florida's first and still only woman on the state Supreme Court, is a top-notch choice for the 11th U.S. Circuit Court of Appeals.

Last year, Floridians expressed their vote of confidence for Ms. Barkett in her merit-retention election, despite a campaign by detractors who tried to make her seem soft on crime. By focusing on a smattering of controversial cases, though, her critics ignored the bulk of Ms. Barkett's rulings.

Chances are good that those critics will try to revive such diversionary tactics.

A look at her state Supreme Court record since 1985 produced an indisputable fact: Ms. Barkett placed solidly in the mainstream, voting with the majority in 91 percent of civil and criminal cases and supporting the death penalty in more than 200 cases.

She is hardly out of step with the law or on a campaign to wage an activist agenda from the bench, as some of Ms. Barkett's critics charged.

The 54-year-old jurist has shown an uncompromising obligation to uphold Florida's constitution.

Such was the case when her vote decided that the privacy amendment in Florida's constitution protects all the state's citizens, including pregnant minors who want an abortion.

Surely, deciding that case must have been difficult for Ms. Barkett, a former Catholic nun, but the state's constitution did not allow for anything else. It is an issue that should be settled by voters changing Florida's constitution, not by a campaign to smear Ms. Barkett's good name.

U.S. Sen. Bob Graham, who appointed Ms. Barkett to a judgeship when he was governor calls her "a rigorous legal scholar with an understanding of how the law affects the everyday lives of men and women.."

And the lives of children, too. Ms. Barkett serves on an American Bar Association panel that is looking at the unmet needs of children. It's heartening that she plans to continue her work on that panel.

When senators meet Ms. Barkett during confirmation hearings, they will find a committed judge who strives for justice under the law.

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[From the Sun-Sentinel, Oct. 1, 1993]

BARKETT A HIGH-QUALITY NOMINATION FOR COURT, SOURCE OF PRIDE FOR SOUTH FLORIDA

As expected, President Clinton has nominated Rosemary Barkett, chief justice of Florida's Supreme Court, to become a federal appellate judge.

The choice is an excellent one, reflecting well on Clinton's commitment to quality in making appointments. If confirmed, she would join the 11th U.S. Circuit Court of Appeals in Atlanta, which hears cases from Florida, Georgia and Alabama.

Barkett's rise up the legal and judicial ladder has been swift, earned by skill as a trial attorney and judge, leadership as chief judge and chief justice, intelligence as a legal scholar (tops in her law school class), tenacity in problem-solving, plus a commitment to social justice, particularly the needs of the poor.

Her confirmation by the Senate should be swift, despite likely opposition from groups like Florida Right to Life and the National Rifle Association, which mounted a noisy but ineffective campaign in 1992 to defeat her in a merit retention election.

Her critics have claimed, falsely, that she is "soft" on crime and criminals and engages in a pattern of "liberal activism" to free convicted killers, weaken law enforcement and usurp crime victims' rights.

To the contrary, the court almost always upholds death penalty convictions (she has done so 200 times) and avoids engaging in "judge-made law." So-called liberal activism really involves overturning convictions or sentences based on major trial court errors, protecting people from abusive police and prosecutorial tactics and upholding federal laws and higher court rulings.

An evaluation of Barkett's rulings shows she is not an extremist, going against the grain, but is clearly in the court's mainstream, siding with the majority 91 percent of the time.

Barkett, 54, is a University of Florida Law School graduate who has been on the court since her appointment in 1985 by then-Gov. Bob Graham, who as a senator will vote on her confirmation.

In a sense, she exemplifies one aspect of the American dream—an immigrant who moves to America, learns English and achieves success. Born in Mexico of Syrian parents, she is a former nun and schoolteacher.

South Floridians have particular cause for pride. Raised in Miami, Barkett served as a private attorney in West Palm Beach for nine years before being appointed a Circuit Court judge in 1979. She became Palm Beach County's chief judge in 1983 and joined the 4th District Court of Appeals in West Palm Beach in 1984, moving to the Supreme Court a year later. In July 1992, she was named Florida's first female chief justice.

Barkett is also living proof of why Florida's "merit selection" appointment process does a far better job than elections in putting high-quality people on the bench.

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[From the Tampa Tribune, Oct. 2, 1993]

CLINTON WISE TO CHOOSE BARKETT

President Clinton made a wise and courageous choice in nominating Florida Supreme Court Chief Justice Rosemary Barkett to fill a seat on the 11th Circuit Court of Appeals in Atlanta.

Wise because Barkett, a former non and schoolteacher, would bring a lifelong commitment to fairness and justice unsurpassed on the appellate court responsible for hearing cases from Florida, Georgia and Alabama.

Courageous because despite Barkett's long record of upholding the law while defending the rights of all people, her critics will be out in force when the U.S. Senate confirmation hearing begin.

Her detractors will be quick to falsely portray Barkett as soft on crime, careless of the rights of children and promoting a liberal agenda.

Senators, including Florida's owns Connie Mack, will do well to dispense with the rhetoric and, instead, take a hard look at Barkett's record.

The senators will find that while she has refused to accept the death penalty carte blanche, she has voted to uphold it more than 200 times. She is one of the state's strongest and most outspoken defenders of children's rights. Of the more than 3,000 cases in which she and the other justices have rendered opinions based on a vote of the court, she has voted with the majority in 91 percent of the cases. That scarcely indicates she is guided by her own personal agenda or is out of the mainstream.

Of the 19 specific cases used to attack her record during the 1992 retention election, seven were unanimous decisions by the court. The 270 cases cited as evidence that she somehow favors criminals were chosen from among 3,000 decisions because they supported the critics' points; her supporters would easily select 270 that would have refuted them.

Fortunately, voters saw through the smoke and returned her to the bench with more than 60 percent of the vote.

A 1970 honors graduate of the University of Florida Law School, Barkett has experience with the law that includes nine years as a lawyer in West Palm Beach, six years as a circuit and state appellate judge and eight years as a member of the state Supreme

Court, the last year as chief justice. She has consistently spoken out for public participation in and inspection of fiscal and managerial matters of the government and courts. But she also recognizes the need to shield some judicial files, including psychological evaluations of children and private papers filed in divorce disputes.

"She is everything you want in a judge," said Florida Attorney General Bob Butterworth. "Someone who listens thoroughly to a case, researches both sides fully and renders a decision which is in accordance with the law."

Off the bench, Barkett, 54, has touched many lives on the lecture circuit and served admirably as chairwoman of the Study Commission on Child Welfare, which helped lead to the ongoing overhaul of the state Department of Health and Rehabilitative Services (HRS).

Overall, Barkett's reputation—as dynamic thoughtful, intelligent and personable—makes her amply suited to serve on the federal bench.

The Senate should move swiftly to confirm her appointment.

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[From the St. Petersburg Times, Oct. 19, 1993]

RIGHT WING IS RECYCLING OLD GARBAGE

(By Philip Gailey)

The Wall Street Journal editorial page and the Free Congress Foundation—the hard-right team that seeded the political controversy that engulfed Lani Guinier's nomination to a top Justice Department post—have discovered another threat to the republic. This time it is Florida Supreme Court Justice Rosemary Barkett, who is President Clinton's nominee to a seat on the 11th U.S. Circuit Court of Appeals.

To hear the rap sheet they have compiled on Barkett, you'd think she is personally responsible for most of the crime and mayhem in Florida, that she is aggressively pro-criminal and anti-police, and that she spend most of her waking hours looking for technicalities to spare brutal killers from the hot seat.

In his Wall Street Journal column last Friday, Paul Gigot wrote that "to wade through Ms. Barkett's opinions is to encounter root causes, 'unconscious discrimination,' fear of police and other liberal explanations for crime. This is especially true in death penalty cases, which she attempts to overturn on the smallest technicality."

Gigot and his friends on the right are recycling the same garbage that anti-abortion forces, the National Rifle Association and some state prosecutors threw at her in last year's retention election. The smell is even fouler this time around. They're using the same distortions, oversimplifications and untruths that her Florida opponents used in their smear campaign.

The state's voters sorted through the garbage and affirmed Barkett, the first woman to serve on Florida's high court, for another term. She won 61 percent of the vote. Remember, Florida's conservative voters stuck with George Bush last year, and they overwhelmingly support the death penalty.

Sen. Orrin Hatch of Utah, a conservative Republican on the Senate Judiciary committee, plans to lead the inquisition at Barkett's confirmation hearings. If President Clinton is willing to nominate to federal judgeships men and women who personally oppose abortion, you would think Republicans would be willing to accept nominees who have shown they can uphold the death penalty regardless of their personal feelings.

What will it take to convince people like Hatch that Barkett has not attempted to pull the plug on Florida's electric chair?

Barkett was nominated to the Florida Supreme court by then-Gov. Bob Graham, who signed dozens of death warrants. She has hardly been a disappointment to Graham on that score: Barkett has upheld the death penalty in more than 200 cases since she joined the court.

A study by Steven Gey, a professor of constitutional law at Florida State University, found that Barkett voted with the majority of the court in 88 percent of the criminal cases it decided from 1986 to September 1992. No one would call the Florida Supreme Court a bunch of bleeding heart liberals, and Barkett has often stood with some of the court's most conservative members in her opinions.

Yes, Barkett has voted to overturn death sentences. But what appeals judge hasn't? The criminal justice system makes mistakes. The courts are there to correct them. The thing that really bothers her critics is Barkett's obvious lack of enthusiasm for the death penalty.

Barkett, a former nun, refuses to say what her personal views are. I assume she personally opposes capital punishment but understands a judge must follow the law. Attorney General Janet Reno personally opposes state executions, but as Dade County state attorney she sought the death penalty in plenty of cases. And what about Ruth Bader Ginsburg? The newest member of the U.S. Supreme Court, which has the final word on these matters, was confirmed even though senators still don't know much about her views on capital punishment.

When the Senate Judiciary Committee opens its confirmation hearings on the Barkett nomination, the Florida jurist will be escorted to the witness table by Democratic Sen. Bob Graham. It would be a shame if the state's Republican senator, Connie Mack, doesn't join Graham for the customary introduction of the nominee.

Mack, who voted to confirm Ginsburg, says he won't make up his mind about Barkett until he sees what the hearings produce. That's a cop-out. It is usually Graham, not Mack, who waits until the last minute to take a position on a controversial issue.

Mack, who is facing an easy re-election campaign next year, has grown as a senator in recent years. Even many of his old critics grudgingly acknowledge that much. That's why it's disappointing to see Mack holding back while the hard-right ideologues in Washington circle Barkett for the kill.

For Mack, the choice is simple: He can stand with Florida voters, who stuck with Barkett last year, or he can stand in the slimy swamp with the vipers who poison nearly every issue they touch.

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[From the Orlando Sentinel, Oct. 25, 1993]

BARKETT IN THE MAINSTREAM

Consevatives on Capitol Hill have started to question whether Chief Justice Rosemary Barkett of the Florida Supreme Court is too soft on crime to be a federal appeals judge.

Nothing new there.

President Clinton's choice for the 11th U.S. Circuit Court of Appeals already fought that war last year during her retention election to Florida's top court. Armed with the facts, she won over Floridians with 61 percent of the vote.

Last year, Ms. Barkett's detractors—from the National Rifle Association to abortion-rights opponents—used a few high-profile cases in which Ms. Barkett sided with the minority to try to paint her as out of step with Florida's judiciary.

A review of Ms. Barkett's record from 1985, when she was appointed to the Supreme Court, to September 1992, however, shows the jurist to be solidly in the mainstream. She voted with the majority in 91 percent of all cases before the court, and in 88 percent of the criminal cases.

That apparently isn't enough for Utah Republican Sen. Orrin Hatch or the Free Congress Foundation, an ultra-conservative, judicial watchdog group. Both Mr. Hatch and, the foundation are questioning Ms. Barkett's commitment to uphold the death penalty.

Certainly, Ms. Barkett has been cautious about applying the death penalty in certain instances. Taking into account that there is no turning back on such a decision, however, that caution is warranted.

Consider that a study released Thursday by Death Penalty Information Center, a group that opposes capital punishment, documents the cases of 48 men who were released from death row in their states during the past 20 years when new evidence emerged to prove their innocence.

The report concludes that, in those cases, perjured testimony or improper conduct of prosecutors led to guilty verdicts. It points out several cases in which coincidence, rather than courtroom procedure, produced evidence of an inmate's innocence.

As it stands, Ms. Barkett voted to uphold the death penalty 200 times when the issue came before the Florida Supreme Court in the past eight years she has been on the bench.

Not only that, but of seven cases in which the U.S. Supreme Court decided to overturn Florida death sentences while George Bush was president, Ms. Barkett had voted to execute in four.

That would seem to make Ms. Barkett much tougher than the U.S. Supreme Court majority appointed by two Republican presidents in the past decade.

Clearly, drawing conclusions from a few cases about Ms. Barkett's integrity and her commitment to the law is reckless and unfair. Let the Senate judge Ms. Barkett based on her overall record.

Senators are sure to find Ms. Barkett's caution to be well-reasoned and in the best interests of fairness and justice for all Americans.

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[From the Orlando Sentinel, Oct. 31, 1993]

CHEAP-SHOT ARTISTS WASTE TAXPAYERS DOLLARS TO TAKE AIM AT BARKETT

(By Charley Reese)

To sue mild language, I don't have much use for the U.S. Senate Judiciary Committee. In recent years, it has allowed the confirmation process for judicial appointments to become show and circus in which the news media and special-interest groups play a bigger role than the senators themselves.

That is wrong. It doesn't matter which nominee is being trashed or smeared or which party is in the White House. As citizens, we have a vested interest in the integrity of our governmental processes. We have a vested interest in those processes not becoming so distorted and destructive of people's reputations that no decent person would even accept a presidential nomination.

Finally, we as citizens have a vested interest in our governmental processes always being fair and just.

For all those reasons, I was ticked off—I'm really trying to use mild language—to find a large package in my mailbox from the Sen-

ate Judiciary Committee. It was addressed to me in care of my syndicate and was unsolicited.

In it was a couple of memoranda from some public servant named Mark R. Disler, who identifies himself as Republican Staff Director, Senate Judiciary Committee. The two memos are addressed to "interested parties" and to "interested persons." One dated Oct. 5, states: "Re: Nomination of Great Interest." The second, dated Oct. 12, states: "Re: Rosemary Barkett."

They are both about Florida Supreme Court Justice Rosemary Barkett, who has been nominated by President Clinton to be a federal appeals court judge in the 11th Circuit.

The packages contain a number of cases in which she has written dissents, as well as a so-called analysis of them. He urges me to feel free to use them, though they are not for attribution. Disler has been in Washington too long. I don't let some staff turkey I never laid eyes on send me an unsolicited package of information, all acquired and paid for at the public's expense, and then be told not to attribute the information. I don't grant anonymity to cheap-shot artists. The public has a right to know how their public servant, in this case Mr. Mark Disler, is wasting their money.

If you see some other pundit pontificating about Justice Barkett as if he or she actually knew anything about her, you'll know the source—Little Mr. Leaker on the minority staff of the Judiciary Committee.

In the second memo, while repeating that his memoranda are not for attribution, he states, "but you can feel free to use the information in them. Please write early and often. Thanks. You can contact Ed Whelan of my staff at the above number if you have questions."

I don't know what the official duties of the Republican Staff Director of the U.S. Senate Judiciary Committee are, but they surely do not include instigating a disinformation campaign against a nominee. Somebody ought to fire the jerk. The so-called analyses of the cases he includes are inept distortions. They are wrong characterizations, not analyses. Some are so far off the mark one wonders if the writer can even comprehend the English language.

The drift of this poisonous partisan, so-called analyses is that Justice Barkett is soft on crime. In one such bit of garbage, it says, "Barkett views herself as one of the enlightened elite who must override democratically enacted laws in order to bring about what the riff-raff would really want." That's a damned lie.

Listen, I happen to know this lady justice. She is not soft on crime. She has one of finest legal minds in the country, a terrific set of moral values, and abiding respect for the U.S. Constitution and the principles of liberty and law. Thomas Jefferson, James Madison and Patrick Henry would love her—and respect her brilliant mind. They would despise dimwit partisan pipsqueaks like Disler who abuse their positions and the taxpayers.

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[From the New Yorker, Dec. 20, 1993]

CLINTON'S JUDGES

George Bush has been out of there for less than a year, and already it's hard to remember much of anything about his Presidency—except that he waged the Gulf War and appointed David Souter and Clarence Thomas to the Supreme Court. In the long view of history, the appointments will probably loom larger than the war. In fulfilling their constitutional duty to populate the federal judiciary, Presidents leave a legacy that long outlasts them. Federal judges hold office for life; they serve as arbiters of the Constitution's magnificent—and magnificently vague—commands; on issues as various as racial equality, personal privacy, and religious liberty, they shape the society in which we live. Whatever questions may obsess and torment us in the future (Do clones have inheritance rights? Are speed traps permissible on the information highway?), we can pretty sure that federal judges will have the last word on them.

With Congress in recess, President Clinton has done all the judicial nominating he can do for his first year in office, and it is possible to make an early assessment of how he has discharged this pivotal duty. He turns out to have launched a quiet revolution in the "diversity"—Beltway shorthand for ethnic and gender heterogeneity—of the federal judiciary. A glance at the record of his predecessors shows the dimensions of the change. According to a comparative analysis by the Clinton White House Counsel's Office, Jimmy Carter, by Thanksgiving of his first year in office, had nominated thirty-four judges, one of whom was a woman; in that same span, Ronald Reagan had nominated forty, two of them women, and George Bush had nominated twenty-three, four women among them. Bill Clinton has nominated forty-eight judges—and eighteen of them are women, including, of course, his most important appointee, Justice Ruth Bader Ginsburg of the Supreme Court. The same pattern holds true for minorities. In the first eleven months of their terms, Carter nominated five black or Hispanic judges, Reagan one, and Bush two. Clinton has nominated fourteen. To put it another way, eighty-two percent of Carter's first-year nominees were white males, and so were ninety-two percent of Reagan's and seventy-four percent of Bush's, while only thirty-eight percent of Clinton's first-year nominees to the federal bench were members of that not yet long-suffering breed. The first-year trends among Clinton's predecessors continued with little change, and it's logical to expect this President to maintain his pace as well.

All this good news on the diversity of Clinton's nominees would be bad news indeed if the President had achieved diversity at the expense of quality. But, if the ratings of judicial candidates put out by the American Bar Association are any guide, that hasn't happened. Of the Clinton nominees rated so far this year, three-quarters have received the A.B.A.'s "well qualified" label—a higher percentage than Carter's Reagan's, or Bush's first-year nominees achieved. A look at a few of the nominees themselves shows what's behind this favorable consensus. In New York, for example, Pierre N. Leval has long been among the region's most eminent district-court judges; he richly deserved to be elevated to the court of appeals. Dean David Trager of Brooklyn Law School, who likewise has a long and distinguished record in public service, clearly belongs on the district-court bench. Highly qualified nominees of diverse backgrounds have been the rule throughout the country. Martha Craig Daughtrey, whom Clinton appointed to the court of appeals, was the first female prosecutor in Tennessee, the first woman to serve as a state-court judge in Tennessee, and the first woman to serve on that state's supreme court. Martha Vázquez, an appointee to the district court in New Mexico, is the daughter of Mexican immigrants and is a distinguished trial lawyer. And Nancy Gertner, a nominee to the district court in Massachusetts, has been a leading civil-liberties practitioner and a professor at Harvard Law School.

The nominee who has generated the most controversy may be the most highly qualified of all. The life story of Rosemary Barkett reads like a gloss on the American dream. She was born in 1939 in a small town in Mexico. Her parents, who were immigrants from Syria, had sixteen children, of whom only five survived. The Barkett family moved to Miami when Rosemary was five. About the time she turned eighteen, she became both a Roman Catholic nun and a United States citizen. After teaching school for several years, she graduated from college, and then, having left the convent, she graduated near the top of the University of Florida College of Law's class of 1970. Following a successful stint as a litigator, Barkett became a lower-court judge in the Florida state system in 1979, and by 1985 she had worked her way up to an appointment to the Florida Supreme Court. As a justice on that court—she is now its chief justice—she won a reputation as one of the most progressive and intelligent judges in the nation, gaining particular notice for her 1989 vote that the Florida Constitution protects a woman's right to choose abortion.

A handful of conservative critics have assailed Barkett for insufficient zeal in support of Florida's death-penalty statute. One may question whether such zeal is something to be desired in a judge; in any event, Barkett has shown nothing but evenhandedness in enforcing that doleful law, voting more than two hundred times to approve death sentences. Barkett's opponents managed to prevent her confirmation to a seat on the court of appeals from going forward before Congress adjourned in November, but, since she has virtually the entire Florida legal establishment behind her—and most of the state's major newspapers as well—she stands every chance of winning approval early next year.

Clinton's nominees are different from those of his Republican predecessors in more suprising ways, too. Bush and, especially Reagan nominated any number of aggressively opinionated young academics to the federal bench. Clinton has resisted the temptation to match that record ideologue for ideologue; rather, he has drawn in significant measure from a deep pool of judges on state courts, which served as a refuge for many moderate jurists over the past twelve years. Nor has Clinton sought to magnify his legacy by reaching out for notably youthful nominees; his selections include many judges in their fifties and a few in their sixties. It's true that, as the Washington Post pointed out the other day, the Clinton judge-picking machinery has moved slowly, and that the age factor will cause vacancies to remain endemic in the system. But this President seems to recognize that, in the long run, who the judges are rather than how long they serve will determine their contribution to the judicial system and the nation.

Mr. GRAHAM. Mr. President, the question that has been asked is, "Will she carry out the law?" The statement has been made that she did not follow the edicts of the U.S. Supreme Court as it related to equal protection, to due process, to privacy, and a list of other items, a charge to which I would say she would enthusiastically plead guilty. And the reason is because she was not sitting as a Federal judge with responsibilities singularly for enforc-

ing the Constitution of the United States of America. She took a dual oath of office to enforce not only the Constitution of the United States of America, but where it went beyond the standards available to all Americans to enforce the constitution of the State of Florida.

Mr. President, let me just bring to your attention, as I did earlier today to the Members of the Senate, a provision which was adopted in our Constitution in 1980, 5 years before Justice Barkett became a member of the supreme court. It was adopted by an overwhelming vote of the people of Florida in November 1980. It is our State's right to privacy. That amendment reads:

> Every natural person has the right to be left alone, has the right to be free from governmental intrusions into his private life.

Mr. President, those words are part of the protections available through the Florida Constitution to the citizens of our State. The arguments against her would state that she was disqualified from being a member of the Federal judiciary because she had faithfully carried out the mandates of the State constitution to which she swore an oath of allegiance. Had she failed to do so, I think that would have been the disqualifying factor. Yes. Under provisions like that, as well as other State constitutional provisions, which give additional protections in important areas of equal protection and due process, she has judged the constitution of Florida as it has been interpreted in the past and as it is written, by the vote of the people, to give those additional protections. She has been a faithful jurist in discharging her responsibilities.

Mr. President, if she had been less than that, she would not have had the support of the law enforcement agencies, of the legal community, of the leading observers of the civic life of our State, as she did when she continued in service in the Florida Supreme Court in 1992, and now, as she has been nominated by the President of the United States of America to serve in this high Federal judicial position.

I am surprised that her opponents would essentially argue for a unitary judicial system in America, which would deny States the right to afford to their citizens a different standard of protection.

Mr. HATCH. Will the Senator yield?

Mr. GRAHAM. Mr. President, I will finish my remarks, and then I will yield for whatever questions or comments the Senator cares to make.

As Senator MITCHELL referred to the first 10 amendments to the Constitution of the United States as being man's highest statement of human rights and civil rights, I point out that the 10th of those 10 first amendments was one which reserved to the States and to the people all powers not delegated by the Constitution to the central Government. The State of Florida and other States have exercised that reserve power, including exercising it to grant additional protections to the people of their State.

Mr. President, in conclusion, this is a uniquely qualified woman to serve in the Federal judiciary. She has served our State with distinction for a significant portion of her adult life. She has met every test in terms of her personal, professional, and judicial qualifications, and has passed each of those tests. She has demonstrated her knowledge and her willingness to enforce the law. She has stated that she understands the difference between her service as a member of the Florida Supreme Court—now the chief justice of the supreme court—and the responsibilities she will have as a member of the Federal judiciary. And in her new position, she will follow the precedents as established by the U.S. Supreme Court.

She has the support of law enforcement, of those persons who know what contributions she has made toward the provision of criminal justice in our State.

Mr. President, this is a person whom I know personally; this is a person whom I recommend in the strongest terms for this important Federal judicial responsibility.

I am now pleased to yield.

Mr. HATCH. I thank my colleague for yielding.

Mr. President, I know the distinguished Senator from Florida is very sincere and very dedicated in getting this nominee through. I admire him for that and appreciate it. Keep this in mind: When I listened to the majority leader saying that the Bill of Rights is what is involved here, I think it is the Bill of Rights. Nobody reveres the Bill of Rights more than I do. That is precisely why I do not think this judge should be confirmed.

Second, the Senator from Florida has indicated that, yes, there have been some problems with Justice Barkett's not following Federal precedents. There really have, and she has admitted it. In the first place, the role of a State supreme court justice and of a Federal appellate court judge are absolutely identical in terms of their obligation to follow U.S. Supreme Court precedent on issues of Federal constitutional law. The issue is not whether she reads the Florida Constitution more broadly—as has been argued here—than the U.S. Constitution. The issue is that she has a clear pattern of misreading the U.S. Constitution and clear-cut Supreme Court precedent. That has to be said. Nobody believes in the Bill of Rights more than I do. That is why I do not think this judge should be confirmed for the circuit court of appeals.

Mr. GRAHAM. Mr. President, in the remaining 30 seconds, I will briefly respond. In case after case that has been cited on the principle that Justice Barkett is not following precedent, those are the cases which she resolved under State standards, not under Federal standards. There has been no allegation that she was not faithfully adhering to the law and precedent, and applying her judgment as she felt it appropriate to do to carry out her dual responsibilities as a State supreme court justice and to the Federal Constitution.

She will meet that same high standard of fidelity and judicial commitment to the law as a judge on the Eleventh Circuit Court of Appeals, to which I am confident this Senate will soon confirm her.

Mr. WALLOP. Mr. President, last January 25, President Clinton used his State of the Union Address to assure Americans that he was tough on crime. He urged that we pass a "strong, smart, tough crime bill," and endorsed, among other things, boot camps for young offenders and the "three strikes, you're out" provision which mandates life in prison for criminals convicted of a third serious felony.

I applaud those statements. I would suggest, however, that what we need is not more rhetoric, but firm leadership, actions that speak louder than words.

A President who is tough on crime would not appoint judges who believe in coddling criminals because they are the victims of society. A President who was tough on crime would not appoint Justice Rosemary Barkett to sit on the U.S. Court of Appeals for the Eleventh Circuit.

In particular, I am referring to decisions by Justice Barkett that would severely hamper the ability of police officers to enforce laws against drug trafficking and other crimes. I am not a lawyer, Mr. President, but when the ranking member of the Judiciary Committee describes a pattern of unduly restrictive fourth amendment decisions on search and seizure then I understand that the result is a soft-on-crime approach.

A person certainly does not have to be trained in the law to understand just how outrageous was the dissent in which she joined in the Dougan case. Let me briefly outline the facts in that case.

Dougan was the leader of a group called the Black Liberation Army, a group which had the sole purpose of killing white people in order to start a revolution and racial war. In 1974, Dougan and four other members of the group picked up a white hitchhiker, drove him to a dump, and repeatedly stabbed and then shot him in the chest and head.

Later Dougan made several tape recordings bragging about the murder, describing it in graphic detail and stating that he thought it was beautiful and that he enjoyed every minute of the grisly scene.

Dougan was ultimately sentenced to death because the trial court found aggravating circumstances and no mitigating circumstances. The Florida Supreme Court agreed. However, Justice Barkett joined in a dissent which stated:

This case is not simply a homicide case, it is also a social awareness case. Wrongly, but rightly in the eyes of Dougan, this killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection.

On a side note, Mr. President, I find it ironic that a Senate which recently passed a strong anticrime measure containing a provision to enhance sentences for hate crimes—where a defendant selects a victim because of race—would affirm any nominee who finds hate a mitigating, rather than an aggravating factor.

This is just a short synopsis of Justice Barkett's record. This nomination typifies the hypocrisy of an administration that on the one hand says it is tough on crime but on the other does its level best to see that no one can, or will by their own admission ensure that happens.

President Clinton can use a high-visibility speech or he can use the weight of his office to convince America that he cares about the problem of crime.

Mr. NICKLES. Mr. President, Rosemary Barkett, chief justice of the Florida Supreme Court, has been nominated to the U.S. Court of Appeals for the Eleventh Circuit. I am going to vote against her.

To help explain my vote, I will refer to three capital punishment cases. These cases help illuminate Justice Barkett's views of life and the law—and it seems to me that these views disqualify her for elevation to the court of appeals.

Justice Barkett has, of course, written hundreds of opinions and participated in thousands of cases, and perhaps it is unfortunate that we must focus on a small number of her cases. I acknowledge that Justice Barkett has often, indeed usually, voted with the majority of her court. However, her dissents most vividly outline her views, and when we turn to the dissents we see most clearly those cases where she has drawn a line between her and her colleagues.

Former Associate Justice William J. Brennan has written:

[D]issents are * * * critical to an understanding of [a] justice. Just as we judge people by their enemies, as well as their friends, their dislikes as well as their likes, the principles they reject as well as the values they affirmatively maintain, so do we look at judges' dissents, as well as their decisions for the court, as we evaluate judicial careers. *In Defense of Dissents*, 37 *Hastings L.J.* 427, 428 (1986).)

Let us now turn to the cases that illustrate Justice Barkett's views:

First, *Dougan* v. *State*, (595 So.2d 1 (Fla. 1992) (per curiam)), a case where a racially motivated murder was committed in the hope that it would trigger a race war. Here are the facts as reported by the court:

Jacob Dougan and four of his friends belonged to the Black Liberation Army [BLA]. They were, perhaps, the only members of this group "whose apparent sole purpose was to indiscriminately kill white people and thus start a revolution and race war."

In June 1974, Dougan and his accomplices drove around Jacksonville, FL, searching for victims, but they saw no one who could be murdered secretly. Dougan did, however, write a note that was to be placed on the body of the eventual victim. Later that night the BLA chose its victim, a lone, white hitchhiker named Stephen Orlando, age 18. Orlando was kidnaped, taken to an isolated garbage dump, stabbed repeatedly, and shot by Dougan.

Dougan then took to bragging about the murder. He made audiotape recordings which he mailed to the media and, as if that weren't villainous enough, to the victim's mother. The following excerpt is from one of Dougan's tapes—which the court said aptly illustrates their contents:

The reason Stephen was only shot twice in the head was because we had a jive pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a (expletive deleted). He was stabbed in the back, in the chest, and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes.

At trial, one of Dougan's accomplices testified for the State, and the other four were convicted of murder. Only Dougan, however, was sentenced to death. The trial court found three aggravating factors and no mitigating factors.

The dissent, which sought life imprisonment rather than death, was not written by Justice Barkett, but she joined it. It said:

This case is not simply a homicide case, it is also a social awareness case. Wrongly, but rightly in the eyes of Dougan, this killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection. Throughout Dougan's life his resentment to bias and prejudice festered. His impatience for change, for understanding, for reconciliation matured to taking the illogical and drastic action of murder. His frustrations, his anger, and his obsession of injustice overcame reason. The victim was a symbolic representative of the class causing the perceived injustices.

At her hearing in the Senate Judiciary Committee on February 3, 1994, Justice Barkett said that she was attempting to follow the law in Dougan, and that although she didn't pen the dissenting opinion she had no problem in agreeing with it.

The majority of the Florida Supreme court said that the dissenters' logic in the Dougan case "would lead to the conclusion that the person who put the bomb in the airplane that exploded over Lockerbie, Scotland, or any other terrorist killer should not be sentenced to death if the crime were motivated by deep-seated philosophical or religious justifications."

Mr. President, in his recent book, "The Moral Sense," Prof. James Q. Wilson writes of the "philosophical doubts, therapeutic nostrums, and ideological zealotry" that have "infected" the modern age. He said:

"The moral relativism of the modern age has probably contributed to the increase in crime rates. * * * It has done so by replacing the belief in personal responsibility with the notion of social causation and by supplying to those marginal persons at risk for crime a justification for doing what they might have done anyway. If you are tempted to take the criminal route to the easy life, you may go further along that route if everywhere you turn you hear educated people saying—indeed proving—that life is meaningless and moral standards arbitrary.

Mr. President, I am unwilling to confirm Justice Barkett because this dissenting opinion sounds to me like an apology for murder—so long as the murder is politically correct. I cannot vote for a judge who would write, or join, such an opinion.

The second case is *Cruse* v. *State*, (588 So.2d 983 (Fla. 1991) (per curiam), cert. denied, 112 S. Ct. 2949 (1992), a case involving a notorious mass murderer and cop killer. Here are the facts as reported by the court:

In the spring of 1987, in Palm Bay, FL, William Cruse shot and killed rookie police officers Ronald Grogan and Gerald Johnson and four others. They were shot with a powerful semiautomatic rifle—which Cruse had purchased a month earlier—fitted with special ammunition clips—which Cruse had purchased a week earlier.

Cruse's first three victims were killed at a Kmart shopping center. When Cruse heard sirens approaching, he got in his car and drove across the street to another shopping center where he began firing into a Winn Dixie store. When officers Grogan and Johnson drove into the Winn Dixie parking lot in separate police cars, Cruse turned his attention from the store, inserted a fresh 30-round clip into his assault rifle, and fired eight times through Grogan's windshield, killing him. As Officer Johnson was getting out of his car, Cruse wounded him in the leg. Officer Johnson then attempted to find cover among the cars but Cruse pursued him and killed him with three shots. When a rescue team tried to retrieve Grogan's car, Cruse opened fire on them, shouting, "Where is the cop? Get away from the cop. I want the cop to die."

At trial, the jury found Cruse guilty of six counts of first-degree murder and numerous other counts and recommended the death penalty for each of the murders. However, the trial

judge upheld those recommendations only for the murders of Grogan and Johnson. All 12 jurors agreed that Officer Johnson's murder was worthy of the death penalty; 11 of them agreed that Officer Grogan's murder called for death. The trial judge concurred in both cases. On appeal, six of the seven members of the Florida Supreme Court also concurred—the one exception was Rosemary Barkett.

In sentencing Cruse to death, the trial court found one mitigating circumstance—extreme mental or emotional disturbance—to which it gave great weight. That court also found four aggravating circumstances, including that the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Although Cruse had procured the weapons, clips, and ammunition in advance, driven to one shopping center and then another, reloaded before opening fire on Officer Grogan, and tracked Officer Johnson through the parking lot, Justice Barkett held that Cruse was too mentally disturbed for cool and calm reflection. Furthermore, she wrote, Cruse had acted with a pretense of moral or legal justification because he "was acting in response to his delusions that people were trying to harm him." Justice Barkett would have revoked the death sentences and imposed life sentences.

Justice Barkett also dissented because she believed that the prosecution in Cruse had withheld evidence from the defense in violation of the U.S. Supreme Court's mandate in *Brady* v. *Maryland*, (373 U.S. 83 (1963)). On this ground, she would have reversed the convictions and remanded for a new trial. No other justice agreed with her on this point, either.

Justice Barkett was asked about Cruse in her hearing before the Senate Judiciary Committee on February 3. She said she had merely followed precedent, and she asked not to be judged on this one case.

The question is, is Cruse an aberration, or is it illustrative?

Senator DOLE has pointed out that "Justice Barkett has never—not once—dissented from a majority decision of the Florida Supreme Court" when the court was overturning a capital sentence, but she has dissented more than 100 times when the court enforced a capital sentence (140 Cong. Rec. S1822 (daily ed. Feb. 24, 1994)). Her dissent in Cruse was one of those 100-plus dissents. Justice Barkett does not always oppose capital sentences, though. According to one count, she has voted to uphold them some 120 times. Here, then, is Justice Barkett's record:

Voted with majority to uphold capital sentence: some 120 times,

Voted against majority when it upheld capital sentence: 100-plus times,

Voted against majority when it struck down capital sentence: zero.

This is not, Mr. President, a balanced judicial record.

The third case is, *LeCroy* v. *State* (533 So.2d 750 (Fla. 1988), cert. denied, 109 S.Ct. 3262 (1989)), a case where a double murder was committed by a 17-year-old. Here are the facts as reported by the court:

> While camping in a wild area of Palm Beach County, FL, in January, 1981, husband and wife John and Gail Hardeman were murdered by Cleo LeCroy. Mr. Hardeman was killed by a shotgun blast to the head. Mrs. Hardeman was shot in the chest, head, and neck with a small caliber gun. There was some evidence that Mrs. Hardeman was sexually molested after she was shot. LeCroy was 17 years and 10 months old when he killed the Hardemans.

The jury found LeCroy guilty of first-degree felony murder in the murder of Mr. Hardeman because the murder was part of a robbery. LeCroy was found guilty of first-degree premeditated murder in the murder of Mrs. Hardeman because that murder was committed to silence a witness. The jury recommended a life sentence for the murder of Mr. Hardeman but recommended death for the murder of Mrs. Hardeman. The trail judge agreed with the jury on both counts.

In his sentencing order for the murder of Mrs. Hardeman, the judge found there aggravating circumstances and two mitigating circumstances.

> The trial court gave great weight to the second mitigating factor [LeCroy's age] but found that the evidence showed that [he] was mentally and emotionally mature and that he understood the distinction between right and wrong and the nature and consequences of his actions.

Florida, like all States, recognizes numerous distinctions between adults and minors, but a Florida statute provided that a minor of any age charged with a capital crime "shall be tried and handled in every respect as if he were an adult." The Florida Supreme Court deferred to the legislature's judgment and upheld the death sentence against the 17 year old.

Only Justice Barkett dissented. She said:

> I believe that imposing the death penalty on one who was a child at the time of the crime violates the [proscription against cruel and unusual punishments in] the eighth amendment to the federal constitution and article I * * * of the Florida Constitution. * * * I believe the death penalty is totally inappropriate when applied to persons who, because of their youth, have not fully developed the ability to judge or consider the consequences of their behavior.

When asked about LeCroy at her Judiciary Committee hearing, Justice Barkett said she was applying principles she had derived from a case decided by the U.S. Supreme Court four months earlier. That case was *Thompson* v. *Oklahoma*, (48 U.S. 815 (1988) (plurality opinion), where the Court held that the Constitution of the United States does not allow capital punishment for a person who was 15 years old when he committed murder. To be more precise, the Court did not announce a flat rule against such executions, although four members of the U.S. Supreme Court were prepared to do so. Justice O'Connor, who cast the deciding vote, was willing to strike down the Oklahoma statute but unwilling to announce a per se rule.

On the other hand, the six-member majority of Justice Barkett's court gave four reasons for believing that Thompson versus Oklahoma did not control LeCroy. The reasoning of the majority was subsequently justified when a few months later in *Stanford* v. *Kentucky*, (492 U.S. 361 (1989)), the U.S. Supreme Court held that the Constitution of the United States does not forbid a State to impose capital sentences on persons who were 16 or 17 years old when they committed murder. At the time Stanford was decided, of the 37 States that permitted capital punishment, 25 States allowed the death penalty for 17 year olds and 12 States did not. (492 U.S. at 370 n. 2).

In her dissent in LeCroy, Justice Barkett cited "evolving societal standards" which are, of course, a fixture of eighth amendment law. Many Americans wonder, though, why some judges have society evolving in ways that make it more and more difficult to punish criminals. As criminals themselves become younger and more vicious and more efficient in their lawlessness, the law seems to evolve into confusion and powerlessness. What kind of evolution is this, Mr. President?

I cannot support Justice Barkett's nomination and will vote against her. I encourage our colleagues to do likewise.

Mr. KENNEDY. Mr. President, I commend President Clinton for nominating Justice Rosemary Barkett to the U.S. Court of Appeals.

Justice Barkett's career is a powerful symbol of the American dream and the achievement that is possible through hard work and commitment to the Nation's ideals. One of 16 children born to an immigrant family living in Mexico, she came to America at the age of 5. She knew only a few words of English. She became a Roman Catholic nun and taught school for several years before attending the University of Florida Law School, where she graduated near the top of her class.

After 8 years in practice, she was appointed to the State trial court in 1979, then to the State appellate court, and finally to the Florida Supreme Court in 1985, the first woman to be accorded that high honor. For the past 2 years, she has served as chief justice of that distinguished court. She has been a leader in assuring that the courts are accessible to persons with disabilities, and she has been a strong advocate of pro bono work by all members of the bar.

Justice Barkett has been harshly attacked by a small group of critics who claim that she is soft on crime. Few people are in a better position to understand and appreciate the falsity of that charge than the people of Florida, who have overwhelmingly rejected such claims. On two occasions, the people of Florida have voted overwhelmingly to retain her on the State supreme court. She was endorsed in her most recent election by the Police Benevolent Association, the Fraternal Order of Police, and the Peace Officer's Association.

The impressive bipartisan support she has received for this position is a tribute to her outstanding qualifications for this important court. Elected officials from Florida, including Senator GRAHAM and Senator MACK, Gov. Lawton Chiles, and the attorney general and his Republican predecessor in the State all support Justice Barkett's nomination. None of them supports coddling criminals, and none of them would support Justice Barkett's nomination if they though she was soft on crime.

Her critics have sought to characterize Justice Barkett as opposed to the death penalty, because she has voted in selected cases to set aside a death sentence.

In our system of justice, if the death penalty is to be imposed, the courts must take care to ensure that it is not imposed on an innocent person. These life or death cases are among the most important responsibilities of the courts, and Justice Barkett clearly takes that responsibility seriously.

In fact, Justice Barkett has voted to enforce the death penalty more than 100 times. It would be wrong to oppose an outstanding nominee with a distinguished record on the bench simply because she has voted to set aside the death penalty in a few cases.

Justice Barkett is an outstanding jurist. She is well qualified to serve on the court of appeals, and I urge the Senate to reject the baseless charges against her, and confirm her nomination.

Mr. BURNS. Mr. President, President Clinton has exercised his constitutional power and nominated Judge Rosemary Barkett to the U.S. Court of Appeals for the Eleventh Circuit. While the President has the right to choose his political appointments, we as Members of the U.S. Senate have the responsibility to thoroughly review these nominations.

I believe the proper way to evaluate a judicial nominee is by examining her judicial philosophy as reflected in her substantive record. While there's no question that I have philosophical differences with Justice Barkett on some of her political viewpoints, my greatest concern is that she is too soft on crime. Her record has shown that she has gone out of her way to block attempts to enact criminal laws, to limit enforcement of criminal laws, and to prevent implementation of criminal laws.

The most salient of her efforts to soften criminal law are her efforts to block the implementation of the death penalty. Rosemary Barkett has tried to set a precedent for great empathy for convicted killers. While this position is borne out of the best intentions, her personal empathy has led her to blame even the most heinous crimes on everything from troubled racial relations to a failure of the social system and learning problems during a killer's youth. To this end, she has embraced a radical theory of statistical manipulation—rejected by both the U.S. Supreme Court and the U.S. Senate, as well as State attorneys general across America—that would effectively abolish the death penalty without regard to whether actual killers in actual cases deserved execution.

At a time when violent crime is one of the foremost concerns across the United States, and the Senate has focused an unprecedented amount of time and effort to produce legislation that will finally address the crime problem and alleviate the growing concerns of American citizens. I am frustrated that the President, with his tough-on-crime rhetoric, would counteract these efforts and nominate a judge whose record has made evident that she will not uphold tough criminal laws in our judicial system.

I urge my colleagues to review Justice Barkett's judicial opinions, as a member of Florida's supreme court, and cast their votes with Justice Barkett's views on crime in mind. We have made great strides in our unified support for the passage of the crime bill. But, placing more police officers on the street and building new regional prisons will do little good if judges will misconstrue our intentions and narrow the scope of the criminal laws.

Ms. MIKULSKI. Mr. President, I just want to take this opportunity to offer my support for the nomination of Rosemary Barkett, of Florida, to serve on the eleventh circuit court of appeals.

I have three criteria that I apply to all nominees for Federal judicial appointments: First, is the nominee competent? Second, does the nominee possess the highest personal and professional integrity? Third, will the nominee protect and preserve the core constitutional values and guarantees that are central to our system of Government?

First, Chief Justice Barkett's background is evidence of her competency and qualifications to serve on the circuit court. Not surprisingly, she graduated among the top of her class in law school. In 1979, she was appointed to the trial court and became the first woman to serve as a chief judge of the Florida circuit court and Florida supreme court. Justice Barkett is held in high regard by her colleagues, supported by both U.S. Senators representing Florida and Florida's Gov. Lawton Chiles, and endorsed by several organizations including the Fraternal Order of Police.

Second, prior to becoming a lawyer, Justice Barkett was a school teacher and was a Roman Catholic nun. She taught religious and public school children while at the convent and her life exemplifies the utmost in personal and professional integrity.

It may seem unusual to some for a former nun to serve on the court, but I will tell you what her nomination actually represents. This nomination is indicative of the progress we have made. It shows that we are able to judge individuals on their qualifications and merit. Judge Barkett through her efforts and hard work is refuting old stereotypes—religious and gender.

Finally, I believe that Chief Justice Barkett has shown that she will continue to be a great jurist. She will serve the court well to protect and preserve our core constitutional values. I commend the President for nominating her and demonstrating his support for diversity on the court.

Mr. MCCAIN. Mr. President, after reviewing Judge Barkett's judicial record and her testimony before the Judiciary Committee, I regret that I must oppose her confirmation to be a judge of the U.S. court of appeals for the eleventh circuit. I believe that Justice Barkett is a fine person, but I am greatly concerned by many of her judicial opinions which have led me to believe the judge might misconstrue the written law in order to support her own personal views and that she will take a weak stance on criminal law enforcement.

One of the most important issues in which she has ruled and would rule on the eleventh circuit is the death penalty. According to a January poll by the Prodigy Service, 71 percent of the American people favor the death penalty and would like to see it applied to more violent crimes. The people are correct on this issue. However, if Justice Barkett's opinions were to be followed, application of the death penalty would be rendered much less likely an option.

For example, Judge Barkett has advocated that a seemingly limitless and legally tortuous defense against the death penalty be applied to the Florida State Constitution in response to U.S. Supreme Court ruling against the use of "disparate impact" statistical evidence under the Federal Equal Protection Clause in *McCleskey* v. *Kemp*, 461 U.S. 279 (1987). Judge Barkett then responded to the ruling by stating that McCleskey failed to address the problems concerning "unconscious discrimination," and that statistical evidence should include not only the disposition of first degree murder cases,

but also "other information that could suggest discrimination" including "the general conduct of a state attorney's office, including hiring practices. * * *" The defendant can then use this "statistical" evidence to prove that discrimination influenced the decision by the State attorney's office to seek the death penalty, which the State is then forced to disprove.

This opinion would allow any death penalty defendants to investigate the offices of the State attorneys to find latent discrimination resulting in discriminatory death penalty prosecution. Under Judge Barkett's skewed standard, there could be cases where defendants can claim discrimination based upon race, religion, or sex. Judge Barkett's opinion, if applied, could drive the legal system to a halt, clogging the courts with cases where death penalty defendants appeal their sentences not on their innocence or guilt but on the basis of the atmosphere in the State attorney's office.

Justice Barkett's supporters will argue that this is merely one case, and that she has, on occasion, voted in favor of the death penalty. However, I want to point out that well over 100 times she dissented from the majority of the Florida Supreme Court, and voted against the death penalty. She never once dissented from the majority to vote in favor of the death penalty. Judge Barkett's record raises serious doubts about her true support for the death penalty and her judicial judgment.

Mr. President, Justice Barkett has also proven herself to be soft in other areas of crime, especially on the issue of obscenity. In the case of Stall versus State of Florida, Justice Barkett dissented from the Florida Supreme Court majority by ruling that a Florida obscenity law violated due process. In her opinion, she stated that, "A basic legal problem with criminalization of obscenity is that it cannot be defined."

This is a direct contradiction of the U.S. Supreme Court case, Miller versus California, which stated that obscene material can be defined as material that appeals to the prurient interest, or offensively describes sexual conduct without artistic, political or literary standards, when it is judged by the contemporary community standards. It appears that Justice Barkett did not know that these Florida laws were based on the Miller standard. I'm particularly concerned that she did not even mention this important Supreme Court case in her decision.

Finally, Justice Barkett also suffers from some troubling ethical problems. Serious concerns have been raised regarding her impartiality, specifically her actions during the deliberation on the case of University of Miami versus Echarte. In October 1991, the Academy of Florida Trial Lawyers submitted an amicus brief in this case, and argued that a cap on noneconomic damages in medical malpractice cases were unconstitutional. In 1992, this organization set up an annual award to be named after Judge Barkett, and she was invited to present the first annual award at the trial lawyers' convention in November. In May 1993, she dissented from the court's ruling, and followed the trial lawyers' argument that the caps were unconstitutional.

Her actions in this case were inconsistent with her duty as a Justice to be impartial in both appearance and fact. By deciding a case in which an organization that had named an award after her filed a brief, Judge Barkett may have violated the ABA Code of Judicial Conduct. Canon 2, subpart B of the code clearly states that a judge "shall not lend the prestige of judicial office to advance the private interests of others; nor * * * convey the impression that they are in a special position to influence the judge." I am troubled by the fact that during the confirmation hearings, Justice Barkett did not see any way a possible appearance of an ethical lapse.

In conclusion, Mr. President, I must regretfully oppose the nomination of Justice Rosemary Barkett. I am greatly concerned by the fact that her decisions on the death penalty seem to have more to do with her personal views on the subject than the dictates of the law. In the case of the obscenity law, I am disturbed not only by her belief that obscenity cannot be defined, but also by her refusal to even address important Federal Supreme Court precedents. Finally, her appearance of partiality toward one group, and her refusal to even acknowledge that she might have acted unethically when deliberating the Echarte case makes me wonder if she possesses the proper judicial temperament to serve as a circuit court judge.

Mr. President, we recently passed a tough crime bill. We now need tough judges who will not undermine that tough legislation. I believe, as Senator HATCH has noted, that the President's tough-on-crime rhetoric will certainly be downgraded if he appoints judges, such as Rosemary Barkett, who will contradict his stances and go easy on criminals. In order to successfully carry out the war against crime, we must be prepared not only to have enough police to arrest the criminals, but we must also have enough tough judges to see that these criminals are brought to justice.

Mr. President, I urge my colleagues to oppose this nomination and I yield the floor.

Mr. DURENBERGER. Mr. President, I rise today to briefly explain my reasons for supporting the nomination of Rosemary Barkett to the U.S. Court of Appeals for the Eleventh Circuit.

I have served with four Presidents during my career in the U.S. Senate, and I have always used the same standard to evaluate the nominees of each administration. The criteria I use are whether the nominee has the experience necessary to do the job, the temperament to serve honorably, and the character to be entrusted with this serious responsibility. After a review of Chief Justice Barkett's record, I believe that she deserves confirmation.

As an opponent of capital punishment, I am probably much less troubled than many of my Republican colleagues about Justice Barkett's dissent in several capital cases. I do not believe that a lack of enthusiasm for the death penalty in several cases should disqualify a nominee from serving on the Federal bench. I respect retiring Supreme Court Justice Harry Blackmun for his recent renouncement of the death penalty, and I very much doubt that his position makes him an unfit jurist.

I do not always agree with the ideology of nominees that I vote to confirm. I have never considered applying an ideological test to be an appropriate part of my duty as a Senator to advise and consent on Presidential nominations. I am supporting this nomination because Chief Justice Barkett has had a distinguished career of service on the State bench in Florida, and I believe that she has the experience, temperament, and character to serve with distinction at the Federal level.

The PRESIDING OFFICER. Under the previous order, the hour of 3:15 p.m. having arrived, the Senate will now vote on the President's nomination of Rosemary Barkett to be U.S. Circuit Judge for the Eleventh Circuit.

Mr. BIDEN. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays are ordered, and the clerk will call the roll.

The bill clerk called the roll.

Mr. FORD. I announce that the Senator from Colorado [Mr. CAMPBELL] is necessarily absent.

I also announce that the Senator from Alabama [Mr. SHELBY] is absent because of illness.

The result was announced—yeas 61, nays 37, as follows:

[Rollcall Vote No. 92 Ex.]

YEAS—61

| | | |
|---|---|---|
| Akaka | Dodd | Kennedy |
| Baucus | Dorgan | Kerrey |
| Biden | Durenberger | Kerry |
| Bingaman | Exon | Kohl |
| Boren | Feingold | Lautenberg |
| Boxer | Feinstein | Leahy |
| Bradley | Ford | Levin |
| Breaux | Glenn | Lieberman |
| Bryan | Graham | Mack |
| Bumpers | Harkin | Mathews |
| Chafee | Hatfield | Metzenbaum |
| Cohen | Heflin | Mikulski |
| Conrad | Hollings | Mitchell |
| Danforth | Inouye | Moseley-Braun |
| Daschle | Jeffords | Moynihan |
| DeConcini | Johnston | Murray |

| | | |
|---|---|---|
| Nunn | Riegle | Simon |
| Packwood | Robb | Wellstone |
| Pell | Rockefeller | Wofford |
| Pryor | Sarbanes | |
| Reid | Sasser | |

NAYS—37

| | | |
|---|---|---|
| Bennett | Gorton | Murkowski |
| Bond | Gramm | Nickles |
| Brown | Grassley | Pressler |
| Burns | Gregg | Roth |
| Byrd | Hatch | Simpson |
| Coats | Helms | Smith |
| Cochran | Hutchison | Specter |
| Coverdell | Kassebaum | Stevens |
| Craig | Kempthorne | Thurmond |
| D'Amato | Lott | Wallop |
| Dole | Lugar | Warner |
| Domenici | McCain | |
| Faircloth | McConnell | |

NOT VOTING—2

| | |
|---|---|
| Campbell | Shelby |

So the nomination was confirmed.

Mr. DODD. Mr. President, I move to reconsider the vote by which the nomination was confirmed.

Mr. GRAHAM. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

## LEGISLATIVE SESSION

Mr. FORD. Mr. President, I ask unanimous consent that, under the regular order, we now return to legislative session.

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

## MORNING BUSINESS

Mr. FORD. Mr. President, I ask unanimous consent we now have a period for morning business with Senators permitted to speak therein for up to 5 minutes.

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

The Chair recognizes the Senator from New York [Senator D'AMATO].

## WHITEWATER

Mr. D'AMATO. Mr. President, tomorrow, April 15, is the deadline for millions of American people to pay massive, retroactive tax increases that President Clinton pushed through the Congress last year. President Clinton raised income taxes, gas taxes, taxes on seniors and small businesses. The President sought to tax everything that moves and some things that do not.

On November 21, 1991, Bill Clinton told an audience here in Washington:

> For 12 years of this Reagan-Bush era, Republicans have led the S&L crooks and self-serving CEO's to try to build an economy out of paper and perks, instead of people and products. It is the Republican way. Every man for himself, and get it while you can. They stacked the deck in favor of their friends at the top and let everybody else wait for whatever trickles down.

If you omitted the reference to Republicans, candidate Clinton's own words should provide President Clinton with ample evidence of why Whitewater has become an issue of importance to the American people and why congressional hearings must be held.

Well, now that the President has raised everyone else's taxes, we discover he has not paid all of his own. Worse yet, President Clinton's health care plan will be the single-largest tax increase in the history of the world.

It seems like the President never met a tax he did not like, except his own.

Mr. President, I believe I am speaking for millions of hard-working American taxpayers when I say we expect our President to pay his full and fair share of taxes, and to pay them on time. In yesterday's and today's "Doonesbury" cartoons, Republican leadership is depicted brainstorming about Whitewater.

Let me refer to yesterday's cartoon, "Doonesbury." GOP leadership is brainstorming. It has Congresswoman Davenport:

"If I may, Bob, dear?"

"The Chair recognizes Congresswoman Davenport."

She goes on to say: "I think we should tread carefully with these hearings. If there is, in fact, malfeasance, then by all means, we should bring it to light.

"But if there is no real scandal at the center of Whitewater, this all could backfire. We should ask ourselves, honestly: Why we are doing this?"

And a voice from the back comes: "Because it's payback time, Baby."

The Chair then recognizes Senator D'AMATO, who goes on to say: "C'mon, everybody, it's payback time."

And Senator Davenport says,

> Alphonse, that is exactly the impression we don't want to create. In fact, dear, the little lapses that you and Newt [Gingrich] had on the ethics front are rather a problem for us.

She goes on to say: "Lest we appear merely vindictive, it might be best if you kept a low profile during the actual hearings."

"Um, [how do I do that?] how low?"

And she goes on to say, "Cleveland? Seattle? It's up to you, dear."

Mr. President, the only payback I have seen is to watch President Clinton pay back his back taxes.

Mr. President, notwithstanding that, the fact is we do need hearings. It has not a whit to do with payback, but rather accountability. The same accountability that candidate Clinton called for, before he became President Clinton.

I yield the floor.

The PRESIDING OFFICER. The Chair recognizes the Senator from Washington [Mr. GORTON].

## HABEAS CORPUS REFORM

Mr. GORTON. Mr. President, just an hour ago in Olympia, the attorney general of the State of Washington, my distinguished successor in that office, Christine Gregoire, held a news conference together with several prosecuting attorneys from the State, of both political parties.

The news conference was on a topic of overwhelming and urgent and immediate importance, the habeas corpus provisions contained in the House bill on crime, a bill, and perhaps an amendment, which is being discussed at the present time.

Ms. Gregoire denounced those provisions in the House bill and urged the Congress to remove the entire title, all of the provisions in title VII of H.R. 4092 relating to habeas corpus.

In her judgment, and I am quoting:

> The proposal does not constitute meaningful reform and will increase delays in the appellate process in capital cases. We support efforts to strike the habeas provisions from the bill and address the issue outside the context of the omnibus crime legislation.

The citizens of the State of Washington are particularly sensitive to this case of endless appeals. Today marks the 12th anniversary of the brutal murders of three women in Clearview, WA, by a man named Campbell. Mr. Campbell was sentenced to death some considerable time ago, but in the course of the last 7 or 8 years, he and his attorneys have filed 44 motions and briefs in State and Federal courts, and 5 separate appeals in a so-far successful attempt to delay his execution.

On March 28 we marked the fifth anniversary of a stay of that execution, imposed by the Ninth Circuit Court of Appeals. Five years and seventeen days have elapsed—that period of time. Campbell appeals have cost our State and our Nation's taxpayers an estimated $2.3 million. I need to emphasize that his murders were perhaps the most brutal and callous undertaken in the State of Washington at any time in the last several decades.

Some in the State of Washington in positions of legal authority feel that, should the House provisions on habeas corpus become law, that the Campbell appeals would start all over again. As a consequence, provisions which are advertised as simplifying the appeals structure in fact add additional and unnecessary complications to that procedure, and focus attention not on the guilt or innocence, not even on the trial in the State courts before a jury, but on various procedural aspects of those appeals themselves.

Our attorney general and our prosecuting attorneys have gotten together to ask for changes in the habeas corpus rules that apply in the Federal courts at the present time: First, to allow one appeal and one appeal only through the Federal court system; second, to require that such a petition be filed within 6 months of final adjudication in State court; third, to ensure that appeals are judged by legal standards pre-

vailing at the time of conviction and not new standards that invite constant new petitions; and fourth, to impose deadlines on Federal courts for their decisions to end the unconscionable delays which were involved in the Campbell appeal the first time through in the ninth circuit which actually resulted in an order from the Supreme Court to the Ninth Circuit Court of Appeals actually to act.

Mr. President, on the surface of it, any provision which states that it is a reform of habeas corpus procedures is deemed to be a plus by most of the people of the country when, in fact, we are faced with one which makes the process more complicated, which adds to the time and the expense and the delay. That proposal should be defeated. It was removed by this body in the debate last November over a crime bill. It ought to be removed from the House bill as well.

Mr. HATCH. Will the Senator yield on that particular point?

Mr. GORTON. I am happy to yield to the Senator from Utah.

Mr. HATCH. If the Senator will allow me to comment, it is pretty apparent the House leadership is doing everything it can to thwart the passage of the true crime bill. Frankly, the current House crime bill contains a habeas corpus proposal which would result in a de facto elimination of the death penalty. Does the Senator agree with me on that?

Mr. GORTON. The Senator regretfully does agree that that is very likely to be the net result of that provision if it should become law.

Mr. HATCH. If I could go on, the leadership in the House appears set on keeping this measure in the bill to obtain leverage in the conference between the House and the Senate. They know that we are very upset about the habeas corpus provision. We kept it out of our bill because it is so controversial. The Senate passed a very tough habeas corpus provision in the prior Congress. They want to put it in to get leverage.

Now, the Rules Committee over there has reported the rule which, aside from dumping most of the Republican initiatives or amendments, also stacks the deck against efforts to remove the liberal habeas corpus provision. The rule also fails to allow Republicans to offer an amendment which will ensure funding for the crime bill—again, a leverage position so they can get a softer bill than what we have done over here.

Mr. President, despite the odds, Republicans are prevailing in the House on other death penalty amendments. The habeas votes were supposed to occur this afternoon over there, but when it looked to the leadership that their efforts to pass a liberal habeas corpus —that is, to allow more multiple appeals up through the State courts, Federal Courts—when it looked like their efforts to pass that type of provision might fail, the House leadership promptly decided to adjourn until next week. Now they are talking about a "king of the hill" group of amendments.

Now, the way that works is—and it is a big game—the way it works is they know their habeas corpus provision is going to go down, and so they come up with two votes. One is to strike, I believe, the habeas corpus provision. But nothing happens even if they vote to strike until the second when they move to correct it. What it means is that the liberals in the House can vote to strike their habeas corpus provision, and then they turn right around and move to correct it and put it right back into effect. Nobody else can have another amendment, and the Republicans and conservative Democrats who want to straighten this incessant number of habeas corpus appeals out, they are just out in the crime debate.

Now, does the Senator agree with me on that particular analysis?

Mr. GORTON. This Senator certainly does agree with that analysis, and the reason this Senator came to the floor was to point out that from the point of view of the country as a whole, this is not a partisan issue. The attorney general, my successor in the State of Washington, is a member of the Democratic Party. Most of the prosecuting attorneys who appeared with her today are members of the Democratic Party. And they reflect the views of the vast majority of State attorneys general across the United States, Republicans and Democrats and nonpartisans combined. They want true habeas corpus reform just as the senior Senator from Utah wants true habeas corpus reform.

But just as the senior Senator from Utah feels that doing nothing is far preferable to doing the terrible job which was proposed here at one point in the Senate in our debate but defeated, so this group of attorneys general and prosecuting attorneys wants this provision stricken from the House bill and this issue taken up at a later time separately when it can be debated on its own merits.

I am certain that their advice to Members of Congress, my attorney general to my members, probably the Senator's attorney general to his members, would be, under this set of circumstances, to vote to strike the present provisions and not to insert anything in their place, to separate this issue out entirely for future debate. And if that is the result, then it may very well be that the House will have passed a bill which will be constructive in connection with dealing with crime.

If, in fact, the House passes a bill that includes its present habeas corpus provisions or anything remotely similar to them, what is called an anticrime bill will, in fact, be a procriminal bill. It will add to the time that people like Campbell can delay justice and can add to the costs to the people of the United States and frustrate the administration of justice.

Mr. HATCH. If the Senator will yield again, I wish to compliment the Senator because the Senator is a former attorney general of his State. He understands this situation. It is a very difficult issue to understand. A lot of people in both Houses do not understand it, except everybody understands that there are now unlimited appeals through both systems, the State and the Federal system.

Just so we all understand, those crafting the House rules have passed a rule, or will pass a rule, that contains what is called the "king of the hill" provision, and by this I mean Republicans will get their amendment to strike the liberal habeas corpus provisions of the House bill. It is the prevailing view that this effort to strike the liberal habeas will pass, but immediately after that vote there will be a vote on another liberal Democrat habeas corpus amendment which the ACLU, the American Civil Liberties Union, supports. This will allow liberal Democrats to vote to strike the original habeas corpus provision but ensures the passage of another one of these provisions that is not going to do anything to solve the problem.

So Democrats in the House have been blaming Republicans for delaying their crime bill, but when it was apparent that Republicans might win on some votes, especially habeas corpus, the leadership folded their tents until next Tuesday so that they could put it together in a way that they could not lose even though a majority of Members of the House would like to have a different habeas corpus provision.

So we here, as the distinguished Senator from Washington has said, avoided the issue. We just kept habeas out of the bill hoping that we could work it out separately later. But we know that, if the House is intent on keeping their liberal habeas provision that will exacerbate the situation in their bill, then, in all honesty, it is going to be kept there for leverage during the conference because they know that we do not want that liberal provision in the bill that is going to exacerbate the problem, not alleviate the problem. I think the distinguished Senator from Washington has done us all a favor in pointing this out.

Mr. GORTON. It is exactly for that reason that I came to praise my successor, Ms. Gregoire, as the attorney general of Washington, for a very cogent presentation of her point of view and that of our prosecuting attorneys. I think they are doing the State a great service. I hope and I expect that many or most of the members of the congressional delegation of my State in both parties will defer to her judgment in

this connection and see to it that we deal with the crime bill and leave this issue to later and not do something which adds to the complexity of appeals in the guise of making them more simple.

Mr. BIDEN. Mr. President, as I say, I just happened to be walking through and heard this discussion on habeas corpus.

We worked for a long, long time, as the Presiding Officer knows, to arrive at a compromise on habeas corpus. I met for the better part of 7 months with the National District Attorneys Association, and the National Attorneys General. Both of those associations officially signed on to a meticulously detailed and compromised habeas corpus provision which we thought we could have agreement on in this body.

I made a commitment, although I do not agree with the characterization of the House provision on habeas corpus as being this great get-out-of-jail free card that is being painted. But I do acknowledge one important fact; this will complicate matters greatly.

I would remind my colleagues that we had in the underlying crime bill, the so-called Biden bill, to which we added amendments—I had included my provision on habeas corpus that had been negotiated with the DA's, and negotiated with the attorneys general, the National Attorneys General Association. Although over a third of the national attorneys general did not ultimately support it, the majority of the association did, and an overwhelming majority of the DA's, and the National District Attorneys Association supported it.

It did not go as far as I believe the Derrick amendment; that is, the alternative amendment that is going to be offered in the House. But I withdrew it. I withdrew it in order to get a crime bill passed. I withdrew it in order to make sure that we would also be able to get the Brady bill passed. I withdrew it in order for us to be able to attend to other matters in the crime bill.

We reached an agreement here on the floor that as part of that extensive compromise that brought about the most significant crime bill we have ever passed through this body, that we would, in fact, put it aside and not raise it in this calendar year.

Mr. SPECTER. Will the Senator from Delaware yield for a question?

Mr. BIDEN. I am delighted to.

Mr. SPECTER. This Senator knows fully the sequence of events, having participated in the discussion on habeas corpus for many years in the Judiciary Committee. I am sure the chairman will recall that my amendment on habeas corpus was separated out, was taken up as a freestanding bill. But in that procedural posture, realistically, it lacked the impact of being considered as part of the crime bill.

I understand fully why the Senator from Delaware did what he did, as he has explained, to get the crime bill passed. I thought at the time that the habeas was very important and should have been taken up.

My question to my colleague from Delaware is will we not have in conference an opportunity worthy, of necessity—naturally depending on what the House of Representatives does—to deal with habeas corpus?

Mr. BIDEN. The answer is, unfortunately, possibly, yes. I say "unfortunately" because the one thing that the police officers of America need urgently is assistance. I am fearful that by having to bring up habeas corpus in conference and then on the floor in both bodies again through a conference report, based on my 22 years of experience in dealing with these crime bills here, and 9 years of experience—I see some of the staff on the floor here who are on the Republican side who know as much or more about this than I do—we know from our vast experience that this is an incredibly difficult topic to reach any accommodation on. In fact, in the past it has been used as a rationale, and sometimes was a rationale to allow, in effect, what amounted to a filibuster to keep any crime legislation from passing.

That is why I committed on the Senate side—and I would like to ask the RECORD to be held open so I can get my exact quotes because I know I will be quoted on this 75 more times if I get it wrong—but my recollection is during the debate on the crime bill this Congress last year, I indicated that we would—in the unanimous-consent agreement we had, other than attending to the separate amendment that the Senator from Pennsylvania had—that we would not attempt a return, forgetting an agreement on what amendment would be considered—we would not raise on either side habeas corpus in this Congress, in this Senate, or at least until the crime bill was passed in this Senate. I will go and check the RECORD precisely on what it was.

The reason for that was not because I disagreed with what the House is attempting to do, not because I disagree with the so-called Biden compromise reached with the district attorneys and attorneys general. I agree. But because I recognize the reality of what will happen to something I care much more about, and that is putting 100,000 cops on the street, building boot camps, setting up $1 billion for drug courts, $9 billion for preventive programs, drug treatment, et cetera, et cetera. I care much more about those things than reforming habeas corpus at the moment.

So what I am fearful of, in answer to the question of the Senator, is if the House of Representatives passes any—forget "liberal." Let us assume they pass, from my perspective, a draconian habeas corpus provision that essentially eliminates habeas corpus. Whatever position they take on habeas, once habeas is in the conference, the fat is in the fire, and the one thing other than guns that has been the thing that has kept the crime bills from passing here will have to be resolved.

We have never been able to resolve it thus far. It has always been used as an excuse by everyone who has any reason to be against the legislation to say they are against it, and we end up stalemated.

So I sincerely hope that we do not have to consider habeas in the context of the crime bill.

Mr. SPECTER. If the Senator from Delaware will yield for one moment, my suggestion is that the habeas issue can be dealt with and can be resolved if we can separate out those who are really opposed to capital punishment, who use the habeas issue as a vehicle for stalemated legislation.

The issue boils down to two critical points. One was what would happen on intervening judicial decisions with the kind of language on fundamental rights very close among the participants in the last Senate debate; that is, the Senator from Delaware and the Senator from Utah, and this Senator; and what would happen on successive petitions?

We passed the habeas bill in 1989 which had the agreement of Senator HATCH and Senator THURMOND, and I think it was very close to what the Senator from Delaware had in mind. Of course, we have to deal with the semicolons. We cannot deal with the generalizations. But my view has always been that the death penalty is so important as a deterrent, and that this is one area of Federal law which touches State law directly because of the 37 States which have the death penalty, it cannot be carried out because of the lengthy appeals on Federal habeas corpus that the Senator from Washington has talked about—one case today—and that there are about 2,800 people on death row. I think last year the number of executions was 38.

From my own experience as a district attorney, with the view that capital punishment is a deterrent, and the need for some imposition and fair timeframe, which I have addressed on timeliness, part of which the Senator from Delaware has subscribed to in terms of filing it 6 months after the process is finished, if we take a close look at getting the case into the Federal court early and one comprehensive hearing without the rules set up by the Supreme Court on bouncing back and forth—on a conservative Supreme Court has not made any real practical sense—it is my view that when JOE BIDEN, ORRIN HATCH, ARLEN SPECTER and some of the House Members get together to talk about the specifics, we can solve it.

(Mrs. MURRAY assumed the chair.)

Mr. BIDEN. Madam President, I say to my friend from Pennsylvania, if we could get the people who are viewing habeas as a means to curtail application of the death penalty out of the debate, and if you can get the conservatives looking for full and fair essentially to eliminate Federal habeas out of the debate, we can get an agreement.

Unfortunately, some of my right- and left-wing friends arrive at the same point, which is they are intractable, unwilling to acknowledge any change.

The Senator from Pennsylvania and the Senator from Delaware can most likely arrive at an agreement, but I doubt whether Senator GRAMM from Texas and the Senator from Delaware and the Senator from Pennsylvania and the Senator from Massachusetts could arrive at an agreement.

Mr. SPECTER. I will make the Senator an offer he cannot refuse. I will deliver from the right wing, this side of the aisle, being a centrist myself. I think the Senator from Delaware can deliver the other side, which I prefer not to characterize.

Mr. BIDEN. I would not want to ask the Senator to carry such a heavy load, because I am confident my shoulders are not strong enough to carry the corresponding load.

Mr. GORTON. If the Senator will yield, I am delighted that the Senator from Delaware and this Senator from Washington have, by different roads, reached the same point on this issue.

Mr. BIDEN. On the procedure, not the issue.

Mr. GORTON. That is exactly correct. And it is because there have been so many differences on substance that the Senator from Delaware reached that procedural decision, reluctantly as he may have come to it, in any event.

I began in this discussion by praising the attorney general for the State of Washington for asking the congressional delegation to keep the House bill clean on this issue—as the Senate has already done—so that we may concentrate on a number of areas in connection with crime that may be controversial, but at least on which there is a greater degree of agreement than there is on this issue.

Habeas corpus is vitally important. We undercut respect for the law by the observation on the part of citizens that these appeals go on forever and ever. The way in which we are to solve that question has obviously become a matter not only of controversy on its own merits, but as the Senator from Pennsylvania said, as a vehicle to get at other things often stated in the debate.

I reiterate my praise for the prosecuting attorneys and the attorney general from my State. I hope we will be able to debate habeas corpus, but along with them, I trust we will do it independently.

(Mrs. BOXER assumed the chair.)

Mr. BIDEN. I thank the Senator from the great Northwest.

Madam President, I want to point something out here. I worked for 7 months on a compromise. I got an absolute majority of the attorneys general of the United States of America, including a Republican attorney general from the State of Pennsylvania, and other Republicans, as well, and an overwhelming majority of all of the district attorneys in America, to agree to it.

The Senator from Washington still would not agree to that compromise. The conservatives still would not agree to it. So we have a phrase that we use in the law—and there are three lawyers on the floor—and the phrase is: You come with unclean hands when you make an assertion for which you have, in fact, put yourself in the position to have no credibility to make because of actions earlier.

It is one thing to come and praise a single attorney general for being opposed to a House provision. It is another thing to imply that if we let the attorneys general make the decision, and the DA's, we could be for what they were for. In truth, they were for the Biden compromise. Your attorney general was in the minority. But the attorneys general were for the Biden compromise. The DA's were for the Biden compromise. The conservative Republicans were against the Biden compromise on the floor. We took it out of the bill because the conservative Republicans were not for what the prosecutors of America were for.

They are the facts, nothing but the facts. They used to say in that show with Walter Brennan, "Ain't brag, ma'am, just fact." Those are the facts.

I say that not to be critical, but to underscore that the idea that we can get together in a conference and arrive at a conclusion is bizarre, because even when I came to this floor with a document in hand, negotiated in detail for 7 months, with the imprimatur of the District Attorneys' Association and the United States Attorneys General Association, I could not get my Republican friends to be for that. I respect that.

But it is mildly disingenuous for somebody to suggest the reason to be against the House provision is because the district attorneys and attorneys general are against it—which they are. I assume that the corollary of that would be true—if they were for something, we should be for it—because, clearly, the district attorneys are not for preventing the death penalty from being imposed.

So this Senator from the State of Delaware, after 7 months of frustration, dealing in good faith with honorable men and women who prosecute these offenses at a State level, reached an accommodation with them, for which they said: We agree with BIDEN. And I said: I agree with the attorneys. The liberals became very angry with me, and the conservatives became very angry with me because we, the prosecutor-types, agreed.

So I say: Either say the attorneys general know what they are talking about, and the DA's know what they are talking about, and be for it; or say that nobody knows what they are talking about except me, whoever "me" happens to be speaking. But this is a perfect illustration of why I hope the House does not pass anything on habeas corpus, because we will have some of it—I am not characterizing the last two arguments. I want the RECORD to show that I am not speaking of the Senator from Washington nor the Senator from Pennsylvania. But we will hear on the floor the most humorous and outlandish assertions relative to habeas corpus.

The reason they can make them is because our distinguished fellow citizens in the gallery, who are not lawyers, should not, and most times do not, know the details of habeas corpus. So I can stand here and say: "Habeas corpus is the root of all evil," and people up in the gallery would say, "He may be right. I kind of like the guy," or, "I do not like him, and he is probably wrong." Half of the people I ran into out in the street when this was a big issue thought it was the name of a convicted felon crouched behind a garbage can in an alley waiting to jump on someone.

Habeas corpus is the cause of our problems. Habeas "schmabeas." Most people do not understand it. I know everybody comes to the floor and brags about not being a lawyer. Well, ignorance is sometimes bliss. I know my friend from the State of Washington is a fine lawyer, a better lawyer than the Senator from Delaware. He was a prosecutor, and understands it fully. That is not the point I am making.

The point is, when we get to the debate on the floor and we are trying to pass either a $15 billion or $23 billion crime bill that could really do something about crime, Congress will spend weeks talking about habeas corpus. In the meantime, people will get shot and killed. Forget the death row guy.

There is one thing I want to remind everyone of, and I will stop. Anyone filing a habeas corpus petition is not a threat to any American. If they are filing a petition, by definition that means they are in jail. You do not file a petition, you cannot file a petition unless you are behind bars. Those are the facts in terms of impact.

So anybody who files a petition and says, "Hey, judge, I've got a habeas corpus petition; here read it," is already in jail.

Now you may argue that justice is being delayed in that they are not being hung and they are only in jail.

OK, fine. I understand that argument. Sometimes it is a correct argument. But we are not putting anybody in this gallery or anybody on the street, or anybody in this Chamber in jeopardy because we have not fixed habeas corpus.

The only people in jeopardy are the people in the jail who might be innocent. And, I might add, an outrageously high percentage of the petitions filed in Federal court—and, I might add, in the Federal courts out of 735 Federal judges, three-quarters of them were appointed by Ronald Reagan. So they are not your left-wing judiciary if really an outrageously large percentage of those criminals who pass that paper out through the bars and give it to a court and say, "Check me out, habeas corpus." The court says: "Hey, you are right. Your rights were violated."

Funny thing, but that is a separate issue.

The issue here is, will anybody understand the habeas corpus debate if we bring it up when we have to pass this crime bill? My suggestion is people here will understand it.

Will it get confused in the public? What will the end result of it be? That we do not get a crime bill?

If we do not get a crime bill that means more people will be murdered, more people will be mugged, more people will be battered, more people will be without protection. Less help will go to the community because we will stand here left, right, and center, myself included, all of us, and we will either speak intelligently or pontificate not so intelligently on habeas corpus.

I say let us pass the crime bill. Let us put habeas corpus over here. Let us go help the communities and come back and fight over habeas corpus.

I will conclude by saying if you cite prosecutors as a reason why to be against a particular position that is credible, that is worth doing. That carries weight.

I respectfully suggest if you cite them as evidence for why we should be against a position when they are overwhelmingly for a position, you should also take that into consideration.

Mr. GORTON. Madam President, will the Senator yield?

Mr. BIDEN. Yes.

Mr. GORTON. It is a great pleasure to listen to the Senator from Delaware in his enthusiasm as well as his knowledge of this subject. Occasionally he may get slightly more enthusiastic than the facts warrant. This Senator began with the discussion of this subject by quoting only his own attorney general——

Mr. BIDEN. I understand.

Mr. GORTON. And prosecuting attorneys from his own State. When, however, the Senator from Delaware says that his compromise was endorsed by the National District Attorneys Association and by the Association of Attorneys General, he is exaggerating to a certain degree.

The National Association of Attorneys General did not endorse the Biden compromise. It might very well have been he got agreement from a slight majority of individual attorneys general. He did not get the support of the majority of attorneys general from States which impose capital punishment.

When the board of directors of the National District Attorneys Association, a relatively small group, endorsed the Biden compromise, there was literally an uprising across the country among the members of that association. Undoubtedly, the board of directors, having worked for 7 months with the very distinguished and forceful Senator from Delaware who wished to do something in this area, figured that they better endorse the Biden compromise or they might get something worse. They did not have their troops with them.

Mr. BIDEN. Will the Senator yield on that point?

The PRESIDING OFFICER. The Senator from Delaware controls the time and has yielded to the Senator from Washington.

Mr. BIDEN. Madam President, I want to intervene on that point. I will relinquish the floor back to the Senator.

If the Senator will recall what I said, I knew he was speaking only for his attorney general. I pointed out his attorney general was against the Biden compromise and I pointed out that a majority of the attorneys general were for the compromise and a third to half ended up being opposed to the compromise.

The official endorsement came from the District Attorneys Association. The Senator is correct in that the attorneys general board of directors endorsed it. He is also correct that a majority of the attorneys general of the United States of America beginning and at the end endorsed, and he is correct that the Attorneys General Association as an association did not officially endorse because at that point when, by, I guess it was—how many attorneys general—I think there were—do not hold me to this. I will do it for the RECORD. But I think there were 11 attorneys general officially opposed, 11 State district attorneys general, and there was as many as 18 that had questions about it, if I recall correctly.

So, my enthusiasm was not overblown or overborne. My enthusiasm, as characterized by my friend from Washington, was accurate in that by his own admission a clear majority of attorneys general in the United States did, in fact, support the compromise, No. 1; and No. 2, the organization of district attorneys officially, their organization and an overwhelming number of their membership as characterized to me by the organization, endorsed the compromise.

Essentially what there was, was a very articulate, very forceful attorney general from the State of California named Dan Humbert who led the charge against the compromise and was able to get, I think, at the top of the line, 12 attorneys general to agree with him.

But the point is that I am flattered. I am flattered that I now know that a majority of the attorneys general of the United States are fearful of me, that they are fearful that if they do not agree with me they are going to get something worse.

I wish my colleagues would take some lead from them and follow their genuine concern and fear and drop habeas corpus from our discussion, because I want to get cops on the street as quickly as I can get them there, and habeas corpus should be delayed for another day.

Mr. GORTON. Will the Senator yield?

Mr. BIDEN. I yield the floor.

Mr. GORTON. Good.

The PRESIDING OFFICER. The Senator from Washington has the floor now.

Mr. GORTON. Madam President, maybe it is just that the colleagues know the Senator better than the attorneys general do.

Mr. BIDEN. I suspect that is true.

Mr. GORTON. In any event, the numbers in this connection are perhaps not as important as the substance. Clearly, they are not as important as the substance, and the numbers are somewhat murkier than the Senator from Delaware would have the membership believe.

Mr. BIDEN. If the Senator will yield, I frankly resent the constant reference to my attempting to mislead the United States Senate.

Mr. GORTON. I am not making any such statement.

Mr. BIDEN. Does the Senator question whether the majority of attorneys general endorse the compromise? Does he have any doubt about that?

Mr. GORTON. This Senator does not know first hand the answer to that question. This Senator accepts——

Mr. BIDEN. Then the Senator should resist suggesting that I exaggerate.

Mr. GORTON. This Senator accepts the statement that the Senator from Delaware made. This Senator did dispute the proposition which the Senator from Delaware has withdrawn, that the National Association of Attorneys General endorsed his position. That did not happen. They took no position on it. This Senator asserts that a majority of the attorneys general from the States which impose capital punishment did not endorse his position.

This Senator also points out that the board of directors of the National District Attorneys Association did, in fact, agree with the position that the

Senator from Delaware ultimately reached, but that many—I cannot say most and neither, I suspect, can the Senator from Delaware, because there are literally hundreds of district attorneys throughout the United States—that there was a considerable revolt among district attorneys with respect to that matter. And it is the belief of this Senator that if the district attorneys of the United States and the attorneys general of the United States were asked whether or not they support the provision which is before the House of Representatives today, it is the view of this Senator that they would reject it by a rather substantial majority.

Mr. BIDEN. Will the Senator yield on that point?

Mr. GORTON. In that connection, of course, the Senator from Delaware and the Senator from Washington have reached the same position.

Mr. BIDEN. If the Senator will yield, I not only would guess, I know that the leadership, Democrat and Republican, of the National Attorneys General Association and the District Attorneys Association would be and are opposed to either the proposition offered in the House Judiciary Committee-passed provision or the anticipated alternative about to be offered, I believe, I am not certain of this, by Congressman DERRICK.

But I think, regardless of whether or not anyone accepts either of our characterizations of where the prosecutors of America stand on this issue, I think this discussion, where we are trying to agree and cannot, is illustrative of how difficult it will be to reach a compromise where we do not agree and we are trying to reach agreement.

We cannot even agree when we are trying to agree when it comes to habeas corpus. I would suggest it is nearly impossible for us to agree in time to pass a crime bill where we have serious substantive disagreements.

I will conclude my comments on this for the day by saying, I happen to substantively agree with the approach taken, as I understand it, by the Derrick amendment that is going to be proposed in the House. But I practically do not agree with this incorporation because it will have the effect of torpedoing something I have worked now 5 years to put together—5 years—and that is the core of the crime bill we passed out of here and that they are about to pass on the floor of the House.

So I want the record to be clear. There is nothing altruistic in my opposition to including habeas corpus. There is nothing that relates to substantive concerns I have with the House approach. It relates to the ability to put 100,000 cops on the street and $9 billion or $7 billion, whether you take the House or Senate bill, of prevention methods and efforts on the street to help protect Americans and to help keep children at risk out of the drug stream and the crime stream.

That is my reason for hoping that the House, by whatever method they arrive at, chooses not to include a habeas corpus provision.

Because although I enjoy negotiating with my Republican friends, I know that what will happen is I will be spending more nights at 3 o'clock in the morning with Mr. Manus Cooney, who is not even a Senator, but just a brilliant staff person—and he is, by the way, first-rate—on the Republican side. Manus and I have spent more time with one another having to deal with habeas corpus than we have with our families on occasion.

As much as I like him—and I see him in the back—I do not want to spend any time with him this spring, because we basically agree on the crime bill. And as one of the lead staff persons, the most knowledgeable staff person in this place on these criminal justice issues, he can tell you, on behalf of Senator HATCH and on behalf of Senator THURMOND before him, he and I as two principals in the past, one in the present, we have spent a lot of time trying to resolve this. We tried very hard and we do not know how though do it, and we are not bad at trying to reach compromises.

I envy and admire the optimism of my friend from Pennsylvania, Senator SPECTER, who says he has a compromise but he forgets to point out to you, not only do the liberals not agree with him, the conservatives do not agree with his compromise. Nobody does. Nobody.

I mean the Senator from Delaware could probably reach an accommodation, because I am an accommodating fellow and I am his neighbor. But nobody really agrees with his compromise.

That in no way goes to the merits of the compromise. That goes to the political reality of the compromise.

So, you know, as I said, here we have spent probably 40 minutes so far, or longer, and the poor Senator from Arkansas is here to get the floor on a totally different matter, and the Senator from Washington, Senator MURRAY, is here probably on a different matter. I have been a party to and maybe the principal reason we have absorbed almost 40 to 50 minutes on an issue that is not even before us. Can you imagine, Madam President, what will happen when it comes before us?

So my plea is that the House has the wisdom and the fortitude to forgo putting this in the crime bill this time around and we can visit it another time when we have a year or so to deal with it.

I yield the floor for the evening.

I thank my colleague.

Mr. GORTON. Madam President, does the Senator from Washington have the floor?

The PRESIDING OFFICER. The Senator from Washington has the floor.

Mr. BIDEN. I will not seek the floor for the evening.

Mr. GORTON. I thank the distinguished Senator from Delaware.

At the ultimate end of this discussion we find ourselves in agreement procedurally, though not necessarily with the Derrick amendment in the House of Representatives. I am relieved we have exhausted the subject and I yield the floor.

Mr. PRYOR addressed the Chair.

The PRESIDING OFFICER. The Senator from Arkansas.

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## THE PAYMENT OF BACK TAXES

Mr. PRYOR. Madam President, I thank the Chair for recognizing me.

Madam President, a few moments ago, on the floor of the U.S. Senate, in fact it was about 1 hour ago, I believe, now—the distinguished junior Senator from New York, Senator D'AMATO, spoke on the floor relative to the coming tax deadline, April 15, which is tomorrow at midnight.

Because I was not in the Chamber where I could listen to the entirety of his statement, as the Senator from New York was leaving the Chamber, I requested of the Senator if he would be so kind as to give me a copy of his speech. He did.

On page 2 of the Senator's speech, Madam President, I would like to quote from his statement.

> Well, now that the President has raised everyone else's taxes, we discovered that he had not paid all of his own. Worse yet, President Clinton's health care plan will be the single-largest tax increase in the history of the world.
>
> It seems like the President never met a tax he did not like except his own.
>
> Mr. President, I believe I am speaking for the millions of hardworking American taxpayers when I say that we expect our President to pay his full and fair share of taxes, and to pay them on time.

End of the quote of the Senator from New York, Senator D'AMATO.

Well, Madam President, guess what? Apparently our friend from New York had forgotten the fact that President Nixon had to pay $280,000 of back income taxes after he became President when his deductions were challenged by the Internal Revenue Service. I did not hear the Senator from New York make reference to President Nixon having to pay $285,000 in back taxes.

Nor did I hear the distinguished Senator from New York or anyone else on that side of the aisle or this side of the aisle complain when Vice President Bush, as Vice President, Madam President, had to fork up $198,000 in back taxes because of a change in the interpretation of his legal residence. I did not hear the Senator from New York complaining about Vice President Bush.

I did not see him take the floor of the U.S. Senate and complain that we have

to pay our taxes on time and that millions of Americans are upset about this. Nor, Madam President, did I hear the distinguished Senator from New York—I wish he were in the Chamber now; maybe he could be asked to come over and talk about some of this—I do not recall the distinguished Senator from New York criticizing President Reagan, who had to pay $20,000 in back taxes because of gifts to his wife.

Madam President, where was the Senator from New York when these back taxes were paid? Where was his outcry? And do you not think it might have been a little worthy of comment, about President Clinton's taxes, that he and Mrs. Clinton on their own, voluntarily, without any encouragement whatsoever from the Internal Revenue Service, reached back, like every other American has the right to do if they think they may have committed an error, and wrote a check to the Internal Revenue Service for the amount so owed to the U.S. Government?

This is what the President and Mrs. Clinton did after they reconstructed their very complicated tax forms of many—several years ago. And, once again, every American citizen, from the lowest to the highest, has that right, Madam President, under the law of this land.

Finally, I might state that with regard to President Clinton's and Mrs. Clinton's payment of back taxes, the IRS had not discovered that. The statute of limitations had run. There could be no criminal sanctions against the President and the First Lady. It was all over. But they did it because they found an error, and they did it because they think it is right.

I am just very hopeful, as we continue in this ongoing debate—I hate it has to happen on the floor of the U.S. Senate, almost on a daily basis—as we talk about the so-called Whitewater issue and other issues that the Senator from New York is constantly bringing to our attention, I hope all of us will continue to be a little more objective and that when we talk about back taxes being paid voluntarily by this President and his wife, that they will also remind the American people that, yes, President Nixon had to pay $280,000, Vice President Bush had to pay $198,000, and that former President Reagan had to pay $20,000 in back taxes.

So, once again, this is only one attempt to set the record straight and to get the facts before the American people and to put them in some perspective.

Madam President, I yield the floor. I understand my good friend from Washington State is present and ready to speak.

The PRESIDING OFFICER. The Senator from Washington.

## FOREST MANAGEMENT CRISIS IN PACIFIC NORTHWEST

Mrs. MURRAY. Madam President, I would like to address my colleagues for a few minutes about an old subject that is about to undergo a new beginning. I am referring to the forest management crisis in the Pacific Northwest. Many of you have been hearing about this issue for a long time. Some of you are probably tired of hearing about it. You are all quite aware that it has defied resolution over the past 5 years.

Today could be the end of the conflict. I make that statement with very cautious optimism. This is the day the Clinton administration forest plan for the spotted owl forests of the Pacific Northwest goes to court for final judicial review.

It has been a long process. Since the President convened his forest conference in Portland, OR, 1 year ago, the plan has been through every conceivably legal, regulatory, and bureaucratic twist and turn. Let me give you a sampling:

Upon completion of the forest conference, the President created the Forest Ecosystem Management Assessment Team, charged with creating options for ecologically sound land management, based on the highest legal integrity, and capable of providing a long-term, sustainable timber supply for businesses and communities.

At the same time, he set up a task force to work with us in Congress to create the Northwest Economic Adjustment Initiative, a 5-year, $1.3 billion economic development and diversification plan.

July 2, 1993, President Clinton announced the completion of FEMAT's work, and the selection of option 9 as the preferred alternative.

Option 9 was subjected to an environmental impact statement that included a 3-month public comment period that generated over 100,000 public comments.

Then came 5 months of agency review. On February 23 of this year, a final EIS was published. This was followed by an additional 30-day comment period.

During this time, a multidisciplinary EIS team coordinated review in Portland. Within the team there were no less than 17 task forces established to work with State and local officials, tribes, and stakeholder groups of every kind.

The Office of Forestry and Economic Development was established to coordinate agencies, oversee implementation of the economic strategy, and give the White House strong presence in the region.

Most of these actions were carried out pursuant to court order. Two extensions were requested and granted. Today, the record of decision embodying the plan has been completed for Federal court to review.

It has taken a little over a year, untold thousands of documents, innumerable meetings, heated discussions, and lot of Rolaids. But that is a small amount of work to repair a problem that has festered nearly a decade. I believe all of us in the Northwest owe a debt of gratitude to the administration for investing an extraordinary amount of time and energy in resolving what is essentially a thorny regional conflict.

We need to see the Clinton forest plan for what it represents: the best attempt yet to balance competing needs and make the law work. It is an honest effort to bring forest management out of the courts, and put it back into the hands of the Forest Service, the Bureau of Land Management, and the Fish and Wildlife Service.

I have said it before and I will say again: It is my strong feeling that this plan is not perfect; I am particularly concerned about its short-term economic implications. There are people on all sides who take issue with this plan. But I want to remind my colleagues, and the citizens of the Pacific Northwest, how little progress was made on this issue before the President began working on this issue last spring.

Parties are lining up on all sides and preparing their lawsuits. Some lawsuits have already been filed. But I would caution everyone against hasty action.

Let me be very clear about this: Our region suffered because of legal and political gridlock. A return to conflict will not heal our wounds. Given the extraordinary effort dedicated to this plan, I hope everyone involved will give it a chance to work.

If there are environmentalists out there, or workers, or forest products companies, I urge you to find solutions through the implementation phase. The plan is a fluid document. It is subject to the National Forest Management Act, the National Environmental Policy Act, and everything these two important laws represent. You all have recourse to seek assistance in the forest planning process, if you only give the agencies a chance to put it in place.

Equally important now is the need for the Federal agencies to work together to implement this plan. In the past, we saw agencies at odds with one another, working actively to disrupt each other. The Pacific Northwest cannot tolerate such behavior in the future. I am impressed by what I have heard from the agencies to date, but the proof will be in seeing results.

The road ahead is rough. But we have a plan—if all goes well—that will afford the agencies an opportunity to restore public confidence; that will ensure the responsible stewardship of our resources; that will bring some certainty to businesses and communities; that will give a solid sense that there is a bright future for Northwest culture.

Beyond this plan we will have to address the 4-D rule under the Endangered Species Act. This rule is critically important to private land owners in my State—large and small. This rule has been held in abeyance, awaiting approval of the Federal forest plan. Frankly, the flexible 4-D rule is contingent on finishing a management plan for the Federal forests. Once that is done, I am committed to working out a 4-D rule as well.

Let us give Option 9 a chance to work. As I said before, we have a tremendous opportunity to make this a new beginning for an old issue that has divided my region—and this Nation—for too long.

## MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Thomas, one of his secretaries.

## EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

## MESSAGES FROM THE HOUSE

At 2:01 p.m., a message from the House of Representatives, delivered by Ms. Goetz, one of its reading clerks, announced that the House has passed the following bills, in which it requests the concurrence of the Senate:

H.R. 3498. An Act to establish the Great Falls Historic District, and for other purposes.

H.R. 3770. An Act to designate the United States courthouse located at 940 Front Street in San Diego, California, and the Federal building attached to the courthouse as the "Edward J. Schwartz Courthouse and Federal Building."

The message also announced that the House has passed the following bill, without amendment:

S. 2004. An Act to extend until July 1, 1998, the exemption from ineligibility based on a high default rate for certain institutions of higher education.

The message further announced that the House insists upon its amendment to the amendment of the Senate to the bill (H.R. 965) to provide for toy safety and for other purposes, and agrees to a conference with the Senate on the disagreeing votes of the two House thereon; and appoints the following Members as the managers of the conference, on the part of the House: from the Committee on Energy and Commerce, for consideration of the House bill, and the Senate amendment, and modifications committed to conference: Mr. DINGELL, Mrs. COLLINS of Illinois, Mr. TOWNS, Mr. MOORHEAD, and Mr. STEARNS. As additional conferees from the Committee on Public Works and Transportation, for consideration of sections 201–203, 205 and 206 of the Senate amendment, and modifications committed to conference: Mr. MINETA, Mr. OBERSTAR, Mr. RAHALL, Mr. SHUSTER, and Mr. PETRI.

The message also announced that the House disagrees to the amendment of the Senate to the bill (H.R. 2659) to amend the Public Health Service Act to revise and extend programs relating to the transplantation of organs and of bone marrow, and agrees to the conference asked by the Senate on the disagreeing votes of the two Houses thereon; and appoints Mr. DINGELL, Mr. WAXMAN, Mr. WASHINGTON, Mr. MOORHEAD, and Mr. BLILEY as the managers of the Conference on the part of the House.

## MEASURES REFERRED

The following measures were read the first and second times by unanimous consent, and referred as indicated:

H.R. 3498. An Act to establish the Great Falls Historic District, and for other purposes; to the Committee on Energy and Natural Resources.

H.R. 3770. An Act to designate the United States courthouse located at 940 Front Street in San Diego, California, and the Federal building attached to the courthouse as the "Edward J. Schwartz Courthouse and Federal Building"; to the Committee on Environment and Public Works.

## ENROLLED BILLS PRESENTED

The Secretary of the Senate reported that on April 13, 1994, he had presented to the President of the United States, the following enrolled bill:

S. 1206. An Act to redesignate the Federal building located at 380 Trapelo Road in Waltham, Massachusetts, as the "Frederick C. Murphy Federal Center."

## EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, which were referred as indicated:

EC–2458. A communication from the Principal Deputy Under Secretary of Defense (Acquisition and Technology), transmitting, pursuant to law, the Select Acquisition Reports for the quarter ending December 31, 1993; to the Committee on Armed Services.

EC–2459. A communication from the Under Secretary of Defense (Personnel and Readiness), transmitting, pursuant to law, the report evaluating civilian separation incentives cost and benefits for fiscal year 1993; to the Committee on Armed Services.

EC–2460. A communication from the Principal Deputy Under Secretary of Defense (Acquisition and Technology), transmitting, pursuant to law, the annual report on the Foreign Comparative Testing Program for fiscal year 1993; to the Committee on Armed Services.

EC–2461. A communication from the Deputy Under Secretary of Defense (Acquisition and Technology), transmitting, pursuant to law, the annual report of the Defense Environmental Cleanup Program for fiscal year 1993; to the Committee on Armed Services.

EC–2462. A communication from the Deputy Assistant Secretary of the Air Force (Communications, Computers and Support Systems), transmitting, pursuant to law, notice relative to the costs of operating the grounds maintenance function on Ellsworth Air Force Base; to the Committee on Armed Services.

EC–2463. A communication from the Deputy Assistant Secretary of the Air Force (Communications, Computers and Support Systems), transmitting, pursuant to law, notice relative to the costs of operating the Military Family Housing maintenance function on Langley Air Force Base; to the Committee on Armed Services.

EC–2464. A communication from the Secretary of the Air Force, transmitting, pursuant to law, notice relative to the Unit Cost of a major defense acquisition program; to the Committee on Armed Services.

EC–2465. A communication from the Deputy Secretary of Defense, transmitting, pursuant to law, the report of the plan for alternative assessment of the survivability of the C-17A aircraft; to the Committee on Armed Services.

EC–2466. A communication from the Principal Deputy Assistant Secretary of Defense (Economic Security), transmitting, pursuant to law, a report entitled "Adequacy of the United States Shipbuilding Industry"; to the Committee on Armed Services.

EC–2467. A communication from the Assistant Secretary of State (Legislative Affairs), transmitting, pursuant to law, the annual report on the Panama Canal Treaties for fiscal year 1993; to the Committee on Armed Services.

EC–2468. A communication from the Secretary of the Navy, transmitting, pursuant to law, the report on the Strategic Sealift Program for fiscal year 1993; to the Committee on Armed Services.

EC–2469. A communication from the Secretary of Energy, transmitting, pursuant to law, the report of the activities relating to the Defense Nuclear Facilities Safety Board for calendar year 1993; to the Committee on Armed Services.

EC–2470. A communication from the Chairman of the Federal Financial Institutions Examination Council, transmitting, pursuant to law, the annual report for calendar year 1993; to the Committee on Banking, Housing, and Urban Affairs.

EC–2471. A communication from the President and Chairman of the Export-Import Bank of the United States, transmitting, pursuant to law, a report on a transaction involving U.S. exports to Italy; to the Committee on Banking, Housing, and Urban Affairs.

EC–2472. A communication from the Acting Director of the Office of Thrift Supervision, Department of the Treasury, transmitting, pursuant to law, the report on the preservation of minority savings associations for calendar year 1993; to the Committee on Banking, Housing, and Urban Affairs.

EC–2473. A communication from the Acting Director of the Office of Thrift Supervision, Department of the Treasury, transmitting, pursuant to law, the annual report on con-

sumers; to the Committee on Banking, Housing, and Urban Affairs.

EC-2474. A communication from the Director (Office of Governmental Relations), Resolution Trust Corporation, transmitting, pursuant to law, the report on covered property for fiscal year 1993; to the Committee on Banking, Housing, and Urban Affairs.

EC-2475. A communication from the Secretary of Housing and Urban Development, transmitting, pursuant to law, the report on the administration of the Manufactured Home Construction and Safety Standards Program; to the Committee on Banking, Housing, and Urban Affairs.

EC-2476. A communication from the Chair of the Public and Assisted Housing Occupancy Task Force, transmitting, pursuant to law, the report of the Public and Assisted Housing Occupancy Task Force; to the Committee on Banking, Housing, and Urban Affairs.

EC-2477. A communication from the Secretary of Agriculture, transmitting, pursuant to law, the report on foreign investment in U.S. agricultural land for calendar year 1993; to the Committee on Agricultural, Nutrition and Forestry.

EC-2478. A communication from the Director of the Office of Management and Budget, Executive Office of the President, transmitting, pursuant to law, a report on appropriations legislation within five days of enactment; to the Committee on the Budget.

EC-2479. A communication from the Director of the Office of Management and Budget, Executive Office of the President, transmitting, pursuant to law, the cumulative report on rescissions and deferrals dated April 1, 1994; referred jointly, pursuant to the order of January 30, 1975, as modified by the order April 11, 1986, to the Committee on Appropriations, the Committee on the Budget, the Committee on Agriculture, Nutrition and Forestry, the Committee on Armed Services, the Committee on Banking, Housing and Urban Affairs, the Committee on Commerce, Science and Transportation, the Committee on Energy and Natural Resources, the Committee on Environment and Public Works, the Committee on Finance, the Committee on Foreign Relations, the Committee on Governmental Affairs, the Committee on the Judiciary, and the Committee on Small Business.

## EXECUTIVE REPORTS OF COMMITTEES

The following executive reports of committees were submitted:

By Mr. NUNN, from the Committee on Armed Services:

Rudy deLeon, of California, to be Under Secretary of the Air Force;

Gilbert F. Decker, of California, to be an Assistant Secretary of the Army; and

Sara E. Lister, of the District of Columbia, to be an Assistant Secretary of the Army.

(The above nominations were reported with the recommendation that they be confirmed, subject to the nominees' commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.)

The following named officer to be placed on the retired list in the grade indicated under the provisions of Title 10, United States Code, Section 1370:

*To be admiral*

Adm. Frank B. Kelso, II, U.S. Navy, 410-50-8737.

(The above nomination was reported with the recommendation that he be confirmed.)

## REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. JOHNSTON, from the Committee on Energy and Natural Resources, with an amendment in the nature of a substitute:

S. 1341. A bill to establish the Wheeling National Heritage Area in the State of West Virginia, and for other purposes (Rept. No. 103-249).

By Mr. BAUCUS, from the Committee on Environment and Public Works, without amendment:

S. 2019. An original bill to reauthorize and amend title XIV of the Public Health Service Act (commonly known as the "Safe Drinking Water Act"), and for other purposes (Rept. No. 103-250).

By Mr. ROCKEFELLER, from the Committee on Veterans Affairs, with amendments:

S. 1904. A bill to amend title 38, United States Code, to improve the organization and procedures of the Board of Veterans' Appeals.

## INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second time by unanimous consent, and referred as indicated:

By Mr. DOLE:

S. 2016. A bill to establish a National Commission on the Future of Disability, and for other purposes; to the Committee on Finance.

By Mr. McCAIN (for himself and Mr. INOUYE):

S. 2017. A bill to prohibit regulations that classify, enhance, or diminish the privileges and immunities of an Indian tribe relative to other federally recognized Indian tribes, and for other purposes; to the Committee on Indian Affairs.

By Mr. PRESSLER:

S. 2018. A bill to reauthorize Public Law 81-815 (School Construction), and for other purposes; to the Committee on Labor and Human Resources.

By Mr. BAUCUS:

S. 2019. An original bill to reauthorize and amend title XIV of the Public Health Service Act (commonly known as the "Safe Drinking Water Act"), and for other purposes: from the Committee on Environment and Public Works; placed on the calendar.

By Mr. SARBANES (for himself, Mr. WARNER, and Ms. MIKULSKI):

S. 2020. A bill to authorize the establishment of a pilot program to provide environmental assistance to non-Federal interest in the Chesapeake Bay watershed, and for other purposes; to the Committee on Environment and Public Works.

By Mr. RIEGLE (for himself, Mr. D'AMATO, Mr. KERRY, and Mr. METZENBAUM) (by request):

S. 2021. A bill to clarify the statute of limitations for actions brought by the Federal Deposit Insurance Corporation and the Resolution Trust Corporation as conservator or receiver; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. STEVENS:

S. 2022. A bill to reduce waste of fishery resources off Alaska by eliminating the catch of prohibited species, requiring full retention of economic discards and full utilization of processing waste, and for other purposes; to the Committee on Commerce, Science, and Transportation.

By Mr. STEVENS (for himself and Mr. MURKOWSKI):

S. 2023. A bill to provide for the transfer of certain real property to the General Services Administration and for other purposes; to the Committee on Governmental Affairs.

By Mr. BYRD:

S.J. Res. 180. A joint resolution to provide for the appointment of an executive secretary for the United States Capitol Preservation Commission, and for other purposes; considered and passed.

By Mr. SIMON (for himself, Ms. MOSELEY-BRAUN, Mr. COCHRAN, and Mr. THURMOND):

S.J. Res. 181. A joint resolution to designate the week of May 8, 1994, through May 14, 1994, as "United Negro College Fund Week"; to the Committee on the Judiciary.

## STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. DOLE:

S. 2016. A bill to establish a National Commission on the Future of Disability, and for other purposes: to the Committee on Finance.

NATIONAL COMMISSION ON THE FUTURE OF DISABILITY ACT

Mr. DOLE. Mr. President, 25 years ago today I rose to give my maiden speech as the newly elected junior Senator from Kansas. It concerned a minority group whose existence affects every person in our society and the very fiber of our Nation.

It is an exceptional group which I joined another April 14th, during World War II. As I said then, it is a group no one joins by personal choice, and neither respects nor discriminates by age, sex, wealth, education, skin color, religious beliefs, political party, power, or prestige.

It is a group that for too long had known exclusion—maybe not exclusion from the front of the bus, but perhaps from even climbing aboard it; maybe not exclusion from pursuing advanced education, but perhaps from experiencing any formal education; maybe not exclusion from day-to-day life itself, but perhaps from an adequate opportunity to develop and contribute to his or her fullest capacity.

Mr. President, it is a minority, yet a group to which at least one out of every five Americans belongs.

PROGRESS IN 25 YEARS

Mr. President, I was speaking then about Americans with disabilities—today 49 million persons, 24 million of whom are severely disabled. As I said in 1969, and which is still true today, the challenge to our Nation is to help foster their independence, dignity, and security.

As my fellow Senators know well, we have worked hard over the years to meet these goals. In fact, they are the foundation of the Americans with Dis-

abilities Act, a sweeping law to promote equal opportunity and full participation.

Mr. President, today I will speak of the progress we have made in the past 25 years, and what remains to be done.

ARCHITECTURAL BARRIERS

In 1969, I called for greater removal of architectural barriers. At that time, there was only a single Federal law requiring accessibility, and it applied only to new or newly renovated Federal buildings.

In 1973, the Rehabilitation Act expanded this mandate to all federally funded programs, including State and local governments. People with disabilities are citizens and taxpayers, and it was unconscionable that they were denied the benefits of publicly supported services.

Since then, we have learned that providing accessibility is often not difficult—where there is the will. Thus, in 1990, with ADA, we required reasonable accommodations by businesses and other private entities.

Perhaps in no other area have we had such visible success. Last May, even before the effective dates of ADA, GAO reported that accessibility is generally good. ADA should eliminate many of the remaining barriers. I have been deeply impressed, in my home State of Kansas and elsewhere, that despite the real costs and some uncertainties about what ADA requires, people recognize how important accessibility is and are willing to do their part.

EDUCATION OF CHILDREN WITH DISABILITIES

Mr. President, I also spoke about the need to improve education for children with disabilities. Back then, the Council for Exceptional Children estimated that less than one-third of children needing special ed received it. And many thousands with severe or multiple disabilities had little or no education.

In 1975, Congress passed a national law, the Education of All Handicapped Children Act, based on pioneering State laws, to make sure children with disabilities had the same opportunity as others for a "free and appropriate education."

Today, almost 5 million young people, 10 percent of all students, have a disability. Their education poses many challenges. As Senators DODD and JEFFORDS recently pointed out, Congress has never kept its promise to pay 40 percent of the extra costs of special ed. Inclusive education works when supports are available, and that costs money. And I am also deeply concerned about the high percentage of African-Americans and other minorities assigned to special education.

I hope when we reauthorize the Individuals with Disabilities Education Act next year we can help fix these and other problems.

HEALTH CARE

Mr. President, then as now, health care is an important and understandably emotional issue for many people with disabilities. We have done much, if not enough, through Medicare and Medicaid, to provide medical insurance. In fact, coverage of people with severe disabilities is about the same as for the general population—85 percent—though they more often depend on these Federal programs.

There is perhaps no other group for whom health care reform offers such opportunity and such peril. For those who have stayed out of the job market in order to keep their Medicare or Medicaid, health care reform will hopefully mean they can look for work with the confidence they can obtain other—and perhaps better—medical insurance.

Like all Americans, people with disabilities want security, simplicity, and portability. I also know they are looking for services which today are not covered or only partly covered by many insurance plans—including personal assistance, assistive technology and durable medical equipment, and rehabilitation services. I can make no promises, but I hope we can do better.

But, Mr. President, we must also be sobered by the very real limits of medical care. Medical science has never been more successful at keeping people alive, but sometimes at the price of severe, lifelong disability.

I recently received a letter from the parents of a child in a small town in south central Kansas, near the Oklahoma border. They wrote:

> We desperately love our [1-year-old] son and want to do everything we possibly can for him. His health problems were so severe that specialists in Wichita told us we probably would never take him home from birth. . . . [H]e does not have the part of the brain needed for intellect, reasoning, etc.
>
> We live in a rural area where there are not many resources for a family such as ours. Where do we turn for special help?

Yes, there is help for this family, but we are still humbled by what medical science cannot do.

INTERNATIONAL HUMAN RIGHTS

Mr. President, disability is a matter of human rights. In July I introduced a bill to require the Secretary of State to examine discrimination against people with disabilities in the annual report on human rights. My bill received broad bipartisan support—26 cosponsors across the political spectrum.

The Secretary of State was listening. In this year's report, each of the 190 countries covered, from Angola to Zimbabwe, includes a short section on people with disabilities. Some of the accounts are distrubing. In our country, for example, infants born with birth defects are considered sorcerers, and sometimes killed at birth. But other reports are encouraging. Even in some low-income countries, there are real efforts at advocacy and opportunity.

Mr. President, this report sends the message around the world that America respects the rights of all people, including those with disabilities.

DIGNITY AND RESPECT

We have also made important contributions in other areas—including housing, transportation, assistive technology, and help to families of people with disabilities. I have been proud to be part of many of these initiatives. In 1983, I created the Dole Foundation, which I am pleased to say has awarded over $5 million in grants.

But perhaps the greatest success has been in how people with disabilities are viewed—no longer with pity, but with respect for their dignity and recognition that disability is a natural part of the human condition. Where institutional care and dependency were often considered inevitable, today independent living is an important goal. The Federal Government backs this view with dollars. In August, I cut the ribbon at a brand new independent living center in Dodge City, in the western, most rural part of my State. Kansas now has 12 independent living centers, bringing their services within reach of most citizens.

Indeed, 50 years ago, we had a President, Franklin Roosevelt, who could not walk and believed it necessary to disguise that fact from the American people. Today I trust that Americans would have no problem in electing as President a man or woman with a disability.

But this is not something Congress can take credit for. It is something people with disabilities have done for themselves.

In 1970, I spoke on the Senate floor about a young woman, Judy Heumann, who I read about in the New York Times. Ms. Heumann filed a lawsuit because the New York City School Board had refused her a teaching job simply because she was unable to walk and used a wheelchair.

Well, she won that lawsuit and today is the Assistant Secretary for Special Education and Rehabilitation Services in the U.S. Department of Education.

And I, congratulate the advocacy community. When I arrived in the Senate, there were few organizations representing the interests of people with disabilities in Washington. In the early 1970's, the forerunner of today's Consortium for Citizens With Disabilities was formed. Now CCD is a vigorous association of over 130 member agencies, representing millions of Americans with disabilities and their families.

PERSISTENT JOBLESSNESS AND POVERTY

Mr. President, the news is not all good, however. The poet Archibald Macleish once wrote, "America is always promises." But America's biggest promise—a job—is too often an empty promise to the disabled. According to a Census Bureau report released several weeks ago, only 52 percent of people with disabilities are working, and only 23 percent of those with a severe disability.

Even more disturbing, other surveys have shown that over the past 15 years,

the percentage of people with disabilities not working has remained constant, or even increased.

I would not be concerned if people were well off. But they are not. According to a 1992 GAO study, 45 percent of families headed by a person with a disability, and 65 percent of single parents or single persons with a disability, live in poverty. These numbers are startling, and I bet unknown to most people.

The Federal Government certainly has tried to help. Between just two programs, social security disability insurance and supplemental security income, it spent $54 billion last year for cash incomes to people with disabilities.

There is no career ladder for social security recipients. The lesson here is simple: for people with disabilities, as for most Americans, working is essential to a decent income. We need to help people get off the disability check and onto a paycheck.

DISABILITY FUTURE

Mr. President what's wrong, and what's the remedy? In my view, there are two big problems. First, as I said back in September, our vocational rehabilitation program is outdated. Our social security disability programs still discourage people from going to work. True, we have created work incentives, but few use them.

Second, our expectations for people with disabilities have changed. What was once acceptable is not any longer. Indeed, many Federal disability programs are in trouble. We can have little confidence that our priorities are right or that our money is well spent.

There are also other nondisability programs that serve large numbers of people with disabilities that need attention. For example, 27 percent of welfare mothers are either disabled or have a child with a disability. Both Republican and Democratic welfare proposals generally exempt such individuals from reforms. We mean well, I know, but I fear we are doing these individuals no favor.

Mr. President, if we are in trouble today, consider the future. Little attention is paid to the rapidly growing number of people with disabilities. In my view, disability will soon become the Nation's No. 1 health care and social welfare issue.

Unfortunately, good ideas for change are in short supply, especially compared to many other areas of policymaking—such as defense and national security, telecommunications, education, and employment. The Federal Government itself funds little disability policy research. Worse, as one disability expert has stated bluntly, "We in disability services continue to plan for yesterday * * * to overcome the problems of a decade ago."

Our Federal agencies haven't been much help, either. As Senator MOYNIHAN has said at least twice in the past 6 months, the Social security administration "has been brain dead in a policy sense for 15 years."

A NATIONAL COMMISSION ON THE FUTURE OF DISABILITY

Mr. President, for these reasons I introduce today a bill to establish a National Commission on the Future of Disability. Its purpose is to examine all the Nation's disability programs; evaluate them according to the Goals of ADA—equal opportunity, full participation, independent living, and economic self-sufficiency; recommend priorities; and prepare us for the 21st century. It must interpret this charge very broadly. And it must look to the unfulfilled opportunities of rehabilitation science.

This commission is also charged with actually writing bill text. Good ideas are fine, but we need something to work with.

CONCLUSION

This, then, Mr President, is the sum and substance of my 25th anniversary speech in the Senate. I know of no more important subject matter, not solely because of my personal interest, but because in our great country, to quote the President, "we have not a single person to waste." I think this is something we can all agree on, Republican or Democrat.

No doubt about it, much work remains. But I know we are ready and willing.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

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

S. 2016

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "National Commission on the Future of Disability Act".

**SEC. 2. FINDINGS.**

The Congress finds that—

(1) the Nation's proper goals regarding individuals with disabilities are to ensure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals;

(2) the vast changes underway in the workplace, information technologies, and other aspects of society have been insufficiently studied for the opportunities and hazards such changes present for individuals with disabilities;

(3) the Federal Government has created many programs to serve the needs of individuals with disabilities, including programs that provide financial assistance, medical care, education, vocational rehabilitation, housing, transportation, legal assistance, and rehabilitation research and training, but many of these programs operate in a manner that is inconsistent with the Nation's goals, work at cross-purposes with each other, are outdated, or could otherwise be improved, and new programs to serve individuals with disabilities may need to be established;

(4) there are Federal programs that are not viewed as disability programs, yet serve significant numbers of individuals with disabilities, and the impact and value of such programs for individuals with disabilities have received insufficient attention;

(5) the Nation is not well informed about the increasing number of Americans with disabilities, and disability is a health and social welfare issue of growing proportions, for which the Nation is ill prepared; and

(6) it is incumbent upon the Federal Government to examine its programs that serve individuals with disabilities to ensure they are consistent with the Nation's goals, reflect the best use of the its resources, and properly anticipate societal and technological change.

**SEC. 3. ESTABLISHMENT.**

There is established a commission to be known as the National Commission on the Future of Disability (referred to in this Act as the "Commission").

**SEC. 4. DUTIES OF THE COMMISSION.**

(a) IN GENERAL.—The Commission shall develop and carry out a comprehensive study of all matters related to the nature, purpose, and adequacy of all Federal programs serving individuals with disabilities, in particular, programs authorized under the Social Security Act, in terms of both current performance and future value.

(b) MATTERS STUDIED.—The Commission shall prepare an inventory of Federal programs serving individuals with disabilities, and shall examine—

(1) trends and projections regarding the size and characteristics of the population of individuals with disabilities, and the implications of such analyses for program planning;

(2) the feasibility and design of performance standards for the Nation's disability programs;

(3) the adequacy of Federal efforts in rehabilitation research and training, and opportunities to improve the lives of individuals with disabilities through all manners of scientific and engineering research; and

(4) the adequacy of policy research available to the Federal Government, and what actions might be undertaken to improve the quality and scope of such research.

(c) RECOMMENDATIONS.—The Commission shall submit to the appropriate committees of the Congress and to the President recommendations and, as appropriate, proposals for legislation regarding—

(1) which (if any) Federal disability programs should be eliminated or augmented;

(2) what new Federal disability programs (if any) should be established;

(3) the suitability of the organization and location of disability programs within the Federal Government;

(4) other actions the Federal Government should take to prevent disabilities and disadvantages associated with disabilities; and

(5) such other matters as the Commission considers appropriate.

**SEC. 5. MEMBERSHIP.**

(a) NUMBER AND APPOINTMENT.—

(1) IN GENERAL.—The Commission shall be composed of 12 members, of whom—

(A) four shall be appointed by the President, of whom not more than 2 shall be of the same major political party;

(B) two shall be appointed by the Majority Leader of the Senate;

(C) two shall be appointed by the Minority Leader of the Senate;

(D) two shall be appointed by the Speaker of the House of Representatives; and

(E) two shall be appointed by the Minority Leader of the House of Representatives.

(2) REPRESENTATION.—The Commission members shall be chosen based on their education, training, or experience. In appointing individuals as members of the Commission, the President and the Majority and Minority Leaders of the Senate and the Speaker and Minority Leader of the House of Representatives shall seek to ensure that the membership of the Commission reflects the diversity of individuals with disabilities in the United States.

(b) COMPTROLLER GENERAL.—The Comptroller General shall serve on the Commission as an ex officio member of the Commission to advise and oversee the methodology and approach of the study of the Commission.

(c) PROHIBITION AGAINST OFFICER OR EMPLOYEE.—Each individual appointed under subsection (a) shall not be an officer or employee of any government.

(d) DEADLINE FOR APPOINTMENT; TERM OF APPOINTMENT.—Members of the Commission shall be appointed not later than 60 days after the date of enactment of this Act. The members shall serve on the Commission for the life of the Commission.

(e) MEETINGS.—The Commission shall locate its headquarters in the District of Columbia, and shall meet at the call of the Chairperson, but not less than four times each year during the life of the Commission.

(f) QUORUM.—Ten members of the Commission shall constitute a quorum, but a lesser number may hold hearings.

(g) CHAIRPERSON AND VICE CHAIRPERSON.—Not later than 15 days after the members of the Commission are appointed, such members shall designate a Chairperson and Vice Chairperson from among the members of the Commission.

(h) CONTINUATION OF MEMBERSHIP.—If a member of the Commission becomes an officer or employee of any government after appointment to the Commission, the individual may continue as a member until a successor member is appointed.

(i) VACANCIES.—A vacancy on the Commission shall be filled in the manner in which the original appointment was made not later than 30 days after the Commission is given notice of the vacancy.

(j) COMPENSATION.—Members of the Commission shall receive no additional pay, allowances, or benefits by reason of their service on the Commission.

(k) TRAVEL EXPENSES.—Each member of the Commission shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

**SEC. 6. STAFF AND SUPPORT SERVICES.**

(a) DIRECTOR.—

(1) APPOINTMENT.—Upon consultation with the members of the Commission, the Chairperson shall appoint a Director of the Commission.

(2) COMPENSATION.—The Director shall be paid the rate of basic pay for level V of the Executive Schedule.

(b) STAFF.—With the approval of the Commission, the Director may appoint such personnel as the Director considers appropriate.

(c) APPLICABILITY OF CIVIL SERVICE LAWS.—The staff of the Commission shall be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

(d) EXPERTS AND CONSULTANTS.—With the approval of the Commission, the Director may procure temporary and intermittent services under section 3109(b) of title 5, United States Code.

(e) STAFF OF FEDERAL AGENCIES.—Upon the request of the Commission, the head of any Federal agency may detail, on a reimbursable basis, any of the personnel of such agency to the Commission to assist in carrying out the duties of the Commission under this Act.

(f) OTHER RESOURCES.—The Commission shall have reasonable access to materials, resources, statistical data, and other information from the Library of Congress and agencies and elected representatives of the executive and legislative branches of the Federal Government. The Chairperson of the Commission shall make requests for such access in writing when necessary.

(g) PHYSICAL FACILITIES.—The Administrator of the General Services Administration shall locate suitable office space for the operation of the Commission. The facilities shall serve as the headquarters of the Commission and shall include all necessary equipment and incidentals required for proper functioning of the Commission.

**SEC. 7. POWERS OF COMMISSION.**

(a) HEARINGS.—The Commission may conduct public hearings or forums at the discretion of the Commission, at any time and place the Commission is able to secure facilities and witnesses, for the purpose of carrying out the duties of the Commission under this Act.

(b) DELEGATION OF AUTHORITY.—Any member or agent of the Commission may, if authorized by the Commission, take any action the Commission is authorized to take by this section.

(c) INFORMATION.—The Commission may secure directly from any Federal agency information necessary to enable the Commission to carry out its duties under this Act. Upon request of the Chairperson or Vice Chairperson of the Commission, the head of a Federal agency shall furnish the information to the Commission to the extent permitted by law.

(d) GIFTS, BEQUESTS, AND DEVISES.—The Commission may accept, use, and dispose of gifts, bequests, or devises of services or property, both real and personal, for the purpose of aiding or facilitating the work of the Commission. Gifts, bequests, or devises of money and proceeds from sales of other property received as gifts, bequests, or devices shall be deposited in the Treasury and shall be available for disbursement upon order of the Commission.

(e) MAILS.—The Commission may use the United States mails in the same manner and under the same conditions as other Federal agencies.

**SEC. 8. REPORTS.**

(a) INTERIM REPORT.—Not later than 1 year prior to the date on which the Commission terminates pursuant to section 9, the Commission shall submit an interim report to the President and to the Congress. The interim report shall contain a detailed statement of the findings and conclusions of the Commission, together with the Commission's recommendations for legislative and administrative action, based on the activities of the Commission.

(b) FINAL REPORT.—Not later than the date on which the Commission terminates, the Commission shall submit to the Congress and to the President a final report containing—

(1) a detailed statement of final findings, conclusions, and recommendations; and

(2) an assessment of the extent to which recommendations of the Commission included in the interim report under subsection (a) have been implemented.

(c) PRINTING AND PUBLIC DISTRIBUTION.—Upon receipt of each report of the Commission under this section, the President shall—

(1) order the report to be printed; and

(2) make the report available to the public upon request.

**SEC. 9. TERMINATION.**

The Commission shall terminate on the date that is 2 years after the date on which the members of the Commission have met and designated a Chairperson and Vice Chairperson.

**SEC. 10. AUTHORIZATION OF APPROPRIATIONS.**

There are authorized to be appropriated such sums as may be necessary to carry out this Act.

Mr. HARKIN. Mr. President, I commend the distinguished majority leader—or minority lead, excuse that little slip of the tongue there—the Senator from Kansas, for his tireless leadership of the people of this country in the area of disabilities. Last night I went home and sat down on the sofa and reread Senator DOLE's maiden speech given in this Chamber 25 years ago. I first read it during the debates on the ADA, and I went home last night and read it again.

I thought, as I read it, just how prescient he was at that time, in 1969, and how far ahead of the curve he really was in thinking, conceptualizing about the role of people with disabilities in our society.

For 25 years he has been a tireless leader in breaking down those barriers, the physical barriers and the attitudinal barriers, that people have in this country against people with disabilities.

He has been in the forefront of every fight that this Congress had had to break down those barriers and open up opportunities from the Rehabilitation Act of 1973, the Education for all Handicapped Americans Act of 1975; of course, the Americans with Disabilities Act could not have gotten through without his strong leadership. Even in the international arena, Senator DOLE has consistently pushed for the rights of people with disabilities.

Indeed, since that maiden speech of his 25 years ago, we have come a long way in this country, but we could not have come this far in these 25 years without the strong leadership of Senator DOLE, who understood these disability issues far better and far before many of us who came after, and who was willing to work in a bipartisan effort to see that our policies and our legislative activities moved us in the direction of independence, inclusion, and empowerment for all Americans.

So while Senator DOLE and I may have various disagreements on other issues, this is one in which I am proud to stand by his side and to back him up in every effort that he has taken since I have been privileged to be a Member of the Senate, again in enhancing opportunities and breaking down the bar-

riers to people with disabilities. The speech that he gave 25 years ago was really a call to conscience, and it was a call for us as Americans to put aside the prejudices and the fears that we have had in the past of people with disabilities and to understand that not only was it in their best interests that we break down those barriers, that we gave them full inclusion and empowerment in society, but that it was in all of our interests as Americans to do so.

So again I commend today Senator DOLE for those 25 years of courageous leadership, to commend him for the new legislative effort he has undertaken, and to let him know I will do whatever I can to work with him in a bipartisan spirit to continue the great efforts that he started 25 years ago.

Mr. DOLE. Mr. President, let me extend my thanks to the Senator from Iowa. As we all know, he has been the real leader on disability issues. We have been able to work together. This is not a partisan issue, as he knows. He has experienced as a family member what disability is all about, and I think that makes us all a little bit more sensitive.

So I wish to congratulate the Senator from Iowa for the great work he has done over the years, and it has been my privilege to join with him on many of those occasions. And again, as he said, this transcends partisanship. There is nothing partisan about dealing with these issues, never has been in this body, and I do not expect there ever will.

Mr. BIDEN. Mr. President, I, too, would like to congratulate Senator DOLE. Senator DOLE has always reminded me of a comment my father would often make to his children. He used to say, "Never complain and never explain. Just go do it."

One of the things about BOB DOLE is his character is reflected in all that legislation that was recited here. I have never heard the man complain. I never heard him explain. I have just seen him fight for the things he thinks important.

I admire him and say congratulations for 25 years of making life better for a whole lot of people in this country.

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By Mr. MCCAIN (for himself and Mr. INOUYE):

S. 2017. A bill to prohibit regulations that classify, enhance, or diminish the privileges and immunities of an Indian tribe relative to other federally recognized Indian tribes, and for other purposes; to the Committee on Indian Affairs.

THE INDIAN REORGANIZATION ACT OF 1934 AMENDMENTS ACT

• Mr. MCCAIN. Mr. President, today I am introducing legislation to amend section 16 of the Indian Reorganization Act of 1934. I am pleased that the distinguished chairman of the Committee on Indian Affairs, Senator INOUYE, has joined me as a cosponsor of this bill.

This bill is intended to stimulate discussion about the interpretation of section 16 of the Indian Reorganization Act [IRA] by the Department of the Interior. It has recently been brought to my attention that for most of the past 60 years the Department has interpreted section 16 to authorize the Secretary to categorize or classify tribes as being either "created" or "historic." A created tribe is apparently regarded as lacking retained inherent sovereign authority because it is viewed as being something less than a tribe. According to the Department, created tribes are only authorized to exercise such authority as the Secretary may confer on them. On the other hand, historic tribes are deemed to retain all inherent sovereign authority not otherwise limited or divested by a treaty or an act of Congress.

I find absolutely no basis in law or policy for the manner in which section 16 has been interpreted by the Department of the Interior. One of the reasons stated by the Department for distinguishing between created and historic tribes is that the created tribes are new in the sense that they never existed before. At the same time, the Department insists that it cannot tell us which tribes are created and which are historic because this is determined through a case-by-case review. All of this ignores a few fundamental principles of Federal Indian law and policy. Neither the Congress nor the Secretary can create a tribe where none previously existed. Not only is this simple common sense, it is also the law as enunciated by the Federal courts.

Section 16 of the IRA did not authorize the Secretary to create Indian tribes. Congress itself cannot create Indian tribes, so there is no authority for the Congress to delegate to the Secretary in this regard. The recognition of a tribe by the Federal Government is just that—the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution and with which the Federal Government has established formal relations. All that section 16 was intended to do was to provide authority and procedures for the adoption, amendment, and approval of tribal constitutions for those tribes that choose to employ its provisions.

I have concluded that a serious mistake has been made by the Department in construing the intent of Congress in enacting section 16. Such a mistake would be possible since this section of the IRA was literally written in a conference between the House and Senate by taking "* * * phrases from the bill that had passed the House and other phrases from the bill that had passed the Senate * * *" according to the great legal scholar Felix Cohen, who urged caution in the interpretation of section 16.

Clearly, the interpretation which has been developed by the Department is inconsistent with the principal policies underlying the IRA, which were to stabilize tribal governments and to encourage self-government. These policies have taken on additional vitality in the last 20 years as the Congress has repudiated and repealed the policy of termination and enacted the Indian Self-Determination and Education Assistance Act and the Tribal Self-Governance Project. The effect of the Department's interpretation of section 16 has been to destabilize tribal governments. Tribes face uncertainty about which category the Department would place them in and, in addition, those tribes placed in the created category face uncertainty about the specific governmental authorities the Department believes they possess.

On its face, section 16 does not authorize or require the Secretary of the Interior to draw distinctions between tribes or to categorize them based on their powers of governance. As Mr. Cohen noted in his 1942 Handbook on Federal Indian Law, the IRA "* * * had little or no effect upon the substantive powers of tribal self-government vested in the various Indian tribes * * *". The courts have consistently construed the IRA to have had no substantive effect on tribal sovereign authority.

One example of the absurdity of the Department's interpretation of section 16 involves the Pascua Yaqui Tribe in Arizona. Despite explicit direction from the Congress in 1978, the Department has determined that the Pascua Yaqui Tribe is a created tribe and that it therefore lacks the authority to provide law enforcement services on its reservation under the Indian Self-Determination and Education Assistance Act. This interpretation of the IRA, the Self-Determination Act, and the Pascua Yaqui legislation of 1978 not only flies in the face of these acts of Congress, it completely ignores centuries of history of the Pascua Yaqui people and their Toltec forebears.

In decisions involving other tribes, the Department has determined that created tribes lack the authority to establish judicial systems or to enact laws setting forth procedures for evicting tenants from tribal housing. I am sure that we will never know the number and the full extent of the absurd and unnecessary determinations which have resulted from the Department's reading of section 16. We do know that the implementation of the basic policies implicit in the IRA and the self-determination and self-governance laws will continue to be impeded by the Department's interpretation of section 16 unless we act to correct this situation.

I believe that Federal Indian law and policy clearly supports the view that tribes that have been recognized by the Federal Government stand on an equal footing to each other. That is, each fed-

erally recognized Indian tribe has the same governmental status as other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States. Each federally recognized tribe is entitled to the same privileges and immunities as other federally recognized tribes and have the right to exercise the same inherent and delegated authorities.

The legislation we are introducing today will prohibit the Department from implementing its erroneous interpretation of section 16. By enacting this bill we will provide the stability for tribal governments which the Congress thought it was providing 60 years ago when the IRA was enacted and we will remove a barrier to the full implementation of the policies of self-determination and self-governance.

We have been advised that the Department may soon take action on its own to correct its interpretation of section 16. I would certainly welcome such action by the Department. Depending on what action is taken, it may well be necessary to consider revising the legislation we are introducing today. As I stated earlier, this bill is intended to promote discussion about this issue. Any actions taken by the Department to correctly interpret section 16 of the IRA will be a welcome and constructive addition to those discussions.

I ask unanimous consent that the bill be printed in the RECORD.

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

S. 2017

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 16 of the Act of June 18, 1934 (25 U.S.C. 476) is amended by adding at the end the following new subsections:

"(f) PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES; PROHIBITION ON NEW REGULATIONS.—Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934, as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

"(g) PRIVILEGES AND IMMUNITIES OF INDIAN TRIBES; EXISTING REGULATIONS.—Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on the date of enactment of this Act and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.".●

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By Mr. PRESSLER:

S. 2018. A bill to reauthorize Public Law 81-815 (School Construction), and for other purposes; to the Committee on Labor and Human Resources.

SCHOOL CONSTRUCTION IMPACT AID PROGRAM REAUTHORIZATION ACT

Mr. PRESSLER. Mr. President, I rise today to introduce legislation to reauthorize Public Law 81-815, the construction portion of the Impact Aid Program.

As Congress continues the reauthorization of the elementary and secondary education programs, I feel strongly that school facility funding can not be overlooked. Some young people are striving to gain their education in school facilities that provide a less than ideal learning environment.

Out-dated equipment coupled with overall deplorable school facilities in some parts of this country distract rather than support the learning environment. Updating equipment and renovating school facilities would be a big step towards providing a level playing field. But this costs money, lots of money for construction projects.

In the case of the Impact Aid Program, providing additional funding is a Federal responsibility. Public Law 81-815 authorizes funds for constructing and renovating schools where federally connected students are in attendance.

For the benefit of my colleagues, a federally connected student is the term used to describe students in school districts affected by a Federal Government activity; for example a military base, Indian reservation, or a national park. These federal activities remove taxable land or have other revenue consequences for local funding of school districts. The Impact Aid Program, under both Public Law 81-874 and Public Law 81-815, authorizes Federal funds to make up for this loss of local revenue.

I have already introduced legislation to revise and reauthorize Public Law 81-874. S. 874, cosponsored by 15 of my colleagues, is awaiting further action by the Committee on Labor and Human Resources. Today, I am pleased to introduce legislation to reauthorize and improve Public Law 81-815.

During the last reauthorization of the Elementary and Secondary Education Act, I offered an amendment to require the General Accounting Office [GAO] to examine Public Law 81-815 in order to determine: First, the gap between the eligible requests and the amount available for school construction funds; and second, whether the Department's criteria for ranking unfunded projects are equitable. Mr. President, I ask unanimous consent that the GAO letter to me dated July 12, 1990 (GAOHRD90-90), be included in the RECORD.

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

U.S. GENERAL ACCOUNTING OFFICE,
*Washington, DC, July 12, 1990.*

Hon. EDWARD M. KENNEDY,
*Chairman, Committee on Labor and Human Resources, U.S. Senate.*

Hon. LARRY PRESSLER,
*U.S. Senate.*

The Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988 directed us to review the federal school construction program for school districts affected by federal activities. This program (authorized by P.L. 81-815) provides federal funds for constructing and renovating schools in districts that educate "federally connected" children, such as those whose parents live and/or work on military installations and Indian reservations. These funds are used to provide classrooms and classroom equipment to qualifying school districts. The Department of Education determines applicant eligibility, calculates the federal share of construction project costs,[1] and awards grants to school districts.

The Congress funded almost all eligible requests for school construction assistance between 1950 (when the program began) and 1967. However, since 1967, federal appropriations have been insufficient to fund the estimated federal share of all construction projects in federally impacted school districts. The continuing shortfall has resulted in a substantial backlog of eligible unfunded projects in districts with federally connected enrollment increases,[2] nontaxable federal property, children residing on Indian land, and Indian land. The Department ranks, for funding purposes, these unfunded projects in priority order based, in part, on the number of federally connected children eligible for payment in the school district.

As agreed with your offices, we determined (1) the gap between the eligible requests for school construction funds and the amount of available Public Law 81-815 funds and (2) whether the Department's criterion for ranking unfunded projects is equitable.

RESULTS OF OUR ANALYSIS

Department records show that as of fiscal year 1988, the estimated funding gap was about $200 million. This figure, however, is misleading because it includes the estimated federal costs of projects in school districts that may no longer be eligible for the program, as well as the costs of projects that are no longer needed by the districts. This figure also includes project cost estimates that have not been revised to reflect increased school construction costs. Therefore, the actual amount of the gap is unknown because the Department does not regularly reconfirm applicants' eligibility nor revise outdated funding estimates.

The Department's criteria for (1) computing priority numbers (scores) of eligible projects for funding purposes and (2) ranking projects are equitable, but the Department does not periodically reevaluate these scores once projects are ranked on waiting lists. Priority scores reflect federally connected enrollments and school construction needs when districts applied for assistance; however, most project requests are at least 12 years old. These project scores may be out-

[1] For example, the federal share of school construction costs to certain eligible school districts is the product of the number of federally connected children eligible for payment and the state's average per pupil cost of school construction.

[2] "Enrollment" is referred to by the Department as "membership." If state law does not define membership, the Department defines it as the number of children listed on a school district's current enrollment records.

dated and invalid because for many of the projects we reviewed, the school districts subsequently completed their projects without federal assistance. In addition, federally connected enrollments have declined in some districts. Thus, since the Department does not periodically reevaluate project priority scores to reflect this kind of information, it cannot provide the Congress with an accurate ranking of federally impacted schools with current school construction needs.

The law requires that those school districts that qualify for assistance based on federally connected enrollment increases receive payments based on the average state per pupil construction costs near the time of application. Because of increased construction costs, such school districts with projects that have been waiting for federal payments for many years will receive a smaller share of total construction costs than they would have received had they been funded promptly.

RECOMMENDATION TO THE CONGRESS

We recommend that the Congress amend Public Law 81-815 to require that school construction payments to eligible school districts with federally connected enrollment increases (those eligible under section 5) be based on average state per pupil construction costs in the year these projects are funded.

RECOMMENDATION TO THE SECRETARY OF EDUCATION

To ensure that the Congress and the Department have accurate information when they make program decisions, we recommend that the Secretary require school districts to apply annually for school construction assistance so that project requests reflect (1) school districts' current enrollments of federally connected children and school construction needs and (2) the current estimate of the federal share of school construction costs. (See p. 20.)

MATTER FOR CONSIDERATION BY THE CONGRESS

To provide federal assistance to more eligible school districts and thereby reduce the backlog of unfunded projects, the Congress may want to consider authorizing the Secretary of Education to distribute available appropriations among a greater number of higher-priority projects. This could be accomplished by reducing on a pro-rata basis funds awarded to school districts with the greatest school construction needs. (See p. 20.)

AGENCY COMMENTS

The Department of Education generally agreed with our recommendation to the Congress. However, it said that our recommendation to the Secretary, requiring annual school construction applications, may also require a legislative change to implement.

The Department raised several concerns about the (1) disposition of currently unfunded projects if an annual process was instituted and (2) the administrative burden that such a process may place on school districts. The National Association of Federally Impacted Schools had similar comments about this recommendation.

Both the Department and the association disagreed with our suggestion to distribute limited program funds on a pro-rata basis. These and other comments along with our evaluation are included on pages 20-25 of this report. We made changes to the text where appropriate.

We are sending copies of this report to the Secretary of Education, appropriate congressional committees, the National Association of Federally Impacted Schools, and other interested parties. Please call me on (202) 275-1793 if you or your staff have any questions about this report. Other major contributors are listed in appendix VIII.

FRANKLIN FRAZIER,
*Director, Education and Employment Issues.*

Mr. PRESSLER. Mr. President, one of the major problems, as identified in this GAO letter is out-dated eligible requests. A good example of this would be the application from the Dupree School District in my home State. Their application to the Department of Education has remained unfunded since 1974—20 years, Mr. President. Other school districts have had the same problem—growing enrollments causing overcrowded school facilities, but no construction funding available.

The bill I am introducing today limits the eligibility of a construction funding request to three years. If the eligible request has not received funding, a new request may be submitted to the Secretary of Education, thereby keeping school district applications current to reflect accurate funding needs under this law.

Mr. President, I ask unanimous consent that the text of the bill and additional material be printed in the RECORD.

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

S. 2018

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SCHOOL CONSTRUCTION.**

The Act entitled "An Act relating to the construction of school facilities in areas affected by Federal activities, and for other purposes" approved September 23, 1950 (20 U.S.C. 631 et seq.) is amended to read as follows:

**"SECTION 1. STATEMENT OF PURPOSE AND AUTHORIZATION OF APPROPRIATIONS.**

"(a) STATEMENT OF PURPOSE.—It is the purpose of this Act to provide financial assistance to federally impacted school districts which are urgently in need of—

"(1) school facilities in school districts—

"(A) that have substantial increases in school membership as a result of new or increased Federal activities; and

"(B) the membership of which includes children in need of minimum school facilities; and

"(2) facility improvements or structural modifications due to the need to meet life safety codes, average daily attendance requirements, Federal laws, rules or regulations, or curriculum improvements.

"(b) AUTHORIZATION OF APPROPRIATIONS.—

"(1) IN GENERAL.—There are authorized to be appropriated $29,000,000 for fiscal year 1995, and such sums as may be necessary for each of the fiscal years 1996 through 1999, to carry out sections 5, 9, 10, and 13.

"(2) ADMINISTRATIVE EXPENSES.—There are authorized to be appropriated such sums as may be necessary for each of the fiscal years 1995 through 1999 for the administrative expenses of the Department of Education.

"(3) AVAILABILITY.—Funds appropriated pursuant to the authority of paragraph (1) shall remain available until expended.

**"SEC. 2. PORTION OF APPROPRIATIONS AVAILABLE FOR PAYMENTS.**

"(a) IN GENERAL.—For each fiscal year the Secretary shall determine the portion of the funds appropriated pursuant to the authority of section 1 which shall be available for carrying out the provisions of sections 9 and 10. The remainder of such funds shall be available for paying to local educational agencies the Federal share of the cost of projects for the construction of school facilities for which applications have been approved under section 6.

"(b) ALLOCATION BETWEEN SECTIONS 5 AND 13.—In any fiscal year the remainder of funds described in the second sentence of subsection (a) shall be used so that—

"(1) 50 percent of such funds are used for payments under section 5 for such year; and

"(2) 50 percent of such funds are used for payments under section 13 for such year.

"(c) ALLOCATION WITHIN SECTION 5.—In any fiscal year, the amount of funds available for payments under section 5 for such year shall be used so that—

"(1) 50 percent of such funds are available for activities described in section 1(a)(1)(A); and

"(2) 50 percent of such funds are available for activities described in section 1(a)(1)(B).

**"SEC. 3. ESTABLISHMENT OF PRIORITIES.**

"(a) IN GENERAL.—In the event that funds appropriated pursuant to the authority of section 1 and remaining available for payment to local educational agencies under this Act are less than the Federal share of the cost of the projects with respect to which applications have been filed prior to such date (and for which funds under section 1 have not already been obligated), the Secretary shall make payments under section 5—

"(1) in the case of activities described in section 1(a)(1)(A), on the basis of the highest percentage of children in need of minimum school facilities; and

"(2) in the case of activities described in section 1(a)(1)(B), on the basis of the highest percentage of federally connected students eligible for payment.

"(b) SPECIAL RULE.—Only applications meeting the conditions for approval under this Act (other than section 6(b)(2)(C)) shall be considered applications for purposes of subsection (a).

"(c) INCREASES.—

"(1) IN GENERAL.—The priorities described in this section shall be applied so that applications for payments based upon increases in the number of children residing on, or residing with a parent employed on, property which is part of a low-rent housing project assisted under the United States Housing Act of 1937 shall not be approved for any fiscal year until all other applications for payments under paragraph (1) of section 5(a) for payments relating to military connected children, and under subsections (a) and (b) of section 13 for payments relating to Indian children, have been approved for that fiscal year.

"(2) MILITARY CONNECTED CHILDREN.—For the purpose of paragraph (1), the term 'military connected children' means children described in—

"(A) section 3(a) of Public Law 81-874 who reside on a military installation;

"(B) section 3(b)(1) of such Public Law who reside on a military installation;

"(C) section 3(b)(2) of such Public Law who have a parent employed on a military installation; and

"(D) section 3(b)(3) of such Public Law.

**"SEC. 4. FEDERAL SHARE FOR ANY PROJECT.**

"(a) IN GENERAL.—Subject to section 5 (which imposes limitations on the total of the payments which may be made to any local educational agency), the Federal share of the cost of a project under this Act shall be equal to such cost, but in no case to exceed the cost, in the school district of the applicant, of constructing minimum school facilities, and in no case to exceed the cost in such district of constructing minimum school facilities for the estimated number of children who will be in the membership of the schools of such agency at the close of the second year following the increase period and who will otherwise be without such facilities at such time.

"(b) DETERMINATION.—For the purposes of subsection (a), the number of such children who will otherwise be without such facilities at such time shall be determined by reference to those facilities which as of the date the application for such project is approved, are included in a project the application for which has been approved under this Act.

**"SEC. 5. LIMITATION ON TOTAL PAYMENTS TO ANY LOCAL EDUCATIONAL AGENCY.**

"(a) LIMITATION.—

"(1) IN GENERAL.—Subject to the limitations in subsection (c), the total of the payments to a local educational agency under this Act may not exceed the sum of the following:

"(A) The estimated increase, since the base year, in the number of children determined with respect to such agency who live on Federal property and have a parent who works on Federal property multiplied by 100 percent of the average per pupil cost of constructing minimum school facilities in the State in which the school district of such agency is situated.

"(B) The estimated increase, since the base year, in the number of children determined with respect to such agency who have a parent who lives on or works on Federal property multiplied by 50 percent of such cost.

"(2) COMPUTATION RULE.—In computing for any local educational agency the number of children in an increase under subparagraph (A) or (B) of paragraph (1), the estimated number of children described in such subparagraphs who will be in the membership of the schools of such agency at the close of the increase period shall be compared with the estimated number of such children in average daily membership of the schools of such agency during the base year, except that the base year average daily membership shall be adjusted to exclude the number of children that formed the basis for previous payments on applications approved 30 or more years prior to the close of the increased period for the application for which the determination is made.

"(b) ELECTION.—If both subparagraphs (A) and (B) of subsection (a)(1) apply to a child, the local educational agency shall elect which of such subparagraphs shall apply to such child, except that, notwithstanding the election of a local educational agency to have such subparagraph (B) apply to a child instead of such subparagraph (A), the determination of the maximum amount for such agency under subsection (a)(1) shall be made without regard to such election.

"(c) MINIMUM INCREASE REQUIREMENT.—A local educational agency shall not be eligible to have any amount included in its maximum by reason of subparagraph (A) or (B) of subsection (a)(1) unless the increase in children referred to in such subparagraphs is—

"(1) at least 20; and

"(2)(A) equal to at least 6 percent of the number of federally connected children who were in the average daily membership of the schools of such agency during the base year; or

"(B) at least 750,

whichever is the lesser.

"(d) EXCEPTIONAL CIRCUMSTANCES.—Notwithstanding the provisions of subsection (c) of this section, whenever and to the extent that, in the Secretary's judgment, exceptional circumstances exist which make such action necessary to avoid inequity and avoid defeating the purposes of the Act, the Secretary may waive or reduce the minimum number requirement or any percentage requirement described in subsection (c).

"(e) COUNT LIMITATION.—

"(1) IN GENERAL.—In determining under this section the total of the payments which may be made to a local educational agency on the basis of any application, the total number of children counted for purposes of subparagraph (A) or (B) of subsection (a)(1) may not exceed—

"(A) the number of children whose membership at the close of the increase period for the application is compared with average daily membership in the base period for purposes of that paragraph (except that the base year average daily membership shall not include any children counted for purposes of a payment pursuant to an application approved 30 or more years ago), minus

"(B) the number of such children whose membership at the close of the increase period was compared with membership in the base year for purposes of such subparagraph under the last previous application, if any, of the agency on the basis of which any payment has been or may be made to that agency.

"(2) LAST PREVIOUS APPLICATION.—For the purpose of paragraph (1)(B) the term 'last previous application' means the last application for assistance under this Act that was funded within 4 fiscal years preceding the fiscal year for which the determination is made.

**"SEC. 6. APPLICATIONS.**

"(a) APPLICATION REQUIRED.—No payment may be made to any local educational agency under this Act except upon application therefore which is submitted through the appropriate State educational agency and is filed with the Secretary in accordance with regulations prescribed by the Secretary.

"(b) CONTENTS.—

"(1) IN GENERAL.—Each application by a local educational agency shall set forth the project for the construction of school facilities for such agency with respect to which it is filed, and shall contain or be supported by—

"(A) a description of the project and the site therefore, preliminary drawings of the school facilities to be constructed thereon, and such other information relating to the project as may reasonably be required by the Secretary;

"(B) assurance that such agency has or will have title to the site, or the right to construct upon such site school facilities as specified in the application and to maintain such school facilities on such site for a period of not less than 20 years after the completion of the construction;

"(C) assurance that such agency has legal authority to undertake the construction of the project and to finance any non-Federal share of the cost thereof as proposed, and assurance that adequate funds to defray any such non-Federal share will be available when needed;

"(D) assurance that such agency will cause work on the project to be commenced within a reasonable time and prosecuted to completion with reasonable diligence;

"(E) assurance that, except for emergency relief under section 7 of the Act of September 30, 1950 (Public Law 81-874), all laborers and mechanics employed by contractors or subcontractors on all construction and minor remodeling projects assisted under this Act shall be paid wages at rates not less than those prevailing on similar construction and minor remodeling in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5) and the Secretary of Labor shall have, with respect to the labor standards specified in this subparagraph, the authority and functions set forth in Reorganization Plan Numbered 14 or 1950 and section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 276c), (20 U.S.C. 1232(b));

"(F) assurance that the school facilities of such agency will be available to the children for whose education contributions are provided in this Act on the same terms, in accordance with the laws of the State in which the school district of such agency is situated, as such facilities are available to other children in such school district; and

"(G) assurance that such agency will from time to time prior to the completion of the project submit such reports relating to the project as the Secretary may reasonably require.

"(2) APPROVAL.—Except as provided in paragraph (3), the Secretary shall approve any application if the Secretary finds—

"(A) that the requirements of paragraph (1) have been met and that approval of the project would not result in payments in excess of those permitted by sections 4 and 5;

"(B) after consultation with the State and local educational agencies, that the project is not inconsistent with overall State plans for the construction of school facilities; and

"(C) that there are sufficient Federal funds available to pay the Federal share of the cost of such project and of all other projects for which Federal funds have not already been obligated and applications for which, under section 3, have a higher priority.

"(c) NOTICE AND HEARING.—No application under this Act shall be disapproved in whole or in part until the Secretary has afforded the local educational agency reasonable notice and opportunity for hearing.

"(d) SUBMISSION.—An application for a payment under this Act shall be submitted by June 30 of the fiscal year preceding the fiscal year for which payment is requested. An application submitted pursuant to the preceding sentence shall remain active for a period of 2 fiscal years following the fiscal year for which payment under this Act is requested. If a local educational agency wishes to make an application for payment under this Act after the expiration of the 2-year period described in the preceding sentence such agency shall resubmit an application in accordance with this section.

**"SEC. 7. PAYMENTS.**

"(a) IN GENERAL.—Upon approving the application of any local educational agency under section 6, the Secretary shall pay to such agency an amount equal to 10 percent of the Federal share of the cost of the project. After final drawings and specifications have been approved by the Secretary and the construction contract has been entered into, the Secretary, in accordance with regulations prescribed by the Secretary and at such times and in such installments as may be reasonable, shall pay to such agency the remainder of the Federal share of the cost of the project.

"(b) REPAYMENT.—Any funds paid to a local educational agency under this Act and not expended for the purposes for which paid shall be repaid to the Treasury of the United States.

**"SEC. 8. ADDITIONAL PAYMENTS.**

"(a) IN GENERAL.—Not to exceed 10 percent of the funds appropriated pursuant to the authority of section 1(b)(1) for any fiscal year may be used by the Secretary, under regulations prescribed by the Secretary, to make grants to local educational agencies where—

"(1) the application of such agencies would be approved under this Act but for the agencies' inability, unless aided by such grants, to finance the non-Federal share of the cost of the projects set forth in their applications; or

"(2) although the applications of such agencies have been approved, the projects covered by such applications could not, without such grants, be completed, because of flood, fire, or similar emergency affecting either the work on the projects or the agencies' ability to finance the non-Federal share of the cost of the projects.

"(b) SPECIAL RULE.—The grants described in subsection (a) shall be in addition to the payments otherwise provided under this Act, shall be made to those local educational agencies whose need for additional aid is the most urgent and acute, and insofar as practicable shall be made in the same manner and upon the same terms and conditions as such other payments.

"(c) ADDITIONAL APPROPRIATIONS REQUIRED.—The provisions of this section shall take effect only when funds are specifically appropriated to carry out this section.

**"SEC. 9. WHERE EFFECT OF FEDERAL ACTIVITIES WILL BE TEMPORARY.**

"Notwithstanding the preceding provisions of this Act, whenever the Secretary determines that the membership of some or all of the children, who may be included in computing under section 5 the maximum on the total of the payments for any local educational agency, will be of temporary duration only, such membership shall not be included in computing such maximum. Instead, the Secretary may make available to such agency such temporary school facilities as may be necessary to take care of such membership; or the Secretary may, where the local educational agency gives assurance that at least minimum school facilities will be provided for such children, pay (on such terms and conditions as the Secretary deems appropriate to carry out the purposes of this Act) to such agency for use in constructing school facilities an amount equal to the amount which the Secretary estimates would be necessary to make available such temporary facilities. In no case may the amount so paid exceed the cost, in the school district of such agency of constructing minimum school facilities for such children. The Secretary may transfer to such agency or its successor all the right, title, and interest of the United States in and to any temporary facilities made available to such agency under this section; and such transfer shall be without charge, but may be made on such other terms and conditions, and at such time as the Secretary deems appropriate to carry out the purposes of this Act.

**"SEC. 10. CHILDREN FOR WHOM LOCAL AGENCIES ARE UNABLE TO PROVIDE EDUCATION.**

"(a) IN GENERAL.—In the case of children who it is estimated by the Secretary in any fiscal year will reside on Federal property at the end of the next fiscal year—

"(1) if no tax revenues of the State or any political subdivision thereof may be expended for the free public education of such children; or

"(2) if it is the judgment of the Secretary, after the Secretary has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children,

the Secretary shall make arrangements for constructing, leasing, renovating, remodeling, or rehabilitating or otherwise providing the minimum school facilities necessary for the education of such children. In any case in which the Secretary makes arrangements under this section for constructing, leasing, renovating, remodeling, or rehabilitating or otherwise providing minimum school facilities situated on Federal property in Puerto Rico, Wake Island, Guam, American Samoa, the Northern Mariana Islands, or the Virgin Islands, the Secretary may also include minimum school facilities necessary for the education of children residing with a parent employed by the United States though not residing on Federal property, but only if the Secretary determines, after consultation with the appropriate State educational agency, (A) that the construction or provision of such facilities is appropriate to carry out the purposes of this subsection, (B) that no local educational agency is able to provide suitable free public education for such children, and (C) that English is not the primary language of instruction in schools in the locality. Such arrangements may also be made to provide, on a temporary basis, minimum school facilities for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to such children as a result of official action by State or local governmental authority and it is the judgment of the Secretary, after the Secretary has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children.

"(b) SPECIAL RULES.—

"(1) COMPARABILITY.—To the maximum extent practicable school facilities provided under this section shall be comparable to minimum school facilities provided for children in comparable communities in the State.

"(2) INAPPLICABILITY.—This section shall not apply to—

"(A) children who reside on Federal property under the control of the Atomic Energy Commission; and

"(B) Indian children attending schools supported by the Bureau of Indian Affairs.

"(3) SPECIAL RULE.—Whenever it is necessary for the Secretary to provide school facilities for children residing on Federal property under this section, the membership of such children may not be included in computing under section 5 the maximum on the total of the payments for any local educational agency.

"(c) TRANSFERS.—When the Secretary determines it is in the interest of the Federal Government to do so, the Secretary may transfer, upon the written request of the local educational agency, to the appropriate local educational agency all the right, title, and interest of the United States in and to any facilities provided under this Act (or section 204 or 310 of Public Law 81-815 as such law was in effect January 1, 1958). Prior to any transfer, the facility shall meet all State and Federal building health and safety codes, regulations and laws. Any such transfer shall be without charge, but may be made on such other terms and conditions and at such time as the Secretary deems appropriate to carry out the purposes of this Act.

"(d) SPECIAL RULE REGARDING TAX REVENUES.—If no tax revenues of a State or of any political subdivision of the State may be expended for the free public education of children who reside on any Federal property within the State, or if no tax revenues of a State are allocated for the free public education of such children, then the property on which such children reside shall not be considered Federal property for the purposes of section 5 of this Act.

**"SEC. 11. WITHHOLDING OF PAYMENTS.**

"(a) IN GENERAL.—Whenever the Secretary, after providing reasonable notice and opportunity for hearing to a local educational agency, finds that—

"(1) there is a substantial failure to comply with the drawings and specifications for the project;

"(2) any funds paid to a local educational agency under this Act have been diverted from the purposes for which paid; or

"(3) any assurance given in an application is not being or cannot be carried out,

the Secretary may notify such agency that no further payment will be made under this Act with respect to such agency until there is no longer any failure to comply or the diversion or default has been corrected or, if compliance or correction is impossible, until such agency repays or arranges for the repayment of Federal moneys which have been diverted or improperly expended.

"(b) JUDICIAL REVIEW.—The final refusal of the Secretary to approve part or all of any application under this Act, and the Secretary's final action under subsection (a) of this section, shall be subject to judicial review on the record, in the United States court of appeals for the circuit in which the local educational agency is located, in accordance with the provisions of the Administrative Procedure Act.

**"SEC. 12. USE OF OTHER FEDERAL AGENCIES TRANSFER AND AVAILABILITY OF APPROPRIATIONS.**

"(a) ADMINISTRATION.—In carrying out the provisions of this Act, the Secretary is authorized to utilize the services and facilities of any agency of the Federal Government and of any other public or nonprofit agency or institution, in accordance with appropriate agreements, and to pay for such services either in advance or by way of reimbursement, as may be agreed upon.

"(b) REQUESTS FOR INFORMATION.—All Federal departments or agencies administering Federal property on which children reside, and all such departments or agencies principally responsible for Federal activities which may give rise to a need for the construction of school facilities, shall to the maximum extent practicable, comply with requests of the Secretary for information the Secretary may require in carrying out the purposes of this Act.

"(c) SPECIAL RULE.—No appropriation to any department or agency of the United States, other than an appropriation to carry out this Act, shall be available for the same purposes as this Act.

**"SEC. 13. SCHOOL CONSTRUCTION ASSISTANCE IN OTHER FEDERALLY AFFECTED AREAS.**

"(a) ASSISTANCE AUTHORIZED FOR CERTAIN INDIAN CHILDREN.—

"(1) IN GENERAL.—If the Secretary determines with respect to any local educational agency that—

"(A) such agency is providing or, upon completion of the school facilities for which

provision is made under this subsection, will provide free public education for children who reside on Indian lands, and whose membership in the schools of such agency has not formed and will not form the basis for payments under other provisions of this Act, and that the total number of such children represents a substantial percentage of the total number of children for whom such agency provides free public education, or that such Indian lands constitute a substantial part of the school district of such local educational agency, or that the total number of such children who reside on Indian lands located outside the school district of such agency equals or exceeds 100;

"(B) the immunity of such Indian lands to taxation by such agency has created a substantial and continuing impairment of such agency's ability to finance needed school facilities;

"(C) such agency is making a reasonable tax effort and is exercising due diligence in availing itself of State and other financial assistance available for the purpose of this section; and

"(D) such agency does not have sufficient funds available to such agency from other Federal, State, and local sources to provide the minimum school facilities required for free public education of a substantial percentage of the children in the membership of its schools,

then the Secretary may provide the additional assistance necessary to enable such agency to provide such facilities upon such terms and in such amounts (subject to the provisions of this section) as the Secretary may consider to be in the public interest, except that such additional assistance may not exceed the portion of the cost of such facilities or improvements or structural modifications which the Secretary estimates has not been, and is not to be, recovered by the local educational agency from other sources, including payments by the United States under any provision of this Act or any other law.

"(2) WAIVER.—Notwithstanding the provisions of this subsection, the Secretary may waive the percentage requirement described in paragraph (1)(A) whenever, in the Secretary's judgment, exceptional circumstances exist which make such actions necessary to avoid inequity and avoid defeating the purposes of this section. Assistance may be furnished under this subsection without regard to paragraph (1)(B) (but subject to the other provisions of this subsection and subsection (e)) to any local educational agency which provides free public education for children who reside on Indian lands located outside its school district.

"(3) DEFINITION.—For purposes of this subsection 'Indian lands' means Indian reservations or other real property referred to in the second sentence of section 14(4).

"(b) ASSISTANCE AUTHORIZED FOR OTHER INDIAN CHILDREN.—

"(1) IN GENERAL.—If the Secretary determines with respect to any local educational agency that—

"(A) such agency is providing or, upon completion of the school facilities for which provision is made under this subsection will provide free public education for children who reside on Indian lands, and whose membership in the schools of such agency has not formed and will not form the basis for payments under other provisions of this Act, and that the total number of such children represents a substantial percentage of the total number of children for whom such agency provides free public education, or that such local educational agency, or that the total number of such children who reside on Indian lands located outside the school district of such agency equals or exceeds 100; and

"(B) the immunity of such Indian lands to taxation by such agency has created a substantial and continuing impairment of such agency's ability to finance needed school facilities,

then the Secretary may, upon such terms and in such amounts (subject to the provisions of this section) as the Secretary may consider to be in the public interest, provide the additional assistance necessary to enable such agency to provide the minimum school facilities required for free public education of children in the membership of the schools of such agency who reside on Indian lands, except that such additional assistance may not exceed the portion of the cost of constructing such facilities which the Secretary estimates has not been, and is not to be, recovered by the local educational agency from other sources, including payments by the United States under any provisions of this Act or any other law.

"(2) WAIVER.—Notwithstanding the provisions of this subsection, the Secretary may waive the percentage requirement in paragraph (1)(A) whenever, in the Secretary's judgment, exceptional circumstances exist which make such action necessary to avoid inequity and avoid defeating the purpose of this section. Assistance may be furnished under this subsection without regard to paragraph (1)(B) (but subject to the other provisions of this subsection and subsection (e)) to any local educational agency which provides free public education for children who reside on Indian lands located outside its school district.

"(3) DEFINITION.—For purposes of this subsection 'Indian lands' means Indian reservations or other real property referred to in the second sentence of section 14(4).

"(c) ASSISTANCE AUTHORIZED FOR INADEQUATELY HOUSED CHILDREN.—

"(1) IN GENERAL.—If the Secretary determines with respect to any local educational agency that—

"(A) such agency is providing or, upon completion of the school facilities for which provision is made under this subsection, will provide, free public education for children who are inadequately housed by minimum school facilities and whose membership in the schools of such agency has not formed and will not form the basis for payments under other provisions of this section, and the total number of such children represents a substantial percentage of the total number of children for whom such agency provides free public education, and Federal property constitutes a substantial part of the school district of such agency;

"(B) the immunity of such Federal property from taxation by such agency has created a substantial and continuing impairment of such agency's ability to finance needed school facilities;

"(C) such agency is making a reasonable tax effort and is exercising due diligence in availing itself of State and other financial assistance available for the purpose of this section; and

"(D) such agency does not have sufficient funds available to such agency from other Federal, State, and local sources to provide the minimum school facilities required for free public education of a substantial percentage of the children in the membership of its schools,

then the Secretary may provide the assistance necessary to enable such agency to provide minimum school facilities for children in the membership of the schools of such agency whom the Secretary finds to be inadequately housed, upon such terms and conditions, and in such amounts (subject to the applicable provisions of this section) as the Secretary may consider to be in the public interest. Such assistance may not exceed the portion of the cost of such facilities or improvements or structural modifications which the Secretary estimates has not been, and is not to be, recovered by the local educational agency from other sources, including payments by the United States under any other provisions of this Act or any other law.

"(2) WAIVER.—Notwithstanding the provisions of this subsection, the Secretary may waive the percentage requirement in paragraph (1)(A) whenever, in the Secretary's judgment, exceptional circumstances exist which make such action necessary to avoid inequity and avoid defeating the purposes of this section.

"(d) APPLICATION.—No payment may be made to any local educational agency under subsection (a) or (b) except upon application therefor which is submitted through the appropriate State educational agency and is filed with the Secretary in accordance with regulations prescribed by the Secretary, and which meets the requirements of section 6(b)(1). In determining the order in which such applications shall be approved, the Secretary shall consider the relative educational and financial needs of the local educational agencies which have submitted approved applications and the nature and extent of the Federal responsibility. No payment may be made under subsections (a) or (b) unless the Secretary finds, after consultation with the State and local educational agencies, that the project or projects with respect to which the payment is made are not inconsistent with overall State plans for the construction of school facilities. All determinations made by the Secretary under this section shall be made only after consultation with the appropriate State educational agency and the local educational agency.

"(e) PAYMENTS.—Amounts paid by the Secretary to local educational agencies under subsections (a) or (b) may be paid in advance of, or by way of reimbursement for, work performed or purchases made pursuant to the agreement with the Secretary under this section, and may be paid in such installments as the Secretary may determine. Any funds paid to a local educational agency under this section and not expended or otherwise used for the purposes for which paid shall be repaid to the Treasury of the United States.

"(f) INAPPLICABILITY OF CERTAIN PROVISIONS.—None of the provisions of sections 1 through 10, other than section 6(2)(A) shall apply with respect to determinations made under this section.

**"SEC. 14. DEFINITIONS AND DETERMINATIONS.**

"(a) DEFINITIONS.—As used in this section:

"(1) BASE YEAR.—The term 'base year' means the third or fourth regular school year preceding the fiscal year in which an application was filed under section 6, as may be designated in the application.

"(2) CHILD.—The term 'child' means any child who is within the age limits for which the applicable State provides free public education.

"(3) CONSTRUCT; CONSTRUCTING; AND CONSTRUCTION.—The terms 'construct', 'con-

structing', and 'construction' include the preparation of drawings and specifications for school facilities; erecting, building, acquiring, altering, remodeling, improving, modifying, or extending school facilities; and the inspection and supervision of the construction of school facilities.

"(4) FEDERAL PROPERTY.—(A) The term 'Federal property' means real property which is owned by the United States or is leased by the United States, and which is not subject to taxation by any State or any political subdivision of a State or by the District of Columbia. Except for purposes of sections 5, 10, and 13(c), such term includes—

"(i) real property held in trust by the United States for individual Indians or Indian tribes, and real property held by individual Indians or Indian tribes which is subject to restrictions on alienation imposed by the United States;

"(ii) any low-rent housing (whether or not owned by the United States) which is part of a low-rent housing project assisted under the United States Housing Act of 1937; and

"(iii) any interest in Federal property (as defined in the provisions of clauses (i) and (ii)) under an easement, lease, license, permit, or other arrangement, as well as any improvements of any nature (other than pipelines or utility lines) on such property even though such interests or improvements are subject to taxation by a State or political subdivision of a State or by the District of Columbia.

"(B) Notwithstanding the provisions of subparagraph (A), such term does not include—

"(i) any real property used for a labor supply center, labor home, or labor camp for migratory farm workers; and

"(ii) any real property under the jurisdiction of the United States Postal Service and used primarily for the provision of postal services.

"(5) FREE PUBLIC EDUCATION.—The term 'free public education' means education which is provided at public expense, under public supervision and direction, and without tuition charge, and which is provided as elementary or secondary school education in the applicable State.

"(6) INCREASED PERIOD.—The term 'increased period' means the period of 4 consecutive regular school years immediately following such base year.

"(7) LOCAL EDUCATIONAL AGENCY.—The term 'local educational agency' means a board of education of any public school or other legally constituted local public school authority having administrative control and direction of free public education in a county, township, independent, or other school district located within a State. Such term includes any State agency which directly operates and maintains facilities for providing free public education or which has responsibility for the provision of such facilities.

"(8) PARENT.—The term 'parent' includes a legal guardian or other person standing in loco parentis.

"(9) SCHOOL FACILITIES.—The term 'school facilities' includes classroom and related facilities; and initial equipment, machinery, and utilities necessary or appropriate for school purposes. Such term does not include athletic stadiums, or structures or facilities intended primarily for athletic exhibitions, contests, or games or other events for which admission is to be charged to the general public. Except as used in sections 9 and 10 such term does not include interests in land and offsite improvements.

"(10) SECRETARY.—The term 'Secretary', unless otherwise specified, means the Secretary of Education.

"(11) STATE.—The term 'State' means a State, the Commonwealth of Puerto Rico, Guam, the District of Columbia, American Samoa, the Commonwealth of the Northern Mariana Islands, the Virgin Islands, or Wake Island.

"(12) STATE EDUCATIONAL AGENCY.—The term 'State educational agency' means the officer or agency primarily responsible for the State supervision of public elementary and secondary schools.

"(b) DETERMINATIONS.—

"(1) MEMBERSHIP OF SCHOOLS.—(A) The membership of schools shall be determined in accordance with State law or, in the absence of State law governing such a determination, in accordance with regulations of the Secretary, except that, notwithstanding any other provisions of this section, where the local educational agency of the school district in which any child resides makes or contracts to make a tuition payment for the free public education of such child in a school situated in another school district, for purposes of this section the membership of such child, shall be held and considered—

"(i) if the 2 local educational agencies concerned so agree, and if such agreement is approved by the Secretary, as membership of a school of the local educational agency receiving such tuition payment; and

"(ii) in the absence of any such approved agreement, as membership of a school of the local educational agency so making or contracting to make such tuition payment.

"(B) In any determination of membership of schools, children who are not provided free public education (as defined in subsection (a)(5)) shall not be counted.

"(2) AVERAGE PER PUPIL COST.—The average per pupil cost of constructing minimum school facilities in the State in which the school district of a local educational agency is situated shall be determined by the Secretary on the basis of the average State per pupil construction cost in the year previous to the year of funding (including costs of minimum site improvements, minimum initial equipment, and applicable architectural, engineering, and legal fees). The cost of constructing minimum school facilities in the school district of a local educational agency shall be determined by the Secretary, after consultation with the State and local educational agencies, on the basis of such information as may be contained in the application of such local educational agency and such other information as the Secretary may obtain.

"(3) TIMING AND INFORMATION REQUIREMENT.—Estimates of membership, and all other determinations with respect to eligibility and maximum amount of payment, shall be made as of the time of the approval of the applications for which made, and shall be made on the basis of the best information available at the time of such approval.

"(4) MINIMUM SCHOOL FACILITIES.—Whether or not school facilities are minimum school facilities shall be determined by the Secretary, after consultation with the State and local educational agencies, in accordance with regulations prescribed by the Secretary. Such regulations shall—

"(A) require the local educational agency concerned to give due consideration to excellence of architecture and design;

"(B) provide that no facility shall be disqualified as a minimum school facility because of the inclusion of works of art in the plans therefor if the cost of such works of art does not exceed 1 percent of the cost of the project; and

"(C) require compliance with such standards as the Secretary may prescribe or approve in order to ensure that facilities constructed with the use of Federal funds under this Act shall be, to the extent appropriate in view of the uses to be made of the facilities, accessible to and usable by individuals with disabilities.".

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SECTION-BY-SECTION ANALYSIS OF S. 2018

SECTION 1—PURPOSE AND APPROPRIATION

Purpose—To provide financial assistance to federally impacted schools urgently in need of:

(1) School facilities due to increased enrollment.

(2) School facility improvements or modifications due to ADA or safety codes.

Appropriations—In FY1995, $29 million and FY1996, FY1997, FY1998 and FY1999 such sums as necessary.

SECTION 2—DIVISION OF FUNDS

Priority: Section 9 (temporary facilities), Section 10 (Department of Education Schools) and then divide remaining funds equally between military districts and districts on Indian lands.

SECTION 3—ESTABLISHMENT OF PRIORITIES

All applicants will be reviewed and a priority list will be developed by the Secretary of Education. Projects will be funded starting with highest percentage of students and go on down the list of applicants.

SECTION 4—FEDERAL SHARE OF ANY PROJECT

No project can exceed that actual cost of construction of minimum school facilities.

SECTION 5—LIMITATION ON TOTAL PAYMENTS TO ANY LOCAL EDUCATION AGENCY

Establishes formula for payments to districts serving military dependents. For a district to apply for PL815 funds, the district must have a growth in student enrollment of at least 6% of their enrollment or 750 students, which ever is less

SECTION 6—APPLICATIONS

(1) Description of project

(2) Assurance that LEA has title to site and right to construct. LEA must be able to maintain facility for at least 20 years.

(3) Assurance that LEA has legal authority to undertake construction and finance any non-federal share of project.

(4) Assurance LEA will cause work to be commenced in reasonable time.

(5) Assurance LEA will follow Davis-Bacon Act.

(6) Assurance facilities will be available to children whose education contributions are provided for in this Act.

(7) Assurance LEA will provide reports requested by the Secretary of Education.

(8) Applications due June 30 of fiscal year.

(9) Application not funded within three years will need to be updated to remain active.

SECTION 7—PAYMENTS

Approved applications will be given 10% of the federal share upon approval. Other payments will follow as work is completed. Any unused funds are returned to the U.S. Treasury.

SECTION 8—ADDITIONAL PAYMENTS

Allows the Secretary to make additional payments to school districts which have had their application approved, but cannot finance the non-federal share of the cost of the project.

SECTION 9—WHERE THE EFFECT OF FEDERAL ACTIVITIES WILL BE TEMPORARY

Establishes a procedure for an LEA to receive funds under Section 5 if need is tem-

porary. Secretary of Education has authority to transfer title of temporary facilities to LEA.

SECTION 10—CHILDREN FOR WHOM LEA ARE UNABLE TO PROVIDE EDUCATION

Outlines the criteria for eligibility for schools requesting Department of Education to provide facility. These facilities are built and owned by federal government, however, at some point the Secretary of Education may transfer facility to LEA if LEA agrees.

SECTION 11—WITHHOLDING PAYMENTS

Allows the Secretary of Education to withhold any future payments (after reasonable notice and opportunity for a hearing are extended) from a LEA, if there is a reasonable failure to comply with the drawings and specifications of the project or if any of the funds have been diverted to other purposes.

SECTION 12—USE OF OTHER FEDERAL AGENCIES TRANSFER & AVAILABILITY OF APPROPRIATIONS

Requires federal agency cooperation.

SECTION 13—SCHOOL CONSTRUCTION ASSISTANCE IN OTHER FEDERALLY AFFECTED AREAS

Establishes formula for payments to districts serving students on Indian lands.

Criteria for eligibility:

Immune from taxation; substantial number of students on Indian land; LEA making all efforts to seek funds from state and local sources; insufficient funds from all sources to provide minimum school facilities.

Allows LEA's to construct facilities and renovate existing facilities to meet ADA or safety codes.

SECTION 14—DEFINITIONS AND DETERMINATIONS

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By Mr. SARBANES (for himself, Mr. WARNER, and Ms. MIKULSKI):

S. 2020. A bill to authorize the establishment of a pilot program to provide environmental assistance to non-Federal interest in the Chesapeake Bay watershed, and for other purposes; to the Committee on Environment and Public Works.

CHESAPEAKE BAY ENVIRONMENTAL RESTORATION ACT OF 1994

Mr. SARBANES. Mr. President, today I am introducing legislation together with Senator WARNER and Senator MIKULSKI to expand the authority of the U.S. Army Corps of Engineers to assist in the environmental restoration of the Chesapeake Bay. The legislation specifically authorizes a $30 million pilot program for the corps to design and construct water-related environmental and resource protection projects in the Chesapeake Bay including such projects as making beneficial use of dredge material to restore eroding islands and shoreline, creating wetlands, and removing barriers to fish passage in the bay watershed.

The Corps of Engineers has been an integral part of the Chesapeake Bay Program for many years. As the lead Federal agency in water resource management, the corps has completed some of the most comprehensive investigations of the entire Chesapeake Bay basin including a landmark report in 1984 which identified many of the serious problems facing the bay. In addition to the agency's responsibilities for maintaining the navigational channels in the bay, the corps has conducted numerous water resource planning studies and projects, constructed water supply and wastewater treatment systems, implemented regulatory activities, and has provided support to DOD and Army installations within the bay watershed. The corps has played a vital role in the development of the program's complex computer simulation modeling needs, improving our understanding of the watershed's fresh water inflow needs, and regulating valuable wetlands habitats. Clearly, the corps has an important civil engineering, planning, and technical expertise that can be of invaluable help in addressing the myriad of environmental problems facing the bay.

The Chesapeake Bay suffers from several problems which the corps has perhaps the unique capabilities to address—shoreline erosion and sedimentation, wetlands losses, and impediments to fish passage.

Shoreline erosion continues to be a very serious problem in the Chesapeake Bay watershed. The geography and topography of the Chesapeake Bay region make this area particularly susceptible to the processes of erosion and sedimentation. At Smith and Popular Islands in the Maryland waters of the bay, to name only two locations, erosive forces are taking land at such an alarming rate that the very existence of these islands is threatened.

Erosion is not only causing serious property damage, but also contributes nearly 5 million cubic yards of sediment annually to the bay, adversely impacting water quality, habitat, and navigation. During storms, tremendous amounts of sediments are released from these properties and from behind the dams on the Susquehanna, blanketing the bay in a plume of sediment and robbing the bay of life-sustaining sunlight and oxygen. Valuable wetlands, submerged aquatic vegetation, and woodlands, which are a vital part of the bay's ecological system, providing nesting, breeding and feeding areas for populations of finfish, shellfish, and migratory and resident bird species, are being lost to erosion. The sediments are also clogging the bay's navigational channels—our water highways and harbors—creating an additional problem of dredged material disposal.

Over the past century, approximately 45,000 acres, or 70 square miles of land—an area equal in size to the District of Columbia—have been lost to forces of erosion. Unless the problem is addressed soon, under present conditions, many of the bay's lowlands will disappear in the next 100 years.

There is a creative solution that can address the serious erosion problem and help protect and promote the recovery of the bay—making environmentally beneficial use of clean dredged material to stabilize eroding shorelines and restore lost wetlands in the bay. Past efforts have shown that these restoration efforts can be successful. Through its operation and maintenance activities for navigation, the corps has demonstrated successful beneficial use projects using clean dredged material which include: the rebuilding of eroding islands and enhancement of the environment at Barren Island, and wetlands creation and restoration on the James and Anacostia Rivers.

Unfortunately, the corps is currently limited in the degree to which it can participate in environmental restoration projects in the bay. Beneficial use projects using dredged material are generally more expensive than traditional disposal alternatives, such as open water dumping, and Federal policies presently limit the funding and contain other disincentives to making this a viable long-term option. This legislation seeks to provide the Corps of Engineers with the authority and funding to undertake such projects.

The legislation would also permit the corps to play a greater role in the restoration and enhancement of wetlands and aquatic habitat in the Chesapeake Bay. Wetlands have been a vital component of the Chesapeake Bay ecosystem and historically, have been abundant throughout the bay. Unfortunately, our Nation's estuary has experienced a dramatic decline in wetlands averaging over 2,800 acres annually. According to a 1991 report by the Department of the Interior, 73 percent of the wetlands in Maryland that existed in the 1780's are now gone. For Virginia the estimate is 42 percent, and for Pennsylvania, the wetlands loss is 56 percent. These figures together represent a cumulative loss of over 2 million acres of wetlands in the principal three-State Chesapeake basin.

These are some of the most extensive and valuable wetlands along the Atlantic coast, and in the Nation. In fact, the Chesapeake was one of the first wetland areas in the United States to qualify under the "Convention on Wetlands of International Importance Especially as Waterfowl Habitat," commonly known as the Ramsar Convention. The wetlands serve as a source of food and habitat for waterfowl and fish, help filter out sediments and other pollutants, and provide dissolved oxygen to the watercolumn. They are, in short, absolutely essential to the biological integrity of the Chesapeake Bay.

The Chesapeake Bay Program has made restoration and enhancement of wetlands in the bay and its tributaries a top priority for restoring the bay. The program has developed a wetlands policy and implementation plan and committed to no-net loss in the short term, and net-gain in the long term. The Corps of Engineers and other State and Federal agencies have been assigned important responsibilities under

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that plan, including wetland restoration and creation activities. This legislation would give the corps additional authority to carry out these responsibilities.

A third problem inhibiting the recovery of the Chesapeake Bay which this legislation would enable the corps to address is man-made barriers to fish passage. Through the years, we have seen record declines in stocks of migratory fish including striped bass, American shad, hickory shad, river herring, white and yellow perch, and American eel. These species have historically been among the most economically and ecologically important species in the Chesapeake Bay, supporting extensive fisheries in the States of Maryland, Pennsylvania, and Virginia. Over 1,000 man-made barriers to migratory fish, ranging in size from large hydroelectric projects to road culverts, exist on tributaries throughout the bay watershed. These barriers prevent passage of fish to spawning and nursery habitat essential to the viability of the breeding populations. The general ecology of the bay and its tributaries has been adversely affected by the absence of these fish species which play important roles in the ecosystem's aquatic food chain.

The bay program has devoted significant resources to provide for fish passage at dams and to remove stream blockages wherever necessary to restore natural passage for migratory fish. Significant progress has been made to identify priority tributaries for fish passage initiatives. The coordinated work of the bay community has resulted in the provision of fish passage at four dams in the James River basin, at Conowingo, Holtwood, Safe Harbor, and York Haven Dams in the Susquehanna basin, and at many sites in Maryland. With these larger blockages removed, a magnitude of work remains to be done to restore the historic habitat above these dams. The Corps of Engineers has a critical role to play in the bay program's fish passage initiatives. This legislation will enable the corps to provide its technical expertise in these efforts.

Mr. President, this legislation is a modest proposal. It recognizes the budget constraints and is limited in scope and funding authority. It does not seek to address all of the challenges facing the bay, but it will enable the corps to bring its expertise to bear on some key problems in the Chesapeake Bay watershed.

The legislation is strongly supported by the Chesapeake Bay Commission, the Chesapeake Bay Foundation, and the Maryland Department of Transportation. I ask unanimous consent that letters from these organizations endorsing the legislation be printed in the RECORD. I also ask unanimous consent that the bill be printed in the RECORD.

It is my hope that this legislation will be considered when the Senate takes up the Water Resources Development Act of 1994.

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

S. 2020

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. CHESAPEAKE BAY ENVIRONMENTAL RESTORATION AND PROTECTION PROGRAM.**

(a) ESTABLISHMENT.—

(1) IN GENERAL.—The Secretary of the Army (referred to in this section as the "Secretary") shall establish a pilot program to provide environmental assistance to non-Federal interests in the Chesapeake Bay watershed.

(2) FORM.—The assistance shall be in the form of design and construction assistance for water-related environmental infrastructure and resource protection and development projects affecting the Chesapeake Bay estuary, including projects for sediment and erosion control, protection of eroding shorelines, protection of essential public works, wastewater treatment and related facilities, water supply and related facilities, and beneficial uses of dredged material, and other related projects that may enhance the living resources of the estuary.

(b) PUBLIC OWNERSHIP REQUIREMENT.—The Secretary may provide assistance for a project under this section only if the project is publicly owned, and will be publicly operated and maintained.

(c) LOCAL COOPERATION AGREEMENT.—

(1) IN GENERAL.—Before providing assistance under this section, the Secretary shall enter into a local cooperation agreement with a non-Federal interest to provide for design and construction of the project to be carried out with the assistance.

(2) REQUIREMENTS.—Each local cooperation agreement entered into under this subsection shall provide for the following:

(A) PLAN.—Development by the Secretary, in consultation with appropriate Federal, State, and local officials, of a facilities or resource protection and development plan, including appropriate engineering plans and specifications and an estimate of expected resource benefits.

(B) LEGAL AND INSTITUTIONAL STRUCTURES.—Establishment of such legal and institutional structures as are necessary to ensure the effective long-term operation and maintenance of the project by the non-Federal interest.

(d) COST SHARING.—

(1) FEDERAL SHARE.—Except as provided in paragraph (2)(B), the Federal share of the total project costs of each local cooperation agreement entered into under this section shall be 75 percent.

(2) NON-FEDERAL SHARE.—

(A) VALUE OF LANDS, EASEMENTS, RIGHTS-OF-WAY, AND RELOCATIONS.—In determining the non-Federal contribution toward carrying out a local cooperation agreement entered into under this section, the Secretary shall provide credit to a non-Federal interest for the value of lands, easements, rights-of-way, and relocations provided by the non-Federal interest, except that the amount of credit provided for a project under this paragraph may not exceed 25 percent of total project costs.

(B) OPERATION AND MAINTENANCE COSTS.—The non-Federal share of the costs of operation and maintenance of carrying out the agreement under this section shall be 100 percent.

(e) APPLICABILITY OF OTHER FEDERAL AND STATE LAWS AND AGREEMENTS.—

(1) IN GENERAL.—Nothing in this section waives, limits, or otherwise affects the applicability of any provision of Federal or State law that would otherwise apply to a project carried out with assistance provided under this section.

(2) COOPERATION.—In carrying out this section, the Secretary shall cooperate fully with the heads of appropriate Federal agencies, including—

(A) the Administrator of the Environmental Protection Agency;

(B) the Secretary of Commerce, acting through the Administrator of the National Oceanic and Atmospheric Administration;

(C) the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service; and

(D) the heads of such other Federal agencies and departments and agencies of a State or political subdivision of a State as the Secretary determines to be appropriate.

(f) DEMONSTRATION PROJECT.—The Secretary shall establish at least 1 project under this section in each of the States of Maryland, Virginia, and Pennsylvania. A project established under this section shall be carried out using such measures as are necessary to protect environmental, historic, and cultural resources.

(g) REPORT.—Not later than December 31, 1998, the Secretary shall transmit to Congress a report on the results of the program carried out under this section, together with a recommendation concerning whether or not the program should be implemented on a national basis.

(h) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $30,000,000 for fiscal year 1995, to remain available until expended.

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CHESAPEAKE BAY COMMISSION,
*Annapolis, MD, April 11, 1994.*

Hon. Paul Sarbanes,
*309 Hart Senate Building,*
*Washington, DC.*

DEAR SENATOR SARBANES: It is my understanding that you will soon be introducing a bill that expands the authority of the Army Corps of Engineers to put clean dredge material to beneficial use. The legislation also provides for enhanced Corps activities related to habitat restoration and fish passage. The Chesapeake Bay Commission strongly endorses this proposal.

The Commission is a tri-state legislative authority composed of members from Maryland, Pennsylvania and Virginia. As a signatory to the Chesapeake Bay Agreements, the Commission serves as the legislative arm of the Bay restoration effort. Federal partnerships have always been viewed by the Commission as pivotal to the cleanup campaign.

We believe that enhanced Corps involvement will serve as a catalyst for activity throughout the region. It will also help to leverage additional dollars from state, local and private sources for beneficial use of dredged material, wetlands creation and the provision of fish passage.

The Commission is a strong supporter of beneficial use of dredged materials and has worked hard to provide fish passage within the watershed. I have enclosed several resolutions which speak to this commitment.

We are encouraged by your shared dedication to these issues and offer our assistance to you as you shepherd this legislation through the Congress. Thank you for your efforts.

Sincerely,

ANN PESIRI SWANSON,
*Executive Director.*

CHESAPEAKE BAY FOUNDATION,
*Annapolis, MD, April 13, 1994.*

PAUL S. SARBANES,
*309 Senate Hart Office Building, Washington, DC.*

DEAR SENATOR SARBANES: I am writing to enthusiastically support your proposal for a pilot program for watershed restoration programs in the Bay. As you know, I have long maintained that we cannot be satisfied with merely stopping the decline of the Chesapeake Bay—Saving the Bay means restoring its health and productivity. The expertise and capability of the Army Corps of Engineers is an essential component of that effort.

There is certainly no lack of need for the types of projects described here—oyster reef construction and wetlands restoration are two that immediately spring to mind. I am sure there will be no difficulty in identifying worthy projects that far outstrip the available funding. I also believe that the success of this effort will provide the kind of national demonstration for which the Chesapeake Bay Program has become justly famous.

In short, this is precisely the kind of program we have been advocating for some time, and we look forward to working with you and the Corps to implement it. Thank you again for all of your efforts on behalf of the Bay.

Very truly yours,
WILLIAM C. BAKER,
*President.*

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MARYLAND DEPARTMENT
OF TRANSPORTATION,
*April 14, 1994.*

Hon. PAUL SARBANES,
*309 Hart Senate Office Building,*
*Washington, DC.*

DEAR SENATOR SARBANES: I was pleased to learn you will introduce a bill authorizing the U.S. Army Corps of Engineers to participate in a $30 million pilot program to design and construct environmental and resource protection projects in the Chesapeake Bay.

Your legislation will not only have a positive impact on the environment of the Bay, but will also be of assistance to Maryland in its effort to maintain the competitive position of the Port of Baltimore.

We have seen a turnaround in the health of the Port of Baltimore in the last two years. While we expect continued growth in cargo and jobs, we are concerned about the ability to adequately and economically maintain channels leading to the port. Each year, the U.S. Army Corps of Engineers needs to dredge approximately 3.5 million cubic yards of clean, environmentally safe material from shipping channels in the Maryland portion of the Chesapeake Bay—just to maintain these channels at their authorized depths. It is becoming increasingly difficult to locate sites where dredged material can be placed in an environmentally sensitive manner. Clearly we must do this—otherwise the competitive position of the Port of Baltimore would be adversely affected.

The State of Maryland, the U.S. Army Corps of Engineers, and other parties concerned with the Chesapeake Bay are working to devise a master plan for dredge disposal which combined "beneficial use projects"—those that actually enhance the bay environment—with more conventional disposal techniques. The bill that you plan to introduce will greatly assist us in this effort.

Increased federal participation in environmental restoration projects in the Chesapeake Bay will improve both the environment and the economic health of the Port of Baltimore. This is one partnership that is needed in Maryland. Your legislation allowing the federal government to participate in this partnership is greatly welcomed. My Department is ready to assist you as this legislation moves through Congress.

Sincerely,
O. JAMES LIGHTHIZER,
*Secretary.*

Ms. MIKULSKI. Mr. President, I rise today as an original cosponsor to express my strong support for the Chesapeake Bay environmental restoration and protection bill introduced by Senator SARBANES.

This bill expands the authority of the U.S. Army Corps of Engineers to assist in the restoration of the Chesapeake Bay. It establishes a pilot program for the corps to assist in the design and construction of water-related environmental infrastructure and resource protection and development projects.

I have consistently fought for the future of the bay, supporting projects as diverse as erosion control structures at Eastern Neck National Wildlife Refuge, oyster reseeding programs, and funding of improvements to the Back River sewage treatment plant.

This bill represents an important step in my fight for continued protection and restoration of the bay. This bill will allow beneficial uses of dredge materials, protect eroding shorelines, and restore wetlands habitats.

Under this legislation, dredge materials could be used for creative solutions to shoreline erosion and the resulting water quality degradation. By using clean dredge material to rebuild and protect eroding islands, the sediment dumped in the bay would be significantly reduced. Less sediment means improved water quality and a healthier bay. Clean dredge material could also be used to rebuild lost wetlands. Wetlands are a vital link in the bay's ecosystem. They provide essential habitat for waterfowl, fish, and other wildlife.

The corps is an important part of the Federal team that works to protect and restore the bay. It is therefore appropriate for the corps to be allowed to use clean dredged material to improve and restore the bay's environment. It is a natural extension of the corps' current authority.

Unfortunately however, the corps is limited in the extent to which it can participate in such projects. This legislation would reduce the barriers and allow the corps to play a more active and positive role in the bay program. It would remove the disincentives that now stop the corps from using clean dredged materials for environmental restoration. The Chesapeake Bay Commission and the Chesapeake Bay Foundation both strongly support this bill.

I thank my colleague from Maryland, Senator SARBANES, for his vision and leadership on this issue, and I urge all my colleagues in the Senate to support this important effort.

By Mr. RIEGLE (for himself, Mr. D'AMATO, Mr. KERRY, and Mr. METZENBAUM) (by request):

S. 2021. A bill to clarify the statute of limitations for actions brought by the Federal Deposit Insurance Corporation and the Resolution Trust Corporation as conservator or receiver; to the Committee on Banking, Housing, and Urban Affairs.

BANK AND THRIFT STATUTE OF LIMITATIONS CLARIFICATION ACT OF 1994

Mr. RIEGLE. Mr. President, I rise today, along with Senators D'AMATO, KERRY, and METZENBAUM, to introduce by request of the Federal Deposit Insurance Corporation a bill titled the "Bank and Thrift Statute of Limitations Clarification Act of 1994." The bill is the FDIC's proposal to clarify the statute of limitations for actions brought by the FDIC and the RTC as conservator or receiver. The FDIC estimates that over $500 million in claims in pending lawsuits involving FDIC and old FSLIC receiverships, and millions more for claims still under investigation, are at risk for dismissal on statute of limitations grounds if the provisions contained in this bill are not enacted into law. The FDIC further indicates that claims of the same general order of magnitude involving RTC receiverships are similarly at risk.

The FDIC informs me that this legislation is necessary to correct certain court decisions that have interpreted the statute of limitations provisions contained in FIRREA in a manner contrary to the expressed congressional intent regarding those provisions. This legislation would clarify the statute of limitation provisions originally passed in 1989. The FDIC advises that this legislation is critical to allowing them and the RTC to fulfill their missions to hold wrongdoers accountable and to recover losses for the insurance funds and the taxpayers.

I ask unanimous consent that a letter from Acting FDIC Chairman Andrew Hove asking me to introduce the bill on behalf of the FDIC, a copy of the bill, and explanatory materials be reprinted in the RECORD.

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

S. 2021

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Bank and Thrift Statute of Limitations Clarification Act of 1994".

**SEC. 2. AMENDMENTS TO FEDERAL DEPOSIT INSURANCE ACT.**

Section 11(d)(14)(B)(i) of the Federal Deposit Insurance Act (12 U.S.C. 1821(d)(14)(B)(i)) is amended by inserting after "receiver" the following: ", regardless of whether the claim may have been barred under any otherwise applicable statute of limitation at the date of such appointment, unless such claim was barred more than 5 years before the date of such appointment".

**SEC. 3. APPLICABILITY.**

The provisions of this Act shall apply to all actions pending or brought by the Corporation as conservator or receiver on or after August 9, 1989.

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FEDERAL DEPOSIT INSURANCE CORPORATION,
*Washington, DC, April 11, 1994.*

Hon. DONALD W. RIEGLE, Jr.
*Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: I would like to bring to your attention concerns that the Federal Deposit Insurance Corporation has with respect to recent court decisions interpreting the statute of limitations governing actions brought by the FDIC and the Resolution Trust Corporation as receiver or conservator of failed institutions.

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) provides that the statute of limitations for tort claims brought by the FDIC and the RTC as conservator or receiver is the longer of three years or the period applicable under state law. FIRREA also clearly states that the date on which the statute of limitations begins to run is the *later of* the date of the appointment of the Corporation as conservator or receiver or the date on which the cause of action accrues. Nevertheless, the courts have added the further requirement that the claim must not be barred under state law at the time the FDIC takes over.

As described in the enclosed analysis of the issue, we believe the courts have incorrectly applied the statute of limitations that was established under FIRREA. Also enclosed is legislation intended to clarify FIRREA with respect to this issue. How the statute of limitations is computed is critical to the FDIC's mission to hold bank and tariff officials and professionals accountable and to maximize recoveries from failed institutions. We estimate that over $500 million in claims in pending lawsuits involving FDIC and old FSLIC receiverships, and millions more for claims still under investigation, are at risk for dismissal on statute of limitations grounds if the proposed legislation is not enacted. We understand that claims of the same general order of magnitude involving RTC receiverships are similarly at risk.

I urge you to introduce the proposed legislation and to promote its passage. Legislation to clarify the statute of limitations is critical to allowing the FDIC and the RTC to fulfill their missions to hold wrongdoers accountable and to recover losses for the insurance funds and the taxpayers. Without such legislation, more and more RTC and FDIC professional liability cases will continue to be dismissed on the "technicality" of the statute of limitation having run before the institution failed. Such legislation is important not only to maximize recoveries involving institutions that failed in the past but also to ensure the orderly resolution of institutions that may fail in the future.

Please let me know if you have any questions or need assistance with respect to our proposal.

Sincerely,

ANDREW C. HOVE, JR.,
*Acting Chairman.*

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EXPLANATION OF NEED TO CLARIFY THE STATUTE OF LIMITATIONS

*Recent Cases.*

Courts recently have dismissed a number of FDIC professional liability lawsuits as time-barred. In those cases, the FDIC has sued former officers and directors and professional advisors for negligence, gross negligence or breach of fiduciary duty, for loans that were approved several years before the bank failed and that subsequently defaulted. These loans generally contained serious defects in underwriting, lacking the most basic requirements to protect the bank's interest, such as adequate collateral or adequate financial information indicating that the borrower had the means to repay the loan. In other cases, loans violated specific laws or regulations, such as limits to a single borrower.

Despite the clear misconduct involved in approving such loans, courts have dismissed lawsuits against the responsible bank officials because the claims for the bad loans, which were approved and funded several years before the bank failed, were deemed to have accrued and expired under state statute of limitations *before* the FDIC was appointed receiver. Thus, although such flagrantly irresponsible loan decisions may have been the major cause of the bank's failure, the FDIC has been prevented from seeking recoveries from those who made such damaging decisions.

Until recently, the FDIC and the RTC have had some success in invoking the doctrine of adverse domination to toll the statute of limitations and proceed with lawsuits against responsible officers and directors. *See, e.g., FDIC v. Bryan*, 902 F.2d 1520 (10th Cir. 1990) (copy attached). That doctrine recognizes that the members of the board of directors cannot be expected to sue themselves while they continue to control the board, and thus the statute of limitations is tolled while those members remain in control.

In the past year, however, several courts have, for various reasons, refused to apply the doctrine of adverse domination, at least as established under federal law, to toll the limitations period. The leading case is *FDIC v. Dawson*, 4 F.3d 1303 (5th Cir. 1993), petition for cert. filed, 62 U.S.L.W. —— (U.S. March 21, 1994) (No. 93-1486), where the Fifth Circuit upheld the trial court's decision finding the FDIC's claims against three members of the Board of Directors of the Texas Investment Bank were time-barred (copy attached). In so finding, the court refused to apply federal tolling principles and instead looked to Texas law on adverse domination, which the court found to be more stringent in the requirements that must be met to toll the statute. The court stated that the adverse domination theory would be applied only when the culpable directors constituted a majority of the board and when "wrongdoing or fraud" were involved, not negligence.

Subsequently, a number of courts, particularly district courts in the Fifth Circuit, have followed *Dawson. RTC v. Seale*, 13 F.3d 850 (5th Cir., Jan. 26, 1994); *FDIC v. Bel Fay*, Civil Action No. H-91-1273 (S.D. Tex., Dec. 17, 1993); *RTC v. Action*, Civil No. 3:92-CV-0624-H (N. D. Tex., Feb. 1, 1994); *FDIC v. Allison*, No. 6-93-CV-59C (N.D. Tex., Jan. 21, 1994); *FDIC v. Benson*, Civil Action No. H-93-640, (S.D. Tex., March 3, 1994); *FDIC v. Henderson*, 6:91cv481, (E.D. Tex., March 9, 1994). In the *Bel Fay* case, for example, the court applied *Dawson* to dismiss claims against outside directors for gross negligence, and total abdication of duty in approving defective loans, including an insider loan to another director. Further, just this month, the FDIC's case against the defendant owner, CEO and president of the thrift in *Henderson* was dismissed for not satisfying *Dawson* requirements on the adverse domination doctrine even though a federal jury had returned a verdict finding that the defendant was grossly negligent and had breached his fiduciary duty.

The problem is not limited to Texas and the Fifth Circuit. In *FDIC v. Cocke*, 7 F.3d 396 (4th Cir. 1993), petition for cert. filed, 62 U.S.L.W. —— (U.S. March 21, 1994) (No. 93-1485), the Fourth Circuit refused to toll Virginia's one-year statute of limitations and held that the FDIC's claims based on bad loans were time-barred by the time the FDIC was appointed receiver. Under such a short statute of limitations, it is virtually impossible for the FDIC to hold bank officials accountable because it normally takes at least one year from approval of even patently defective loans before the bank is forced to admit that the loans are in default and have caused damage to the institution.

CONGRESSIONAL INTENT

We believe the courts have been incorrectly applying the statute of limitations that was established under FIRREA. As codified at 12 U.S.C. §1821(d)(14), FIRREA provides that the statute of limitations for tort claims brought by the FDIC or RTC as conservator or receiver (the most common type of professional liability claim) is the longer of three years or the period applicable under state law. 12 U.S.C. §1821(d)(14)(A).

As set forth at 12 U.S.C. §1821(d)(14)(B), FIRREA clearly states that the date on which the statute of limitations *"begins to run . . .* shall be the *later of—*

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues." (emphasis supplied)

This provision is clear on its face that the statute does not start to run, at a minimum, until the FDIC (or RTC) takes over a bank. Nevertheless, the courts have added the further requirement that the claim must not be barred under state law at the time the FDIC takes over. In other words, FIRREA, despite its plain language to the contrary, has been interpreted not to revive claims that had expired under the state statute of limitations. *E.g., Randolph v. RTC*, 995 F.2d 611 (5th Cir. 1993); *FDIC v. Shrader & York*, 991 F.2d 216 (5th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3336 (Oct. 26, 1993).

That this interpretation may be contrary to Congressional intent, was acknowledged by the court in *RTC v. Sealt*, 13 F. 3d 850 (5th Cir., Jan. 26, 1994) (copy attached), even while it rejected the RTC's claims as time-barred. As the *Seale* court pointed out, there is evidence in the legislative history that Congress intended FIRREA to revive claims that would have been considered stale under state law. As Chairman of the House-Senate Conference on FIRREA, Mr. Chairman, you stated that the statute was intended "to maximize potential recoveries by the Federal Government by preserving to the greatest extent permissible by law claims that otherwise would have been lost due to the expiration of hitherto applicable limitations periods." 135 Cong. Rec. s 10205 (daily ed. Aug. 4, 1989). Moreover, the House-Senate Conference Committee *rejected* a provision stating that FIRREA could *not* revive stale claims. *See Seale*, 13 F.3d 850, 853.

PROPOSED LEGISLATION

Section 1 of the attached legislation makes clear that FIRREA was intended to be interpreted as already written—that is, that the statute of limitations for the claim begins to run on the date the receiver was appointed, *regardless* of whether it was still viable under state law on that date.

However, recognizing a need for some limit on the revivability of claims (*see RTC v.*

*Krantz*, 757 F. Supp. 915, 921 (N.D. Ill. 1991)), section 1 further provides that claims may not be revived if they had expired more than five years before the FDIC or RTC is appointed receiver. The five-year revival period is designed to strike a balance. It recognizes the reality that defective loans that contribute to bank failure often are approved several years before the institution actually fails and often before the relatively short period (typically, only one, two or three years) under state statute of limitations. At the same time, a revival period of only five years promotes the public policy of a reasonable limit to protect citizens from stale claims.

A time-certain revival is preferable to federal legislation codifying adverse domination because it is mechanical and mathematical. It is thus less likely to spawn litigation on the facts necessary to make or defeat a showing of adverse domination.

Section 2 provides that this legislation applies to all cases filed or pending on or after August 9, 1989, the effective date of FIRREA. Because this legislation is intended to clarify and amplify Congressional intent when originally passing FIRREA, we believe it should not be criticized or dismissed as retroactive. Rather, it merely effects the original intent of FIRREA. But even if it were considered retroactive, this does not in any way raise a constitutional concern. *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1944).

Mr. D'AMATO. Mr. President, today I join with Senators RIEGLE, KERRY, and METZENBAUM in introducing, by request, legislation suggested by the Federal Deposit Insurance Corporation concerning the statute of limitations governing actions by the FDIC and the RTC against parties that have caused losses to closed banks and savings and loans.

In 1989, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act [FIRREA]. In this legislation, Congress provided that the applicable statute of limitations for either the FDIC or RTC would begin on the date the Government is appointed conservator or receiver, or the date on which the cause of action accrues, whichever is later.

According to the FDIC, some courts have dismissed a number of FDIC and RTC suits against parties alleged to have caused losses in Federally-insured institutions on the ground that the applicable State statute of limitations had run prior to the appointment of the FDIC or RTC as conservator or receiver. Due to these cases, the Federal Government may not be able to recover from parties who may have caused substantial losses to the Federal deposit insurance system, and in the case of failed savings institutions, to the American taxpayer. In fact, the FDIC estimates that over $500 million in claims in pending lawsuits could be dismissed on statute of limitations grounds, even though suit was brought within the applicable time limits set out in the 1989 FIRREA legislation.

The legislation proposed by the FDIC provides that the statute of limitations shall begin to run when the Government is appointed receiver or conservator, regardless of whether the claim may have been barred under State law when the institution was taken over. This amendment would apply to all actions pending or brought by the FDIC or RTC as of August 9, 1989.

Mr. President, this legislation would clarify the 1989 legislation, and prevent the continued misinterpretation of a Federal statute of limitations provision that could cost the American taxpayer hundreds of millions of dollars. However, I do have some concerns about retroactive features of the amendment recommended by the FDIC with respect to cases that have already been finally decided. The FDIC has advised that it does not intend to use this authority retroactively, even though as drafted it could be. With this understanding, I am pleased to join Chairman RIEGLE in introducing this bill at the request of the FDIC. I hope to work with the FDIC and my colleagues in the Senate to further perfect this legislation.

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By Mr. STEVENS:

S. 2022. A bill to reduce waste of fishery resources off Alaska by eliminating the catch of prohibited species, requiring full retention of economic discards and full utilization of processing waste, and for other purposes; to the Committee on Commerce, Science, and Transportation.

NORTH PACIFIC FISHERIES WASTE REDUCTION ACT

Mr. STEVENS. Mr. President, at the close of these remarks I wish to introduce and have appropriately referred the North Pacific Fisheries Waste Reduction Act of 1994.

The U.N. Food and Agricultural Organization recently listed 12 of the world's 17 major fisheries as overfished or in serious trouble. Luckily, none of our Alaskan fisheries were on that list. My bill will help make sure that Alaska fisheries never get on that list.

The bill would require the North Pacific Fishery Management Council to adopt conservation and management measures to address the excessive waste of valuable fishery resources that does occur in fisheries off Alaska.

Mr. President, specifically, this bill will require the elimination, to the extent practicable, of the incidental harvest of prohibited species, the full retention of economic discards and full utilization of processing waste, the reduction of bycatch of nontarget species, and rebuilding of fish stocks that are at risk of being overfished.

As Members of the Senate know, roughly 60 percent of the fish caught in the U.S. waters, the waters off our continent, are caught off Alaska. That is true in terms of value as well as, I think, in terms of number.

Now, while this bill would apply only to fisheries off Alaska, I believe it would address a significant portion of the United States fisheries where excessive discards, bycatch and waste are occurring. In terms of harvesting fisheries, the problem in Alaska is not necessarily the gear being used but the way the gear is being used. Virtually all the gear in use in the fisheries of the North Pacific could be used more cleanly.

In 1993, some trawl fisheries discarded over half of the target species for economic reasons. Those fish were either too big or too small to be processed by the facilities on board. Some hook and line fisheries discarded 30 percent of the fish they caught.

In 1993, fishermen off Alaska discarded 693 million pounds of groundfish, 14 million pounds of halibut, 19 million crab, and 372,000 salmon.

Now, I do not want to be too critical of this. I think the Senate knows one of my sons is the captain of a fishing vessel. There are many trawl, longline, and pot fisheries off Alaska that take only a very minimal amount of economic discards, bycatch, or prohibited species. It is almost impossible to fish without catching some fish that are not targeted. It is the reduction in waste that is possible in all of these fishing practices, I think, we are after. We want to maximize the number of clean fishermen that we have in the waters off Alaska.

The bill I introduce today would define "bycatch" "economic discards," "processing waste" and "prohibited species" to help delineate between the types of waste that do occur in the North Pacific. By January 1, 1996, our North Pacific Council would be required to include fees or other incentives to reduce economic discards and processing waste in each fishery management plan.

By January 1, 1998, these incentives would be required to include an allocation preference for cleaner fishing practices within each gear group. In other words, those who eliminate waste would be given a preference in the allocation of fishery species in the North Pacific.

My bill would also require the North Pacific Fishery Management Council to submit a plan to the Secretary of Commerce by January 1, 1996, to phase in the full retention and full utilization of all fisheries resources except prohibited species.

The council would also establish a cap for those prohibited species, and on reaching that cap a commercial fishery would be closed for that season.

I wish to make sure the Senate understands that. We would set a limit on the incidental harvesting of species that are not targeted species for that fishery. If the combined fishery catches that amount of fish, then all commercial fishery practices in the area where the prohibited species exist would close.

I was pleased that at a recent appropriations hearing Commerce Secretary

Brown told me the administration would consider fees to reduce waste and bycatch as a part of the fish fee package the administration intends to submit this spring. I urge the Secretary to do that. The fishing industry is not in good shape. It really cannot pay $75 million a year, as the administration proposed, particularly when one remembers that 60 percent of those fees would be paid by people fishing off Alaska's shores. But if the administration proposal creates disincentives for wasteful practices and a way for responsible fishermen to avoid those fees, I believe the fishermen and Members of the Senate—as a matter of fact, I believe the whole Congress—would be willing to support such a concept.

Both the North Pacific Fishery Management Council and the fishing industry have been progressive in the conservation of valuable fisheries resources off Alaska in the past. As I said, the findings show that we have the healthiest area in the world for fisheries; our wild fisheries are the best in the world, we believe. While we sometimes disagree about the means, I think all involved in the Alaska fisheries share the goal of conserving the resources and thereby preserving the fabric of the Alaska economy and the Alaska coastal communities.

Mr. President, the fishing industry is the major employer in my State. The bill I am introducing does not attempt to address the intricate details needed to reduce the waste in those fisheries. It establishes the goals and gives the North Pacific Fishery Management Council the mandate to achieve those goals. I believe they can do it with the full participation of those involved in the fisheries off our State.

I anticipate a healthy reaction. Perhaps some people will disagree. But the bill I am introducing today I believe is one that will cause people to think. It is my hope that this bill will be considered as an amendment to the Magnuson Act, and I look forward to receiving comments as the Congress focuses our attention this year on the reauthorization of that act.

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By Mr. STEVENS (for himself and Mr. MURKOWSKI):

S. 2023. A bill to provide for the transfer of certain real property to the General Services Administration and for other purposes; to the Committee on Governmental Affairs.

WRANGELL INSTITUTE ACT OF 1994

Mr. STEVENS. Mr. President, I am introducing legislation today to authorize the return of the Wrangell Institute to the General Services Administration [GSA].

The Wrangell Institute was owned and operated by the Federal government as a Bureau of Indian Affairs [BIA] boarding school and medical facility for Indian and Eskimo children between 1932 and 1975. In 1977, the Department of the Interior [DOI] requested that GSA accept the Wrangell Institute as surplus property. DOI did not mention any contamination in their reports to GSA. In fact, BIA stated there was no contamination and no need for cleanup of the site in the statement of intent to relinquish the property.

In 1977 the GSA surplused the Wrangell Institute and the property was obtained by Cook Inlet Region, Inc. [CIRI] in 1978 with monetary credits from the CIRI Property Account at the U.S. Treasury. CIRI is an Alaska Native Corporation. The Property Account was established by Congress to compensate CIRI for relinquishing their holdings in the Lake Clark National Park in Alaska.

The properties that CIRI relinquished to the government were pristine acreage and are now part of one of the crown jewels of the National Park System. Unfortunately, the property that CIRI received in return was contaminated.

The contamination was left by the Government. The BIA was the sole tenant of the property other than for a short period during World War II when the Army used the Wrangell Institute as a relocation center for Alaska Natives who were evacuated from the Aleutian Islands after the Japanese attack of Dutch Harbor and the Island of Attu.

This legislation would return the property to GSA in return for the original monetary credits, interest on the credits for the period after the contamination was discovered, and expenses incurred due to the contamination. CIRI would be relieved of any liability associated with the contamination caused by the U.S. Government. This is just a matter of fairness. CIRI was not aware of the contamination when GSA transferred the property and they should not have to bear the costs of contamination created by the Federal Government.

The Congressional Budget Office reviewed the bill and found it to have "no net impact on the Federal budget."

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By Mr. SIMON (for himself, Ms. MOSELEY-BRAUN, Mr. COCHRAN, and Mr. THURMOND):

S.J. Res. 181. A joint resolution to designate the week of May 8, 1994, through May 14, 1994, as "United Negro College Fund Week"; to the Committee on the Judiciary.

UNITED NEGRO COLLEGE FUND WEEK

• Mr. SIMON. Mr. President, next month the United Negro college Fund [UNCF] celebrates its 50th anniversary. All of us are familiar with UNCF's slogan, "A mind is a terrible thing to waste." And most of us—especially those of us who have served in the other Chamber—know Bill Gray, UNCF's outstanding president and chief executive officer.

But few of us are familiar with the history of UNCF. The organization was the brainchild of Dr. Frederick D. Patterson, who wrote in January, 1943, that the Nation's private black colleges and universities need to "pool their small monies and make a united appeal to the national conscience." Otherwise, he argued, these schools risked their very existence.

It was on May 13, 1944, that "Dr. Pat," as he was affectionately known, formed UNCF by bringing together college, foundation, and business leaders, including: the presidents of private black colleges, including Fisk University, Howard University, Spelman College, Dillard University, Morehouse College, Tuskegee Institute, Clark College, Gammon Theological Seminary—now Interdenominational Theological Seminary; key philantropic leaders representing the Rockefeller Foundation, the Rosenwald Fund; and key business executives such as the head of Lord & Taylor and a representative from John Price Jones. At the time, Dr. Benjamin E. Mays, president emeritus of Morehouse College, said, "Of course, you have in mind our doing this for two or three years, and then going back to what we were doing, don't you?"

Mr. President, I give thanks that UNCF was not just a temporary effort. The first UNCF campaign grossed an impressive $760,000; last year, UNCF's annual campaign grossed more than $58 million, and more than $190 million was raised for Capital Campaign 2000. These efforts have helped support UNCF member institutions so that today they educate nearly 55,000 students.

The Nation, too, should give thanks that UCNF never altered course. Many of our African American leaders attended UNCF member institutions: The Rev. Dr. Martin Luther King, Jr., Vernon Jordan, and former Atlanta Mayor Maynard Jackson attended Morehouse College; Andrew Young, former U.N. Ambassador and Atlanta Mayor, and Ellis Marsalis, jazz musician and instructor, attended Dillard University; Ralph Wiley, author and columnist, attended Knoxville College; attorney and children's advocate Marian Wright Edelman attended Spelman College; Larry Little, Temple University basketball coach and Hall of Fame Miami Dolphins guard, attended Bethune Cookman College; opera diva Leontyne Price attended Wilberforce University; our outstanding Surgeon General, Dr. Joycelyn M. Elders, attended Philander Smith College; Secretary of Energy Hazel Rollins O'Leary attended Fisk University; and former Virginia Governor L. Douglas Wilder attended Virginia Union University.

While UNCF member institutions are not in every state, the alumni are nationwide. In Illinois, they are among the most prominent attorneys, doctors,

elected officials, teachers and school administrators. Many of my colleagues have had graduates of UNCF member institutions serve with distinction on their staffs. For almost 9 years, William A. "Bud" Blakey, who attended Knoxville College, served as my subcommittee counsel and staff director in the House of Representatives and here in the Senate. Much of what I accomplished in the areas of education and training was achieved through his counsel and hard work.

Mr. President, we have come a long way in achieving equal opportunity in higher education. But we still have many miles to go. UNCF member institutions are leading the way by providing a quality higher education for a broad cross-section of African-American students.

I commend UNCF's fine work, and I encourage my colleagues to join me and Senator MOSELEY-BRAUN, Senator THURMOND, and Senator COCHRAN in supporting this resolution commemorating the fiftieth anniversary.

I ask unanimous consent that the text of the joint resolution be printed in the RECORD.

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

S.J. RES. 181

Whereas in 1943, Dr. Frederick D. Patterson of the Tuskegee Institute convened the first meeting to consider the feasibility of a united appeal on behalf of historically black private colleges and universities;

Whereas on May 13, 1944, the organizing meeting of the United Negro College Fund was held at the Waldorf-Astoria Hotel in New York City;

Whereas Atlanta University, Bethune-Cookman College, Clark College, Dillard University, Fisk University, Gammon Theological Seminary, Morehouse College, Spelman College, and the Tuskegee Institute were the founding member institutions of the United Negro College Fund;

Whereas the initial combined campaign of the United Negro College Fund raised $760,000;

Whereas through the year 1993, the 41 member institutions of the United Negro College Fund now enroll more than 55,000 students, have shared more than $58,000,000, and have raised more than $889,000,000 for the 50th Annual Campaign, and more than $190,000,000 for the United Negro College Fund Capital Campaign 2000; and

Whereas the United Negro College Fund continues to provide students quality academic instruction in a positive learning environment and assists the mission of the Federal Government to promote equal opportunity in higher education: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That—

(1) the week of May 8, 1994, through May 14, 1994, is designated "United Negro College Fund Week", and the President is authorized and requested to issue a proclamation calling upon the people of the United States to observe that week with appropriate programs, ceremonies, and activities;

(2) Congress salutes and acknowledges the United Negro College Fund, the president of the United Negro College Fund, William H. Gray, III, and the presidents, faculties, staff, and trustees of the 41 member institutions of the United Negro College Fund for their vigorous and persistent efforts in support of equal opportunity in higher education, and commends the students who benefit from the United Negro College Fund for their pursuit of academic excellence; and

(3) this joint resolution may be cited as the "United Negro College Fund 50th Anniversary Resolution".●

## ADDITIONAL COSPONSORS

S. 297

At the request of Mr. STEVENS, the name of the Senator from Alabama [Mr. SHELBY] was added as a cosponsor of S. 297, a bill to authorize the Air Force Memorial Foundation to establish a memorial in the District of Columbia or its environs.

S. 774

At the request of Mr. WOFFORD, the name of the Senator from Alabama [Mr. SHELBY] was added as a cosponsor of S. 774, a bill to authorize appropriations for the Martin Luther King, Jr. Federal Holiday Commission, extend such Commission, establish a National Service Day to promote community service, and for other purposes.

S. 929

At the request of Mr. BREAUX, the name of the Senator from Louisiana [Mr. JOHNSTON] was added as a cosponsor of S. 929, a bill to amend the Internal Revenue Code of 1986 to allow a deduction for contributions to individual investment accounts, and for other purposes.

S. 1208

At the request of Mr. WOFFORD, the name of the Senator from Louisiana [Mr. JOHNSTON] was added as a cosponsor of S. 1208, a bill to authorize the minting of coins to commemorate the historic buildings in which the Constitution of the United States was written.

S. 1350

At the request of Mr. INOUYE, the name of the Senator from Vermont [Mr. JEFFORDS] was added as a cosponsor of S. 1350, a bill to amend the Earthquake Hazards Reduction Act of 1977 to provide for an expanded Federal program of hazard mitigation and insurance against the risk of catastrophic natural disasters, such as hurricanes, earthquakes, and volcanic eruptions, and for other purposes.

S. 1485

At the request of Mr. DECONCINI, the name of the Senator from Illinois [Ms. MOSELEY-BRAUN] was added as a cosponsor of S. 1485, A bill to extend certain satellite carrier compulsory licenses, and for other purposes.

S. 1539

At the request of Mr. INOUYE, the name of the Senator from California [Mrs. BOXER] was added as a cosponsor of S. 1539, a bill to require the Secretary of the Treasury to mint coins in commemoration of Franklin Delano Roosevelt on the occasion of the 50th anniversary of the death of President Roosevelt.

S. 1669

At the request of Mrs. HUTCHISON, the name of the Senator from Pennsylvania [Mr. WOFFORD] was added as a cosponsor of S. 1669, a bill to amend the Internal Revenue Code of 1986 to allow homemakers to get a full IRA deduction.

S. 1696

At the request of Mr. HATFIELD, the name of the Senator from California [Mrs. FEINSTEIN] was added as a cosponsor of S. 1696, a bill to amend the Military Selective Service Act to terminate the registration requirement and to terminate the activities of civilian local boards, civilian appeal boards, and similar local agencies of the Selective Service System.

S. 1805

At the request of Mr. WARNER, the name of the Senator from Kentucky [Mr. FORD] was added as a cosponsor of S. 1805, a bill to amend title 10, United States Code, to eliminate the disparity between the periods of delay provided for civilian and military retiree cost-of-living adjustments in the Omnibus Budget Reconciliation Act of 1993.

S. 1837

At the request of Mr. RIEGLE, the names of the Senator from Massachusetts [Mr. KENNEDY], the Senator from Illinois [Ms. MOSELEY-BRAUN], and the Senator from New Jersey [Mr. LAUTENBERG] were added as cosponsors of S. 1837, a bill to suspend temporarily the duty on the personal effects of participants in, and certain other individuals associated with, the 1994 World Cup soccer games.

S. 1952

At the request of Mr. JOHNSTON, the names of the Senator from Oregon [Mr. HATFIELD], the Senator from Hawaii [Mr. INOUYE], the Senator from Vermont [Mr. JEFFORDS], the Senator from Pennsylvania [Mr. WOFFORD], the Senator from Maine [Mr. MITCHELL], the Senator from Massachusetts [Mr. KENNEDY], and the Senator from Florida [Mr. GRAHAM] were added as cosponsors of S. 1952, a bill to authorize the minting of coins to commemorate the 175th anniversary of the founding of the United States Botanic Garden.

S. 1983

At the request of Mr. HEFLIN, the names of the Senator from Alaska [Mr. STEVENS] and the Senator from Missouri [Mr. BOND] were added as cosponsors of S. 1983, a bill to provide that the provisions of chapters 83 and 84 of title 5, United States Code, relating to reemployed annuitants shall not apply with respect to postal retirees who are reemployed, on a temporary basis, to serve as rural letter carriers or rural postmaster.

S. 1986

At the request of Mr. BREAUX, the name of the Senator from Louisiana [Mr. JOHNSTON] was added as a cosponsor of S. 1986, a bill to amend the Internal Revenue Code of 1986 to provide tax incentives to encourage the preservation of low-income housing.

SENATE JOINT RESOLUTION 146

At the request of Mr. WOFFORD, the names of the Senator from Louisiana [Mr. BREAUX] and the Senator from Florida [Mr. GRAHAM] were added as cosponsors of Senate Joint Resolution 146, a joint resolution designating May 1, 1994, through May 7, 1994, as "National Walking Week."

SENATE JOINT RESOLUTION 161

At the request of Mr. BUMPERS, the name of the Senator from Delaware [Mr. ROTH] was added as a cosponsor of Senate Joint Resolution 161, a joint resolution to designate April 1994, as "Civil War History Month."

SENATE JOINT RESOLUTION 166

At the request of Mr. SPECTER, the name of the Senator from Utah [Mr. HATCH] was added as a cosponsor of Senate Joint Resolution 166, a joint resolution to designate the week of May 29, 1994, through June 4, 1994, as "Pediatric and Adolescent AIDS Awareness Week."

SENATE JOINT RESOLUTION 172

At the request of Mr. DOLE, the names of the Senator from New York [Mr. MOYNIHAN] and the Senator from Nevada [Mr. REID] were added as cosponsors of Senate Joint Resolution 172, a joint resolution designating May 30, 1994, through June 6, 1994, as a "Time for the National Observance of the Fiftieth Anniversary of World War II."

SENATE JOINT RESOLUTION 174

At the request of Mr. BIDEN, the names of the Senator from Arizona [Mr. DECONCINI], the Senator from Ohio [Mr. GLENN], the Senator from Maine [Mr. MITCHELL], the Senator from New Hampshire [Mr. GREGG], the Senator from Colorado [Mr. BROWN], and the Senator from New Mexico [Mr. BINGAMAN] were added as cosponsors of Senate Joint Resolution 174, a joint resolution designating April 24 through April 30, 1994 as "National Crime Victims' Rights Week."

SENATE JOINT RESOLUTION 179

At the request of Mr. DOLE, the name of the Senator from Rhode Island [Mr. CHAFEE] was added as a cosponsor of Senate Joint Resolution 179, a joint resolution to designate the week of June 12 through 19, 1994, as "National Men's Health Week."

SENATE CONCURRENT RESOLUTION 61

At the request of Mr. WOFFORD, the name of the Senator from North Dakota [Mr. CONRAD] was added as a cosponsor of Senate Concurrent Resolution 61, a concurrent resolution expressing the sense of the Congress in support of the President's actions to reduce the trade imbalance with Japan.

SENATE CONCURRENT RESOLUTION 62

At the request of Mr. D'AMATO, the name of the Senator from New Hampshire [Mr. GREGG] was added as a cosponsor of Senate Concurrent Resolution 62, a concurrent resolution expressing the sense of the Congress that the President should not have granted diplomatic recognition to the former Yugoslav Republic of Macedonia.

## NOTICES OF HEARINGS

COMMITTEE ON ENERGY AND NATURAL RESOURCES

Mr. BUMPERS. Mr. President, I would like to announce that a hearing has been scheduled before the Subcommittee on Public Lands, National Parks and Forests.

The hearing will take place on Thursday, April 28, 1994, beginning at 2 p.m. in room SD-366 of the Dirksen Senate Office Building in Washington, DC.

The purpose of the hearing is to receive testimony on two bills pending before the subcommittee pertaining to the management of the Presidio in San Francisco. The bills are:

S. 1549, to amend the act establishing Golden Gate National Recreation Area to provide for the management of the Presidio by the Secretary of the Interior, and for other purposes; and

S. 1639, to provide for the management of portions of the Presidio under the jurisdiction of the Secretary of the Interior, and for other purposes.

Because of the limited time available for the hearing, witnesses may testify by invitation only. However, anyone wishing to submit a written statement is welcome to do so by sending two copies to the Committee on Energy and Natural Resources, 304 Dirksen Senate Office Building, Washington, DC 20510-6150.

For further information regarding the hearing, please contact David Brooks of the subcommittee staff at (202) 224-8115.

## NOTICE OF POSTPONEMENT OF HEARING

SUBCOMMITTEE ON WATER AND POWER

Mr. BRADLEY. Mr. President, I regretfully announce for my colleagues and the public the postponement of a hearing scheduled before the Subcommittee on Water and Power of the Committee on Energy and Natural Resources. The purpose of the hearing was to receive testimony on the implementation of the Central Valley Project Improvement Act and the coordination of these actions with other Federal protection and restoration efforts on the San Francisco Bay/Sacramento-San Joaquin Delta.

The hearing had been scheduled to take place Tuesday, May 3, 1994 at 2:30 p.m. in room 366 of the Dirksen Senate Building, Washington, DC.

The hearing will be rescheduled for June 1994.

For further information, please contact Dana Sebren Cooper, counsel for the subcommittee at (202) 224-4531, or Leslie Palmer at (202) 224-6836.

## AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON ARMED SERVICES

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Committee on Armed Services be authorized to meet at 9:30 a.m. on Thursday, April 14, 1994, in open session, to consider the nomination of Adm. Jeremy M. Boorda, USN, to be the Chief of Naval Operations.

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

COMMITTEE ON ENERGY AND NATURAL RESOURCES

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Committee on Energy and Natural Resources be authorized to meet during the session of the Senate, 9:30 a.m., April 14, 1994, to receive testimony on the operating and economic environment of the domestic natural gas and oil industry.

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

COMMITTEE ON FINANCE

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Committee on Finance be permitted to meet today, April 14, 1994, at 10 a.m., to hear testimony on the subject of academic health centers in health care reform, and to hear and consider the nomination of Joan Logue-Kinder to be Assistant Secretary of the Treasury for Public Affairs and Public Liaison.

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

COMMITTEE ON VETERANS' AFFAIRS

Mr. MITCHELL. The Committee on Veterans' Affairs would like to request unanimous consent to hold a markup on pending legislation at 2:45 p.m. on Thursday, April 14, 1994. The markup will be held in room 418 of the Russell Senate Office Building.

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

SELECT COMMITTEE ON INTELLIGENCE

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Select Committee on Intelligence be authorized to meet during the session of the Senate on Thursday, April 14, 1994, at 2:30 p.m. to hold a closed hearing on intelligence matters.

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

SUBCOMMITTEE ON AGING

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Committee on Labor and Human Resources' Subcommittee on Aging be authorized to meet for a hearing on long-term care and health care reform, during the session of the Senate on April 14, 1994, at 10 a.m.

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

SUBCOMMITTEE ON AGRICULTURAL RESEARCH, CONSERVATION, FORESTRY AND GENERAL LEGISLATION

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Committee on Agriculture, Nutrition, and Forestry Subcommittee on Agricultural Research, Conservation, Forestry and General Legislation be allowed to meet during the session of the Senate on Thursday, April 14, 1994, at 3 p.m., in SR-332, on ecosystem management.

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

SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR REGULATION

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Subcommittee on Clean Air and Nuclear Regulation, Committee on Environment and Public Works, be authorized to meet during the session of the Senate on Thursday, April 14, beginning at 9:30 a.m., to conduct a hearing to examine implementation of the administration's climate change action plan and issues associated with adapting to changing circumstances which may result from potential climate change.

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

SUBCOMMITTEE ON EDUCATION, ARTS AND HUMANITIES

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Committee on Labor and Human Resources' Subcommittee on Education, Arts and Humanities be authorized to meet for a hearing on ESEA reauthorization, during the session of the Senate on April 14, 1994, at 10 a.m.

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

SUBCOMMITTEE ON FORCE REQUIREMENTS AND PERSONNEL

Mr. MITCHELL. Mr. President, I ask unanimous consent that the Subcommittee on Force Requirements and Personnel of the Committee on Armed Services be authorized to meet on Thursday, April 14, 1994, at 2 p.m. in open session, to receive testimony regarding the Department of Defense manpower, personnel, and compensation programs related to the national defense authorization request for fiscal year 1995 and the future years defense program.

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

## ADDITIONAL STATEMENTS

### THE 75TH ANNIVERSARY OF THE NATIONAL EASTER SEAL SOCIETY

• Mr. LIEBERMAN. Mr. President, I rise today before you to acknowledge the 75th anniversary of the National Easter Seal Society which has worked tirelessly to allow people with disabilities to gain independence.

The organization was founded in 1919 by Edgar F. Allen after his son died in a streetcar accident in Elyria, OH. The town did not have a decent health care center and it became Allen's mission to see that one was built. Even after this goal was realized, he continued to work to establish a system of quality care for children with disabilities, administered at the local level.

By 1929, Easter Seals had formed affiliates in 23 States, and since then, it has grown immensely in size and importance. Easter Seals now has 160 affiliates nationwide involved in a wide range of projects which include working to create community-based rehabilitation programs and promoting important legislation such as the Americans with Disabilities Act.

The Easter Seal network of Connecticut, established in 1935, includes six outpatient rehabilitation centers located in Hartford, New Haven, Stamford, Waterbury, Meriden, and Uncasville. These provide the necessary comprehensive outpatient medical and vocational rehabilitation services.

In addition, the Easter Seal Society of Connecticut owns and operates Camp Hemlocks, a barrier-free year-round camping facility located on 160 acres in Hebron, CT. The camp provides recreational and social programs for campers of all ages with various disabilities.

The National Easter Seal Society has been honored by the National Health Council for the past 14 years for being one of the best voluntary health organizations in America. Their work is invaluable and the services they provide are priceless. It is my great privilege to recognize the outstanding work of the National Easter Seal Society as it celebrates 75 years of achievement.•

### ALBANIAN-AMERICANS TO MARCH

• Mr. LAUTENBERG. Mr. President, on April 15, members of the Albanian-American community will march in front of the United Nations seeking support for the Albanians in Kosovo.

The human rights of ethnic Albanians, who comprise 90 percent of the population in Kosovo, continue to be violated and their personal safety threatened. The Serbs have tried to recolonize Kosovo with Serbs from elsewhere. Paramilitary forces harass ethnic Albanians and have reported engaged in random beatings of the population. These conditions make life difficult for the ethnic Albanians on a day-to-day basis and encourage many Albanians to leave Kosovo. Indeed, many Albanian males flee Kosovo to avoid being drafted into the Serb dominated Yugoslav army.

More subtle forms of repression permeate the lives of the ethnic Albanians in Kosovo. Hundreds of thousands of ethnic Albanians have been fired from their jobs, and professors of Albanian decent have been dismissed form the local university. Additionally, Albanian children suffer educationally as the Serbs control the curriculum at schools, effectively keeping Albanian children away from school. These conditions should not persist.

The international community must not forget about the ethnical Albanians in Kosovo. Their human rights must be guaranteed Human rights monitors, such as the CSCE monitors who were expelled by the Serbian Government in 1993, should be redeployed to the region. Additionally, resolution of Kosovo and the rights of the ethnic Albanians should be addressed as part of any broader agreement on the Balkans.

Mr. President, I commend all the Albanian-Americans who are marching in front of the United Nations to show their support for the people of Kosovo, and I hope that someday the Albanian community in Kosovo will live in peace.•

### DR. NAN S. HUTCHISON BROWARD SENIOR HALL OF FAME NOMINEES

• Mr. GRAHAM. Mr. President, today I would like to recognize and congratulate a group of 11 inspiring citizens from Broward County. These exemplary volunteers have each given their time, talents, and love to their communities.

On May 12, 1994, the following men and women were honored as the new members of the Dr. Nan S. Hutchison Broward Senior Hall of Fame, and their names were added to a commemorative plaque housed in the Broward County government building.

Mildred Cleinman is a dynamic senior who has dedicated countless hours to the Broward County Area Agency on Aging. In addition, she has participated as a guest lecturer for the Broward County School System and she often collects crocheted afghans and shawls for the needy elders of her community.

Shirley Sumner, a true woman of valor, has earned this recognition for her fine work with the American Cancer Society, her efforts as a member of the advisory board of the Broward Homebound Program, for her volunteer work for the Broward County library board, and many other contributions she makes every day to the city of Sunrise.

Aaron Neuhaus has displayed true dedication to the Broward County Council of Senior Citizens. He also helped plan activities to raise money for the Hurricane Andrew Disaster Fund and served as an exceptional president of the Men's Club of Sunrise Lakes.

Theodora Williams is truly a gifted person with an ability to make positive alms to her community. Among her notable contributions, she currently serves as the secretary of the Broward chapter of MADD and as president of

the Northeast Federated Woman's Club.

Sylvia Schreiber merits applause for helping enhance the quality of life for seniors residing in Broward County. She has been actively involved with her condominium, serving both as the editor of the condo's official newspaper and as the assistant secretary of the board of directors.

Sid Marcus has dedicated himself to nearly 5,000 young students in Broward County. His ability to teach children effective communications skills have led the county to request his volunteer services to teach the same lesson to other educators.

Ida Kolber has used her musical skills in so many wonderful ways. She has dedicated over 1,200 volunteer hours to Show Shoppers, an organization of senior entertainers which donates all proceeds from its extravaganzas to the Area Agency on Aging.

Joe Welsh has joined the Star of David Memorial Gardens to help families deal with the loss of loved ones. His great compassion is also seen as a volunteer for Meals on Wheels.

Ethel Glass' volunteer efforts in the health-care field are quite extensive. She serves as community liaison for the Sunrise Rehabilitation Hospital, is a member of the community advisory board of Florida Medical Center, is an ongoing speaker for Universal Health Care, and is credited as a very active advocate for the creation of Florida's Department of Elder Affairs.

Anne Oler is a superlative volunteer. She has served as president for the Seniors Foundation of Northwest Broward, Inc., and coordinates the work of over 70 other volunteers.

Lucy Conca is the vice president of the Southwest Focal Point Senior Center in Pembroke Pines. She is also a member of the Sunshine Club, which is a group of entertainers who perform for the elderly.

I wish to congratulate these fine senior citizens who have served diligently and tirelessly in their quest to enhance the lives of others. Florida and Broward County are very fortunate to have such exceptional men and women who give so much to their communities.•

## TRIBUTE TO JANE SCHULTZ, RECIPIENT, 1994 MOTHER OF THE YEAR AWARD

• Mr. LAUTENBERG. Mr. President, I rise today to commend an outstanding individual, Mrs. Jane Schultz of Ridgefield, CT. For her unflagging commitment to ensuring the commemoration of her son, Thomas, and the other victims of Pan Am flight 103, Jane Schultz has received the 1994 National Outstanding Mother Award from the Father's Day and Mother's Day Council, Inc.—an honor which she truly deserves. All mothers, of course, devote themselves to their children. But what Jane has accomplished in memory of Thomas is truly extraordinary.

On December 21, 1988, Pan Am flight 103 was destroyed by a terrorist bomb over Lockerbie, Scotland. In the aftermath of that tragedy, Jane devoted herself to honoring her son and the 269 other individuals who died on that flight, the result of a terrorist act against the United States. On the fifth anniversary of the bombing, a cairn of 270 Scottish sandstones, a gift from the people of Scotland, was erected at Arlington National Cemetery. I was honored and touched to be in attendance at the groundbreaking ceremony, to hear Jane speak of her and her husband's loss, standing in front of the memorial site with President Clinton by her side.

I have known Jane for 5 years—since the tragic explosion. I have been inspired by her dedication and that of the other families and friends of the victims of flight 103, in their efforts to effect change and to ensure that we never forget. That is why I felt so strongly about sponsoring the resolution that allowed the placement of the cairn in Arlington Cemetery. Jane was instrumental in this effort, which overcame considerable opposition.

The cairn will serve as a meeting place, allowing the families and friends of the victims to truly grieve and to feel a sense of purpose and unity in their struggle to make this world a better place in the names of their sons, daughters, fathers, mothers, friends, and relatives.

As the executive vice-president of the Victims of Pan Am Flight 103, Jane Schultz also led the struggle to ensure passage of the 1990 Aviation Security Act, a measure designed to protect U.S. citizens from further terrorist attacks. She has worked tirelessly, not only to establish a permanent reminder of her son's passing, but also to present his death as a symbol of tragedy for the world. Thomas and the other passengers aboard flight 103 were innocent victims of ruthless terrorism.

Jane Schultz has proven beyond a doubt that she is not only a wonderful mother, but a true humanitarian as well. I am proud of and humbled by Jane. Her dedication is an inspiration to us all.•

## FACES OF THE HEALTH CARE CRISIS

• Mr. RIEGLE. Mr. President, I rise today in my continuing effort to put a face on the health care crisis in our country. I would like to share the story of Robert from Lansing, MI. Robert has a chronic medical condition, is unemployed, and he lost his health insurance in a recent divorce. Robert does not want his last name used because he fears it might hurt his employment search.

Robert is 55 years old. Last summer during a routine physical examination he was diagnosed with type II diabetes. This is the most common type of diabetes and affects about 13 million Americans. This type of diabetes can be well controlled. But if left untreated, type II diabetes can lead to kidney failure, gangrene and amputation, blindness or stroke. It is important that people with diabetes follow a daily treatment plan that includes monitoring their blood-sugar levels and seeing a health care practitioner regularly. Robert monitors his blood sugar at home and has a borderline level. But he does not see a physician because he has no insurance and he cannot afford one.

In January of this year, Robert lost his health insurance when his divorce was finalized. Prior to the divorce, he and his family had obtained coverage for the past 15 years through his wife's employer, Michigan State University. Their plan provided excellent, comprehensive benefits with limited copayments to the employees. Robert's 14-year-old son, John, continues to receive benefits through this policy. Because he is unemployed, Robert could not afford to continue his health insurance policy by paying the $200 a month premium.

During Robert's career he has been a science and math teacher, an elected local public official and, most recently, the owner of a small business. Robert has never needed to obtain benefits through his own employment because of the comprehensive benefits offered through his former wife's employer. For 5 years he was a co-owner of a small solar energy conservation firm that failed in 1993. Since that time he has been looking for employment as a teacher, but the market is saturated and he has not found a position yet. He has been told on several occasions that his masters degree makes him overqualified and unaffordable for the school district.

Robert would go to the doctor for his borderline blood sugar level, but since he no longer has insurance, he feels he cannot afford it. After losing his health insurance benefits, Robert was forced to cancel a followup appointment with a nerve specialist for a pinched nerve condition that developed last summer.

Robert had been seeing this specialist when he had coverage, but after losing his benefits, he could not afford to pay for the $75 office visit out-of-pocket.

Robert is concerned about his future as an uninsured individual. At 55, he is getting to the age where it is difficult to find a job. Currently, he is living on savings and borrowed money while he looks for a teaching position. Because of his unemployed status, Robert is unable to purchase a health insurance policy.

In addition, Robert fears that diabetes will be considered a preexisting condition by health insurance compa-

nies and prevent him from obtaining the coverage he needs when he becomes financially able to purchase it.

Robert is in a situation facing many Americans across the country. Because health insurance coverage is usually tied to the employment of an individual or spouse, unemployment and divorce leave many people struggling to get affordable coverage. Robert has a chronic medical condition that can be controlled with proper treatment but can lead to devastating and expensive complications if not medically monitored. Lack of insurance means that cost-effective opportunities to prevent serious medical problems are missed. And preexisting condition exclusions in health insurance policies means that individuals with great need for care will be denied coverage.

Robert and every American deserve to have affordable health care coverage regardless of their unemployment or marital status. Existing medical conditions should not pose a barrier to getting coverage for care. Mr. President, I will continue to work with my colleagues in the House and Senate, and with the White House to make sure that comprehensive health care reform is enacted this year.●

## ACTIONS OF HAMAS IN ISRAEL

● Mr. LAUTENBERG. Mr. President, I rise to express my outrage over the recent violent actions of the extremist fundamentalist group HAMAS in Israel.

Over the past 2 weeks, HAMAS supporters unleashed the worst terrorist violence Israel has experienced in 5 years.

Yesterday, a suicide bomber killed 5 Israelis and wounded another 30 people by blowing up a commuter bus in Hadera.

Last week, another suicide bomber pulled up to a bus stop in Afula, Israel, and detonated his car bomb, killing himself and 7 innocent people and wounding 44 others.

The following day, a Palestinian opened fire on a group of passengers waiting at a bus stop in Ashdod, killing one and injuring four. As the victims were being carried from Ashdod site, sirens wailed to commemorate the 6 million Jewish victims of the Nazi Holocaust.

HAMAS is responsible for unleashing these acts of wanton violence. HAMAS has stated that the Afula bombing was but the first of five attacks they are planning to avenge the Hebron massacre of last February. They had specifically threatened a terrorist action for Thursday's Independence Day celebration in Israel.

There is nothing ambiguous about HAMAS' goals: HAMAS supporters seek to derail the peace process. This sort of violent behavior by HAMAS is not out of character.

This group of militant fundamentalists has done its best to wreak havoc on the peace process since the Madrid Conference in the fall of 1991.

When Israel and the PLO signed the Declaration of Principles on the White House lawn last September, enemies of peace such as HAMAS became alarmed that the chronic state of war between Israelis and Arabs might actually be coming to an end, and they have redoubled their efforts to stop the process in its tracks.

Mr. President, HAMAS' terrorism must not be allowed to succeed. All along, we have known that the road to peace would not be easy or without violence. We have known that success would depend on leaders with vision and with the steadfastness required to see that vision realized.

The battle lines now are drawn between those who are for peace and those who want to continue the misery and bloodshed that has characterized the Arab-Israeli struggles for decades.

When a radical extremist killed 29 Palestinians in Hebron in February, Prime Minister Rabin acted forcefully. He condemned the act in the strongest terms and cracked down on extremist organizations.

Arafat has expressed regret about the latest senseless attack against innocent civilians and recognized that it "strikes at the heart of the peace process." Unfortunately, he stopped short of an absolute condemnation of the act.

And when innocent Israelis—and indeed Arabs—were brutally murdered and maimed in HAMAS' terrorist actions last week, PLO leader Arafat refused to condemn the act. When asked to do so, he turned and walked away. This is unacceptable. Arafat must condemn every senseless act of terrorism against innocent civilians.

We should not allow HAMAS to triumph by pushing Arafat away from the peace process. No one but HAMAS wins if any party abandons the peace process.

Mr. President, terrorist incidents such as occurred in Afula and Ashdod last week are putting a severe strain on the Israeli people's faith in the peace process.

Mr. Arafat's failure to distinguish himself and his organization from murderous groups like HAMAS and the Palestinian Islamic Jihad will only increase Israelis' distrust and undermine the Israeli Government's ability to continue to negotiate with the PLO.

Time is not on the side of the peacemakers in the Middle East. The longer people are prevented from realizing the benefits of the peace process, the longer murderous groups like HAMAS will have the ability to continue their bloody ways.●

## HOSPICE CARE VOLUNTEERS

● Mr. LIEBERMAN. Mr. President, I rise today before you to acknowledge the volunteers of Hospice Care and their significant contributions to the care of persons with life-threatening illnesses. Hospice Care Inc. of Connecticut, a nonprofit organization, was founded in 1981 to provide patients and their families with the medical care and support services that they require to maintain a comfortable level of life during difficult times. Throughout its 13 years of service, these highly trained volunteers, along with company professionals, have provided home care and short-term inpatient care for over 2,000 of southwestern Fairfield County's residents.

Hospice Care volunteers are involved in every aspect of the organization's daily operations. They assist patients with household chores, provide companionship and support, and offer other invaluable services. Volunteers also serve in administrative positions, work to increase public awareness, raise funds for the organization, and function as the board of directors. Many have been with the organization since its founding and will remain to carry on its fine work in the future.

These volunteers have selflessly given their time and energy to help their fellow residents of Connecticut, and the emotional stresses of providing such service cannot be denied. I am extremely proud to acknowledge the success and commitment of Hospice Care's volunteers.●

## REPEAL OF SOUTH AFRICAN DIVESTMENT LAW

● Mr. LAUTENBERG. Mr. President, in New Jersey this week, legislation repealing New Jersey's historic South African divestment law was signed into law.

South African now stands in the crossfire of change and opportunity as a new nation, one nation for all people. Breaking down the racist apartheid regime of the past has been a long and difficult task for the people of South Africa. I believe economic sanctions were the one tool that had the effect of influencing a country to live up to its responsibility to all of its citizens. The victory is for those who supported the sanctions which made the movement toward democracy possible.

New Jersey and America must never be afraid to use its economic power to promote justice and freedom. That is why I am so pleased that Willie Brown led the charge in the New Jersey State legislature many years ago to write the law requiring divestment. It is also why, in the Senate, I cosponsored and supported Federal legislation to impose tough sanctions against South Africa as one way to influence the end of abuses under the apartheid system.

In my own visit to South Africa many years ago, I witnessed first-hand, the injustice and oppression of the apartheid system. As I walked the

streets of Soweto, I saw people living in squalor, barred by law from having equal educational or professional opportunity. Those that protested were imprisoned, tortured, or killed.

Now, as we look to investment again in South Africa, we must look to economic programs which will have a meaningful impact on education, health, and business development in the townships. For the first time, blacks will vote and ensure their part in crafting that agenda.

World attention has recently been drawn to the fighting that has erupted between the Zulu Nation and the supporters of the ANC. These incidents raise the troubling prospect that violence may stand as an obstacle to democratic reform in a country desperate to embrace that very theme. Violence must not derail this historic process. The people of South Africa have waited too long for the apartheid regime to come crumbling down. The United States must play a constructive role in promoting and facilitating the move to democracy and work to ensure that South Africa has the economic ability to make the transition to democracy.

Mr. President, I am proud that Assemblyman Brown led the fight to focus New Jersey's attention on the plight of South Africans, without apology and with a steely resolve. He made New Jerseyans understand that we could not support a system which mandated that a majority of its citizenry had no voice in government.•

## S. 21, CALIFORNIA DESERT PROTECTION ACT

• Mr. MACK. Mr. President, while I believe that it is important to respect the wishes of Senators on public land issues in their State, I am concerned that this legislation will have an impact beyond the borders of California.

I do not think that you can add 4 million acres to the National Park System without impacting the existing parks in the system. Operation and maintenance at existing parks and monuments is currently inadequate. Over the break I had the chance to visit the Fort Jefferson National Monument in the Florida Keys. While this is a beautiful and historical part of American history, I was saddened to see the walls of the fort crumbling. This is just one small example of the enormous backlog of existing needs in the current system.

This legislation also requires the purchase or exchange of about 700,000 acres of private and State lands by the Federal Government. I am told that there are already 12,000 private land owners with land inholdings to be acquired at a cost of around $6 billion. With a total land acquisition budget of approximately $100 million per year it will take around 60 years to finish the task currently at hand.

I understand the importance of this legislation to the Senators from California, but I am concerned about the health of the existing park system, and most critically the Everglades National Park. As my colleagues know, the Everglades is in critical condition, and Florida Bay is experiencing massive algae blooms and a 100,000 acre sea grass die off that threatens the breeding grounds for young shrimp, crabs, lobsters, and fish. Part of the solution of this problem is increasing the water flows through the Everglades National Park to Florida Bay. In order to do this we must raise the water tables and periodically flood lands surrounding the Everglades National Park. If we are going to flood this land, we have to buy it.

As a final point, there is not a clear consensus from the State of California that they want this legislation. Should we be spending scarce Federal dollars to add land to an already overburdened national park system when it is not clear that the State wants those dollars to be spent?

I cannot in good conscience support an additional 4 million acres to the national park system until some of the existing problems are resolved.•

## THE CALIFORNIA DESERT PROTECTION ACT

• Mr. LAUTENBERG. Mr. President, I am pleased to support S. 21, the California Desert Protection Act. This bill will extend important and necessary natural resource protection to over 6 million acres of the California desert, lands that are of national significance and worthy of our investment. I am proud to be an original cosponsor of this legislation.

The ecological, scientific, recreational, and cultural value of these fragile and spectacular lands is unquestioned. The lands preserved by this bill are home to over 750 species of animals and 2,000 species of plants, some of which may hold the key to scientific discoveries. A visitor to the California desert witnesses spectacular beauty in sand dunes rising to 600 feet, extinct volcanoes, badlands, dry lakes, and the world's largest Joshua-tree forest.

This visitor to the national parks and wilderness area designated by this bill will also pump millions of dollars into the local economy. The National Park Service estimates that the three new parks—Death Valley, Joshua Tree, and Mojave—will generate more than $215 million in sales, $27.5 million in tax revenues from tourists, and create more than 4,000 jobs.

Mr. President, this bill was first introduced in 1986. For 8 years those who wanted to preserve their option to engage in activities that degrade the land and its wildlife—grazing, mining, hunting, riding in off road vehicles—have stalled passage of the bill. But the hard work of Senator DIANNE FEINSTEIN and advocates of the bill have made a difference.

Throughout the process, many concessions were made. I applaud the consensus. But, Mr. President, I am disappointed that the 200,000 acres of the Landfair Valley were deleted from the bill. This area is among the most ecologically diverse and scenic valleys of the proposed Mojave Park. However, sometimes it is necessary to concede on one issue for the greater good. Mr. President, this bill is indeed for the greater good.

In these times of fiscal restraint, it is often difficult to justify committing Federal resources to preserve land. We, as Federal legislators, must always keep in mind our priorities, and the funding that must be appropriated—for our children, their education, their safety. This bill is an investment in our children and their future, not just for those who live near there, but for the children, perhaps from New Jersey, who may have the benefit of visiting the desert's great geological and cultural gifts or of learning about those who lived there centuries ago.

We need this bill to preserve the desert's natural resources, protect its rich cultural heritage, and promote tourism and economic development. We need this bill to ensure that the spectacular California desert as we know it today will still be there years from now for our children and their children.•

## TRIBUTE TO SENATOR ALAN CRANSTON ON PASSAGE OF THE CALIFORNIA DESERT PROTECTION ACT

• Mr. DECONCINI. Mr. President, I rise today to hail the passage of the California Desert Protection Act. The bill that passed the Senate yesterday is a good bill that represents a lot of hard work and compromise. The debate was open and fair, and I think that is a credit to the chairman and ranking member of the Energy and Natural Resources Committee. The forthright manner in which Senator FEINSTEIN approached this issue is a tribute to her legislative skills and her dedication and perseverance as well as that of Senator BOXER. Both of the Senators from California are in large measure responsible for the ultimate passage of this legislation. I worked many long hours to pass an Arizona wilderness bill not too long ago, so I know firsthand the difficulties involved in dealing with the diverse groups affected by such designations. Senator FEINSTEIN did a remarkable job of satisfying many competing concerns while preserving the heart of the bill.

Today, however, I want to pay special tribute to the original driving force behind this bill, Senator Alan Cranston. Senator FEINSTEIN

enthustically picked up where Senator Cranston left off. She has put her own stamp on S. 21 and has successfully steered it through Senate passage, but it was Senator Cranston's vision of protecting the California desert for present and future generations that began the process. He introduced the first version of the California Desert Protection Act on February 6, 1986, and in every subsequent Congress until his retirement.

I know that passing a bill to protect the fragile ecosystems and unique wildlife and geography of the California desert was one of Senator Cranston's most important environmental issues and ranked near the top of his legislative agenda. I regret that Senator Cranston is not here to witness the successful culmination of his vision. I know that he will be pleased with the Senate's action yesterday. It shows a strong commitment to preserving this magnificent natural and cultural resource and is an affirmation of Senator Cranston's dedication.

Mr. President, the idea of protecting these desert lands as wilderness areas and national parks was not a result of an impulsive desire by Senator Cranston to overburden the National Park System or to randomly remove land from private hands. I know that Senator Cranston thought this idea was so important that he spent many hours traveling through the desert to see firsthand its diverse environment. He saw the value—and the fragility—of the desert and the increasing threat cased by incompatible use and encroaching development. The passage of this legislation is a tribute to the innumerable hours Senator Cranston spent traveling the desert studying the ecosystems, meeting with interest groups, developing legislation and laying the groundwork that brought us to the passage of S. 21 yesterday.

I commend Senator Cranston's work. His efforts and those of Senators FEINSTEIN and BOXER will now provide us with the opportunity to enjoy the desert of southern California for a long time to come.•

## VALUABLE INFRASTRUCTURE LOST

• Mr. LAUTENBERG. Mr. President, when it comes to collecting taxes, Uncle Sam does not accept excuses. Americans know that if they do not settle their accounts by April 15, the IRS will come knocking, demanding that they pay up. Uncle Sam should be as strict with our European allies as he is with the American taxpayer. We should demand they pay us for the infrastructure we leave behind as we close military bases and withdraw our troops from Europe.

With the demise of the Soviet Union and the reduced threat of an invasion of Western Europe, the Pentagon announced plans to close or reduce our presence at 867 military sites overseas. Most are in Europe, where America has already closed 434 military sites. These closures are part of an overall plan to reduce U.S. troop strength in Europe from 323,432 in 1987 to 100,000 by the end of 1996.

When we close bases in Europe, we bring our troops home, but we leave buildings, roads, sewers, and other physical improvements behind. This valuable infrastructure, which cost us $6.5 billion to build, represents a significant American investment in the collective security of the West. Through a series of "residual value" agreements, some allies have acknowledged they will inherit all the structures we built. As a result, they agreed to repay us for what we leave behind.

Despite those agreements, so far we have gotten a lot of talk and very little cash. We have recouped only $33.3 million, less than 1 percent of our initial investment. Most of that money was recovered in 1989.

Mr. President, our military drawdown has been rapid since 1990, but our European allies do not appear to be in a similar hurry to pay us what they agreed to pay. In Germany, we have already withdrawn from over 60 percent of the military sites slated for closure. Yet the German Government has only budgeted $25 million this year to compensate us—when our overall capital investment in German bases is almost $4 billion. To be sure, the amount we can recover from Germany is subject to negotiations. The $4 billion capital investment may not reflect the current value of the facilities.

However, the U.S. Government has been slow to respond to our allies' reluctance to pay. The Pentagon will not even say how much it is asking our allies to pay, or when it must be paid. Imagine Uncle Sam refusing to tell a taxpayer what his tax bill is or refusing to demand that it be paid.

Clearly, collecting this money from the allies will not be easy. Europe's economies have lagged behind ours. German citizens are no more eager to pay America for its military infrastructure than many Americans were to pay to maintain that infrastructure for the past 40 years. But, a deal is a deal.

It is not as if our Government is abandoning Europe by asking for compensation. We spent $10 billion last year just to operate our forces and maintain military installations in foreign countries, mostly in Europe. That does not include the substantial cost of paying our soldiers and buying their weapons. In fact, in fiscal year 1993, according to Department of Defense figures, our NATO allies paid less than 25 percent of the costs of maintaining troops in their countries while Japan paid more than 75 percent. If the European allies matched the Japanese contributions, the Congressional Budget Office estimates we could save the United States taxpayer $9.6 billion over 5 years.

The NATO allies have not just failed to pay for the infrastructure we leave behind. They also refuse to pay for the infrastructure required to keep our forces at foreign bases today. And the cost of that infrastructure is rising. The administration wants Congress to provide more than $300 million to support new military infrastructure and projects in NATO countries next year.

Even worse, the money we spend to defend Europe is cutting into our own military readiness to respond to conflicts, according to Gen. David Maddox, commander in chief, U.S. Army, Europe.

With a little persistence, our Government should be able to recoup billions from our NATO allies. After the Persian Gulf war, the international community pledged $54 billion to offset costs of United States military activities. With a nudge from the Congress, our Government pressed the gulf allies until they provided every penny. We can and should do the same in this case.

Mr. President, the American Government should not treat our allies better than its own citizens. Every American knows the consequences of not paying their taxes. The Pentagon ought to take a page from the IRS. It should knock a bit harder on the allies' door, and persist in demanding that we receive fair compensation for the value of the multibillion-dollar investment we are leaving behind in Europe.•

## ORDER OF PROCEDURE

Mr. MITCHELL. Madam President, I had earlier announced my intention to proceed next week to consideration by the Senate of S. 1491, the Airport and Airway Improvement bill. However, the principals have informed me that they would rather proceed next week to compromise legislation that would put a 90-day freeze on airport and airline fees and permit the FAA to free up funds for airport projects during that 90-day period.

It will be my intention to proceed to this compromise legislation on Tuesday morning, with the expectation that it will be disposed of swiftly and, if a vote is necessary, to have that vote at 12 noon on Tuesday.

It is my intention then to proceed on Tuesday, following the party conference luncheons, to the consideration of S. 540, the bankruptcy reform legislation. Accordingly, I now ask unanimous consent that the Senate proceed to the consideration of S. 540 at 2:30 p.m. on Tuesday, April 19.

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

## APPOINTMENT OF EXECUTIVE SECRETARY TO THE U.S. CAPITOL PRESERVATION COMMISSION

Mr. MITCHELL. Madam President, I now ask unanimous consent that the Senate proceed to the consideration of Senate Joint Resolution 180, introduced earlier today by Senator BYRD, providing for the appointment of an Executive Secretary for the U.S. Capitol Preservation Commission; that the joint resolution be passed, and the motion to reconsider be laid on the table.

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

So the joint resolution (S.J. Res. 180) was passed, as follows:

S.J. RES. 180

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. APPOINTMENT OF EXECUTIVE SECRETARY FOR THE UNITED STATES CAPITOL PRESERVATION COMMISSION.**

Section 801(e) of the Arizona-Idaho Conservation Act of 1988 (40 U.S.C. 188a(e); Public Law 100-696; 102 Stat. 4608) is amended by inserting at the end thereof "The co-chairmen of the Commission shall jointly appoint an executive secretary of the Commission from public or private life to serve without compensation and to advise and assist the Commission at the direction of the co-chairmen.".

## WHITEWATER, WHITEWATER, WHITEWATER

Mr. MITCHELL. Madam President, a short while ago, the Senator from New York delivered a sharp attack on President Clinton here on the Senate floor. I wish now to respond to that attack, and I advised the Senator from New York that I would do so at the earliest opportunity.

The Senator's attack appears to have been provoked by a cartoon which appeared in newspapers across the country yesterday and today. That cartoon is called "Doonesbury", and it apparently included comments referring to the Senator from New York and the Whitewater issue.

I have not seen the cartoon, and I know nothing about it. If the Senator is offended by a reference to him in a cartoon, that is his business, and it is nothing over which I have any control, nor do I have any concern. But I am distressed that a comment about the Senator in a cartoon would cause him then to launch such a sharp attack on President Clinton, especially an attack which included statements which I believe to be incorrect.

He stated, and I quote, "The President has sought to tax everything that moves and some things that don't."

We have become so accustomed in American political life to hear and accept false statements that we have become numb to them, and it has become an unfortunate part of the American political process that people make false statements apparently to make a political point.

That is obviously a false statement. It is untrue. The speaker surely knew it to be untrue when he made the statement. And yet it was made apparently to make a political point, apparently to embarrass the President, apparently to cause political damage to the President. But I would say to my colleagues, words have meaning and words have consequences. And if we are to use words in making political attacks, at the very least we should make an effort to have those words bear some semblance of truthfulness.

A further statement: "The President has raised everyone else's taxes." Those are the exact words of the statement. "The President has raised everyone else's taxes."

Madam President, that statement is not true. It is a false statement. Surely, the speaker knew it to be false. But again it is plainly intended to make a political point, to cause embarrassment and political damage to the President.

Are we not confident enough of the merit of our argument to restrict our arguments to the facts? Or do we need to embellish those arguments with statements that are obviously false and obviously untrue.

I think it is a debasing of the political debate in our society that so much is said that everyone knows to be false, the person saying it and the person hearing it all knowing it to be false and yet accept it as somehow a normal part of political debate in our society.

The President has not raised everyone else's taxes. Let me go back, if I might, in time, to discuss last year's economic bill which is what this statement must be based upon and its current relationship to the so-called Whitewater issue.

Last summer, in this Chamber, we had a long, difficult and controversial debate. It was over President Clinton's economic plan. It was the largest deficit reduction plan presented in our Nation's history, the largest deficit reduction plan approved in our Nation's history. Some will argue about the accuracy of that later statement depending upon the changing value of the dollar. And so I should make it clear that it was either the largest or by a very small amount the second largest, depending upon which value of the dollar applied at which time. It included spending cuts and tax increases.

Now, opponents of the President's plan including the Senator from New York and every other Republican Member of the Senate voted against the President's economic plan. And during that debate they stood here on the Senate floor and in press conferences and in statements outside the Senate Chamber and said in effect that the President's economic plan was the wrong plan for the country and that, if it passed, interest rates would go up, unemployment would go up, the deficit would go up, and economic growth would go down.

Well, we passed that plan, and every single Republican Member of the Senate voted against it. What has happened in the months since then? About the opposite of what they predicted. Interest rates have gone down, although they are now starting to rise again as a consequence of recent actions taken by the Federal Reserve Board. Unemployment has come down. And the deficit has come way down. Economic growth is up. Indeed, economic growth was so rapid in the last quarter of last year that the Federal Reserve Board took action to increase interest rates to restrain the rate of growth so as not to ignite a new round of inflation.

So what do our colleagues have to talk about? The real need in this country is for economic growth and the creation of jobs, and more jobs were created in America in the first year of President Clinton's term than in all the previous 4 years. So those who had advocated the economic policies of the previous administrations, those who had opposed President Clinton's plan now face the reality that the economy is doing reasonably well—not in every part of the country, not in my region, not in California, not in others, but overall the figures look good and the future looks good.

So for them Whitewater represents an opportunity to distract the attention of the American people away from the state of the economy. Every single American who follows the news knows the Republican program on Whitewater, but I ask is there a single American who knows the Republican program for economic growth and creating jobs in America? And I think the answer must be not one because there is not any such plan.

Whitewater, Whitewater, Whitewater, that is the Republican program in the spring of 1994.

We have a responsibility on Whitewater, and we are going to meet it in a responsible and appropriate way. We are going to meet Congress's oversight responsibilities at a time and under a circumstance that does not undermine the special counsel's investigation, and that meets our responsibilities. It will include hearings at an appropriate time under an appropriate structure.

I have had meetings with the distinguished Republican leader on the subject, and those will continue.

But we are not going to let the Republican obsession with Whitewater prevent this Congress from dealing with health care. We are not going to let the Republican obsession with Whitewater prevent this Congress from dealing with crime. We are not going to let the Republican obsession with

Whitewater prevent this Congress from dealing with welfare reform and all of the other important bills that we must deal with as a Congress. That is our job. We are sent here by the American people to deal with the problems that exist in their daily lives.

I think the attitude of most Americans was well summed up last week when, during the Easter recess, I was walking down the street in Portland, ME, and I came to an intersection. As I waited for the light to change, a fellow driving a pickup truck pulled up to the light, rolled down the window, and yelled out to me, "Senator, why don't you guys do something about health care and forget about this Whitewater stuff?"

I think that is the way the American people feel. I think they realize that what is going on here has been purely partisan politics by our colleagues in a transparent effort to embarrass President Clinton, to politically damage President Clinton, and to keep the Congress from meeting its responsibility, its primary responsibility, in the areas of health care, welfare, crime, and so many other important issues.

Madam President, we are not going to be sidetracked. We can do both and do them responsibly. That is what we are going to do. And I do not think we should let this kind of attack on President Clinton go without response, or detract us from doing our duty. And our duty is clear. The American people want us to act on the problems that affect their daily lives. And that is health care reform; that is welfare reform; that is controlling crime in this country; and dealing with the many other important issues we must confront.

So I encourage my colleagues, when we debate these, let us try to keep the debate within the bounds of fact. Let us try to keep our debate with some fidelity to truth and reality. There are honest differences of opinion here. There are honest differences of philosophy; they ought not be the subject of meaningful debate. I hope we will do that.

But I do not think we ought to let this kind of statement about the President go without responding. And I do not intend to permit such comments to go without response.

Madam President, I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

## SENATOR LUGAR'S WORK ON THE AGRICULTURE BILL

Mr. DOLE. Mr. President, yesterday, by a vote of 98 to 1 the Senate passed S. 1970, the Department of Agriculture Reorganization Act of 1994. I offer today my congratulations to Senator DICK LUGAR, the ranking Republican on the Senate Agriculture Committee, for successfully steering this important reform legislation through the Senate with such overwhelming support.

The success of this legislation is primarily the result of the bold work of Senator LUGAR. In November 1991, prompted by a report from the General Accounting Office and a series of articles printed in the Kansas City Star, DICK LUGAR began a comprehensive review of USDA. He is a farmer and a businessman and used this knowledge to recommend some common sense reforms at USDA. Senator LUGAR urged then-Secretary of Agriculture Ed Madigan to close inefficient local field offices. Madigan eventually identified over 1,200 offices that were no longer needed. Prior to Senator LUGAR's investigation, USDA could not even identify where these employees were located—let alone propose a bold downsizing plan.

The passed bill reduces the number of USDA agencies from 43 to 28. USDA payroll will be reduced by 7,500 employees, and the stage is set for the closing of over 1,200 field offices. According to administration budget estimates, spending on salaries and overhead will be reduced by $2.3 billion over 5 years. Two years ago most thought this task was impossible. But with Senator LUGAR's leadership we have achieved the impossible. Bureaucracy has been dealt a serious setback and taxpayers and farmers will be better off as a result.

I ask unanimous consent that an article regarding Senator LUGAR be printed in the RECORD.

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

[From the Washington Post, Feb. 20, 1992]

### LUGAR FINDS UNEARTHING FACTS ON USDA IS A HARD ROW TO HOE

Employees of the Department of Agriculture have long boasted that they have an office in practically every county in the United States, dispensing everything from bank loans to farm subsidy payments and advice about seed corn, catfish farms and the mating habits of various species of bees.

In fact, Sen. Richard G. Lugar (R-Ind.) found, USDA has fallen short—but not by much. There are 3,158 counties in the country, and USDA has offices in 2,977, or 94 percent.

And that, Lugar said, is too many. In 1986 only 516 counties—16 percent of the U.S. total—were farm counties. "On the face of it," Lugar said in a recent interview, "some of these offices need to be closed."

#### NUGGETS OF INFORMATION

Lugar, quiet-spoken ranking minority member of the Senate Agriculture, Nutrition and Forestry Committee, has made Agriculture Department reform his cause for 1992 and perhaps beyond.

In as-yet-sketchy research he and his staff have discovered several not-so-golden nuggets of information:

Fifty-three counties have Agricultural Stabilization and Conservation Service offices (the ones paying subsidies) that spend more than $1 on administrative expense for every $1 they disburse to farmers. ASCS in eastern Kentucky's Pike County spends $8.50 in overhead for every paid-out dollar.

The Farmers Home Administration, the poor farmer's lender of last resort, spends an annual average of $250 to administer each loan. The rest of the farm credit system (land banks, co-ops and the like) averages $92.

Twenty-five percent of counties have at least two USDA offices, doubling administrative costs (copiers, telephone switchboards, etc.). Even in cases where all the agencies are under one roof, personnel in one office often share nothing with the others and may not even know their colleagues.

In 1932, when 25 percent of the population lived on farms, the USDA had 32,000 employees, one for every 100 farm residents. Today the ratio is about one employee for every 45 farm residents.

Changing USDA may be a noble task, but it is also a daunting one, made even more difficult because almost no one seems to know all the tunnels in the USDA's rabbit-warren bureaucracy.

Even the USDA is scratching its head. In September and November 1991, for instance, the Office of Personnel Management listed 135,478 and 118,645 people respectively as the number of full- and part-time Agriculture Department employees, attributing the discrepancy to the need for extra seasonal labor during the September harvest.

But don't believe everything you read. OPM said there is no "standard or average" figure for USDA employment, even though USDA uses 110,000 people as its rule of thumb.

Lugar's staff, however, also noted that the OPM figures did not include 19,075 county employees working for USDA, which would have raised the September 1991 total to 154,553. If true, this means USDA could be undercounting by as many as 44,553, or 29 percent.

Lugar became interested in USDA's problems last year after reviewing a General Accounting Office study which suggested that the venerable agency—created in 1862—needed a "major overhaul," an exercise not attempted with any seriousness since the Great Depression.

The study found that USDA appeared to be overstaffed, over-represented and inefficient in many areas of the country.

Bureaucratic jealousy mitigated against sharing office equipment and facilities, computer training was woefully inadequate and certain areas of emerging importance, like food safety, water quality, biotechnology and marketing, were not getting the attention they deserved. Agriculture Secretary Edward R. Madigan issued a brief statement saying, "I believe many of the criticisms of the GAO report are justified, but all are not."

#### FOOT-DRAGGING BY THE DEPARTMENT

Nothing further was heard for some time. Lugar's staff in November asked USDA to provide information on size of the USDA payroll, amount of money spent by employees and nature of the work being performed.

The USDA dragged its feet through the last part of 1991, but staffers are not sure

whether it was because they were reluctant to part with the information, had not collected it or simply did not know.

"I was patient," Lugar said. "I was aware we had gaping holes of data that needed to be filled. I told USDA that, 'This is for real, and it would be helpful if you came forward promptly.' "

On Feb. 3, Lugar said, the USDA produced some documents with an accompanying memorandum, which said in part: "You asked for the number of local USDA offices around the country. We have tried to get a straight answer to this question. * * * Our staff still cannot give us an accurate number."

[From the South Bend Tribune, Feb. 13, 1992]

LUGAR VERSUS USDA

There are many reasons why U.S. Sen. Richard G. Lugar is and deserves to be one of the most respected members of the Senate. Now there is another one.

The Indiana Republican is taking on the U.S. Department of Agriculture. He describes it as a "bloated" bureaucracy, with a $61 billion budget, that administers a farm policy that is a "gargantuan mess."

It will be a tough battle for Lugar as he seeks to force the USDA to cut out waste and duplication and to move away from market-distorting policies. But it is a job that needs to be done.

And Lugar is the man to do it. He is not going after the USDA as a foe of agriculture. Far from it. Lugar, the ranking Republican on the Senate Agriculture Committee, has represented the interests of agriculture in Indiana and still manages his family's 604-acre farm.

What the senator is proposing is a leaner USDA, reorganized for the first time since the 1930s, that will be better able to serve agriculture.

Virtually every member of Congress rails against waste in government these days. Few, however, point to specific and substantial savings that could be obtained and then plunge into a fight with the bureaucrats and their protectors to bring about change. Lugar has cited where costly duplication and inefficiency exist and is demanding change.

He is calling, for example, for consolidation of various USDA offices that operate in the same county and elimination of some offices that operate in non-farming counties.

All the changes won't be popular with people in agriculture. And Lugar, obviously aware of that, is willing to take the heat.

But he is convinced that most farmers will welcome consolidation and reorganization because of the greater efficiency and less buck-passing that would occur.

In the speech on the Senate floor in which he took aim at the USDA, Lugar called on "all farmers who have wrestled desperately with the overwhelming tangle of red tape and form filling to let us hear about it loud and clear." He added, "To every farmer I ask: If you have ever stomped out of a local ASCS, Farmers Home, SCS or Cooperative Extension Services office in frustration, let us know now that you support a remedy such as consolidation."

Yes, anybody in agriculture and anybody who is sincere in wanting to trim government waste ought to salute the efforts of Sen. Lugar and back him in this effort.

## FCC GORES COMMUNICATIONS INDUSTRY

Mr. DOLE. Mr. President, the administration is sending conflicting messages about running government. On one hand, it talks about reinventing government to make it more simple. At the same time, it actively supported the Cable TV Act's new bureaucracies and redtape. The administration says it wants to give Americans more for less, but what we will really get is more paperwork with less service.

Take the Federal Communications Commission's latest effort to roll back cable TV rates through rate regulation. The most basic form that every cable TV system operator must fill out is 8 pages long and has 28 pages of instructions. That is more complicated than an IRS form. But, hold on—that is just the beginning. A complete set of forms is 48 pages long, with 97 pages of instructions, while the regulations total more than 500 pages. That is more than 5 pounds of paper.

If it takes this much paperwork for MTV and CNN, how much will it take for an appendectomy?

In fact, the forms are so complex that the FCC also sent along a computer disk so cable TV operators can figure out their new rates. Even so, a multiple-page worksheet must be completed before operators will know what data they must enter into their computers.

DISCLAIMER STATEMENT AND CONGRESSIONAL INTENT

No doubt about it. The cable TV industry had its bad apples who have gouged consumers and delivered poor service. And while I did not agree with the Cable TV Act's approach, I did agree that these problems must be dealt with. But I must remind my friends that we did not authorize the FCC to go after all operators, just the few bad guys. I must assume then that the FCC did not read the law when it established a goal of cutting rates for 90 percent of cable TV consumers.

It should also be remembered that the law did not mandate means-testing of cable TV rates, but that such actions should be voluntary. But under the new regulations, it appears that rates will be based on subscriber income.

WHERE IS THE STUDY?

Mr. President, the FCC said it would justify its actions by releasing a comprehensive study. That was a month and a half ago. It has been my understanding, however, that the FCC had said it would only take 2 weeks. Even so, that was unacceptable. As I have said before, the study should have come first before any rules were issued. While I am not sure what the holdup is, some say it's very simple—the Commission ran out of whiteout while trying to get the study and the rules to match up.

CABLE RATE CUTS A MAJOR ROADBLOCK ON THE INFORMATION HIGHWAY

Mr. President, when the FCC adopted its rules back in February, Chairman Hundt and his Berkeley economist, Michael Katz, said that these cuts won't hurt. Let us face it, there is a difference between theory and reality. The Bell Atlantic-TCI deal went sour. The Southwestern Bell-Cox Enterprises Cable went sour. And many cable companies that had considered selling out have now taken themselves off the auctioning block.

Last week, Chairman Hundt defended his cuts and believes that one day the cable industry will someday thank him. He stated that cable operators only have 60-percent market penetration, while telephone companies have 100 percent, and lower prices will bring more consumers. By the way, actual telephone service penetration is between 92 and 94 percent, not 100 percent. It should be remembered, however, that cable TV is entertainment and not a necessity.

For the time being, cable TV companies will not have the revenues or the borrowing power to build out their systems to the remaining 40 percent. If Chairman Hundt does not want to believe these facts, that is his prerogative. But I can assure him that these deals are not being called off just to embarrass him.

INCREASING REGULATIONS WILL NOT BUILD INFORMATION HIGHWAY

Mr. President, I am very troubled by the FCC's current mindset and the negative impact it can have on the future of American telecommunications. I realize that these are very complex issues, but I must question the Congress' judgment when it considers granting the FCC greater regulatory control of the communications industry. Especially when the FCC does not seem to realize that it dropped the ball with the implementation of the Cable TV Act.

I also do not like hearing that the FCC supports the Hollings-Danforth communications bill because the Commission will get more power. Instead of power grabs, it seems to me that the FCC should be more interested in advancing the development of the information highway so that schools and hospitals can better educate and heal.

Mr. President, I ask my colleagues to seriously consider these comments as they think about supporting future communications legislation. Over the last few months, Senator HOLLINGS has been pushing the most comprehensive communications measure in the last 60 years, and it will have an even greater impact. Its regulatory requirements are far more numerous and far more complex than the Cable TV Act's. And we all know what a fiasco the Cable Act has become. But Mr. President, I can assure you that it will look like child's play if we decide to expand the FCC's authority—and that is not what I have in mind when I think of reinventing government.

Mr. President, I ask unanimous consent that a series of articles be printed in the RECORD.

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

[From the Wall Street Journal, Apr. 8, 1994]

REVIEW & OUTLOOK: BLOCKING THE INFORMATION HIGHWAY

Come to think of it, Al Gore really does look like a state highway cop. Put a helmet and mirrored aviator glasses on the Vice President and you're looking at the guy whose Federal Communications Commission is setting up radar traps and roadblocks all along the Information Highway.

The Gore-FCC's 55 mph speed limit is a mandated 17% reduction in cable TV rates, due to take effect May 15, not to mention some 700 pages of attendant regulatory caution lights. This week, Southwestern Bell and Cox Enterprises junked their proposed $4.9 billion venture into exploring the synergies of cable TV and telephones. The deal foundered principally on the same roadblock that recently thwarted the union of Tele-Communications and Bell Atlantic: an almost certain reduction in cash flow to the cable operators from the 17% cut in their subscriber rates.

Also, Tuesday, Judge Harold Greene, overseer of the AT&T consent decree since 1982, flagged down AT&T's purchase of McCaw Cellular. Judge Greene wants the companies to show that the acquisition is "in the public interest," but even more breathtaking, they have to actually pay their lawyers to prove to Judge Greene that circumstances in telecommunications have changed since the consent decree.

Now, the folks at the FCC are getting testy over the charge that their rate reduction is wrecking the information highway. Their responses, as reported in Wednesday's Washington Post, deserve a lot of attention.

First there was Mr. Gore's handpicked FCC chairman, Reed Hundt, until recently a Beltway lawyer. Mr. Hundt offered that the 17% cut will be good for business because the cheaper rates will attract more customers. (Several weeks ago, when TCI-Bell Atlantic collapsed, we likened the FCC's mindset to that of French bureaucrats. We apologize the French bureaucrats.)

Another, anonymous FCC source got closer to the heart of it: "Our job is not to make mergers work or not work. Our job is to effectuate Congress's mandate that consumers pay reasonable prices for cable and for the industry to have reasonable incentives for future investment." Succinctly, that is the regulators' credo.

Granting the sincerity of the cops here, there is in fact a serious philosophical difference at the center of this tension between the public servants and the road runners on the information highway.

Vice President Gore especially talks a good game about embracing the vision of an information-driven economy riding along electronic pathways. But at crunch time, Mr. Gore and his allies are choking. They're afraid that somewhere, somehow consumers could be "hurt" when the corporate giants start competing hard for the information market. That is, even high-tech Democrats don't trust the market to produce good on its own. No, "in the public interest" they will set up roadblocks on the information highway to mandate safety inspection and extract tolls. Slower is safer.

Our own view is that it is truly hubris for these politicians to think they can somehow fine tune or stage manage the rapidly developing world of advanced technologies. That includes its emerging financial and corporate structure. No doubt the investment bankers are right that the deals will get done eventually. But the famous executives aren't the only ones gridlocked by these decisions. Entire armies of engineers and software wizards, the people who will actually bring this exciting future to life, are put in lead shoes when the FCC micro-manages like this. Our guess is that consumers would happily risk exposure to these folks right now, but the tekkiecrats of Clinton Administration think otherwise.

Of course, even in a down market there are winners. One potential beneficiary that comes to mind could be John Malone's Tele-Communications. With FCC's rate mandate suppressing the income of the remaining small cable operators, they're likely to become vulnerable to acquisition, at a reduced price. Incidentally, we notice that TCI has just elected to its board of directors former House majority whip Tony Coelho, the ultimate Beltway gamesman. Makes sense to us, under the circumstances. But we'd feel safer if these fellows were doing their deals beyond the Beltway, out in the open market where we could seen them.

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[From the Washington Post, Apr. 6, 1994]

FCC HEAD DEFENDS CUTS IN CABLE FEES

(By Paul Farhi)

Cable companies should be grateful that the FCC is cutting their rates, says FCC Chairman Reed Hundt. The reason: They'll make more money in the long run.

Hundt said yesterday that the 17 percent in price reductions ordered by his agency will enable cable companies to attract customers who until now have been scared away by the cost of monthly service. Cable subscriptions, he noted, have "plateaued" at about 60 percent of the nation's households, and lower prices will help operators "break through" to more customers.

"The question begged is why does the telephone industry have 100 percent penetration and cable only 60 percent, and I would suggest that price has something to do with it."

Hundt, a protege of Vice President Gore who was named by the White House to run the FCC in November, made his remarks at a luncheon meeting with editors and reporters of The Washington Post. Soon after he spoke, Southwestern Bell Corp. and Cox Enterprises Inc. announced they have called off their proposed partnership, blaming the FCC's rate action for depressing the value of the cable properties.

Hundt said the rate cut is good for consumers because it will bring either lower prices or better value for the same price. He said it hasn't harmed the cable industry's ability to raise capital "in any way. * * * It all remains to be seen. It should not be prejudged."

But Decker Anstrom, president of the National Cable Television Association, argued that Hundt is wrong on both counts. If price cuts could attract more customers, "cable operators would have been cutting prices five to 10 years ago," he said. "Anytime the government forces you to cut your prices 17 percent, there's going to be fallout."

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[From the Washington Post, Apr. 6, 1994]

SOUTHWESTERN BELL, COX CALL OFF CABLE MERGER; FCC'S MOVE TO CUT RATES DRAWS BLAME AGAIN

(By Paul Farhi)

A second multibillion-dollar deal between a cable company and a major phone company fell apart yesterday, and once again the federal government got the blame.

Citing the adverse impact of new cable TV rate regulations, Cox Enterprises Inc. and Southwestern Bell Corp. called off a partnership they had struck in December that would have combined Southwestern's deep pockets and technological prowess with Cox-owned cable systems worth about $3.3 billion. Cox has about 1.6 million subscribers.

The collapse of the proposed partnership follows by six weeks the implosion of a much larger merger between Bell Atlantic Corp., the regional phone company in this area, and Tele-Communications Inc., the world's largest cable company.

As in the aftermath of the Bell Atlantic-TCI divorce, executives from both Cox and Southwestern said they could not agree on a price as a result of lower earnings and cash flow projections in the wake of the Federal Communications Commission's order in February to cut cable prices by 7 percent.

The 7 percent cut, which followed an initial rollback of 10 percent last fall, has been blamed for upsetting smaller deals as well. In February, Falcon Cable of Los Angeles canceled a planned stock offering, and last month Canada's BCE Telecom said it would renegotiate a $400 million investment in Jones Intercable, a major cable operator, as a result of the rate changes.

In each case, executives say the FCC's action has not only diminished the value of cable properties, but also has crimped the industry's ability to attract money for investment in the hardware that will create the promised "information superhighway."

Cable and phone companies own the wire-based networks likely to form the main arteries of the highway, and the combination of their capital and expertise has been touted as a way to speed up the construction.

Noting Vice President Gore's advocacy for building advanced telecommunications system, Cox Cable President James Robbins said bitterly yesterday, "The administration seems intent on creating the information highway and the FCC seems intent on blowing up the bridges."

Firing back at industry critics, a high-level FCC source said yesterday, "Our job is not to make mergers work or not work. Our job is to effectuate Congress's mandate that consumers pay reasonable prices for cable and for the industry to have reasonable incentives for future investment. I think we did that."

Rather than curtail the phone industry's appetite to enter the cable business, the new FCC rate rules ultimately may reduce the price of smaller cable companies and inspire cash-rich telephone companies to buy them on the cheap, said Berge Ayvazian, an analyst with the Yankee Group in Boston. Such a strategy, he said, reflects the notion that it may be cheaper for the telephone industry to buy existing cable systems than to build costly new ones outside their home markets.

While both Southwestern and Cox urged the FCC to revisit its regulations, agency officials said yesterday that was unlikely to happen anytime soon. The new rules, contained in 500 pages of documents released by the FCC last week, go into effect on May 15 and will likely affect prices paid by most of the 58 million households that subscribe to cable.

Under the proposed deal, Southwestern, the San Antonio-based regional phone company, was to have invested $1.6 billion for 40 percent of 21 cable systems owned by Cox, the privately held Atlanta media company that owns the Atlanta Journal-Constitution. But the deal has been subject to renegotiation for several weeks, and a final break-

down occurred yesterday morning, sources close to the Bell company said.

Southwestern in January became the first Baby Bell to enter the cable business when it took over ownership of the cable systems in Montgomery and Arlington counties; those systems were not part of the Cox venture. The company will invest the $1.6 billion earmarked for the Cox deal in other, unspecified ventures in the wireless communications field, said Jim Kahan, Southwestern senior vice president.

[From USA Today, Apr. 6, 1994]

SOUTHWESTERN BELL, COX CALL OFF DEAL

(By James Cox)

Southwestern Bell on Tuesday killed plans to team up with Cox Cable, blaming federal regulators for the demise of the $4.9 billion joint venture.

Southwestern Bell said nationwide cuts in cable TV rates ordered Feb. 22 by the Federal Communications Commission spoiled the deal. It said the 7% cuts would have kept Cox cable systems from generating enough cash flow to justify its $1.6 billion investment.

Another regional telephone giant, Bell Atlantic, and the USA's largest cable company, Tele-Communications Inc., blamed the FCC's rate cuts for the collapse of their megamerger in February.

The FCC is a "convenient whipping boy," but its rate rules were widely anticipated and have not discouraged dealmaking, says William Kennard, FCC general counsel.

The cuts "have in no way put an end to new ventures in the telecommunications era," says FCC chairman Reed Hundt.

Consumer groups said the two deals more likely fell through because of higher interest rates and uncertainty about Congress' efforts to set terms under which telephone and cable companies can get into each other's businesses.

In December, Southwestern Bell agreed to buy a 40% stake in Cox Cable, an arm of Cox Enterprises, a privately held media company that also owns newspapers and TV stations.

Cox Cable intended to use Southwestern Bell's cash and technology to upgrade its cable systems to offer telephone service and interactive TV. Together, the two considered buying other cable systems that would have made Cox the USA's No. 3 cable operator.

Cox, now the 6th-largest cable company, serves 1.8 million households. San Antonio-based Southwestern Bell provides telephone service in the Southwest and owns a cable system serving 230,000 households in suburban Washington, DC.

Southwestern Bell shares closed at $39½, up ⅞ Tuesday.

[From the Washington Post, Mar. 31, 1994]

RULES ISSUED FOR CUTTING CABLE RATES; INDUSTRY MAY TAKE FCC TO COURT

(By Sandra Sugawara)

The Federal Communications Commission yesterday issued rules designed to cut cable television prices an average of 7 percent. A key consumer group praised the rules, but a cable industry group threatened legal action.

The new rules implement a rate cut the FCC approved last month, on top of another 10 percent reduction the commission mandated last year. Last month the FCC had few details of how it would determine cable rates.

The National Cable Television Association said it intended to challenge the rules in court. It said the regulations are "intended to drastically reduce the industry's revenues and that cannot help but reduce our options when it comes to introducing new programming, new services and new technologies."

The new rules, which will take effect May 15, say that generally, rates should be reduced by as much as 17 percent from Sept. 30, 1992 levels—the sum of the two rate cuts.

But the actual rates will depend on a number of factors, including how many channels and subscribers a cable system has and the wealth of the region it serves.

An FCC official said an analysis by the commission showed that cable operators in wealthy regions charged more than cable operators in poor areas. Even though operators in more affluent areas may reduce rates by an average of 17 percent, they will still charge more than operators in poorer regions, because they will be starting from a higher level.

"We would prefer that price be based on actual cost rather than the income of people," said Bradley Stillman, general counsel of the Consumer Federation of America.

Cable companies also will be allowed rate increases for inflation and additional channels. And they will be allowed to pass on to customers the cost of new programming, plus a 7.5 percent profit margin.

Stillman said he was concerned that companies such as Tele-Communications Inc., the biggest U.S. cable operator and owner of both cable systems and programming, would be able to offset rate cuts by raising programming charges.

The FCC says the average subscriber will pay less, but that a customer who is getting more channels and more programming than in September 1992 probably will pay the same or more.

Stillman said the FCC appeared to have "closed the loopholes" that had allowed cable operators to get around the last FCC rate cut. Rates increased for about one third of cable subscribers after the agency ordered the 10 percent reduction.

To try to simplify the process for cable operators, who have complained about the rules' complexity, the FCC plans to put the rate formula on computer disks, so that all operators have to do is plug in numbers. The disk probably will be available next week at a minimal charge, the FCC said.

[From Broadcasting Cable, Apr. 1, 1994]

SEES NO EVIL

Reed Hundt still doesn't get it. On the same day that Southwestern Bell and Cox called off their joint venture for wont of cash flow, the chairman of the FCC was telling the *Washington Post* that cable would prosper under his new regulatory juggernaut; not to worry.

We wonder what it will take to crack that certitude on the part of Hundt and his cadre of social engineers. A few bankruptcies might help, although none have yet volunteered. Some further pullbacks from investment in the information highway? Definitely in prospect. There's certainly the likelihood that smaller cable systems will be squeezed into selling out—probably to telcos in their own service areas that can take advantage of the depressed price and the lightened regulatory environment. Perhaps the chairman will accept the depletion of cable's capital markets as a measure of the bad news.

Hundt is right, of course, in the larger sense. Even his Draconian cutback won't be able to dismantle the cable industry or eliminate its viability for the future. It will, there's no doubt, slow down cable's progress and send the telcos down another path in developing the information highway. The irony is that if cable is back in bloom 10 years from now, Reed Hundt will be the first to take the credit.

GOOD MONEY AFTER BAD

A congressional report on TV Marti concludes that sweeping changes are necessary in the service. The study found that the program wastes as much as $10 million each year (including more than a million dollars a year in salaries to people who "supervise, review and evaluate" but do not actually contribute to production [the study also suggests a review of hiring practices]). Among its other findings: that problems identified by the General Accounting Office almost two years ago have not been resolved; that the service is characterized by "politicized journalistic decisions and an atmosphere of suspicion, cronyism and hostility"; that those problems are nothing compared to the fact that almost no one sees the broadcasts due to limited hours of operation and Cuban jamming, and that current federal budget concerns demand that programs such as TV Marti "must have sufficient justification for their funding, and returns on investment must be commensurate with the expenditure.

No-brainer, right? Critics have charged that TV Marti is wasteful and inefficient, and here's an independent study that finds the same thing, as the GAO report of 1992 concluded before it. So what's the study conclusion? TV Marti is a vital service, but should be moved to the UHF band at a cost of an additional $1 million and with the hope of projected savings down the line. Savings, of course, defined as wasting only $10 million a year instead of $20 million. The price of that waste could be the livelihood of some radio broadcasters, whose signals are at risk from stepped-up Cuban jamming. This boondoggle has more lives than a Hindu cat and is fast becoming an entrenched symbol of politicization and waste in government.

We have our own recommendation for sweeping change. It involves a broom, a dustpan and the nearest trash can.

## TAX DAY

Mr. GRASSLEY. Mr. President, April 15, tax day, is upon us. Not the most popular day on most people's calendars. The taxpayers worry about this day for two reasons: The ever-growing level of taxes we must pay, and two, the IRS.

First let me discuss the level of taxes. Americans still view their tax payments as burdensome and unfair. Most people feel they pay too much to Uncle Sam. But, we will never get taxes down until we first cut spending.

It is sadly ironic that just when the American people are getting hit with their tax bill, the big spenders here in Congress are fighting as hard as they can to kill the Exon-Grassley amendment which would reduce spending by one-third of 1 percent over 5 years—just $26 billion.

Like Chicken Little, the big spenders here in Congress are claiming that the sky will fall as a result of this minuscule cut. So when you're making that check out to the IRS, and you think it is too big, you can thank in part the big spenders who oppose the Exon-Grassley amendment, because they believe we cannot even cut one-third of 1 percent out of the budget.

As ranking Republican of the Finance subcommittee responsible for oversight of the IRS let me now turn to a few serious problems within the Internal Revenue Service.

I would like to commend Senator PRYOR, the chairman of the subcommittee, for his long-time efforts to win passage of the Taxpayers Bill of Rights Two, which we coauthored. The intent of this bill is to build upon the original Taxpayers Bill of Rights by addressing many of the horror stories that people tell from encounters with the tender mercies of the IRS.

I intend to work closely with Senator PRYOR to ensure that come next April 15 the Taxpayers Bill of Rights Two becomes law.

As Americans work through the night, well, at least until midnight tonight, wading through all this paperwork, I know many are saying there must be a better way. I think they are right.

Let me give you one example. Many of you, myself included, have to fill out forms for the Keogh program. In fact, over 889,290 people use Keogh plans, deducting over $7 billion.

We all know how complicated and time consuming it is for businesses and individuals to establish Keogh programs and then update them every year. It is certainly time that could be much better spent with our families.

You would think that all this paperwork is absolutely essential. Yet, how much can the IRS identify that they received from audits of Keogh plans? Six million dollars in 1992. Yes, that is million, with an "m".

Mr. President, I really wonder if that is a fair tradeoff. The Congress needs to pursue tax simplification and not ask the American people to waste their time filling out forms that only gather dust in warehouses.

It is a great concern of mine that taxpayers realize fair and equitable treatment in their dealings with the IRS. That is why I am particularly concerned about the findings of the Transactional Records Access Clearinghouse [TRAC] located at Syracuse University.

Prof. Susan Long and David Burnham have conducted an ongoing review of the IRS's management and have made some disturbing findings. For example, individuals in Nevada are three times more likely to be audited as people from New Jersey. You are twice as likely to be audited if you live in Manhattan than if you live in Brooklyn. You are twice as likely to be audited if you live in Wyoming than if you live in Philadelphia.

I can see tax cheats reading this report and deciding to move where they are less likely to get caught.

TRAC found that there was great variance nationwide in the IRS agreeing to an installment agreement for taxpayer delinquent accounts. There was a 1,000-percent difference in the IRS agreeing to installment payments if you lived in Indiana versus New Hampshire. Taxpayers are more than three times as likely to get an installment agreement if you live in San Francisco versus Los Angeles and more than twice as likely to get an agreement if you lived in Cleveland versus Cincinnati.

Similar disparities exist when the IRS decides to seize the accounts of delinquent taxpayers. A 1,000-percent difference in deciding to seize or not seize exists between Austin and Dallas. Los Angeles and San Francisco, and Manhattan and Brooklyn.

Even the IRS admits that you are more than four times as likely to have the IRS offer to compromise in Iowa than you are in California. So the message is clear, if you want to negotiate with the IRS move to Iowa, although I am not sure the Iowans who have to negotiate with the IRS would agree.

The underlying assumption is disturbing: The kind of treatment you get depends on where you live. Mr. President, I ask unanimous consent that these TRAC findings be printed in the RECORD.

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

*IRS seizure rate taxpayer delinquent accounts*

[In percent]

| | |
|---|---|
| TX (Austin) | 4.1 |
| CA (San Jose) | 3.1 |
| FL (Ft. Lauderdale) | 2.7 |
| PA (Pittsburgh) | 2.6 |
| CA (Los Angeles) | 2.4 |
| NY (Brooklyn) | 1.9 |
| Connecticut | 1.3 |
| TX (Dallas) | 0.4 |
| TX (Houston) | 0.3 |
| FL (Jacksonville) | 0.3 |
| Massachusetts | 0.3 |
| New Jersey | 0.2 |
| CA (San Francisco) | 0.2 |
| NY (Manhattan) | 0.2 |
| PA (Philadelphia) | 0.2 |
| U.S. Average | 0.5 |

*IRS installment agreements taxpayer delinquent accounts*

[In percent]

| | |
|---|---|
| Indiana | 22.7 |
| TX (Houston) | 19.0 |
| OH (Cleveland) | 17.2 |
| CA (San Francisco) | 16.3 |
| TX (Dallas) | 15.5 |
| New Jersey | 13.3 |
| NY (Manhattan) | 8.7 |
| CA (San Jose) | 7.2 |
| OH (Cincinnati) | 6.4 |
| CA (Los Angeles) | 5.9 |
| PA (Philadelphia) | 5.3 |
| TX (Austin) | 5.3 |
| NY (Brooklyn) | 5.1 |
| PA (Pittsburgh) | 3.4 |
| New Hampshire | 2.2 |
| U.S. Average | 12.7 |

*IRS audits of individual income tax returns*

[In percent]

| | |
|---|---|
| Nevada | 1.9 |
| Wyoming | 1.5 |
| NY (Manhattan) | 1.4 |
| North Dakota | 1.1 |
| Georgia | 1.0 |
| NY (Brooklyn) | 0.7 |
| PA (Philadelphia) | 0.6 |
| Connecticut | 0.6 |
| Massachusetts | 0.5 |
| New Jersey | 0.5 |
| U.S. Average | 1.0 |

Mr. GRASSLEY. I asked the Department of the Treasury what steps the IRS has taken to ensure that there is uniformity nationwide in the treatment of taxpayers. I ask unanimous consent that the Department's response—a nonanswer—be printed in the RECORD as an example of bureaucratspeak at its finest.

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

TAXPAYER UNIFORM TREATMENT

Question 6: What management steps has the IRS taken to ensure that there is uniformity nationwide in the treatment of taxpayers for tax violations?

Answer: The Service's primary selection for auditing returns begins with our Taxpayer Compliance Measurement Program (TCMP). This involves the random selection of taxpayers for comprehensive audits. The results of the audits are analyzed to develop discriminant functional (DIF) data which is used to score returns as they are filed. A return with a higher DIF score is more likely to have errors. The system also is used to determine levels of compliance for various classes of taxpayers and to develop yield curves. The yield curves are used to predict the amount of additional taxes that would be assessed at varying levels of coverage.

Management considerations in allocating resources for the auditing of tax returns and the collection of amounts due is based on resource availability and workload. The IRS determines the number of returns by taxpayer class to audit. The returns are generally selected based on DIF scores which cause the returns with the highest potential tax adjustment to be selected first, regardless of location. This allows the IRS to maximize revenue to the government and ensures that the most non-compliant classes of taxpayers are most likely to be audited. The IRS uses the Collection Resource Database and Information Tracking System (CREDITS) to base its resource allocation decisions. Recommendations by the Collection Resource Allocation Study Group are being implemented (See Attachment A). These actions will improve the staffing/workload balance among District Offices.

Because of geographic and demographic differences, workload/staffing balance among District Offices will never be perfect. However, actions are being taken to improve it by designating some District Offices as "no growth areas" where resources will be allocated sufficient to fund permanent employees less attrition.

In addition, the IRS has instituted new ways of doing business such as Compliance 2000 and the Market Segment Specialization Program (MSSP) which have resulted in the creation of industry agreements on the way certain issues should be reported and auditing guidelines to standardize the audit techniques used by examiners nationwide. The Office of Penalty Administration serves as a focal point for assuring Servicewide consistency of the application of penalties.

Mr. GRASSLEY. Another issue that concerns me is the IRS' handling of

anonymous tips. Before the Berlin Wall came down, we all heard about places where friends and neighbors called in and informed on each other. Its something totalitarian governments like to encourage.

The IRS has its own peculiar program that rewards and encourages people to point the finger at private citizens. The IRS will open an investigation on you or me without our knowledge based on minimal information. If the IRS finds nothing wrong, your faceless accuser will not be punished for his mistake.

I asked the Department of the Treasury several questions about this program, and its replies are disturbing. Approximately 40 percent of the people investigated by the IRS based on outside accusations were found to be completely innocent. However, that does not mean they were not subject to intense scrutiny by the IRS.

And how much did the IRS recover from the rest of the people? A couple million bucks out of well over $1 trillion in revenue. The Congress needs to consider whether this policy is a cost-efficient use of the time of IRS agents; but more importantly, whether the benefits from this policy are really worth the drawbacks to the freedoms we all cherish.

Finally, let me note that these concerns about the IRS are not specific to this administration. These are issues that well predate the current administration. I know that the Department of the Treasury has good intentions, and I hope to work with them to address these and other issues and report to the taxpayers better news next April 15.

I yield the floor.

Mr. COVERDELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Georgia.

## THE CLINTON TAX HOAX

Mr. COVERDELL. Mr. President, at the conclusion of my first year in the United States Senate, as we were approaching the new year, I was asked, "Well, what was your greatest disappointment?" I indicated at the time that my single greatest disappointment was the fact that we had been unable to defeat in this body the Nation's largest tax increase in its history; the largest tax increase in its history.

And then, with all the business that we deal with here in the Senate, the pain of that loss began to ameliorate and we moved on to other activities and I did not think about it every day.

And then, as we come upon tomorrow, April 15, when the bill comes due, all the memories of that 7-month battle renew themselves for me.

Everybody is writing about the impact and the effect. None of it makes very good reading, Mr. President.

I was reading an article by Alan Reynolds of the Hudson Institute that appeared in the Wall Street Journal on April 12. He goes back to that long, arduous battle over the fact that, well, this tax increase is not going to affect many Americans; just 1.2 percent, I believe, was the figure that kept being used, just a small number of Americans and, therefore, we should excuse the fact that we are imposing this economic burden on America because it did not affect very many people.

This article says, if that were true, that would equate to 1.4 million Americans. But it goes on to say:

> This is much worse than misleading. It leaves out millions of unmarried professionals and managers. The 36 percent tax applies to all taxable income above $115,000 for singles, $127,500 for household heads, and $70,000 for married people who file separately. There are 5.6 million families with expanded incomes between $100,000 and $200,000.

The article goes on a bit, and it concludes by saying, Mr. President:

> In reality, the punitive new tax rates on success will indeed hurt saving and will also shrink labor force participation.

That means losing jobs.

> The statistical tricks used to make incomes of affected taxpayers look higher than they are, or to pretend that only families filing joint returns are in the higher tax brackets, will not fool those who are now filing their 1993 tax returns. If legislators who voted for higher tax rates really believe that only 1.2 percent of voters would be directly affected, they will be surprised by the number of angry taxpayers they have to face in November.

And I think that is absolutely accurate.

But the gloomiest report, the one that really set me back in my chair, was the statistical data that now, long after the final vote and the cheering that occurred in this gallery when it passed by one vote, now that we can look at this data and sort of get a true fix on how it affects my State, the State of Georgia, it is not a pretty picture.

The data now show that, over the next 5 years, $6.4 billion will be moved from the families, the individual citizens, and the businesses of my State to Washington, where, theoretically, we have people that feel they are more able to know what to do with these funds than had they been left in the hands of families and businesses at home in my State.

I harken back to the argument, "Well, it is not going to affect anybody except somebody that is terribly wealthy." But $443 million, that is nearly a half billion dollars, will come from Social Security recipients in my State over the next 5 years. It does not sound like those folks are necessarily just wealthy folks, Social Security recipients.

Over $1 billion will come from people who pay additional gas taxes. Now, that is not just wealthy folks. Those are people that are taking the kids to school, taking the route to work and back, going to pick up groceries. That is everybody. Everybody who owns an automobile in my State is going to shell out another $1 billion to send to Washington.

The sum of $1.5 billion comes from just miscellaneous impositions in the bill, user fees, et cetera. That is everybody. That is not just wealthy folks, as was portrayed in these hallowed Halls.

The sum of $3.2 billion is the number for half that is directed at this target that has been rebutted by the Wall Street Journal. But it was directed at this group that, theoretically, is so wealthy that it will be unaffected by this kind of tax increase.

I am reminded every time one of those self-styled wealthy people, many of whom are entrepreneurs, small businesses, every time $20,000 of this amount is written out in a check and sent to Washington for better use, that $20,000 is not left there in that little town and community to hire the graduate from high school or college this May, when they are out looking for a job. That figure is the exact amount that is coming right out of the workplace, that is denying somebody standing there in line with a job application in the private sector.

Mr. President, the 1992 election was virtually a rebellion and the message was, quit doing this kind of thing. The message was, you get spending under control. The promise was, we are going to bring relief to the average American. And the result was, in my State, the largest tax increase in American history and the loss of $1.5 billion a year for my citizens, my neighbors, and businesses.

This is the beginning of President Clinton's economy, tomorrow, April 15, when this economic plan is imposed on the citizens of my State and this Nation.

Mr. President, I ask unanimous consent to have the article by Mr. Reynolds that appeared on April 12 printed in the RECORD.

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

[From the Wall Street Journal, Apr. 12, 1994]

THE CLINTON TAX HOAX

(By Alan Reynolds)

> President Clinton has assured us that when we get around to filing our tax returns, nearly all of us will be pleasantly surprised to find that our taxes have not gone up after all. "In fact," says The Economic Report of the President, "the income tax increases apply only to families with taxable incomes over $140,000—the top 1.2% of households."
>
> Where did they come up with that 1.2% figure anyway? It turns out to be a count of the number of families earning more than $200,000. That comes to 1.4 million, or 1.3% of all families. These families are said to be those with taxable incomes above $140,000, which is where the new 36% tax kicks in on a joint return.
>
> How does a before-tax income of $200,000 turn into a taxable income of only $140,000?

When the administration says 81% of its tax increases affects only those earning more than $200,000, it is defining income in a rather creative way. The small print under Table 2.1 in the budget (omitted from the same table in the economic report) explains: "Family income includes all federal income, social insurance and corporate income taxes." Thus, families supposedly earning $200,000 are really earning closer to $180,000 in the conventional sense. This figure then becomes $140,000 of taxable income, assuming an average deduction of $40,000.

Even if the number of families with "expanded" income above $200,000 is really equivalent to the number of joint returns with a taxable income over $140,000, that still does not tell us what percentage of workers or taxpayers will be affected. For one thing, most high-income families have at least two family members working. That means there are nearly twice as many workers as families affected by the new higher tax rates. By my calculation approximately 2% of all workers who are in married families filing joint returns are now in a 36% or higher tax bracket.

But that is only a fraction of the problem. Recall that the economic report claims that "only 1.2% of households" are affected by higher tax rates. This is much worse than misleading. It leaves out millions of unmarried professionals and managers. The 36% tax applies to all taxable income above $115,000 for singles, $127,500 for household heads and $70,000 for married people who file separately. There are 5.6 million families with expanded incomes between $100,000 and $200,000. That figure includes many singles who are indeed affected by the 36% tax bracket, as well as married people who do not file joint returns and have taxable incomes above $70,000. Not one of these taxpayers is counted among thè 1.4 million families earning over $200,000. Retired people hit hard by higher income tax rates on Social Security benefits are not counted either.

Adding singles and second-earners into the ranks of those shoved into the higher tax brackets would be more honest, but would still understate the percentage of taxpayers in that plight. That is because low-income families do not pay any income tax. More than 10% of all households have instead been receiving a federal check at tax time from the earned income tax credit. This proportion will soon rise quite substantially because the earned income tax credit was made far more generous last year. As a result, many second-earners in two-paycheck households may stop working—which further expands the percentage of taxpayers hit by higher tax rates.

In fairness, nobody on the Clinton team ever claimed that higher tax rates would have no bad effects on the economy. What they claimed is that higher tax rates would only affect 1.2% of households, which is simply untrue. They also claimed that higher tax rates would result in lower long-term interests rates, which never made sense and is now discredited by six months of rising bond yields.

There is a new line of defense, but it does not look more promising than the first two. Mr. Clinton's economic report claims tax rates won't be so bad because "high income taxpayers are presumably more likely to make the payments out of savings." In demand-side, trickle-up economics, savings don't matter. Those "rich" families and singles can simply pay their taxes by liquidating stocks and bonds at distress-sale prices.

Besides, says the economic report, payment of the EITC will tend to stimulate demand." Just send out more government checks on the condition that one spouse stays home, and the economy will remain almost as rosy as the budget forecast of perpetual 5.8% yields on 10-year bonds.

In reality, the punitive new tax rates on success will indeed hurt saving and will also shrink labor force participation. The statistical tricks used to make incomes of affected taxpayers look higher than they are, or to pretend that only families filing joint returns are in the higher tax brackets, will not fool those who are now filing their 1993 tax returns. If legislators who voted for higher tax rates really believed that only 1.2% of voters would be directly affected, they will be surprised by the number of angry taxpayers they have to face in November.

The PRESIDING OFFICER. The Senator from Pennsylvania.

## SENATOR DOLE

Mr. SPECTER. Mr. President, earlier today there had been a number of comments commemorating the 25th anniversary of the speech by Senator DOLE concerning the issue of disability. I believe reference was made to that being his initial speech as a U.S. Senator.

I wish to add my voice of congratulations to Senator DOLE for that speech, and more important for his outstanding service as a U.S. Senator and before that as a Member of the U.S. House of Representatives, and before that as a member of the Kansas Legislature, and before that as the county attorney of Russell, KS.

I have known Senator DOLE for many years since moving to Russell in 1942, so that my association with, friendship with BOB DOLE goes back some 52 years. Of course I am much younger than Senator DOLE. When I moved to town he was already a hero of athletics in Russell High School, a big man on campus at the University of Kansas, and then shortly thereafter he was a war hero. BOB DOLE's courageous story as a wounded veteran from World War II is well known. His disability was extreme. And he fought back from that disability, being hospitalized, convalescing over a very long period of time until he regained his strength and went on to a brilliant career.

BOB DOLE became the county attorney in Russell, KS. One of the stories which BOB DOLE tells, and I think he would not mind having it repeated, is that both parties sought him to run as the nominee for county attorney in the 1950's, very much like Dwight Eisenhower was drafted to be President of the United States. He could have taken his pick of either party.

As BOB tells the story, he was somewhat perplexed at the outset until he checked the registration and then found he was a Republican. Coincidentally, the Republicans had a 2 to 1 majority in Russell County, KS.

Being county attorney in Russell County, a county of some 10,000, a city of some 5,000—actually I say Russell is a town of 4,998 people. It used to have 5,000 until DOLE and I left town. We left our brothers there and his brother Kenny Dole and my brother Morton Specter lived there for many years. Unfortunately, both passed away just about a year ago.

But BOB went from being county attorney in Russell to the State legislature. He went to law school at Washburn Law School, then was elected to the U.S. House of Representatives in 1960, served 4 terms, and was elected to the Senate in 1968, and has been reelected in 1974, 1980, 1986, and again in 1992. He has served as the chairman of the National Republican Party. He was the Vice Presidential nominee in 1976, was elected the majority leader in an election held in late 1984, served there in 1985 and 1986, and has been the Republican leader since 1987.

His work on this floor, and in this body, is legendary. It is better referred to in the CONGRESSIONAL RECORD, where he has made some of the most important pronouncements of any political leader in the history of the country, or on national television, or in the media.

His speech on disability has already been heralded as a milestone, leading other activists into the field of disability so that the disabled have equal opportunity. And we enacted recently the Americans with Disabilities Act as a result of leadership by Senator DOLE, and it was signed into law by President Bush.

Earlier today I noted the presence in the Senate complex of President Clinton, who was here to join Senator DOLE in a lunch in Senator DOLE's office to pay tribute to Senator DOLE's outstanding accomplishments.

I just wanted to take a few minutes of the Senate's time this afternoon—I note my colleague, Senator PELL, has come to the floor so I shall conclude—just to add my voice in tribute to ROBERT J. DOLE, a man whom I have known for many, many years with great respect and admiration.

I yield the floor.

The PRESIDING OFFICER. The Senator from Rhode Island.

## SENATOR DOLE

Mr. PELL. Mr. President, just to follow up the words of the Senator from Pennsylvania, I share in his regard for Senator DOLE. He is a man of his word. He is a man of honor. He knows what war is all about. And in this day of celebration of his work, I want to join in expressing my regard for him.

## THE TRAGEDY IN KURDISTAN

Mr. PELL. Mr. President, this morning a somber President Clinton addressed the Nation about the tragedy that unfolded overnight in Iraqi Kurdistan. As all of us know, two United States Army Blackhawk heli-

copters, carrying military personnel from several countries—including possibly Britain, France, Turkey, and the United States—were shot down early this morning by United States F-16 C jets.

As of now, few details are available. It is unclear who or how many people were killed, or what exactly led to the incident. It is certain, however, that something went terribly awry, and that a number of fine people from several countries have died in a tragic mishap.

I want to take a moment to stress that these military personnel made the ultimate sacrifice in service of a noble cause. The international combined task force [CTF] in northern Iraq was established to prevent the wholesale slaughter of the Iraqi Kurdish and other minorities located there. My staff has traveled to Iraqi Kurdistan on a number of occasions—at times using the same route taken by the two helicopters that were shot down—and has spent a great deal of time with CTF and U.N. personnel. Those killed early this morning were more than just statistics; they were able and committed people working selflessly in the most difficult of circumstances. They, like anyone else, had families, hopes, and dreams. It is a tremendous loss for us all.

The protection of the Kurds—and the containment of Iraq—continues to be a fundamental interest of the international community. It is important that we in the Senate, and the American public, remember that fact. This is a day to honor the fallen and to remember the high cause for which they gave their lives. President Clinton, in his poignant statement this morning, cut right to the heart of the issue when he said,

> Those who died today were part of a mission of mercy. They lost their lives while trying to save the lives of others. The important work they were doing must and will continue.

On behalf of all of us, Mr. President, I offer my profound regret and condolences to the families of the victims.

The PRESIDING OFFICER. The Senator from Kansas.

Mrs. KASSEBAUM. Mr. President, I certainly join with the Senator from Rhode Island, the chairman of the Foreign Relations Committee, Senator PELL, in expressing sympathy to the families in his eloquent tribute to those who did lose their lives today over Iraq.

## THE ANNIVERSARY OF SENATOR DOLE'S FIRST SENATE SPEECH

Mrs. KASSEBAUM. Mr. President, I rise to congratulate my colleague from Kansas on this special remembrance of a speech that is no less compelling today than it was a quarter of a century ago. In choosing the topic for his first speech in this body, Senator DOLE elected to discuss an issue of tremendous importance to him personally and to all of us as U.S. citizens. Issues relating to persons with disabilities—whether physical, mental, or emotional—remain a great challenge to our Government, to businesses and to families, and we have certainly come a long way in many of these areas since 1969.

Senator DOLE laid out a number of his concerns with the state of persons with disabilities in his maiden speech, and he has kept those thoughts in sight throughout his career. His personal commitment and dedication to this issue is felt from communities in Kansas to points across this country, and is evident in his work with the Dole Foundation and here in the U.S. Senate. He has always approached the complex challenges of disability with thoroughness and depth, as well as understanding and compassion, and we owe him a great debt of gratitude for his leadership on this important issue.

As the Senator from Pennsylvania, Senator SPECTER, mentioned, this issue in particular has been mentioned by many who spoke. There are many other aspects of Senator DOLE's leadership that have gone on and beyond this issue, but this is one he has cared about in a very particular and personal way.

It certainly is a tribute to Senator DOLE as well as, I would suggest, a very gracious gesture that the President of the United States came to call on Senator DOLE today on this special anniversary.

Mr. President, I yield the floor.

## HONORING WILLIAM RASPBERRY

Mr. DURENBERGER. Mr. President, I rise today to congratulate one of the most valuable journalists we have in America—William Raspberry of the Washington Post—on the occasion of his Pulitzer Prize.

I think this recognition is not only richly deserved—it is in fact long overdue. I have been a Raspberry fan for many years, and I would like to share with my colleagues the chief reasons why.

Anyone who believes in a reasoned, thoughtful approach to our national problems can only have watched in dismay the trend in our political discourse in recent years. Never in America's history have public issues been talked about so much—with so little intelligence and illumination.

I like to refer to it as the "Crossfirization" of politics. On any issue, there are two and only two sides. We determine which side is right by judging the slogans on their bumper stickers. Because pretty much everybody today has clever media consultants, the slogans tend to be of a uniform quality—so we need a tiebreaker. The tiebreaker is, who can shout the slogans loudest on TV.

It is against this background that the eminence of William Raspberry takes on its true dimensions. Diogenes—the Greek philosopher of the 4th century B.C.—walked around in the daylight with a lantern "in search of an honest man." Today, he would have to look no further than William Raspberry.

The truth is an iceberg, and Raspberry recognizes this. A poor columnist lacks insight entirely. A good columnist provides some insight. A great columnist—like Raspberry—uses an original insight as a springboard for a full-scale investigation into the heart of social and political reality.

Earlier this week, Raspberry did something characteristic. He began a column about the rage of professional African-Americans who confront bigotry in their daily lives. In the middle of the column, Raspberry stopped: "(I)f I were smart, I'd simply acknowledge the truth of the thesis . . . and let it go at that. Instead, I'm about to turn a no-brainer into one of the most difficult columns I've ever written." He admitted that he personally didn't share that rage—and the rest of the column was devoted to his attempt to understand it in others.

A lesser columnist would have made the easy point about discrimination—and avoided the personal admission that ostensibly undercuts it. William Raspberry—in contrast—recognizes that scrupulous honesty increases the credibility and seriousness of one's arguments.

This approach animates the work of William Raspberry from start to finish. When he writes about social disintegration and the crisis of values, he writes in the voice of one who lives with these issues and takes them seriously. He is a man who listens—and a voice to be listened to.

I congratulate Mr. Raspberry on his Pulitzer. He deserves it. And I hope that the journalists of tomorrow take note of William Raspberry's example: Good guys can finish first.

I ask unanimous consent that a selection of excerpts from Raspberry's work—from the Washington Post of April 13—be included in the RECORD at the conclusion of my remarks.

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

PRIZE-WINNING THOUGHTS ON RACE, RAPPROCHMENT, REDEMPTION

Following are excerpts from Washington Post columnist William Raspberry's Pulitzer Prize-winning entry:

On a Supreme Court desegregation decision, likely to result in the closure of at least one predominately-black Mississippi college (1/29/93):

"It's impossible to grow up as I did—as a poor, black Mississippian forced into segregated and third-rate schools—and not admire the man most responsible for bringing an end to school desegregation. . . .

"But if the death of Thurgood Marshall prompts these thoughts, the threatened

death of a tiny college in the Mississippi delta prompts other, contradictory notions, among them this question: Must integration be the overriding priority for those who care about the education of young African Americans?"

On the birthday of black abolitionist Frederick Douglass (2/22/93):

"What would Frederick Douglass say . . . now? Wouldn't he be overjoyed to see college attendance rates for blacks approaching those of whites? Wouldn't he smile in satisfaction to see the growth of the black middle class, in affluence and influence . . . in knowing that the top military man in America is Colin Powell, a black man. . . .

"What would Frederick Douglass say if you seated him in the parlor of the Executive Mansion in Virginia—Virginia—and bade him sit while you fetched the governor, and then you walked in with Doug Wilder? . . .

"Suppose you ticked off the academic and political accomplishments of the grandchildren of slaves, even while informing him that there were still in America those who were indifferent, even hostile, to the advancement of his people. . . .

"And then suppose you put him in the governor's limousine and drove him through the slums of Richmond, or Washington or Los Angeles and let him see what my wife and I have seen too many times: the aimless drifters, the homeless in their cardboard shelters, the bullet-riddled walls, the vandalized schools, the pitifully undereducated children, the drug dealers and their prey.

"What would Frederick Douglass say?

"I think he would say nothing at all. I think that . . . Frederick Douglass would simply cry."

On gangsta rap and violence (6/2/93):

"My generation worried about racial segregation, mean southern sheriffs and the lynching of Emmett Till, but we sang about young love. My children's generation worries about being 'dissed' and sings about killing cops. . . .

"I wish their songs could be more like ours.

"But . . . I wish their world could be more like ours—that we could come together across the generations to reduce the amount of violence and despair in their lives. It'll take a lot more than censorship to get us there."

On reports that President Clinton planned to drop Lani Guinier's nomination as assistant general for civil rights (6/4/93):

"Something other than principle is at stake in the get-Guinier campaign. And something besides newly discovered information has led Cuban to confide that he doesn't agree with 'all' of her writings. Of course he doesn't. I don't either. I doubt that she does, no matter how serious she may have been when she wrote them.

"There are some things I'd like to hear her on. I'd like to know, for instance, how many of the proposals . . . would require new legislation and . . . in her view, are doable under the voting rights legislation she would interpret and administer as assistant attorney general.

"Hearings before the Senate Judiciary Committee are the place to get these matters cleared up. . . .

"Bork may have added a new verb ('to Bork') to our vocabulary. But at least Bork had his hearing. Ronald Reagan insisted upon it.

"Can't Clinton muster the guts to do as much for his nominee?"

On the long-term prospects for "rapprochement" between the Nation of Islam headed by Louis Farrakhan and mainstream black leaders troubled by his "baggage of anti-semitism" (2/20/93):

"For Farrakhan, all this may be a sign of wimpishness. . . . For the black political-civil rights establishment, on the other hand, Jewish support is critical . . . most of them simply don't subscribe to Farrakhan's notions about Jews, and they are troubled by his apparent fixation with Jews.

"But they are also intrigued by the prospect of a unity that could link mainstream activists with the disaffected masses that Farrakhan can . . . turn out by the thousands. Can they bring Farrakhan into the camp without triggering the defection of other critical allies?

"My guess is that they can't. . . . If he insists on going his own unreformed way, taking his occasional shot at Jews and equating black disconfiture with wimpishness, it's hard to see how last week's shining show of unity can turn out to be more than just another flash in the pan.

Repeating his call, first made in 1989, to "bring out the troops" in Washington (9/29/93):

"I believe we need to deal with the depression and despair of our young people—their joblessness, their hopelessness, their empty vision of the future. But I also believe that none of this is possible unless our children's homes and schools and playgrounds are safe places. We're got to do what it takes to make our cities safe again: with federal help and with federal troops, if necessary."

On Jesse L. Jackson's call for the black community to take a stand against violence (10/6/93):

"It does not absolve America of its racism. It does not contend that racism is no longer of much importance. It simply gives voice to what all of us know but have so much trouble talking about: that the major forces that threaten black America—family deterioration, teen pregnancy, drugs, violence—are things that have to be dealt with from the inside."

On stiffer sentences in the new crime bill (10/27/83):

"The crime that may lead to frightened America to take a chance on this flawed bill has its roots not in inadequate punishment but in unformed consciences. The rest of us may violate societal rules whose validity we nonetheless accept. The youngsters we so fear are not backsliders from an accepted faith; they are social infidels. Our values are not their values, our expectations are not their expectations, our fears are not their fears.

"None of this means that we shouldn't punish—even severely—those who violate the law. It means only that the problem—and any hope for solution—begins much, much earlier. . . .

"Maybe it's too much to expect a nation petrified by crime to do different things a different way—by undertaking serious prevention and, yes, redemption."

## SENATE ARMED SERVICES COMMITTEE ACTION ON THE NOMINATION OF ADM. FRANK KELSO

Mr. NUNN. Mr. President, this afternoon the Committee on Armed Services favorably reported the nomination of Adm. Frank B. Kelso II, U.S. Navy, to retire in grade as a four-star admiral. The committee carefully considered this nomination and I want to share with my colleagues the statement I made at the time the committee voted on Admiral Kelso's nomination.

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

OPENING STATEMENT OF SENATOR SAM NUNN, CHAIRMAN, COMMITTEE ON ARMED SERVICES, TO CONSIDER THE NOMINATION OF ADM. FRANK B. KELSO II, USN, THURSDAY, APRIL 14, 1994

The Committee meets to vote on the nomination of Admiral Frank B. Kelso II to retire in grade as a four-star admiral. At a meeting earlier today, the Committee decided we needed no additional witnesses and that was unanimous and I have received no request for additional testimony and were ready to vote.

Admiral Kelso is completing 38 years of distinguished service in the U.S. Navy. He has been serving as the Chief of Naval Operations since June 1990 and prior to that he served as Commander, SIXTH Fleet; as Commander in Chief, U.S. Atlantic Fleet; and as Supreme Allied Commander, Atlantic and Commander in Chief, U.S. Atlantic Command.

Admiral Kelso was serving as the Chief of Naval Operations at the time of the 1991 Tailhook Symposium, and he attended the symposium. Allegations of misconduct at the Tailhook Symposium, as well as allegations relating to the conduct of subsequent investigations, resulted in various well-publicized reports and disciplinary proceedings.

I would like to reiterate at this point the steps taken by the Committee in connection with alleged improper conduct by naval officers at the 1991 Tailhook Symposium. At the outset, it must be noted that the Committee proceeded very carefully in this area in order not to interfere with ongoing investigations and disciplinary proceedings.

After receipt of the report of investigation of the Navy Inspector General, the Committee wrote to then Secretary of Defense, Dick Cheney, to ensure the Committee was properly informed in connection with the confirmation process of Navy and Marine Corps officers. We made it clear that the Committee would not consider any nominee from the Navy or Marine Corps until the Department had answered specific questions on each nominee relating to Tailhook. We worked with the Navy and the Office of the Secretary of Defense to ensure that we established a fair and reasonable system under which the Committee would receive necessary information and the promotions of officers who were not involved in Tailhook could be accomplished without undue delay.

As a result, there was a necessary delay in the Committee's action on all pending Navy and Marine Corps officer promotion boards while the Department of the Navy gathered the information required by the Committee. Additionally, a number of nominations of flag and general officers were held up resulting in a major impact on the normal summer of 1992 reassignment plan in the Navy and Marine Corps.

At the same time, the Committee wrote to then Secretary of the Navy, Lawrence Garrett, expressing our concerns over the results of the Navy's investigations and suggesting that a more formal process might be in order. Our concerns were obviously well placed as shortly thereafter, Secretary Garrett requested the Inspector General of the Department of Defense to review the Navy's investigations and to conduct such additional investigation as may be necessary.

The DoD Inspector General then conducted a detailed investigation and issued two re-

ports. Ultimately, Tailhook and its aftermath led to the resignation of the Secretary of the Navy, early retirement for a number of senior admirals, and administrative and nonjudicial punishment for a number of naval officers.

On Tuesday, the Committee received testimony in open session from Secretary of Defense, William Perry; Secretary of the Navy, John Dalton; and Chairman of the Joint Chiefs of Staff, General John Shalikashvili concerning the nomination of Admiral Kelso. I want to note for the record that the Committee has not received a request from Admiral Kelso to testify before us and that if we had, we would have been prepared to have him testify had he requested.

I will vote to recommend to the Senate that Admiral Kelso be retired in grade as a four-star admiral. I do so on the basis of the following:

First, the testimony we received on Tuesday, from Secretary Perry, Secretary Dalton, and General Shalikashvili, each of whom had concluded that Admiral Kelso did not personally witness misconduct during the Tailhook Symposium and that he did not manipulate the investigative process to shield himself and senior naval officers.

While the testimony we received on Tuesday differed from the findings of Judge Vest, it is important to note the different responsibilities of the judge and of senior DoD officials. The judge was charged with the responsibility of determining whether, as a matter of law, there was a basis for dismissing the allegations against three defendants in prosecutions related to Tailhook. Although the judge made certain findings about Admiral Kelso, Admiral Kelso was not a party to those proceedings and did not have personal representation by counsel or the opportunity to confront or cross-examine adverse witnesses.

Secretary Dalton and Secretary Perry had the independent duty to assess the evidence, to determine whether administrative or disciplinary proceedings should be brought against Admiral Kelso, and whether he should be retired in grade. In exercising that duty, they took into account—but were not bound by—the ruling of the military judge. They also took into account five other sources of information according to their testimony:

First, the conclusion by the Department of Defense Inspector General—who has statutory independence—that Admiral Kelso did not observe misconduct and did not thwart the investigation.

Second, their own review of the material compiled by the Inspector General.

Third, their personal knowledge of Admiral Kelso and their view of his veracity, based upon their experiences with him and the views of others.

Fourth, Secretary Dalton's interviews with Admiral Kelso and others involved in the Tailhook matter.

Fifth, their personal knowledge of the facts surrounding the custody of the investigative files on flag officers, including the file on Admiral Kelso.

Based upon all those sources of information, they concluded that Admiral Kelso did not witness misconduct, did not manipulate the process, and should be retired in grade.

In my view, the information cited by Secretary Perry and Secretary Dalton provides a reasonable basis for reaching findings that differ from those rendered by the military judge.

In addition, there are a number of other points which I believe are worth considering.

In making a judgment about a nomination, it is appropriate to consider your own observations about a person and their behavior. I have known Admiral Kelso since the 1970s. I have always found him to be an individual of the highest integrity and veracity. Based upon my own personal observations, moreover, I believe Admiral Kelso to be one of the least manipulative persons I have ever known in the military. It would be totally out of character for him to deliberately deceive the investigators or to manipulate the investigative process.

I note that Secretary Perry and Secretary Dalton believe that there was a failure of leadership by Admiral Kelso that:

Prior to the Symposium when he could have made a more diligent effort to find out what had happened there in the past;

During the Symposium, when he could have interceded during the flag panel, even though he was not on the panel, when some junior officer did not show the proper respect for the flag officers on the panel;

After the Symposium, when he could have been more forceful in overseeing the Navy Inspector General and Naval Investigative Service investigations even though he was not in the chain of command of the Navy IG and even though the Under Secretary of the Navy was personally overseeing those investigations.

I find it important that Admiral Kelso was the first to go to the Secretary of the Navy after he read the Navy IG's report and to recommend that an independent body come in and investigate the matter.

I am aware that Admiral Kelso received a non-punitive administrative letter of reprimand from Secretary Dalton for his failure of leadership. I am also aware that other flag officers, whom Secretary Dalton decided were guilty of specific acts of failure of leadership, received punitive letters, and one three-star admiral was retired as a two-star admiral with the attendant loss of pay.

I am aware that former Secretary of the Navy, Larry Garrett, resigned from that position as a direct result of the Tailhook incident.

I am aware that Secretary Dalton attempted to have Admiral Kelso retired earlier but I accept his statement that he did not ever intend for Admiral Kelso to retire as anything but a four-star admiral, which is consistent with Secretary Dalton's decision not to award a punitive letter to Admiral Kelso.

I believe it is important that Admiral Kelso was not a party to the trials that led to the military judge's ruling and thus he was not represented by counsel, did not have the right to cross examine witnesses, did not have the right to have witnesses called on his behalf, did not have the right to have an argument made on his behalf, and so forth. The prosecutor in that trial did have an interest in presenting evidence to attempt to establish that Admiral Kelso did not witness improper conduct at Tailhook and did not manipulate the investigative process. It is obvious, however, that he did not produce available evidence—evidence that would have been very important to rebut the suggestion that Admiral Kelso manipulated the process—which would have shown that Admiral Kelso did not have custody of the so called "flag files." Secretary Perry and Secretary Dalton from personal knowledge established that fact and clearly rebutted that important part of the military judge's findings with respect to Admiral Kelso. The judge was limited to the evidence presented in his court in reaching his conclusions and making his ruling.

I believe it is important that the DoD Inspector General, whose investigators interviewed hundreds of people and who reviewed the evidence adduced at trial as well as the voluminous evidence in the IG's files, concluded that Admiral Kelso did not personally witness any Tailhook misconduct and did not manipulate the investigative process.

I am aware of Admiral Kelso's 38 years of outstanding service to the nation, of which 14 years have been as a flag officer and the last 8 of those years have been in the four-star admiral grade.

I am also aware of Admiral Kelso's leading role in enhancing the ability of women in the Navy to serve at sea and in combat aviation positions and in ensuring the proper treatment of all Navy members. I doubt that there is any member of this Committee whom Admiral Kelso has not explained what he is doing in this regard.

I do not believe that we should deny retirement in grade to Admiral Kelso solely on the basis that he was the Chief of Naval Operations at the time of Tailhook. I do not subscribe to what I might call the "absolute accountability" rule.

Based upon my knowledge of Admiral Kelso, I am confident that he would rather sustain severe personal injury rather than have to retire early as a result of Tailhook, with the facts not fully resolved. That he has chosen to retire a couple of months early demonstrates to me that he is putting the needs of the Navy before his personal desires.

Finally, I have thought about the message we will send if we confirm this nomination. I have thought about Senator Hutchison's excellent and very thoughtful opening statement and the several problems that have occurred in the Navy during Admiral Kelso's watch as the CNO. By the way, I might clarify the record with respect to the Navy's investigation of the tragic explosion on board USS IOWA. The Senate Armed Service's activities in bringing Sandia National Laboratories into that matter and Sandia's demonstration of an alternative theory for the explosion served as the catalyst for the decision by Admiral Kelso to reopen that investigation and to ultimately overturn the previous conclusions and to apologize to the family of the sailor who had been charged with responsibility for the explosion. I am sure that Admiral Kelso took a lot of heat from many active and retired Navy officers for his decision in that matter. But he did so and did so courageously.

I am proud of the men and women in our armed forces. However, I realize that people in the military will continue to commit criminal offenses, including sexual harassment. I hope there will never again be a case involving sexual harassment on as wide a scale as occurred at Tailhook. I do not believe that every problem of misconduct in the Department of Defense can be attributed to poor leadership.

Finally, I would like to make a few observations about the issue of accountability. Military commanders and their civilian leaders have responsibility for the operation and maintenance of the awesome arsenal of America's armed forces. Their actions—and their omissions—can have enormous consequences in terms of life, property, and the very security or our nation. As a result, we hold them to a very high level of accountability.

We do not, however, subject our leaders to discipline or demotion for every problem that occurs during their tenure. We have more than 2.5 million men and women in our armed forces, and nearly a million civilians

in the Department of Defense. Given the large, complex, and dangerous activities of the Department, not a day goes by without something going wrong. As we graphically learned today, the consequences can be very tragic, as we have seen in northern Iraq.

As Secretary Perry noted on Tuesday, when something goes wrong, the primary issue with respect to accountability involves the question of due diligence. Given the individual's position, scope of responsibilities, and relationship to the incident, we must ask whether the individual acted with due diligence and, if not, how serious was the individual's deficiency. As the senior uniformed officer in the Navy, Admiral Kelso had supervisory responsibility for those who planned and conducted the Tailhook Symposium, and for those who conducted the investigations. The responsibility, however, was also and ultimately in the hands of his civilian superiors. While he could have done better, it is clear in my own personal view that he was not made aware of misconduct before or during Tailhook, and did not impede or interfere with the subsequent investigations. On the other hand, there is substantial evidence that he intended the Navy to undertake proper investigation, and that he acted vigorously to combat the problems that were at the root of the Tailhook misconduct. Therefore, I personally agree with the judgment of Secretary Perry and Secretary Dalton that while early retirement is an appropriate measure in terms of his accountability, a two grade reduction in rank would not be appropriate. There is certainly room for people to have honest disagreements on the accountability issue in this case, however.

Mr. FORD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. STEVENS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

(The remarks of Mr. STEVENS pertaining to the introduction of S. 2023 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

## TERMINATION OF THE ALASKA PULP CO. CONTRACT

Mr. STEVENS. Mr. President, it is with deep regret that I announce to the Senate that the U.S. Forest Service has terminated the long-term contract with the Alaska Pulp Co. I am told that today the contracting officer, the regional forester of the Tongass Forest, has notified the Alaska Pulp Co. [APC] that the Government is terminating the APC contract because of the 1993 shutdown of the mill in Sitka.

I think that this is a very difficult decision for Alaska. We have tried to meet with the administration to discuss this. The contract to provide timber for the Sitka pulp mill was the first investment entered into by the nation of Japan following World War II. It was a 50-year contract that had 17 years left to run. The impact of the economy was such that the mill was shut down in order to consider a new system, a pressed-wood system which would be more environmentally sound and employ about two-thirds to three-fourths of the employees that are currently there in the mill.

The long-term contract gives permission for APC to close down the mill temporarily. As a matter of fact, it specifically provides that the contract may be extended for the period that it is closed down for economic reasons.

We have been received courteously by the Secretary of Agriculture, the Assistant Secretary of Agriculture, and the regional forester in our protest against this action.

I deeply regret the impact this action will have on southeastern Alaska in general, and the community of Sitka in particular. As a lawyer, I informed the Secretary of Agriculture that I do not believe that they are on sound ground. Unquestionably, the matter now will go to the court to determine the damages for the cancellation of the 17 years remaining on the long-term contract.

Clearly, the Forest Service has not carefully considered the matter of breach. The Sitka mill has been receiving timber and cutting timber in their sawmill ever since the time that the matter of a cancellation of this contract was first raised by the Forest Service.

I would challenge anyone to read the contract and find any ground for the cancellation of the contract because the mill was shut down for economic reasons in order to pursue a different process to preserve the jobs that were brought about by the investment of Japanese nationalists in our State.

It is a matter that was not anticipated by us. I think it is a reaction to extreme environmental interests. I predict now that we will have a very difficult time in the Tongass Forest in trying to maintain a job base utilizing the forest resources that are there.

The Tongass Forest was created at a time when people believed that having a sizable amount of timber in Federal ownership would create a yardstick whereby the Government could measure the performance of the private timber industry in the United States. The theory was that under Government management, under Federal management, with scientific management concepts, with the concepts of sustained yields, that the Federal forest system would be a way to measure the capabilities of the private forest system in our country, and would provide alternative sources of supply in the event that some of the forest products, or many of the forest products of our country, came under a monopoly ownership.

Unfortunately, over the years Congress has restricted more and more of the timber that was available for harvest to sustain the basic processing industry of southeastern Alaska, and the consequences of that restriction have been that now only 10 percent of this forest is available for harvest, and under a 100-plus-year timeframe. In other words, the cutting cycle is more than 100 years for 10 percent of the forest.

This action today I think is a contract termination action in name only. It is an announcement that this administration no longer will countenance the harvest of timber from the Federal forests in order to carry out long-term commitments for the sale of timber that is necessary to support the substantial investments necessary to bring about modernization of the industry, and particularly modernization for processes that are pollution-free, and are such that they would be producing products that have a greater economic viability on the world scene.

Again, Mr. President, I regret the action of the administration that was announced today in Juneau, canceling the balance of the 50-year contract with those members of the Japanese nation that invested in a long-term program in my State.

I ask unanimous consent that this news service report from the Forest Service be printed in the RECORD.

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

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE—ALASKA REGION,
*Juneau, AK, April 14, 1994.*

U.S. FOREST SERVICE TERMINATES LONG-TERM CONTRACT WITH ALASKA PULP

Juneau, Alaska—In a letter to the Alaska Pulp Corporation (APC) today, Contracting Officer Michael A. Barton, Regional Forester of the U.S. Forest Service, notified the corporation that the 50-year timber sale contract between the government and APC was being terminated as a result of APC's 1993 mill shutdown in Sitka.

The decision to terminate comes six months after the corporation's closing of the Sitka pulp mill and followed numerous discussions between APC and the Forest Service concerning contract obligations. The termination means that the Forest Service will offer no more timber under the APC long-term contract.

The Wrangell mill currently has a five month operating supply of wood. The Forest Service will continue to work with APC to supply wood for its Wrangell mill. However, the company would have to bid on short term timber sales as part of the Tongass independent sales program or obtain wood for its mills from other purchasers.

Barton expressed concern over the disruption caused by APC's September 30, 1993 closing of the pulp mill. "We deeply regret APC's closure of the mill and the loss of jobs to not only the Sitka area, but the potential effects throughout Southeast Alaska. We are willing to explore with earnest the economic viability of any facilities with APC or any other interest using the Forest Service authority to prepare a ten-year timber sale package for advertisement and bidding. We remain committed to helping communities through collaborative planning to develop year-round industries in the Southeast using existing authorities and the forest resources."

In his April 14 letter, Barton said APC had not demonstrated sufficient cause to show why the contract should not be terminated. The Contract requires continued year-round operation of the pulp mill. Barton concluded that lack of present commitment to reopen the existing or converted mill facility and other factors warranted contract termination.

The contract with APC is one of two long-term timber sale contracts awarded in the 1950's to utilize low-grade wood from the Tongass National Forest and help establish an employment base in Southeast Alaska. The APC contract would have expired in 2011. The other contract is with Ketchikan Pulp Company and is not affected by this decision.

Mr. STEVENS. I yield the floor.

Mr. McCAIN addressed the Chair.

The PRESIDING OFFICER (Ms. MOSELEY-BRAUN). The Senator from Arizona is recognized.

## SENATOR DOLE'S FIRST SPEECH

Mr. McCAIN. Madam President, I want to take this opportunity to recognize the 25th anniversary of Senator DOLE's first speech before this body. This statement on disability policy was particularly important and was remarkable for its time.

Delivered on April 14, 1969, the 24th anniversary of BOB DOLE's own disability resulting from a World War II injury, this was the first time to my knowledge that a Senator addressed the issue of disability policy from both a personal and a national policy perspective on the Senate floor. It was a visionary speech, discussing the broad range of issues affecting the disability community and recognizing autonomy, independence, and productivity for people with disabilities as the ultimate goals of disability policy.

At a time when the general public believed that people with disabilities could only live desperate lives of dependence on their families and government, and the independent living movement was only beginning to build momentum, Senator DOLE said in his speech that the daily challenge of a person with a disability is to accept and work with his or her functional limitations to "become as active and useful, as independent, secure, and dignified as his disability allows."

Senator DOLE recognized the difficult situation of the many people with disabilities at that time. He stated that "only one-third of America's blind and less than half of the paraplegics of working age are employed, while only a handful of about 200,000 persons with cerebral palsy who are of working age are employed." He added that "far too many handicapped persons and their families bear serious economic problems—despite token Government pensions and income tax deductions for a few, and other financial aids."

After discussing private and public sector efforts, Senator DOLE called for the creation of a Presidential task force or commission to review the various disability programs and policies. He specifically asked that the task force consider the following issues: expansion of employment, transportation, and recreation opportunities; development of a directory or central clearinghouse on available public and private assistance; removal or architectural barriers; improvement of access to health care; improvement of special education; increased financial assistance; more attention to families, and increased program coordination between the public and private sectors.

Progress has been mixed since Senator DOLE made his speech 25 years ago. On the one hand, some important laws have been passed, including the landmark Americans With Disabilities Act, the Fair Housing Amendments, and the various amendments to the Rehabilitation Act. These have begun to address the many problems that Senator DOLE identified. On the other hand, the disability employment figures and other social indicators today are no better than they were then. Clearly, much still needs to be done.

To understand how far ahead of its time Senator DOLE's speech was, his vision of the objectives of disability policy remains true a quarter of a century later, and many of his same words could be made on the Senate floor today.

Recognizing that this is an appropriate time to seriously consider how far we have gone, how far we must still go, and what changes we must make to improve the lives of people with disabilities, Senator DOLE has again introduced legislation to create a bipartisan commission to examine our disability programs and policies. I strongly support this legislation and believe that we must now reconsider all aspects of disability policy to ensure that it is consistent with the independence and community integration goals of the ADA.

I applaud Senator DOLE's longstanding leadership in the area of disability policy. As he said in 1969, our citizens with disabilities "are one of our Nation's greatest unmet responsibilities and untapped resources. We must do better."

Madam 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.

Mr. NICKLES. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

## SENATOR D'AMATO'S SPEECH ON THE TAX INCREASE

Mr. NICKLES. Madam President, a few moments ago, the majority leader, Senator MITCHELL, made a speech where he was critical of Senator D'AMATO for some of the statements that he had made. One of the statements he criticized Senator D'AMATO for was because of Senator D'AMATO's characterization of the tax increase that passed last year, which was a very partisan tax increase, the largest tax increase in history.

The majority leader is critical because the Senator said in his statement that it was a tax increase on everybody. The majority leader said that was incorrect. I will respond, since this is tax day, that the tax increase that passed last year was a tax on everybody, including my now 18-year-old daughter. She drives an automobile, and gasoline taxes went up for everybody. So anybody who drives a car had a tax increase. Some individuals had personal income tax increases, and corporate taxes went up. So there were very significant tax increases. I might well mention that a strong majority of Americans, at least those driving automobiles, had a tax increase.

The majority leader said there was the largest deficit reduction in history and said maybe not if you look at the present value of dollars. CBO says it is not the largest deficit reduction package in history.

I want to mention one other thing, and that is the fact of using figures. We continued to hear today that it had more spending cuts than tax increases. I think that statement is totally false. It is predicated on a false baseline, and we have inflated baselines. The reason I say that is, I think if you use what most people call a baseline as actual dollars that we spend this year, you will find spending goes up every year. So from that analogy of using common-sense budgeting, we had no spending cuts in the package compared to what we are spending today.

We are spending $1.5 trillion today, and next year $1.6 trillion, and the following year, increases I think over a period of time to almost $2 trillion. So it is hard for me to say that we have spending cuts. Spending continues to increase. It may increase at a less progressive rate, or less than what was indicated or what was anticipated.

I tell my colleagues that in the budget package we passed, we passed a resolution I sponsored that said we should use baselines, not next year's projections, but this year's reality. I think that is a commonsense budget approach, and I think Senator BOXER, and others on both sides of the aisle, supported this resolution, even though it was opposed by Chairman SASSER of the Budget Committee. We passed it overwhelmingly in the Budget Committee, and it was part of the budget resolution that passed in the Senate. It is also in the House budget resolution.

Both Houses are passing resolutions that will say we should use real dollar

figures when we set our baseline, not projected inflated baselines. We have used projected inflated baselines going all the way back to 1974, 1975 in the Budget Control Act. I think it has been responsible for inflated budgets and distorted budgets, certainly, and distorted facts, when you get into these deficit reduction debates. The tax increase that passed in last year's budget were real, and some were even retroactive, even before Clinton was sworn into office. We had a very contentious, partisan debate. Our side lost on that by one vote. That was twice, and that is OK; that is the way the legislative procedure works.

I am still irritated when I hear some of the rhetoric on spending cuts, because spending cuts are based on inflated baselines, so it is something that was anticipated to go up 15 percent, and he reduced it, through difficult decisions, to 10 percent. Somebody says you cut 5 percent in whatever program that is, and I find that to be misleading. In any program—defense, entitlements, whatever—we need to say what are we spending this year. If we are spending more next year due to inflation or cost-of-living adjustments, whatever, if it increases, we should call it an increase; if it decreases, we should call it a decrease. I think if we do that, it would simply tighten our accounting and get us away from some of the partisan rhetoric we have had over deficit battles, because it has been so confusing and misleading.

I remember in the budget battle we had last year, a great deal of our time was focused on: Are these cuts real? Many said they were not, because spending goes up every year.

I come to Senator D'AMATO's defense, because it seems like if he or somebody else makes a comment on Whitewater, or requests hearings, or says that some questions have not been answered, two or three colleagues come to the floor and attack him. That is exactly what happened today.

It reminds me that in Arkansas you had a State trooper that made allegations concerning President Clinton's sexual activities, and he was attacked. You had two Arkansas troopers that made allegations a few months ago, and they were attacked. So Mr. Hale made an allegation—this was a judge appointed by then Governor Clinton—that Governor Clinton pressured him to make a loan to Mrs. McDougal, and $110,000 of that went into Whitewater. He made that allegation, and he was attacked.

So anybody who makes an allegation against this administration or the then Governor Clinton is attacked. Senator D'AMATO makes a statement on the floor, and he is attacked. People are going back researching. Did he say such and such? And they are basically saying he distorted the truth, and so on.

Frankly, I heard his comments saying almost everybody had a tax increase. I think that was correct. I agree with the comments made by the majority leader that we should stick to the facts, and we should be very plainspoken when we talk about deficit reduction, and plainspoken when we talk about Whitewater, or any other issue. We should stay to the facts.

President Clinton has stated that he has been bending over backwards—maybe I will find the quote. Yes. On March 24, he said: "Cooperation, disclosure, and doing the people's business are the order of the day."

But he has not disclosed a lot of information. He has never disclosed how much money he invested in Whitewater. I mean, really, if this is an investment or a real estate deal, how much money did he invest, or how much did he lose? We never had that information come out, and he never disclosed it. It is kind of basic. If it was an investment, how much money was put in or taken out? How much did you win? How much did you lose?

It should not be that tough. But the President is saying cooperation and disclosure is the order of the day. That is not the case.

The Whitewater files were in Mr. Foster's office for months. Actually, Mr. Nussbaum and others in the White House looked at some of those documents the day Mr. Foster died. Yet the White House kept control over them or turned them over to President Clinton's attorney for months before they were ever disclosed. Yet they were not disclosed to the public. They were disclosed to the special counsel.

If President Clinton's comments are correct that cooperation and disclosure are the business of the day, why are not those documents just made public? Maybe Mr. McDougal will make some public by selling them. I do not know. Maybe those are some of the same documents. I know we have never seen the information on how much money did the President and Mrs. Clinton invest? It would be nice to know.

What about the fact that the corporation did not file tax returns? That is kind of a basic thing. You know, it is not optional. Tomorrow is tax day. All people all across the country will file their tax returns. We have people who are cramming in trying to do their tax returns. It is going to be very frustrating. Lots of Americans are going to be frustrated late tonight trying to do their tax returns.

The reason is you have to pay the amount owed or the amount refunded or you can file and request an extension. Those are your options. One option that is not there is "I would rather not."

And yet the Clintons, President and Mrs. Clinton, who own 50 percent of Whitewater, did not file tax returns for 3 years. Why? You know, it is against the law not to file tax returns. There is not an option. There is not a box that says "I would rather not." They have never been asked that question. When I say "they," I am talking about the President and Mrs. Clinton. I do not know. I have never seen it. I watched it kind of close. Maybe they have. But I do not believe they ever answered that question.

I have been involved in corporations. I see my friend and colleague from Alaska, Senator MURKOWSKI. He ran a bank and has been involved in private sector business.

You do not have an option not to pay taxes. But they did not file returns for 3 years.

Also, I will just mention a little coverup. They had the Lyons report done during the campaign to investigate Whitewater because the New York Times—not Republicans, the New York Times—made some report about Whitewater, and so the Lyons report was put together to answer all questions.

The Lyons report never told anybody that Whitewater never filed tax returns. Yet those tax returns which now have been filed—Mr. Foster filed those shortly before his death last year. But those tax returns, to my knowledge, have yet to be made public.

So, when I look at Mr. Clinton's comment, and this sounds so good, "Hey, we are cooperating and disclosing, maybe they are already disclosing them to the special counsel because they have been subpoenaed, but they have not been subject to the Freedom of Information Act. They have not been turned over to the public. And both President and Mrs. Clinton said, "Hey, this is just a real estate investment that happened years ago."

These tax returns, I believe, were for the years 1990, 1991, and 1992. That is not 14 years ago. Those tax returns were done, I believe, just last June, June of 1993.

So we are not talking about digging up the archives. They are available. They should be turned over and they should be made public. Why should they be under the guise of a subpoena? Why should just Mr. Fiske see them? If this is just a real estate deal, let us get all the information out.

Frankly, I think that is good advice for President and Mrs. Clinton. I think they would be well advised to turn over all this information and get it out and make it public and be done with it, get this Whitewater issue behind them.

Many of us have called for congressional hearings and have said we need to have some of these questions answered. I know Mr. Clinton yesterday, when he was speaking to the Association of Newspaper Editors, just answered all these questions. But I do not think he answered these very basic questions, not to mention the more detailed, more complicated questions.

I think we are probably going to need to have congressional hearings to get these questions answered, and Mrs. Clinton, who was involved in the issues in a very big way, I think misled people when she said they were just passive investors. I do not think that was accurate. I think it was very misleading.

I do not believe they have answered hardly any questions concerning Whitewater. I do not think they have had a press conference. I do not think she ever asked the press. Maybe she granted one or two selective interpretation views with friendly reporters, but I do not believe she ever answered questions to the extent of her involvement dealing with Whitewater.

Now, there is this issue on commodity futures, and, Madam President, I find it to be very unusual for someone to make a $1,000 investment and in less than a year make $100,000. I find that to be more than unusual. You realize that is about a 10,000 percent rate of return. Most of us feel like we are doing pretty good if we make a 10-percent rate of return or maybe a 12-percent rate of return. If you did real well, maybe you made a 15-percent rate of return. This was not 10 or 15; it was not a 100-percent rate of return; it was not a 1,000-percent rate of return; it was a 10,000-percent rate of return.

I do not know that much about commodity futures and trading in commodity futures, but I realize, according to the data that she has turned over, they turned, in 1 day, a $1,000 investment into $6,300. I have yet to find an investment where you can do that.

I do not know all the answers, but I think we need some answers, and I think many of the statements that Mrs. Clinton and President Clinton have submitted since this commodity futures thing came out—again, I think that information came out originally from a story by the New York Times, not by Republicans. But I do think we are entitled to know the answers.

Is there graft involved? Is there corruption involved? Is there bribery involved? I do not know. But I think we are entitled to know the answers.

I mentioned I do not know that much about commodity futures, but an article in the Wall Street Journal by someone who does, David Brandon—this was in the April 7 edition of the Wall Street Journal. He is the former head of the IRS chief counsel's commodities industry specialization team in the mid-1980's. He says:

. . . I have followed with great interest the media stories on Hillary Clinton's excellent adventures in the commodities markets.

I skip a couple lines and read the conclusion in the first paragraph:

In fact, the chances of someone making almost $100,000 in the futures markets on her first try are about as great as walking into a casino in Las Vegas, hitting the million dollar jackpot on your first try at the slots, then walking out never to play again. It just doesn't happen that way.

You know, I think he is exactly right.

Madam President, I ask unanimous consent to print the entire article of Mr. Brandon in the RECORD at this point.

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

[From the Wall Street Journal, Apr. 7, 1994]

THE MYSTERY OF HILLARY'S TRADES

(By David L. Brandon)

As former head of the IRS chief counsel's Commodities Industry Specialization Team in the mid-1980s, I have followed with great interest the media stories on Hillary Clinton's excellent adventures in the commodities markets. As a proud capitalist and free market proponent—and an avid beef eater—I would be the first in line to salute this woman's success with cattle futures. But, based on my years of experience with these markets, her story just doesn't add up. In fact, the chances of someone making almost $100,000 in the futures markets on her first try are about as great as walking into a casino in Las Vegas, hitting the million dollar jackpot on your first try at the slots, then walking out never to play again. It just doesn't happen that way.

For those unfamiliar with the details of Mrs. Clinton's remarkable venture into the commodities markets, she allegedly made more than $99,000 in cattle futures—and other commodities—in late 1978 and 1979, withdrawing from trading just before the markets went bust. No explanation has been offered of how Mrs. Clinton managed to satisfy state laws that require futures investors to demonstrate a minimum net income and net worth, nor how a novice could have such uncanny timing.

There is, in fact, a much more probable explanation for Mrs. Clinton's good fortune. The media have already suggested that trades may have been moved to Mrs. Clinton's account after gains had been realized. However, the stories thus far have not clearly focused on a common trading strategy called a "straddle" that was very much in vogue at the time.

Straddles have the unique ability to produce exactly equal and offsetting gains and losses that can be transferred or used by the straddle trader for a variety of purposes. During the late 1970s and early 1980s, straddles were used for all kinds of illegal activities, ranging from tax evasion to money laundering and bribes. In fact, this activity prompted a number of legal and regulatory changes by the Reagan administration to curb the abuses.

Although it sounds somewhat esoteric, a commodities straddle is a relatively simple trading device.

A commodities futures contract is nothing more than an agreement between two parties to buy or sell a certain type of commodity—in Mrs. Clinton's case, cattle—for a stated price on some date in the future. If the price of the commodity goes up before the contract delivery date, the individual who agreed to buy the commodity will realize a gain equal to the difference between the current price and the contract price. The individual who agreed to sell will realize a loss in an equal amount. Conversely, if the price goes down, the buyer will lose and the seller will gain.

A straddle is created when an investor enters into contracts to both buy and sell the same commodity. In this case, any gain on one contract will be exactly offset by a loss on the opposite contract. While straddle trading today is used in a variety of legitimate ways, these transactions lend themselves to all sorts of abuses as well. Before regulatory changes in the 1980s, it was common to enter into straddles to wipe out large capital gains for tax purposes. For example, an investor who realized a $100,000 capital gain in the stock market might enter into a large straddle in the commodities market. When the commodity price moved, the investor would close the loss leg of the straddle and realize a $100,000 loss, which offset his gain in the stock market. The investor was not required to report the unrealized $100,000 gain in the opposite leg of the straddle until that leg was closed in the following year. Typically the investor entered into another straddle in the following year, thereby indefinitely rolling over the capital gain into subsequent years.

Another ploy common during that time required the assistance of a friendly broker. An investor could create a straddle using two separate investment accounts with his broker. After the straddle had moved, so that a gain and an offsetting loss had been created, the friendly broker simply wrote in the name of the investor's tax exempt retirement fund on the account that held the gain leg of the straddle. The result was that a loss was realized that was reported on the investor's tax return, while the gain went unreported in the tax exempt retirement account.

In the late 1970s and early 1980s, the IRS began noticing large numbers of individual tax returns that curiously showed commodities losses just big enough to wipe out unrelated capital gains; no corresponding commodities gains, which would suggest a straddle, ever appeared on subsequent returns. Even more curiously, the profile of these investors always had one thing in common, which was limited experience or no prior experience in commodities trading. In the early 1980s, an IRS agent in Chicago thought to look into one taxpayer's retirement fund and, of course, found the hidden gain leg of the straddle.

After that experience, the IRS redoubled its efforts to seek out thousands of missing straddle gains. It found them in retirement accounts, in London, in the Cayman Islands—almost anywhere a taxpayer thought he might hide them from the IRS. With respect to these thousands of mysterious, isolated commodities transactions that showed up on tax returns, the IRS uncovered some form of questionable trading in virtually 100 percent of the cases it investigated. Well before the close of the 1980s, the IRS had assessed more than $7 billion in delinquent taxes and penalties attributable to these transactions and eventually settled these cases out of court for approximately $3.5 billion.

While most of the IRS's efforts were directed at finding hidden gains of the ubiquitous straddle, the trading device could just as easily be used to openly transfer gains while hiding the offsetting loss. If someone desired to make an illicit payment to another party, a straddle could be used to accomplish this purpose with no incriminating or suspicious looking bank withdrawals or deposits. In fact, the IRS found numerous incidents of straddle being used for money laundering purposes.

Does Mrs. Clinton's trading activity fit the profile of the illegitimate straddle trader? She was a novice in the commodities markets who, against all odds, realized large

gains. Although she intermittently realized losses, it does not appear that she ever had to risk her own capital beyond her initial $1,000 deposit, which itself may have been insufficient to cover even her first transaction, which netted her $5,300. According to the trading records released by the White House, most of Mrs. Clinton's gains were recorded as intra-month transactions. This means that these records include no information regarding key elements of the trade, such as the type and quantity of the contracts, acquisition dates, acquisition prices, etc. Such information is needed to determine whether trades were part of a prearranged straddle.

It also appears that Mrs. Clinton's broker, Robert L. "Red" Bone, was no stranger to the spicier practices of commodities trading, according to the Wall Street Journal's front page article last Friday.

It seems more than coincidental that Mr. Bone was a former employee of Tyson Foods and that Mrs. Clinton's investment adviser, James Blair, was the company's legal counsel. Tyson, the poultry concern, is one of the largest employers in the state of Arkansas. The fact that the Clintons withheld disclosing only those tax returns that included their commodities gains until the transactions were reported by the New York Times in February also appears quite suspicious. From my standpoint as a former government staff attorney with extensive experience in these matters, Mrs. Clinton's windfall in the late 1970s has all the trappings of prearranged trades.

How would a straddle have been used in Mrs. Clinton's case? The Journal has already reported that gains theoretically could have been transferred to Mrs. Clinton's account, while "others" may have absorbed losses. Such a transaction could be accomplished with a straddle.

A party desiring to transfer cash to another's personal account for legal or illegal purposes could enter into a straddle in a particularly volatile commodity, such as cattle futures in the late 1970s. After gains and losses were generated in the opposite sides of the straddle, the gain side would be marked to the beneficiary's account, while the loss side would remain in the account of the contributor. The contributor might even be entitled to use the loss to offset other gains. Such a transaction would be not only well-hidden from government authorities but potentially tax deductible.

No direct evidence of wrongdoing has been produced in the case of Mrs. Clinton's trading activity. In fact, no conclusive evidence of anything has been produced. In order to settle the legitimate questions surrounding her trades, a satisfactory explanation is needed for her apparently low initial margin deposit and whether the requirements relating to an investor's minimum net income and net worth were satisfied. In addition, the details of her numerous intra-month trades should be provided, as well as the details of the trades of persons who may have had a special interest in how well she did. If it is discovered that certain interested parties happened to realize losses in cattle futures at the same time, and they were comparable in size to the gains reported by Mrs. Clinton, this would amount to a "smoking gun."

This is not a matter of partisan politics. Even if the public had never heard of Hillary Rodham Clinton, the circumstances surrounding her unusual good fortune would still appear suspicious to anyone awake to abuses of the commodities markets. In this writer's experience, the normal trading world just doesn't work that way.

Mr. Brandon was a career attorney in the Office of Chief Counsel of the Internal Revenue Service from 1983 to 1989. During that time he also served as head of that department's Commodity Industry Specialization Team, which was responsible for coordinating and developing the IRS's legal positions on tax issues arising in connection with commodities transactions.

Mr. NICKLES. Madam President, I do not know all the answers, and I do not have answers to all the questions, but I am concerned about this. I am concerned when I know we have one colleague in the Senate who is under investigation by the Justice Department for basically expensing or being reimbursed improperly for about $4,000 and that one individual has been under investigation for a couple years and has had to spend hundreds of thousands of dollars defending himself.

Mrs. Clinton made $5,300 in 1 day in commodity futures. She made $100,000 in about 10 months. I find that to be very unusual. And the information that they have submitted is not conclusive. They did not give all the information on trades. And originally, too, I might mention, the comments were that the trades were made by Mrs. Clinton, who was very shrewd and prudent and read the Wall Street Journal. Now we find out that that was not the case, that now they say Mr. Blair, who is outside counsel for Tyson Foods, a huge poultry firm affected by the usual State agencies, made many of the trades.

President Clinton said she discontinued to trade when she became pregnant with Chelsea. Now we found that was not the case either. Talking about a new account, they said, well, in this account we lost money. Now it turned out they made several thousand dollars and they forgot to pay taxes on it. Now they just recently made payment on taxes and on interest.

My point is I think there are some questions here. I am concerned about integrity. I heard the majority leader, and again I am referring to Senator MITCHELL, say we should be held accountable.

I think the President and Mrs. Clinton should be held accountable. And I think questions need to be answered. They need to be answered truthfully. I do not think they have been answered truthfully in some of these cases. I am not here to make a partisan row. I am not here to try to tear down the Presidency. I am here trying to seek the truth, and I think the American people are entitled to the truth.

I think concerning the issues of Whitewater and the commodity futures, I do not think they had the truth. Until all the truth and all the information comes out and until the administration releases all the Whitewater documents to the public or at least to the press, many of us will continue to clamor for hearings until we get that information out.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Alaska.

## TIMBER CONTRACTS

Mr. MURKOWSKI. Madam President, my office was just advised by the Department of Agriculture that they have seen fit to cancel timber contracts affecting the Alaska Pulp Co. and, as a consequence of that, my State faces a future of some 1,100 Alaskans losing their jobs. These are jobs in Wrangell, Sitka, Hoona, Corner Bay, False Island, Rowan Bay, small communities that depended on the Alaska lumber and pulp timber contracts to provide an assured supply of pulp timber so that the pulp mill in Sitka and the sawmill in Wrangell can continue to operate.

Madam President, these are relatively small communities. Wrangell has a population of about 2,300. The sawmill is a main source of employment of about 300 jobs associated with longshoring and timber cutting. While the Sitka pulp mill is down, every effort has been made to try to convince the Forest Service that the sanctity of the contract should be maintained, and that time should be allocated so that a medium-density fiberboard plant can be considered and placed in the pulp mill.

Now, what we have here is an extraordinary example, I think, of the Clinton administration not practicing what it preaches. This is rural America, Madam President. These are situations in my State, as far as the pulp mill is concerned, where we have very little year-round manufacturing. As a matter of fact, we have two major plants that operate year round, one in Sitka and one in Ketchikan. The one in Sitka was forced to close for economic reasons. However, they appealed to the Forest Service to allow them approximately 6 months to complete a feasibility study for refitting the mill to manufacture medium-density fiber pulp.

Now, the advantage of that and how it coincides with the objective of the administration, which is encouraging development in rural America by using new technology that would upgrade processing facilities and reduce air and water pollution, would seemingly fit into the administration's goals.

The proposed medium-density fiber mill would use 25 percent less timber, and water pollution is virtually eliminated. The concept of jobs is a major factor in the administration's relative analysis of how America should progress because conversion of that pulp mill to medium-density fiber would involve about 150 high-paying jobs in the city of Sitka, replacing some 300-plus jobs lost with the closure of the pulp mill.

Now, what we have here is extraordinary, because we have an interpreta-

tion, a rather unique interpretation, I might add, by the lawyers for the Forest Service in the Department of Agriculture that have extrapolated that indeed it is an obligation of the Government to cancel this contract based on the fact that there is a termination of Alaska pulp companies' continuous year-round operation in violation of the contract.

I challenge that. That is totally inaccurate. They have continued to cut timber. That timber has been going to the Wrangell mill, going through the sawmill; other timber that cannot go to the sawmill has been sold to the Ketchikan pulp mill. To suggest that the conditions of the contract are unfulfilled as a consequence of the termination of the pulp mill is absolutely inconsistent with reality. Yet, they have chosen to come down with that decision.

What they have done is they have made a policy decision instead of a legal decision.

It was rather interesting to note, and I am quite aware of this, that the Department of Agriculture had two letters. They had one letter authorizing an extension, if you will, considering the aspects of the feasibility study, which still has some 4 months to go, and then they had another letter of outright rejection.

Well, the attorneys prevailed, and the letter calling for outright canceling of the contract was issued, and now there are about 1,100 Alaskans that are going to be out of jobs and are not going to sleep very well tonight, Madam President, because there is an arbitrary decision that the Government is holding this company in breach of contract.

Now, what are the damages to the Government? It is pretty hard to make a case. You know, if timber is being cut, jobs are being provided, a tax base is occurring. Is that not of some benefit to the Government?

But they have chosen to cancel the contract, saying the company is in breach because it shut down the pulp mill. But the pulp mill is not the only function. There is a sawmill that company owns, and there is a timber operation that provides employment.

Now, what this is going to do, Madam President, is result in a full employment act for lawyers. This is going to be litigated. The cost to the taxpayers is in the millions of dollars, close to $1 billion, and the Government could very well, in the opinion of the Senator from Alaska, lose this suit.

The administrators that call these shots, those lawyers, do you think we are going to be able to hold them accountable? Absolutely not. They are nameless. They are faceless. They are out there and they are responding to the extreme environmental community in the United States that wants to cease timber cutting in the national forest.

The southern part of my State is all in the national forest. But it is just not a national forest, Madam President. People live there. They raise their children there; they have their homes there; they have their jobs there. And now, arbitrarily, we have come down and said their contract is in breach because they shut down the pulp mill. No consideration for the continuing timber cutting that goes on, for the continuation of the Wrangell mill.

It is absolutely inexcusable. It is the height of governmental irresponsibility. And to suggest that there is any rational explanation is one I guess that we will simply have to wait for because we do not have the full text.

This decision shows a total callous disregard for Alaskans. This is one issue we have been totally unified on. The Governor, bipartisan, Republicans and Democrats, all of our cities have said: Give this company an opportunity to continue with its feasibility study another 4 months; give this company the consideration to invest $60 million in new technology. The State of Alaska, through its loan program, has committed to fund in excess of $40 million to let this new technology be introduced and save those jobs.

Madam President, I wish you could take a tour through southeastern Alaska timber with me. You would recognize that, yes, this is virgin old-growth timber. But it lives and dies. Just like with wheat, 30 percent is dead or dying. That percentage that is dead or dying has no other use than wood fiber. You cannot run it through a sawmill because you do not have a viable, live, healthy log. You have dead or dying trees, and the consistency is only utilized in an operation that utilizes fiber.

It is rather interesting to note that in the new plant, the medium-density fiberboard is suited for just that kind of timber.

Now we are left with a situation where the dead and dying trees—30 percent of the timber, I might add, most of which is western hemlock—will have little or no market. Or perhaps some of it can be sent to the Ketchikan mill, which is down, obviously, on difficult economic times because their pulp mills are being replaced by pulp mills in other areas of the world where the timber grows much faster. So the economics of Alaska's two pulp mills, I might add, are very questionable.

So we have this decision by the Department of Agriculture. I, personally, as well as Senator STEVENS, met with the Secretary of Agriculture. We met with the Assistant Secretary of Agriculture, Jim Lyons. We met with the Chief of the Forest Service, Jack Ward Thomas, to communicate our concern, to ask for consideration, recognizing that these people have the administrative authority to make the recommendations and make the decisions.

But it was not made by them, in my opinion, Madam President. It was made by the lawyers, the lawyers who have been bamboozled by the extreme environmentalists who want to cease timber cutting in the forest.

They look upon the forest as something that is out there. They do not realize that people live there. They do not realize that a big chunk of our State is made up of the Tongass National Forest.

I suggest that without the dependable supply of a long-term timber contract, it is going to be very, very difficult to finance the fiberboard plant in the Sitka region. They gave us a rather curious window, I guess, in offering that perhaps a 10-year contract to induce the fiberboard plant can be put together, replacing the existing contract which has about 17 years left to run.

We all know that an effort to negotiate a new contract will face an environmental impact statement process and be a field day for the environmental group that is opposed to any timber cutting in the Tongass National Forest. So it is a doubtful alternative.

The Forest Service really should have tried to promote the usage of this new technology to produce the clean product that will aid the environment. Instead, it made a purely political decision. And I might add this decision was not made in Alaska by the Forest Service. This decision was made by the bureaucrats in Washington, DC, dictated by the extreme environmental community and its access at the very top levels of this administration at the expense of the hardworking people of my State of Alaska.

I think it is terrible. It is a heartless, crass, sellout. An administration that so bases its recommendations on rural economic development, simply plays into the hands of the extreme environmentalists who do not care about real people. They only want to see the Tongass locked up, its resources locked up.

We have more of the Tongass in perpetual wilderness—two-thirds tied up in wilderness forever—than we do available for timber cutting. We are not arguing that. We are not asking for opening of the wilderness. We are simply asking for the Forest Service to practice what they preach, and that is multiple use, instead of arbitrarily shutting down half of the total year-round manufacturing in our State of Alaska, and not giving us breathing room for an alternative.

So, Madam President, I saw my senior Senator, Senator STEVENS, earlier expressing his frustration with this decision. I, personally, tonight attempted to contact the Secretary of Agriculture, Mr. Espy. He is out of the country. I attempted to personally contact the Assistant Secretary. He happened to be in the Pacific Northwest. I finally got the Chief of the Forest Service, Jack Ward Thomas, leaving town, and I said we are entitled to an

explanation. We are entitled to have these people in Alaska, in Sitka and Wrangell, who are going to be put out of work, told how they can still have hope, some kind of hope for their homes and their future and their children. I said, "Will you come up to Wrangell, and will you come up to Sitka, and explain to us how this medium-fiber-density plant can possibly be encouraged under this 10-year window of contract that might be out there?"

Much to the chief's credit, Jack Ward Thomas indicated yes, that was his job; and yes, he would do it. So we look forward to him coming back to Washington. He has not seen this letter. We look forward to him reviewing the letter, finding out, and interpreting just what this window of hope might mean. For Wrangell, I understand there is about a 6-month supply of timber, so the likelihood of the mill continuing to operate for that period seems reasonable.

But it is a black day for Alaska, Madam President. And it is certainly frustrating to have to deal with an administration that on one hand suggests that, yes, use your new technology, use the natural resources, and then turns around and makes a legal decision that ultimately is going to cost the taxpayers of this country millions and millions, and perhaps $1 billion.

## SANCTIONS ON TAIWAN TRADE IN TIGER BONES AND RHINOCEROS HORNS

Mr. MURKOWSKI. Madam President, I have one other point I want to bring up. I know it is late, but I will be brief. This matter, I think, is receiving a great deal of attention among those of us who follow the attitude of our State Department toward both Taiwan and China. The issue that I want to discuss is the sanctions that have recently been imposed by the administration, singling out Taiwan for punishment. Can you imagine that? Our allies have been singled out for punishment.

I rise to express my concern over the administration's recommendation that Taiwan alone be sanctioned for trade in tiger bones and rhinoceros horns. These are traditional Chinese medicines. The issue is not over whether Taiwan should stop trading in endangered species. Certainly it should. We all agree to that. But so should China. And yet China does not face any sanctions, or any mention of sanctions. The administration has chosen to single out Taiwan for punishment.

In 1993 the Convention on International Trade and Endangered Species, that is CITES, recommended the imposition of sanctions against both China and Taiwan—both. The administration deferred the action in 1993 as an incentive for both countries to take steps to meet the CITES standards.

According to the Departments of State and Interior, both countries have made progress in eliminating illegal trade, but further progress is needed. This is a reasonable recommendation so far.

But the question is: Why did the administration single out Taiwan for enforcement? There seems to be some disagreement among the agencies over the official explanation, as you might expect. One explanation is that the Taiwanese have not passed tougher legislation through the Yuan, but the Chinese have decreed new laws.

Is it not ironic that Taiwan, which is a legitimate democracy, is being sanctioned because it faces a delay in getting legislation enacted? Have we ever faced delay around here in getting legislation enacted?

And China, compare the two—China, the Communist dictatorship, is being rewarded for decreeing, if you will, new laws overnight, and for staging public events. That is the reality.

Just as in the United States, lawmaking in Taiwan faces political and legal challenges that can delay enactment of new legislation. China's Communist leaders, on the other hand, can decree whatever they like without any due process. Think about that.

Finally, a second unspoken explanation is that the administration's China policy is in such disarray since Secretary Christopher's trip that it just will not risk slapping the Chinese when they deserve it.

Madam President, I think this is the wrong signal to send to both Taiwan and China. China is rebuffing the United States on everything from North Korea to human rights, but we are rewarding their lack of progress by letting them slide on trade in animal parts and taking it out on Taiwan. Taiwan has consistently acted as a friendly ally that is cooperating on a whole range of issues, but we are punishing them now. And Madam President, we are punishing them for being a democracy.

The administration's action reminds me of the parent who punishes the quiet child who does his work but brings home a B on his report card, and does nothing to the loud child who perhaps forges his B on his report card and threatens to quit school if he gets punished.

I think this administration should rethink its policy. Equal progress should receive equal treatment. Taiwan should not be forced to take the rap for China too, and we should certainly not take this action at the expense of our friends in Taiwan, who are simply turning the other cheek on China.

## APPOINTMENT BY THE PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The Chair, on behalf of the President pro tempore, pursuant to Public Law 93–29, as amended by Public Laws 98–459 and 102–375, reappoints the following individuals to the Federal Council on the Aging:

Rudolph Cleghorn of Oklahoma, reappointed to a 3-year term; and

Stephen M. Farnham of Maine, reappointed to a 3-year term.

## ADDITIONAL COSPONSORS—SENATE RESOLUTION 148

Mr. MURKOWSKI. Madam President, I ask unanimous consent that I, Senator JEFFORDS, and Senator NICKLES, be added as cosponsors to Senate Resolution 148.

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

Mr. MURKOWSKI. Madam 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.

Mr. SIMPSON. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

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

## PAYMENT IN LIEU OF TAXES

Mr. SIMPSON. Madam President, two or three items, and when the majority leader is desirous of concluding the day's activity, I would appreciate being advised because his schedule is important. But as we wait in the interim for further activity that must be concluded before the end of the day, let me express my support for the legislation yesterday which was offered by our most able ranking member on the Appropriations Committee, Senator HATFIELD, with regard to payment in lieu of taxes. That may seem rather arcane to many people, but it is very critically important to Western States, and particularly to my State of Wyoming.

There has not been an increase in these PILT payments—and we call it PILT, payment in lieu of taxes—to the States in over 10 years, even though costs of providing these needed services by county and municipal governments have risen constantly.

This is not some giveaway, Madam President. The PILT Program represents nothing more than fair compensation to State and local governments, and the Federal Government is getting a very good deal. Local government revenues have plummeted, often as a direct result of some action by the Federal Government. Wyoming, for example, funds its schools and infrastructure from property taxes and royalty receipts, and PILT payments are a form of property taxes. Wyoming property taxes have increased. Many small towns and cities in these past years have approved property tax increases,

and those tax increases have been levied against all property owners except the Federal Government. It is time the Federal Government ponied up a fair share, as well.

These Federal land management policies and our country's reliance on imported fuels have caused painful reductions in the amount of royalties received by the States and by the State of Wyoming. These reductions in royalties, combined with the fact that the PILT payments have not kept up, have caused severe financial hardship to our counties.

Senator HATFIELD's legislation will ease that hardship somewhat. It is very needed; it is very fair; and it was approved here. We are very pleased that it passed the Senate. We look forward to its enactment into law after conference committee and other activity.

## THE USDA REORGANIZATION ACT OF 1994

Mr. SIMPSON. Madam President, I rise in support of S. 1970, the USDA Reorganization Act of 1994 which we passed overwhelmingly yesterday. I favor the important efforts to reorganize the Department of Agriculture. This bill will ultimately result in a new and improved USDA. The Department will now more effectively deliver farm service programs to its customers while remaining true to the mandated mission of the Department—no more shoe-box accounting methods.

I particularly commend the distinguished chairman and ranking member of the Senate Agriculture Committee for their diligence over the past 2 years to make this much needed reorganization a reality. A very significant portion of the bill was the establishment of the Farm Service Agency, a new single agency that will provide commodity price and income support, farm loans and crop insurance to eligible farmers. I supported this concept 2 years ago when Senator LUGAR began his crusade to determine whether the 1930's-style Department of Agriculture was still effectively serving American farmers. I am most pleased with the results of his efforts. The new agency will include the Agriculture Stabilization and Conservation Service (ASCS), farmers programs located in the Farmers Home Administration (FmHA) and the Federal Crop Insurance Corporation (FCIC).

I have serious concerns with the Senate's reorganization of the USDA's Delivery of Rural Development Programs. The Rural Utilities Service will combine the electric and telephone programs of the Rural Electrification Administration (REA) with the water and sewer programs of the Rural Development Administration (RDA). The Rural Community Development Service will include FmHA rural housing programs as well as RDA and REA rural community loan programs.

This effort is clearly an extraordinary scheme to expand the mission of the REA, an agency that has surely fulfilled its original mission. The co-ops will now have full authority to deliver not only electric and telephone services, but housing, water and sewage and economic development programs in rural America. The REA will no longer just be providing electricity and light to rural America, but flushing toilets, too—and trying to expand into health care too. This should not stand.

I appreciate the cooperation of the chairman and ranking member for their efforts in correcting a major flaw in the reorganization act by their acceptance of my amendment. The bill would have given the Secretary extensive authority to alter, discontinue, and consolidate any function of the Department of Agriculture. This broad-based authority for the Secretary could have led to elimination of important agricultural programs. This flaw has now been corrected.

I look forward to introducing a bill in the coming weeks that will address many of my concerns with the expansion of Rural Electrification Administration authorities into areas in which electric co-ops have no expertise—housing, water and sewage, economic development, and health care to name a few. The commitment of my fine friend and colleague from Alabama, Senator HOWELL HEFLIN to hold hearings in his Subcommittee on Rural Development and Rural Electrification is so very much appreciated.

I believe a major stride has been made towards exposing the sweet deal rural cooperatives have in regard to their use of Federal funds. I look forward to working with the members of the Senate Agriculture Committee in the future to correct these problems.

## SENATOR DOLE'S FIRST SENATE SPEECH

Mr. SIMPSON. Madam President, 49 years ago today, on a hillside near Bologna, Italy, a young lieutenant lead his squad through a complex array of bunkers and gun emplacements manned by German defenders. While executing a flanking maneuver, the squad approached a farmhouse from which German machinegun fire was coming. The young lieutenant was severely and gravely wounded. He lie face down in the mud, paralyzed from his neck down, his collarbone crushed, his lung punctured, and his vertebrae damaged.

He endured numerous operations, and for nearly a year the wounded soldier could not feed himself, not even the basic elements of personal care. It took even longer for him to be able to dress himself without assistance. When he was wounded, he weighed 194 pounds. One year later, he weighed 122 pounds. He ultimately spent 39 months in rehabilitation hospitals, and death was near several times.

Movement gradually returned to his body, and his last operation took place in November 1947. Through sheer guts, determination, mental toughness, and faith the young man not only survived, he excelled. He went back to college. He received a law degree in 1952. He was elected to the Kansas House of Representatives in 1950. In 1960, he was elected to the U.S. House of Representatives. In 1968, he was elected to the Senate.

As a Senator, he wanted to be very sure that his first speech in this remarkable Chamber was a significant one; that it dealt with an issue which combined what was in his heart with his vision for Federal policy in the future. And, of course, there were many things going on in our Nation during that turbulent period—the Vietnam war, campus dissent, inner-city riots. There was surely no shortage for potential topics.

I am told that he and his staff received thousands of suggestions for this first speech. I am also informed that there was never any doubt in the mind of this new Senator as to what the topic of that speech would be.

Twenty-five years ago today the junior Senator from Kansas then, now our friend, our leader, Bob DOLE, rose on this floor to discuss an issue with which he was intimately familiar, and for which he had a remarkable vision: Federal disability policy. I understand that it was the first time that a Senator had ever addressed disability as a personal issue as well as a national issue on the floor of the Senate.

The speech was a comprehensive discussion of the broad sweep of disability issues. He spoke of concepts like independence for people with disabilities, such ideas that are mainstream today, but they were not 25 years ago.

He talked about where our Government was on disability policy issues, where it needed to be in terms of employment issues, transportation issues, architectural barriers, better health care, education issues, technology for the disabled, how Federal tax policy might assist those with disabilities, private sector-public sector partnerships, and how to better incorporate the family of those with disabilities.

The recurring theme of the speech was how our policy might best help to move along those who had disabilities, from their feelings of helplessness and hopelessness, and move them along toward greater independence and security.

Madam President, today, Senator DOLE came to the floor, and in commemoration of his speech 25 years ago, he outlined where we are today in regard to Federal disability policy. I certainly concur with my friend, BOB DOLE. We have come a very long way since 1969. Great progress has been

made in all the areas he discussed in that first speech.

He should be especially proud of his critical leadership role in the passage of the Americans With Disabilities Act, a bill which also had the strong support of so many on both sides of the aisle and President George Bush.

Much of the progress that has been made in the area of disability policy in this country is due to the leadership of this one respected man, our Republican leader. There is no one in Congress that has done more for those who have disabilities or who has helped more to increase the awareness and sensitivities of those Americans who do not. That has been one of his greatest contributions as a Member of Congress, and there are many.

However, Senator DOLE also noted that there is still much to do in the area of disability policy. As so many of our colleagues in Congress have done in the last 25 years, I intend to follow the leadership of Senator Bob DOLE as he continues to point out areas where we must do better, how we might best accomplish our Nation's goals.

I am so very proud to serve as assistant Republican leader to a highly regarded man who has such a superb record not only in defense, law and order, civil rights, foreign and trade policy issues, but on a great number of critical domestic issues, none of which may be more important to him than the Federal disability policies of our country.

So congratulations to our friend, my friend, my leader. It is a great honor to serve as a lieutenant to this fine captain who proved himself not only in the field of battle but in the fray here which can sometimes be nearly as brutal but without the shellfire.

So congratulations to him on the 25th anniversary of his first of so many important speeches on this floor. I am very proud of this man.

## THE AMERICAN ASSOCIATION OF RETIRED PERSONS

Mr. SIMPSON. Madam President, I spoke during the past session on some very deep concerns that I have had regarding the AARP, the American Association of Retired Persons.

As I stated, the AARP is one enormously influential organization in our society. I wanted to make all persons, especially AARP members themselves, aware of just what kind of organization AARP actually is. I did that. It was rather politically harrowing, I might add, telling that they have in their coffers $37 million listed as "yield" on their investments, which would make one wonder that the principal must be quite tight if you have a $37 million yield; the fact that they receive 3 percent of the premium from every single policy they place with Prudential Life Insurance, or RV insurance, or any other insurance that they have; the fact that they are 33 million strong paying $8.

All you have to do is be 50 years old and regardless of your net worth or your income, you are joined together in a common bond with those who love airline discounts, automobile discounts, hotel discounts, and free VISA cards. And that is the AARP.

They do good things, and they do things which in my mind are not so good, such as killing off the balanced budget amendment which was worked on so diligently by our colleague from Illinois, our colleague in the chair, sharing her Senate tenure with that remarkable friend of ours, Senator PAUL SIMON, who worked doggedly on that issue.

You will recall the AARP rose, rose from wherever they rise from, and smoked the legislation on the basis I think that every person on Social Security in America will lose $1,122—I mean they had it right down to the nub and 50 cents, whatever it was—if the balanced budget amendment passed. I thought that was egregious. I shall continue to think it.

They also receive an $80 million grant from the Federal Government that I have still been unable to find out exactly what it is or why it is, more importantly, when they have the yield on investments of $37 million.

I am trying to find out what the salaries of their members are. I have not been able to determine that—the salaries of their officers. I hope I will receive that.

I visited with John Roberts. I find him a delightful gentleman. He is a pleasant enough man. He is committed. He is sharp. He is dedicated. So we are going to visit to see where we are going because I think it is wrong that all of us seem to cower in the trenches here when the AARP rises from wherever they rise. They have a huge legal network. They pay out a great deal on legal fees. There was at one time a retainer paid to the law firm of the original originators of the AARP. I think that is now just a normal—whatever that is; payment to attorneys; quite a battery of those. I visited with the counsel—a very pleasant, articulate, and very bright person.

So I intend to visit with them. I do not intend to come to the floor because I realize the political hazards entailed in this kind of work. I want to look into their manual. It is said that if their field people do not concur with the orders and instructions from the national office, they are subject to being sacked, dismissed. I would like to know a little bit more about that.

I would like to know how it is they can tell their membership that what we need in this country is long-term health care for everyone in America regardless of their net worth or their income which would bring this country to its knees fiscally. It cannot be. Means testing is apparently a horrid expression to them. I am going to call it "affluence testing" from now on, and we will see where we go from there as we use the phrase "affluence testing," which is a phrase used by our good former colleague, Senator Paul Tsongas of Massachusetts and Senator Warren Rudman of New Hampshire; as they worked diligently with the Concord Coalition group to see if we could bring some sense into the entitlements issue and the issue of, again, affluence testing.

So I have had some good mail from the AARP members, and a majority of it is very supportive from AARP members, saying, believe it or not, "I agree with you. I am in it just for the discounts. That is what I am doing, and that is what I am up to. I like the cards, the insurance, the RV insurance." I do not have any argument with that at all. I am a member of the AARP, and their magazine is a stirring magazine; it looks like the Smithsonian magazine. It is a very interesting magazine, and it has some dazzling advertising in it. It has some of the sleekest looking gray-haired cats you have ever seen playing golf, tennis, and it talks about cruises and things to do. It is pretty, we would say in Wyoming.

Yet, the editorial comment is a continual reference to what the Congress is doing to senior citizens, regardless of their net worth or income. I think that is wrong, and I think we need to look into that, and I hope there will be colleagues on the floor who will jump off the cliff with me into the stygian pits of despair when we get to taking them on. I want to find out more things, and we will.

I am sure others in the audience, or others who are listening on the floor, will wonder with me, what is the purpose of the AARP receiving $80 million in a grant from the Federal Government? The best I have been able to find up to this point is that it is used to assist senior citizens, and somehow it is best used by the AARP because of their ability to reach senior citizens. We have all sorts of things to reach senior citizens through the Government, without going to private organizations. We have the Rolling Meals; we have the senior programs, senior citizens programs; the green thumb program, and we have all sorts of programs. So I have not yet been able to find out what the $80 million is for. I do think that an organization that has that much dues income—all you do is multiply 33 million by 8, and that ought to give anybody an idea that there is enough petty cash lying around to serve a lot of different forces. That is what we hope to find out.

There was an article in Money magazine, I believe, some years ago, that said that the cash flow through the AARP in nine different businesses—re-

member what they are in: Pharmacy, insurance, RV, Scudder—I have not found out what is all involved in the premiums and brokerage fees they receive. They have investment funds, and the cash flow is $9 billion a year through the agencies of the AARP. That does not mean they make that. It just means that that is the kind of flow that goes between 33 million members and the various things that they operate at a very high intensity level.

Nevertheless, so often people write to me and say that there is some poor beleaguered emaciated soul that has the political—it is not courage at all; it may be political ignorance—to take on such a powerful force as the AARP and criticize its propaganda and money-making business machine, but I am just ornery enough to be that one.

In addition, in the past, I have been very vocal in my discontent with another senior citizen group, the National Committee to Preserve Social Security and Medicare. This group almost single-handedly perpetuated the notch baby issue with the ramblings about the terrible inequity toward persons who happened to be born within the notch years. In the past, the national committee had been the only fairly well-known organization pushing for notch legislation, because they believed the notch babies were not receiving their rightful due, and the legislation is critically needed to provide them with additional benefits.

This entire issue is based on the perception that legislation enacted in 1977 somehow unfairly reduced benefits for people born within a 5 to 10 year period after 1916. The clear problem was that many of those persons who were retiring in the late 1970's and early 1980's, those born in 1915 and 1916, received higher benefits than was ever intended. The notch babies who came after, in later years, actually received an actuarially correct amount. What is more eye-popping is to take a good look at what persons born in those notch years actually have paid into the Social Security System over their working lives.

Hear this: As a 20-year-old in 1937, the maximum amount a worker contributed to the system was $30 a year. That comes out to $2.50 a month.

In 1945, that amount was still $30 per year, as to what people were paying into the Social Security System.

In 1957, 3 years after I was married, the maximum was $84 per year.

In 1967, $234 per year. This is maximum stuff.

In 1977, as a 60-year-old worker, $722 per year.

In 1992, these persons who had made an "average wage" and retired at age 65 received $797 per month in Social Security benefits.

Does anyone need a computer? Does anyone need to know where our problems lie? I hope the entitlements commission—of which I am very proud to be a member, as the President appointed me to that—will seriously present to the American people this remarkable set of statistics. That does not mean we are going to go out chopping people up, but it means at some point in time, you have to have some relationship with what you paid in and what you get out, even if you take the base, put compound interest on it. And, yes, I have heard the old story that had we invested it ourselves and not given it to you slobs, it would have worked, and we could have done it. Add all that in there, too.

I have a form I take to town meetings, and it costs 29 cents. You send it to Social Security, and they show you what you put in, what you are going to get out. I say, "If you still feel you are getting cheated, write me after you get the material back." I have never heard from anybody, not a soul. How could they? I got mine back. In 1945, my first job at Cody bakery, I put in $5. Then I worked at the B4 ranch and put in $7. I really got ripped that year. And then the army did not do any. And then as a self-employed lawyer, $300 a year and $400 a year. They really stuck me one year for $1,500. My wife, Ann, is a very wonderful woman, a homemaker, businesswoman and mother, and all things, a very hardworking woman, who taught and earned money. The two of us, when we role into our 65th year, will be picking about $1,100 or $1,300 a month out of the system.

And that is the biggest year I ever remember before I ever got here, and I pay the maximum, which I suppose now is about $3,300 a year and will go up to $3,500. I will get that all back in 2 months. That is where we are.

Nobody listens, and I cannot believe that these groups have the desire to just leave their children and grandchildren just wallowing in nothing, regardless of their net worth or their income, and I will be visited by free spirits in the middle of the night probably tonight and there they will be clinking the tin cup giving me the business. And I am not talking about poor people. I am not talking about people who dug ditches. I am not talking about poor guys who never made over 20 grand a year. They are in this system and they should be in this system and the replacement weight of their wages is weighted to take better care of them than it is for the rich who should never forget that is our obligation. It is not to people who are earning $70,000 in retirement and are receiving a COLA, a cost-of-living allowance when they have 40,000, 50,000, 60,000, 70,000 bucks coming to them a year in retirement income whether earned or unearned.

What is really even more eye-opening is to then compare this amount that I just gave as to what they are receiving $797 a month in 1992, for a guy who made an average wage, retired at 65, but compare that with what today's worker pays. Today's worker is paying into the Social Security System in 1993, working persons paid a maximum of $3,225 per year into Social Security. That is only for Social Security. It does not include what persons contributed for Medicare or what they pay in income tax, and you have a situation right now in America where young people are paying more in Social Security tax than they are paying in income tax. That has never happened in this country. It is happening all day every day.

And I do so admire Leon Panetta and Dr. Alice Rivlin who placed in the President's budget a full paragraph, more than a paragraph of detailed information on generational analysis that shows that unless these things are corrected and unless we do something with Medicare and Medicaid, pensions, Social Security, COLA's, all the rest, that in the year 2035 people will be paying 82 percent of their income in to take care of themselves through the system. I do not think many people will sit still for that.

Those are things that we must address and the National Committee for the Preservation of Social Security and Medicare now probably remains as the last lone hysterical voice on notch reform legislation. Since they have discovered that this issue also generates sufficient heat and indignation and possibly indigestion and it keeps those donations nicely flowing into their outfit. I have visited with their people. I admire them. I enjoy them. I said, why don't you quit talking about notch babies since this is the phoniest issue that has ever confronted us, and they say we will, but they do not because I get their mail and they are still doing it. And so "notch reform" has been kept alive. I think they are wholly irresponsible on this issue, and I have never hesitated to bring this to their attention as well as to the public's attention. The folks with the committee have told me time and time again that they have left the notch issue "behind them" and are focusing now on the budget deficit and health care reform. At the present time, they are finding it very difficult to get Congress' attention on the notch reform with the problems of the budget. In the meantime, seniors continue to send additional contributions from their meager pensions to the committee so they may line their own coffers and continue their "good works." The committee's mailings and "alerts" contain misleading and distorted statements about the budget bill, the Social Security trust fund. That is always the one: "You guys steal it. You know you stole it all." We did not steal a nickel of it. It all has to be invested in Federal securities and federally backed securities. And they talk about cuts in Medicaid. One statement contained in a recent mailing, even ricochets off the wall to

state that, "The Congress has pulled some last minute, closed door deals—deals that actually bring the Social Security trust funds back into the budget * * * If entitlement spending exceeds the budget, Congress can then go looking anywhere in entitlements to pay for the overspending * * * and they are going to be looking at the Social Security trust funds." This is absolutely not true. During the budget deliberations this past summer Congress never attempted to meddle with the Social Security trust funds. It has never been healthy to even think of doing that. We tried one night doing that in 1987 and went for 24 hours, and we sealed that hole and never tapped into it again but you never know that when you get out and read the material from this group. It is one more stamp of how the national committee twists the facts.

With regard to the balanced budget amendment, the committee's latest legislative alert states that, "The balanced budget amendment requires that the total expenditures of the Federal Government not exceed total receipts or revenues. The problem for seniors is that "revenues" or "receipts" include the funds the Government takes in for specific purposes—and this includes Social Security trust fund dollars. It allows the Government to officially use the Social Security trust funds moneys to reduce the deficit." The legislative alert goes on to note that, "* * * If Social Security is back on the budget, there will be intense pressure on Congress to resist benefit improvements, such as cost-of-living adjustments, so that the huge Social Security surplus is maintained for deficit reduction purposes." The committee then urges members to contact their Senators and Representatives to tell them that the Social Security trust funds should not be used to balance the budget, and they are not and they never were and they never will.

The type of propaganda currently being churned out by the national committee through communications to their membership is intentionally confusing and diverts attention from the real issues which lawmakers face in trying to balance the budget. As an integral part of the Federal budget, Social Security certainly darn sure does have an impact on the budget and should be directly linked to the budget deficit problem. Simply put, the budget deficit—and the national debt of 4 trillion, 500 billion—yes, that is the figure—is a terrible threat to our entire Nation's financial stability and security. All Federal programs and all Americans must participate in some way in helping to reduce the budget deficit. It is no more sinister or mysterious and no less real than that. The deficit is caused by unrestrained Federal spending and a deep part of this spending is tied directly into entitlement programs such as Social Security, Medicare, civilian and military pensions, veterans' benefits, railroad retirement, and unemployment compensation. Does anyone want to step up and take on some of those? The one thing that all of these programs have in common is that they are not subject in any way to the scrutiny of the annual appropriations process. Spending for these programs occurs "automatically"—regardless of a person's net worth or income—without any action or review by Congress. In short, entitlements represent uncontrolled Government spending. That is the essence of our most serious national problem.

With the enormous amount of funds that are concentrated in Social Security and other entitlement programs, one can understand the need to include these programs in any real and significant effort to reduce the horrid budget deficit. But, it is surely not an easy task when every time I turn around, someone says, "I'm all for helping to reduce the horrid budget deficits, but don't do anything to my favorite program." Or the other good one is, "We are ready to do something if everybody else will," and they know everybody else will not so they know they are off the hook on that. Unfortunately, that kind of an attitude, which the national committee loves to perpetuate, only further compounds the difficulty of lowering the deficit.

No one in Washington is asking senior citizens to bear the brunt of deficit reduction. But they, too, have to be part of the "mix" if we are to achieve any honest deficit reduction. What we are asking all the American people to do—and I surely include seniors in this—is to save for our future so your Federal Government is not forced to borrow more and plunge the American people—that is called their children and grandchildren—ever deeper into the black hole of decline.

That is what groups like the National Committee, with their scare tactics and propaganda machines, are forcing us to do. We simply cannot stand back and watch groups like the National Committee and the AARP let their dramatic and draconian charges go unanswered. They are going to have to be examined very carefully: Their income, what they do, what they invest; and we have to know it all. And I intend to do that.

So, in conclusion and finally, both the National Committee and the AARP have been blatantly misleading seniors on the decreases in Medicare spending contained in the Clinton budget package.

And I will conclude. Listen to this.

Once again, the reduction in Medicare spending by $55.8 billion—that is what was in there—has been classified as a "spending cut" by the National Committee. These are not cuts. We cannot continue to allow groups like the AARP and the National Committee and other "senior spokesmen" to sell our country's senior citizens a bill of goods on that stuff. The fiscal year 1992 increase in Medicare spending was 14 percent. The fiscal year 1993 increase is estimated to be 10.9 percent. So they are not "cuts." We are simply not going to allow the program to go up as fast as it has in past years. When a 9- or 10-percent increase—instead of a 13- or 14-percent increase—is described as a "cut", someone is not telling the truth, because increases are not cuts.

I want to emphasize, I have not the slightest desire to "muzzle" the National Committee or any other interest group, or the AARP or the Gray Panthers or the Pink Panthers. Let them rip and snort. That is America. All I want is for them to tell the truth. I always say that "everyone is entitled to their own opinion, but no one is entitled to their own facts." I happen to believe that is a pretty good rule to follow. In fact, if I could get the National Committee to do only one thing, it would be stick with the facts and tell the truth. I sure will not hold my breath waiting for the National Committee to adopt such a policy, but I will continue to keep my eyes peeled on all of their future activities.

I hope some of my colleagues will join me as we review the material they thunder in upon us.

Well, I have taken too much time. I appreciate the generosity of the occupant of the chair.

If the majority leader is available for whatever may be necessary, I think at this point a quorum call would be appropriate. So I suggest the absence of a quorum.

The PRESIDING OFFICER. The absence of a quorum has been suggested. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. MITCHELL. 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

### EXECUTIVE CALENDAR

Mr. MITCHELL. Madam President, I ask unanimous consent that the Senate proceed to executive session to consider the following nominations: Calendar Order No. 796; Calendar Order Nos. 815, up to and including 824; and all nominations placed on the Secretary's desk in the Public Health Service.

I further ask unanimous consent that the nominees be confirmed en bloc; that any statements appear in the RECORD as if read; that, upon confirmation, the motions to reconsider be laid upon the table en bloc; that the Presi-

dent be immediately notified of the Senate's action; and that the Senate return to legislative session.

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

The nominations considered and confirmed en bloc are as follows:

INTER-AMERICAN FOUNDATION

Alexander Fletcher Watson, of Massachusetts, to be a Member of the Board of Directors of the Inter-American Foundation for a term expiring September 20, 1996.

NATIONAL COUNCIL ON DISABILITY

Larry Brown, Jr., of Maryland, to be a Member of the National Council on Disability for a term expiring September 17, 1995.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Mary Lucille Jordan, of Maryland, to be a Member of the Federal Mine Safety and Health Review Commission for the remainder of the term expiring August 30, 1996.

NATIONAL SCIENCE FOUNDATION

Shirley Mahaley Malcom, of Maryland, to be a Member of the National Science Board, National Science Foundation, for a term expiring May 10, 1998.

NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

Martha B. Gould, of Nevada, to be a Member of the National Commission on Libraries and Information Science for a term expiring July 19, 1997.

Gary N. Sudduth, of Minnesota, to be a Member of the National Commission on Libraries and Information Science for a term expiring July 19, 1997.

Frank J. Lucchino, of Pennsylvania, to be a Member of the National Commission on Libraries and Information Science for a term expiring July 19, 1998.

Bobby L. Roberts, of Arkansas, to be a Member of the National Commission on Libraries and Information Science for a term expiring July 19, 1998.

Robert S. Willard, of Ohio, to be a Member of the National Commission on Libraries and Information Science for the remainder of the term expiring July 19, 1994.

Robert S. Willard, of Ohio, to be a Member of the National Commission on Libraries and Information Science for a term expiring July 19, 1999.

DEPARTMENT OF EDUCATION

Rodney A. McCowan, of Oklahoma, to be Assistant Secretary for Human Resources and Administration, Department of Education.

IN THE PUBLIC HEALTH SERVICE

Public Health Service nominations beginning Michael A. Fallon, and ending Lori A. Willinghurst, which nominations were received by the Senate and appeared in the Congressional Record of January 26, 1994.

Public Health Service nominations beginning Susan S. Carlson, and ending Thomas R. Tahsuda, which nominations were received by the Senate and appeared in the Congressional Record of January 26, 1994.

Public Health Service nominations beginning Stephen E. Epstein, and ending Patricia R. Warne, which nominations were received by the Senate and appeared in the Congressional Record of January 31, 1994.

## LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now resume legislative session.

## TEMPORARILY SUSPENDING THE DUTY ON PERSONAL EFFECTS OF PARTICIPANTS IN THE WORLD CUP SOCCER TOURNAMENT AND THE 1996 OLYMPICS

Mr. MITCHELL. Madam President, I ask unanimous consent that the Senate proceed to the consideration of H.R. 4066, a bill to temporarily suspend the duty on personal effects of participants in the World Cup Soccer Tournament and the 1996 Olympics; that the bill be read a third time and passed, the motion to reconsider be laid upon the table, and any statements thereon appear at the appropriate place in the RECORD as though read.

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

So the bill (H.R. 4066) was passed.

Mr. MOYNIHAN. Mr. President, I rise today regarding the bill H.R. 4066, to facilitate the entry of foreign athletes coming to the United States to participate in five international sporting events over the next 2 years. The five events are soccer's World Cup, the World Rowing Championships, the Special Olympics, the Paralympics, and the 1996 Summer Olympics.

The U.S. has routinely granted duty-free entry in the past for such events, most recently for the World University Games held last year in Buffalo. Without this bill, teams, athletes, and officials would have to go through an extensive Customs paperwork process and pay temporary duties for their equipment and personal effects. This Customs paperwork process can be particularly onerous when large and unusual equipment, such as rowing shells as long as 60 feet, complicate the entry process. As well, the sheer volume of athletes entering for the World Cup and the three Olympic events would make it extremely difficult for Customs officials to handle the volume in anything resembling a timely manner.

As soccer fans well know, the World Cup begins in 2 months. And teams will begin arriving in the U.S. in the next 3 to 4 weeks. Foreign nations, without exception, assure hassle-free entry for U.S. athletes participating in similar events. For example, the U.S. athletes traveling to Lillehammer for the recently concluded Winter Olympics encountered no problems entering Norway. And in recent memory, the U.S. has similarly provided such consideration for incoming athletes. Given the urgency and unusual time sensitivity of the situation, I decided to take the exceptional step of expediting full Senate consideration by having the bill be held at the desk rather than referred to the Finance Committee, which has jurisdiction over the bill's provisions. I note that the Finance Committee consulted closely with the Ways and Means Committee to ensure comfort with the language of the bill.

Measures to provide expedited treatment for the World Cup (S. 1837) and the World Rowing Championships (S. 1931) have been introduced in the Senate by Senator RIEGLE and by Senators LUGAR and COATS, respectively. H.R. 4066 provides the same treatment contemplated in each of these bills, and as well includes the other three events.

Two notes on the language of the bill. First, the bill explicitly states that none of its provisions apply to any goods to be sold or distributed to the public. The intent of this legislation is strictly to expedite entry for participants in these events.

Second, we have also included a clause allowing the Organizing Committees to import equipment in connection with these events. The Organizing Committees often use the same equipment each time they hold an event. For example, timing equipment used by the International Olympic Committee at the Barcelona Olympics will be brought into the United States for the 1996 Olympics, before being sent on to Sidney, Australia, for the 2000 Summer Games. The language of H.R. 4066, in granting this authority, implicitly places the trust of the United States in the Organizing Committees. I have full faith that the Organizing Committees will use this authority responsibly and judiciously. However, given the wide range of events, and their sheer size, the Finance Committee will closely follow implementation of this bill.

## PROGRAM

Mr. MITCHELL. Madam President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until 8:55 a.m. on Friday, April 15, and that on Friday, the Senate meet in pro forma session only; that at the close of the pro forma session, the Senate then stand in recess until 9:30 a.m. on Tuesday, April 19; that following the prayer, the Journal of proceedings be deemed approved to date and the time for the two leaders reserved for their use later in the day; that there then be a period for morning business, not to extend beyond 10 a.m., with Senators permitted to speak therein for up to 5 minutes each; and that on Tuesday, the Senate stand in recess from 12:30 p.m. until 2:30 p.m. in order to accommodate the respective party conferences.

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

Mr. MITCHELL. Madam President, I am awaiting one more matter, so I suggest the absence of a quorum.

The PRESIDING OFFICER. The absence of a quorum has been suggested. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. MITCHELL. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

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

## CLARIFICATION OF EARLIER REMARKS

Mr. MITCHELL. Madam President, earlier today in a statement which I made extemporaneously on the floor of the Senate, I made the following statement: "Interest rates have gone down, although they are now starting to rise again as a consequence of recent actions taken by the Federal Reserve Board." I then went on to say, "Economic growth is up. Indeed, economic growth was so rapid in the last quarter of last year that the Federal Reserve Board took action to increase interest rates to restrain the rate of growth so as not to ignite a new round of inflation."

Madam President, I am advised that while it is correct that interest rates went down following the passage of the budget last year, and it is correct that they have risen since then, that the current level of rates is slightly higher than they were at the time the budget was adopted. I want to make absolutely clear that I have not misspoken with respect to that. So I wanted to clarify my remarks and make clear that, following passage of the budget, interest rates went down, bottoming in the months following the passage of the budget last year, have since begun to rise again, and are now at a level that is slightly higher than they were at the time that the budget was adopted.

My remarks are ambiguous as to that point and I wanted to make that clear so there can be no misunderstanding.

## RECESS UNTIL 8:55 A.M. TOMORROW

Mr. MITCHELL. Madam President, I note that there is no other Senator present seeking recognition and no further business to come before the Senate today.

I therefore ask unanimous consent that the Senate stand in recess as previously ordered.

There being no objection, the Senate, at 7:44 p.m., recessed until Friday, April 15, 1994, at 8:55 a.m.

## NOMINATIONS

Executive nominations received by the Senate April 14, 1994:

### FEDERAL COMMUNICATIONS COMMISSION

RACHELLE B. CHONG, OF CALIFORNIA, TO BE A MEMBER OF THE FEDERAL COMMUNICATIONS COMMISSION FOR A TERM OF 5 YEARS FROM JULY 1, 1992, VICE SHERRIE PATRICE MARSHALL, RESIGNED.

SUSAN NESS, OF MARYLAND, TO BE A MEMBER OF THE FEDERAL COMMUNICATIONS COMMISSION FOR THE REMAINDER OF THE TERM EXPIRING JUNE 30, 1994, VICE ERVIN S. DUGGAN, RESIGNED.

SUSAN NESS, OF MARYLAND, TO BE A MEMBER OF THE FEDERAL COMMUNICATIONS COMMISSION FOR A TERM OF 5 YEARS FROM JULY 1, 1994. (REAPPOINTMENT.)

### DEPARTMENT OF LABOR

CYNTHIA A. METZLER, OF THE DISTRICT OF COLUMBIA, TO BE AN ASSISTANT SECRETARY OF LABOR. (NEW POSITION.)

### DEPARTMENT OF THE TREASURY

RONALD K. NOBLE, OF NEW YORK, TO BE UNDER SECRETARY OF THE TREASURY FOR ENFORCEMENT. (NEW POSITION.)

### DEPARTMENT OF TRANSPORTATION

RAYMOND G. ROMERO, OF ILLINOIS, TO BE AN ASSISTANT SECRETARY OF TRANSPORTATION, VICE JEFFREY NEIL SHANE, RESIGNED.

### CORPORATION FOR PUBLIC BROADCASTING

ALAN SAGNER, OF NEW JERSEY, TO BE A MEMBER OF THE BOARD OF DIRECTORS OF THE CORPORATION FOR PUBLIC BROADCASTING FOR THE REMAINDER OF THE TERM EXPIRING JANUARY 31, 1998, VICE DAVID P. PROSPERI.

### DEPARTMENT OF TRANSPORTATION

DHARMENDRA K. SHARMA, OF CALIFORNIA, TO BE ADMINISTRATOR OF THE RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION, DEPARTMENT OF TRANSPORTATION. (NEW POSITION.)

### IN THE ARMY

THE FOLLOWING-NAMED OFFICER TO BE PLACED ON THE RETIRED LIST IN THE GRADE INDICATED UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTION 1370:

*To be lieutenant general*

LT. GEN. THOMAS P. CARNEY, 297-34-4061, U.S. ARMY

THE FOLLOWING-NAMED OFFICER TO BE PLACED ON THE RETIRED LIST IN THE GRADE INDICATED UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTION 1370:

*To be lieutenant general*

LT. GEN. JAMES R. ELLIS, 419-46-0632, U.S. ARMY

THE FOLLOWING-NAMED OFFICER TO BE PLACED ON THE RETIRED LIST IN THE GRADE INDICATED UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTION 1370:

*To be lieutenant general*

LT. GEN. MERLE FREITAG, 503-40-7089, U.S. ARMY

THE FOLLOWING-NAMED OFFICER TO BE PLACED ON THE RETIRED LIST IN THE GRADE INDICATED UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTION 1370:

*To be lieutenant general*

LT. GEN. LEO J. PIGATY, 044-32-1385, U.S. ARMY

### IN THE NAVY

THE FOLLOWING-NAMED REAR ADMIRALS (LOWER HALF) IN THE LINE OF THE U.S. NAVY FOR PROMOTION TO THE PERMANENT GRADE OF REAR ADMIRAL, PURSUANT TO TITLE 10, UNITED STATES CODE, SECTION 624, SUBJECT TO QUALIFICATIONS THEREFORE AS PROVIDED BY LAW:

UNRESTRICTED LINE OFFICER

*To be rear admiral*

REAR ADM. (LH) DAVID SPENCER BILL III, 228-58-8134, U.S. NAVY
REAR ADM. (LH) MICHAEL WILLIAM BORDY, 287-32-5519, U.S. NAVY
REAR ADM. (LH) FRANK LEE BOWMAN, 411-64-5146, U.S. NAVY
REAR ADM. (LH) HERBERT ARCHIBALD BROWNE, JR., 460-72-4815, U.S. NAVY
REAR ADM. (LH) ARTHUR KARL CEBROWSKI, 147-32-9746, U.S. NAVY
REAR ADM. (LH) VERNON EUGENE CLARK, 318-38-8489, U.S. NAVY
REAR ADM. (LH) WINFORD GERALD ELLIS, 263-56-6240, U.S. NAVY
REAR ADM. (LH) ANDREW ALOYSIUS GRANUZZO, 101-32-1738, U.S. NAVY
REAR ADM. (LH) ALEXANDER JOSEPH KREKICH, 157-32-9900, U.S. NAVY
REAR ADM. (LH) JOHN MICHAEL LUECKE, 350-34-7015, U.S. NAVY
REAR ADM. (LH) JOHN JAMES MAZACH, 410-70-0306, U.S. NAVY
REAR ADM. (LH) JOHN ROY RYAN, 201-34-4509, U.S. NAVY
REAR ADM. (LH) JOHN FRANCIS SHIPWAY, 069-34-8999, U.S. NAVY
REAR ADM. (LH) JOHN FLEET SIGLER, 006-42-7765, U.S. NAVY
REAR ADM. (LH) BERNARD JOHN SMITH, 262-58-2097, U.S. NAVY
REAR ADM. (LH) GEORGE FRANCIS ADOLF WAGNER, 125-32-3873, U.S. NAVY
REAR ADM. (LH) WILLIAM HARRY WRIGHT IV, 545-56-7540, U.S. NAVY

ENGINEERING DUTY OFFICER

*To be rear admiral*

REAR ADM. (LH) MICHAEL THOMAS COYLE, 141-34-3656, U.S. NAVY

SPECIAL DUTY OFFICER (PUBLIC AFFAIRS)

*To be rear admiral*

REAR ADM. (LH) KENDELL MILFORD PEASE, JR., 018-34-3423, U.S. NAVY

### IN THE COAST GUARD

THE FOLLOWING-NAMED OFFICERS OF THE U.S. COAST GUARD FOR APPOINTMENT TO THE GRADE OF REAR ADMIRAL:

ROGER T. RUFE, JR. HOWARD B. GEHRING

## CONFIRMATIONS

Executive nominations confirmed by the Senate April 14, 1994:

### NATIONAL COUNCIL ON DISABILITY

LARRY BROWN, JR., OF MARYLAND, TO BE A MEMBER OF THE NATIONAL COUNCIL ON DISABILITY FOR A TERM EXPIRING SEPTEMBER 17, 1995.

### FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Mary Lucille Jordan, of Maryland, to be a Member of the Federal Mine Safety and Health Review Commission for the remainder of the term expiring August 30, 1996.

### NATIONAL SCIENCE FOUNDATION

Shirley Mahaley Malcom, of Maryland, to be a Member of the National Science Board, National Science Foundation, for a term expiring May 10, 1998.

### NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

Martha B. Gould, of Nevada, to be a Member of the National Commission on Libraries and Information Science for a term expiring July 19, 1997.

Gary N. Sudduth, of Minnesota, to be a Member of the National Commission on Libraries and Information Science for a term expiring July 19, 1997.

Frank J. Lucchino, of Pennsylvania, to be a Member of the National Commission on Libraries and Information Science for a term expiring July 19, 1998.

Bobby L. Roberts, of Arkansas, to be a Member of the National Commission on Libraries and Information Science for a term expiring July 19, 1998.

Robert S. Willard, of Ohio, to be a Member of the National Commission on Libraries and Information Science for the remainder of the term expiring July 19, 1994.

Robert S. Willard, of Ohio, to be a Member of the National Commission on Libraries and Information Science for a term expiring July 19, 1999.

### INTER-AMERICAN FOUNDATION

ALEXANDER FLETCHER WATSON, OF MASSACHUSETTS, TO BE A MEMBER OF THE BOARD OF DIRECTORS OF THE INTER-AMERICAN FOUNDATION FOR A TERM EXPIRING SEPTEMBER 20, 1996.

### DEPARTMENT OF EDUCATION

RODNEY A. MCCOWAN, OF OKLAHOMA, TO BE ASSISTANT SECRETARY FOR HUMAN RESOURCES AND ADMINISTRATION, DEPARTMENT OF EDUCATION.

THE ABOVE NOMINATIONS WERE APPROVED SUBJECT TO THE NOMINEES' COMMITMENT TO RESPOND TO REQUESTS TO APPEAR AND TESTIFY BEFORE ANY DULY CONSTITUTED COMMITTEE OF THE SENATE.

### THE JUDICIARY

ROSEMARY BARKETT, OF FLORIDA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT.

### PUBLIC HEALTH SERVICE

PUBLIC HEALTH SERVICE, NOMINATIONS BEGINNING MICHAEL A. FALLON, AND ENDING LORI A. WILLINGHURST, WHICH NOMINATIONS WERE RECEIVED BY THE SENATE AND APPEARED IN THE CONGRESSIONAL RECORD ON JANUARY 26, 1994.

PUBLIC HEALTH SERVICE NOMINATIONS BEGINNING SUSAN S. CARLSON, AND ENDING THOMAS R. TAHSUDA, WHICH NOMINATIONS WERE RECEIVED BY THE SENATE AND APPEARED IN THE CONGRESSIONAL RECORD ON JANUARY 26, 1994.

PUBLIC HEALTH SERVICE NOMINATIONS BEGINNING STEPHEN E. EPSTEIN, AND ENDING PATRICIA R. WARNE, WHICH NOMINATIONS WERE RECEIVED BY THE SENATE AND APPEARED IN THE CONGRESSIONAL RECORD ON JANUARY 31, 1994.

### NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

MARTHA B. GOULD, OF NEVADA, TO BE A MEMBER OF THE NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE FOR A TERM EXPIRING JULY 19, 1997.

GARY N. SUDDUTH, OF MINNESOTA, TO BE A MEMBER OF THE NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE FOR A TERM EXPIRING JULY 19, 1997.

FRANK J. LUCCHINO, OF PENNSYLVANIA, TO BE A MEMBER OF THE NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE FOR A TERM EXPIRING JULY 19, 1998.

BOBBY L. ROBERTS, OF ARKANSAS, TO BE A MEMBER OF THE NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE FOR A TERM EXPIRING JULY 19, 1998.

ROBERT S. WILLARD, OF OHIO, TO BE A MEMBER OF THE NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE FOR THE REMAINDER OF THE TERM EXPIRING JULY 19, 1994.

ROBERT S. WILLARD, OF OHIO, TO BE A MEMBER OF THE NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE FOR A TERM EXPIRING JULY 19, 1999.

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ALEXANDER FLETCHER WATSON, OF MASSACHUSETTS, TO BE A MEMBER OF THE BOARD OF DIRECTORS OF THE INTER-AMERICAN FOUNDATION FOR A TERM EXPIRING SEPTEMBER 20, 1996.

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