SENATE—*Tuesday, June 27, 1995*

(Legislative day of Monday, June 19, 1995)

The Senate met at 9:15 a.m., on the expiration of the recess, and was called to order by the President pro tempore [Mr. THURMOND].

The PRESIDENT pro tempore. Today's prayer will be offered by Commissioner Hodder, national commander of the Salvation Army.

PRAYER

The guest Chaplain, Commissioner Kenneth L. Hodder, national commander of the Salvation Army, offered the following prayer:

Let us pray:

Lord, at the beginning of this new workday, we ask for an enlarged capacity to care for others.

Help us to care—really care—for all those with whom we serve in this Chamber. Many of us are carrying personal and painful burdens of which others are unaware. So help us to work with each other with a gracious spirit of caring, one that reaches beyond the obvious and ministers to the hidden.

And help us to care—really care—for this Nation of others. Surely people matter most. Assist us, then, as we struggle to balance our ideas with others' aspirations, our causes with others' concerns, and our passions with others' needs.

We pledge to assist You in answering this prayer by our thinking, speaking, and doing this day.

And it is in Your strong name that we ask these things and offer ourselves. Amen.

PRIVATE SECURITIES LITIGATION REFORM ACT

The PRESIDENT pro tempore. Under the previous order, the Senate will now resume consideration of S. 240, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 240) to amend the Securities and Exchange Act of 1934 to establish a filing deadline and to provide certain safeguards to ensure that the interests of investors are well protected under the implied private action provisions of the act.

The Senate resumed consideration of the bill.

Pending:

Bryan amendment No. 1474, to restore the liability of aiders and abettors in private actions.

Boxer-Bingaman amendment No. 1475, to establish procedures governing the appointment of lead plaintiffs in private securities class actions.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The distinguished acting majority leader.

SCHEDULE

Mr. BROWN. Mr. President, this morning, the leaders' time has been reserved, and the Senate will immediately resume consideration of S. 240, the securities litigation bill. There will be 30 minutes of debate in relation to the pending Bryan amendment regarding aiding and abetting, to be followed by 30 minutes on the Boxer amendment regarding lead plaintiff.

At the hour of 10:15 this morning, there will be two stacked rollcall votes on or in relation to the pending amendments.

The Senate will stand in recess today from the hour of 12:30 p.m. to 2:15 p.m. for the weekly policy luncheons to meet.

Mr. President, at this time I suggest the absence of a quorum, and I ask unanimous consent that the time be divided equally.

The PRESIDENT pro tempore. Without objection, it is so ordered. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

PRIVATE SECURITIES LITIGATION REFORM ACT

The Senate continued with the consideration of the bill.

AMENDMENT NO. 1474

Mr. BRYAN. Mr. President, if I might inquire of the Chair, it is my understanding that on the Bryan amendment, there is a time agreement in which the distinguished chairman of the Banking Committee has 15 minutes allotted to him and the proponents of the Bryan amendment have 15 minutes; is that correct?

The PRESIDENT pro tempore. The Senator is correct.

Mr. BRYAN. Mr. President, I yield myself 8 minutes out of my allocated time.

Mr. President, for the benefit of my colleagues, for six decades, the foundation upon which public confidence in the American securities market has been built rests upon two fundamental premises: First, effective regulation by the Securities and Exchange Commission; second, the right of individual investors who have been defrauded to pursue a private cause of action against those wrongdoers.

Mr. President, I greatly fear that S. 240, as it is being processed through this Chamber, will, for all intents and purposes, emasculate that private cause of action, which has been so important in keeping the American securities market safe and sound and investor confidence high. Those are not just statements made by the Senator from Nevada. The former Chairman of the SEC, Mr. Breeden, the last Republican Chairman, made similar statements in testimony before the Banking Committee during his tenure. The current Chairman, Mr. Levitt, has also made that proposition.

The amendment before us seeks to correct a decision by the Supreme Court decided last year by a narrow 5-to-4 margin that wipes out liability for aiders and abettors.

Now, there has been much debate on the floor of the Senate about proportionate liability, joint and several liability, intentional misconduct, knowing misconduct, and reckless misconduct. None of those distinctions makes a whit of difference if this amendment is not granted, because under the current State of the law, no aider and abettor is liable under that theory, irrespective of his or her misconduct. Everyone is home free.

I cannot conceive of a public policy that would support that conclusion. And, indeed, the prime sponsors of this legislation have previously written—I refer to the distinguished Senator from Connecticut and the senior Senator from New Mexico—expressing their support for restoration of aider and abettor liability.

Interspersed throughout all of this debate has been a great antipathy to plaintiff's lawyers. I understand that antipathy and I do not, for a moment, doubt that there has been some misconduct, and some provisions in S. 240 deal with that misconduct. But let me point out that aiders and abettors are also lawyers, and if misconduct on the part of the plaintiff's bar ought to be addressed—as it ought to—under what theory of social or economic justice, can we assert that those who are part of the conspiracy itself—lawyers and accountants, primarily, and to some extent bankers—in effect, be given a blank check? If they did not sign their names to any of the statements, in effect, they have no liability.

● 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

Now, is this theoretical? Is it esoteric? No. If the state of law at the time of the Keating actions—one of the most notorious securities frauds of this century—were in the form that it is today, here is what would occur. My colleagues will recall that Mr. Keating, the primary wrongdoer, was bankrupt. No recovery from him. Some $262 million were recovered as a result of the Keating fraud by private investors. Jeri Mellon, a retired woman who lives in Henderson, NV, a suburb of Las Vegas, who came back, most of her savings were lost as a result of the fraud. She joined with others similarly situated in a class action to recover money. They recovered $262 million.

If that action were brought today, because aiding and abetting is no longer a part of the law as a result of the Central Bank of Denver case—I might add, the Court, in deciding that case, said, look, we do not believe that the statute can be construed to apply to aider and abettor liability, but we sure as the devil believe that there ought to be liability. So this was not a value judgment made by the Court that aiders and abettors ought not to be available. Here are some of the aiders and abettors: Parker Milliken, Kay Sholer, Sidley & Austin, Michael Milken; $121 million of the overall value of $262 million would be wiped out if that action was filed today. So we are down now to $141 million.

Previously, I offered for the consideration of the Senate a recommendation shared by the SEC, by the State Securities Association, by every regulator, by consumer groups, by those charged with public finance responsibilities at the State and local government level, to extend the statute of limitations, which is currently limited to 1 to 3, to make it a 2-year to 5-year statute of limitations.

Had the action against Charles Keating been brought today, 20 percent of the class claims would have been barred because of this restricted statute of limitations. Another $28 million in recovery, wiped out.

These are people like the Jeri Mellons. I suspect that virtually every Member of this Senate has had individuals who lost money as a result of the Keating fraud.

The recovery is down $262 million, to $113 million. Joint and several liability: Under the provisions of S. 240, in order to be jointly and severally liable, you have to either have knowing misconduct or intentional misconduct. Reckless misconduct no longer does it.

Although I recognize a distinction can be made between the two of those, the amendment that Senator SARBANES and I sought to offer in one form or another, sought to make sure that if the primary violator is insolvent, that those who are guilty of reckless misconduct—it is not ordinary negligence, not simple negligence—if a Member of this Chamber goes out this evening, gets in his or her automobile, is involved in an accident and is negligent, that Member is responsible to the party to whom he or she has inflicted the injury. Not so with securities law. Only if they are guilty of reckless misconduct.

In effect, as a result of the changes we make in the joint and several liability, those who are proportionally liable pay only their share. It is estimated that another $67 million would be wiped out in terms of investor recovery if the Keating case were brought today. S. 240 also wipes out the Rico treble damages provision, and another $30 million.

So if the Keating case were brought today, with the state of the law as it exists on this morning as this debate continues, rather than $262 million recovered by innocent investors, many of whom lost their life savings—and a disproportionately large number, small, elderly, retired investors who had little likelihood of ever regaining their loss—$262 million of recovery would be reduced to $16 million.

Mr. President, I ask my colleagues, under what theory of social or economic justice do we want to do this? Sure, we want to get at the plaintiff's lawyers that file frivolous actions, and the enhanced provisions of rule 11 under the Federal Rules of Civil Procedure address that issue.

The amendment before the Senate would simply restore aiding and abetting liability. Zippo, no recovery at all. Intentional misconduct, knowing misconduct, reckless misconduct—not 1 cent could be recovered under a theory of aider and abettor liability under the state of the law today, unless the Bryan amendment is enacted.

May I inquire, I have used my time; how is the time being charged at this point?

The PRESIDING OFFICER (Mr. COVERDELL). The Senator has approximately 3 minutes remaining on his side.

Mr. D'AMATO. Mr. President, this is, admittedly, a very complex subject. We must distinguish between knowingly and intentionally having committed a fraudulent act and recklessly committing an act.

What is the difference between reckless conduct and intentional and knowing fraud? What standard of proof is there between gross negligence, negligence, and recklessness? These are not clear distinctions and it is because of these blurred distinctions that there has been a large body of case law, over the years, trying to make the definitions clear. This is particularly true in the area of reckless conduct; over the years a number of courts have given the interpretation that someone who was not the primary wrongdoer, but participated in the fraud and knowingly and substantially assisted in the fraud could be held liable. This does not seem to me to be reckless conduct but knowing fraud.

Courts have found, over the years, that a firm could be held fully liable for conduct which the average person would consider imprudent, negligent, or careless. Some circuit courts have recognized this so-called aiding and abetting liability as part of the recklessness standard.

Aiding and abetting liability holds the business community to an incredibly high standard, particularly when they can be held liable for damages that are far greater that any damage that they have caused. There is a real culprit to hold liable. The primary wrongdoer is somebody that has really committed fraud, who has practiced avarice and greed, who has wantonly and knowingly broken the law.

The Supreme Court decided that aiding and abetting liability applies to someone who is not the primary wrongdoer but participated in a fraud and knowingly and substantially assisted in the fraud. In the Central Bank of Denver case, the Court decided there was no aiding and abetting liability for private lawsuits involving fraud.

The Supreme Court did not believe that section 10(b) intended to cover aiding and abetting liability. Providing for aiding and abetting liability under section 10(b) would be contrary to the goals of this legislation.

This bill is aimed at reducing frivolous litigation. Even the Supreme Court recognized that expanding 10(b) to include aiding and abetting liability would lead many defendants to settle to avoid the expense and risk of going to trial.

The Supreme Court said, "Litigation under rule 10b-a presents a danger vexatiousness, different in degree and in kind, and would require secondary actors to expend large sums even for pretrial defense and the negotiation of settlement."

As I have said, aiding and abetting liability would require secondary actors—not the primary wrongdoer, the person who has committed the fraud—to expend large sums, even for pretrial defense, and the negotiation of settlement.

Indeed, I do not believe that just because people have made settlements that they were guilty of fraud or that it was right and proper that they were sued.

When 93 percent of the cases—and I know not all the defendants were brought in to these suits for aiding and abetting, I grant that—but 93 percent of the defendants settled. These aiders and abettors are people tangentially involved in the fraud; they are brought into the suits only because they were involved with a scoundrel—a Keating—who was deliberately breaking the law. Often these aiders and abettors are accountants who did not notice the fraud,

but possibly should have, yet we would hold them liable as if they committed the fraud. The Supreme Court said last year that aiding and abetting liability did not belong in private lawsuits involving fraud.

Of course, if someone has knowingly, intentionally, misled investors or been involved in committing fraud, they are no longer just aiders and abettors, and can be held liable for their actions.

Under S. 240, people who commit fraud will be treated as primary wrongdoers, as the culpable party, and can be held jointly and severally.

Further, S. 240 grants the Securities and Exchange Commission express authority to prosecute cases against wrongdoers who knowingly aid and abet primary wrongdoers.

This issue is both very interesting and very complex. It is not easy. First, the circuit courts recognized aiding and abetting liability, then the Supreme Court decided there is no place in these lawsuits for this liability. Using the aiding and abetting liability to proceed under rule 10(b) with a lawsuit, which is what this amendment would do, would take us to a standard that the Supreme Court decided should not be applied. Again, I quote that this liability standard "presents a danger of vexatiousness, different in degree in kind and would require secondary actors to expend large sums, even for pretrial defense and negotiations of settlements."

This amendment would actually destroy a good part of what this legislation attempts to do in terms of keeping lawyers honest and protecting those people who did not commit fraud, but were associated with those who did. It is my belief that these firms, the so-called aiders and abettors, are only brought in to these suits because of their deep pockets. They are professionals; securities analysts, accountants, and bankers who are involved in some way with the fraudulent party. They get brought in to the lawsuits and have to spend millions of dollars defending themselves. And their lawyers tell them that there is a chance that "you may be held liable for the full amount." Why? Because when the name of a primary wrongdoer like Keating comes up, you are "guilty by association."

Any prudent lawyer would have to say that there is a chance you will be held liable if you were involved with a rogue—and there will be more rogues, make no mistake about it. I do not care what kind of legislation we pass here, there will be others who break the laws, who will do terrible things. It is not right that an accountant, law firm or securities broker is dragged in and linked to the fraud because they were asked to counsel and they gave some advice. They did not tell the wrongdoers to lie, they did not participate in fraud, but if they rendered some professional service, by virtue of their being linked with by that fraud they may be held liable by a jury. Do you think that a defendant is going to be able to establish clearly what is reckless conduct and what is not? The jury can find against them and then hold them for hundreds of millions of dollars in damages. That risk is why you have the incredible percentage of settlements.

You heard Senator DODD last evening explain how it was that a prominent firm, one of the big six accounting firms, did $15,000 worth of work, a contract to review something, and was then brought in to the suit. This accounting firm did defend itself and won the case, but in winning the case expended over $6 million. We cannot subject people to that kind of choice. I tell you when that accounting firm is hauled in the next time, it will settle. This amendment would allow a firm that was associated with the fraudulent firm to be fully liable for the damages. This would move us in the wrong direction, so I have to oppose this amendment.

I yield the floor.

The PRESIDING OFFICER. Who seeks recognition?

Mr. BRYAN. Mr. President, may I inquire what the state of time is?

The PRESIDING OFFICER. The Senator from Nevada has 2½ minutes. The Senator from New York has 2 minutes.

Mr. BRYAN. Mr. President, let me, in 2½ minutes, tell my colleagues this amendment has nothing to do with frivolous lawsuits, absolutely nothing. This amendment simply indicates whether or not the Senate of the United States believes that those who counsel, who aid, who provide assistance to those who perpetrate investor fraud, ought to be held responsible. Under the current law, aiders and abettors are not liable. Among that group are the lawyers who have been the focus of much criticism during the course of the debate.

Sidley & Austin, Jones Day. These are law firms. A vote against the Bryan amendment places the individual Senator and this Congress on record as saying this kind of conduct—misconduct in my view—ought to be tolerated, approved, and tacitly accepted. I cannot conceive of such a result.

A decade ago the Congress of the United States enacted a piece of legislation, Garn-St Germain, that led, within a decade, to a savings and loan industry which cost the American taxpayers tens and tens of billions of dollars.

It is my view that S. 240, in its present form, without the kinds of amendments the distinguished Senator from Maryland and I have tried to add, will cause investor losses of those magnitudes over the ensuing years, and essentially private causes of action will be destroyed.

Mr. SARBANES. Will the Senator yield for a question?

Mr. BRYAN. I will be pleased to yield to the Senator.

Mr. SARBANES. Am I correct, under the legislation before us, there could be no liability whatever imposed in a private action for aiding and abetting?

Mr. BRYAN. The Senator is correct, no liability.

Mr. SARBANES. In the Keating case, a large part of the recovery of the victims came from aiders and abettors, did it not?

Mr. BRYAN. If I might respond to the Senator, out of $262 million recovered in a private cause of action—because Mr. Keating himself was bankrupt—$121 million of the $262 million was recovered from aiders and abettors. Under the state of law currently, that $121 million is wiped out.

Mr. SARBANES. What public policy reason could there possibly be for letting aiders and abettors go completely free? I understand there could be an argument about what standards to impose. But on what basis in public policy is it that aiders and abettors go free?

The PRESIDING OFFICER. The time of the Senator from Nevada has expired.

Mr. BRYAN. Might I inquire if the acting floor manager will yield me 1 minute to respond to the question of the Senator from Maryland?

Mr. SARBANES. Mr. President, I ask unanimous consent the Senator be allotted 1 additional minute.

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

Mr. BRYAN. Mr. President, in responding to the question of the Senator from Maryland, I am at a total loss. It is beyond my comprehension, whether one positions himself or herself in the political spectrum to the left of Fidel Castro or to the right of the Sheriff of Nottingham, under what theory you could say this kind of conduct ought to be encouraged and to simply say to these folks, by and large: Hey, as long as you are looking the other way and not signing any documents, you can, with total impunity under the private cause of action, counsel, aid, and provide tangible help to perpetrators of investor fraud. It is simply incomprehensible, I respond to my good friend.

Mr. SARBANES. I thank the Senator.

The PRESIDING OFFICER. Does the Senator from Colorado seek recognition? You have 2 minutes left. The Chair recognizes the Senator from Colorado.

Mr. BROWN. Mr. President, the distinguished Senator from Nevada, I think, is a very thoughtful Member and brings persuasive arguments to the floor on this and other issues that he takes on. The concern I find, as I listen to this, is the potential of holding someone liable for another's actions when they had no idea that fraud, that

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action, was taking place. That is what this amendment does. This would hold someone, an accountant, someone else involved in this process who has no idea that a fraud is taking place, this would hold them liable even though they did not commit the fraud and they did not even know about the fraud.

Making someone liable, taking millions of dollars away from them, putting them through this when they did not even know about the action seems to me to be outrageous.

We yield the remainder of our time on this side.

AMENDMENT NO. 1475

The PRESIDING OFFICER. Under the previous order, there will now be 30 minutes debate on the Boxer amendment No. 1475, to be equally divided in the usual form.

The Senator from Colorado.

Mr. BROWN. Mr. President, if the Senator from California is willing, I would like to address an inquiry to her concerning her amendment.

Mrs. BOXER. Certainly.

Mr. BROWN. On the first page of the amendment, on page 98, following through line 100, you put in a subsection and insert the following subsection that reads:

Not later than 90 days after the date on which a notice is published under subparagraph (A) or (B) of paragraph (1), the court shall determine whether all named plaintiffs acting on behalf of the purported plaintiff's class who have moved the court to be appointed to serve as lead plaintiff under paragraph (1)(A)(ii) have unanimously selected a named plaintiff or plaintiffs to serve as lead plaintiff or plaintiffs of the purported plaintiff class . . . .

I did not read all of that. My question relates to it, and I frankly find it a bit confusing. When we say "all named plaintiffs acting on behalf of the purported plaintiff class," who is it we are describing?

Mrs. BOXER. Everyone in the class. We took it right from your bill. I guess the bill the Senator is supporting; that you have to advertise that class actions are about to take place and every named plaintiff has a chance to vote on who the lead plaintiff shall be. We think this is very democratic. Unlike your bill, the richest investor will be the lead plaintiff.

Mr. BROWN. If the Senator would, my question is I think very specific. When it says all named plaintiffs, who are those? Are those solely the ones who brought the suit?

Mrs. BOXER. Every plaintiff of the class who responded to become part of the suit. There is a 90-day period where they go out and advertise.

Mr. BROWN. It would be the people who brought the suit as well as people who decided to add their names?

Mrs. BOXER. Everyone; all plaintiffs who are interested in being part of the suit gets to vote on who the lead plaintiff shall be.

Mr. BROWN. If that is the case, why do we have language "acting on behalf of the purported plaintiff class who have moved the court to be appointed to serve as lead plaintiff?" What if one of the outside plaintiffs has not moved the court to serve to be plaintiff?

Mrs. BOXER. I think the Senator is confusing a very simple straightforward point. We take the language straight out of S. 240. In 90 days, there are newspaper advertisements of general circulation, and everyone who is part of the class is invited to join in the class. At that point in time, all the plaintiffs who are in the suit—and everyone is invited to be in—get to vote on who they want the lead plaintiff to be. If there is not a unanimous selection then the judge appoints.

Mr. BROWN. My question was very specific. The question I have is this: If the intention is to have it include all plaintiffs, why do we modify this by saying "who have moved the court to be appointed to serve as lead plaintiff"? What if one of the outside plaintiffs that joined the suit does not petition the court to serve as lead plaintiff? Does that mean that they have no voice under subparagraph (a) and they are not required to consent to the naming of lead plaintiff?

Mrs. BOXER. My understanding of this amendment is clear. Everyone who has joined in the suit has an equal say. And if they cannot agree, then the court shall appoint. In S. 240 it is the richest investor. So the answer is all the plaintiffs get to choose.

Mr. BROWN. Let me just say, at least for this Member, I was intrigued by the arguments of the Senator from California last night. As I read the bill, it appears to me that the language here seems to imply that someone who is not in the original filing, or more specifically had not moved the court to be appointed to serve as lead plaintiff, would not have a voice in that unanimous consent required under selection for subparagraph (a).

Mrs. BOXER. No. I would address my friend to page 3 on the selection of lead counsel. The lead plaintiff or plaintiffs appointed under paragraph 2 shall be subject to the approval of the court selecting the named counsel. So everyone has a chance. All the plaintiffs have a chance to vote.

Mr. BROWN. My suggestion would be if the Senator does not want to limit that plaintiff class, having the words "who have moved the court to be appointed to serve as lead plaintiff," I think gives the impression that you have to have been in that group. But the Senator mentioned "rich" under the bill. I have looked in the bill. I do not find that term. Could she show me where in the bill this indicates that the richest one determines?

Mrs. BOXER. Certainly I will. Unfortunately, at this point I would need a quorum call to find the exact place because I am working off my amendment. My friend did not tell me he was going to question me about the exact wording of the bill itself. So could we put a quorum call in place? I could find the section.

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

Mr. SARBANES. If the Senator will withhold, the bill says "in the determination of the court has the largest financial interest in the relief sought by the class" on page 99 of the bill.

The PRESIDING OFFICER. Who yields time?

Mr. SARBANES. Will the Senator yield so I may respond to his question?

Mr. BROWN. Surely.

Mr. SARBANES. On page 99 of the bill, the language is "in the determination of the court has the largest financial interest in the relief sought by the class." That is the language.

Mr. BROWN. That was not the question. That is an unresponsive answer. The question was where in the bill is "rich"? The Senator had made the point.

Mr. SARBANES. "The largest financial interest in the relief sought by the class."

Mr. BROWN. The Senator from Maryland is telling me "rich" is not in the bill, that they use terms with regard to the "largest financial."

Mr. SARBANES. The richest person in the sense of having the "largest financial interest in the relief sought by the class" is the one you are putting forward.

Mr. BROWN. Mr. President, let me simply note this.

Mr. SARBANES. "The largest financial interest."

Mr. BROWN. I believe it is my time. Mr. President, who has the time?

The PRESIDING OFFICER. The Senator from Colorado has the floor.

Mr. BROWN. Mr. President, we all make mistakes in debate on the floor. I certainly am included. The point I wanted to make was that the terms used by the Senator from Maryland and the Senator from California are in fact not in the bill. The recitation and description of what was in the bill is not in the bill. What was said was inaccurate. Mr. President, I think there is an important point here.

Let us assume you have two lawyers from New York who bring a class action against Wells Fargo. Each one of them is worth $10 million each. The public employees pension fund is also a shareholder of Wells Fargo. The manager of that public employees association has total assets about one-tenth of what the lawyers from New York have. Who is rich? Who is the richest? Are the people worth $10 million, the lawyers in New York, who are professional plaintiffs, the poor ones in this? The answer is obvious. The professional plaintiffs who are worth $10 million each are a lot richer than the person

who happens to work for a living and manage the assets of the California employees' pension fund. But the California employees' pension fund has a great deal larger financial interest.

Mr. President, I simply want to assure the Senator from California, for whom I have great respect, that if she is concerned about improving on who we select to be the lead plaintiff, I will join her. But setting up a provision where professional litigants get to name the lead plaintiff and close other people out I think is a problem. The way I read this measure is it says that the people who bring the suit agree, and they may only have one share each. They may be in this only for the purposes of getting a lawsuit and naming the plaintiff and getting to name the lawyer. But if the people who are professional litigants agree and bring the suit, they can name the lead plaintiff. They can control the lawsuit. They can name the lawyer and they can benefit indirectly from the attorney's fees. That is what this is all about.

The Senator has indicated that it is not her intention to exclude those who did not specifically move the court to be appointed as lead plaintiff. It is not her intention to exclude plaintiffs. It may not have done that. But that is the wording of the amendment. If that is not the intention, the language ought to be corrected.

Mr. President, more important than anything else, if her purpose is to get the best lead plaintiff possible, I would suggest that we ought to focus on that question, and that we should not carve out an exception for those who are professional litigants who may have brought the suit.

I reserve the remainder of my time.

Mrs. BOXER addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from California.

Mrs. BOXER. I have heard a lot of distortions on this floor, but this one takes the cake. I say to my friends on the other side, if you ask the public who they stand and represent, most people would say it is those in the upper income brackets. And this argument proves the point better than I ever could.

That is correct, I said the "richest" investor, and my friend takes great umbrage with that. Let us just say largest investor. That is what you say in the bill. Let us stick with that. Because let me tell you, if S. 240 had been the law of the land during the Keating case, you know who the largest investor was? A company that turned out to be guilty in that case, a codefendant in that case. So just because somebody has the largest investment should not make them automatically the lead plaintiff.

Now, my friend can ignore it all he wants, all he wants, but that is exactly what S. 240 does. And I think it is elitist, I think it is antidemocratic, and I say to my friend that just because you may be wealthier, richer, if you will—and I am not going to change my language—have a bigger investment than everyone else does not make you better than anyone else. And if America stands for anything, it stands for that premise.

Now, I want my friend to know—and he cares a lot about process—that this provision he defends here today—and I ask my friend, was my friend involved in the writing of this bill? I ask my friend from Colorado, did he participate in the markup on this bill?

Mr. BROWN. I am not a member of the committee.

Mrs. BOXER. I think that is a point. He stands up here, and he argues about something he never marked up. The fact is we held a lot of hearings on this, and no one ever brought this issue forward about selecting the lead plaintiff. It was brought 4 days before the markup, with not one hearing. The SEC has concerns about it. The SEC is very concerned about it. They do not know how it would work. They think it is going to lead to more litigation, because what if what the Senator from California says is accurate, that in many cases you are going to have the lead plaintiff be someone who is eventually named as a coconspirator, a codefendant? Imagine the kind of lawsuits that would bring about.

Look, I do not care who is appointed attorney. I could care less. There is going to be an attorney for the class. The question is, should it be automatically the prerogative of the largest investor to determine the course of the case?

Now, in the Boxer amendment, we say, if the plaintiffs cannot agree unanimously—and any plaintiff can be part of that discussion—then the judge gets to select the lead plaintiff based on a number of criteria.

I am very proud that Senator BINGAMAN and many others are supporting me in this amendment. We can twist and turn and chastise people for using plain English on this floor, and maybe my friend just wants to talk about the exact language in the bill. I never thought we did that around here. I thought we tried to get it down to where people can understand. My friend wants me to say the "largest" investor? I say the "richest" investor, and he takes me on as if I have committed some kind of a sin. I stand by it. I think we need the Boxer amendment. I think we need to send a message from this Chamber that just because you are the largest investor does not give you the right to take over from everybody else, because let me tell you sometimes the largest investor does not really stand that much to lose because maybe he has a very large dollar investment but in accordance with his net worth it is not much, and someone who has invested $5,000 or $10,000 or $20,000 has much more to lose.

I brought to my colleagues' attention yesterday a woman from California who was bilked of $20,000 by Charles Keating. That may not sound like a lot to my Republican friend on the other side, who chastised me for using the word "rich," but I can tell you that $20,000 was the difference for this woman in being able to sleep at night and pay her bills and have a sense of security.

Mr. President, at this time I reserve the remainder of my time and ask, if there is a quorum call, it be divided from each side equally.

The PRESIDING OFFICER. Who yields time?

Mr. BROWN addressed the Chair.

The PRESIDING OFFICER (Mr. CAMPBELL). The Senator from Colorado.

Mr. BROWN. Mr. President, I feel bad that the Senator from California has responded the way she has. At least my experience in this Chamber and the legislative process is that when you read the language and there is a problem with the language and you offer to work on that, Senators are grateful. All of us have an interest in good legislation.

As I read this amendment—and I have quoted the exact language—it says, "acting on behalf of the purported plaintiff class who have moved the court to be appointed as lead plaintiff."

As I read that—and I certainly could be wrong; I do not mean to hold myself out as the authority—I think it suggests in very plain English you have to move the court to be appointed as lead plaintiff to come under that category. That means some people could be plaintiffs that would be excluded. That is a drafting problem. It may not be a drafting problem, but it certainly ought to be clarified, and it ought to be clarified for the benefit of the Senator from California.

Now, the Senator from California has talked about democracy in this process. Mr. President, what we are involved with here today, if this amendment passes, is stuffing the ballot box. And let me be specific. You can have one share of stock and bring the class action, and the California public employees trust fund that may have a million shares of stock and represent 100,000 people may be excluded from the process of selecting the lead plaintiff.

Now, that is not right, and that is not democracy. Should the California public employees trust fund, a retirement fund, that owns a million times as many shares as a professional plaintiff, have more voice? I think they should. If they own a million times as many shares, they surely should have a larger voice in the selection of this.

This amendment stuffs the ballot box. It says the people who brought the

suit and who have moved the court to be appointed to serve as lead plaintiff end up, under the first option, being able to dictate who the lead plaintiff is and end up being able to dictate who the lawyer is who gets the fees and ends up being able to help guide the case.

Now, that is wrong. To have a person with one share or five shares control an action where the California public employees trust fund may have a million shares is wrong.

Let me reiterate. If there is interest in adding fairness to this process, we ought to do it. One thing I might mention, because I think what was mentioned on this floor was that the person who has the largest financial interest may well have a conflict of interest, the bill deals with that on page 100.

1. Will not fairly and adequately protect the interests of the class.

Now, that is one of the grounds in which you can exclude someone, even though they may have the largest financial interest.

2. Is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

Both of those, Mr. President, would apply as we have talked.

The PRESIDING OFFICER. The Senator's time has expired.

The Senator from California has 7 minutes 52 seconds remaining.

Mr. SARBANES. Will the Senator yield me just 1 minute?

Mrs. BOXER. Certainly.

The PRESIDING OFFICER. The Senator from Maryland is recognized for 1 minute.

Mr. SARBANES. Mr. President, I wish to say to the Senator from Colorado that my perception of the dispute that arose as between him and the Senator from California was his taking issue with her reference to the "richest" plaintiff being named as the lead plaintiff under the bill.

The Senator says, well, the word "richest" is not in the bill. That is correct. But what is in the bill is that the lead plaintiff shall be the one who has the largest financial interest, and in that sense I think it is fair to say that is the richest of the plaintiffs, the largest financial interest.

Now, second, the Senator says, well, we have covered the problem of a conflict of interest in the bill. That is a rebuttable presumption and, as someone said last night, it is really written to be almost irrebuttable.

The SEC, which examined this provision of the legislation, having looked at it and having looked at the very provision the Senator is making reference to, said that:

It may create additional litigation concerning the qualifications of the lead plaintiff, particularly when the class member with the greatest financial interest in the litigation has ties to management or interests that may be different from other class members.

So clearly there is a problem here. And the way the bill is written it may place the lead plaintiff position in the hands of people about whom the SEC has raised large and significant questions.

I thank the Senator for yielding.

Mrs. BOXER. I thank my friend.

Mr. BROWN. May I respond?

Mrs. BOXER. Mr. President, how much time do I have?

The PRESIDING OFFICER. Five minutes fifty seconds.

Mrs. BOXER. How much time does the Senator from Colorado have remaining?

The PRESIDING OFFICER. The Senator from Colorado has none.

Mrs. BOXER. I will be glad to yield if I have time at the end, but we are getting down to the last 5 minutes of this discussion.

Mr. SARBANES. Mr. President, I ask unanimous consent that the Senator from Colorado have 1 minute—I had 1 minute—to make a point in response, so the Senator from California can preserve her time in order to make her closing statement.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from Colorado has an additional 1 minute.

Mr. BROWN. Mr. President, I want to thank the Senator from Maryland for his kindness. I simply want to join the Senator from Maryland to indicate that I think he has a valid point. If someone has a conflict of interest, obviously that ought to be addressed.

I believe the plain language of the bill on page 100 covers that: "will not fairly and adequately protect the interest of the class." I think that covers it. But if there is better language or more language, I want to assure him I will support it, and I will be glad to join him in that effort.

But, Mr. President, the point remains, we are not dealing with disqualifications on that basis. What we are dealing with is a whole new way to stack the deck, where someone with very few shares who brings the suit can control the action and pick the attorney, and someone who has a lot more shares and yet not be as rich, as has been used on this floor, will be closed out of the process. Stacking the deck is the problem with this amendment. If we eliminate that portion of it, I think we would have something that all parties could work together on.

I yield back any remaining time.

The PRESIDING OFFICER. The Senator's time has expired. Who yields time?

Mrs. BOXER. Mr. President, I want to ask my friend from Colorado a question. My friend from Colorado made two attacks on this Senator's amendment, certainly not on the Senator, so I do not take it personally at all. The two attacks were, one, that the Senator from California said the richest investor and he took umbrage and said, "Well, wait a minute, the word 'richest' is not in the bill." OK, that is right, the largest investor—I say the richest investor. I stand by that, with all due respect.

Second, the Senator says that only a certain number of the plaintiffs can, in fact, vote on who the plaintiff should be. The fact is if the Boxer amendment becomes law, every single potential plaintiff in the country, member of the class action, has an opportunity to be part of the selection. This is not some secret thing of stuffing the ballot box. Any plaintiff who joins the class, petitions the court, votes.

Now, if the Senator believes that the largest investor would not get involved in that, I do not know what the Senator thinks. But the fact is I do not care who the attorney is who gets to represent either side. It does not make a whit's worth of difference to me. What I care is that the lead plaintiff be selected in a way that is fair.

The fact of the matter is that the Banking Committee never held a hearing on this and it shows up in the bill 4 days before the markup. It is wrong to legislate this way. I believe it is elitist.

I pointed out to this Chamber last night that if S. 240 had been law during the Keating case and the richest investor, or as my friend would prefer, the largest investor had been named lead plaintiff, it would have been someone who was guilty along with Keating, someone who actually wound up paying to make those——

Mr. DODD. Will my colleague yield?

Mrs. BOXER. I will not yield at this time. I have very little time. I ask my friend from New Mexico if he wishes to have a couple of minutes in this debate. I will reserve that for him.

Mr. BINGAMAN. Mr. President, I will respond that I would like a couple minutes to support the amendment by the Senator from California.

Mrs. BOXER. I say to my friend, how much time do I have?

The PRESIDING OFFICER. The Senator has 3 minutes.

Mrs. BOXER. I yield 2 minutes to my friend, and then I will conclude.

The PRESIDING OFFICER. The Senator from New Mexico.

Mr. BINGAMAN. Let me briefly say I support the effort of the Senator from California to amend the bill in this regard. This provision, this most adequate plaintiff idea, as I understand, was proposed as part of a substitute in committee. There was no hearing held on it. I believe that is the case.

Mr. SARBANES. If I could say, the Senator is correct, there have been no hearings on this issue. It was not considered at any point until it appeared in the draft.

Mr. BINGAMAN. Mr. President, I think one of the hallmarks of our legal system has always been that a person's

right to go to court or a person's right to have his or her case presented in court should not be strictly tied to the person's financial condition. We should not means test justice, as the saying goes.

I think where you get a provision like this where there is a presumption that the plaintiff who has the most invested is the most adequate plaintiff and, therefore, should control the litigation, that comes very close to means testing justice. It causes me great concern that we would have this kind of a provision.

Clearly, there have been groundless lawsuits brought, and that is the purpose. The purpose of this legislation is to deal with that. I understand that. I support this legislation. I am a cosponsor of this legislation, but when I cosponsored it, there was no provision in it for most adequate plaintiff.

Now there is a presumption that those who have the most invested should control the litigation. I do not know that that is always true. I do not know that that should always be the case. Therefore, I do have problems with the bill as it now stands.

The PRESIDING OFFICER. The Senator's 2 minutes have expired.

Mrs. BOXER. I yield the Senator another 25 seconds.

Mr. BINGAMAN. I will just say, the Senator from California has made a very good-faith effort to correct this. I support her efforts. I hope the Senate will adopt her amendment.

The PRESIDING OFFICER. The Senator has 43 seconds remaining.

Mrs. BOXER. Mr. President, I gave an example of if S. 240 was the law and who would be the lead plaintiff in the Keating case. Let me give another example.

The Wall Street Journal reported last night that a Wall Street investment bank filed a class action suit against Avon Products for securities fraud. That Wall Street bank was supposed to represent the interest of small investors, but the Journal reported that that Wall Street bank tried to get Avon to settle the case by giving them $50 million to invest. That is the way they thought they would act in the best interest of the class.

Now I say to my friends, this is absurd. There is no way that small investors would have benefited from that type of a settlement, and this bill would prevent those small investors from discovering the secret deal because they would have to know about it before they could use subpoenas.

I hope my colleagues will support the Boxer-Bingaman amendment.

Mr. BENNETT. Section 102 of the legislation would require courts to consider a motion by a purported class member to become a lead plaintiff and would require courts to appoint as lead plaintiff the class member "most capable of adequately representing the interests of the class member." The bill sets up a rebuttable presumption that the most adequate plaintiff is the person who has made such a motion, who has the largest financial interest in the relief sought by the class, and who satisfies the requirements of rule 23 of the Federal Rules of Civil Procedure. This presumption may be rebutted if a member of the class proves that the presumptively most adequate plaintiff will not fairly and adequately protect the interests of the class or is subject to unique defenses.

What is the purpose of this provision?

Mr. DODD. This provision has two essential purposes. First, it will improve class member choice, by giving class members an opportunity to request service as lead plaintiff. Second, it will enhance a court's ability to appoint as lead plaintiff any class member who has requested service and who otherwise meets the conditions of the provision.

Mr. BENNETT. Would this provision require courts to name any institutional investor as lead plaintiff?

Mr. DODD. No. Under the bill, a court may only appoint a plaintiff who has asked, in a motion to the court, to serve as lead plaintiff. Moreover, the institutional investor who asks to serve must satisfy the conditions of rule 23, which authorizes the court to determine whether such a party should serve as representative plaintiff in order to facilitate management of the case. The court also has to determine that the party who asks to serve has the largest financial interest in the relief sought. Finally, the presumption as to most adequate lead plaintiff could be rebutted under the bill.

Mr. BENNETT. Would the bill require any institutional investor to request that it be appointed as lead plaintiff?

Mr. DODD. No. The bill merely gives each class member the opportunity to request service. In no way does it obligate any member to do so. Institutional and other investors would continue to have the right simply to remain class members and not serve as lead plaintiff, and they may select that approach independent of any responsibility to the other class members or to anyone else.

Mr. BENNETT. Does this bill impose any new fiduciary duty on an institutional investor to its shareholders or beneficiaries, or to other class members, to request service as lead plaintiffs?

Mr. DODD. No. The bill imposes no fiduciary or other obligation on institutions or other plaintiffs to serve or not to serve as lead plaintiffs. Moreover, the court would have no authority to impose such an obligation. For example, rule 23 authorizes the court to make certain determinations about who should serve as representative plaintiff. These determinations concern management of the case, and they do not authorize the court to require a plaintiff to serve as representative due to any perceived responsibility to the other class members or to anyone else.

The PRESIDING OFFICER. All time has expired.

AMENDMENT NO. 1474

The PRESIDING OFFICER. Under the previous order, the question now is on agreeing to amendment No. 1474, offered by the Senator from Nevada [Mr. BRYAN]. The yeas and nays have been ordered.

Mr. SARBANES addressed the Chair.

The PRESIDING OFFICER. The yeas and nays have not been ordered. The Senator from Maryland.

Mr. SARBANES. Mr. President, I believe under the procedure we are following, the Senator has 1 minute to set out his amendment; is that correct?

The PRESIDING OFFICER. That is 2 minutes for debate prior to the second vote.

Mr. D'AMATO. I ask unanimous consent that there be 1 minute equally divided for Senator BRYAN.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. D'AMATO. I do not believe the yeas and nays have been ordered.

The PRESIDING OFFICER. The Senator is correct.

Mr. D'AMATO. I request the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. D'AMATO. As relates to the Boxer amendment, have the yeas and nays have been ordered?

The PRESIDING OFFICER. The yeas and nays have not been ordered.

Mr. D'AMATO. I request the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. BRYAN. Mr. President, I want to make this very clear. I have said it ad nauseam. The Bryan amendment has nothing to do with frivolous lawsuits. The question is whether or not the Senate wants to go on record as tolerating, allowing, and permitting the conduct of aiders and abettors, whether intentional, knowingly, or reckless, to go unpunished. That is the state of the law.

This amendment would say that lawyers, accountants, bankers, and others that aid and abet securities fraud will be held liable. That was the law until the Central Bank case was decided, and the Supreme Court in deciding that case made it clear that they were not saying that aiders and abettors ought not to be liable. They just very narrowly interpreted the statute. We have

hit the plaintiffs' lawyers for their frivolous actions, but how can we ignore the conduct of lawyers who counsel those perpetrating securities fraud? If we fail to adopt the Bryan amendment, we are simply saying to that group of lawyers that you can continue and be free to continue your activities, and that may cost literally hundreds of millions of dollars to innocent investors.

Mr. D'AMATO. Mr. President, I yield 1 minute to Senator DODD.

Mr. DODD. Mr. President, very briefly, what the Senator from Nevada is doing here is raising a whole new standard that was never universally the case prior to the Central Bank of Denver. Here, in the amendment, the standard is knowing and reckless—knowing or reckless. And to include recklessness here, a standard that is so vague the courts have had great difficulty defining it, would be to open up a whole new area of law and allow proportionate liability to be gutted as a result of this amendment. What we have done with this bill is, of course, allowed the SEC to bring a Government action in the aiding and abetting.

Where you do have fraudulent intent, joint and several applies. Proportionate liability does not. In that case, where you have even the casual conduct of an aider and abettor, they would be trapped. We try to avoid when you do not have that standard being met, just a small mistake, which can be the case of a lawyer or accountant, In the process, should not be held fully accountable for the entire cost. So the adoption of this amendment would destroy that very effort which is central to this bill. So, for those reasons, because recklessness is used here—were this to be an actual knowledge—words of art in describing that—I might have some different views on this amendment. But the fact of it is, using the recklessness standard, I think, takes this far beyond where we even were before—before the Supreme Court ruled in the Central Bank of Denver case, where certain courts in this land held it to a much higher standard than recklessness.

So for that reason, I reluctantly urge my colleagues to reject this amendment.

Mr. D'AMATO. May I inquire? I did not know if the Senator from California wanted to use her 1 minute now.

Mrs. BOXER. In between the votes, I believe, is what the unanimous-consent says. I would prefer it before the next vote, before the vote on the Boxer amendment, which is what it said in the unanimous-consent request.

Mr. D'AMATO. Fine.

The PRESIDING OFFICER. The question is on agreeing to amendment No. 1474 offered by Mr. BRYAN.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. BOND (when his name was called). Present.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 39, nays 60, as follows:

[Rollcall Vote No. 286 Leg.]

YEAS—39

Akaka	Feingold	Kohl
Baucus	Feinstein	Lautenberg
Biden	Ford	Leahy
Boxer	Glenn	Levin
Bradley	Graham	McCain
Breaux	Harkin	Moynihan
Bryan	Heflin	Pryor
Bumpers	Hollings	Robb
Byrd	Inouye	Rockefeller
Cohen	Jeffords	Sarbanes
Conrad	Kennedy	Shelby
Daschle	Kerrey	Simon
Dorgan	Kerry	Wellstone

NAYS—60

Abraham	Gorton	Moseley-Braun
Ashcroft	Gramm	Murkowski
Bennett	Grams	Murray
Bingaman	Grassley	Nickles
Brown	Gregg	Nunn
Burns	Hatch	Packwood
Campbell	Hatfield	Pell
Chafee	Helms	Pressler
Coats	Hutchison	Reid
Cochran	Inhofe	Roth
Coverdell	Johnston	Santorum
Craig	Kassebaum	Simpson
D'Amato	Kempthorne	Smith
DeWine	Kyl	Snowe
Dodd	Lieberman	Specter
Dole	Lott	Stevens
Domenici	Lugar	Thomas
Exon	Mack	Thompson
Faircloth	McConnell	Thurmond
Frist	Mikulski	Warner

ANSWERED "PRESENT"—1

Bond

So the amendment (No. 1474) was rejected.

Mr. D'AMATO. Mr. President, I move to reconsider the vote.

Mr. DOMENICI. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 1475

The PRESIDING OFFICER. Under the previous order there will now be 2 minutes equally divided for debate prior to the second vote, which will be on the Boxer amendment No. 1475. The Senator will withhold until we have order. The Senate will be in order.

The Senator from California [Mrs. BOXER] has 1 minute.

Mr. FORD. Mr. President, the Senate is still not in order. She deserves to be heard.

The PRESIDING OFFICER. The Senate will be in order. The Senator from California.

Mrs. BOXER. Mr. President, very briefly, if S. 240 as currently written had been the law then, the lead plaintiff in the Keating case would have been one of the guilty parties in the Keating case. That is because S. 240 says the judge must choose the largest investor as the lead plaintiff and the largest investor in the Keating case turned out to be a party to the fraud.

Let us not allow this outrage. This "largest investor" language was added, without public hearings, 4 days before markup. The SEC has problems with it.

The Boxer-Bingaman amendment says the following, that after advertising for 90 days, all the plaintiffs——

The PRESIDING OFFICER. The Senator will withhold until we have order. The Senate will be in order.

The Senator from California.

Mrs. BOXER. The Boxer-Bingaman amendment says that after advertising for 90 days, all the plaintiffs get to select the lead plaintiff. If they cannot agree unanimously, then the judge will choose the lead plaintiff, taking into consideration all factors, including conflicts of interest, who the largest investor is, et cetera. Just because someone is rich should not automatically make them the lead plaintiffs. Support Boxer-Bingaman.

The PRESIDING OFFICER. The Senator from New York [Mr. D'AMATO] is recognized for 1 minute.

Mr. D'AMATO. Mr. President, our bill stops the kind of outrageous conduct where the same handful of plaintiffs bring multiple complaints. Mr. Cooperman has been a plaintiff 14 times and has always chosen the same law firm.

Mr. Shore, 10 times, a professional plaintiff.

Mr. Shields, seven times.

Mr. Steinberg, seven times.

William Steiner, six times. They become the lead plaintiffs, they pick the attorneys. Our legislation would prohibit that.

This legislation would give due deference to lead the case to someone who has a real financial stake, not a phony professional plaintiff. This amendment would keep alive that race to the courthouse. That is why I urge a "no" vote.

The PRESIDING OFFICER. Does the Senator yield the remainder of his time?

Mr. D'AMATO. Yes.

The PRESIDING OFFICER. The question occurs on the amendment of the Senator from California. The yeas and nays have been ordered.

The clerk will call the roll.

The bill clerk called the roll.

Mr. BOND (when his name was called). Present.

The PRESIDING OFFICER (Mr. THOMAS). Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 41, nays 58, as follows:

[Rollcall Vote No. 287 Leg.]

YEAS—41

Akaka	Ford	Levin
Baucus	Glenn	McCain
Biden	Graham	Moynihan
Bingaman	Harkin	Pell
Boxer	Heflin	Pryor
Bradley	Hollings	Robb
Breaux	Inouye	Rockefeller
Bryan	Jeffords	Roth
Bumpers	Kennedy	Sarbanes
Byrd	Kerrey	Shelby
Conrad	Kerry	Simon
Daschle	Kohl	Specter
Dorgan	Lautenberg	Wellstone
Feingold	Leahy	

NAYS—58

Abraham	Frist	Mikulski
Ashcroft	Gorton	Moseley-Braun
Bennett	Gramm	Murkowski
Brown	Grams	Murray
Burns	Grassley	Nickles
Campbell	Gregg	Nunn
Chafee	Hatch	Packwood
Coats	Hatfield	Pressler
Cochran	Helms	Reid
Cohen	Hutchison	Santorum
Coverdell	Inhofe	Simpson
Craig	Johnston	Smith
D'Amato	Kassebaum	Snowe
DeWine	Kempthorne	Stevens
Dodd	Kyl	Thomas
Dole	Lieberman	Thompson
Domenici	Lott	Thurmond
Exon	Lugar	Warner
Faircloth	Mack	
Feinstein	McConnell	

ANSWERED "PRESENT"—1

Bond

So the amendment (No. 1475) was rejected.

Mr. D'AMATO. Mr. President, I move to reconsider the vote.

Mr. SARBANES. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 1476

Mr. D'AMATO. Mr. President, I believe under the consent order my friend and colleague from Maryland, Senator SARBANES, is to be recognized for the purpose of offering an amendment. I have asked him to give me the opportunity—and if it looks like I am looking around, I am, because staff was supposed to prepare an amendment dealing with the issue of safe harbor. And in that provision we call for knowingly, intent, and expectation.

If I could have a copy of the bill itself, at page 121 of the bill it says, "knowingly made." These are statements that are knowingly made with the expectation, purpose and actual intent of misleading investors.

There is a very real question as to what do we mean by "expectation," and do we go too far? I do not believe it is a word that is necessary. I think it is gilding the lily, and for that purpose I would submit an amendment, the purpose of which is to delete the word "expectation," so that it would then read: "knowingly made with the purpose and actual intent of misleading investors."

I ask unanimous consent that I might be able to submit this amendment and have it considered at this time.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The clerk will report the amendment.

The bill clerk read as follows:

The Senator from New York [Mr. D'AMATO] proposes an amendment numbered 1476:

On page 121, line 1, delete the word "expectation,".

Mr. D'AMATO. Mr. President, I have no illusions. I recognize that this amendment does not answer all those questions or go as far as some might like. But I certainly think it clears up something that would raise a question and is a move in the right direction, and I urge its adoption.

Mr. SARBANES. Mr. President, I welcome the amendment from the Senator from New York. We spoke earlier about introducing it at this point ahead of the general debate on safe harbor. I am quite amenable to that because I want to get a substantive result. This provision was going to be a part of the debate had this not happened, I think as the Senator from New York well recognizes, but we are willing to forego the debate points in order to try to clean something out of the bill. There is still plenty wrong with it, and I am going to address that when we have the general debate on safe harbor. But I support this modification that is being made in the bill, and I hope the Senate will accept the amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

Mr. D'AMATO. I am advised—and I mention this to my colleague and friend—that there is another area of the bill that we will have to modify because it is referred to a second time. But rather than do that at this point in time, I suggest that we go forward, and then later on I will make that modification.

Mr. SARBANES. Why not go ahead?

Mr. D'AMATO. On page 114, line 7, we delete the word "expectation" as well. This was not done in the first. I ask that the amendment be modified.

The PRESIDING OFFICER. The amendment is so modified.

The amendment, as modified, is as follows:

On page 121, line 1, delete the word "expectation,".

On page 114, line 7, delete the word "expectation,".

The PRESIDING OFFICER. The question is on agreeing to the amendment.

So the amendment (No. 1476), as modified, was agreed to.

Mr. D'AMATO. Mr. President, I move to reconsider the vote.

Mr. SARBANES. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. SARBANES. Mr. President, I think under the order I am to be recognized at this point?

The PRESIDING OFFICER. The Senator is correct.

AMENDMENT NO. 1477

(Purpose: To amend the safe harbor provisions of the bill)

Mr. SARBANES. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Maryland [Mr. SARBANES], for himself and Mr. LAUTENBERG, proposes an amendment numbered 1477.

Mr. SARBANES. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

Beginning on page 112, strike line 1 and all that follows through page 126, line 14, and insert the following:

SEC. 105. SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS.

(a) CONSIDERATION OF REGULATORY OR LEGISLATIVE CHANGES.—In consultation with investors and issuers of securities, the Securities and Exchange Commission shall consider adopting or amending rules and regulations of the Commission, or making legislative recommendations, concerning—

(1) criteria that the Commission finds appropriate for the protection of investors by which forward-looking statements concerning the future economic performance of an issuer of securities registered under section 12 of the Securities Exchange Act of 1934 will be deemed not be in violation of section 10(b) of that Act; and

(2) procedures by which courts shall timely dismiss claims against such issuers of securities based on such forward-looking statements if such statements are in accordance with any criteria under paragraph (1).

(b) COMMISSION CONSIDERATIONS.—In developing rules or legislative recommendations in accordance with subsection (a), the Commission shall consider—

(1) appropriate limits to liability for forward-looking statements;

(2) procedures for making a summary determination of the applicability of any Commission rule for forward-looking statements early in a judicial proceeding to limit protracted litigation and expansive discovery;

(3) incorporating and reflecting the scienter requirements applicable to implied private actions under section 10(b); and

(4) providing clear guidance to issuers of securities and the judiciary.

(c) SECURITIES EXCHANGE ACT OF 1934.—Title I of the Securities Exchange Act of 1934 (15 U.S.C. 73a et seq.) is amended by inserting after section 13 the following new section:

"SEC. 37. APPLICATION OF SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS.

"(a) IN GENERAL.—In any implied private action arising under this title that alleges that a forward-looking statement concerning the future economic performance of an issuer registered under section 12 was materially false or misleading, if a party making a motion in accordance with subsection (b) requests a stay of discovery concerning the claims or defenses of that party, the court shall grant such a stay until the court has ruled on the motion.

"(b) SUMMARY JUDGMENT MOTIONS.—Subsection (a) shall apply to any motion for summary judgment made by a defendant asserting that a forward-looking statement was within the coverage of any rule which the Commission may have adopted concerning such predictive statements, if such motion is made not less than 60 days after the plaintiff commences discovery in the action.

"(c) DILATORY CONDUCT; DUPLICATIVE DISCOVERY.—Notwithstanding subsection (a) or (b), the time permitted for a plaintiff to conduct discovery under subsection (b) may be extended, or a stay of the proceedings may be denied, if the court finds that—

"(1) the defendant making a motion described in subsection (b) engaged in dilatory or obstructive conduct in taking or opposing any discovery; or

"(2) a stay of discovery pending a ruling on a motion under subsection (b) would be substantially unfair to the plaintiff or to any other party to the action.".

Mr. SARBANES. Mr. President and Members of the Senate, this is the issue of safe harbor. I know many Members have heard about this issue. In my judgment, it is an extremely important issue which we now seek to develop. We have actually addressed five major issues in this bill: Joint and several liability, statute of limitations, aiding and abetting, and safe harbor, and the lead plaintiff amendment that was offered by my distinguished colleague from California.

Now, Mr. President, this is an extremely important amendment. It is a very complex issue and some very able people have worked very hard to understand it and try to address it. I hope to develop it here over a reasonably short period.

This amendment that I have sent to the desk, this particular amendment, does not try to define in the statute the standard for safe harbor. That may come later. What this amendment seeks to do is simply to put into this bill the provision on the issue of safe harbor that was in the bill introduced by Senator DODD and Senator DOMENICI.

I want to say to my colleagues who sponsored that bill that this amendment is the provision you cosponsored. The provision that is in the bill before us dealing with safe harbor is not the provision that was in the bill which you cosponsored.

Some may say, "Well, that's all right, I want the provision that's in this bill." But others may not say that. Every Member should understand that the provision that was in the bill which they cosponsored—a significant number of Members cosponsored—is the provision that is in the amendment at the desk. That is the safe harbor provision that people signed on to.

And what Senator DODD and Senator DOMENICI had done is, in effect, create a regulatory safe harbor. They had placed the burden, as it were, on the Securities and Exchange Commission to come up with a definition of safe harbor, and it set out certain standards by which the Commission would be governed.

This is an extremely important matter. It is one about which the Chairman of the Commission is very much concerned. And I submit to my colleagues, at some point in this legislative process, Members ought to stop, look and listen and ask themselves whether they want to continue to be at variance or at odds with very strongly held opinions of the regulators, of the Chairman of the SEC, of the States securities regulators, particularly in a matter as difficult and as complex as the safe harbor issue.

The regulators disagree with a majority of this body on the statute of limitations issue, but the statute of limitations issue is a relatively easily understood issue. The question was, are you going to have 1 and 3 years, or 2 and 5 years? That is not the safe harbor issue.

On May 19, the Chairman of the Securities and Exchange Commission wrote to the Banking Committee a four-page letter entirely devoted to the safe harbor issue. Only the safe harbor issue was discussed in that four-page letter.

The letter itself is complex, let alone the issue. The letter reflects the complexity of the issue.

In that letter, the Chairman states his interest in trying to have changes in the securities litigation issue. He concedes that he would like to see improvements in existing safe harbor provisions. He talks about the need to get accurate forward projections, but he also talks about the need to protect investors.

Mr. President, I ask unanimous consent that the full letter be printed in the RECORD at the end of my remarks.

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

(See exhibit 1.)

Mr. SARBANES. Mr. President, I am quoting:

A carefully crafted safe harbor protection for meritless private lawsuits should encourage public companies to make additional forward looking disclosure that would benefit investors. At the same time, it should not compromise the integrity of such information which is vital to both investor protection and the efficiency of the capital markets, the two goals of the Federal securities law.

Later he says, and I quote him:

A safe harbor must be balanced. It should encourage more sound disclosure without encouraging either omission of material information or irresponsible and dishonest information.

Let me repeat that:

A safe harbor must be balanced. It should encourage more sound disclosure without encouraging either omission of material information or irresponsible and dishonest information.

A safe harbor must be thoughtful so that it protects considered projections but never fraudulent ones. A safe harbor must also be practical. It should be flexible enough to accommodate legitimate investor protection concerns that may arise on both sides of the issue.

This is a complex issue in a complex industry and it raises almost as many questions as it answers. Should the safe harbor apply to information required by Commission rule, including predictive information contained in the financial statements, for example, pension liabilities and over-the-counter derivatives? Should it extend to oral statements? Should there be a requirement that forward looking information that has become incorrect be updated if the company or its insiders are buying or selling securities? Should the safe harbor extend to disclosures made in connection with a capital raising transaction on the same basis as more routine disclosures as well? Are there categories of transactions, such as partnership offerings or going private transactions, that should be subject to additional conditions?

There are many more questions that have arisen in the course of the Commission's exploration of how to design a safe harbor. We have issued a concept release, received a large volume of comment letters in response and held 3 days of hearing, both in California and Washington. In addition, I have met personally with most groups that might conceivably have an interest in the subject—corporate leaders, investment groups, plaintiffs lawyers, defense lawyers, State and Federal regulators, law professors and even Federal judges.

The one thing I can state unequivocally is that this subject eludes easy answers.

Let me repeat that last statement. This is Chairman Levitt:

The one thing I can state unequivocally is that this subject eludes easy answers.

Then he goes on to say:

Given these complexities and in light of the enormous amount of care, thought and work that the Commission has already invested in the subject, my recommendation would be that you provide broad rulemaking authority to the Commission to improve the safe harbor.

He then goes on to address considerations if the committee tries to put in a legislative standard, instead of having a regulatory safe harbor. I think Chairman Levitt was absolutely right. That is obviously what Senators DODD and DOMENICI thought when they put in their bill. I do not know how many other people who cosponsored that bill agreed that, in effect, giving this assignment to the Securities and Exchange Commission was the way to do it. As Chairman Levitt said:

Given these complexities and in light of the enormous amount of care, thought and work that the Commission has already invested in the subject, my recommendation would be that you provide broad rulemaking authority to the Commission to improve the safe harbor.

That is not what was done. The provision that was in the original bill, which is the amendment that is at the desk, was dropped from the bill and instead a legislative standard was substituted.

The provision that was in the bill that is on Members' desks, the original bill, is at page 19 through 22, and those pages, as Members can all see, have been stricken. That is what Members originally signed on to, and that provision has been, as you can see, lined out in this bill, and instead an effort has been made for this body to define the standard in an extremely complex matter. As Chairman Levitt said:

The one thing I can state unequivocally is that this subject eludes easy answers.

We have just seen an example of that. My distinguished colleague from New York, just before I offered this amendment, got up to offer an amendment to amend the standard that is in the bill. In other words, here we are, they are conceding that the standard in the bill goes too far and needs to be corrected, so we just amended it. I indicated I welcome that amendment because I think this standard that is in the bill,

even with the amendment, is an improper standard. But the fact that the amendment was offered is a demonstration of the point I am trying to make about the complexity of this issue and the wisdom of the original approach to, in effect, charge the Commission with the responsibility of defining the safe harbor provision, a matter which the chairman has indicated he was, in fact, working on. Now, as people who were here just a few minutes ago noted, not only was it amended, but then my distinguished colleague from New York neglected to amend another section of the bill which also needed to be amended. So you get some sense of how we are dealing with a very difficult issue. Here we are trying to jury-rig it at the last minute. Now, later, if I have to, I will try to deal with the legislative standard, but I think that fools are rushing in where angels fear to tread, with all due respect to my colleagues. This is a matter that ought to be put to the Securities and Exchange Commission, just as Senators DODD and DOMENICI proposed in their initial legislation.

On May 19, Chairman Levitt wrote the Banking Committee a four-page letter on safe harbor only. This safe harbor is a catastrophe waiting to happen. And Members must keep in mind the danger that the safe harbor is going to become a haven for pirates. As I have said earlier, it will turn into a pirate's cove. That is where they will shield themselves in order to really perpetrate some egregious frauds on the investing public.

Subsequent to the letter of May 19 from the Chairman of the Securities and Exchange Commission, the majority within the Banking Committee, including the sponsors of the earlier bill, departed from their approach in terms of charging the Commission with the responsibility of developing a safe harbor. I mean, the Commission are the experts, they can hold the hearings, and I will discuss in a minute the hearings they held in trying to resolve this matter. But a majority decided that, well, no, they were going to do a legislative standard.

Efforts began to develop an appropriate legislative standard in discussions with the SEC and others and with members of the committee on both sides, including those of us that are now opposing this legislation. But the end result of that discussion, unfortunately, was an inability to come to an agreement. The definition, the standard in the bill I think is just fraught with danger. In fact, it was just amended by the proponents of this legislation here on the floor only a moment or two ago. They took out one element of it right here, obviously recognizing themselves the deficiencies in it. That illustrates the problem with this body trying to formulate a legislative standard.

I welcome that substantive change, but I do think it illustrates, in a rather demonstrative way, the problem with this body trying to write the legislative standard rather than letting the SEC do it. Now, if we have to write it, I will try to do it, but I think it is a mistake. This is an opportunity for Members, in effect, to go back to the provision that was in the bill.

Let me read what Chairman Levitt said about the provision that was in the markup document. In other words, after this week of working, the committee moved with a document that had this definition, and this is what the Chairman said:

> As Chairman of the Securities and Exchange Commission—

This letter came on the morning of the markup.

> I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.

And then he discussed the problems that he saw with the provision that is in this legislation. The Chairman of the Securities and Exchange Commission said, "I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection."

Mr. DOMENICI. Will the Senator yield for a question?

Mr. SARBANES. Certainly.

Mr. DOMENICI. Does not the safe harbor provision do just that—make sure that willful fraud is still covered, expressly stating that the safe harbor does not apply to knowing fraud?

Mr. SARBANES. I say to the Senator that I do not believe it does so.

Mr. DOMENICI. I do not know what else we can put in.

Mr. SARBANES. That is why Chairman Levitt wrote the letter. He read the provision in the bill.

Mr. DOMENICI. He wrote the letter about a lot of other issues besides that. We addressed his concerns about willful fraud. We have knowledge and intent, which exempt people from the safe harbor.

Mr. SARBANES. This letter was written the morning of the markup and was directed to the very provision in the bill, as brought out of the committee. Senator Levitt wrote an earlier letter, which I quoted from earlier. I do not know if the Senator was on the floor.

Mr. DOMENICI. He is not a Senator yet, is he? Arthur Levitt is not a Senator.

Mr. SARBANES. Chairman Levitt.

Mr. DOMENICI. I wanted to correct the RECORD.

Mr. SARBANES. I am not sure who to apologize to about that.

Mr. DOMENICI. Just to clear up the RECORD.

Mr. SARBANES. I will not try to reach a conclusion, but I do lay out a general apology for anyone who may have been offended by it. There may be differing views of the matter.

But Chairman Levitt wrote an earlier letter, which I quoted from at some length. At one point, it looked like maybe, if we were going to do a statutory definition, we might be able to arrive at an appropriate one. That did not work. The comment I just quoted is what he had to say about the provision that is in the bill. This came to us on the morning of the markup.

Now, the Dodd-Domenici bill—and I must say to my two colleagues that had we stuck with your bill, the number of issues in dispute here on the floor would have been fewer. There still would have been some.

Your bill also had in it the statute of limitations issue, and it had an approach on safe harbor which I think was acceptable, which left us, of course, with the joint and several, on which there is, I think, a sharp difference in perception and philosophy. I recognize that. And there is the aiding and abetting issue.

But the bill was introduced in the last Congress on March 24, 1994. I believe I am correct. If I am in error about that, I hope the two cosponsors will correct me, both of whom are here on the floor.

Now, that bill contained in it this charge to the SEC, which is in the amendment that is at the desk, I say to my distinguished colleagues. This amendment is your language, verbatim, from the bill as you introduced it and the bill which a lot of Members cosponsored.

The SEC put out their concept release on safe harbor on October 13, 1994. Let me just read the summary of their concept release and notice of hearing:

> The Securities and Exchange Commission is soliciting comment on current practices relating to disclosure of forward-looking information. In particular, the Commission seeks comment on whether the safe harbor provisions for forward-looking statements set forth in rule 175 under the Securities Act of 1933, rule 3b-6 under the Securities Exchange Act of 1934, rule 103(a) under the Public Utility Holding Company Act of 1935, and rule 0-11 under the Trust Indenture Act of 1939 are effective in encouraging disclosure of voluntary forward-looking information and protecting investments, or, if not, should be revised, and if revised, how?
>
> The Commission also seeks comment on various changes to the existing safe harbor provisions that have been suggested by certain commentators. Finally, the Commission is announcing that public hearings will be held beginning February 13, 1995, to consider these issues.

They went on to say:

> Comments should be received on or before January 11, 1995. Public hearings will begin at 10 a.m. on February 13, 1995. Those who wish to testify at the hearings must notify the Commission in writing of their intention to appear on or before December 31, 1994.

So the Commission is moving to try to develop a safe harbor. I think it moved relatively promptly after it saw this signal of, in effect, charging them with this mandate.

The Commission received 150 responses on the safe harbor issue. That

is more witnesses, by far, more witnesses by far, than the Banking Committee has heard from on all securities litigation issues. The Banking Committee hearings with respect to the safe harbor were eclipsed by the SEC.

The SEC held public hearings, 2 days in Washington, February 13 and February 14. Then a day in California on February 16.

At those public hearings they had 62 witnesses in all. Venture capitalists, law professors, corporate executives, plaintiff's lawyers, defense lawyers, institutional investors.

Mr. President, these are the hearing records of the SEC with respect to the matter of safe harbor for forward-looking statements.

Now, I submit to my colleagues that it is—I do not want to say sheer folly, because at some point we may have to try to work out a legislative standard—but it is certainly imprudent conduct, at the least, to be trying to develop a standard here instead of allowing the Securities and Exchange Commission to develop the standard, which was recognized by the original sponsors of this legislation.

I assume they will argue, "Well, the Commission had not done it, and therefore we are going to go ahead and do it." The fact is, the Commission is working to do it and trying to struggle through some very difficult and complex issues as the Chairman of the Commission has stated.

He set out a number of questions which I read earlier, and I defy any Member of this body to take those questions and go through them and give me an easy answer to them. Not only do I defy the Members, I defy their staffs to go through it, to go through those questions and work through them—the ones that the Chairman outlined in his letter; of course, there are many others, as he indicated—and give me an easy response.

As the Chairman pointed out, "A safe harbor must be balanced. It should encourage more sound disclosure without encouraging either omission of material information, or irresponsible and dishonest information."

Actually, Chairman Levitt and others recognize the need to have more disclosure of information. That is a desirable objective. The question is, what safeguards do we have to ensure that this disclosure of information is not going to set people up to be exploited in fraudulent schemes?

Chairman Levitt went on to say, "A safe harbor must be thoughtful so that it protects considered projections but never fraudulent ones. A safe harbor must also be practical. It should be flexible enough to accommodate legitimate investor protection concerns that may arise on both sides of the issue. This is a complex issue and a complex industry. It raises almost as many questions as one answers."

He then details some of those questions, and then goes on to say, "There are many more questions that have arisen in the course of the Commission's exploration of how to design a safe harbor. We have issued a concept release, received a large volume of comment letters and response, and held 3 days of hearings, both in California and Washington. In addition, I have met personally with most groups that might conceivably have an interest in the subject. Corporate leaders, investor groups, plaintiff's lawyers, defense lawyers, State and Federal regulators, law professors, and even Federal judges. The one thing I can state unequivocally, is that this subject eludes easy answers."

He then goes on to state his basic conclusion, which is, "Given these complexities and in light of the enormous amount of care, thought, and work that the Commission has already invested in the subject, my recommendation would be that you provide broad rulemaking authority to the Commission to improve the safe harbor."

Mr. President, that is what the amendment at the desk does. I urge its adoption. I yield the floor.

EXHIBIT 1

U.S. SECURITIES AND EXCHANGE COMMISSION,
Washington, DC, May 19, 1995.

Hon. ALFONSE M. D'AMATO,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As Chairman of the Securities and Exchange Commission I have no higher priority than to protect American investors and ensure an efficient capital formation process. I know personally just how deeply you share these goals. In keeping with our common purpose, both the SEC and the Congress are working to find an appropriate "safe harbor" from the liability provisions of the federal securities laws for projections and other forward-looking statements made by public companies. Several pieces of proposed legislation address the issue of the safe harbor and the House-passed version, H.R. 1058, specifically defines such a safe harbor.

Your committee is now considering securities litigation reform legislation that will include a safe harbor provision. Rather than simply repeat the Commission's request that Congress await the outcome of our rulemaking deliberations and thereby run the risk of missing an opportunity to provide input for your own deliberations, I thought I would take this opportunity to express my personal views about a legislative approach to a safe harbor.

There is a need for a stronger safe harbor than currently exists. The current rules have largely been a failure and I share the disappointment of issuers that the rules have been ineffective in affording protection for forward-looking statements. Our capital markets are built on the foundation of full and fair disclosure. Analysts are paid and investors are rewarded for correctly assessing a company's prospects. The more investors know and understand management's future plans and views, the sounder the valuation is of the company's securities and the more efficient the capital allocation process. Yet, corporate America is hesitant to disclose projections and other forward-looking information, because of excessive vulnerability to lawsuits if predictions ultimately are not realized.

As a businessman for most of my life, I know all too well the punishing costs of meritless lawsuits—costs that are ultimately paid by investors. Particularly galling are the frivolous lawsuits that ignore the fact that a projection is inherently uncertain even when made reasonably and in good faith.

This is not to suggest that private litigation under the federal securities laws is generally counterproductive. In fact, private lawsuits are a necessary supplement to the enforcement program of the Commission. We have neither the resources nor the desire to replace private plaintiffs in policing fraud; it makes more sense to let private forces continue to play a key role in deterrence, than to vastly expand the Commission's role. The relief obtained from Commission disgorgement actions is no substitute for private damage actions. Indeed, as government is downsized and budgets are trimmed, the investor's ability to seek redress directly is likely to increase in importance.

To achieve our common goal of encouraging enhanced sound disclosure by reducing the threat of meritless litigation, we must strike a reasonable balance. A carefully crafted safe harbor protection from meritless private lawsuits should encourage public companies to make additional forward-looking disclosure that would benefit investors. At the same time, it should not compromise the integrity of such information which is vital to both investor protection and the efficiency of the capital markets—the two goals of the federal securities laws.

The safe harbor contained in H.R. 1058 is so broad and inflexible that it may compromise investor protection and market efficiency. It would, for example, protect companies and individuals from private lawsuits even where the information was purposefully fraudulent. This result would have consequences not only for investors, but for the market as well. There would likely be more disclosure, but would it be better disclosure? Moreover, the vast majority of companies whose public statements are published in good faith and with due care could find the investing public skeptical of their information.

I am concerned that H.R. 1058 appears to cover other persons such as brokers. In the Prudential Securities case, Prudential brokers intentionally made baseless statements concerning expected yields solely to lure customers into making what were otherwise extremely risky and unsuitable investments. Pursuant to the Commission's settlement with Prudential, the firm has paid compensation to its defrauded customers of over $700 million. Do we really want to protect such conduct from accountability to these defrauded investors? In the past two years or so, the Commission has brought eighteen enforcement cases involving the sale of more than $200 million of interests in wireless cable partnerships and limited liability companies. Most of these cases involved fraudulent projections as to the returns investors could expect from their investments. Promoters of these types of ventures would be immune from private suits under H.R. 1058 as would those who promote blank check offerings, penny stocks, and roll-ups. It should also address conflict of interest problems that may arise in management buyouts and changes in control of a company.

A safe harbor must be balanced—it should encourage more sound disclosure without encouraging either omission of material information or irresponsible and dishonest information. A safe harbor must be thoughtful—so that it protects considered projections, but never fraudulent ones. A safe harbor must also be practical—it should be flexible enough to accommodate legitimate investor protection concerns that may arise on both sides of the issue. This is a complex issue in a complex industry, and it raises almost as many questions as one answers: Should the safe harbor apply to information required by Commission rule, including predictive information contained in the financial statements (e.g. pension liabilities and over-the-counter derivatives)? Should it extend to oral statements? Should there be a requirement that forward-looking information that has become incorrect be updated if the company or its insiders are buying or selling securities? Should the safe harbor extend to disclosures made in connection with a capital raising transaction on the same basis as more routine disclosures as well? Are there categories of transactions, such as partnership offerings or going private transactions that should be subject to additional conditions?

There are many more questions that have arisen in the course of the Commission's exploration of how to design a safe harbor. We have issued a concept release, received a large volume of comment letters in response, and held three days of hearings, both in California and Washington. In addition, I have met personally with most groups that might conceivably have an interest in the subject: corporate leaders, investor groups, plaintiff's lawyers, defense lawyers, state and Federal regulators, law professors, and even Federal judges. The one thing I can state unequivocally is that this subject eludes easy answers.

Given these complexities—and in light of the enormous amount of care, thought, and work that the Commission has already invested in the subject—my recommendation would be that you provide broad rulemaking authority to the Commission to improve the safe harbor. If you wish to provide more specificity by legislation, I believe the provision must address the investor protection concerns mentioned above. I would support legislation that sets forth a basic safe harbor containing four components: (1) protection from private lawsuits for reasonable projections by public companies; (2) a scienter standard other than recklessness should be used for a safe harbor and appropriate procedural standards should be enacted to discourage and easily terminate meritless litigation; (3) "projections" would include voluntary forward-looking statements with respect to a group of subjects such as sales, revenues, net income (loss), earnings per share, as well as the mandatory information required in the Management's Discussion and Analysis; and (4) the Commission would have the flexibility and authority to include or exclude classes of disclosures, transactions, or persons as experience teaches us lessons and as circumstances warrant.

As we work to reform the current safe harbor rules of the Commission, the greatest problem is anticipating the unintended consequences of the changes that will be made in the standards of liability. The answer appears to be an approach that maintains flexibility in responding to problems that may develop. As a regulatory agency that administers the Federal securities laws, we are well situated to respond promptly to any problems that may develop, if we are given the statutory authority to do so. Indeed, one possibility we are considering is a pilot safe harbor that would be reviewed formally at the end of a two year period. What we have today is unsatisfactory, but we think that, with your support, we can expeditiously build a better model for tomorrow.

I am well aware of your tenacious commitment to the individual Americans who are the backbone of our markets and I have no doubt that you share our belief that the interests of those investors must be held paramount. I look forward to continuing to work with you on safe harbor and other issues related to securities litigation reform.

Thank you for your consideration.

Sincerely,

ARTHUR LEVITT.

Mr. BENNETT. Mr. President, I ask the Senator from Maryland to pay attention closely to this since it concerns him directly.

I ask unanimous consent that the vote occur on or in relation to the Sarbanes amendment No. 1477 at 2:15 today and that the time between the beginning of the debate and 2:15 be equally divided in the usual form.

Mr. SARBANES. Reserving the right to object, first of all, could I inquire of the Chair, what is the time situation?

The PRESIDING OFFICER. We began consideration of this amendment at 11:09.

Mr. SARBANES. So the Senator has used 30 minutes.

The PRESIDING OFFICER. Thirty-five.

Mr. SARBANES. Mr. President, I am agreeable to dividing the time between now and 12:30 equally, and then having half an hour after lunch, equally divided, and then going to a vote on the amendment.

Mr. BENNETT. Mr. President, I would like to confer with the chairman of the Banking Committee before agreeing to that. I have no personal objection to it. I would think we ought to bring Senator D'AMATO into the discussion.

Mr. SARBANES. Fine. I was not aware of this request until I just heard it. I do think we should have some time after the caucus on the debate—after the conference luncheon.

Mr. BENNETT. Mr. President, I propound a unanimous-consent request that the time between now and 12:30 be equally divided on this issue, and leave the unanimous-consent request as to the exact time of the vote for a later request.

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

Mr. BENNETT. Mr. President, I have heard the Senator from Maryland talk at great length about all of the hearings and the comments and the legal aspects of this.

Once again, I would like to talk about it from the standpoint of the chief executive officer, struggling to maintain the investor confidence in his company, and bring an appropriate return to investors, and talk about how this safe harbor circumstance would actually work.

A chief executive officer, having been one, sees dozens, maybe hundreds, of memorandum, every week. He engages in any number of conversations with individuals in the company in any given week about any particular subject. That is the fact against which I want to paint the picture of how this thing works.

We have been having this discussion about weakening a standard, safe harbor; where should the threshold be? I think the issue comes down, do we want a safe harbor or not? If we want one, it has to be safe, or we should not go through the exercise.

Now, the opponents have suggested that the safe harbor in the bill is, in fact, a pirate's cove.

Let me list, Mr. President, the pirates who are not welcome in this cove. That is, the pirates who would be denied the right to sail into this particular harbor, by the bill.

A blank check company, a blind investment pool that does not tell anybody how they invest, a penny stock company, a rollup transaction, a going private transaction. Not to imply these people are pirates, but they could not get into the cove. A mutual fund. It is very significant that that is on the list because that is where most of the seniors invest their money. They do not go out and individually pick stocks unless they have some experience at that. They buy a mutual fund. A mutual fund cannot come into this particular harbor. A limited partnership. A tender officer. Anyone filing certain ownership reports with the SEC. Or information in the financial statements is excluded. And, of course, any company that has recently committed a violation of the antifraud provisions of the securities laws cannot sail into the harbor.

Those kinds of restrictions are already out there. So the safe harbor is not for the pirates. It is for the people who do not fall into those categories.

Now, for those in the harbor, they have some requirements written into the bill. They must clearly state that any projection they are making is, in fact, a statement about the future, and they must clearly state, here in the words of the bill, "The risk that actual results may differ materially from such projections, states, or descriptions."

In other words, there is not a risk that we might be off a day or two. There is not a risk that we might be off a penny or two. There is a risk that the actual results may differ materially from the projections or estimates. Then, of course, we have the language that the bill does not permit companies to take advantage of the safe harbor if they act with "the purpose and actual intent of misleading investors." This is the language of the bill that we have before us.

Those are the requirements in this particular harbor; those that prevent people from coming in in the first place and those who govern the people who are there.

Let me explain why it is important that we not further lower the threshold that we have established with the words "purpose" and "actual intent of misleading investors." Here is how things work in an actual company, as I say speaking from experience as a chief executive officer. You gather all of your people around you. You look at the memos and the other reports that come out, and you inevitably find that there is a difference of opinion about just about everything going on in your company. Let us talk about a new product.

Some of your people say to you, "Oh. Our product, product X, will be available right on schedule in August. You can depend on it. You can take it to the bank." Others will say, "No. We are a little worried. We may not make it in August. We have this problem. We have that problem. Our supplier may not come through. We may miss the target date." You are the chief executive officer. You have to decide. You have a meeting coming up with a group of security analysts, and they are going to ask you point blank, "When will product X be on the market?" You want to give them the very best information you can.

So you sift through all of this and ultimately you have to make a decision. And you decide based on the track record of the people who are advising you that you think product X is a pretty good bet to be on line in August just as you anticipated it would. You go before the analyst meeting. And they say to you, "When will product X be available?" You say, "Well, it is my best judgment that it will be available in August. I have to qualify that by saying that is my estimate. I tell you there are some people in the company who do not think it will be available in August. But the best I can tell, my guess, my prediction, is that we will deliver product X in August." He can maybe put some other caveats in. You know, this is very sophisticated. The analysts do not hear any of that. They are like pollsters. "Who is ahead? Who is going to win the election?" "No. We want to know what your numbers say right now." And they do not listen to the caveats. The CEO can put in all the caveats he wants. But they are going to walk away saying, "He predicted that is going to come out in August."

Now we get to August. What happens? Any one of a number of things happens. Frankly, they do not have to be the kinds of things projected in the memo that the division manager who said it might not happen in August included. There could be a hurricane in Florida where one of your suppliers is and the supplier cannot provide the parts that you were depending on. There was no way you could predict that. There are any number of things that could have happened. But you get to August, and the company puts out a press release saying product X has been delayed and will not be introduced until sometime later in the fall.

Bang—the analysts pound the stock. There is wild speculation. I have seen those. We have all seen those. They go through the marketplace—all kinds of rumors, the company has serious problems, their management is in difficulty, so and so is going to get fired, the stock drops 10 percent, and within a week strike suits are filed naming the company, its chief executive officer, and a bunch of other officers for conspiring to put out false information about product X and misleading the marketplace.

Product X comes out in September. It is a great hit. The stock price recovers. Presumably nobody is hurt. But, frankly, all of that is irrelevant because the legal machinery is now in motion and they do not care what is happening to the product or the company. Whether they want to or not, the top management of that company must now focus on an issue that is irrelevant to the management of the business; and, if I may, Mr. President, to the detriment of the investors in that company because the investors in that company want top management focusing on sales. They want top management focusing on efficiency. They want top management focusing on cutting costs and opening new markets. But instead they have a situation where in the name of the investors the legal machinery is forcing the top management of that company to focus on something totally unproductive—coming up with a defense against the charges that they mislead the public.

Discovery: That great word in the legal lexicon; discovery starts, and it goes to every piece of paper that has to do with product X, and every memorandum that may have crossed the CEO's desk. And they find the memo from the fellow who says, "I don't think we are going to be ready in August." And, bingo, we have a smoking gun. No reference is made to the other opinions now. In court the reference is all going to hammer in on this one fateful memo, and, "Mr. CEO, did you read this memo?" If, he says yes, he not only has knowledge that product X was not going to come in, he has actual knowledge, not just imputed knowledge, actual knowledge. He admits he read the memo. Nail him to the wall.

That is what happens if he does not have the safe harbor that we have written into this act. Let us assume that this company is not one of those that is kept out of the harbor, the list I read in the beginning. It is one of those that is allowed into the harbor and without the harbor that is what happens.

Now suppose we have the reckless standard that people have argued for. This would be a very easy standard for a plaintiff's lawyer to meet in the circumstance I have described. Arguably any projection about the future is reckless. "You do not know, Mr. CEO, that the future is going to produce this product in August. It was reckless of you to say that you would have it in August. You may have believed it but it was a reckless statement." There is no protection for the CEO in this circumstance with the term "reckless." No. He needs the safe harbor of the bill.

And the question is how safe should that harbor be? Well, if we had the simple knowledge standard that the SEC suggests, the question is, "Well, did you know that this product would not meet its date in August? Well, here is a memo in the company. It came over your desk. You read it. If you did not know, you should have known." Simple knowledge can be twisted in the hands of a careful lawyer, and the CEO has a very difficult time explaining this circumstance.

So a knowledge standard, even an actual knowledge standard, is not going to be a safe harbor. It is not going to protect the CEO. And again the point, Mr. President, it is not going to be for the benefit of the investors because the CEO is not going to be able to be doing what he is hired by the investors to do—run the company. He is going to be worrying about this particular problem.

This is the kind of thing that drives companies to settle out of court and to say, "Well, we really did not do anything wrong but in order to get back to the business of making products and out of the business of prosecuting lawsuits, we will settle even though we are pretty sure we did not do anything wrong."

No. What we need to have is what we have in this bill, a safe harbor that says not only did the CEO have knowledge but he acted with the purpose and actual intent of misleading investors. Now, that no one can tolerate. That clearly must not be allowed. But it must be the purpose and actual intent of misleading investors before the CEO is driven out of the harbor.

Why actual intent? Because without it intent can be implied in a number of circumstances. "You saw this memo, the very fact that you decided to ignore it in your presentation to the security analyst, Mr. CEO, implies that you intended to deceive them." No. The standard must be higher than that. You must prove that he had the actual intent, that he had the purpose of deceiving investors before you drag him into that area.

Is this a high threshold? I think it is an appropriate threshold because it fits the reality of the circumstances, and it prevents plaintiffs from accusing companies and officers of committing fraud

simply because documents of differing opinions exist somewhere in the file. You have to go beyond that. You have to prove actual intent.

If I may stray into waters that I probably should not, since I have not gone to law school, but I have had some experience in this area, it is a little like the standards that we apply in the first amendment.

If a newspaper inadvertently prints something that is inaccurate, they cannot be held for libel unless it is proven that they acted with malice, with actual intent, if you will, to harm the reputation of the individual. Thus free speech is allowed to go forward unimpeded, however damaging it is to the individual involved. Having been the individual involved in some circumstances, I know how hard sometimes that is to accept.

But that is the standard we have created in that circumstance, and I think the language in this bill holds that same kind of standard.

Now, Mr. President, I come to the final question, which is what I think we should focus on here. Whom are we trying to protect? With all of this legislation, whom do we seek to benefit? What is the purpose of all of this? Are we trying to protect CEO's? Are we trying to protect lawyers? Are we trying to protect security analysts and newspapers that report things? Whom are we trying to protect at base by all of this legislation? The answer, Mr. President, is the investor. The purpose of this legislation is to protect the investor and his or her investment.

Look at every issue that we are talking about here through that particular lens. Is it good for the investor or is it bad for the investor? Is it good for the investor to have the CEO feel constrained about talking about the prospects of his company? Is it good for the investor to have the CEO being hedged about by lawyers who tell him when he goes before the security analyst: You cannot talk about this; you cannot talk about that; you cannot make any speculation of any kind lest you run the risk of exposing yourself to these kinds of suits later on.

I submit that it is good for the investor to have the CEO be as open and candid as he possibly can be and to say to the security analyst: Yes, it is my judgment that product X will be on the market in August. Because what if he is right and product X is on the market in August, and he did not tell anybody that and they did not have the opportunity to buy the stock in the expectation that that would be the case?

Is it good for the investors to have him say: I have differences of opinion within the company; there are some people who do not think it will be.

Yes, it is good for the investors to have him be as candid and open as possible. And the only way you can get that kind of candid, open discussion is if you have a safe harbor in which that honest CEO can sail knowing that he will be protected from the waves and whims of the shark suits that are out there.

Is it good for the investor or is it bad for the investor to have the CEO's attention diverted into lawsuits that have nothing whatever to do with the management of the company? I submit it is bad for the investor to have the CEO concentrating on things other than the things for which he was hired. And ultimately, is it good for the investor or is it bad for the investor to have the company paying out millions of dollars in legal fees on issues that are tangential to the company's performance?

I submit it is bad for the investor, and it becomes doubly bad for the investor when, as we have seen over and over again in the debate on this bill, the highest percentage of those fees and fines being paid out by the investor—those are the investor's moneys; those are not the CEO's moneys. When you say those are the company's moneys, there is only one source of company money, and that is the investor. That is the investor's money going out, with the vast bulk of it going out to the plaintiff's attorneys and not the investor. They say: Oh, look, we are protecting the investor. Look at the money that is going back to the investor.

No, the money is going back to the lawyer, and in the meantime all of the money and attention and activity on behalf of the management of the company has been focusing on this suit.

That is why they settle, Mr. President. They settle because it is good for the investors and for them to get this thing behind them. But it would be better for the investors if honest executives who have no intent and no purpose of deceiving have a safe harbor from which they can explain to the public the things that are going on in the company and make statements about the future fully hedged about with protections that say these are speculations so that the investor then has information from which to make his or her own intelligent decisions.

So, Mr. President, I oppose the amendment by the distinguished Senator from Maryland. I enjoy serving with him on the Banking Committee. I enjoy the intellect and I enjoy the thoroughness with which he approaches these decisions, and I hope he recognizes it is not an act of disrespect on my part when I say I disagree with him on this amendment and intend to vote against it and urge my colleagues to do the same.

Now, Mr. President, I ask unanimous consent that at 2:15 p.m. today, Senator KASSEBAUM be recognized in morning business for not to exceed 5 minutes, and that at the hour of 2:20 p.m. there be 40 minutes of debate on the Sarbanes amendment No. 1477, equally divided in the usual form, with the vote occurring on or in relation to the Sarbanes amendment at 3 p.m. today, with no second-degree amendments in order to the amendment; further, that following the disposition of the Sarbanes amendment No. 1477, Senator SARBANES be recognized to offer an amendment regarding safe harbor.

Mr. SARBANES. Reserving the right to object, Mr. President, I have indicated a desire to have an up-or-down vote on the amendment. Does the Senator have any problem with that?

Mr. BENNETT. Mr. President, I have no problem with that, but I cannot bind other Senators who may wish to make a motion to table.

Mr. President, I would have no objection to that.

Mr. SARBANES. So with that amendment to the unanimous consent request, I have no objection.

Mr. BENNETT. Yes, on the Sarbanes amendment there would be no motion to table.

Mr. SARBANES. Right.

The PRESIDING OFFICER (Mr. ASHCROFT). Without objection, it is so ordered.

Mr. DODD addressed the Chair.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I thank the Chair.

Let me just, if I can, make a couple of observations here about this amendment and the history——

The PRESIDING OFFICER. Who yields time?

Mr. DODD. How much time remains?

The PRESIDING OFFICER. All of the time remaining is under the control of the Senator from Maryland.

Mr. SARBANES. Mr. President, I do not think that is correct, in all fairness to my colleague. I wish to be fair. I think the agreement was we would divide equally the time between 11:10, as I understood it, when we went——

Mr. BENNETT. Mr. President, I ask unanimous consent that the previous unanimous-consent be amended to be as the Senator from Maryland remembers it.

Mr. SARBANES. I thought that is what it was.

It would not be fair to divide the time from 11:45 equally since the time before 11:45 was consumed, not quite but primarily, on one side. That is not really fair to my colleagues, and I recognize that. I think if we divided it—was it from 11:15 on?

Mr. BENNETT. It was 11:09.

Mr. SARBANES. If that time were divided equally, what would the time situation now be?

The PRESIDING OFFICER. The Senator from Maryland would have 10 minutes, and the Senator from Utah would have 10 minutes.

Mr. BENNETT. I ask unanimous consent that that be the state of the time

from this time until we break for lunch.

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

The PRESIDING OFFICER. Who yields time?

Mr. SARBANES. And that would mean from the time we went on this amendment, all time would have been equally divided; is that correct?

The PRESIDING OFFICER. That is correct.

Mr. SARBANES. Yes.

Mr. BENNETT. Mr. President, I yield such time as he may consume to the Senator from Connecticut.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. I thank my colleague from Utah. I yield myself 5 minutes. If the Chair would remind me at the end of 5 minutes so as not to take too much time on this because a lot has been said already about it.

Mr. President, let me make a couple of observations to underscore the point that my colleague from Utah has already addressed. Some of my colleagues have said that the safe harbor provisions of S. 240 do not go as far as some would suggest. First, our provisions of safe harbor limit significantly the circumstances in which the safe harbor applies.

I think it is very important to lay out as clearly as I can here, what is included and what is excluded.

The safe harbor provisions of S. 240 apply only—only—to statements made by issuers or outside reviewers retained by issuers. Statements by stockbrokers are not protected at all under S. 240's safe harbor. Certain issuers are excluded. Not all issuers are included; some are excluded from safe harbor, including anyone who has violated securities laws within the prior 3 years. Penny stock companies, blank check companies, investment companies, all companies, Mr. President, are excluded from the safe harbor when they engage in certain types of transactions such as IPO's, initial public offerings. The tender offers, rollup transactions, all of those are excluded. So this is a very narrow provision here. All information contained in historical financial statements is excluded as well.

Second, Mr. President, the safe harbor applies only to projections or estimates that are identified—they must be identified—as forward looking statements and that refer "clearly and proximately" to "the risk that actual results may differ materially"—that is the language, "the risk that actual results may differ materially"—from the projection or estimate.

That goes right to the heart of what the Senator from Utah was talking about. This is a very narrow area we are talking about, and the point is to create a safe harbor. Why do you create a safe harbor? Because we are trying to solicit from these issuers as much information as possible so that a potential buyer can have as much awareness as possible about where this stock or where this company is likely to go. It is in the interest of the investor that we get as much of that information as possible.

There is no requirement in law that an issuer even put out forward looking statements. In fact, what has happened lately is a lot of them have retreated from that very advantageous idea because of the very situation we find ourselves in today. So it is in our interest to solicit this kind of information, but in doing so, we say, "Look, we want you to share as much information about where you think this company is going, where this stock is going so that investors will make intelligent decisions."

In doing so, if you do anything—and we say very clearly in the bill if you do anything that knowingly with purpose or intent of misleading investors, on page 121 of this bill, we now take out the word "expectation"—knowingly made with the purpose or intent of misleading investors, then you are excluded. Not only excluded, you are subject to the penalties of the law.

So anyone who knowingly with intent to mislead in those forward looking statements is subject to the provisions of the law that apply in this piece of legislation before us. But the idea is to get that information out, and it seems to me that is in everyone's interest.

You have to strike that balance. There are those who are opposed to safe harbor. I disagree with them; I understand it. I do not think anyone who has really looked at the larger issues would agree with it. So we have attempted with this legislation to craft the safe harbor provisions.

My colleague from Maryland has correctly pointed out that in the earlier bill we introduced some 17 months ago, we asked the SEC to try to develop a regulatory scheme to deal with safe harbor. I must say, I have heard now for the last 2 days a lot of these kudos and praise over the bill that we introduced last March. I would very much have liked to have passed a bill in the previous Congress in this area, but I could not get that kind of support.

I ask unanimous consent that I may be able to proceed for 5 additional minutes.

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

Mr. DODD. Mr. President, I wish we had some of that support. The very people today who find the previous bill so attractive, I must say candidly, were not exactly racing to support the legislation when it potentially could have been adopted in the last Congress.

Putting that aside, let me also point out to my colleagues, having made the offer 17 months ago to have the SEC move, frankly, the SEC has not moved, and I am convinced today they would not move on this.

There is ample evidence to indicate that that suspicion of mine is correct. In a June 22 edition of the Bureau of National Affairs publication, which follows legislation dealing with financial institutions, under securities, the headline is, "SEC safe harbor initiative may be overtaken by litigation reform." Following are several pertinent paragraphs I think support what I am saying:

> Although one agency official stated in late March that SEC action in its October concept release was imminent, that has not materialized. Rather, the SEC remains at the concept-release stage on the initiative. Its inaction during the 8 months since release was issued has been attributed by some observers to some differences of opinion within the Commission on various issues connected with the initiative.

Another Commissioner, Richard Roberts, told BNA June 21 that there are bona fide reasons that the Commission did not act quickly on the concept release, including questions about the agency's authority in the area of forward looking information.

Again, we just were not getting the action in this area.

It is a complex area. The Senator from Maryland is absolutely correct. Anyone who suggests otherwise has not spent any time looking at this. But I will argue, despite the fact that our original bill tried to get the SEC to come forward in this area—in fact they have not—that there is a good case to be made that leaving these matters just up to the regulatory bodies or, as we have seen in other cases dealing with aiding and abetting, for instance, to the courts, is not a wise way to go ultimately.

In many matters here, we ought to be trying to establish through the legislative process what our intent is. So while I welcomed in the past the SEC's efforts in this regard, that was not forthcoming. Now it is being suggested by those who opposed the bill last year that I ought to go back to my earlier position on this matter, even though the SEC did not move in this area, given the 17 months they had an opportunity to do so.

Letters are being bandied about. The letter of May 19 from the Chairman of the SEC certainly recognizes that there is a need to strengthen the safe harbor provisions. In fact, in paragraph 3 of Chairman Levitt's letter on May 19, he says:

> There is a need for a stronger safe harbor than currently exists. The current rules have largely been a failure, and I share the disappointment of issuers that the rules have been ineffective in affording protection for forward-looking statements. Our capital markets are built on the foundation of full and fair disclosure. Analysts are paid and investors are rewarded for correctly assessing a company's prospects. The more investors know and understand management's future plans and views, the sounder the valuation is

of the company's securities and the more efficient the capital allocation process. Yet, corporate America is hesitant to disclose projections and other forward-looking information because of excessive vulnerability to lawsuits if predictions ultimately are not realized.

It goes on to talk about how he was a businessman all his life, and so forth, and lays out some specific areas and talks on page 2 of this letter, in the last paragraph:

A safe harbor must be balanced, should encourage more sound disclosure, without encouraging either omission or material information or irresponsible and dishonest information. Safe harbor must be thoughtful so that it protects considered projections, but never fraudulent ones.

I invite my colleagues to look at the language on page 121 of our bill, where we specifically lay out, No. 1, knowingly—talking about projections—knowingly made with the purpose and actual intent of misleading investors.

So we clearly there are saying if you make a knowingly fraudulent statement, a misleading—not even fraudulent but misleading statement—a knowingly misleading statement, that you are not protected by the safe harbor provisions. Is this perfect? I cannot say that it is. But I will say it conforms to what the Chairman of the SEC says, that the present situation is not working very well. We know when we see what is happening with the forward-looking statement; they are being contracted and contracted and contracted. That is the practical effect of the environment we live in today. That does not serve the investor community well, Mr. President.

With those reasons, with all due respect and great admiration for my colleague from Maryland, throwing this back into the court of the SEC I do not think is going to advance our cause in dealing with clear reform in the area of safe harbor that is needed.

I urge my colleagues to reject the amendment offered by the Senator from Maryland.

Mr. SARBANES. Mr. President, I listened very carefully to both of my colleagues and I would like to, very quickly, address some of the points they made. I think the Senator from Connecticut is being extremely unfair to the SEC in terms of saying that they did not pick up on this. They have picked up on it. Whether they should have picked up sooner is the question. But they did issue a period for comment, and that was in October 1994, and they received comments—over 150. They then held hearings in the first part of this year. The Chairman, I think, of the SEC, as the Senator quoted him in the letter, has indicated that he wants to do something about safe harbor. The Senator quoted him correctly.

Mr. President, I ask unanimous consent that a letter from Chairman Levitt, dated May 25, 1995, be printed in the RECORD at the end of my statement.

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

(See exhibit 1.)

Mr. SARBANES. The real question here is not whether we should improve safe harbor. The question is, who is going to try to do it? Where is the best place to do that? This amendment says that the best place to do that is at the SEC, and that this body is not equipped to try to work through this complex issue; and if it tries to do it, the law of unintended consequences is going to bring a lot of potentially devastating developments.

The proposal to have it done at the SEC is, of course, the proposal which the Senators from Connecticut and New Mexico had when they first introduced the bill—the bill which Members cosponsored. Members who cosponsored this legislation were cosponsoring a provision with respect to safe harbor, which is exactly the amendment at the desk. That provision was subsequently changed in the committee. That is not the provision that was in the legislation which Members were signing onto as cosponsors.

Chairman Levitt has warned us of the danger that the provision in the bill will protect fraud. Safe harbor is a grant of immunity, an exemption from any liability. Safe harbor, in effect, says that you are immunized altogether. So it is very important to properly define the safe harbor. I have been interested in Members—first of all, the chairman amended the statutory provision in the bill on safe harbor shortly a while ago here on the floor, recognizing that this effort to write this statutory standard was deficient, I assume.

My colleague from Connecticut is citing provisions in the bill where certain activities cannot get safe harbor. He specifically precludes them from doing that and he went through some of them. All of those are things that developed. We got concerned about penny stocks when they were used as an abuse. Who knows what the next abuse is going to be down the road? If the SEC does this, they are in the business of being able to adjust to the abuses as they come. The SEC can, in effect, modify the framework. These listings of exceptions to the safe harbor standard in the rule are a demonstration, in my judgment, of the inappropriateness of trying to write the standard here, as opposed to letting it be done by the regulatory authorities.

The forward-looking statements in this bill are broadly defined. They include both oral and written statements. Now, we want a lot of the information, but it is the kind of information investors use in deciding whether to purchase a particular stock.

Now, the Chairman of the SEC himself has said they want—in fact, the Senator quoted one member of the SEC who said maybe they were not moving as quickly because they had some doubts about their statutory authority to do so. Of course, his original proposal would have provided that statutory authority. So if that is an inhibition, the amendment eliminates that and any doubts with respect to the SEC's ability to move ahead. The Commission received 150 comment letters in response to the release. It has worked closely with a vast representation of the industry. In fact, when Chairman Levitt testified in April of this year, he said:

From the Commission's perspective, an appropriate legislative approach is contained in the Domenici-Dodd bill. This provision would allow the Commission to complete its rulemaking proceeding and take appropriate action after its evaluation of the extensive comments and testimony already received. Based on the Commission's experience with this issue to date, we believe there is considerable value in proceeding with rulemaking which can more efficiently be administered, interpreted and, if needed, modified than can legislation.

The North American Securities Administrators Association, the Government Finance Officers Association, the National League of Cities, and nine other groups, in a letter to the committee, on the 23d of May, expressed the same view, saying:

We believe the more appropriate response is SEC rulemaking in this area.

Unfortunately, the committee print substitute to S. 240, unlike the bill as introduced, abandoned this approach in favor of trying to formulate a statutory safe harbor.

This is contrary to all the advice we are receiving from the regulators. Everybody gets up here and says this interest group wants this and this interest group wants that. I recognize that. I have been the first to state that you have these interest groups clashing over this thing. But what are the public interest officials telling us—those whose responsibility it is to serve the public interest, not one or another of these economic interest groups—what are they telling us? Of course, what they are telling us is that the approach in my amendment is the approach to follow.

The standard that is in the legislation, I think, is going to allow fraud to occur. In fact, Chairman Levitt, on the morning of the markup, wrote about the language that is in the bill before us. He stressed that this language failed to adhere to his belief that a safe harbor should never protect fraudulent statements. Let me quote him:

I continue to have serious concerns about the safe harbor fraud exclusion as it relates to the stringent standard of proof that must be satisfied before a private plaintiff can prevail. As Chairman of the Securities and Exchange Commission, I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.

He had seen the language. That is a comment on the very language that is in this bill. He said:

. . . I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.

Others have criticized this provision as well. The Government Finance Officers Association, representing more than 13,000 State and local government financial officials, county treasurers, city managers, and so forth, wrote on the safe harbor provision in the bill:

We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery.

I say to my colleagues, no one is arguing here that we do not need to do something to improve safe harbor. The issue framed by this amendment is, who should do it? I submit, as I indicated earlier, in an issue of this complexity, it is better that it be done by the Securities and Exchange Commission.

The North American Securities Administrators Association represents 50 State securities regulators. They said:

We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery.

These are on the front line of defense against securities fraud. They are really the regulators closest to the individual investors. They call the provision in this bill an overly broad safe harbor, making it extremely difficult to sue when misleading information causes investors to suffer losses.

AARP has also written calling for replacement of the safe harbor provision, with a directive to the SEC to issue a rule which structures a safe harbor that protects both legitimate business and investors.

Given the broad definition in this legislation of forward-looking statements, discussed above, it is crucial that the legislation not shield such statements when they are false. Encouraging reasonable disclosures is one thing. Allowing fraudulent projections is another. Actually, that kind of safe harbor would hurt investors trying to make intelligent investment decisions and penalize companies trying to communicate honestly with their shareholders. It runs counter to the whole premise of our Federal securities laws, which has helped to give us strong markets. The fraud must be deterred, and the fraud must be punished when it occurs.

Mr. President, I think it is important that safe harbor not protect fraudulent statements and, in my judgment, the best way to address this issue is to, in effect, use the approach that was initially in the legislation charging the SEC with developing a safe harbor regulation—a process now engaged in.

These are the transcripts of the hearings they held on the issue. They received over 150 comment statements and letters, and they have engaged in an extensive discussion with a whole range of people who have acquaintance and knowledge in this area.

I very much hope the body will adopt the amendment.

EXHIBIT 1

U.S. SECURITIES AND EXCHANGE COMMISSION,
Washington, DC, May 25, 1995.

Hon. ALFONSE M. D'AMATO,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I understand that this morning you and the members of the Banking Committee will be considering S. 240 and that you will be offering an amendment in the nature of a substitute. While I have not had the opportunity to analyze fully the May 24th manager's amendment to the Committee print, I appreciate your leadership and efforts to address the concerns of the Commission in drafting your alternative.

The safe harbor provision in the amendment, in my opinion, is preferable to the blanket approach of H.R. 1058. It addresses a number of the concerns pertaining to the size of the safe harbor and the exclusions from the safe harbor. The Committee staff appears to be genuinely interested in the Commission's views of its draft legislation and has attempted to be responsive. I was pleased to see the latest draft deleted the requirement that a plaintiff must read and actually rely upon the misrepresentation before a claim is actionable. Your attempt to tailor the breadth of the safe harbor of the Securities Exchange Act of 1934 to the more narrow safe harbor of the Securities Act of 1933 was encouraging. However, I continue to believe that the definition should be further narrowed to parallel the items contained in my letter of May 19th. Moreover, there remain a number of troubling issues.

I continue to have serious concerns about the safe harbor fraud exclusion as it relates to the stringent standard of proof that must be satisfied before a private plaintiff can prevail. As Chairman of the Securities and Exchange Commission, I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection. The scienter standard in the amendment may be so high as to preclude all but the most obvious frauds. I believe that there should be a direct relationship between the level of scienter required to prove fraud and the types of statements protected by the safe harbor. My letter of May 19th indicated the discreet list of subjects that are suitable for safe harbor protection, assuming a simple "knowing" standard. Accordingly, if the Committee is unwilling to lower the proposed scienter level to a simple "knowing" standard, the safe harbor should not protect forward-looking statements contained in the management's discussion and analysis section. This would be better left to Commission rulemaking.

In addition to my concerns about the safe harbor, there is no complete resolution of two important issues for the Commission. First, there is no extension of the statute of limitations for private fraud actions from three to five years. Second, the draft bill does not fully restore the aiding and abetting liability eliminated in the Supreme Court's Central Bank of Denver opinion. I am encouraged by the Committee's willingness to restore partially the Commission's ability to prosecute those who aid and abet fraud; however, a more complete solution is preferable.

I also wish to call you attention to a potential problem with the provision relating to Rule 11 of the Federal Rules of Civil Procedure. I worry that the standard employed in your draft may have the unintended effect of imposing a "loser pays" scheme. The greater the discretion afforded the court, the less likely this unintended consequence may appear.

I would like to express my particular gratitude for the courtesy and openness displayed by the Committee and its staff. I hope we will continue to work together to improve the bill so as to reduce costly litigation without compromising essential investor protections.

Thank you for your consideration.

Sincerely,

ARTHUR LEVITT.

RECESS UNTIL 2:15 P.M.

The PRESIDING OFFICER. Under the previous order, the Senate will stand in recess until the hour of 2:15 p.m.

There being no objection, the Senate, at 12:33 p.m., recessed until 2:15 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. KYL).

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BRADLEY. 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. BRADLEY. Mr. President, I ask unanimous consent that I may proceed as if in morning business for up to 3 minutes.

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

The Senator from New Jersey is recognized.

Mr. BRADLEY. I thank the Chair.

(The remarks of Mr. BRADLEY and Mrs. KASSEBAUM pertaining to the introduction of S. 969 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

PRIVATE SECURITIES LITIGATION REFORM ACT

The Senate continued with the consideration of the bill.

The PRESIDING OFFICER. The time from now until 3 p.m. will be reserved for debate on the Sarbanes amendment with the time to be equally divided in the usual manner.

Mr. DOMENICI addressed the Chair.

The PRESIDING OFFICER. The Senator from New Mexico.

AMENDMENT NO. 1477

Mr. DOMENICI. Mr. President, I have discussed this with Senator D'AMATO. Some of the time remaining will be allocated to me by him. So let me start by yielding myself 7 minutes from our side.

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

Mr. DOMENICI. Mr. President, speaking now of the safe harbor amendment that is before us, and the safe harbor language that is in the bill, I first want to call to the Senate's attention the chilling effects on voluntary disclosure that exist today because of our failure to have an adequate safe harbor for voluntary statements about future conditions.

First:

Seventy-five percent of the American Stock Exchange CEO's surveyed have limited disclosure of forward-looking information.

That is according to an April 1994 survey.

Limited disclosure:

Seventy-one percent of more than 200 entrepreneurial companies surveyed are reluctant to discuss the companies performance. (National Venture Capital Association, 1994.)

Nearly 40 percent of investor relation personnel surveyed at 386 companies have cut back on voluntary disclosure of information to the investment community. (National Investor Relations Institute, March 1994.)

Fear of litigation is the number one obstacle to enhance voluntary disclosure by corporate managers. (Harvard Business School study, 1994.)

Less than 50 percent of companies with earnings result significantly above or below analysts' expectations released information voluntarily. That information, too, is from one of our great universities, the University of California, (November 1993.)

Mr. President, it has been asked why, originally in the Dodd-Domenici or Domenici-Dodd bills we did not have this statutory safe harbor language.

Mr. President, fellow Senators, the truth of the matter is that it has been 4 years since we first started this exercise of trying to get this law. And the final draft, more or less, of what is being alluded to as the Dodd-Domenici or Domenici-Dodd bill is 3 years old.

For those who are questioning why we do not adopt the original bill's language on safe harbor, let me just suggest that such an approach's time has come and gone. If the Senators suggesting the regulatory approach would have all come to the party 3 years ago, the bill would have been enacted. But nobody would. So what happened is we had in that bill asked that the Securities and Exchange Commission solve this problem.

Mr. President, for various reasons the Securities and Exchange Commission is not able to solve the safe harbor problem. They have had numerous hours of hearings, Commissioners are split, we are short two Commissioners. There are vacancies. Entrenched staff of that institution are arguing back and forth on philosophy and language. Meanwhile, the status quo continues, and here we sit with an unfixed safe harbor even though Congress has asked them to fix it.

Last year in appropriations, Mr. President, fellow Senators, I put in the appropriations bill report language that the SEC needed to create a new safe harbor and to report back to us by the end of the fiscal year. The provision called upon them to tell the people of this country what the safe harbor would be since the SEC wanted to develop it. They have not done it. It is almost time for another appropriations bill. And they have not done it.

Let me suggest that inaction and gridlock at the SEC do not mean we should not do something. In fact, I do not believe that is what the current head of the SEC, Arthur Levitt is saying, that we should not do anything because we should still leave it up to them 3 years and untold numbers of hours, and hundreds of pages of testimony. So frankly, we ought to do something statutorily about the safe harbor.

The fact that it is a problem is absolutely manifold before us here today. And the fact that those very same lawyers, that small group of sharks, that sit around waiting for litigation, are fighting so hard to keep the current, ineffective safe harbor makes it patently clear that filing frivolous lawsuits when a company misses an earnings projection is one of their great slot machines. This is one situation where they just jump out there and pick up on statements that are predictions of the future, and anything that does not turn out as it was spoken as a basis to file a lawsuit.

Forward-looking statements are predictions about the future. Frequently, these lawsuits are based on past statements of future expectations.

Why do not future predictions always come true?

Mr. President, changes in the business cycle occur beyond the control of the company or their executive or their accountants. Is that fraud?

Changes in the market occur. And ask somebody why the changes have occurred and you will get as many answers as there are people you would ask. Is that fraud?

Changing the timing of an order—is that fraud?

Because forward-looking statements often involve future products, innovations, technologies of the future, failure to meet one or another expectation, is inevitable. But it should not be inevitable that a lawsuit follows. But I ask: Is each of those a fraud if you do not meet them? No. It is simply failure of a prediction about the future to come true.

Talk about the chilling effects of disclosure. I have just explained the reality of harm this ineffective policy is causing in the marketplace. And so now let me proceed to talk about the safe harbor in this bill.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. DOMENICI. I yield myself 5 more minutes.

Arthur Levitt, for whom I have great respect, and he knows that, said he wanted a balanced safe harbor. The SEC has been promising this new safe harbor for at least 3 years. Arthur Levitt has said that the current safe harbor "is a failure."

That is not PETE DOMENICI, who proposed this bill some 4 years ago; it is Arthur Levitt saying the current safe harbor, whatever it is, is a "failure." The securities litigation reform bill that Senator DODD and I introduced, directed them to make plans for, and recommend a fix to this broken safe harbor situation. We have gone through that with you already. But I can repeat again, frustrated by this lack of progress, I put language in the appropriations bill's report.

Actually, it has been 8 months since the SEC took its first step and issued a concept proposal, and still we get nothing.

So in answer to those in the Chamber, including my friend from Maryland, Senator SARBANES, who say Senator DODD, Senator DOMENICI, if you left the bill the way it was when you originally introduced it, I would be for this provision because you did not have the provision that is before the Senate today. Of course not. We have been anxiously waiting for 3 years now for the SEC to fix this. And since they have not, we believe the committee has come up with an excellent solution to this problem.

Let me go on then and cite for the RECORD a little detail about the disagreements among the Commission and various staff at the SEC just to show that there is great imbalance.

Wallman wants a meaningful safe harbor. Beese wants a strong safe harbor. The Commission is two commissioners short and there will be three empty seats soon. With new commissioners eventually coming onboard, it will slow the process even further. It will be years.

The Senate bill recognized the problem at the SEC and the urgency of a meaningful safe harbor. The committee made the change and crafted a statutory safe harbor, even though the Securities Commission could not tell us how to do it. And I believe the committee have done it right. They had the benefit of this entire record before the SEC.

The main concern that Arthur Levitt has expressed to the Congress is that there should be no safe harbor for predictions about the future that were intentionally false.

The Council of Institutional Investors, the mutual fund managers, did not agree with Arthur Levitt and they had suggested that Congress go further than our bill. They argued that statements which are accompanied by warnings should be per se immune from liability. The Senate bill does not go that far.

CALPERS—the California public employees pension fund—in their testimony to the SEC, stated:

By definition, projections are inherently uncertain. The more such statements are based on assumptions susceptible to change, the less useful they are in assessing prospective performance. Investors recognize this and appropriately discount the importance of such information when making investments. This being the case, we see no reason why investors should then be allowed to rely upon such statements in an action for fraud after their speculative nature has been fulfilled.

There is a warning that will accompany each of these statements if it is to be protected under the safe harbor created by the bill. It will clearly: say these forward looking statements are predictions; they may not come true. It may turn out that the actual results differ materially from this prediction about the future.

The Council of Institutional Investors—that is the professional people who manage these funds, people who have a fiduciary duty and high level of trust to manage pension funds—told the SEC that any safe harbor must be "100 percent safe." This means that all information in it must be absolutely protected even if it is irrelevant or unintentionally, or intentionally, false or misleading." The bill does not go that far.

For decades, Congress has deferred to the courts in setting the contours of class action 10b–5 litigation. We are changing that in this bill, and we should not pass the buck on to anyone on something as important as safe harbor.

The chilling effect on the willingness of companies to make disclosures is bad for investors, for analysts, for professional fund managers, for retirement stewards, companies and the market in general. The high technology companies cannot grow without a meaningful safe harbor, and we provide just that.

We provide a meaningful safe harbor. That meaningful safe harbor clearly does not protect against intentional fraud and knowing misrepresentations. We have made it very specific; individuals engaging in that type of activity cannot get into our safe harbor. Those statements are still actionable. So any statements on the floor that we will let people perpetrate fraud because of this statutory safe harbor, which includes knowledge, purpose and intention, that is not so. Nonetheless, you either have to have a safe harbor that works on future statements that are predictive only or you have it wide open again for litigation and we are right back where we started.

Mr. President, I yield the floor.

Mrs. FEINSTEIN. Mr. President, the safe harbor provisions of the bill have been criticized by some of my colleagues. I would like to address those criticisms by pointing out that S. 240 puts more responsibilities on companies seeking to use the safe harbor and puts more conditions on their use of the safe harbor than the SEC does in its current rules. It also goes further than a number of courts of appeals that have examined the issue of liability for forward-looking statements.

I wonder if the bill's manager would engage in a colloquy with me on this point?

Mr. D'AMATO. I would be delighted to.

Mrs. FEINSTEIN. First, S. 240 has a definition of forward-looking statement. It includes projections of revenues, statements about management's plans for the future, and statements about future economic performance of a company, among other things. Can you tell me where that definition came from?

Mr. D'AMATO. It came directly from rule 175. It is the SEC's own definition of forward-looking statements.

Mrs. FEINSTEIN. Now, the Banking Committee excluded a number of companies and a number of transactions from using the safe harbor. Can you explain why that was done?

Mr. D'AMATO. The Banking Committee made a policy decision to exclude from the safe harbor certain companies and certain transactions in which the incentives for making overly optimistic forward-looking statements might be present. It is important to note that the safe harbor does not apply to:

First, statements about a company that within the past 3 years has been convicted of certain violations of the Federal securities laws.

Second, statements made in an offering by a blank check company. These are companies that offer securities to the public, but which have no clear business plan and are therefore highly speculative.

Third, statements made by an issuer of penny stock. These are companies that sell very low priced stock, often through brokers who use high pressure sales tactics. There have been significant problems of fraud in the sale of these securities in the past.

Fourth, statements made in connection with a rollup transaction. These are transactions in which sponsors of limited partnerships attempt to combine many separate partnerships and rake off huge management fees. Congress passed legislation to address these abuses in 1990. We shouldn't allow these transactions to use the safe harbor.

Five, statements made in connection with a going private transaction. These are transactions in which a company buys back its shares from its public shareholders. Often, it involves management of the company buying back the shares.

Six, statements made in connection with the sale of mutual funds. Mutual funds simply should not be making projections. The SEC has a long series of rules governing mutual fund disclosure.

Seven, statements made in connection with a tender offer also are excluded. These often are hotly contested takeover battles, and we have decided not to give them any safe harbor protection.

Eight, statements made in connection with certain partnership offerings and direct participation programs. Very often, these are securities products put together in-house at a broker-dealer, and we think the temptation for making rosy performance projections may be too great in these cases.

Nine, statements made in connection with ownership reports under 13(d) also are excluded. These are the reports required under law by anyone who purchases 5 percent or more of a company's securities. The law also requires that they state their plans with respect to the company. The committee decided these statements should not be protected under the safe harbor.

Ten, finally, the safe harbor does not apply to forward-looking statements in the financial statements of a company.

So, to answer your question, we excluded a long list of companies and transactions from the safe harbor, because we were concerned that, in these companies and in these transactions, there might be a temptation for companies to make rosy projections.

Mrs. FEINSTEIN. The committee's bill also has a tough requirement that, in order to use the safe harbor, a company has to accompany any projection with a warning; is that not correct?

Mr. D'AMATO. That is true. The bill requires that there be a clear warning that actual results may differ materially from any projection, estimate, or description of future events.

Mrs. FEINSTEIN. Then, I want to compliment the committee for its work here. Clearly this is a difficult area. We want to provide certainty for companies and encourage them to make disclosure. At the same time, we want to make sure that no one takes advantage of the safe harbor to mislead investors. You have tried to strike a balance here.

The PRESIDING OFFICER. Who yields time?

If no one yields time, the time will be deducted equally.

Mr. DOMENICI. Parliamentary inquiry, Mr. President. How much time do we have?

The PRESIDING OFFICER. The Senator still has 5 minutes 48 seconds; the other side has 18 minutes.

Mr. SARBANES. Mr. President, how much time remains?

The PRESIDING OFFICER. The Senator has 17 minutes remaining.

Mr. SARBANES. How much is remaining on the other side?

The PRESIDING OFFICER. About 5 minutes.

Mr. SARBANES. I thank the Chair.

Mr. President, the amendment we are about to vote on shortly is an amendment that puts into this bill the very

provision that was in the bill introduced by Senators DODD and DOMENICI, which referred over to the Securities and Exchange Commission the responsibility for developing a safe harbor provision.

I have to tell you, I think it is either the height of arrogance or the height of folly to be trying to draft these standards here in the committee and in the Chamber of the Senate. Even the proponents admit this is a very complex issue. The original bill as introduced and as cosponsored provided to send this issue to the Securities and Exchange Commission in order for them to put their expertise and their rulemaking authority to work in order to develop an appropriate safe harbor provision.

Now, the Chairman of the SEC has indicated that he thinks changes need to be made with respect to safe harbor for forward-looking statements. But he has also indicated that the provision in the bill is not acceptable, that it goes much too far. And, in fact, the very morning of the markup he said in a letter to the committee, "I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection."

In other words, it is his view of the standard written in the bill that it would provide safe harbor protection for willful fraud. I challenge anyone in the Chamber to rise and defend that should be the case.

What they will try to argue is, "No, this standard does not really permit that." But here is the Chairman of the Securities and Exchange Commission, in effect, saying that this standard does permit that. And he is supported in this judgment by a range of public interest groups concerned with securities regulation. The North American Securities Administrators Association has come in with respect to this matter and have indicated that they believe that the safe harbor definition should be left to the Securities and Exchange Commission. In a May 23, 1995, letter, the North American Securities Administrators Association, the Government Finance Officers Association, the National League of Cities, and nine other groups expressed the view:

> We believe the more appropriate response is SEC rulemaking in this area.

Mr. DOMENICI. Will the Senator yield?

Mr. SARBANES. Certainly.

Mr. DOMENICI. Mr. President, I stated in the Senator's absence—you can charge this to my time; I do not mean to use his—that the SEC had been trying to do this for 3 years. And last year, we put it in the appropriations bill. I said, because I was the one who wrote it in, while funding the SEC, we expect them to do it. Is it not true they have been unable to arrive at a consensus and present one that they are willing to say will work and should be adopted? Is that not true?

Mr. SARBANES. No. I think what is true is that the SEC—the Senator put it in his bill that he introduced 15 months ago, in March 1994, was when he first brought forth in statutory language the proposition that it should be referred to the SEC. The SEC, in October 1994, issued a concept release and notice of hearing. In that concept release, they invited comments to be made before the end of the year, and they also scheduled hearings to take place in February of this year, of this very year.

Now, the SEC received over 150 comments by the end of the year. They held 3 days of hearings, 2 days in Washington and 1 day in California. This, in fact, is the hearing record from those hearings conducted by the Securities and Exchange Commission. Now, as the Chairman of the Commission pointed out in a letter to the committee about the problem of working this out, he said there is a need for a stronger safe harbor than currently exists. He has made that statement. And I think generally people accept that. The question is, who is going to write this safe harbor? Does it make sense for the Congress to be writing the safe harbor instead of the experts and the regulators who represent—who are supposed to represent the public interest in this matter to devise the safe harbor?

Mr. DOMENICI. May I ask a question?

Mr. SARBANES. Certainly.

Mr. DOMENICI. The Senator is assuming we do not have the public interest in mind when we write this?

Mr. SARBANES. We do not have the expertise.

Mr. DOMENICI. We do not?

Mr. SARBANES. We do not have the expertise of the SEC. And we do not, particularly in an area that is as difficult and complex as this one. I think that is very clear. In fact, the standard you propose in the bill was amended here on the floor by the chairman of the committee earlier today.

Mr. DOMENICI. I understand.

Mr. SARBANES. In response to criticism. If we have to define it legislatively, of course we will have to try to do that. But I invite the Senator's attention to the provisions of the bill that try to define out the safe harbor. It is obviously a very intricate and complex section. The Chairman of the Securities and Exchange Commission, upon reading this, then wrote a letter to the committee saying he could not embrace the proposal because it would allow willful fraud to receive the benefit of safe harbor protection.

So, in fact, your very bill—it is very interesting the way this bill has been structured. The proposal now before us allows the SEC to expand the safe harbor. In other words, they can provide even more of a safe harbor, but it does not allow the SEC to limit the safe harbor. So it is all a one-way voyage. It is a one-way voyage, and really giving the SEC the role that it ought to have in this situation and has been denied to them.

I think the Members are assuming an incredible responsibility here. As I pointed out earlier, the North American Securities Administrators, the Government Finance Officers, the National League of Cities, and nine other similar groups all express the view that they thought what was a more appropriate response is SEC rulemaking in this area. Now, then, I quoted earlier from the Chairman of the SEC. The Government Finance Officers Association, representing more than 13,000 State and local government financial officials, county treasurers, city managers, and so on, wrote of the safe harbor provision in the bill, and I am now quoting them:

> We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery.

Let me repeat that.

> We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery.

The North American Securities Administrators Association, which represents the 50 State securities regulators—they are really a front line of defense against securities fraud—have called the provision that is in the bill "an overly broad safe harbor making it extremely difficult to sue when misleading information causes investors to suffer losses."

Mr. President, I submit that the wise course of action here is to adopt this amendment. That is the provision that was originally in the bill. That is the provision that Members were acquainted with when they cosponsored the bill. Let the Securities and Exchange Commission, which has the expertise and the knowledge and the experience, deal with this very complex area and shape a proper safe harbor provision which is not subject to abuse and which is not subject to the objection of the Chairman of the Commission, who stated with respect to the provision that is in this bill that we are now trying to change:

> I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.

Mr. President, I reserve the balance of my time.

Mr. DODD. Mr. President, how much time remains on this side?

The PRESIDING OFFICER. The minority has 7 minutes, 40 seconds. The majority side has 4½ minutes.

Mr. DODD. I ask consent to have 2 minutes, if I may?

The PRESIDING OFFICER. Is the Senator from Maryland yielding?

Mr. SARBANES. Yes.

Mr. D'AMATO. Yes, certainly. I yield 2 minutes to my colleague.

Mr. DODD. Let me state again, Mr. President, there are those, I suppose, who would always say, in any matter, defer to an agency to write it. We deal with a lot of complex areas of law. This is one of them. I admit that.

But the notion inherent there is that there is in the SEC an ability to deal with this issue beyond the capacity of this body. I do not think that is necessarily true. In fact, the Commission itself is so highly divided on the issue we might wait 2 or 3 years before we get an answer. If you read the two letters from Arthur Levitt, one dated May 19 and one May 25, you would hardly recognize they are coming from the same author. In the May 19 letter, it says, this area has to be cleared up. The letter of May 25, I would call a fairly strident letter. The authors might have been different people, although they were signed by the same individual.

We have in this legislation very emphatically made it clear that for any individual who knowingly and intentionally misleads, knowingly intentionally misleads an investor, that there is no protection of safe harbor. I do not know how much more clear and explicit you can be.

The idea somehow that this is a major gaping hole by which defrauded investors are somehow going to be taken advantage of is rhetoric. We close up that loophole. We close it up by saying no misleading statements.

In fact, we go further than that. We require there be warnings in these forward-looking statements. It narrows it down to who can take advantage of safe harbor, under what circumstances, what kind of people. This is not available to stockbrokers or others. It is the issuers, and it is designed specifically to give investors the kind of information they need.

We need to encourage the issuers to step forward with their statements, not cause them to step back. It does not serve the economic interest of this country, or anyone for that matter, to be faced with that kind of a problem. That is why we included safe harbor, that is why we included the language to cut out the misleading statements. We think this is a good provision, and we urge that we stick with the language of the bill.

Mr. SARBANES. Mr. President, what is the time situation?

The PRESIDING OFFICER. The Senator from Maryland has 7 minutes 40 seconds. The Senator from New York has 2 minutes 22 seconds.

Mr. SARBANES. Mr. President, I say to my colleague from Connecticut, I think he is being extremely unfair to the Chairman of the Securities and Exchange Commission. I think the two letters that the Chairman wrote us are perfectly consistent with one another.

I know the Senator is very involved in this legislation and very anxious to try to pass it. I differ sharply with him on that issue, but I do not think in the course of the debate he ought to, in effect, demean the Chairman of the SEC.

The letter he wrote on May 19 spelled out his very considerable concern over the safe harbor provision. I quoted from it at great length earlier in the day. I am not going to repeat that here except, for instance, he says:

> A safe harbor must be thoughtful—so that it protects considered projections, but never fraudulent ones.

He then raises a lot of questions about what safe harbor can cover, and he states right in the letter, this is the earlier letter:

> Given these complexities—and in light of the enormous amount of care, thought, and work that the Commission has already invested in the subject—my recommendation would be that you provide broad rulemaking authority to the Commission to improve the safe harbor.

That is what the amendment at the desk does. That is what this amendment does.

The Chairman then went on, since the Senator from Connecticut, or at least colleagues of his were pushing hard for statutory definition, to spell out the components that he thought ought to be in any statutory definition of safe harbor.

At that time, efforts were being made to shape this. Those efforts did not prove fruitful and, in the end, on May 25, the morning of the markup, the Chairman wrote a letter to the committee expressing his view about the provision that is in this bill, the very provision we are now trying to change. And he said:

> I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.

I think Chairman Levitt is a dedicated public servant. I think he is trying to do what is right. In his letter, he acceded to the view that something needed to be done to provide a stronger safe harbor protection, but then he raised his concerns in the nature of the protections that ought to be made. He has spent a lifetime on Wall Street. He is an experienced businessman. In fact, he quoted himself as a businessman about the problem of meritless lawsuits. He recognizes the problem of frivolous lawsuits and, in fact, has been working with the committee to try to address those. He has a sufficient removal representing the public interest as he does to be able to identify provisions in this bill which he thinks are defective.

I want the Members to realize what they are doing here. They are trying to enact a standard which the regulators—the Chairman of the Securities and Exchange Commission, the State regulators, the Government finance officers—are all telling them, "Don't do this; don't do this." This is not as though we were putting into the law a standard which the regulators acceded to or thought was reasonable. They are saying, "Don't do this, don't put this standard in."

There are two ways to correct that. One is to refer it back to the Commission, which is exactly what was in the bill as it was introduced and a matter the Commission was working at, and that is what this amendment does. The other is to try to define the standard here. If we have to do that, I am prepared to address that subject.

I do not think that is the wise thing to do. I do not think that, frankly, with all due deference to my colleagues, that there is anyone here who really knows this law intimately and well enough in a highly complex area to write the standard. I say that with all due deference, and I include myself within those about whom I am making that judgment. So it ought not to be done in the legislation.

The initial approach by Senators DODD and DOMENICI was the correct approach, and that is what this amendment does. This amendment is word for word what was in the bill. It would provide the opportunity for the Commission, through broad rulemaking authority, to improve the safe harbor provision, and I very strongly commend this amendment to my colleagues.

I yield the floor and reserve whatever time is remaining.

Mr. D'AMATO. May I ask how much time?

The PRESIDING OFFICER. The Senator from New York has 2 minutes 22 seconds. The Senator from Maryland has 1 minute 48 seconds.

Mr. D'AMATO. Mr. President, let me refer to one of the two letters mentioned by my colleague. In the letter, sent by the Chairman of the SEC, the Chairman says:

> There is a need for a stronger safe harbor than currently exists. The current rules have largely been a failure, and I share the disappointment of the issuers that the rules have been ineffective in affording protection for forward-looking statements.

He says clearly in this letter that we have not afforded protection for forward-looking statements.

History shows that we have been waiting for 3 years for the SEC to work out the safe harbor issue. Last year, the Appropriations Committee stated that the time for the SEC to act on this had come, it said, "We want some rules. We can wait no longer."

The Chairman of the SEC has been working on this but it is obvious that the Commission has some concerns on the safe harbor and cannot come to a point where it publishes rules. I say the media does not know what they are writing about. What we are attempting to do with this legislation is to allow companies the flexibility to make forward-looking statements but, holding them liable if they make knowingly

and intentionally misleading statements. There is no safe harbor for any untested companies and there is not safe harbor in situations where we felt the investor was at too great a risk of being mislead. To this effect, the safe harbor provision excludes IPO's, it excludes tender offers, and excludes stockbrokers. If you want a good example of legislation that goes too far, look at the House bill.

I think some of the journalists writing on this legislation, particularly those from the New York Times, have not taken the time to really understand what this legislation does. I suggest that they take some time to read the bill before they write. There is not a safe harbor that allows companies to say anything—anything, even intentionally false or misleading statements—as long as there is a disclaimer that the statement is in the safe harbor. This legislation does not institute a caveat emptor, buyer beware, attitude. I believe that would be going too far, much too far. But to say that the safe harbor in S. 240 would do this is wrong; it is wrong.

We cannot continue to allow businessmen to be held up by a handful of buccaneering barristers. That is an artful term used by my friend and colleague from Connecticut, and that is exactly what these lawyers are doing, they do not give two hoots and a holler about the stockholders. They care only about their own personal enrichment. That is why I have to oppose this amendment. I yield the floor.

The PRESIDING OFFICER. The Senator's time has expired. The Senator from Maryland.

Mr. SARBANES. Mr. President, I, in fact, quoted the very sentence the Senator from New York quoted from Arthur Levitt where he says, "There is a need for a stronger safe harbor than currently exists." The question is, how are you going to develop that safe harbor?

This amendment says the SEC should do it. That is what the bill introduced by Senators DODD and DOMENICI on March 24, 1994, provided for. Then they say, well, the SEC has delayed. The SEC put out their concept release on safe harbor in October 1994. In other words, about 7 or 8 months ago. They received 150 responses on the safe harbor issue. That is more testimony than the Banking Committee has had on all securities litigation issues.

The SEC held 3 public hearings on the safe harbor issue in February—2 in Washington, 1 in San Francisco—62 witnesses in all: Venture capitalists, law professors, corporate executives, plaintiffs lawyers, defense lawyers, institutional investors.

Arthur Levitt says:

> There are many questions that have arisen in the course of the commission's explanation of how to design a safe harbor.

He then talks about the concept release, the comment letters, the 3 days of hearings, and his meeting personally with a wide range of groups that have an interest in the subject.

This matter should be handled by the SEC, just the way it was proposed in the original bill, which Members have cosponsored. That is what this amendment does.

I urge its adoption.

VOTE ON AMENDMENT NO. 1477

The PRESIDING OFFICER. Under the previous order, the question is on agreeing to amendment No. 1477 offered by the Senator from Maryland.

Mr. D'AMATO. 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. BOND (when his name was called). Present.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 43, nays 56, as follows:

[Rollcall Vote No. 288 Leg.]

YEAS—43

Akaka	Glenn	Moynihan
Biden	Graham	Nunn
Bingaman	Harkin	Pell
Boxer	Heflin	Pryor
Bradley	Hollings	Robb
Breaux	Inouye	Rockefeller
Bryan	Jeffords	Roth
Bumpers	Kennedy	Sarbanes
Byrd	Kerry	Shelby
Cohen	Kohl	Simon
Conrad	Lautenberg	Snowe
Daschle	Leahy	Specter
Dorgan	Levin	Wellstone
Exon	McCain	
Feingold	Mikulski	

NAYS—56

Abraham	Ford	Lugar
Ashcroft	Frist	Mack
Baucus	Gorton	McConnell
Bennett	Gramm	Moseley-Braun
Brown	Grams	Murkowski
Burns	Grassley	Murray
Campbell	Gregg	Nickles
Chafee	Hatch	Packwood
Coats	Hatfield	Pressler
Cochran	Helms	Reid
Coverdell	Hutchison	Santorum
Craig	Inhofe	Simpson
D'Amato	Johnston	Smith
DeWine	Kassebaum	Stevens
Dodd	Kempthorne	Thomas
Dole	Kerrey	Thompson
Domenici	Kyl	Thurmond
Faircloth	Lieberman	Warner
Feinstein	Lott	

ANSWERED "PRESENT"—1

Bond

So the amendment (No. 1477) was rejected.

Mr. D'AMATO. Mr. President, I move to reconsider the vote by which the amendment was rejected.

Mr. DOMENICI. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Under the previous order, the Senator from Maryland is recognized to offer an amendment.

Mr. DOLE. Mr. President, will the Senator yield to me for 3 minutes?

Mr. SARBANES. Certainly.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. SARBANES. Mr. President, at the end of that time I will be recognized to offer the amendment?

The PRESIDING OFFICER. That is correct.

Mr. DOLE. I thank the Senator.

NATURAL BORN KILLERS

Mr. DOLE. Mr. President, today's Boston Herald contains a shocking front-page story—a story that should send shivers down the spines of all Americans, especially those who have criticized my call to the entertainment industry to exercise good citizenship when it comes to producing films that celebrate mindless violence.

That is the headline: "We're 'Natural Born Killers.'" There was a movie called "Natural Born Killers." This is a story, the prosecutor says, where the suspects bragged about the slaying saying, "We're natural born killers."

"We're 'Natural Born Killers,'" the headline blares, referring to the critically acclaimed Oliver Stone film.

This is what happened. The Boston Herald story begins, and I quote:

> As they changed out of their bloody clothes, the men who plunged a knife into an elderly Avon man 27 times bragged they were "natural born killers," a Norfolk County prosecutor said yesterday.
>
> "Haven't you ever seen 'natural born killers' before?," 18-year-old suspect Patrick T. Morse allegedly bragged to a girl after the gruesome slaying.

According to the Norfolk County prosecutor, "This is one of the most vicious premeditated murders I have ever seen." And Massachusetts State Police Trooper Brian Howe said "My understanding was that they were drawing a comparison between the characters in the movie and themselves."

Of course, no movie caused this brutal killing in Massachusetts. We are all responsible for our own actions, period. But, at the same time, those in the entertainment industry who deny that cultural messages can bore deep into the hearts and minds of our young people are deceiving themselves. If the Boston Herald story is true, and if these are the kinds of role models that Hollywood is content to promote, then perhaps some serious soul-searching is in order in the corporate suits of the entertainment industry.

Let me just indicate again that is the headline. It is not BOB DOLE's headline. It is the headline this morning in the Boston Herald about how these young murderers bragged about attacking an old man and stabbing the person 27 times. In fact, it goes into graphic detail about the knife that was so bloody that they had to ask for a new knife.

Something is wrong in America with the entertainment industry, and maybe

it is high time they took a look at themselves and put profit behind common decency.

Mr. President, I ask unanimous consent that the article from the Boston Herald be printed in the RECORD.

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

WE'RE "NATURAL BORN KILLERS"

As they changed out of their bloody clothes, the men who plunged a knife into an elderly Avon man 27 times bragged that they were "Natural Born Killers," a Norfolk County prosecutor said yesterday.

"Haven't you ever seen 'Natural Born Killers' before?" suspect Patrick T. Morse allegedly bragged to a girl after the gruesome slaying of 65-year-old Philip Meskinis.

Chilling details of the trio's murderous attack and their fascination with the murder spree depicted in the motion picture "Natural Born Killers" were revealed yesterday when Morse, 18, and Leonard Stanley, 20, were arraigned on murder charges and held without bail.

Police are scouring the Brockton area for a third suspect, Michael F. Freeman, a 20-year-old fugitive and former convict who allegedly wielded the knife that slashed Meskinis' throat early Friday morning and punctured his body with 27 stab wounds.

"I've been doing violent felonies for 20 years," Norfolk County prosecutor Gerald Pudolsky said after the arraignment. "This is one of the most vicious, premeditated murders I've seen."

After an intensive investigation that led to Morse's arrest about 36 hours after the grisly murder, and Stanley's surrender shortly after 11 p.m. Sunday, police learned in interviews with Morse and the trio's associates that the men and their female friends "on occasion" watched "Natural Born Killers" after one person bought the movie, said State Police Trooper Brian L. Howe.

"My understanding was they were drawing a comparison between the characters in the movie and themselves," Howe said.

In Stoughton District Court yesterday, Morse and Stanley sat expressionless as Pudolsky recited the threesome's alleged vile deeds.

"I think the only thing they're sorry about is they got caught," Howe said after the arraignment.

The trio allegedly started plotting the slaying at a coffee-ship in Avon after Freeman—whose handicapped mother once dated the disabled victim—told Morse and Stanley that Meskinis had money and guns stashed inside in his School Street home, Pudolsky said.

At 5 p.m. Thursday, the trio went to a girlfriend's house in Avon where they discussed "pulling an armed invasion at Mr. Meskinis' house," Pudolsky said.

Armed with at least two, maybe three knives, the suspects left the girl's house in Morse's Chevrolet Cavalier at about 1:30 a.m.

"Mr. Freeman knew he was going to kill the victim and the other two went along 100 percent," Pudolsky said in an interview.

As Meskinis lay asleep in his bed, the men invaded his home and Freeman launched the bloody assault, jamming a knife repeatedly into the helpless man's body.

"So much blood was coming from Mr. Meskinis' body that Mr. Freeman actually lost the grip on the knife," Pudolsky said.

Freeman yelled to Morse for another knife and Morse complied, passing a Buck knife, Pudolsky said. The blows were so forceful that Freeman allegedly broke Meskinis' wrist and clavicle during the relentless hacking.

Stanley was "ready, willing and able" to assist in the bloody siege—although his attorney and relatives insisted yesterday that he was not in the bedroom during the murder.

The suspects stole a shotgun and a .22-caliber rifle, stashing them first in the woods, and later inside the girlfriend's house.

Police recovered two knives, two victim's guns and bags of bloodied clothing ditched in a dumpster behind a Brockton convenience store.

The trio returned to the woman's home where three other female friends were staying that night, police said. They stripped their bloodied clothing, and worried that they had left behind fingerprints, Morse and Freeman brazenly returned to the murder scene at abut 5 a.m. to remove evidence from ashtrays and door knobs, police said.

As Morse and Freeman sat down at 8:30 a.m. for breakfast, Stanley said he was not hungry.

But Stanley, using a glass of water, gurgled the liquid in his mouth to imitate "the death chortle of Mr. Meskinis as his throat was being slashed," Pudolsky said.

ELECTIONS IN HAITI

Mr. DOLE. Mr. President, long-delayed parliamentary elections were held in Haiti last weekend. The long-suffering Haitian people deserve credit in what is a momentous step in their efforts to develop democracy. For many months, it appeared elections might never take place. Since January, President Aristide has been governing by decree because elections were not held in the constitutionally mandated period.

All reports out of Haiti indicate confusion and chaos in the electoral process. Hundreds of thousands of Haitians were waiting to vote 24 hours after polls were supposed to close. Some polling stations opened very late, and some never opened at all. An election station was burned in northern Haiti. Turnout was low.

According to information my office received from Haiti today, the ballot counting process is in total disarray. The final results are not yet in, but the early returns indicate deep flaws in the process leading up to the election, deep flaws on election day, and now a complete breakdown of the process. All the signs point to an election process that is fatally flawed.

There are credible reports of ballots being destroyed, and of nonexistent ballot security. No one knows when ballot counting will be completed—or if it can ever be done credibly.

You may have seen a picture of ballot security in the Washington Post this morning, boxes and boxes of ballots stacked up and ballots spilling out of the boxes.

Witnesses today cite cases of ballots being shoveled into trash containers, and left in the street.

The International Republican Institute [IRI] documented dozens of shortcomings in the months and weeks leading up to the election. The IRI delegation, headed by Congressman PORTER GOSS, issued a statement yesterday titled: "Irregularities Mar the Electoral Process." The IRI statement details grave concerns with the Haitian elections.

The International Republican Institute deserves credit for its honest and serious effort to expose flaws in the Haitian election process. The international community should not just stand by and applaud a deeply flawed election. As Chairman GOSS' statement noted yesterday, "The Haitian people deserve better."

In light of the work done by IRI, it was all the more surprising to see the Washington Post editorialize today against IRI's work. The Post claimed IRI's criticism was not informed or constructive, but misunderstood the tough effort to rehabilitate Haiti. I agree the effort to rehabilitate Haiti will be tough—but it will not be served by turning our eyes from the very real problems in Haiti, or from an election that is fraught with problems. This is not a Republican view—it is an honest assessment of the facts. The New York Times today reported that the Haitian election unraveled further yesterday. The mayor of Port au Prince, an old ally of President Aristide, said yesterday: "There has been massive fraud. It does not seriously advance the process."

I expect hearings into Haiti's election to begin as soon as the Senate returns from recess in July. Instead of criticizing the monitors of the election, the Post should look for answers to the tough questions:

Why were thousands of candidates rejected by the election council in total secrecy?

Why was an official list of candidates never released?

Why weren't election administrators trained until it was too late—despite the availability of millions in international assistance for such training?

What happened to 1 million voter registration cards missing before election day? Why were voter registration records unavailable on election day, and then being destroyed 48 hours later?

Why was there a complete lack of ballot security on election day and subsequently?

Why were thousands of ballots and tally sheets destroyed and discarded before any official count was recorded or finalized today in Port au Prince and other departments?

Are the verifiable cases of ballot substitution part of a national pattern to influence the outcome of the elections?

Why was President Aristide silent on key issues of election integrity in the days before Sunday's balloting?

Who in the government and police force played a role in the undermining of Haitian democracy?

What has happened to the millions of dollars in election assistance given to Haiti—amid rumors that elections workers will not be paid?

Is the election chaos in Haiti orchestrated, as charged by credible international observers on the scene today?

These and other issues deserve serious scrutiny—not just cheerleading. The Haitian election process is at a standstill. I believe the election process in Haiti should be judged by the same standard used for other elections in other parts of the world—the Haitian people deserve no less. The election observers have left the country but IRI is still on the ground asking the tough questions. I am confident Congress will fully examine all issues associated with the Haitian elections in the coming weeks.

I ask consent that a summary of the preelection analysis and the International Republican Institute statement of June 26, 1995, be printed in the RECORD.

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

INTERNATIONAL REPUBLICAN INSTITUTE,

Washington, DC, June 26, 1995.

IRREGULARITIES MAR ELECTORAL PROCESS—STATEMENT BY REP. PORTER GOSS (R–FL), DELEGATION CHAIRMAN

Good morning. This is our second press conference. On Saturday, the International Republican Institute (IRI) released its pre-electoral assessment in which we expressed our concern over a number of issues. They include the implications of the failure of the electoral authorities to create an open, transparent and verifiable process; the disqualification of parties and candidates; the lack of adequate training for electoral workers; and the failure to conduct any civic education to encourage voter participation. Today, all of us here have seen the consequences of these failings.

I want to underscore the fact that our delegates are still in the field throughout the nine departments sending in reports. Election day has only recently come to an end and the counting continues. Our serious concern about the total lack of ballot security is being borne out as I speak. We received reports from our delegates early this morning who observed disturbing irregularities at BEC level (regional collection and counting station). I have asked our delegation to determine the extent of these abuses for our evaluation of the count. The problems in this electoral process can only complicate the strengthening of democracy in Haiti.

Frankly, the Haitian people deserve better. We saw their remarkable dignity and endurance yesterday while trying earnestly to participate in an arbitrary process. We share a common objective with others in the international community—we all want a better Haiti and a stronger democracy here. IRI is not here to certify this election. Only the Haitian people themselves have the right to determine the legitimacy of this process. Already several major parties have issued statements challenging the integrity of the process. We must take their judgements seriously.

Let me share with you our observations about yesterday's events. We received radio and telephone reports from IRI delegates in the field from Les Cayes to Fort Liberte. Together, the IRI delegates have visited during the course of election day about 500 BIVs (local polling stations). Our delegates in Jacmel and Jermie reported an election we had hoped for—sufficiently organized, whose irregularities were overcome by the Haitian people and the electoral workers themselves. For myself, the only normal process I observed was at Cabaret, which is doubly ironic because it used to be Duvalierville, the former dictator's Potemkin Village. Our delegates throughout the departments in the north reported graphically about the closing of the BIVs, the intimidation of politicians and the burning down of the BEC in Limbe. Today in Port-au-Prince our delegates observed the use of xeroxed ballots, and early this morning we witnessed tally sheets being intentionally altered and ballots being substituted with newly marked ballots. This occurred in the Delmas BEC, not 10 minutes from where we are today. This raises the serious possibility of the political manipulation of this election.

So let me take a step back and point out a positive aspect of these elections. Throughout the country, all of us were surprised and impressed by the significant presence of political party observers. I would like to give credit to the Haitian private sector who filled a crucial void by providing the necessary support to field these pollwatchers. The Center for Free Enterprise and Democracy (CLED) deserves credit for putting this bold initiative together in 48 hours.

Let me summarize our grave concerns:

Security: The international military served as a deterrent to widespread violence for these elections. However, the issue of personal security for those participating in this political process remains a serious concern. This issue was permeated every step of the process, affected the quality of the campaign, the environment in which this election occurred and clearly lessened voter participation. It was magnified yesterday by threatened electoral workers and intimidated and harassed candidates. Yesterday, violent incidents closed BIVs in Port-au-Prince, Limbe, Port de Paix, Don Don, Ferrier, Jean Rabel, Carrefour and Cite Soleil. These actions disenfranchised an undeserving Haitian population. Without visible security, BIV authorities were forced to close the polls and in other cases voters went home without casting their votes.

Voter Materials: The CEP failed to deliver and distribute voter materials in the necessary time frame. Many BIVs also received incomplete election material packages. This resulted in countless delayed BIV openings. This created enormous voter frustration and even postponed the elections in La Chapelle.

Unpaid Elections Workers: As noted in our pre-electoral assessment, the failure of the CEP to pay thousands of electoral workers was attributed as one of the reasons for absenteeism which delayed and closed many BIVs. Demonstrations were reported in several departments.

Administration Capability: As noted in our pre-electoral assessment, electoral workers received minimal or no training on the duties and procedures. This resulted not only in lengthy delays but jeopardized the security and secrecy of the process.

Secrecy of the Ballot: There was widespread disregard for the secrecy of this process. IRI and other delegates reported that the ballot box seals were rarely used. Additionally, the setup of most BIV's did not afford voters secrecy in marking their ballots.

Security of the Ballot: The most flagrant lack of control occurred from the point of the count to the BEC level. Upon arrival of the ballots at the BEC's, observers reported a lack of control of used and unused ballots. The most egregious examples of this known to IRI occurred in the Delmas BEC where clean ballots were marked and substituted for ballots that had arrived from the BIV's; tally sheets were altered.

Disqualification of Candidates: The thoroughly arbitrary process of qualifying candidates led to serious consequences which we anticipated in our pre-election report. While some argued that the number of candidates that were disqualified was not statistically significant, it proved on election day to destabilize the electoral environment in certain areas. The results of this ranged from a low voter turn out in Saint Marc where five candidates for magistrate were left off the ballot to Jean Rabel, where it was reported that followers of independent candidate Henry Desamour burned ballots and closed BIV's because his name did not appear on the ballot.

Voter Turnout: IRI delegates reported low to modest voter turnout in the BIV's they visited. If this remains the case, we believe that it is the consequence of a compressed election timetable, a lack of civic education, and frustration with the electoral process.

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

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

HAITI—IRI PRE-ELECTORAL ASSESSMENT OF THE JUNE 25, 1995, LEGISLATIVE AND MUNICIPAL ELECTIONS, JUNE 24, 1995

I. EXECUTIVE SUMMARY

On June 25, 1995 Haiti will hold elections for 18 Senators, 83 Deputies, 135 mayors and 565 community councils. These elections were originally to be held in December but were postponed several times for a variety of reasons.

This election occurs at a pivotal time for Haiti as it struggles to rejoin the family of democratic nations and offer renewed hope of stability for its people. This election is also critical for the international community as it seeks a benchmark to demonstrate the transition from an internationally dominated country to a Haiti governed by Haitians. For many in the international community, these issues have made the holding of an election far more important than the quality of the election. IRI has sought to evaluate the pre-electoral process and environment for their comparision to minimal standards of acceptability.

ELECTORAL PROCESS

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

The formulation of the Provisional Electoral Council (CEP) itself breached an agreement between the President of the Republic and the political parties to allow the parties

to nominate all candidates from which CEP members would be chosen by the three branches of government. Only two of the nine CEP members were chosen from the parties' list.

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

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

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

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

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

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

ELECTORAL ENVIRONMENT

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

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

The electorate itself is basically uninformed about this election—what it stands for and who is running. There has been no civic education campaign, with the exception of some limited U.S. and U.N. military efforts, to illuminate the purpose of this election.

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

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

PRIVATE SECURITIES LITIGATION REFORM ACT

The Senate continued with the consideration of the bill.

The PRESIDING OFFICER. Under the previous order, the Chair recognizes the Senator from Maryland to offer an amendment.

AMENDMENT NO. 1478

(Purpose: To amend the safe harbor provisions of the bill)

Mr. SARBANES. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Maryland [Mr. SARBANES] proposes an amendment numbered 1478.

On page 114, strike lines 7 and 8, and insert the following:

"(1) made with the actual knowledge that it was false or misleading;

On page 121, strike lines 1 and 2, and insert the following:

"(1) made with the actual knowledge that it was false or misleading;

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, the previous amendment, the one we just considered, which was not adopted on a vote of 43 to 56, would have sent the matter of defining the parameters of the safe harbor exemption to the Securities and Exchange Commission.

I, of course, argued very strenuously in the consideration of the amendment that that is where this ought to be done, that it ought not to be done, well, in the committee and now in this Chamber, because the existing definition in the bill has already been amended.

The Senate did not adopt that provision, and the question now arises, if you are going to have a statutory definition, what should it be? What should it be?

This amendment that has been sent to the desk would strike out the language that is in the bill. What the bill says is that the exemption from the liability provided does not apply to a forward-looking statement that is knowingly made with the expectation, purpose, and actual intent of misleading investors.

Earlier the Senator from New York modified that and struck the word "expectation," but the problem still remains, the essential problem which prompted the Chairman of the Securities and Exchange Commission to say, and I quote him, "I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection."

So we are now into the question, if the standard in the bill is inappropriate, as I believe strongly it is, and as has been indicated by the Chairman of the Securities and Exchange Commission, and indeed by other securities regulators, State securities regulators, by Government finance officers and others, all of whom in a sense are outside the controversy amongst the economic interests associated with this bill, and represent the public interest, the question now is, is this standard so difficult that all but the most egregious fraudulent efforts would be exempted from liability. And I submit that it is, and the amendment I have sent to the desk is an effort to modify that. The standard provided for in that amendment is made with the actual knowledge that it was false or misleading.

Let me repeat that: Made with the actual knowledge that it was false or misleading.

There are forward-looking statements that would be exempted from liability under the standard in the bill that would not be exempted from liability under the standard of this amendment.

The question then becomes, is the standard in this amendment an appropriate one? And I defy anyone to advance a rationale why a forward-looking statement made with the actual knowledge that it was false or misleading should be protected from liability. I have heard people talk, oh, we are not going to allow knowing fraud to be protected.

That is exactly what this amendment provides. It says that the exemption from liability provided for in this bill does not apply for a forward-looking statement that is made with the actual knowledge that it was false or misleading. And I want to hear from others, if they oppose the amendment, why they believe a forward-looking statement made with the actual knowledge that it was false or misleading ought to be protected from liability.

Mr. President, this is an issue of significance and moment. We have heard from the various securities regulators in opposition to the provision in the committee bill. The National Association of Securities Dealers has written to us in opposition to it, as has the Government Finance Officers Association. SEC, of course, I have already quoted their statement. But let me just point out the Government Finance Officers Association, which represents more than 13,000 State and local government financial officials, county treasurers, city managers, and so on, and which issues securities and invests

billions of dollars of public pension and public taxpayer funds every year, wrote of the safe harbor provision in the bill, the standard that we are seeking to change, the one in the bill which says knowingly made with the purpose and actual intent of misleading investors, "We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery."

Let me repeat that: "We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery."

The provision in the bill requires you to show the actual intent of the parties making the forward-looking statement. Not only that, you have to show that it was knowingly made with the purpose of misleading investors. And as originally written also the expectation, although that was stricken earlier in our consideration. So it is now knowingly made with the purpose and actual intent of misleading the investors.

That is what you have to demonstrate in order for the forward-looking statement to lose its immunization from liability. And that is a standard that is so extreme that the Chairman of the Securities and Exchange Commission wrote to us and said, "I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection." And that is the provision which the Government Finance Officers Assocation said, "We believe this opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery."

The amendment that I have sent to the desk very simply states that the exemption from liability is lost for a forward-looking statement that is made with the actual knowledge that it was false or misleading, very simply put. You make a forward-looking statement, and you make it with the actual knowledge that it was false or the actual knowledge that it was misleading, and you lose your immunity. You lose your immunity.

Why should anyone who makes a forward-looking statement with an actual knowledge that it was false or misleading have immunity from liability for that forward-looking statement?

That is the issue that is before us by this amendment. It was my preference that this issue be worked out by the Commission. I thought that is where it ought to go in terms of expertise.

If Members want to deal with it here on the floor, then we need to examine it on the standard, address the standard that is in the bill, why I think it opens, as the Government Finance Officers said, a major loophole, or which, as the Chairman of the Commission said, would allow willful fraud to receive the benefit of safe harbor protection. That ought not to be the case. Therefore, I propose to substitute the language "made with actual knowledge that it was false or misleading." No statement made with the actual knowledge that it was false or with the actual knowledge that it was misleading ought to have safe harbor protection.

Mr. President, I yield the floor.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Mr. President, what we are talking about now is what we call in legal jargon the scienter standard. It is not an easy one. It can be difficult to understand. And indeed it can open up an incredible loophole, one that we are attempting to deal with; that is, to permit people to make projections. And they must state—I can have that disclaimer—they must state this is a projection, this is a projection, and that it may not be accurate. I will get the exact verbiage. It may not be accurate.

Whole classes of issuers are exempted, the penny stocks, the mergers and acquisitions. "Refers clearly that such projections, estimates, or descriptions are forward-looking statements and the risk that the actual results may differ materially from such projections, estimates, or descriptions" has to be included.

Now, let us read the language, because I have heard this, and I have seen it written, too. It is inaccurate to describe this bill as giving a license to people to knowingly, with intent, defraud. It is just wrong.

Here is the language in the bill. We modified it today because I thought there was one standard that might go above and beyond. The exemption from liability provided for in subsection A does not apply. It does not apply. In other words, you get no exemption. Then on page 114, line 4, it says:

(c) EXCLUSIONS.—The exemption from liability provided for in subsection (a) does not apply to a forward-looking statement that is—

In other words, you get no exemption.

(1) knowingly made with the expectation, purpose, and actual intent of misleading investors.

So if you knowingly make a false statement, knowingly, with the purpose and actual intent of misleading investors, you are not protected. And that is as it should be. These are projections. Now, I have to ask the question, who knows what someone knows, what is knowledge to them? And once you have that, once you say, if you knowingly made this, all they have to do—the plaintiffs bar this particular group, very small group —is allege that you knowingly made a false statement.

The burden now comes upon that person who has this complaint filed against them to prove that they did not. How do you prove it? How do you prove it? That is why we say, look, it has to be a little tougher. You cannot say, "You knowingly made this. You knowingly made this, knowingly, with intent, with the purpose to mislead investors." It seems to me that that is pretty reasonable.

If a person does that, then you should go after them and hold them. We do. They are not exempt. We get down to the issue of splitting legal hairs and opening the doors for this group of bandits. That is what they are, bandits, absolute bandits; this is the group that, you know, suggests that we make it easier to bring these kinds of suits. We do not want to make it easier to bring suits that have no merit, where people allege someone knowingly, falsely made these statements. All you have to do is allege someone made the statement. Bingo, we have not solved the problem. That brings us right back into court and brings us into the situation where a person gets sued for millions, and has to settle for millions of dollars and/or pay millions of dollars in legal fees against claims that would otherwise be worthless and should get no dollars.

I have to tell you something; that we have sat back for far too long in dealing with this because it was really a very small and almost insignificant portion of the population that was affected. We did not see on a daily basis lawsuits being brought with no claim. We did not see where we had, for example, of 229 cases filed, 229 cases filed, 38 percent used the same repeat plaintiffs; 38 percent used the same cadre. In other words, they were professional plaintiffs. And I have to tell you why we may have cured that and said—by the way, they were paid bonuses. These people, for letting their names be used, got $15,000, $20,000, $25,000 for being professional plaintiffs.

So when we talk about protecting the little guy, we are not protecting the little guy. What we are trying to do is put a stop to and really protect the investors who have their money invested in these small companies, who have the mutual funds, who have those pension funds, which represent trillions of dollars and truly represent millions of people. Give them an opportunity. Give them a say. And do not have their companies savaged by people who are only looking to take care of their own interests. And those are the buccaneering barristers, those lawyers. The term was coined, at least the first time I heard it, by Senator DODD. He happens to be correct. They are sharks who are looking to eat whatever they can and the devil may care as it relates to the harm and the injury that they bring, in many cases, to good people simply by being able to allege that someone knowingly made a misleading statement.

We say, no, you have to go a little further. Knowingly, and you have to show intent. Because who knows what

"knowingly" is. Show me. You say: I allege you knew it. I say I did not know. But if one has to allege that you knew and you had intent, that is a little more difficult; is it not? I think people are entitled to that presumption. I do not think they should be subjected to these scurrilous lawsuits. And they have taken place. That is why we say "knowingly, with intent," and that you deliberately did this to mislead investors.

It is one thing to have people subjected to suits where there is intent to deliberately mislead, and it is another thing where people have made accidents and now are held to a standard whereby that was an accident and they say, "You knew." You say, "I did not know." You did and you actually made, if the fellow actually made the statement, he made the statement. Nobody can say he actually did not. So the word "actually," that is nothing. They say you have knowledge, claim you have knowledge. Wait, I did not know that it was wrong. I got you in court because all I had to do is say that, well, you did. You had actual knowledge, and if you checked your papers, you would have found out that the projections you were making were off. Now I have him in under a claim of actual knowledge.

Did he really have actual knowledge? No. But it is very easy to allege. And once you allege it, you have him in this revolving door, in the chain. What do his lawyers say to him? "We can fight it. We may be able to win it." But you know what? You may stand to lose, if they get a judgment against you, tens of millions of dollars, and put the company—a startup company —out of business. Or if you are an accountant, yes, we can probably win it. But you can get hit pretty hard. Because you know, these people made this and you saw it and they dragged you in.

I think that when you look at and read what we have put in, not what somebody puts in substitution, tell me how you can read this bill and say, anybody, that we say that you can deliberately lie and mislead with intent, and that we give you safe harbor for that? We do not.

I want to do it, and I will sit down and read once more, there is no exemption from liability where, line 7, a forward-looking statement is:

(1) knowingly made with the expectation, purpose, and actual intent of misleading investors.

They are not protected. You can be sued. And if that is the case, you should be sued, no doubt; absolutely. There is nothing that keeps the SEC from doing this, from bringing these suits. Our bill does not protect fraudulent statements or conduct. The administration does not say that it does. It does not say that it does.

A letter, from Abner Mikva, counsel to the President, asked for clarification. I do not think that our bill is unclear on this point. I can clarify it. If it is, this debate should provide important guidance that the bill does not and will not protect fraud. I think this is clarification enough. How many times should we state it? We do not do it, we will not do it, that is not my intent, and I urge my colleagues to oppose the amendment by my distinguished colleague and friend from Maryland.

Mr. SARBANES addressed the Chair.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, the distinguished Senator from New York read the standard that is in the bill, and that is the problem, that standard. Those who are knowledgeable in the securities field have looked at that standard and reached the conclusion that it is an enormous loophole, and it will enable people to engage in willful fraud.

The amendment which I sent to the desk, which would change that language, would not allow a forward-looking statement to claim exemption from liability where the statement was made with the actual knowledge that it was false or misleading.

What every Member has to ask themselves is on what possible basis would you want to give immunity to a forward-looking statement that was made with the actual knowledge that it was false or with the actual knowledge that it was misleading? I submit to you, statements of that sort ought not to be protected from immunity. The bill, as written, would, in effect, allow statements made of that sort to have protection from immunity.

The standard in the bill is so high and so narrow that virtually any forward-looking statement is going to have immunity. The burden of showing purpose and actual intent—before, of course, we also had expectation which the Senators struck from the bill—but to show purpose and actual intent is so heavy that a lot of very fast games by some very fast artists are going to be played on the investing public and is going to cause a lot of people a great deal of grief and harm and damage.

So I urge Members to examine this issue very carefully. This is one of those issues that will come back to haunt you because people are going to be swindled, they are not going to be reachable because of the immunity which the bill provides, and everyone is going to look at what they did and say, "Why should these people be immunized from liability," and the responsibility for immunizing them is going to rest on the people voting on this amendment and voting on this legislation.

So I very strongly urge the adoption of the amendment.

Now, the letter to which my colleague referred is a letter from the counsel to the President, Judge Mikva. I ask unanimous consent that the letter be printed in the RECORD at the end of my remarks.

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

(See exhibit 1.)

Mr. SARBANES. Mr. President, I quote:

The White House

Washington, June 27, 1995.

DEAR SENATOR SARBANES: I am writing to express the administration's support of your amendment to S. 240. The administration strongly believes the bill's safe harbor provision should not protect a statement made with the actual knowledge that it was false or misleading.

Let me repeat that:

. . . should not protect a statement made with the actual knowledge that it was false or misleading.

The bill's current safe harbor standard would exclude forward-looking statements "knowingly made with the expectation, purpose, and actual intent of misleading investors."

And as I noted, let me depart from the text of the letter for a moment, not very long ago, earlier in our proceedings, the Senator from New York struck the word "expectation" from the standard that is in the bill.

So he continues then, it now reads:

"knowingly made with the purpose, and actual intent of misleading investors."

I double checked, and I am told that does not affect the import of this letter, and that knowing of that change, the letter still stands as sent to us. I double checked that in order to be very accurate with my colleagues.

The letter goes on to say:

The Securities and Exchange Commission has opposed the use of this standard because it might allow some defendants to avoid liability for certain false statements.

In the Statement of Administration Policy forwarded to the Senate on June 23, 1995, the administration urged the Senate to clarify whether the safe harbor's current language would protect statements known to be materially false or misleading when made. The Senate can best ensure that the safe harbor would not protect fraudulent statements by adopting an actual knowledge standard, as your amendment proposes.

Let me repeat that:

The Senate can best ensure that the safe harbor would not protect fraudulent statements by adopting an actual knowledge standard, as your amendment proposes.

Sincerely,

ABNER J. MIKVA,
Counsel to the President.

Mr. President, my colleague from New York has suggested, well, we are just splitting legal hairs here. We are engaged in some difficult legal analysis, that is quite true. And I suggested that when we did the previous amendment that the place where this ought to be done is by the SEC. The Senator from New York did not agree with that, and a fairly narrow margin of the Members of this body supported him in that view and, therefore, the burden

falls upon us to define the standard here.

The SEC and the State regulators have told us that the standard, as written in the bill, will protect fraud artists. In effect, the bill swings the pendulum too far and the language of the bill goes too far and, therefore, will end up protecting fraud and hurting investors.

This amendment is an effort to bring the pendulum back toward the middle. It still will provide an enhanced safe harbor over what now exists, but it will not go to the extreme lengths of the provision in the bill which all the experts tell us, all the people whose responsibility it is to deal with securities fraud, who work in the field full-time all the time, they all tell us that this will end up protecting fraud artists. As I said, the Chairman of the SEC said:

I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.

That is what we are talking about here. The substitute standard which I am proposing simply says that you are not going to give protection from liability to a forward-looking statement —listen very carefully to this—to a forward-looking statement that is made with the actual knowledge that it was false or misleading. You cannot make the statement with actual knowledge that it is false or actual knowledge that it is misleading and be protected from liability. And I invite anyone to explain to me why that kind of statement ought to get protection from liability. I would think it is as clear as can be that is the very sort of statement that ought not to get protection from liability. Therefore, I say to my colleagues, if—as apparently has been decided—we are going to write the standard right here, clearly, we must rewrite the standard in the bill. I submit that the standard contained in the amendment is an appropriate standard, if we are going to be concerned about a proper balance that will help to provide some insurance that investors will not be subjected to fraud.

Mr. President, I yield the floor.

EXHIBIT 1

THE WHITE HOUSE,
Washington, DC, June 27, 1995.

Hon. PAUL SARBANES,
U.S. Senate,
Washington, DC.

DEAR SENATOR SARBANES: I am writing to express the Administration's support of your amendment to S. 240. The Administration strongly believes the bill's safe harbor provision should not protect a statement made with the actual knowledge that it was false or misleading.

The bill's current safe-harbor standard would exclude forward-looking statements "knowingly made with the expectation, purpose, and actual intent of misleading investors." The Securities and Exchange Commission has opposed the use of this standard because it might allow some defendants to avoid liability for certain false statements.

In the Statement of Administration Policy forwarded to the Senate on June 23, 1995, the Administration urged the Senate to clarify whether the safe harbor's current language would protect statements known to be materially false or misleading when made. The Senate can best ensure that the safe-harbor would not protect fraudulent statements by adopting an actual knowledge standard, as your amendment proposes.

Sincerely,

ABNER J. MIKVA,
Counsel to the President.

Mr. D'AMATO. Mr. President, I think we have debated this point now over and over. First, let me say, that if the Securities and Exchange Commission has constructive suggestions to make in this area, we stand ready, willing, and able to adopt them. We would be happy to have hearings. But, we have been waiting for the safe harbor standards for 3 years, and we finally have felt compelled to create the safe harbor ourselves. Once again, I direct my colleagues to the letters from Chairman Levitt. He has shared with us the frustration and problems that the business community face. He alludes to these problems and he has recognized that there is a need to begin solving these problems.

Now, if you look at the language of my friend and colleagues' amendment, and then look at the language in S. 240, as it currently exists, it is very clear that the current language means that if you knowingly make a statement with the purpose and intent of misleading investors you will be held liable. This current standard means that you have to demonstrate that this statement was made with an intent to mislead investors. However, the Sarbanes amendment would reduce that standard to just knowing a misstatement was made. That is too easy to allege. That opens the door to meritless suits and that then forces firms to pay huge settlements. That is what we are attempting to stop.

We cannot countenance lying nor can we countenance the making of false statements. But the fact of the matter is, if we use this scienter provision, it will open the door to meritless litigation based only on allegation. This will prove to be a nearly impossible standard—how does one prove that he actually did not know and was not aware of the misstatement? How does one prove that? That is the high burden that we place on the defendant with this standard. With this standard, I feel that firms will be forced to settle and that means payments of millions of dollars.

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 were ordered.

Mr. DODD. Mr. President, how much time remains?

The PRESIDING OFFICER. There is no control of time.

Mr. DODD. Thank you. Mr. President, let me commend my colleague from Maryland, first of all, for offering a creative amendment here. It looks tempting with the language that is offered and the arguments he has given as to why not just support the replacement language that he has offered, which would strike paragraph one on page 121 and paragraph one on another page—I apologize for not having the page number—and replace what we now have, "knowingly made with the purpose and intent of misleading investors," to "actual knowledge of false and misleading information," I believe is the language of the amendment.

Let me begin, Mr. President, by stating what I hope all of our colleagues will accept is the point here. That is, that we are all after the same goal—certainly, those of us who have spent time over the last 3 or 4 years in trying to deal with the broader issue that this legislation attempts to address. I have tried to strike a balance that will deal with an existing problem that we have identified over these last several days in our debate.

Let us also assume that we have some six, seven, eight pages here in the bill that deal with the issue of safe harbor. An amendment being offered by the Senator from Maryland deals with one clause—an important clause, but nonetheless one aspect of safe harbor.

I said earlier today, Mr. President, that the purpose of safe harbor is designed to encourage the disclosure of information, to encourage the disclosure of information. There is no requirement, under law, that companies disclose information to potential investors. There may be those who want to require that, but the law does not require it.

So the very purpose of having a safe harbor is not just to create some island where people can make statements, futuristic statements, and avoid litigation or be immune, but because we think it is important to elicit from businesses, from industry, from corporations, statements about what they believe the company is likely to be doing.

Good news and bad news. It is not just good news. A forward-looking statement can be bad news about what may happen—product lines that are not necessarily going to live up to earlier expectations.

I hope that everyone would agree that it is in the interests of our country economically to encourage businesses to be forthcoming about information which they possess that will allow for investors to make intelligent, reasonable decisions about whether to buy stock, sell stock, whatever else they may be engaged in. That is why we create a safe harbor. That is the only reason for it.

If you had a law that required businesses to tell everything they know, you would not need safe harbor. No one is suggesting we do that. Proprietary

information, businesses trying to make plans for the future, should remain private. In the whole area of securities litigation, the notion of safe harbor is a longstanding notion.

The problem, today, as identified by the Chairman of the Securities and Exchange Commission is that the present safe harbor is not working.

We have heard at length earlier today, and maybe I ought to put in the letter again, the letter of May 19, in which the Chairman of the SEC identifies in paragraph 3 of that letter, "There is a need for stronger safe harbor than currently exists."

Mr. President, I ask unanimous consent this letter be printed in the RECORD, because the Chairman of the SEC lays out why that problem exists.

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

SECURITIES AND EXCHANGE COMMISSION,
Washington, DC, May 19, 1995.

Hon. ALFONSE M. D'AMATO,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As Chairman of the Securities and Exchange Commission I have no higher priority than to protect American investors and ensure an efficient capital formation process. I know personally just how deeply you share these goals. In keeping with our common purpose, but the SEC and the Congress are working to find an appropriate "safe harbor" from the liability provisions of the federal securities laws for projections and other forward-looking statements made by public companies. Several pieces of proposed legislation address the issue of the safe harbor and the House-passed version, H.R. 1058, specifically defines such a safe harbor.

Your committee is now considering securities litigation reform legislation that will include a safe harbor provision. Rather than simply repeat the Commission's request that Congress await the outcome of our rulemaking deliberations and thereby run the risk of missing an opportunity to provide input for your own deliberations, I thought I would take this opportunity to express my personal views about a legislative approach to a safe harbor.

There is a need for a stronger safe harbor than currently exists. The current rules have largely been a failure and I share the disappointment of issuers that the rules have been ineffective in affording protection for forward-looking statements. Our capital markets are built on the foundation of full and fair disclosure. Analysts are paid and investors are rewarded for correctly assessing a company's prospects. The more investors know and understand management's future plans and views, the sounder the valuation is of the company's securities and the more efficient the capital allocation process. Yet corporate America is hesitant to disclose projections and other forward-looking information, because of excessive vulnerability to lawsuits if predictions ultimately are not realized.

As a businessman for most of my life, I know all too well the punishing costs of meritless lawsuits—costs that are ultimately paid by investors. Particularly galling are the frivolous lawsuits that ignore the fact that a projection is inherently uncertain even when made reasonably and in good faith.

This is not to suggest that private litigation under the federal securities laws is generally counterproductive. In fact, private lawsuits are a necessary supplement to the enforcement program of the Commission. We have neither the resources nor the desire to replace private plaintiffs in policing fraud; it makes more sense to let private forces continue to play a key role in deterrence, than to vastly expand the Commission's role. The relief obtained from Commission disgorgement actions is no substitute for private damage actions. Indeed, as government is downsized and budgets are trimmed, the investor's ability to seek redress directly is likely to increase in importance.

To achieve our common goal of encouraging enhanced sound disclosure by reducing the threat of meritless litigation, we must strike a reasonable balance. A carefully crafted safe harbor protection from meritless private lawsuits should encourage public companies to make additional forward-looking disclosure that would benefit investors. At the same time, it should not compromise the integrity of such information which is vital to both investor protection and the efficiency of the capital markets—the two goals of the federal securities laws.

The safe harbor contained in H.R. 1058 is so broad and inflexible that it may compromise investor protection and market efficiency. It would, for example, protect companies and individuals from private lawsuits even where the information was purposefully fraudulent. This result would have consequences not only for investors, but for the market as well. There would likely be more disclosure, but would it be better disclosure? Moreover, the vast majority of companies whose public statements are published in good faith and with due care could find the investing public skeptical of their information.

I am concerned that H.R. 1058 appears to cover other persons such as brokers. In the Prudential Securities case, Prudential brokers intentionally made baseless statements concerning expected yields solely to lure customers into making what were otherwise extremely risky and unsuitable investments. Pursuant to the Commission's settlement with Prudential, the firm has paid compensation to its defrauded customers of over $700 million. Do we really want to protect such conduct from accountability to these defrauded investors? In the past two years or so, the Commission has brought eighteen enforcement cases involving the sale of more than $200 million of interests in wireless cable partnerships and limited liability companies. Most of these cases involved fraudulent projections as to the returns investors could expect from their investments. Promoters of these types of ventures would be immune from private suits under H.R. 1058 as would those who promote blank check offerings, penny stocks, and roll-ups. It should also address conflict of interest problems that may arise in management buyouts and changes in control of a company.

A safe harbor must be balanced—it should encourage more sound disclosure without encouraging either omission of material information or irresponsible and dishonest information. A safe harbor must be thoughtful—so that it protects considered projections, but never fraudulent ones. A safe harbor must also be practical—it should be flexible enough to accommodate legitimate investor protection concerns that may arise on both sides of the issue. This is a complex issue in a complex industry, and it raises almost as many questions as one answers: Should the safe harbor apply to information required by Commission rule, including predictive information contained in the financial statements (e.g. pension liabilities and over-the-counter derivatives)? Should there be a requirement that forward-looking information that has become incorrect be updated if the company or its insiders are buying or selling securities? Should the safe harbor extend to disclosures made in connection with a capital raising transaction on the same basis as more routine disclosures as well? Are there categories of transactions, such as partnership offerings or going private transactions that should be subject to additional conditions?

There are many more questions that have arisen in the course of the Commission's exploration of how to design a safe harbor. We have issued a concept release, received a large volume of comment letters in response, and held three days of hearings, both in California and Washington. In addition, I have met personally with most groups that might conceivably have an interest in the subject: corporate leaders, investor groups, plaintiff's lawyers, defense lawyers, state and federal regulators, law professors, and even federal judges. The one thing I can state unequivocally is that this subject eludes easy answers.

Given these complexities—and in light of the enormous amount of care, thought, and work that the Commission has already invested in the subject—my recommendation would be that you provide broad rulemaking authority to the Commission to improve the safe harbor. If you wish to provide more specificity by legislation, I believe the provision must address the investor protection concerns mentioned above. I would support legislation that sets forth a basic safe harbor containing four components: (1) protection from private lawsuits for reasonable projections by public companies; (2) a scienter standard other than recklessness should be used for a safe harbor and appropriate procedural standards should be enacted to discourage and easily terminate meritless litigation; (3) "projections" would include voluntary forward-looking statements with respect to a group of subjects such as sales, revenues, net income (loss), earnings per share, as well as the mandatory information required in the Management's Discussion and Analysis; and (4) the Commission would have the flexibility and authority to include or exclude classes of disclosures, transactions, or persons as experience teaches us lessons and as circumstances warrant.

As we work to reform the current safe harbor rules of the Commission, the greatest problem is anticipating the unintended consequences of the changes that will be made in the standards of liability. The answer appears to be an approach that maintains flexibility in responding to problems that may develop. As a regulatory agency that administers the federal securities laws, we are well situated to respond promptly to any problems that may develop, if we are given the statutory authority to do so. Indeed, one possibility we are considering is a pilot safe harbor that would be reviewed formally at the end of a two year period. What we have today is unsatisfactory, but we think that, with your support, we can expeditiously build a better model for tomorrow.

I am well aware of your tenacious commitment to the individual Americans who are the backbone of our markets and I have no doubt that you share our belief that the interests of those investors must be held paramount. I look forward to continuing to work

with you on safe harbor and other issues related to securities litigation reform.

Thank you for your consideration.

Sincerely,

ARTHUR LEVITT.

Mr. DODD. Mr. President, if you disagree with safe harbor, and wish to apply a standard here that is appealing on its face, but actually undercuts the very intention of the safe harbor, then it seems to me you run the risk of destroying a very important vehicle that causes businesses to voluntarily give information out that is critical. Information, as I say, that could be positive or negative information. So that is the reason it exists.

Now let me cite examples where I believe that the actual knowledge standard, as tempting as it is, can actually just bring us back to the point we are trying to get away from, and that is the litigation that has swamped up in many ways in terms of the ability of these companies to move forward and to, as I said earlier, to give the kind of information that may be necessary.

We all want safe harbor, as I mention. We want a safe harbor that will work. When the chief executive officer of a large industry goes to his general counsel in a very practical way, and says "Should I tell pension fund investors,"—remember, that is primarily who we are talking about— "that," returning to an earlier example, "a new disk drive at the heart of their investment in this company, may not quite work as well as we planned."

We should have a safe harbor that will allow the general counsel to say "Yes, you can say this without being sued." It is so the company now has this information, not required by law, that it share that information. But the CEO says, "I do not think this disk drive will work quite as well as I planned, and I want to know whether or not to let people know," knowing full well what may be the implication in terms of the investors.

Pension funds obviously, I think, are entitled to information even if it is not required to be disclosed. We want to make sure that CEO's can say and tell us what is going on without the fear of millions of dollars in litigation costs. That is the point of this bill—trying to reduce litigation costs.

If we do not make this a very clear division, a very clear division, as to when safe harbor does not apply, it is not going to be safe enough, and that general counsel is then going to say to that CEO, "You are not required to say anything—don't say anything. Don't say anything."

Who are the winners and losers, when that decision is made? The general counsel says "Don't say anything here, don't you dare say anything. You are not required to by law." You can never be sued for what he did not say in this case. So they do not do anything.

Mr. SARBANES. Will the Senator yield?

Mr. DODD. If I could finish this train of thought, I will be glad to yield for a question.

We are trying here to get this information out. As the Council of Institutional Investors, representing literally millions of small investors in this country with hundreds of billions of dollars in assets, said in testifying before the SEC, the safe harbor must be 100 percent safe.

Let me go back at that point quickly. There is a fear that Members will think that anything that anybody does in relationship to securities can fall into this safe harbor category. That is not the case at all.

As pointed out by the distinguished junior Senator from Utah today, by the Senator from New York, and myself, let me go back, there are 6 or 7 pages in the bill dealing with safe harbor. This is one line in that entire section.

Safe harbor only applies to statements by issuance and reviewers hired. Statements by stockbrokers are not included. Certain issuers are excluded from safe harbor, including anyone found to have violated securities law, anyone involved in penny stocks, blank check companies, investment companies, IPO's, tender offers, roll-up transactions—all are exempted. Historical information contained in historical financial statements is excluded as well.

I forget to mention this earlier, but in this bill we require cautionary language be included in forward-looking statements so investors can pick up the kind of language that ought to give them a better sense to put them on notice that maybe these predictions are not going to turn out to either be as bad or as good as the company may utter and say. That was never before required.

In the discussion of safe harbor, remember, we are dealing with narrow fact situations here.

Mr. D'AMATO. Will my friend yield for a question?

Mr. DODD. I yield.

Mr. D'AMATO. Is it not true that one of the other provisions never included, safe harbor will now permit the SEC to bring suits for disgorgement, for violation of safe harbor provisions?

Mr. DODD. I was just about to get to that point. That is a second added new provision.

Mr. D'AMATO. That has never been in before?

Mr. DODD. Never before in this legislation. It is all new authority we are extending to the SEC.

To listen to this debate, we would think we have been stripping away and stripping away. What we are doing is providing different vehicles. As we listened and heard testimony, the Council of Institutional Investors represents, I said, millions of people in the country, involving billions of dollars.

They want that information. These pension funds want to know what is going on in these companies. If these companies do not provide that kind of information, these pension funds are not making decisions with all of the information they have when they decide whether or not to invest or not to invest.

So the safe harbor is a critical issue in soliciting that kind of information. That is why it is so important. I think their testimony before the SEC on truly a safe harbor, a 100 percent safe harbor is absolutely critical. Again in the context of what we are talking about, those that are excluded, from the protections of safe harbor.

Now, returning to my earlier example, I illustrate the problem with the amendment of my colleague from Maryland. The CEO in the fact situation I described does not think it will work out as well as it is, and goes to the general counsel and says, "should I share this information?"

It turns out the disk drive prediction that he had made was a panic decision; that, in fact, the disk drive turns out to be fine, turns out not to be as bad as he thought. But many shareholders, based on the earlier prediction, sold their stock. Now they sue them for actually knowing that the disk drive was really OK.

Of course when he gets before a jury he will be able to make his case. But the problem is, Mr. President, before you get to the jury, you are probably going to end up with a settlement involving millions of dollars, because there were memos or other information that came across his desk that said, "Mr. CEO, we think this disk drive will be OK." During the discovery period, as a practical matter in litigation, every single paper that crossed that CEO's desk is going to be subject to discovery.

So there on the table is a memo or two or three that says, "We think this disk drive is not as bad as you think," but he felt based on his feelings about this, with the advice of general counsel that he said "I don't think it will do that well."

Now you have yourself with actual knowledge—not with intent, not with purpose, to mislead, but with actual knowledge of information—that suggested a different result than what the CEO predicted when he put out a statement that he thought the pension funds ought to know about.

I do not believe that it is in our interest in the safe harbor context—not in other issues of aiding and abetting and joint and several and proportional liability, but in safe harbor context, if it is a standard of actual knowledge of something that existed that contradicted your own statement, thereby you said something misleading, because there was information that reached a different conclusion, and you end up with a lawyer saying "Look, you know, I don't know how a jury will

find with this." The Sarbanes language in this bill says "actual knowledge."

Mr. SARBANES. Actual knowledge that it was false. Why should anyone be able to make a statement that they have actual knowledge that is false.

Mr. DODD. Misleading. That could be the subject of litigation here. You made a statement that you said you thought this disk drive was going to do poorly. You had information before you that said something else. I sold my stock on the basis of that prediction you put out, that it was not going to do well.

Now I know you had information from your people in your divisions that said it would do fine. You made a prediction it would do poorly. You had actual knowledge there was different information available to you. You cannot tell me about that. As a result, I am suing you, and I think I can collect.

Mr. SARBANES. Do you think he should have told? Do you think he should have had a forward-looking statement that said some have said we have a problem; others say we do not have a problem. Would that not be an honest statement to the potential investors?

Mr. DODD. Let me say to my colleague, another aspect of this bill, here in the safe harbor context, in the safe harbor context, it is our common desire to solicit information from these businesses that do not have to make it forthcoming. I think, frankly, going to the intent and purpose, to disregard intent and purpose of that CEO, and have the mere standard actual knowledge, I think, creates a nightmare. That is my view.

Mr. SARBANES. Is it the Senator's view—will the Senator yield for a question?

Mr. McCAIN. Regular order. If the Senator asked for the Senator to yield for a question, fine.

The PRESIDING OFFICER (Mr. GRAMS). The Chair reminds the Senator——

Mr. DODD. I am happy to yield to my colleague.

Mr. SARBANES. I just asked the Senator if he would yield for a question.

The PRESIDING OFFICER. A reminder that the Senator must address the Chair to ask a question.

Mr. SARBANES. Mr. President, I ask the Senator if he will yield.

Mr. DODD. I am happy to yield to my colleague.

Mr. SARBANES. Is it the Senator's view that all forward-looking statements are voluntary? As I understand it, the Senator says you are going to dissuade forward-looking statements because these are voluntary things; and, if they have a problem with what the standard is, they will not volunteer the information.

Is that your position?

Mr. DODD. That is the difficulty here. Yes.

Mr. SARBANES. What is your explanation of the language on page 113 of the bill which includes within the definition of a forward-looking statement in paragraph 3, lines 18 through 22, a statement of future economic performance contained in the discussion and analysis of financial condition by the management, or in the results of operations included pursuant to the rules and regulations of the Commission.

Mr. DODD. I do not understand the purpose of the statement.

Mr. SARBANES. It is my understanding that currently under the rules and regulations of the Commission you are required to provide certain information that is in effect a forward-looking statement.

Does the Senator agree to that?

Mr. DODD. I understand that. How much information you have to——

Mr. SARBANES. But you earlier made the statement in effect that this was all voluntary, and that people, if they were dissuaded, would provide no information. The fact is under current SEC requirement they are required to provide some forward-looking information.

Is that correct?

Mr. DODD. The Senator is correct. I stand corrected.

My point here is that soliciting all the necessary information one would like to have is not required by law. Some statements are. The point I was trying to make was in the case of the one that I ascribed to. But the condition of a particular product line, a case could be made that that information would not necessarily be required to be forthcoming.

So my point is that while the temptation to adopt the actual knowledge standard here, in effect we may be undoing the very purpose that I presume is unanimous here. Maybe there are some who disagree with us, but you want a good safe harbor. The purpose of having a safe harbor is that it be safe. If it just be a harbor that is sometimes safe or never safe or rarely safe, then the very purpose for its existence is undermined. As a result, you defeat the very purpose of creating it.

My point here is that a simple standard of actual knowledge can undermine that very desire that I believe is unanimously held in this body to create that safe harbor. So while the standard of actual knowledge is a difficult standard to overcome rhetorically in the subject of debate, in the practical application of it, then I think it is a standard that undermines the very purpose of safe harbor.

I say to my colleague from Maryland and others, they know I have some difficulty even with this standard. I am worried about having a good one that does create the safe harbor, and that does apply to those efforts. My colleague from New York and I and Senator DOMENICI have discussed this at some length. And there are many different ways we may finally get some language here that can be appropriate. But establishing just actual knowledge with no intent or no purpose to mislead, it seems to me, runs the risk of having the very purpose of the safe harbor destroyed.

I cite the factual kind of example involving a good meaning, well intended person—let us assume that most of the people we are talking about here are not inherent crooks. We are talking about decent, competent people who want to do their business appropriately and properly. And sharing information that can then undermine them and end up with significant litigation costs is not exactly serving the purpose of the intent when we desire to put in a safe harbor in the legislation.

The SEC itself, as I said earlier, feels as though the safe harbor needs to be strengthened. Their present standard is "acted in good faith and reasonable basis for believing what you are saying." That, of course, created a mountain of problems over the issue of reasonable basis.

But as I mentioned a moment ago, we have added language here that requires cautionary language. The Senator from New York has pointed out that we extended to the SEC the authority to go after these matters which may be the best way of recovering, I would say anyway, because they are not necessarily out to just win for themselves but rather win for the investors where they have the knowingly intentionally and with purpose attempted to mislead the investor. That may not be a perfect standard but I think our desire here to have a higher standard makes sense if you understand the value of safe harbor.

Again I will state what I said at the outset. For those who do not believe in safe harbor, adoption of the Sarbanes amendment makes sense because in my view that undermines the safe harbor.

So I would respectfully disagree with my colleague in his amendment, as appealing as it is to the rhetorical sense. I think the net effect of it at the end of the day is that we are going to abandon the safe harbor protection. Information will not be forthcoming that could otherwise help your institutional investors, particularly in terms of deciding whether or not to buy or sell the stock in a particular company.

I think that is a shortcoming, if we adopt this language as part of this bill. I think it will hurt what we have tried to do here with this legislation in trying to strike the balance.

With that, Mr. President, I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. LAUTENBERG. Mr. President, the Chair has an obligation to recognize the Senator who stood up first.

Mr. McCAIN. Mr. President, last September the United States——

Mr. LAUTENBERG addressed the Chair.

The PRESIDING OFFICER. The Senate is out of order. The Senate will be in order. Both Senators were standing. The Senator from Arizona has been standing.

Mr. LAUTENBERG. I have been standing. With all due respect, I have been here, was here before the Senator from Arizona, and I called for recognition from the Chair. And the Chair, as I saw it, deliberately chose to ignore my appeal for recognition. The Chair I guess has that right. But that is not the way this body is to operate.

The PRESIDING OFFICER. The Senator from Arizona has the floor.

Mr. McCAIN. Mr. President, my friend from New Jersey is obviously upset. Could I ask how long the Senator from New Jersey intended to speak?

Mr. LAUTENBERG. Probably 15 minutes. I am not upset at the Senator from Arizona. I am upset because of common courtesy.

Mr. McCAIN. I understand. May I say that I believe it is a very close call. And, Mr. President, I ask unanimous consent to yield 15 minutes to the Senator from New Jersey, and that as I do so, I have been in these similar situations with very tough calls from the Chair as to who speaks first. I believe the rule of the Senate is who is on their feet and speaks first is who seeks recognition. I believe we were both on our feet. I do not believe that the rule of the Senate is who has been standing the longest.

With that, I ask unanimous consent that the Senator from New Jersey is to be recognized for 15 minutes, and then I would be recognized for my remarks.

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

Mr. LAUTENBERG. The Senator from Arizona is very courteous.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. LAUTENBERG. I respect and appreciate it.

How long does he intend to speak?

Mr. McCAIN. About 10 minutes. Please go ahead. The Senator was on the floor. Please go ahead.

Mr. LAUTENBERG. I thank the Senator from Arizona.

Mr. President, I ask unanimous consent to be added as a cosponsor of the Sarbanes amendment.

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

Mr. LAUTENBERG. Mr. President, as the Senator from Maryland explained, this amendment would modify a provision of S. 240 that I find very troubling. I know that earlier today our colleague from New York tempered somewhat the existing language relating to the safe harbor provision, but Mr. President, I do not think he went far enough.

One goal of this bill is to minimize the existing disincentives to provide detailed forward-looking statements about the economic prospects of their companies.

Everyone agrees that is a desirable goal.

I certainly do.

Indeed, my support is based on personal experience.

Prior to coming to the Senate, I worked in the private sector. I cofounded a company with two others, three of us from poor working-class homes, that today employs over 20,000 people. It is an American success story. I say that because I think it is important to occasionally call on one's background as we review some of the legislation that is proposed in front of us. After the company went public in 1961, I filed countless statements with the SEC as its CEO. As the CEO, I believed that it was important for investors to have as much information as possible.

Each year, I made it a practice to project earnings for the following year. And if it needed modification during the period due to changes and conditions, I quickly went to the public to alert them to any revision. This process had significant rewards because investor confidence in ADP—my company—caused our stock, which is listed on the New York Stock Exchange, to sell at among the highest price-earnings ratios of all listed securities on any exchange.

There used to be a company in the investment business, an old name in the financial world, Kidder-Peabody. And each month they would publish a list known as The Nifty 50. These were the highest price-earnings ratio companies that were listed. They did that for over 265 months, for more than 22 years. Every month they would publish lists of the companies that were among the investors' favorites. The company that led that list was my company, ADP. It was on the list 215 out of 265 months, far more than the next best company which listed among the top list more than 200 times. Obviously, the company did well. It performed well year after year. But it was the investors' belief, the investors' confidence, that they could always count on ADP to tell the truth about what was happening that caused the stock price to swell as the earnings grew.

As I look back at that period, I know that I was in the forefront of CEO's who provided investors with forward-looking statements on my company's financial health. It made sense to me then. It makes sense to me now.

One of the things that I know this bill would like to accomplish is to make sure that the public is as well informed as possible. It is not simply to focus on whether or not litigation is possible or whether there ought to be ceilings on certain claims but, rather, to give the public a chance to know what is going on and at the same time not to encourage frivolous or whimsical lawsuits.

It is important that investors have as much information as they can. Everyone knows, especially in the larger companies, that senior executives in the company know very well what they are expecting to happen over a year, 2, 3, 4, 5 years in advance. It may not be precise, but they have a target; they have a goal. Everyone knows that in addition to the executives within the company, the board of directors has to be notified if there are any changes.

What does that represent? It represents an advantage that people on the inside have over those on the outside who are investing their money. And there is nothing, no reason at all why anyone on the inside ought to have privileged information with which to sell stock or buy stock ahead of the investing public. It is critical that all investors have as much information about the company as they can to make informed investment decisions.

Despite the desire to provide information, many issuers, many companies do not provide sufficient information. They do not because they are concerned about their potential liability, which this bill addresses, should these forecasts turn out to be off the mark. Well, if things change, as I said in my comments, then what ought to happen is the company ought to say: Investors, be prepared. We have to take a hit on our earnings because of this product or this market or what have you, but we have confidence in the future and this is what we expect. The investors will stay with the ship. This is especially true for the small high-tech companies, which is what my company was. These are companies whose growth we want to encourage. It is not in the public interest for these companies to go out of business because of a lawsuit based on a financial forecast or information which despite the company's best efforts later turns out to be inaccurate. And that can happen despite the best intentions of the company.

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

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

To me, this standard, although an improvement over the version reported

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

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

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

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

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

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

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

Mr. McCAIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

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

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

HAITI'S ELECTION

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

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

Mr. GOSS led an accredited election observation team from the International Republican Institute [IRI]. I have the honor of serving the institute as chairman of its board of directors. I am proud of IRI's work generally, and its work in Haiti specifically. I will talk some more about the quality of that work a little later in my remarks.

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

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

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

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

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

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

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

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

EXECUTIVE SUMMARY

ELECTORAL PROCESS

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

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

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

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

The sliding scale of registration fees imposed by the CEP—whereby political parties

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

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

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

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

ELECTORAL ENVIRONMENT

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

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

The electorate itself is basically uninformed about this election—what it stands for and who is running. There has been no civic education campaign, with the exception of some limited U.S. and U.N. military efforts, to illuminate the purpose of this election.

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

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

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

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

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

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

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

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

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

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

Mr. President, this is, as I said, only a brief sampling of the problems which IRI observers and all credible observers witnessed. For calling the press' attention to these problems, the IRI mission was chastised today in a Washington Post editorial for unconstructive political science correctness.

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

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

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

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

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

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

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

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

What the Post editorial writers and others are really saying is that whatever standards we hold El Salvador to; whatever standards we hold Nicaragua to; whatever standards we hold Croatia to; whatever standards we hold Serbia to; whatever standards we hold Albania to; whatever standards we hold Bulgaria to; whatever standards we hold Azerbaijan to; whatever standards we hold Russia to; whatever standards to which we hold all these countries where IRI observed elections without controversy, no matter how minimal those standards are we cannot expect Haiti to meet them.

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

Most importantly, Mr. President, it is an injustice to the people of Haiti. They are human beings who yearn for freedom like any other nation, and who are capable of building and sustaining the institutions that will protect that freedom. To expect any less of Haiti is, as I said, an injustice. The people who

have condescended to Haitians, including the Post editorialists, by asking the world's indulgence of their election's failings, should apologize to the Haitian people, and to those good Americans who they have maligned in the process.

Mr. President, I yield the floor.

PRIVATE SECURITIES LITIGATION REFORM ACT

The Senate continued with the consideration of the bill.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

AMENDMENT NO. 1478

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

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

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

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

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

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

The Senator from Colorado.

Mr. BROWN. Mr. President, distributed on our desk is a statement from Abner Mikva, counsel to the President and former Member of this Congress, who has what I believe is a very distinguished record, as well as a fine record as a judge for this Nation. I have the utmost respect for Judge Mikva, and so it is with seriousness that I view his letter that has been distributed.

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

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

"How is the weather at your plant?"

"Can't say."

"What do you expect your earnings to be?"

"I don't know."

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

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

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

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

Mrs. BOXER. Will the Senator yield?

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

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

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

Mr. President, I want to pledge one thing. I think the issue raised is appropriate and is a good one. I pledge one thing. If there are additional carved-out areas, exemptions from this that we ought to look at, I want to look at them and support them if they are reasonable. But let me say, Mr. President, that I think it is important that we be very careful about denying economic free speech. It is an important aspect of giving a full picture in describing economic opportunities and economic endeavors.

Mr. D'AMATO. Mr. President, I believe that under the present order we have 10 minutes equally divided.

The PRESIDING OFFICER. The Senator is correct.

Mr. D'AMATO. Mr. President, we have debated this issue for several days and I think the Senator from Colorado stated the concern with this amendment well. If there are areas where we need additional carve-outs—to exempt people from getting this safe harbor, I am willing to look at them. Senator DODD is willing to look at them. Senator DOMENICI is willing to look at them. If there are reasonable suggestions that the SEC has, we will look at them. We are going to go to conference if we pass this bill, and I pledge that we will keep the offer open to look at those suggestions. We have been looking for them for 3 years. If suggestions come up now, because of this legislation, and they make sense, I will certainly consider them. We have worked to modify and strengthen, S. 240, to protect the rights of the legitimate investor and understand their concerns. That is what we attempted to do in drafting this legislation.

I yield the floor.

Mr. SARBANES. Mr. President, I just want to make a couple of comments here at the close of the debate on this amendment. I have to say to my colleagues, I hope everyone understands that they are ignoring the recommendations and judgment of the Chairman of the SEC, the State Securities Regulators, Government Finance Officers Association, and so forth. It may well be that people feel so knowledgeable and have such expertise in this area that that does not trouble them. I have to tell you, it troubles me and would trouble me wherever I found myself on some issues. I would want to be very certain about ignoring those opinions.

Arthur Levitt said:

> A carefully crafted safe harbor protection from meritless private lawsuits should encourage public companies to make additional forward-looking disclosure that would benefit investors.

That is what the Senator from Connecticut has been asserting. No one is challenging that. He earlier said, "You are not going to have any safe harbor." Nobody is saying that.

Arthur Levitt goes on to say:

> At the same time, it should not compromise the integrity of such information which is vital to both investor protection and the efficiency of the capital markets—the two goals of the Federal securities law.

He has said about the language that is in the bill, the language we are trying to take out:

> I cannot embrace proposals which allow willful fraud to receive the benefit of safe harbor protection.

That is what the issue is. The Government Finance Officers Association has written to us that the safe harbor provision in the bill opens a major loophole through which wrongdoers could escape liability while fraud victims would be denied recovery. That is the issue.

I understand that we need a meaningful safe harbor, but the safe harbor should not be structured in such a way that pirates can find shelter in it. And, as written, the language in the legislation does exactly that. That is why the Chairman of the Securities and Exchange Commission, the Government Finance Officers Association, the North American Securities Administrators Association, which represents the 50 States' security regulators, that is why—the North American Security Administration Association called the provisions in the bill "An overly broad safe harbor making it extremely difficult to sue when misleading information causes investors to suffer losses."

The amendment is very simple. The amendment would take out the language in which all of the regulators have seen major problems, in terms of investor fraud, and substitute for it that you do not have protection in a safe harbor if you make a forward-looking statement made with the actual knowledge that it was false or misleading. And no one yet on the floor has explained to me why such statements ought to get protection from liability.

Mrs. BOXER. Will the Senator yield?

Mr. SARBANES. I yield to the Senator from California.

Mrs. BOXER. Mr. President, I think that this is the crux of the matter. And the ranking member is really the conscience of the Senate on this whole matter. I want to ask a very direct question. I am not an attorney, and my learned friend is.

If we vote for S. 240 without the Senator's amendment, is it the Senator's view that a company or an officer of a company, could make a false statement—tell a lie, put it that way—make a false statement, which is tell a lie, that he had actual knowledge was a lie?

In other words, I know I am wearing a yellow suit. If I said I am wearing a blue suit, I am telling a lie. I have to know that this is yellow. Is my friend saying that unless we adopt his amendment we could have a business person make a false statement that he knew was false, and he could still benefit from the safe harbor in S. 240 and hide behind that?

Mr. SARBANES. He could find shelter within the safe harbor even though he had actual knowledge that the statement was false—even though he had actual knowledge.

Mr. D'AMATO. Mr. President, I have heard many statements in this debate. One particular statement I have heard is about a pirate's cove. The pirate's cove exists today, those pirates are taking investors for a real ride, and they are drowning them. They are drowning companies and they are drowning good people.

All the pirates have to do is allege fraud, and companies find themselves facing millions of dollars in damages or in settlements. If we adopt the standard in this amendment, nobody will be willing to make predictions. They will not take the risk.

Now, look at what S. 240 says. It says, with no exceptions, that the safe harbor does not apply to a forward statement that is knowingly made with the purpose and actual intent of misleading investors.

We think that this standard will encourage people to make statements, make predictions, but will hold them liable if they knowingly, with intent to defraud make a statement that is false. Anything less than this standard will allow the same band of pirates that we have now to continue to bring meritless cases.

S. 240 stops lawyers from being able to pay their professional plaintiffs. They were actually paying people $10,000, $15,000, $20,000 to use their name on the suit. One of these characters has signed up 14 times with the same law firm, the same law firm that is working, lobbying, paying millions of dollars to try and defeat comprehensive reform.

If we want reform and to we want to get rid of these pirates, we need to pass S. 240. This amendment will cause a chilling effect on the ability of people to make projections about the future.

I yield the floor.

Mr. D'AMATO. Mr. President, I move to table the amendment and I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays have been ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion to table.

The yeas and nays have been ordered.

The clerk will call the roll.

The bill clerk called the roll.

Mr. LOTT. I announce that the Senator from Indiana [Mr. LUGAR] is necessarily absent.

The PRESIDING OFFICER (Mr. DEWINE). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 50, nays 48, as follows:

[Rollcall Vote No. 289 Leg.]

YEAS—50

Abraham	Domenici	Kassebaum
Ashcroft	Faircloth	Kempthorne
Bennett	Ford	Kyl
Brown	Frist	Lieberman
Burns	Gorton	Lott
Campbell	Gramm	Mack
Chafee	Grams	McConnell
Coats	Grassley	Nickles
Cochran	Gregg	Packwood
Coverdell	Hatch	Pressler
Craig	Hatfield	Reid
D'Amato	Helms	Santorum
DeWine	Hutchison	Simpson
Dodd	Inhofe	Smith
Dole	Jeffords	

Snowe	Thomas	Thurmond
Stevens	Thompson	Warner

NAYS—48

Akaka	Feinstein	Mikulski
Baucus	Glenn	Moseley-Braun
Biden	Graham	Moynihan
Bingaman	Harkin	Murkowski
Boxer	Heflin	Murray
Bradley	Hollings	Nunn
Breaux	Inouye	Pell
Bryan	Johnston	Pryor
Bumpers	Kennedy	Robb
Byrd	Kerrey	Rockefeller
Cohen	Kerry	Roth
Conrad	Kohl	Sarbanes
Daschle	Lautenberg	Shelby
Dorgan	Leahy	Simon
Exon	Levin	Specter
Feingold	McCain	Wellstone

ANSWERED "PRESENT"—1

Bond

NOT VOTING—1

Lugar

So the motion to lay on the table the amendment (No. 1478) was agreed to.

Mr. D'AMATO. Mr. President, I move to reconsider the vote.

Mr. DOMENICI. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. D'AMATO. Mr. President, I would propound a unanimous-consent request which I believe will deal with all of the outstanding amendments. I believe there are six amendments, three on each side, and it would be my intent to ask that we stack those votes so we could give our colleagues the opportunity to arrange their evening schedule. Possibly, with the concurrence of the two leaders, we can agree to time limits on all of those amendments, so we can take them up tomorrow morning and then proceed to final passage. That is my intent, to see if we can reach that agreement. I bring this up because some of my colleagues have asked what the schedule will be. If we can work out that agreement, it would be my hope that we would dispose of all of the amendments this evening and then start voting at a certain time tomorrow morning.

I yield the floor.

Mr. COVERDELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. COVERDELL. Mr. President, I rise to speak on the bill.

DISTURBING EVENTS IN HAITI

Mr. COVERDELL. I wish to comment specifically on the remarks that were made earlier by the Senate majority leader and the Senator from Arizona with regard to the disturbing events we have witnessed in Haiti.

Mr. President, we have received reports that voting tally sheets were being intentionally altered and ballots were being substituted with newly marked ballots. While widespread violence had been deterred, there has been a lack of visible security, and closed individual polls have forced Haitians to go home without casting their vote. There have been long delays in the opening of polls in many areas and a shortage of electoral material. Many ballot boxes were not sealed properly before being turned over to the regional centers. Observers found a few cases of ballot stuffing.

In short, we have a serious situation. I conferred with the majority leader with regard to these events, and want to announce to the Senate we will conduct hearings on the week we return in the subcommittee of the Foreign Relations Committee, specifically the Western Hemisphere Subcommittee. I wanted to make that known to the Senate.

Mr. President, I yield the floor.

Mr. DODD. Mr. President, I ask unanimous consent that I may speak as if in morning business.

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

EVENTS IN HAITI

Mr. DODD. I was not in Haiti this past weekend as part of an observer group, but as I think most of my colleagues know, I have been there on numerous occasions. In fact, I lived on the border of that country for 2½ years and have a more than passing interest in the awareness of Haiti.

As I have listened this afternoon to several speeches now made about the events in Haiti over the past several days, I find it stunning in many ways. My colleagues, by their remarks, almost imply that the situation in Haiti would have been preferable had there not been an election or had there not been the decision by the administration in previous months to go back to intercede, along with the support of the international community, to try to restore the democratically elected government of that country.

This was not a perfect election in Haiti. There were serious problems. But, remember, this is a country that can count free elections on one hand—fewer fingers in fact—that they have had over the years. The last free one was 4 or 5 years ago when President Aristide was elected. And then we watched that election be ripped from the people of that country through a coup.

President Clinton, the administration, took the courageous decision to restore President Aristide to power in that country. And I recall back in those days during that debate the almost apparent disappointment that there was not more of a tragedy. We did not lose a single soldier in that effort. In fact, the President deserves great commendation, mind you, for the courage he showed in making an unpopular move. It was not popular at the time. Today, interestingly, the majority of people in this country think the President did the right thing.

Now, over the weekend, they had an election. It is a poor country with a tremendous level of illiteracy and staggering economic problems. So it did not look like a perfect election in this country. But it is an effort of poor people to get out and freely choose its leadership, literally hundreds and hundreds of candidates for local office and national office in that country. And rather than castigate and denounce the effort for the shortcomings that certainly were obvious and apparent, why are we not applauding the fact that this country was trying to embrace democracy and do so in a noble way?

Granted they had problems with ballot boxes and people abused the process. Votes were not counted. There were shortcomings, to put it mildly, in the process. All of that I accept. But instead of picking this process apart, there ought to be at least some underlying statements that indicate that we support this effort. We hope it is not just a one-time effort, but that in coming months and years we will see democracy take hold in this poor, little country to our south.

And so I have been disappointed. It is just a continuum of almost the disappointment people expressed over the last year over the President's decision to go in and restore President Aristide, which was a success. It seems to be a continuation of that. I am disappointed by these remarks. This is working. It is not perfect. We have watched what happened in other countries, including what we are watching in the former Soviet Union, the New Independent Republics. Countries that are struggling to find their democratic feet do not do so instantaneously. It takes time.

So I commend President Aristide and commend the people of Haiti for the courageous attempt to have a free and fair election. I am terribly disappointed it did not meet our high standards of a perfect election. But rather than spend our time denouncing the imperfections, we ought to take a moment out and commend these people. Some people walked literally miles and miles to get to a polling place in order to exercise their rights. Most of them are illiterate, cannot read or write. They have to vote by looking at colors or symbols on a ballot in order to choose their party or candidates. And to watch people get out with, I think, the returns somewhere around 60 or 70 percent—in our elections in 1974 we had 38 percent that turned out to vote.

So with all its imperfections, I think the people of Haiti deserve our applause, our commendation for their efforts. And certainly the Government of Haiti does, as well, for conducting this election. And albeit with its shortcomings, my hope is in coming years we will see better results and less imperfections in the process. But they do not deserve to be denounced, in my

view, for the significant efforts they have made.

Mr. President, I yield the floor.

Mr. McCAIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. McCAIN. I listened with interest to the statement just made by my friend from Connecticut. And all I can say is it is deja vu all over again. I remember the criticism that the Senator from Connecticut leveled at the election in El Salvador that was attended by me and others. And, Mr. President, he might have missed the thrust of my remarks. And that is, that this election, according to the same group, the IRI, that has observed some 48 elections around the world, did not meet high standards. They did not meet minimum standards, I say to the Senator from Connecticut.

I applaud the effort of the people of Haiti for wanting to be involved in the electoral process. I applaud the efforts that have been made by many people. But the fact is, by objective judgment, this election was chaos—chaos.

And, Mr. President, the report of our observers—I will be brief because I know the Senator from New York gets understandably impatient with this issue impeding the progress of the pending legislation. But this is the report of the objective observers, these same observation teams that, as I say, observed 48 other elections throughout the world and judged by the same standards, not high standards, Mr. President, the same standards. Here's what they said:

General: Total breakdown in reception of ballots and tally sheets to counting centers; total abandonment of materials; zero supervision of materials; counting of ballots occurring without supervision.

Tally Sheets: Tally sheets being destroyed deliberately; tally sheets have been created/replaced; tally sheets with opposition parties leading have been destroyed in front of observers; tally sheets and other electoral records are being thrown out as garbage—and trash is being removed from site.

Ballots: Ballots have been burned, both used and unused; ballots have been substituted with newly marked ballots; unused ballots by the hundreds of thousands are readily accessible at counting sites.

Let me repeat that. Perhaps the Senator from Connecticut feels it is a real high standard not to expect unused ballots by the hundreds of thousands readily available at counting sites.

Unused ballots being mixed in with marked ballots; new ballots clearly being marked at counting sites; crumpled ballots, registration materials, and ballot boxes accumulating in trash heaps, inside and outside counting sites.

Ballot Boxes: Ballot boxes universally unsealed; ballot boxes being sealed at counting sites with serial numbered seals that may not correspond to actual voting site number; sealed ballot boxes are being thrown away.

Registration Cards: Registration records in total disarray; registration records being jettisoned into the trash in large quantities; unused registration cards (remember one million missing) found in large quantities.

This is not a result of underdevelopment nor simple mismanagement; this is orchestrated chaos.

Mr. HARKIN. Would the Senator yield for a question?

Mr. McCAIN. I would be glad to.

Mr. HARKIN. You mentioned—I do not know who IRI is.

Mr. McCAINQ. The International Republican Institute, which was there monitoring this election, as they have some 48 elections throughout the world. I say to my friend from Iowa, there are certain standard procedures used in judging any election, whether it be Russia, El Salvador, Haiti, anywhere else. These minimum standards are what an election is judged by.

Mr. HARKIN. If I could ask another question.

It is the International Republican Institute. I did not know that.

Second, in this institute, did they monitor the elections that were held in Haiti about, if I am not mistaken, a little over 2 years ago when the junta, the military, was in charge and there was an election there?

I am wondering whether they monitored that election and if they drew any comparisons between this election and that election. I only ask that question because——

Mr. McCAIN. My answer is, as you know, that that election was so fraudulent there was no international observer groups allowed there. But in the words of other people who observed the 1990 election, this was far worse than the 1990 election conducted in Haiti which was observed by international organizations.

Mr. HARKIN. May I ask one more question? Does the Senator know how much money the United States or other nations may have provided and support that we may have provided in order to help that electoral process in Haiti, being a poor country? I just wonder if there are any figures on how much we did in terms of monitoring assistance to help them do the things that the Senator has pointed out were shortcomings in that election.

Mr. McCAIN. I respond to my friend from Iowa, I do not know the amount of money. I do know what the commitment on the part of the American Government was. But I know the election should have met certain minimum standards. Otherwise, there is no sense in holding an election. And the observers who came in to observe this election and others did not believe those standards were met. I mean, the front page of the Washington Post this morning, "chaos" and other descriptions along those lines clearly indicate that if we did spend money, and I am sure we did, that it was either misplaced or improperly used or something.

The real point here, I say to my friend from Iowa, is I do not know how much money was spent. I know money was spent, but I know that these are trained observers who observe election after election after election around the world and judged the election in Russia to be overall fair, the election in El Salvador to be fair, the election in Nicaragua to be fair, the recent election in Chile to be fair. This is the first time they have judged this election not to be, that I know of, one which was fair and open. But they certainly did not judge the previous election to be in any way acceptable. They did not even go to see it because everybody knew what that election was all about.

Mr. HARKIN. I thank the Senator.

Mr. McCAIN. I thank my friend. I always appreciate this dialog with my friend from Connecticut. I think he may have misunderstood the point when I made my statement. I also admire the tenacity, desire, the will of the Haitian people to obtain freedom. They are people who deserve, if any one group of people in this hemisphere deserves our assistance and help, and they deserve a freely elected government after all they have suffered through.

I am just saying to my friend from Connecticut that there are certain standards that must be observed, that must be adhered to in any election; otherwise, the people do not have that precious right, and that is to choose their own leadership.

It is not clear to me yet what all the reasons behind this failure were but, in my view, it has been a significant failure.

I yield the floor.

Mr. GRAHAM addressed the Chair.

The PRESIDING OFFICER. The Senator from Florida.

Mr. GRAHAM. Mr. President, it had been my intention at this point to offer an amendment, but I ask unanimous consent for time as in morning business.

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

OBSERVATIONS ON ELECTIONS IN HAITI

Mr. GRAHAM. Mr. President, I was in Haiti on Saturday and Sunday of this weekend, and I would like to share with my colleagues some of my observations. I intend to submit a more formal statement later, but for this afternoon, I would like to talk about some of the things that I saw.

Frankly, to my good friend from Arizona, who was represented in Haiti, he and the IRI, by another good friend, Congressman PORTER GOSS of my State of Florida, I was concerned about my first experience in Haiti this weekend. I got off the plane Saturday morning at approximately 11 o'clock, and at the foot of the plane were several U.S. reporters, including a representative of one of the major networks. The first question that was asked was what did

we think about the report that had been issued a few hours earlier on Saturday morning—this is the day before the election—by the IRI criticizing the election that had not yet taken place?

Obviously, we were in no position to comment on a report that we had not seen about an election that had not yet taken place.

Mr. MCCAIN. Will the Senator yield to me to respond to that?

Mr. GRAHAM. I would like to complete my comments and then yield.

Mr. MCCAIN. The Senator made a serious charge. I would like him to let me respond.

Mr. GRAHAM. That is not a charge. It is a factual statement.

Mr. MCCAIN. As the Senator knows, it is the preelectoral process and, to be fair, the Senator from Florida ought to say that. They did not comment on the election itself, they commented on the preelectoral process. Let us not distort the record here, I say to my friend from Florida.

Mr. GRAHAM. I am not distorting the record. They were commenting and made a conclusionary statement as to what they thought the status of the election was 24 hours before the election took place.

Mr. MCCAIN. I say to my friend from Florida, I have the document in my hand: "Preelectoral Assessment of the June 25, 1995, Election."

Mr. GRAHAM. You do not have the document in your hand.

Mr. MCCAIN. Preelectoral.

Mr. GRAHAM. Because the document was approximately 300 pages long, assessing an election that was 24 hours yet before it was to commence.

Mr. MCCAIN. I have the executive summary of the 300-page document, and it clearly states "preelectoral." Preelectoral.

Mr. GRAHAM. It seems to me that it would have—and this is just my assessment, this is my editorial judgment—that it would have been more appropriate to have made such an assessment after the election had taken place as opposed to the morning prior to the election taking place. And it would have been more appropriate to have deferred to what has been the tradition of American politics, which is that partisan politics end at the Nation's boundaries.

The reality is——

Mr. MCCAIN. Will the Senator yield again? Is the Senator impugning the integrity of Congressman GOSS, who was the leader of that organization, saying that he took partisanship past the water's edge? If the Senator has evidence——

The PRESIDING OFFICER. The Senator from Florida has the floor.

Mr. GRAHAM. I am not impugning anyone's integrity. I am suggesting that I believe that where the United States sends organizations to a foreign country to serve as objective election observers, that both in terms of their objectivity as election observers and in the spirit that partisan politics end at the Nation's boundaries, that it would be appropriate to defer observations on the election until after the election has taken place.

There is a suspicion raised that the purpose of issuing a report on an election 24 hours before it commences is to either influence the election in that country or to influence domestic politics within the United States. I do not think that the process of American political party involvement is advanced by issuing a report of 300 pages on the morning before the election. That is my judgment. I would not recommend that that be done. Others may have different assessments as to the propriety of doing so, and I would not state that my values on this are biblical or absolute, but they are my values.

Mr. President, after having gotten off the plane and responding to that series of reporters' questions, we then went to a series of sessions in which we were briefed as to what we might expect on election day and some of the preparation for this election.

Let me say, this election is one that originally was supposed to have taken place in February or March of this year, coincident with the completion of the term of all of the members of the lower house of the Haitian Parliament and approximately half of the members of the Haitian Senate. Because of a variety of difficulties in getting the election organized, it was postponed several times and finally took place last Sunday.

There will be a runoff election towards the end of July in those races where there was not a majority of the vote secured by any candidate.

I think it is important—and I say this not in an attempt to create an unduly positive sense of the atmosphere, environment, but the reality of conducting an election in Haiti.

First, you are dealing with a nation that has a very high proportion of its population that is illiterate. Because of that, the ballots that were printed were some of the more complex ballots that I have ever seen. They were multicolored, in order to depict the parties by being able to fully illustrate the party symbols. If it was a rooster, it was a red rooster, with all of the coloration of the rooster. They also had pictures of all of the candidates for the Senate. And in the first voting precinct that I visited in Cite Soleil, one of the large slum areas in Port-au-Prince, there were 29 candidates for the Senate from that particular district, two of whom would be elected. There were 29 pictures of each of those candidates for the Senate. These are logistically difficult steps to take in order to assure that people, many of whom cannot read and write, would be able to cast an informed ballot.

We are also dealing with a country which has had only two elections within a whole generation. People do not have much experience—those people who are running the election, those people who are participating in the election. Basic electoral infrastructure is largely missing. Highways are extremely substandard. Telephone and other means of communication are often nonexistent.

So those are some of the practical circumstances under which an election was held. Many of the shortcomings which were cited by the Senator from Arizona and the Senator from Georgia were the result of an attempt to increase the democracy of the elections. They may have been attempts which exceeded the capability of those responsible for administering the election. As an example, a decision was made that no precinct would have more than 400 registered voters. The theory was that they did not want to overburden the people who were at the precinct and had the responsibility for managing by having an excessive number of voters at each precinct. The number 400 was selected as a manageable number.

The problem with that was that they ended up with over 12,000 precincts in order to have everybody in a precinct with no precinct more than 400. Even more than that, because of the attempt to allow as many people a chance to register as possible, registration did not close until a few days before last Sunday's election. So you had many people who registered late, who were assigned to one of these precincts with no more than 400 people, where they did not have the time or the logistical capability to get the ballots printed out to those precincts that were created in order to accommodate the late registrants. Probably, in retrospect—and maybe this will be a lesson to be applied at the runoff election next month and at the Presidential election at the end of the year—they will close the registration books earlier to assure that there is an adequate amount of time to process all of the registered people and get the materials to those precincts.

That is an example of the kind of circumstance which started from a good motive, to get as many people registered and participate as possible, which ended causing the kinds of problems that have been cited.

I talked to IRI—International Republican Institute—people who were actually out in the field in the precincts and small towns. I talked to OAS representatives in Port-au-Prince, and to others who were observing the election. I asked, "Is there any evidence that these problems were intended to benefit a party or a set of candidates?" The answer was, from all sources, "no." The problems, the shortfalls, were as a

result of incompetence, maybe an overreaching in terms of the desire to extend the election to all of the people, and to the kind of basic circumstances that are the atmosphere, the environment for any election in a country like Haiti. But there was no evidence that those were intended to serve partisan political advantage.

As some have said, we are going to have an early opportunity to see whether some of the lessons learned last Sunday will be applied, because there are going to be a second round of elections in just a matter of 4 weeks. It will be the opportunity for those responsible for the electoral process to incorporate some of those lessons that have been learned, in seeing that the next round of elections are more orderly.

Let me just recite some of the vignettes that stick in my mind of this election. In 1987, there were elections scheduled in Haiti, and as people lined up at 6 o'clock in the morning to vote, the Tontons Macoutes came by with machine guns and slaughtered people in the voting lines. You would think that kind of circumstance that occurred less than a decade ago would create a sense of anxiety and apprehension for people to go out and vote on a Sunday morning in 1995. That was not the case. People were, in fact, joyful in their attitudes. They were enthusiastic about the opportunity to vote. At 6 o'clock in the morning in Cite Soleil—the same place people were being shot down 8 years ago—40 people were standing in line waiting to be able to be the first to vote at that particular precinct. It was an exciting exhilarating experience to see people who wanted so much to participate in democracy.

I was particularly impressed with the number of young people. I just read an article about the low participation in American elections by our youngest voters. In Haiti, the youngest voters seem to be the most participating. I made a point, through a translator, of asking a number of these young people why they were doing this. Why was this 18-year-old out on a Sunday morning standing in line to vote? The answer was, "This is my country, this is my future. It is important to me and my country that democracy work."

That is exactly the kind of spirit that will drive this country into a better future, the kind of spirit that will begin to eradicate those circumstances that have made holding an election in June 1995 so difficult.

So, Mr. President, as I said, I will be submitting a fuller report at a later time, but I wanted to put in context what is happening in this country. I do not intend to be naive or Pollyannaish about the difficulties, including the difficulties of this election. But I believe that we, as Americans, can take pride in what we have accomplished, taking a country which a year ago was under one of the most brutal dictatorships in modern history in the Western Hemisphere, where bodies where showing up every morning butchered as a result of the previous night's brutality by agents of a military dictatorship; and now we have people standing upright, prideful of their country, optimistic of their personal future, desirous of being a part of the future of their nation and seeing democracy as the means by which that future would be achieved.

I think we should take some pride in that and that we will be able to look back, I hope, at this experience last Sunday as an important step in what will be a long path toward the emergence of Haiti as a fully committed, operative democracy with an economy that provides opportunity and a future for its people and a government which respects the rights and dignity of each individual citizen of Haiti.

(Ms. SNOWE assumed the chair.)

Mr. DODD. If my colleague will yield. Madam President, I want to commend our colleague from Florida, who took the time, once again, as he has on numerous other occasions, to personally participate and observe routine, watching the elections in Haiti.

Senator GRAHAM of Florida has a consistent and longstanding interest in Haiti, and I think it is worth our while. We anticipate and await a more detailed report.

I was particularly interested in hearing your firsthand accounts of what actually occurred this past weekend, with all of the shortcomings that occurred.

I read with some interest the departure statement of the U.S. Presidential delegation who observed the Haitian elections and the number of places that the delegation—some 300 polling sites—observed complicated balloting procedures involving elections for more than 2,100 legislative, mayoral and local council offices, 25 political parties, and it goes on how complicated this process was.

The delegation notes here that:

Despite repeated misunderstandings over the actions of election officials at all levels, the delegation saw little evidence of any effort to favor a single political party or of an organized attempt to intentionally subvert the electoral machinery. At many points, the Provisional Electoral Council's actions and public statements raised questions about the credibility of the process. The most significant of the problems was the failure to explain the reasons candidates were rejected. Political parties raised these and other concerns relating to the transparency of the elections in their contacts within the delegation.

It goes on. I think it points out the success of this delegation.

Last, Mr. President, in the Miami Herald, Monday, June 26, edition, "Haiti: Ballots, Not Bullets." I think it is a worthwhile headline to note, Ballots Not Bullets.

Historic vote is mostly free of violence. Democracy scored a fragile victory Sunday as Haitians trooped to the polls under a blazing sun and a cloud of confusion to vote on all but 10 of the country's 2,205 elected offices.

I ask unanimous consent to have the article printed in the RECORD.

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

HAITI: BALLOTS, NOT BULLETS

(By Don Bohning and Susan Benesch)

PORT-AU-PRINCE.—Democracy scored a fragile victory Sunday as Haitians trooped to the polls under a blazing sun and a cloud of confusion to vote on all but 10 of the country's 2,205 elected offices.

Perhaps most important, the election was virtually free of the violence that marred previous ones.

Sunday's was the first and most complicated of three crucial electoral tests in the wake of the U.S.-led military intervention in September that restored President Jean-Bertrand Aristide to office after three years of exile.

The next test comes July 23, with a runoff for Senate and Chamber of Deputies candidates who did not win a majority in Sunday's balloting. All 83 seats in the lower house and 18 in the 27-seat Senate were contested.

Both Sunday's vote and the July 23 runoff are curtain-raisers for year-end presidential elections.

"We're voting for democracy to advance," pronounced a smiling Aristide after voting near his residence on the outskirts of Port-au-Prince.

Dressed in blue jeans and a white polo shirt with green trim, the diminutive Aristide, buried in a phalanx of security officials and aides, walked the half-mile from his home to the polling station at the St. John Paul II church and school complex.

Aristide emerged 15 minutes later, showing a crowd of journalists and admirers his thumb coated in indelible ink, a sign he had voted.

A far greater problem than the few scattered and mostly minor incidents of violence across the country, were the almost universal complaints of snafus at the 10,000 polling stations.

Many polling places opened late, some by several hours. In others, ballots and other voting materials were missing. In some cases, so were poll workers. Transportation was a problem, with all but official and public vehicles banned from the streets. The ban also applied to all commercial airline flights.

For the most part, Haitians waited patiently outside polling stations as electoral officials scurried to correct the deficiencies.

With about 80 percent of Haitians illiterate, many voters struggled to decipher a multitude of party symbols on the ballots. Independent candidates were identified with a Haitian flag. Voters also got help from election officials in marking their ballots and depositing them correctly.

Electoral officials estimated that about 90 percent of eligible Haitians—3.5 million—had registered to vote. There were no immediate figures available of how many actually voted, but turnout appeared to be heavy, although not equal to that of the December 1990 election that swept Aristide to office.

Results for the local, district and the first round of parliamentary elections are not expected for at least a week, because the ballots have to be counted by hand.

FOREIGN ASSESSMENT

The tentative assessment was that Sunday's vote probably met at least the minimum standards for a credible election. A final verdict is expected today, when up to 1,000 foreign observers offer their assessment. And it's likely that even they might not agree.

"There were the kind of administrative problems we anticipated, but Haitians as a whole voted without intimidation or fraud in the electoral process," said a Clinton administration official participating in the 20-member U.S. presidential delegation witnessing the vote.

"I have been in many African countries for elections and they are doing very well here," was the midmorning assessment of Sen. Jacques Goillet, member of a French parliamentary observer delegation.

POSITIVE SIDE

While the credibility of the election may be debated, on the clearly positive side there were no reports of major election day violence.

The most serious incidents of election-related violence occurred overnight Friday in the northern areas of Limbe, Le Bourgne and Dondon. Sunday's vote was called off in all three places, with the expectation it would be rescheduled in conjunction with the July 23 runoff.

In Limbe, somebody threw a firebomb into the electoral offices, destroying thousands of ballots. In neighboring Dondon, election officials decided to shut down to prevent problems. And in Le Bourgne, a mob attacked the electoral offices, stealing seven boxes of election materials. They were later recovered but in unusable condition.

There seems to be little doubt the election violence was held to a minimum by 6,000 foreign troops—including 2,400 Americans—remaining here as part of a United Nations force. Along with about 1,000 international police monitors, they were deployed nationwide.

Florida Sen. Bob Graham, observing the vote, said he was "pleased by what I have seen so far."

Almost to a voter, Haitians in line in Cite Soleil, a Port-au-Prince slum, said they were voting for the candidates of the ticket known as The Table, who are favored by Aristide.

Mr. DODD. I want to commend my colleague for his efforts and for sharing his observations here. This was not perfect by any standards. Given what we have seen over the years here, this does offer at least some significant hope—that the comments you heard from young people about what they wish for, why they were going through the process of voting, is something that we can get behind and nourish and try to encourage in the coming years.

I thank my colleague for his efforts.

Mr. McCAIN. Madam President, while my friend from Florida is on the floor, International Republican Institute has similar preelection reports from Nicaragua, China, El Salvador, Slovenia, just to name a few. The National Democratic Institute has issued preelection reports in the course of their monitoring of elections.

For the Senator from Florida to somehow believe that this is an unusual or inappropriate measure is simply, I think, incorrect, in light of the fact that it is a normal, standard procedure for electoral observation teams to make these reports.

I will be glad to provide for the RECORD all those that the National Democratic Institute also completed.

Because this report was very critical in no means, in my view, invalidates it. I would like to point out I know that the Senator from Florida knows that Congressman GOSS, of all people, is highly qualified. He is a former member of the CIA—I think the only member of the other body that is a member of the CIA.

I would say to my friend from Florida, at no time, in 4 years of observing 48 elections, has the International Republican Institute or the National Democratic Institute, been challenged on the basis of party bias. If they did, if there was any of that, they would have no credibility.

While we are looking at newspapers, here is a picture at a counting station in downtown Port-au-Prince. "Monique Georges reacts to the state of ballot boxes deposited by angry election workers who said they had not been paid."

The Washington Post reports:

Parties and election observers across the political spectrum—from the government of President Jean-Bertrand Aristide—today criticized as chaotic and disorderly elections Sunday that were considered a key step in establishing democracy in this impoverished nation.

To be fair I should go on:

But most said the disarray did not invalidate the voting, and even the Republican observer team said the irregularities were not enough to prompt a cutoff of U.S. aid.

Nor am I seeking a cutoff of U.S. aid.

"The process is very badly organized, and we, the government, are not proud of it," said Jean-Claude Bajeaux, the Minister of Culture, in a radio interview. "Instead of improving on the 1990 elections, we have done worse."

Now, this is the Minister of Culture in Haiti.

Madam President, we are wasting the time of the Senate in a way, because the facts are going to come out on this election. These are the first initial observations made by qualified observers, and I think more and more evidence is pouring in that this election did not meet the minimum standards in order to judge an election as fair and equitable and that the people are allowed to select their leadership.

I just want to emphasize, Madam President, that this election was observed by unbiased observers. I will provide for the RECORD the names of those individuals who made the observations.

There being no objection, the ordered printed in the RECORD, as follows:

OBSERVATION DELEGATION

CHAIRMAN OF THE DELEGATION:

U.S. Representative Porter J. Goss: Congressman Goss (R-FL) is serving his fourth term in the House. He has a particular interest in Latin American policies and served as an election observer to the 1990 electoral process in Nicaragua. Congressman Goss is a member of the Select Committee on Intelligence, the House Ethics Committee, and the House Rules Committee.

DELEGATION (IN ALPHABETICAL ORDER)

Cleveland Benedict: Mr. Benedict represented the Second District of West Virginia in the U.S. House of Representatives from 1980–1982, and he has served as the state Commissioner of Agriculture, as well as a Deputy Assistant Secretary of the U.S. Department of Agriculture. He is the President of Ben Buck Farms in Lewisburg, West Virginia.

Jeff Brown: Mr. Brown is Director of Grassroots Development with the Republican Party of Virginia. Prior to joining the state Party, he served in Governor Allen's Administration as Director of the Commission on Citizen Empowerment and was with Empower America.

Malik M. Chaka: Mr. Chaka is the Director of Information for Free Angola Information Service in Washington, D.C., and editor of Angola Update, an internationally distributed monthly newspaper. As a Tanzanian-based free lance journalists in the 1970's, Mr. Chaka has observed the advance of democratic processes in southern Africa.

George Dalley: Mr. Dalley is a partner with the Washington, D.C. law firm of Holland and Knight. He is a former Counsel and Staff Director to Congressman Charles Rangel (D-NY) and was a Deputy Assistant Secretary of State in the Carter Administration.

Mary Dunea: Ms. Dunea is Assistant to Governor Jim Edgar of Illinois. She directs cultural and international initiatives for Governor Edgar and serves as his liaison with groups involved in developing international trade.

George A. Fauriol, Ph.D.: Dr. Fauriol is Director and Senior Fellow, American Programs with the Center for Strategic & International Studies in Washington, D.C. At CSIS, he directs the program in engaging policy makers in Canada, the United States, Mexico, Latin American and the Caribbean in pivotal issues of common concern, such as trade, democratization, and security matters.

Ronald Fuller: The owner of an advertising and public relations firm in Little Rock, Arkansas, Mr. Fuller serves as a consultant on governmental and media relations to businesses, trade associations, and political candidates. He served as a communications and political party trainer on an IRI mission to Latvia and Lithuania.

Rich Garon: Mr. Garon is Chief of Staff of the U.S. House of Representatives Committee on International Relations. He is a longtime assistant to Committee Chairman Ben Gilman (R-NY) and has extensive experience in developing foreign policy legislation.

Kevin T. Lamb: Mr. Lamb is a partner and chair of the creditors' rights, business restructuring, and bankruptcy practice group at Testa, Hurwitz & Thibeault in Boston, Massachusetts. Mr. Lamb represents major lending institutions and venture capital funds in corporate reorganization and workout arrangements.

Kirsten Madison: Ms. Madison is Senior Legislative Assistant to U.S. Representative Porter Goss (R-FL). She manages the Congressman's initiatives regarding U.S. policy toward Haiti, as well as has oversight responsibilities involving other foreign policy legislation.

Roger Noriega: Mr. Noriega is a professional staff member on the U.S. House of

Representatives International Relations Committee, responsible for issues involving U.S. interests in Latin America, the Caribbean, and Canada. He has actively monitored the situation in Haiti since the 1991 coup and has visited Haiti twice in the last six months and met with President Aristide. Before joining the House committee, he served at the State Department, the Agency for International Development, and the Organization of American States.

Martin Poblete: Professor Poblete is the permanent adviser on Latin American Affairs at the Northeast Hispanic Catholic Center in New York. He is also Chairman of Columbia University Seminar on Latin America and a Professor of History at Rutgers University.

Steve Rademaker: Mr. Rademaker is Chief Counsel of the Committee on International Relations of the U.S. House of Representatives. Prior to joining the committee staff in 1993, he had served as General Counsel for the Peace Corps and Associate Counsel to the President and Deputy Legal Adviser to the National Security Council during the Bush Administration.

Therese M. Shaheen: Ms. Shaheen, who has wide-ranging experience working in Asia, the Middle East, and Europe, is President, Chief Operating Officer and Co-founder of U.S. Asia Commercial Development Corporation in Washington, D.C. U.S. Asia develops and manages commercial projects for American firms in Asia.

Tim Stadthaus: Mr. Stadthaus is Legislative Assistant and Assistant Press Secretary to U.S. Representative William F. Goodling (R–PA). He monitors foreign relations matters and oversees related legislation initiated by Congressman Goodling, who is a member of the House International Relations Committee.

John Tierney Ph.D.: Dr. Tierney is a member of the faculty at Catholic University in Washington, D.C. and also teaches at the University of Virginia and Johns Hopkins. He has served as Director of the U.S. House of Representatives Caucus on National Defense, as a consult to the Heritage Foundation, and as a Special Assistant with the U.S. Arms Control and Disarmament Agency during the Reagan Administration.

Jacqueline Tillman: Ms. Tillman is Senior Staffer for National Security Affairs and Director of Issue Advocacy for Empower America in Washington, D.C. Before joining Empower America, she was Executive Vice President of the Cuban American National Foundation, Director of Latin America policy with the National Security Council during the Reagan Administration and an assistant to U.S. Ambassador to the United Nations Jeane Kirkpatrick.

Mr. MCCAIN. People can honestly disagree on what they observed. But to allege that somehow agreement or disagreement with administration policy concerning Haiti would somehow affect one's view of this election, I think, does great disservice to the people what took their time and their effort.

The Senator from Florida certainly knows how unpleasant the conditions are down there. They may disagree with the Senator from Florida as to the veracity of the elections, but I cannot, without any evidence, accept any allegation that the observation of these elections and the conclusions that were reached by these observers were in any way colored by their view of United States policy toward Haiti.

I am sure that my friend from Florida would not intimate such a thing. I want to make the record clear and I want to thank the Senator from Florida for his many-year-long involvement in the issue of Haiti, for his strong advocacy for freedom and democracy in Haiti, and his continued knowledgeable and informative manner as far as the region is concerned. I yield the floor.

PRIVATE SECURITIES LITIGATION REFORM ACT

The Senate continued with the consideration of the bill.

Mr. D'AMATO. Madam President, I know the distinguished Senator from Florida, Senator GRAHAM, is about to offer an amendment.

It would be my intent when the ranking member returns, Senator SARBANES, to offer a unanimous-consent agreement, the nature of which is we would have 1 hour equally divided on Senator GRAHAM's amendment, and we then would proceed to Senator BOXER's amendment.

I see Senator SARBANES is here. I yield the floor to Senator GRAHAM so he can start and offer his amendment, and at some point in time he might break to propound the unanimous-consent agreement.

Mr. GRAHAM. Could I ask the Senator from New York a question? Your unanimous consent—are you going to provide some time in the morning prior to the vote for a brief statement for those who may not be able——

Mr. D'AMATO. It would be our intent to vote this evening, probably by about 8 o'clock.

Mr. GRAHAM. I am sorry. From earlier comments, I understood it was suggested otherwise.

Mr. D'AMATO. We had attempted to get an agreement to stack the votes, but there was an objection to stacking more than a certain number. It is my intent to dispose of the Senator's amendment prior to disposing of the Boxer amendment.

May I ask at this point unanimous consent that when the Senate considers the Graham amendment, there be 1 hour for debate, to be equally divided in the usual form, and no second-degree amendments be in order.

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

Mr. D'AMATO. Madam President, I further ask that following the conclusion or yielding back of the time on the Graham amendment, that the amendment be laid aside and Senator BOXER be recognized to offer an amendment regarding insider trading, on which there would be 90 minutes for debate to be equally divided in the usual form, and no second-degree amendments to be in order.

Mr. SARBANES. Madam President, I will have to object to that request.

The PRESIDING OFFICER. Does the Senator object? Objection is heard.

Mr. D'AMATO. Well, then, we proceed to the Graham amendment.

The PRESIDING OFFICER. The Senator from Florida.

AMENDMENT NO. 1479

(Purpose: To provide for an early evaluation procedure in securities class actions)

Mr. GRAHAM. Madam President, before I offer my amendment, I would like to make a few comments relative to this legislation. When I approach a piece of legislation, I like to do so by asking some basic questions, the first of which is: What is the problem? What is it that we do not like about the status quo that has caused us to propose some alteration of the status quo?

In this case, that diagnosis has been very consistent, clear, and trumpeting, and it is that we have too many frivolous lawsuits that relate to securities fraud.

I cite as my evidence of that an ad which appeared on page A7 of today's Washington Post, under the headlines, "Who Profits? 'A Coterie of Lawyers'."

This ad was in support of S. 240, and it was placed by "America Needs More Investors, Not More Lawsuits," under the sponsorship of American Business Conference and American Electronics Association.

What did the proponents of this legislation say was the reason that we have S. 240 before us this evening? Quoting from the ad:

> Specialized securities lawyers win big bucks by filing meritless lawsuits against many of America's most promising companies. The securities lawyers profit handsomely, but Americans with money in stocks, pensions and mutual funds are the losers in the deal.

This is what editorial writers across the Nation are saying about securities lawsuit abuse:

And then the ad quotes a number of newspapers which have taken a position in support of this legislation. It happens that the first of those newspapers is from my State, the Tampa Tribune, June 25, 1995:

> The situation now is that all investors are paying the costs of settling lawsuits that should never have been filed. . . . [T]he time has come to pull the legal leeches off the backs of corporations that have done no wrong.

That is from the Tampa Tribune.

The next is from the Rocky Mountain News:

> . . . the nogoodniks suffer at the same rate as the straight-shooters. Meanwhile, who profits? A coterie of lawyers with stock charts and fill-in-the-blanks fraud complaints.

That is the January 18, 1995, Rocky Mountain News.

The Chicago Tribune of March 29 of this year:

> . . . groundless lawsuits by shareholders alleging fraud . . . are often merely a way of extorting settlements from corporations whose stock prices have dropped.

Madam President, I ask unanimous consent the totality of the ad from today's Washington Post be printed in the RECORD immediately following my remarks.

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

(See exhibit 1.)

Mr. GRAHAM. Madam President, that is the stated problem: Frivolous, meritless lawsuits. But what do we have? Is that the prescription that has come out in S. 240? Is it legislation which is targeted at eradicating the tumor of meritless lawsuits? Unfortunately not.

If I may quote from another newspaper, the Miami Herald of yesterday, which stated, under the headline, "License to steal":

Practically everyone in Washington, to some degree or other, has blamed "frivolous or abusive lawsuits" for sapping America's economic vigor. And judging from anecdotes, the complaint has some merit. But more often than not, the proposed cures turn out to be far more debilitating than the disease. A perfect illustration is a bill moving through Congress that supposedly protects the securities industry from "frivolous" suits by investors.

The bill may come to a Senate vote today. It would bar, among many other things, charges of fraud against those who make false projections of a company's likely performance. By granting "safe harbor" to all statements of a "forward-looking" nature, it essentially tells companies and brokers: Go ahead, lie about the future. As long as you're not misrepresenting the past, you can fleece investors in any way that your imagination allows.

Madam President, I ask unanimous consent the editorial from the June 26, 1995, Miami Herald also be printed in the RECORD immediately after my remarks.

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

(See exhibit 2.)

Mr. GRAHAM. What I think has happened, Madam President, is we had a goal to eliminate frivolous lawsuits which could have been hit easily with a .22 rifle. We have now used a howitzer, which has cratered in a large area of the legitimate rights of American investors when they are subjected to abusive and to fraudulent activities. We have created a situation in which it is going to be much more difficult to maintain any kind of suit, serious or frivolous, where fraud is alleged. We have shortened the statute of limitations. We have provided protection for those who assisted in the fraudulent behavior of the principals. We have created a circumstance of a conflict of interest by designating the largest investor in the company as the principal plaintiff in these types of cases. These are just some of the things that have happened, all under the pretext that we are going to be dealing with frivolous lawsuits.

I suggest that there are serious consequences of this type of legislation, and what it is likely to lead to for the American free enterprise system. It was only 100 years ago that we had a very predatory form of free enterprise in the United States. We had large companies using their power in an abusive way to squelch small competitors, to gain monopolistic economic control. We had extreme swings in our business cycle, in large part attributed to that predatory behavior. We had the growth of populism and other forms of political dissent, as farmers and workers felt as if they were being the targets of this predatory behavior.

The free enterprise system in America was in a very precarious condition. Free enterprise has flourished in America when people felt that the rules of free enterprise were fair and that everyone was going to be treated equally, that people could invest in firms—not without risk; that is the nature of the marketplace. But at least they were going to be treated with some discretion and some level of an equal playing field.

I am afraid that legislation such as S. 240—which is going to be seen as, and I believe will in fact result in, a tilting of the economic playing field toward those who would be inclined to wish to abuse it and to use it for their own fraudulent purposes—will undermine that essential confidence of the American people in their economic institutions.

So, with that, Madam President, I have an amendment that I would like to propose. It is an amendment which I will send to the desk which actually goes directly at the issue of frivolous lawsuits.

Madam President, I send the amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Florida [Mr. GRAHAM] proposes an amendment numbered 1479.

Mr. GRAHAM. Madam President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 104, after line 22, insert the following:

(c) EARLY EVALUATION PROCEDURES.—

(1) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following new subsection:

"(j) EARLY EVALUATION PROCEDURES IN CLASS ACTIONS.—

"(1) IN GENERAL.—In a private action arising under this title that is filed as a class action pursuant to the Federal Rules of Civil Procedure, if the class representatives and each of the other parties to the action agree and any party so requests, or if the court upon motion of any party so decides, not later than 60 days after the filing of the class action, the court shall order an early evaluation procedure. The period of the early evaluation procedure shall not extend beyond 150 days after the filing of the first complaint subject to the procedure.

"(2) REQUIREMENTS.—During the early evaluation procedure described under paragraph (1)—

"(A) defendants shall not be required to answer or otherwise respond to any complaint;

"(B) plaintiffs may file a consolidated or amended complaint at any time and may dismiss the action or actions at any time without sanction;

"(C) unless otherwise ordered by the court, no formal discovery shall occur, except that parties may propound discovery requests to third parties to preserve evidence;

"(D) the parties shall evaluate the merits of the action under the supervision of a person (hereafter in this section referred to as the 'mediator') agreed upon by them or designated by the court in the absence of agreement, which person may be another district court judge, any magistrate-judge or a special master, each side having one peremptory challenge of a mediator designated by the court by filing a written notice of challenge not later than 5 days after receipt of an order designating the mediator;

"(E) the parties shall promptly provide access to or exchange all nonprivileged documents relating to the allegations in the complaint or complaints, and any documents withheld on the grounds of privilege shall be sufficiently identified so as to permit the mediator to determine if they are, in fact, privileged; and

"(F) the parties shall exchange damage studies and such other expert reports as may be helpful to an evaluation of the action on the merits, which materials shall be treated as prepared and used in the context of settlement negotiations.

"(3) FAILURE TO PRODUCE DOCUMENTS.—Any party that fails to produce documents relevant to the allegations of the complaint or complaints during the early evaluation procedure described in paragraph (1) may be sanctioned by the court pursuant to the Federal Rules of Civil Procedure. Notwithstanding paragraph (2), subject to review by the court, the mediator may order the production of evidence by any party and, to the extent necessary properly to evaluate the case, may permit discovery of nonparties and depositions of parties for good cause shown.

"(4) EVALUATION BY THE MEDIATOR.—

"(A) IN GENERAL.—If, at the end of the early evaluation procedure described in paragraph (1), the action has not been voluntarily dismissed or settled, the mediator shall evaluate the action as being—

"(i) clearly frivolous, such that it can only be further maintained in bad faith;

"(ii) clearly meritorious, such that it can only be further defended in bad faith; or

"(iii) described by neither clause (i) nor clause (ii).

"(B) WRITTEN EVALUATION.—An evaluation required by subparagraph (A) with respect to the claims against and defenses of each defendant shall be issued in writing not later than 10 days after the end of the early evaluation procedure and provided to the parties. The evaluation shall not be admissible in the action, and shall not be provided to the court until a motion for sanctions under paragraph (5) is timely filed.

"(5) MANDATORY SANCTIONS.—

"(A) CLEARLY FRIVOLOUS ACTIONS.—In an action that is evaluated by the mediator

under paragraph (4)(A)(i), upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of rule 11(b) of the Federal Rules of Civil Procedure.

"(B) MANDATORY SANCTIONS.—If the court makes a finding under subparagraph (A) that a party or attorney violated any requirement of rule 11(b) of the Federal Rules of Civil Procedure, the court shall impose sanctions on such party or attorney in accordance with rule 11 of the Federal Rules of Civil Procedure.

"(C) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS.—

"(i) IN GENERAL.—Subject to clauses (ii) and (iii), for purposes of subparagraph (B), the court shall adopt a presumption that the appropriate sanction for failure of the complaint to comply with any requirement of rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

"(ii) REBUTTAL EVIDENCE.—The presumption described in clause (i) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

"(I) the award of attorneys' fees and other expenses will impose an undue burden on that party or attorney; or

"(II) the violation of rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

"(iii) SANCTIONS.—If the party or attorney against whom sanctions are to be imposed meets its burden under clause (ii), the court shall award the sanctions that the court deems appropriate pursuant to rule 11 of the Federal Rules of Civil Procedure.

"(6) EXTENSION OF EARLY EVALUATION PERIOD.—The period of the early evaluation procedure described in paragraph (1) may be extended by stipulation of all parties. At the conclusion of the period, the action shall proceed in accordance with Federal Rules of Civil Procedure.

"(7) FEES.—In a private action described in paragraph (1), each side shall bear equally the reasonable fees and expenses of the mediator agreed upon or designated under paragraph (2)(D), if the mediator is not a judicial officer.".

(2) SECURITIES EXCHANGE ACT OF 1934—Section 21 of the Securities Act of 1933 (15 U.S.C. 78a) is amended by adding at the end the following new subsection:

"(l) EARLY EVALUATION PROCEDURES IN CLASS ACTIONS.—

"(1) IN GENERAL.—In any private action arising under this title that is filed as a class action pursuant to the Federal Rules of Civil Procedure, if the class representatives and each of the other parties to the action agree and any party so requests, or if the court upon motion of any party so decides, not later than 60 days after the filing of the class action, the court shall order an early evaluation procedure. The period of the early evaluation procedure shall not extend beyond 150 days after the filing of the first complaint subject to the procedure.

"(2) REQUIREMENTS.—During the early evaluation procedure described under paragraph (1)—

"(A) defendants shall not be required to answer or otherwise respond to any complaint;

"(B) plaintiffs may file a consolidated or amended complaint at any time and may dismiss the action or actions at any time without sanction;

"(C) unless otherwise ordered by the court, no formal discovery shall occur, except that parties may propound discovery requests to third parties to preserve evidence;

"(D) the parties shall evaluate the merits of the action under the supervision of a person (hereafter in this section referred to as the 'mediator') agreed upon by them or designated by the court in the absence of agreement, which person may be another district court judge, any magistrate-judge or a special master, each side having one peremptory challenge of a mediator designated by the court by filing a written notice of challenge not later than 5 days after receipt of an order designating the mediator;

"(E) the parties shall promptly provide access to or exchange all nonprivileged documents relating to the allegations in the complaint or complaints, and any documents withheld on the grounds of privilege shall be sufficiently identified so as to permit the mediator to determine if they are, in fact, privileged; and

"(F) the parties shall exchange damage studies and such other expert reports as may be helpful to an evaluation of the action on the merits, which materials shall be treated as prepared and used in the context of settlement negotiations.

"(3) FAILURE TO PRODUCE DOCUMENTS.—Any party that fails to produce documents relevant to the allegations of the complaint or complaints during the early evaluation procedure described in paragraph (1) may be sanctioned by the court pursuant to the Federal Rules of Civil Procedure. Notwithstanding paragraph (2), subject to review by the court, the mediator may order the production of evidence by any party and, to the extent necessary properly to evaluate the case, may permit discovery of nonparties and depositions of parties for good cause shown.

"(4) EVALUATION BY THE MEDIATOR.—

"(A) IN GENERAL.—If, at the end of the early evaluation procedure described in paragraph (1), the action has not been voluntarily dismissed or settled, the mediator shall evaluate the action as being—

"(i) clearly frivolous, such that it can only be further maintained in bad faith;

"(ii) clearly meritorious, such that it can only be further defended in bad faith; or

"(iii) described by neither clause (i) nor clause (ii).

"(B) WRITTEN EVALUATION.—An evaluation required by subparagraph (A) with respect to the claims against and defenses of each defendant shall be issued in writing not later than 10 days after the end of the early evaluation procedure and provided to the parties. The evaluation shall not be admissible in the action, and shall not be provided to the court until a motion for sanctions under paragraph (5) is timely filed.

"(5) MANDATORY SANCTIONS.—

"(A) CLEARLY FRIVOLOUS ACTIONS.—In an action that is evaluated under paragraph (4)(A)(i) in which final judgment is entered against the plaintiff, the plaintiff or plaintiff's counsel shall be liable to the defendant for sanctions as awarded by the court, which may include an order to pay reasonable attorneys' fees and other expenses, if the court agrees, based on the entire record, that the action was clearly frivolous when filed and was maintained in bad faith.

"(B) CLEARLY MERITORIOUS ACTIONS.—In an action that is evaluated under paragraph (4)(A)(ii) in which final judgment is entered against the defendant, the defendant or defendant's counsel shall be liable to the plaintiff for sanctions as awarded by the court, which may include an order to pay reasonable attorneys' fees and other expenses, if the court agrees, based on the entire record, that the action was clearly meritorious and was defended in bad faith.

"(6) EXTENSION OF EARLY EVALUATION PERIOD.—The period of the early evaluation procedure described in paragraph (1) may be extended by stipulation of all parties. At the conclusion of the period, the action shall proceed in accordance with Federal Rules of Civil Procedure.

"(7) FEES.—In a private action described in paragraph (1), each side shall bear equally the reasonable fees and expenses of the mediator agreed upon or designated under paragraph (2)(D), if the mediator is not a judicial officer.".

On page 105, line 5, strike "(j)" and insert "(i)".

On page 106, line 25, strike "(l)" and insert "(k)".

On page 108, line 24, strike "(k)" and insert "(j)".

On page 109, line 8, strike "(l)" and insert "(k)".

On page 126, line 19, strike "(m)" and insert "(l)".

On page 127, line 6, strike "(m)" and insert "(l)".

Mr. GRAHAM. Madam President, the time I just used should be counted against the time which I was afforded to debate this matter.

Madam President, the amendment that I send to the desk I do not purport to be original.

It is in fact a version of what appeared in S. 240 as it was originally filed. It also draws heavily on language that was contained in the Bryan-Shelby bill, S. 667. What it attempts to do is to provide an early evaluation procedure for litigation filed either under the 1933 Securities Act, or the 1934 Securities Act. It would provide that on the motion of the parties, or by the motion of the court before whom the case has been filed, that there can be an independent mediator designated. That mediator would have the responsibility of reviewing all of the facts of the litigation. After that review, the mediator would submit a report. That report would contain a finding that the litigation was either one of three categories. It was either a clearly frivolous action; second, a clearly meritorious action; or, third, was neither.

If the parties in the face of that determination proceed with litigation, at the conclusion of the litigation, that report is submitted to the judge. And in the case under the 1934 act, for instance, where the report has found that this was a clearly frivolous action, and if the final judgment is entered against the plaintiff—that is, the plaintiff proceeded forward to full litigation in spite of the fact that there had been an early evaluation that this was a clearly frivolous action, and the plaintiff had in fact had the final judgment entered against the plaintiff—then the plaintiff or the plaintiff's counsel shall be liable to defendant for sanctions as awarded by the court, which may include an order to pay reasonable attorney's fees

and other expenses, if the court agrees based on the entire record that the action was clearly frivolous when filed and was maintained in bad faith.

Madam President, if, on the other hand, this report of the early evaluation found that this was a clearly meritorious action, and the defendant carried it through to final judgment, and final judgment was entered against the defendant, then the defendant, or the defendant's counsel, shall be liable to the plaintiff for the sanctions awarded by the court which may include reasonable attorney's fees and other expenses; if the court agrees based on the entire record that the action was clearly meritorious and was defended in bad faith.

Madam President, that is what we are trying to do here. We are trying to create some effective sanctions against people bringing frivolous lawsuits. We are attempting to set up a procedure that will facilitate the delineation and early determination of the frivolous from the nonfrivolous and meritorious cases. It is hoped with that early determination the parties against whom this report is entered will not pursue it further, or, in the case of the defendant, that they will settle the case without the necessity of prolonged and expensive litigation.

Is not that what we are here for? We have identified the problem as being frivolous lawsuits. Why do we not solve the problem of frivolous lawsuits and not allow that problem to become a Trojan horse into which we load a lot of other issues, of shortening statute of limitations, creating conflicts of interest by designating only the most affluent investor as the lead plaintiff, giving really quite unwarranted protection to persons who make projections about the future with knowledge that those projections are false, giving increased sanction and protection to aiders and abettors who have acted in a reckless manner that has resulted in investors of being defrauded? None of those things are relevant to the issue of frivolous lawsuits.

So, Madam President, I urge my colleagues to seriously consider this amendment which is submitted in an attempt to refocus our remedies on what has been general agreement to be the problem, which is frivolous lawsuits that do not advance the cause of justice that have the economic adverse effects that are recited by the proponents of S. 240.

So, Madam President, I will reserve the remainder of my time. But I urge a favorable consideration of this amendment by my colleagues.

Thank you.

EXHIBIT 1

Who Profits? "A Coterie of Lawyers"—Rocky Mountain News.

Specialized securities lawyers win big bucks by filing meritless lawsuits against many of America's most promising companies. The securities lawyers profit handsomely, but Americans with money in stocks, pensions and mutual funds are the losers in the deal.

This is what editorial writers across the nation are saying about securities lawsuit abuse:

"The situation now is that all investors are paying the costs of settling lawsuits that should never have been filed. . . . [T]he time has come to pull the legal leeches off the backs of corporations that have done no wrong."—Tampa Tribune, June 25, 1995.

". . . the nogoodniks suffer at the same rate as the straight-shooters. Meanwhile, who profits? A coterie of lawyers with stock charts and fill-in-the blanks fraud complaints."—Rocky Mountain News, January 18, 1995.

". . . groundless lawsuits by shareholders alleging fraud . . . are often merely a way of extorting settlements from corporations whose stock prices have dropped."—Chicago Tribune, March 29, 1995.

"Enactment of either [the House or Senate] bill would remove a serious blot on the legal system, which is supposed to settle real disputes, not provide a protection racket for a few lawyers."—Boston Sunday Herald, June 18, 1995.

"These frivolous lawsuits discredit the legal profession, distract companies from their main tasks, discourage or retard the development of new, cutting edge businesses and ultimately harm the interests of shareholders."—The Hartford Courant, April 11, 1994.

"The contemporary class action has created a class of entrepreneurial lawyers. The first beagle to the court house with a tame plaintiff in tow often gets to represent the class, and collect a 33%-50% fee. . . Then the members of the class receive small compensation . . ."—Barron's, June 5, 1995.

"The chief target of the reform legislation is a small group of lawyers who have made a venal industry of filing groundless securities-fraud lawsuits . . .

". . . the securities bill [S. 240] would go a long way toward curbing egregious abuse of the legal system. Such abuse is in effect a hidden tax that costs American jobs and discourages the entrepreneurial risk-taking that stimulates economic growth."—The News Tribune (Tacoma, Washington), June 10, 1995.

Legislation introduced in the Senate (S. 240) by Republican Pete Domenici and Democrat Chris Dodd will give control back to shareholders and really protect investors.

EXHIBIT 2

[From the Miami Herald]

LICENSE TO STEAL

Practically everyone in Washington, to some degree or other, has blamed "frivolous or abusive lawsuits" for sapping America's economic vigor. And judging from anecdotes, the complaint has some merit. But more often than not, the proposed cures turn out to be far more debilitating than the disease. A perfect illustration is a bill moving through Congress that supposedly protects the securities industry from "frivolous" suits by investors.

The bill may come to a Senate vote today. It would bar, among many other things, charges of fraud against those who make false projections of a company's likely performance. By granting "safe harbor" to all statements of a "forward-looking" nature, it essentially tells companies and brokers: Go ahead, lie about the future. As long as you're not misrepresenting the past, you can fleece investors in any way that your imagination allows.

Technically, investors still could sue in cases of egregious deceit. But they'd have only one year to do so, and they'd have to show evidence, up front, that the fraud was deliberate. Not even the Securities and Exchange Commission can prove willfulness that quickly.

The problem is that companies make plenty of rosy projections in good faith. Sometimes, when the promises don't pan out, frustrated (or merely opportunistic) investors try to sue. How common is that? Experts disagree.

But the Senate bill offers a curious solution: To prevent some unknown number of unfair securities-fraud lawsuits, let's *outlaw huge categories of them*. The genuine, fair ones will just have to go unpunished.

So sorry you're swindled, old chap. Better luck next time.

This is licensed larceny, and it's unconscionable. Yet Florida Sen. Connie Mack, a member of the Banking Committee, has cosponsored and voted for the bill so far. In the time since the committee review, Mr. Mack may have had a chance to ponder its ill consequences. He'd do well to vote No today and help slay this beast for good.

Recent history is replete with colorful illustrations of deliberate, systematic fraud on small investors. Their savings were replenished, if at all, only by the courts or by the threat of litigation. It's a strange moment indeed, with the sores of the savings-and-loan fiasco still raw, for Congress essentially to declare open season for deceiving investors.

It prompts an ironic question: How does it help American investment to scare off potential investors with a promise that the law *won't aid them* if they're bilked? The point of solving the "frivolous lawsuit" problem was supposed to be to encourage more investment. By that standard, the Senate's "Private Securities Litigation Reform Act" amounts to self-strangulation.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Madam President, the distinguished Senator from Florida is correct that the amendment he is now submitting has been the subject of intense scrutiny. Indeed, it was considered in the initial draft of this legislation. One of the reasons this proposal was rejected and dropped from the initial legislation was because it requires—and will wind up costing—too much. Also, this provision would set up an entirely new bureaucracy, by setting up an early evaluation procedure for class action lawsuits.

Although early evaluation may be a laudable concept, this amendment will force parties into an early evaluation procedure. The procedure requires parties to voluntarily turn over documents or be subject to sanctions. At the end of the evaluation, if the parties do not settle or dismiss the action, they can be sanctioned if any further action is considered frivolous. I believe that parties should attempt to mediate their claims, if possible, but they should not be forced to mediate claims if they really want to seek a day in court.

This is the balance that was reached. This Senator has never attempted to

keep people from having their day in court. This Senator stated that belief clearly for the record during debate on this provision and the loser pays provision when they were strongly urged by those in the private sector who sought relief. But I would not, and could not, support the losers-pays concept because, as laudable as that might sound, it would indeed infringe upon the basic rights of men to seek relief. It would just be too high a bar for those who have truly been aggrieved.

This amendment requires parties to submit to an early dispute resolution. If one of the parties, however, does not want this early procedure, then we have a very real problem. The early evaluation procedure would take place if each side agrees to it, or if either side wants it and the court acts upon such motion within 60 days of the filing the class action. I believe that this amendment goes too far in its attempt to resolve disputes. It actually sets up a standard where people would lose the ability to fight for their rights, whether they are the plaintiff or the defendant. I notice that Senator DODD is here and know that he has spent a great deal of time on this issue.

I yield the floor.

Mr. DODD addressed the Chair.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Madam President, let me first of all thank my colleague from Florida for giving me a call earlier today about what he was going to offer with this amendment.

Let me first of all, say that the spirit of this amendment, which I admit I like, in a way, has been offered as a part of the original bill alternative dispute resolution procedure to try to give litigants in securities matters an option of going a route rather than going into court to resolve their problems. We tried that on a number of bills. I go back 7 or 8 years ago in my efforts with then Senator Danforth of Missouri. We proposed some tort reform legislation that set up an alternative dispute resolution mechanism.

So there is a spirit to this amendment and I am attracted to that spirit. I say that at the outset. But let me also say that despite my attraction with the spirit of what is being offered, I see this as being a proposal which is going to complicate matters rather than help resolve them.

Under this amendment, as I understand it, any party that seeks a court order or an early evaluation—and if the court grants that order—an early evaluation might sound, and does sound very attractive, to Federal judges who are looking for a way to clear off their dockets, then you have the fishing process which can begin which I think runs counter to what we are trying to achieve even under an alternative dispute resolution, a modest one as we have in the bill.

Even if the complaint, Madam President, is clearly a matter—let us for the sake of argument assume that is the case—which would be dismissed and the case ended, when a motion to dismiss is decided, the plaintiff would get complete discovery prior to any ruling on the motion to dismiss. Now, that raises the issue of discovery and discovery costs. Of course, these are some of the principal forces and factors that cause innocent defendants to settle their cases.

In testimony before our committee, in hearings on this matter—and I am quoting from page 14 of our committee report:

> . . . discovery costs account for roughly 80 percent of the total litigation costs in securities fraud cases.

In many cases the discovery can work in determining the guilt of a party. So I am not arguing there should not be discovery, but here you are getting it completely even before you get to the process, even before the motion to dismiss.

One witness described the broad discovery requests requiring a company to produce over 1,500 boxes of documents at an expense of $1.4 million, referring to page 16 of our report.

What does all this mean, Madam President? Lawyers who can file meritless cases—and we have seen examples of that, cases that would be dismissed by the Court—will be able to circumvent the very important protection against unjustified claims that is provided by the motion to dismiss process.

Indeed, this amendment would expand attorneys' ability to coerce settlements, in my view to include a new category of cases—those that are by definition meritless and that would be dismissed by the court. Given all the evidence that these lawyers extract in settlements in unjustified cases, we cannot—in my view, should not—enact a provision that would expand their power to do so in meritless cases, and that would be the net effect were the amendment to be adopted.

So again, for one who is attracted very strongly to the alternative dispute resolution process, what you are getting here is something very different than that which raises the costs which provokes these kinds of settlements in meritless cases, and therefore, with all due respect to my good friend from Florida, I would urge the rejection of this amendment.

The PRESIDING OFFICER. Who yields time?

Mr. D'AMATO. Madam President, we have nothing further to say on this side, unless the Senator from Florida wishes to continue. Otherwise, we will put in a quorum call.

Mr. GRAHAM. 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. GRAHAM. Madam 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. I ask unanimous consent that the quorum call time be taken equally off both sides.

The PRESIDING OFFICER. Without objection, the time will be applied equally.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. I suggest the absence of a quorum.

Mr. SARBANES. Will the Senator withhold on that?

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. How much time remains?

The PRESIDING OFFICER. The Senator from Florida has 14½ minutes; the Senator from New York has 22 minutes and 32 seconds.

Mr. SARBANES. I thank the Chair.

Will the Senator from Florida give me just 2 minutes?

Mr. GRAHAM. The Senator from Florida yields such time as the Senator from Maryland would choose to use.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Madam President, I wish to say to the Senator from Florida that I think he has come up with a very imaginative proposal here. His proposal in fact really gets at the question of the frivolous suits. We have been hearing a lot of discussion here over the last couple of days about trying to get at frivolous suits.

When you look at the provisions that are being used in order to get at frivolous suits, you discover that they really encompass a great number of other things as well. As my colleague from Nevada, Senator BRYAN, said at one point during the debate, this is a Trojan horse riding beneath the pennant of the frivolous suit with all sorts of other menacing, dangerous things hidden in the Trojan horse.

I am interested that the proponents of this legislation are not responsive to the amendment of the Senator, which, of all the proposals I have seen, is the one that focuses on the frivolous suit and on the frivolous suit only, as I understand it.

I ask the Senator, is it, in fact, correct that the focus of the Senator's amendment is the frivolous suit and it does not go beyond that?

We have other things that are being done. People are being denied access to the courthouse. Aiders and abettors are being protected from any liability whatsoever. Joint and several liability is being done away with, all in the name of trying to get at the frivolous suit. It may have some implications for

the frivolous suit, but the unfortunate thing is it also has very significant implications for the meritorious suit.

As I understand the Senator's amendment, it is not subject to that criticism. This is the frivolous suit only.

Mr. GRAHAM. The purpose, I say to the Senator, is the difference between using a laser beam to precisely remove a tumor as opposed to amputation to remove the entire limb. I fear that what we have done in this legislation, Madam President, is to amputate the ability of most investors to bring a serious case of securities fraud. Whether it is frivolous, competitive, or highly meritorious, we have eliminated for many individuals the ability to have access to court, to have their claims adjudicated in all types of cases.

The purpose of this amendment was to be that laser that would identify those cases which in fact are, to use the amendment's term, clearly frivolous actions, and to provide some very stiff sanctions against persons who are found to have filed a clearly frivolous action but persist. If they lose that clearly frivolous action, which assumedly they are likely to do, then they face the prospect of paying not only their attorneys and their costs; they have to pay the defendant's attorneys and costs.

Conversely, if a clearly meritorious action is filed and the defendant persists in litigation to defend against that clearly meritorious action and the defendant loses, then the defendant is placed in the position of being subject to the sanction of having to pay not only his own costs but also the costs of the plaintiff.

This is not an attempt to apply a broadly based English standard of loser pays. This is an attempt to achieve the very purpose of this legislation, which is to discourage frivolous lawsuits by making the economic consequences of filing a frivolous lawsuit so onerous.

I thank my colleague for having asked that clarifying question.

Mr. SARBANES. As I understand it, the amendment of the Senator is balanced. There has been a tremendous amount of focus about the frivolous lawsuit filed by plaintiffs, but there also can be a problem with defendants resisting what are otherwise meritorious claims. Is that not correct? How does the Senator address that?

Mr. GRAHAM. Yes, Madam President, there could be a frivolous defense as well as there can be a frivolous plaintiff's filing. And this amendment would provide balance. Exactly the same sanctions would be applied under the 1934 Securities Act to a frivolous action as would be applied to a clearly meritorious action. That is, if you are the defendant, and the evaluation is this is a clearly meritorious case, but you persist, litigate, and you lose, then you are subject to the sanction of having to pay the plaintiff's attorneys fees and court costs. So this is an attempt to create some strong economic incentives for people to settle and for people not to file a frivolous action, nor to persist in frivolous defenses.

Mr. SARBANES. I have to say to the Senator, having listened to this explanation, I have difficulty understanding why the proponents of this legislation have asserted that the purpose in trying to move the legislation is to avoid expensive litigation or preparation for litigation.

Let me ask the Senator one final question. Does your process come in ahead of an extensive discovery period, or how does it work? At what point does your process come into play?

Mr. GRAHAM. The expectation would be that this would be at the discretion of the parties or of the judge that this would be the first action initiated after the litigation has been filed.

Mr. SARBANES. I see. So it would involve potentially a lot of the costs that are associated with preparing for trial, let alone the costs connected with the trial?

Mr. GRAHAM. That is correct.

Mr. SARBANES. It is difficult for me to understand the people who are opposing this amendment on the assertion they are trying to get at the cost of frivolous suits, or as I understand it, opposing the Senator's amendment. I just have difficulty squaring that.

Mr. GRAHAM. It seems to me, Madam President, that this amendment is exactly consistent with what proponents of this legislation say the evil is that we are attempting to correct, and it would avoid the necessity of having to overreach in terms of a remedy to apply an excessive amount of medication of severely restricting access to courts by people with legitimate claims, which I fear this legislation will do. And even if a legitimate claim matures into a judgment, to then protect those persons against whom the judgment might be rendered by things like the aiders and abettors provision and the joint and several liability, particularly as it relates to small investors, et cetera. All of those types of things would be less necessary if we went straight at the problem cited, the frivolous lawsuit, and tried to eliminate as many of those lawsuits by effective sanctions as I believe this will be at the initial stages.

Mr. SARBANES. Then you would not be running the risk, the very substantial risk, as I perceive this legislation, that meritorious claims would be adversely affected by these other sweeping provisions that are in this legislation. Your provision by definition is so directed that the meritorious claim would pass through the screening process, as I understand it?

Mr. GRAHAM. The early evaluation would make a determination that the case was either clearly frivolous, clearly meritorious, or neither. And if you fell into that third category, then that ought to be the kind of open, civil due process that we associate with the American judicial system.

Mr. SARBANES. Well, I thank the Senator very much for his explanation and for his very constructive and I think imaginative proposal.

Mr. GRAHAM. Madam President, unless there is someone else who would like to speak on this amendment, I am prepared to make a short concluding statement and then if the opponents are prepared to yield back their time, I would be so prepared and we could proceed.

Madam President, we have before us consensus on one issue, and that is that there is a problem relative to frivolous lawsuits in the securities area. The quandary is how to eradicate or mitigate that problem without doing excessive damage to other rights of investors, without eliminating what has been one of the principal deterrents to fraudulent behavior within our free enterprise system, what has been one of the foundations of public confidence that they could invest in our capitalistic system and be treated fairly.

I believe this amendment goes directly at the problem that we have identified. It states that early on, after a case has been filed, there will be an independent evaluation by a judicially selected mediator as to whether this is a frivolous, meritorious, or other action. The case would then be in the hands of the litigants as to whether, in the face of that determination, they wish to proceed.

But if they proceeded with a frivolous case, and if they lost that frivolous case, then they would be subject to very serious sanctions of having to pay not only their bills, but also the attorney fees and costs of their opponent. I think that would be a significant factor in terms of deterring the prosecution of frivolous suits.

Frivolous defenses are sanctioned in exactly the same manner. So if a case is determined to be clearly meritorious, and yet the defendant proceeds and loses, that defendant will be subject to these sanctions. Madam President, I believe that comes as close to solving the problem we have identified and does so in a way that does not have unintended, adverse consequences on other aspects of investors' rights.

So I urge those who are proponents of S. 240 to see this as a supportive, friendly, positive contribution to achieve their objective. And I hope that they and my other colleagues will support this amendment, which I believe moves toward achieving the very purpose that led to the introduction of this legislation in the first instance.

Thank you, Madam President.

I yield the floor, and I am prepared to yield back the balance of my time.

Mr. D'AMATO. Madam President, I want to thank the Senator from Florida. I too yield back the balance of our

time, and ask unanimous consent that this matter be sent over for the purpose of giving Senator BOXER an opportunity to offer her amendment. She has indicated that she would take 40 minutes on her side and retain the balance of 5 minutes for tomorrow with the express intent that we will vote on her amendment first tomorrow after she makes her 5-minute statement. I reserve ourselves 2 minutes for tomorrow, and as much time as we need this evening. I do not intend to use more than 15 minutes at the most.

Mrs. BOXER. Reserving the right to object, and I do not want to object, when are we going to vote on the Graham amendment?

Mr. D'AMATO. It is my thought and intent that we will vote on Senator GRAHAM's amendment after your amendment. And Senator SPECTER has several amendments to offer. If we could stack them to accommodate some of our colleagues, certainly well before 9 o'clock. It is my intent to ask for unanimous consent that we proceed in that manner.

No matter, at least the Senator will have the opportunity of offering her amendment and starting to use some of her time.

(Mr. BURNS assumed the chair.)

Mrs. BOXER. I say to my friend, I am very willing. I would prefer to have my vote follow Senator GRAHAM's. I think it makes more sense.

Mr. D'AMATO. Would you like to vote on it this evening?

Mrs. BOXER. I am suggesting tomorrow morning.

Mr. D'AMATO. We will vote on Senator GRAHAM's amendment this evening.

Mrs. BOXER. I was not aware of that.

Mr. D'AMATO. That was my purpose, so you would have an opportunity.

Mr. SARBANES. If the manager will yield, as I understand the procedure now, the Graham amendment is being set aside so Senator BOXER can offer her amendment?

Mr. D'AMATO. That is correct. Possibly Senator SPECTER, as well.

Mr. SARBANES. Senator BOXER's amendment we will debate for 40 minutes. You will respond for, I think, not more than——

Mr. D'AMATO. Not more than 15 minutes.

Mr. SARBANES. Then we will move on to some other amendments?

Mr. D'AMATO. It is my hope we would take the three Specter amendments, at least two of those amendments, and dispose of them this evening, as well.

Mr. SARBANES. The Boxer amendment would go on over to the morning. Senator BOXER will have an opportunity to speak in the morning for 5 minutes.

Mr. D'AMATO. That is correct.

Mr. SARBANES. We intend to vote tonight on Senator GRAHAM and Senator SPECTER?

Mr. D'AMATO. That is correct.

Mr. SARBANES. All together, or Senator GRAHAM after Senator BOXER finishes her debate?

Mr. D'AMATO. Well, I would like to possibly stack them for the convenience of our Members so they do not have to keep coming back and forth this evening.

Mr. SARBANES. This evening.

Mr. D'AMATO. This evening.

Mr. SARBANES. So it would be the Graham amendment and Specter, some number of Specter.

Mr. D'AMATO. That is correct, either two or three.

Mr. GRAHAM addressed the Chair.

The PRESIDING OFFICER. The Senator from Florida.

Mr. GRAHAM. Mr. President, at the appropriate time, and if that appropriate time is now, I would like to ask for the yeas and nays on my amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered. The Senator from California is recognized.

AMENDMENT NO. 1480

(Purpose: To make an amendment relating to the consequences of insider trading)

Mrs. BOXER. I yield myself 30 minutes at this time.

Mr. President, I send an amendment to the desk, and I ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from California [Mrs. BOXER] proposes an amendment numbered 1480.

Mrs. BOXER. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

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

The amendment is as follows:

At the appropriate place in title I, insert the following new section:

SEC. . CONSEQUENCES OF INSIDER TRADING.

(a) SECURITIES ACT OF 1933.—Section 13A of the Securities Act of 1933, as added by section 105 of this Act, is amended by adding at the end the following new subsection:

"(h) CONSEQUENCES OF INSIDER TRADING.—

"(1) IN GENERAL.—Notwithstanding subsection (c), the exclusion from liability provided for in subsection (a) does not apply to a false or misleading forward-looking statement if, in connection with the false or misleading forward-looking statement, the issuer or any officer or director of the issuer—

"(A) purchased or sold a material amount of the equity securities of the issuer (or derivatives thereof), as reflected in filings with the Commission; and

"(B) financially benefited from the forward-looking statement.

"(2) DEFINITION.—For purposes of this subsection, the term 'material amount' means—

"(A) with respect to an issuer, equity securities of the issuer of any class having a total value of not less than $1,000,000; and

"(B) with respect to an officer or director of an issuer, holdings of that officer or director of any class of the equity securities of the issuer having a total value of not less than $50,000.".

(b) SECURITIES EXCHANGE ACT OF 1934.—Section 37 of the Securities Exchange Act of 1934, as added by section 105 of this Act, is amended by adding at the end the following new subsection:

"(h) CONSEQUENCES OF INSIDER TRADING.—

"(1) CONSEQUENCES OF INSIDER TRADING.—Notwithstanding subsection (c), the exclusion from liability provided for in subsection (a) does not apply to a false or misleading forward-looking statement if, in connection with the false or misleading forward-looking statement, the issuer or any officer or director of the issuer—

"(A) purchased or sold a material amount of the equity securities of the issuer (or derivatives thereof), as reflected in filings with the Commission; and

"(B) financially benefited from the forward-looking statement.

"(2) DEFINITION.—For purposes of this subsection, the term 'material amount' means—

"(A) with respect to an issuer, $1,000,000 worth of any class of the equity securities of the issuer; and

"(B) with respect to an officer or director of an issuer, $50,000 worth of the holdings of that person of any class of the equity securities of the issuer.".

Amend the table of contents accordingly.

Mrs. BOXER. Mr. President, simply put, my amendment says that insider traders who financially benefit from false or misleading forward-looking statements shall not benefit from the safe harbor in S. 240. It could not be more direct. I am very hopeful colleagues will support me on this.

It is very clear that 48 colleagues are unhappy with the safe harbor as it is in S. 240. All we are doing here is saying, "Well, you didn't change it, so at least let us not allow insiders who financially benefit in connection with a false and misleading statement they issue to get the benefit of the safe harbor."

S. 240 has a safe harbor provision which basically gives insiders huge protection for false forward-looking statements, all statements, except those involving intentional fraud. In other words, there is a safe harbor for reckless fraud, knowing fraud and purposeful fraud. Let me repeat that. The S. 240 safe harbor provision, which gives insiders immunity for false forward-looking statements, involves reckless fraud, knowing fraud and purposeful fraud.

Senator SARBANES tried to change that standard. He offered two amendments. Those two amendments failed, although I would say the second one got 48 votes from both sides of the aisle. Obviously, people are troubled by the safe harbor which my friend from Maryland calls a pirate's cove. I call it a deep ocean—a deep ocean.

In the Boxer amendment, the insider trading has to appear on the records of the SEC, so it is no guesswork. You know that insider made his insider trades because it is registered with the

SEC, and it would have to involve significant insiders—the company itself or its officers or directors. So it is very narrowly drawn.

Under my amendment, the insider trading would have to involve significant sums; in the case of a company, a million dollars in insider trading or more; in the case of an officer or director, insider trading would have to involve $50,000 or more.

Let us be clear, the Boxer amendment only covers those trading on inside information who also issue false forward-looking statements in connection with that insider trading and who financially benefit from that trading.

Make no mistake, unsuspecting investors are harmed quite directly by false or misleading forward-looking statements made in connection with insider trades. Why is that? Because small investors believe the statement. Buy the stock, push up the price, the insider then sells his stock at the higher price, pockets the profit, because of a false and misleading statement. The stock collapses. When the true news hits, the small investors are left holding losses.

I am going to show a chart which I showed last week, the Crazy Eddie story. Crazy Eddie was a business. This is real. This is not a figment of anyone's imagination. Let us hear what Crazy Eddie said. This is a forward-looking statement:

"We are confident that our market penetration can grow appreciably."

"Growing evidence of consumer acceptance of the Crazy Eddie name augurs well for continuing growth outside of New York."

Crazy Eddie dumps his stock, the top officer flees the country with millions, the CEO is convicted of fraud, and to any of my colleagues who say there is another provision that covers insider trading, that is only for the stockholders who actually bought Crazy Eddie's stock. It does not cover the class of other people who suffer because the stock plummeted. I think that is an important point, because every time I raise an amendment, the opposition stands up and says this is covered in another section. Wrong. Not for the class of shareholders, only the ones who buy Crazy Eddie's stock.

If he sells a million dollars worth of stock, those people who bought it, yes, they can pursue under another provision of law. The other $2 million worth of stock bought by the general public have very little chance here.

Let us go to the next chart.

T2 Medical, Inc. Here is another business. Take a look at this one's forward-looking statements. My colleagues want to encourage forward-looking statements. So do I, but not false ones. I want to encourage honest ones. Does that mean that some businesses may make a mistake? They may make a mistake, a true mistake. But look at these guys:

"T2 plans to lead the way through the 1990's."

"We expect continued steady revenue and earnings growth."

Just at the time of those statements, look what happens: The stock goes up; insiders sell 571,000 shares for 31 million bucks; the Wall Street Journal reports insurers reducing their payments by 15 to 50 percent; the stock plunges; then the company discloses a grand jury investigation; total insider sales of $31.6 million.

And look at the story here. Now the people at T2 Medical would get the safe harbor for forward-looking statements, the very same safe harbor that Senator SARBANES tried to tighten up. They would get the protection of that safe harbor.

It is an invitation to fraud. It is exactly what Chairman Levitt of the SEC said would happen. He does not like the safe harbor. He said if you do this, by God, you crook, you cannot hide under that safe harbor. I hope my colleagues will embrace this amendment.

Look at this, it tells the story, I say to my friend. The statement is made:

"T2 plans to lead the way through the 1990's."

"We expect continued steady revenue and earnings growth."

The stock goes up, insiders sell, and the truth comes out. They disclose the grand jury investigation and bye, bye, baby, for all those poor snooks who bought it.

This individual and these insiders do not deserve the safe harbor in S. 240. If Senator SARBANES had been successful at changing the safe harbor, I would feel a lot better and I would not have offered this amendment. I told that to my friend. But we have the pirate's cove. Here are the pirates—Crazy Eddie and these people. These are just two examples. And for those who said Charles Keating never made forward-looking statements, I have a chart on that, too. So Crazy Eddie's top officer fled the country. The CEO was convicted of fraud. Investors were left with huge losses. That is the type of misbehavior this bill would encourage and reward. Why? It is not that anybody who writes this bill wants to help guys like this. But as a result of the safe harbor, these guys get the benefits. We say that they should not.

Now, I do not think we want to encourage this. These are not isolated examples. There is a great deal of insider trading. Am I picking out two examples because I am exaggerating here? No; let me show you where we are with insider trading. This is a story from Business Week, December 1994. "Insider Trading: It's Back, But With a New Cast of Characters." They looked at 100 of the largest businesses, by the way, and found that one out of every three merger deals was proceeded by stock price runups.

Here is one from the Los Angeles Times. I want to say to my friends that this is a story from Saturday, June 24, 1995. I opened the paper when I was in L.A., and there it was. "Insider Trading Probes Make a Comeback. Wall Street. SEC official notes more investigations than at any time since the takeover boom of the 1980's."

What are we doing? We are giving these people a safe harbor. I do not think this is in the best interest of the country. How about reading this a little bit:

A wave of mergers and acquisitions in the United States is reviving an unwanted headache for regulators: Insider trading.

"We have more insider trading investigations now than at any time since the takeover boom of the 1980's," said Thomas Newkirk, associate director of enforcement for the Securities and Exchange Commission.

No wonder the SEC has trouble with the safe harbor in this bill. These are the guys who have to go after these crooks. They do not want to make it harder to catch them.

I will put all of these in the RECORD at the appropriate time.

Now, here is a quote from Gene Marcial, a Business Week "Inside Wall Street" columnist. This is his book.

Don't kid yourself: Very little has changed on Wall Street. Half a dozen years after the scandals of the 1980's, when any number of street veterans were charged with violations of securities laws and several high profile insiders were marched off to jail, insider trading and market manipulation—in most cases illegal—are still the most zealously desired play in the financial world.

He concludes and basically says, "Sorry, but that's the way the game is played."

Now, look, if the game is played that way, we should try to stop it. We should not make it easier.

Let us go to the next chart. Here is another one. New York Times, June 1995.

Regulatory Alarms Ring on Wall Street. With the frenzy of merger deals and takeover battles these days, it seems like old times on Wall Street in more ways than one. Securities regulators say they are opening investigations into insider trading at a rate not seen since the mid-1980's, the era in which Ivan Boesky, who went to jail for trading on inside information, became a household name.

They go on to say that it is a growth industry. We are going to give insider traders a safe harbor. They do not deserve it. I am worried about the good business people. I represent a lot of them and I am proud of them. They would not cheat anyone. They deserve to be supported, and they do not deserve frivolous lawsuits. This is about the bad guys.

So let us, in good faith, say we did not change the safe harbor, but let us make sure that the worst of the worst, these inside players who issue a false or misleading statement and then sell their stock and benefit, do not get the benefit of the safe harbor.

I say, if we do not do this, the incentives for insider trading and cashing in

will be greater because, clearly, there is a nice, safe harbor for these people to hide in. I hope anyone who supports this bill would not want to encourage insider trading.

Again, my amendment focuses narrowly on only one type of notorious fraud, insider trading in conjunction with false or misleading forward-looking statements, and they have to increase the insider trader's profit. That is the only way they do not get the safe harbor. It has to be a false or misleading statement made in conjunction with their sale, and they have to make a profit. So we are not opening up a loophole for anybody good. We are closing a loophole for the bad. And that is very clear.

My friend from Connecticut—and he is my friend and we go back and forth on this bill—has said many times that confidence of the investors is the most important thing. I have news. You just wait. If we do not fix this bill and this safe harbor provision goes forward, and we do not at least take this Boxer amendment, when we have the first crisis in the marketplace, when a group of investors like those burned by Keating or any of the others, when they come to Washington and stand on the steps of the Capitol and say, "What have you done? You are giving these people a safe harbor. Where is my safe harbor? Why can I not collect from these crooks?" You know, that is when confidence in the investing public will plummet.

I tell you, with what I know about this bill—and my colleague said some claims would work. I worked on Wall Street at Hemphill, Noyes & Co., Zuckerman & Smith, and J.R. Williston & Beane. I was proud of those days. I was one of the few women who had the license, passed the exam, was a registered representative. I had a very small—but important to me—practice. You can call it a practice. I had clients. They trusted me, and I will tell you, if I was in that business today, honestly knowing what I know about this bill and the fact that we did not pass the amendment offered by my friend from Maryland, I would really tell people to be very wary and to be very careful. I really would.

The small investor, the IRA owner, the 401(k) owner, is increasingly coming to believe there are two games in town, two securities markets, one for the insiders and one for the little investors. The small investor is increasingly coming to fear that little investors are being played for suckers. Gary Lynch, who oversaw the Securities and Exchange Commission's investigation of Ivan Boesky, Dennis Levine, and Michael Milken is quoted as saying, "What is happening now is exactly what everyone predicted in the 1980's, that as memories dulled, insider trading would pick up again. The temptation would be too great."

That is what this bill does—temptation in the form of a safe harbor, which my friend from Maryland calls the pirate's cove and I call an ocean. Insiders could well have a field day if this bill passes in its current form.

I talked about the loss of faith that people would feel, and I say that very seriously. We may not see securities markets as we know them today. They may not be the envy of the world, the engine of economic opportunity for ordinary Americans, because they will be rigged against the honest investor, who will stay out of the securities marketplace.

Now the bill supporters want to stop strike suits. So do I. They want to stop frivolous lawsuits. So do I. I have to say, I do not think anyone that backs S. 240 wants to help insiders who would issue a false and misleading statement, and pocket the stock. I know they do not.

I hope they look at this legislation with an open mind. I think it is very narrowly focused. It is crafted for the sole purpose of making sure the bill does not shield and encourage insider trading. I think it is quite clear.

Let me say I do have a Charles Keating chart, and I want to just say some of the things that Charles Keating said in terms of his forward looking statements: "Future prospects are outstanding." That's what he said. He tried to get people to buy the junk bonds. He said, "We offer significant profit potential over the next 5 years." That is forward looking. "Completion and sale of projects will generate huge gains." Thousands bought and lost money.

Senator BRYAN showed a chart. He showed what the impact would be if we adopt S. 240 the way it came to the floor. It would hurt those people.

I just want to say, and I will retain the balance of my time, we are very clear in what we are trying to do with S. 240. We are trying to make it a better bill.

Believe me, it would be easier for the ranking member and those members on the committee who had trouble with this bill to fold up our tents, because in this committee we could hardly get but a couple of votes.

We believed enough in these amendments that we are offering that we decided to take to the floor and try to explain them to our colleagues. As others have said, it is difficult to do that. It is a technical area of the law.

The bottom line is we do not want to give the Crazy Eddies—those who would make a false statement—a safe harbor, and then turn around when they make their money, the facts come out, the investors are left holding the bag. Why should those people get a safe harbor, I say to my friends.

I hope you will endorse the Boxer amendment.

Mr. President, I ask unanimous consent to have printed in the RECORD a New York Times article and a Los Angeles Times article.

There being no objection, the articles were ordered to be printed in the RECORD, as follows:

[From the New York Times, June 9, 1995]

REGULATORY ALARMS RING ON WALL STREET

(By Susan Antilla)

With the frenzy of merger deals and takeover battles these days, it seems like old times on Wall Street in more ways than one. Securities regulators say they are opening investigations into insider trading at a rate not seen since the mid 1980's, the era in which Ivan Boesky, who went to jail for trading on inside information, became a household name.

Regulatory alarm bells went off again earlier this week after I.B.M. disclosed its hostile $60-a-share offer for the Lotus Development Corporation. That bid pushed up the value of Lotus shares by 89 percent on Monday, the day it was announced, and caused regulators to begin looking into suspicious trading last week.

Other cases brought to light recently involved Lockheed's merger last year with Martin Marietta, another military contractor, and AT&T's acquisition of the NCR Corporation.

"It's a growth industry," said William McLucas, director of the division of enforcement at the Securities and Exchange Commission."In terms of raw numbers, we have as many cases as we've had since the 1980's, when we were in the heyday of mergers and acquisition activity."

Through the end of May, the National Association of Securities Dealers, which oversees the Nasdaq electronic trading market, had already referred 47 cases to the S.E.C. for investigation into possible insider trading, said James Cangiano, N.A.S.D.'s senior vice president for surveillance. If the pace of suspect trading continues at that rate, it would mean the N.A.S.D. would surpass the record 110 insider trading referrals it made to the S.E.C. in 1987, he added.

The same holds true for the New York Stock Exchange, where investigators have opened three times as many insider trading cases so far this year as they had by this date in 1994.

The Lotus case seems typical. In the days before the I.B.M. announcement, trading in both Lotus stock on Nasdaq and Lotus options, which are traded on the American Stock Exchange, was unusually heavy. "I think you can presume we are looking at it," Mr. Cangiano said. And while the S.E.C. does not comment on pending investigations, Wall Street professionals say that the agency has undoubtedly already opened a case to investigate Lotus trading.

These days, those trading on insider information apparently do not come as frequently from the ranks of Wall Street's professionals as they did in the 1980's, regulators say. Those who take advantage of privileged information now tend to be corporate officers, directors, and their families, friends and lovers, according to executives at the nation's stock exchanges, and lawyers who represent defendants.

But the game—and the potential profits—are the same: get information about a proposed deal that might raise the shares of a publicly traded company before it is announced, and buy the stock ahead of the news. Better yet, buy the options, which cost less and tend to attract less regulatory scrutiny.

Then, after the public learns what the insiders knew ahead of time, it's time to get out with a quick profit.

The lure of profits from insider information regarding deals is just too much to resist for some players, the S.E.C.'s Mr. McLucas said. The potential rewards compared with the risks look better "when people look at the premiums available in takeovers," he said. "We're a few years removed from the Boesky insider trading cases, and people have short memories." Of the 1,400 unresolved cases in the S.E.C.'s current inventory, Mr. McLucas said, 20 percent involve insider trading.

The initial rounds of suspect trading of the last year or so differed from those of the 1980's in that they generally did not focus on big names in the securities business. "While Wall Street learned some lessons of the 1980's, it's not completely clear that Main Street learned all of the lessons," said Harvey Pitt, the former S.E.C. lawyer who defended Mr. Boesky.

If Wall Street appears to be more honest, though, it is largely a function of increased surveillance by brokerage firms and by regulators, say defense lawyers and securities cops. "We have not returned to the environment of the 1980's where so many defendants were investment bankers, brokerage firm employees and young lawyers," Mr. McLucas said. Still, he added, "We're seeing people in those areas start to crop up, and I wouldn't be surprised to see more of them."

Earlier this week, Frederick A. Moran, a money manager in Greenwich, Conn., said that he was the focus of an S.E.C. investigation. Regulators contend that he bought shares of Tele-Communications Inc., the big cable operator, in advance of the announcement that it planned to merge with Bell Atlantic. The S.E.C. is looking at Mr. Moran's purchases because his son is a securities analyst who was privy to information about the pending deal. Mr. Moran has said he will fight the charges.

Despite the higher numbers, regulators undoubtedly miss cases both big and small. But, in this newest round of insider trading investigations, it appears that the chances of being caught are higher than before. At the New York Stock Exchange, 100 employees work in market surveillance today, up from 76 in 1975. And white-collar criminals who are members of the Big Board face stiffer fines if they get caught. In 1988, the New York exchange removed the previous limit of $25,000 for each charge against a member, eliminating any cap on potential fines. At the same time, Congress enacted the Insider Trading Sanctions Act, which allows for triple damages to be paid when a trader is convicted on insider charges.

Moreover, the New York Stock Exchange and the Chicago Board Options Exchange, which routinely share information with each other and with the S.E.C. about suspect action in the markets, have beefed up their detection mechanisms substantially.

"When I first came here in 1981, the analysts drew genealogical trees of corporate officers and investment bankers and hung them on the wall" to analyze who had privileged information about a pending deal, said Agnes Gautier, a vice president in the Big Board's market surveillance department. Today, by contrast, computer software programs spit out the dates, times and names behind the trades that look suspicious, she said, making what used to be an onerous task a fairly simple exercise.

Thus, the S.E.C. was able to quickly investigate and settle a case against a lawyer for Lockheed only eight months after the news that the military contractor and Martin Marietta would merge. The lawyer made $42,000 in illegal profits by buying Lockheed options, Mr. McLucas recalled.

Considering all this renewed attention to insider trading, shouldn't more people be wary of breaking the rules? "We'd like to think so," Ms. Gautier said. "But, I guess, as the defense lawyers say, 'Greed will overcome.'"

[From the Los Angeles Times, June 24, 1995]

INSIDER-TRADING PROBES MAKES A COMEBACK

WALL STREET: SEC OFFICIAL NOTES MORE INVESTIGATIONS THAN AT ANY TIME SINCE THE TAKEOVER BOOM OF THE 1980'S

NEW YORK.—A wave of mergers and acquisitions in the United States is reviving an unwanted headache for regulators: insider trading.

"We have more insider-trading investigations now than at any time since the takeover boom in the 1980s," said Thomas Newkirk, associate director of enforcement for the Securities and Exchange Commission.

Several of this year's largest merger announcements have been preceded by unusual trading Thursday, shares of Scott Paper Co. jumped $2.50 to $46.875. Friday morning, the Wall Street Journal reported that Kimberly-Clark Corp. was negotiating to buy the company.

During the merger bonanza of the 1980s, insider trading was equated with greed on Wall Street as prosecutors won convictions against Ivan Boesky, Michael Milken and others. The alleged culprits of the 1990s tend to be more ordinary working folk.

In February, the SEC charged 17 people with civil violations of insider-trading laws related to trading in shares of AT&T Corp. acquisition targets, including NCR Corp. and McCaw Cellular Communications Inc. Two were former AT&T employees. Charles Brumfield, former vice president in the human resources department, pleaded guilty in connection with the case.

Earlier this month, the SEC sued a Salomon Bros. Inc. analyst, Frederick Moran, and his father, a money manager in Greenwich Conn., for alleged insider trading in the failed merger of Tele-Communications Inc., the nation's largest cable systems operator, and Bell Atlantic Corp.

"We brought 45 cases in the last fiscal year and the caseload is running about the same this year," the SEC's Newkirk said.

Opportuunities are increasing for people to use advance knowledge of a merger to make illegal profits. About $178 billion in mergers have been announced since the beginning of the year, putting 1995 on course to exceed last year's $368 billion, according to Securities Data Co.

Regulators say they are looking at such transactions for any sign of trading picking up before the agreements were announced. That was the case for shares of Telular Corp., which said June 22 that it might seek a buyer for the company, and for Lotus Development Corp., which agreed to be bought by International Business Machines Corps.

On June 20, just before a New York state agency proposed a buy-out of Long Island Lighting Co. for $17.50 a share, the utility's stock jumped $1.50 to a seven-month high of $17.

One person who isn't surprised by the recent rise in insider-trading cases in Gary Lynch, who as chief of enforcement at the SEC during the 1980s was one of the main people responsible for bringing about the convictions of Boesky and Milken.

"What's happening now is exactly what everyone predicted back in the '80s: that with the number of high-profile cases brought, the incidence of insider trading would decline for a while, but as memories dulled, insider trading would pick up again," said Lynch. "The temptation is too great for people to resist."

Mrs. BOXER. I yield such time as he desires to my friend from Maryland.

Mr. SARBANES. How much time does the Senator have?

The PRESIDING OFFICER. Nineteen minutes and 41 seconds.

Mr. SARBANES. I will be very brief so the Senator can reserve the balance of her time.

I want to say the distinguished Senator from California has made a very strong, effective statement on behalf of her amendment.

Does the Senator agree with me that there are people who—corporate insiders—who would sometimes make fraudulent forward-looking statements, to run up the stock price so they can unload their stock price before it goes down? Is that not exactly what has been happening?

Mrs. BOXER. Exactly. And we showed the same in two examples. Here is one of the charts.

Mr. SARBANES. Could we see the other chart? That is Crazy Eddie's. The other chart, as I understand it, the Senator shows on the left where we begin, making the statements. That runs their stock price up. Then they start unloading their stock, having done that.

Is that correct?

Mrs. BOXER. That is exactly right.

Mr. SARBANES. What happens further along there? They get news, then revealed, that the insurance for this medical company is falling off, is that it?

Mrs. BOXER. That is correct. The clients say they are reducing their payments to the T2 Medical Inc. by 15 to 50 percent, and the company here discloses a grand jury investigation which they knew.

Mr. SARBANES. What happens further along?

Mrs. BOXER. It goes on down list.

They have unloaded at this point, $31 million or 571,000 shares of the stock at the high price, and now as this bad news comes out, we see the stock plummet, and essentially, the company here reports the SEC is investigating them.

That is as far as this chart goes. They are under investigation. These were bad apples. People got snookered in as this stock went up, left holding the bag as it goes down. Insiders knew all of this.

And we are saying they should not have the ability to get the safe harbor.

Mr. SARBANES. I want to commend the Senator for offering this amendment, for her very clear explanation of it.

I want to underscore one other point the Senator had which I think is extremely important. Members have taken the floor in the sense of a constructive way, trying to propose and

get adopted amendments which we think should straighten out some of the problems with this legislation.

In fact, I am prepared to say if all of the amendments had been adopted I would have been prepared to be supportive of this legislation.

But what is happening here is that the bill contains provisions that are far in excess of dealing with frivolous suits. The provisions in this bill are going to cut off meritorious suits, and they will make honest, legitimate investors suffer as a consequence, as the Senator has so carefully outlined. I simply want to thank the Senator for her very strong statement.

Mr. President, we have had difficulty with respect to these amendments, although we have come increasingly close on some of these amendments. I think that is reflecting a growing sense within this body that there is something amiss with this legislation.

All is not right with this legislation. I think that is increasingly becoming clear. There has been an effort to portray it by the proponents in terms of the competing economic interests. So they engage in long denunciations in that regard.

The fact is, every, as it were, independent observer or outside group, has sounded warning bells about this legislation. Members need to understand that. The Securities and Exchange Commission, the North American Securities Administrators Association, the Government Finance Officers Association.

The distinguished Senator from California put into the RECORD a long list of organizations that had difficulty with this legislation. We were sounding the warnings about this legislation. The consumer groups all have joined in doing that.

I hope, as Members approach the end of the amendment process and consider the bill itself, they will come to realize that the burden of the consequences are going to fall on the supporters. If this legislation passes, those voting to support it will bear the heavy burden in terms of what the consequences are going to be.

There is no doubt in my mind that honest people will end up being defrauded and not have a remedy as a consequence of this legislation. The regulators have warned Members of that fact. Groups that have no vested economic interest in this legislation have warned Members of that fact. I just want to sound that warning to my colleagues.

Mr. D'AMATO. Mr. President, first of all, I want to thank the Senator from California for being so gracious and so accommodating in attempting to go forward in a manner—and I know she was not feeling up to par. Although she has made a brilliant case, and has presented her case with the eloquence of someone who believes in what they are saying, and she does believe very strongly, I am forced to oppose this amendment.

Let me say, this is not easy to oppose. Let me explain why I oppose this amendment, because this is a very complex issue. The fact of the matter is that insider trading is not given safe harbor protection and is absolutely covered and will continue to be covered by section 10(b) and rule 10b–5 of the securities laws. It prohibits the kind of fraudulent conduct that we consider to be insider trading. Fraudulent conduct and insider trading? The conduct that Senator BOXER seeks to prohibit is already prohibited in the securities law.

Let me tell you what the consequences this amendment would be. They would be devastating. For example, somebody who routinely takes stock options—officers, directors in the company—would lose safe harbor protection. This amendment would bring us back to the situation that lawyers could simply allege fraud to bring a lawsuit. This amendment opens the door for the same kinds of operations that this legislation seeks to stop. That is why I must oppose this bill, notwithstanding the fact this amendment seems to indicate that it prohibits insider trading. This amendment does not do that.

What this amendment does is strip away, the opportunity for someone to make a forward looking statement that might at some point in time prove to be inaccurate. Why should a firm have the door to litigation opened just because an executive engaged in any trades or exercised an options and made $50,000?

Tell me, if someone engages in legal insider trading should they be tarred and feathered? Should they be sued? However, should you have a right of action against illegal insider trading as prohibited by rule 10b–5? Absolutely. And that right of action does exist.

So I have to oppose the amendment. But again I commend my colleague for coming forward and certainly for the manner in which she has made this presentation tonight, in an attempt to accommodate so many of our colleagues.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I am going to wait until my colleague from California is back at her desk, because I have some questions that the amendment raises, that I would legitimately like to get some answers to. I am trying to understand the implications of the amendment.

On page 2 of the amendment, as I read this, now—part of the difficulty is under the previous amendment——

The PRESIDING OFFICER. If the Senator will suspend, who controls the time?

Mr. DODD. The Senator from New York.

Mr. D'AMATO. Senator DODD is speaking on the time of the Senator from New York.

The PRESIDING OFFICER. I thank the Senator from New York.

Mr. DODD. Mr. President, one of the difficulties is trying to read and understand. The previous amendment, offered by the Senator from Florida, was a 12-page amendment. Trying to read through it and understand the implications in the space of a short amount of time is difficult.

Let me come to page 2 of this amendment. Starting on the bottom of page 1.

> Notwithstanding subsection (c), the exclusion from liability provided for in subsection (a) does not apply to a false or misleading forward-looking statement if, in connection with the false or misleading forward-looking statement, the issuer or any officer or director of the issuer—
>
> (A) purchased or sold . . .

And so forth.

My concern is this, and correct me if I am wrong. It seems to me you would be confronted with a factual situation where you have a director who had nothing to do with the problems associated with the Crazy Eddie case or whatever else. I heard my colleague, and I agreed with her, give eloquent statements on the importance of stock options. It was on an issue not too many months ago involving the value of stock options. She talked about what a valuable tool this can be.

The mere action on the part of a director to either purchase or sell a stock that may or may not—let us assume did not have anything to do with what an officer of the company was doing regarding statements. Am I correct in assuming that director, then, if in fact you are able to prove the first point, assuming they met the other qualifications of $50,000, would be penalized under your amendment, were it to be enacted?

Mrs. BOXER. I say to my friend, we indicate in the amendment who insiders are. It is pretty boilerplate. Yes, it covers insiders, people who would have inside information. But only, and I underscore only, if in conjunction with the false or misleading statement they sold stock and made a profit, they would be covered.

Mr. DODD. What about the directors themselves? Not an officer, the director. Directors—one of the compensations for directors is we offer them stock options.

The members of the board of directors did not have anything to do with this; the officers of the companies did. Let us assume that is the situation, assuming everything else is the case and that director, who had no involvement whatsoever with the insider false statements, as I read this, that innocent director who then sold or bought stock innocently, outside of whatever else the officers may be doing, would then be subject to the penalties of this?

Mrs. BOXER. That is right. I say to my friend, we are using a pretty boilerplate definition of what an insider is. The insider is the company itself or any officer or director. But only if they sold their securities in connection with a false and misleading statement, we do not give them the safe harbor. We did not go out of our way to reach them. We are just saying you have to be an officer or director——

Mr. DODD. Even though the director had nothing to do with the false and misleading statements? We all know how important stock options are, and so forth. I want to know the implications.

Mrs. BOXER. All it says is they cannot benefit from the safe harbor and the lawsuit can go forward. If, in the course of the lawsuit, it turns out that this director is senile and did not know anything about it, or whatever the defense is, that is different. But we are saying as reasonable people that insiders—and we define that as the company, any officer or director.

I have to tell my colleague, if my friend from Connecticut does not view that as a fair definition of an insider, I want to know what is—someone who sits on the board of directors, someone who knows all the good news and bad news.

All we are saying is the case will have to go forward. But in fact, if there is insider trading in connection with a false or misleading statement, they do not get the safe harbor and the case goes forward. Does it mean they are convicted? Of course not.

Mr. DODD. I am not trying to be argumentative here.

Mr. D'AMATO. Will my colleague yield?

Mrs. BOXER. I am trying to answer my friend's questions. I am not being argumentative. I am being strong in my response.

The PRESIDING OFFICER. If the Senator will suspend, I will advise the Senators they may speak in third person through the Chair.

Mr. D'AMATO. Mr. President, I would like to propound a unanimous-consent request so we might give, to those of our colleagues who are off the Hill, an opportunity to get back and request that we vote up or down on the Graham amendment.

Have the yeas and nays been ordered on the Graham amendment?

The PRESIDING OFFICER. The Chair advises they have.

Mr. D'AMATO. Mr. President, I ask unanimous consent we be permitted to vote on the Graham amendment at 8 o'clock. In this way we will give opportunity to all our Members to get back and they would get a little extra notice. That would not interfere with any of the time my colleagues have.

The PRESIDING OFFICER. Is there objection?

Mr. DODD. I am glad to yield to my colleague. Do I not still have the floor?

The PRESIDING OFFICER. Is there objection to the unanimous consent?

Mr. SARBANES. What is the time situation on the Boxer amendment?

The PRESIDING OFFICER. Senator BOXER has 13 minutes and 14 seconds; the other side has 5 minutes and 41 seconds.

Mr. SARBANES. The time would expire at 8 o'clock under the agreement and then vote at 8 on the Graham amendment.

Mr. D'AMATO. Then maybe we might be able to dispose of the other amendment by consent.

Mr. SARBANES. After the Graham amendment, the Bingaman amendment?

Mr. D'AMATO. Possibly before, or after. Certainly.

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

Mr. D'AMATO. I thank my colleagues.

Mr. DODD. Mr. President, I yield to my colleague from California who wants to make a request.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Thank you, I say to my friend. Mr. President, I ask for the yeas and nays on the Boxer amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. DODD. Mr. President, if I can, let me just come back. The point I am trying to make here, and I say this with all due respect, no one wants to protect insider trading—obviously insider trading is an abhorrent exercise and practice.

My concern here is that the mere exercise of an option by, for the sake of discussion, an innocent director—there can be innocent directors here; not the assumption that they automatically then take away the safe harbor for the entire company because there has been a sale or a purchase of an amount triggered by the amounts indicated in the amendment itself. I appreciate where my colleague from California wants to get. But my concern here is that she is reaching a legal conclusion about someone where the assertion has been made and the mere existence of that then takes away the safe harbor protections. I think that goes farther even for those who have strong reservations about safe harbor. I think that just strips away unnecessarily. That is just drawing a legal conclusion triggering a whole response to a safe harbor provision on the mere assumption that someone has engaged in an illegal activity.

As I read the amendment, that is how I see it being triggered. When you talk about any officer or any director who purchased or sold a material amount of equities and who financially benefited from the forward-looking statement in it, that is, to me, trying to put too much in this with a lot of assumptions made that I do not think are necessarily borne out by the actions. To assume there is inherently something illegal, that it is an assumption of an illegal act for someone to exercise an option, and that action becomes a presumption of guilt in this context, then stripping away safe harbor, I think, goes too far. That is how I read it and understand it.

I am going to yield the floor in a minute and give my colleague from California an opportunity to respond to how I read this. But that is my concern here. I think it is taking an abhorrent activity of insider trading and then using that vehicle as a way to try to jam it into the issue of the safe harbor.

My colleague from California and others have real problems with safe harbor. I understand that. But it seems to me that again we are taking a set of actions where there is not necessarily anything wrong with them, making a presumption about that, and then taking that activity and immediately stripping away the veil that protects the statements made in the forward-looking statements that are made in the context of predictions by companies, their direction, and thus triggered the safe harbor provisions. I for the life of me do not understand why we want to necessarily do that when I do not think those actions necessarily should trigger that kind of response.

So for those reasons, I object to the amendment. Again, I appreciate, I think, the direction they want to go in, but it seems to me to be overreaching in terms of how you deal with safe harbor. With that, I give my colleague a chance to respond to that.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Thank you, Mr. President.

Mr. President, let me say to my friend, to say that I am overreaching in this amendment could not be farther off the mark, I have made this so narrow in scope. I have said, if Senator SARBANES' safe harbor provisions had passed, I would not have gone with this. But what I am saying is, why should we give such a good, nice, warm, and cozy safe harbor to crooks? It does not mean automatically that anyone is guilty of anything, I say to my friend. All we are saying is this is about getting a case brought forward and move forward. All we are saying is if an insider—I defy my friends, seriously, I do not understand how I could have been more fair in defining who an insider is other than to say the company, an officer or director. I did not say the secretary or anybody else. I am just hitting the top people. If they sell securities in connection with a false or misleading forward-looking statement—when my friend read my amendment, he left out the words "false or misleading,"—then all we are saying is they do

not get the benefit of the safe harbor. The case moves forward quicker. If they are innocent, this will take care of it.

My goodness. Let us not make small investors leap through hurdles when you have a situation such as this where clearly the insiders—by the way, there were a lot of insiders here: $31 million worth of stock. I do not think that the small investor who got caught in this downward plummet should have to leap through all sorts of hoops to get into court in this case.

I hope my friends who support S. 240 will support this. I think we drew it narrowly. I think we are fair. I just hope that we can get a good vote on this amendment.

Mr. SARBANES. Mr. President, I say to the Senator from California, the Senator from Connecticut says we are for it. If I could say, I am for legitimate safe harbor, I am not for excessive or overreaching safe harbor. That is what the whole debate has been about today.

I thought that the safe harbor issue should have been sent to the SEC the way the Senator from Connecticut proposed in his bill and that the SEC could then develop the safe harbor, taking into account all of these complications.

This body decided not to do that. So we then tried to have a different standard governing safe harbor. Again, the regulators are telling us that the standard in this bill is going to permit abuse. Under the standard in this bill, there will be abuses. The Senator from California is offering yet an even more limited amendment addressed to the insider traders. She has demonstrated in very graphic form the kind of practices that took place in two instances which she is trying to preclude and she has offered a remedy. For the life of me, I do not understand why this amendment is being resisted.

Mr. DODD. Will my colleague yield for the purpose of a question?

Mr. SARBANES. It is on the time of the Senator from California.

Mr. DODD. If you told me the officer or director who made the misleading statements, that would be one thing. You could have an outside director of a company that could live literally thousands of miles away who exercises an option, and it has nothing to do with the misleading statement. That is my point here. If the Senator said the director or officer makes the misleading statements, then I understand, I think, where the Senator is going. But I do not understand why you take an outsider——

Mrs. BOXER. Let me ask my friend on my own time. It is true, the director could have been in Paris. He could have a call from someone. "Hey, Joe, tomorrow, the Wall Street Journal is giving us a bad report."

Mr. DODD. That is different though.

Mrs. BOXER. Let me finish my point. We would not know that. The plaintiffs do not know that. If this man or woman is totally innocent, we are not taking away his or her right. We are just saying there is a smoking gun if a director unloads, by the way, a large amount, a material amount, makes a good profit, and, quess what, in conjunction with a forward-looking statement or a bad report coming out in the paper. It is worth it, we think, to allow that case to go forward. If the director is totally innocent, fine. All we are saying is they should not have the safe harbor of this particular bill as the good people should. And if, in fact, it turns out that they were far away, they are on their honeymoon, they did not take any calls, did not know anything about the fact that there was going to be a false statement, they are going to walk away. God, I hope we have faith.

Mr. DODD. The Senator has triggered a whole legal activity on the mere financial transaction. The Senator has then triggered a whole level of activity on safe harbor merely because she is assuming something that she has not been able to prove yet. But the mere fact that some director exercises an option, that then the whole safe harbor process collapses, the Senator has connected a lot of dots here on the basis of some assumptions. That, to me, is exactly what we are trying to avoid.

Mrs. BOXER. If this is what the Senator is trying to avoid, then this is, in my view, a terrible bill. In other words, if you are trying to avoid giving an insider a hard time if he dumps his stock and runs over——

Mr. DODD. The Senator has drawn a legal conclusion.

Mrs. BOXER. Not a bit. What we are saying is you will meet a certain threshold if these facts happen to come forward, a false and misleading statement in conjunction with insider sale. Look, I am not too naive about these insider trades because I have seen it happen. Business Week did a whole issue on insider trades. Let us bring that up. The Wall Street Journal has run stories on this. Everybody is saying it is coming back in vogue. That is not BARBARA BOXER. Those are people who are experts in the field. "Insider trades." "It's back, but with a new cast of characters." All we are saying with this amendment, and I think this is important, all we are saying is it is an insider, and we have narrowly defined that.

I challenge anyone to write a better definition of an insider other than the company itself, the board of directors or the officers. If they pocket huge amounts of money in connection with a false and misleading statement, they should not benefit from the safe harbor. Now, the case goes forward. If they are away and they can prove it, fine. But we are changing the law radically here. We are going far beyond anything the Senator from Connecticut proposed doing in his original bill. We have a safe harbor that has caused 48 Senators in this Chamber to say we want to change it. We have a safe harbor in S. 240 that has the SEC saying they are very worried that there will be increases in fraud.

Now, I think as a Senator from the largest State in the Union, where a lot of this happens—we look to the Keating people, and a lot of it was California—I have an obligation to make this bill better.

I would far prefer to have the safe harbor that my friend from Maryland proposed. Instead, we have this other safe harbor that my friend from Connecticut embraces. And we are saying you are opening it up for everybody. How about closing it for some obvious abuses.

Mr. DODD. Will my colleague yield on that point?

Mrs. BOXER. I will.

Mr. DODD. Again, I am not arguing about the spirit of what the Senator is trying to do. And no one is here trying to defend insider trading. But at this juncture, when we have tried to get directors to buy stock—it is one of the things we have tried to do over the years in our committee, purchase stock and get involved—I would have to say today, if this amendment were adopted, the last thing you would want to do is become even a purchaser. Forget a seller; the amendment says even purchasing stock here. You are removed from the process. All of a sudden you are trying to buy. My advice to anyone in that category, if this amendment were to be adopted, would be to stay away from this. I would stay entirely away from this. It would have absolutely the countereffect as we try to get people to acquire this stock. You are subjecting yourself to some very dangerous situations.

Mrs. BOXER. Let me take my time because my friend is distorting what this amendment does. He is distorting what this amendment does. No honest director, no honest person has to fear about this amendment. Only the crooks. Only the crooks. And all we are saying is this is a problem. "Insider-Trading Probes Make a Comeback," Saturday's edition of the L.A. Times.

I say to my friends in the Senate from both sides of the aisle, I think if you vote for this Boxer amendment, you will thank those of us who brought it forward because the handwriting is on the wall. They are saying it is back in vogue, insider trading is back in vogue. If it occurs in connection with a false or misleading statement, not a true statement but a false or misleading statement, we say why should we give the benefit of that safe harbor to those people? Let the case be brought forward. Let the officer or director make the point. But my goodness, to

argue against this amendment, I just am rather stunned. I was hopeful that we could have an agreement on both sides. I thought we could from the beginning. I was hit with all kinds of arguments the first time I brought this up: well, it is covered in another section. If you bought the shares the insider sold, yes, you are covered in another section.

What about the general public? They are not covered. And yet those directors, those officers, who pocketed that money are protected by the safe harbor.

I have reiterated this on a number of occasions, and I do not feel the need to continue at this point; my energy level is running down. But I have to come back tomorrow and present this in 5 minutes. So I look forward to that conclusion tomorrow, and I hope a favorable vote. I know that my colleagues have been hanging on my every word and everything I read here. I know that they are sitting in their offices, and they are absolutely intrigued by this debate. I hope if they did watch all of it they will come down and vote yes on the Boxer amendment tomorrow after we reiterate this argument and get it down to 5 minutes tomorrow morning.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Chair advises the Senator from California she has 2 minutes.

Mrs. BOXER. I will save that time, Mr. President, in case something is stated here to which I feel I must retort. Otherwise, I will be happy to yield back.

Mr. D'AMATO. Mr. President, do we have any time remaining?

The PRESIDING OFFICER. The time remaining on the Senator's side of the aisle is 13 seconds.

Mr. D'AMATO. Well, Mr. President, I am prepared to yield back the remainder of our time. I yield the floor.

Mrs. BOXER. Mr. President, in the spirit of comity and good will across the party aisle, I will yield back my 2 minutes.

The PRESIDING OFFICER. All time is yielded back.

Mrs. BOXER. I note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

VOTE ON AMENDMENT NO. 1479

The PRESIDING OFFICER. The hour is 8 o'clock. The question now is on agreeing to the amendment No. 1479 offered by the Senator from Florida [Mr. GRAHAM]. The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. BOND (when his name was called). Present.

Mr. LOTT. I announce that the Senator from Rhode Island [Mr. CHAFEE], the Senator from North Carolina [Mr. HELMS], the Senator from Vermont [Mr. JEFFORDS], the Senator from Indiana [Mr. LUGAR], and the Senator from Tennessee [Mr. THOMPSON] are necessarily absent.

Mr. FORD. I announce that the Senator from Hawaii [Mr. INOUYE] is necessarily absent.

The PRESIDING OFFICER (Mr. ASHCROFT). Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 32, nays 61, as follows:

[Rollcall Vote No. 290 Leg.]

YEAS—32

Akaka	Feingold	Levin
Biden	Graham	McCain
Bingaman	Harkin	Moynihan
Boxer	Hatfield	Nunn
Bradley	Heflin	Pell
Breaux	Hollings	Rockefeller
Bryan	Johnston	Sarbanes
Byrd	Kennedy	Shelby
Conrad	Kerrey	Simon
Daschle	Kohl	Wellstone
Dorgan	Lautenberg	

NAYS—61

Abraham	Ford	Moseley-Braun
Ashcroft	Frist	Murkowski
Baucus	Glenn	Murray
Bennett	Gorton	Nickles
Brown	Gramm	Packwood
Bumpers	Grams	Pressler
Burns	Grassley	Pryor
Campbell	Gregg	Reid
Coats	Hatch	Robb
Cochran	Hutchison	Roth
Cohen	Inhofe	Santorum
Coverdell	Kassebaum	Simpson
Craig	Kempthorne	Smith
D'Amato	Kerry	Snowe
DeWine	Kyl	Specter
Dodd	Leahy	Stevens
Dole	Lieberman	Thomas
Domenici	Lott	Thurmond
Exon	Mack	Warner
Faircloth	McConnell	
Feinstein	Mikulski	

ANSWERED "PRESENT"—1

Bond

NOT VOTING—6

Chafee	Inouye	Lugar
Helms	Jeffords	Thompson

So the amendment (No. 1479) was rejected.

Mr. D'AMATO. Mr. President, I move to reconsider the vote.

Mr. BIDEN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. D'AMATO. Mr. President, let me say that if we get this unanimous consent agreement, all those Members who have asked to have amendments considered will have them considered. All of the votes on those amendments will take place tomorrow, or tonight by voice. So what I am saying is there will be no further rollcall votes. And all of the debate, with the exception of, I believe, 7 minutes for one Member, and the intervening times, will take place this evening. I am going to propound that request.

UNANIMOUS-CONSENT AGREEMENT

Mr. D'AMATO. Mr. President, I ask unanimous consent that the following amendments be the only remaining first degree amendments in order, other than the committee-reported substitute, that no second-degree amendments be in order and that all amendments must be offered and debated this evening: The Biden amendment; the Bingaman amendment; the D'Amato-Sarbanes managers amendment; the Boxer amendment, re: insider trading; the Specter amendment, re: fraudulent intent; the Specter amendment, re: rule 11B; the Specter amendment, re: stay of discovery.

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

Mr. D'AMATO. I further ask that when the Senate completes its business today, it stand in recess until 8:40 a.m., and at 8:45 a.m. the Senate proceed to vote on or in relation to the first Specter amendment, and that following the conclusion of that vote, there be 4 minutes for debate, to be equally divided on the second Specter amendment, to be followed by a vote on or in relation to the second Specter amendment.

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

Mr. D'AMATO. I further ask that following the vote on the second Specter amendment, there be 4 minutes for debate, to be equally divided, on the third Specter amendment, to be followed by a vote on or in relation to the Specter amendment.

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

Mr. D'AMATO. I further ask that following the vote on the third Specter amendment, there be 7 minutes for debate, to be divided under the previous order, to be followed by a vote on or in relation to the Boxer amendment.

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

Mr. D'AMATO. I further ask that following the disposition of the Boxer amendment, the committee substitute, as amended, be agreed to and S. 240 be advanced to third reading, and the Banking Committee be discharged from further consideration of H.R. 1058, the House companion bill, and the Senate proceed to its immediate consideration; that all after the enacting clause be stricken and the text of S. 240, as amended, be inserted in lieu thereof, and H.R. 1058 be considered read the third time.

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

Mr. D'AMATO. I further ask unanimous consent that at that point there be 30 minutes for closing remarks, to be equally divided in the usual form, to be followed by a vote on H.R. 1058.

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

Mr. D'AMATO. Mr. President, I further ask unanimous consent that all of the votes after the first vote in the voting sequence be limited to 10 minutes each, except for final passage.

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

Mr. D'AMATO. Mr. President, there will be no further rollcall votes this evening, and the first vote tomorrow is at 8:45 a.m. The first amendment to be in order will be the Biden amendment, which will be kept under 5 minutes. Thereafter, the Bingaman amendment will follow, which will also be limited to 5 minutes, to be followed by Senator Specter's three amendments.

Mr. SARBANES. The first vote in the morning will be at 8:45. I remind my colleagues, that is a vote at 8:45.

The PRESIDING OFFICER. The first vote will be 8:45.

Mr. D'AMATO. Mr. President, I ask unanimous consent that the pending amendment be set aside so the Senator from Delaware can offer his amendment.

The PRESIDING OFFICER. Without objection, it is so ordered. The pending amendment is set aside.

AMENDMENT NO. 1481

Mr. BIDEN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Delaware [Mr. BIDEN] proposes an amendment numbered 1481.

Mr. BIDEN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

At the appropriate place insert:

SEC. . AMENDMENT TO RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.

Section 1964(c) of title 18, United States Code, is amended by inserting before the period ", except that no person may rely upon conduct that would have been actionable as fraud in the purchase of sale of securities to establish a violation of section 1962", provided however that this exception shall not apply if any participant in the fraud is criminally convicted in connection therewith, in which case the statute of limitations shall start to run on the date that the conviction becomes final.

Mr. BIDEN. Mr. President, I have been here a while. When I first got here 23 years ago, I learned a lesson from Russell Long.

I went up to him on a Finance Committee day and asked to have an amendment accepted, and he said yes. I proceeded to speak on it half an hour and say why it was a good amendment. And he said, "I changed my mind. Rollcall vote." I lost. He came later and he said, "When I accept an amendment, accept the amendment and sit down."

I will take 30 seconds to explain my amendment because it is about to be accepted. I thank my friend from Pennsylvania for allowing me to move ahead. He is always gracious to me and I appreciate it.

There is a carve-out in this legislation, carving out securities fraud from the application of the civil RICO statutes. I think that is a bad idea. But I will not debate that issue tonight.

I have an amendment that is before the body that says such a carve-out exists, except that it shall not apply if any participant in fraud is criminally convicted; then RICO can apply, and the statute does not begin to toll until the day of the conviction becomes final.

Keeping with the admonition of Russell Long, I have no further comment on the amendment.

Mr. D'AMATO. Mr. President, we have no objection. We accept that amendment.

The PRESIDING OFFICER. If there is no further debate, the question is on agreeing to the amendment.

The amendment (No. 1481) was agreed to.

Mr. BIDEN. I move to reconsider the vote.

Mr. SARBANES. I move to table the motion.

The motion to lay on the table was agreed to.

AMENDMENT NO. 1482

(Purpose: To clarify the application of sanctions under rule 11 of the Federal Rules of Civil Procedure in private securities litigation)

Mr. BINGAMAN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The pending amendment is set aside. The clerk will report.

The legislative clerk read as follows:

The Senator from New Mexico [Mr. BINGAMAN], for himself and Mr. BRYAN, proposes an amendment numbered 1482.

Mr. BINGAMAN. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 105, line 25, insert ", or the responsive pleading or motion" after "complaint".

On page 107, line 20, insert ", or the responsive pleading or motion" after "complaint".

Mr. BINGAMAN. Mr. President, I send this amendment on behalf of myself and Mr. BRYAN. It is a very simple amendment.

The present bill, as it is pending before the Senate, calls for a mandatory review by the court in any private action arising under the legislation. It says that the court shall establish a record with specific findings regarding compliance by each party, and each attorney representing any party with the requirements of rule 11 of the Federal Rules of Civil Procedure, prohibiting frivolous pleading or frivolous activity by counsel.

The difficulty is that later in the bill where it specifies presumption, that we call for on page 105 and 107 of the bill, we only specify that the appropriate sanction apply to pleadings filed by the plaintiffs.

Our amendment would change that and make it more balanced, in that it would specify that the sanctions could apply either to pleadings filed by the plaintiff or to responsive pleadings or motions filed by defense.

I think this is acceptable to the managers of the bill. I think it is only reasonable that if we are going to have this provision in the bill—which is a provision, quite frankly, I do not agree with—I think that singling out these securities cases as the only cases in our court system where we require a mandatory review by the court, and the finding and imposition of specific findings, is a mistake. If we are going to have it, we should make it balanced between plaintiff and defendant.

I know the Senator from Nevada wishes to speak. I yield the floor.

Mr. BRYAN. Mr. President, first let me commend my colleague from New Mexico. I think his amendment is well-constructed. We have used the word often in the course of the debate—balanced. This is balanced. What is sauce for the goose is sauce for the gander.

Those lawyers, whether they be plaintiff's lawyers or defendant's lawyers who are involved in frivolous conduct, now feel the full effect of sanctioned rule 11 under the Federal Rules of Civil Procedure.

Much has been said about the frivolous nature of this lawsuit correction act. I must say this is one of the few amendments that actually deals with this issue. I am pleased to support my colleague and friend from New Mexico, and I am pleased that the managers have agreed to accept the amendment. I urge its adoption.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 1482) was agreed to.

Mr. SARBANES. I move to reconsider the vote.

Mr. D'AMATO. I move to table the motion.

The motion to lay on the table was agreed to.

Mr. SPECTER. Mr. President, I have sought recognition to offer three amendments which I think will provide some balance to the legislation that is now pending before the Senate.

I believe that there is a need for some modification of our securities acts, but I think it has to be very, very carefully crafted.

As I take a look at what is occurring in the courts, compared to what happens in our legislative process, I think that the very deliberative rule in the courts, case by case, with very, very careful analysis, has to take precedence over the procedures which we use in the Congress where hearings are attended, sometimes by only one or two Senators, and then provisions are added in markup very late in the process. Legislation does not receive the

kind of very thoughtful encrustation that comes through common law development and interpretation of the securities acts.

I have represented both sides in securities litigation before coming to the U.S. Senate in the private practice of law. I would remind my colleagues that before we proceed to make such enormous changes by this legislation, we need to recall the importance of protecting investors, especially small investors, small unsophisticated investors, in some cases, who put a substantial part of their savings, perhaps all of their life savings, into securities, and how much is involved in the accretion of capital through corporations, through common stock, compared to what is the thrust of this legislation, really looking to curb some lawsuits which should not be brought, some frivolous lawsuits which ought not to have been filed, and perhaps some of the excesses in the plaintiffs' bar, as there may be excesses in any group.

What we are looking at is the value of shares traded in 1993 on the stock exchanges, the most recent year available for analysis. Mr. President, the $6.63 trillion traded on the stock exchanges in 1993 is more than half of the gross national product of the United States in 1963. The value of initial public offerings in 1993, was $57.444 billion.

If we take a look at the comparison as to how much is spent on attorney's fees, according to a 1990 article in the Class Action Reports, a review of some 334 securities class action cases decided between 1980 and 1990, a group of cases in which there was a recovery of $4.281 billion, only some 15.2 percent of that recovery went to fees and costs, a total of some $630 million.

In those cases, according to the court records, the attorneys for the plaintiffs spent 1,691,642 hours.

Statistics have already been presented on the floor of the Senate which show a decrease in securities litigation. I submit that it is very important to be able to continue to protect investors—especially small investors—from stock fraud.

We know that in the crash of the Depression, 1929 and thereafter, tremendous savings were lost at that time. These losses gave rise to the legislation in 1933 and 1934 to protect investors and the securities markets.

Without speaking at length on the subject, I would point to a few cases where there were very substantial losses to the public and in which private actions were brought to enforce the securities laws. For example, the ongoing Prudential Securities litigation, with over $1 billion in losses, perhaps as much as double that; the Michael Milken cases, where there were recoveries in the range of $1.3 billion, involving Drexel, Burnham & Lambert, recovered by the Federal Deposit Insurance Corporation under the securities laws; we all know the famous Charles Keating case, involving his former company, Lincoln Savings & Loan, involving some $262 million recovered and some $288 million lost; the $2 billion lost in the Washington Public Power Supply System case—mentioning only a few.

The concern that I have on the legislation as it is currently pending is that there is an imbalance which will discourage this very important litigation to protect the shareholders. I have supported the managers of the bill on a number of the amendments which have been filed, but I am going to submit a series of three amendments which, I submit, will make the bill more balanced.

The PRESIDING OFFICER. Without objection the pending amendment will be set aside.

AMENDMENT NO. 1483

(Purpose: To provide for sanctions for abusive litigation)

Mr. SPECTER. At this time, Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER] proposes an amendment numbered 1483.

Mr. SPECTER. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

Beginning on page 105, strike line 1 and all that follows through page 108, line 17, and insert the following:

SEC. 103. SANCTIONS FOR ABUSIVE LITIGATION.

(a) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following new subsection:

"(j) SANCTIONS FOR ABUSIVE LITIGATION.—In any private action arising under this title, if an abusive litigation practice relating to the action is brought to the attention of the court, by motion or otherwise, the court shall promptly—

"(1) determine whether or not to impose sanctions under rule 11 or rule 26(g)(3) of the Federal Rules of Civil Procedure, section 1927 of title 28, United States Code, or other authority of the court; and

"(2) include in the record findings of fact and conclusions of law to support such determination.".

(b) SECURITIES EXCHANGE ACT OF 1934.—Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) is amended by adding at the end the following new subsection:

"(*l*) SANCTIONS FOR ABUSIVE LITIGATION.—In any private action arising under this title, if an abusive litigation practice relating to the action is brought to the attention of the court, by motion or otherwise, the court shall promptly—

"(1) determine whether or not to impose sanctions under rule 11 or rule 26(g)(3) of the Federal Rules of Civil Procedure, section 1927 of title 28, United States Code, or other authority of the court; and

"(2) include in the record findings of fact and conclusions of law to support such determination.".

Mr. SPECTER. Mr. President, this amendment is designed to leave discretion with the trial judge in place of the very onerous provisions of the pending bill which require a mandatory review by the court after each securities case is concluded and then a requirement that the court impose sanctions on a party if the court finds that the party violated any requirement of rule 11(b) with the presumption being that attorney's fees will be awarded to the losing party.

I submit that this is a very harsh rule which will have a profoundly chilling effect on litigation brought under the securities acts, and will in addition spawn an enormous amount of additional work for the Federal courts by causing what is called satellite litigation.

That means that in any case where the litigation is concluded under the securities acts, the judge will be compelled, under the mandatory review provision, to review all the pleadings filed in the case to determine whether rule 11 was violated, whether or not either party chooses to have that review made, and then will be compelled to impose the sanction with the presumption being payment of attorney's fees, which is really the British system, not the United States' system, where we have had open courts. This provision risks causing a tremendous imbalance between plaintiffs and defendants in these cases because the defendants are characteristically major corporations with much greater resources to defend, contrasted with the plaintiffs who do not have those resources, or their lawyers who bring the suits on their behalf.

I have surveyed the Federal bench, the judges in the U.S. district courts and in the courts of appeals, to see how the judges respond to changes in rule 11 to take away the discretion of the trial judges and have what is, in effect, micromanagement of the judiciary by the Congress of the United States. I have done this to try to get a sense as to what is going on in the courts. It has been some time since I practiced there.

I submit that the views of a few Senators, the authors of this bill and the Senators who are voting on this legislation, are a great deal more limited than the insights of the Federal judges who preside in the administration of these cases day in and day out. The procedures which are being followed in this legislation are not those customarily followed where the rules of civil procedure are formulated by the Federal courts under the Rules Enabling Act—the Supreme Court which has the authority to do so, and the delegation of that authority to committees where the judges work with it all the time, and representatives of the bar, as opposed to the Members of Congress, who have very, very limited experience in this field and, in this particular case, had this provision added

very late in the process, late in May, a few days before there was final markup of the bill in the Banking Committee, which does not normally deal with issues of the Federal Rules of Civil Procedure.

Earlier in the consideration of this bill I made an effort to have these issues on procedure referred to the Judiciary Committee, on which I serve, which has the most experience of any committee in the Congress—certainly more than the Banking Committee, which has jurisdiction over this bill—because hearings were not held and consideration was not given to this rule 11 provision.

Among the responses which I received, some 164 responses from Federal judges, there was a general sense that the trial judges ought to have the discretion and were in the best position to make a determination as to whether sanctions ought to be imposed without having a mandate from the Congress, the micromanagement from the Congress, saying you must make this determination. Even though the winning party did not ask for it, even though there are not procedures for one party to say to the other, "You are undertaking something which our side considers frivolous and, if you do not cease and desist, we will bring an action to impose sanctions," to have a chance to correct it.

A very lucid statement of the problem was made by a very distinguished judge for the Court of Appeals for the Third Circuit, Judge Edward R. Becker, who had this to say:

The mandatory sanctions are a mistake and will only generate satellite litigation.

By satellite litigation, Judge Becker is referring to the situation where another lawsuit, another issue has to be litigated as to whether a rule 11 sanction should be instituted. Again, not at the request of the losing party. Judge Becker continues to this effect:

The flexibility afforded by the current regime enables judges to use the threat of sanctions to manage cases effectively. Well-managed cases almost never result in sanctions. Moreover, the provisions for mandatory review, presumably without prompting by the parties, will impose a substantial burden on the courts and prove completely useless in the vast majority of cases. Requiring courts to impose sanctions without a motion of a party also places the judge in an inquisitorial role, which is foreign to our legal culture, which is based on the judge as a neutral arbiter model.

A very cogent reply was made by Judge James A. Parker, of the United States District Court for the District of New Mexico, who had this to say:

As a member of the judiciary, I implore members of the legislative branch of government to follow the Rules Enabling Act procedures for amending rules of evidence and procedure that the courts must apply. Congress demonstrated great wisdom in passing the Rules Enabling Act which defines the appropriate roles of the legislative and judicial branches of government in adopting new rules or amending existing rules. Those who hold the strong and sincere belief that changes should be made to the current formulation of Rule 11 should present their views and proposals in accordance with the procedures set forth in the Rules Enabling Act.

Judge Parker further writes that "Rule 11 * * * gives federal judges adequate authority to impose appropriate sanctions for conduct that violates Rule 11."

Mr. President, a number of the judicial comments which I am about to read apply to my second amendment as well. That second amendment relates to a provision in the bill which requires that the court not allow discovery after a motion to dismiss is filed. On that particular line, the rule is that discovery may proceed unless the judge eliminates discovery. Under the pending legislation, there would be no discovery as a matter of mandate unless under very extraordinary circumstances, but the mandatory rule applies. And the comments of Judge Parker would apply to the second amendment as well, the second amendment which I propose to bring.

Mr. President, the statement by Judge Bill Wilson of the Eastern District of Arkansas, in a letter dated April 27, is to the same effect, as follows:

Federal Rule . . . 11, as it now reads, gives a judge all he or she needs to handle improper conduct. And I think we should all keep in mind that we can't promulgate rules good enough to make a good judge out of a bad one.

On that point, Mr. President, I think it is fair and appropriate to note that we have a very able Federal judiciary which can administer justice if left to do so with appropriate discretion.

Judge Prentice H. Marshall of the Northern District of Illinois said this in a May 5 letter:

Rule 11 . . . gives the judge greater flexibility in the imposition of sanctions; it affords the offending party the opportunity to correct his or her misdeed.

A letter from Martin F. Loughlin of the District of New Hampshire, dated May 2 reads:

Federal Rule of Civil Procedure 11 is working well. It gives the judge adequate discretion to deal with frivolous litigation and untoward conduct by attorneys.

A letter from Federal Judge Miriam Goldman Cedarbaum from the Southern District of New York, dated May 10, 1995, says in part:

I have found the general supervisory power of the court as well as 28 U.S.C., Section 1927, and Rule 11 adequate sources of judicial authority to discourage frivolous litigation.

A letter from Federal Judge J. Frederick Motz from the District of Maryland, dated May 9, 1995, referring to the mandatory rules said that they are:

. . . counterproductive in that it increased judges' workloads and contributed to litigation cost and delay by requiring judges to impose sanctions whenever a Rule 11 violation was found. Satellite litigation in which one lawyer or party sought fees from another became commonplace.

Continuing to quote:

I oppose any amendment to the Rule that would make imposition of sanctions mandatory.

A similar view was expressed by Judge Ilana Diamond Rovner of the Court of Appeals for the Seventh Circuit in a letter dated April 1995:

The current Rule 11 gives the District Court ample discretion to address frivolous litigation.

A letter from Senior Judge Floyd R. Gibson from the U.S. Court of Appeals for the Eighth Circuit, dated April 20, 1995:

I believe more discretion should be given to the district judge in the how and when to apply the sanctions under Rule 11(c) on sanctions.

Similarly, Judge Avern Cohn from the Eastern District of Michigan, dated May 5, 1995, says, in part:

I firmly believe that Congress involves itself too deeply in the procedural aspects of the litigation process.

A letter from Martin Feldman from the Eastern District of Louisiana, says, in part:

I believe that giving district courts more discretion in applying the Rule was good thinking.

And Judge Jimm Larry Hendren of the Western District of Arkansas, writes, in part:

I am not sure the Congress needs to pass any legislation. I think the courts, themselves, can handle this matter with the rules already in place and their inherent powers.

And a letter from Judge Leonard I. Garth, a distinguished member of the Court of Appeals for the Third Circuit, says:

In my opinion, abandoning mandatory sanctions and permitting district court judges to exercise their judicial discretion was a welcome measure.

A good many of these comments apply to the change in rule 11, which had been mandatory from 1983 to 1993. It would apply equally well to the kind of a rule which is in effect here.

The letter from Senior Judge William Schwarzer from San Francisco says that the sanctions ought to be discretionary.

Mr. President, I ask unanimous consent that these letters, which represent only a small sample of the responses I received supporting discretionary imposition of sanctions, appear in the RECORD at the conclusion of my statement, with the exception of the letter from Judge Becker.

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

(See exhibit 1.)

Mr. SPECTER. Mr. President, I now refer again to the letter from Judge Becker citing the draft of a rule from Circuit Judge Patrick Higginbotham, who is chairman of the Judicial Conference Advisory Committee on Civil

Rules, which sets out the amendment which I have submitted, and it is to this effect: that the sanction for abusive litigation would arise in any private action when the abusive litigation practice is brought to the district court's attention by motion or otherwise. The court shall promptly decide with written findings of fact and conclusions of law whether to impose sanctions under rule 11, and upon the adjudication, the district court shall include the conclusions and shall impose the sanctions which the court in the court's discretion finds appropriate.

Mr. President, I submit to my colleagues that leaving the discretion to the judge really is the right way to handle these matters. These judges sit on these cases, know the cases, and have ample authority as a discretionary matter to impose the sanction. As one judge said, all these rules cannot make a bad judge do the right thing. But I think we can rely upon the discretion of the judges without tying their hands.

Mr. President, I would be glad to yield the floor at this time to argument by the managers if they would care to do so. We can then proceed to conclude the argument on this amendment.

EXHIBIT 1

U.S. DISTRICT COURT,
DISTRICT OF NEW MEXICO,
Albuquerque, NM, May 2, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Wsshington, DC.

DEAR SENATOR SPECTER: Thank you for your letter of April 24, 1995 and the opportunity to express comments on issues involving Rule 11 of the Federal Rules of Civil Procedure.

For purposes of clarity, I have restated each question posed in your April 24, 1995 letter followed by my response.

(1) Is there a significant problem with frivolous litigation in the Federal Courts such as to justify "loser pays" and strengthening of FRCP 11?

Response: Rule 11, as amended effective December 1, 1993, gives federal judges adequate authority to impose appropriate sanctions for conduct that violates Rule 11. Rule 11(c) states that if Rule 11 has been violated "the Court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." Rule 11(c)(2) describes the sanctions that may be imposed for a violation. These include directives of a non-monetary nature, an order to pay a penalty into Court, or an Order directing that an unsuccessful movant who has violated Rule 11 pay "some or all the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." At this point there appears to be no need to change Rule 11, or to pass legislation, to introduce a more stringent "loser pays" sanction.

(2) How well did FRCP 11 work after the 1983 Amendment, which strengthened the rule, and since the 1993 Amendment, which weakened the rule?

Response: In this judicial district, considerable satellite litigation developed under Rule 11 after the 1983 amendment. This required judges to devote significant time to resolving squabbles among counsel unrelated to the merits of the case. The 1993 amendment of Rule 11 has dramatically reduced the number of motions alleging Rule 11 violations. This I attribute directly to the "safe harbor" provision found in Rule 11(c)(1)(A). The "safe harbor" provision has forced lawyers to communicate and to resolve their disputes in most instances without the need for Court intervention. My personal opinion is that this feature of the 1993 amendment of Rule 11 strengthened instead of weakened Rule 11. It has made the lawyers talk to each other about claims or defenses perceived by their opponents to be frivolous and this has resulted in most disputes being resolved without extensive briefing and devotion of valuable court time. Removal of the "safe harbor" provision from Rule 11 would be extremely detrimental to the orderly functioning of the courts.

(3) What suggestions, if any, do you have in relation to this issue?

Response: As a member of the judiciary I implore members of the legislative branch of government to follow the Rules Enabling Act procedures for amending rules of evidence and procedure that the courts must apply. Congress demonstrated great wisdom in passing the Rules Enabling Act which defines the appropriate roles of the legislative and judicial branches of government in adopting new rules or amending existing rules. Those who hold a strong and sincere belief that changes should be made to the current formulation of Rule 11 should present their views and proposals in accordance with the procedures set forth in the Rules Enabling Act.

If you wish, I will be happy to provide additional information on this subject either orally or in writing.

Sincerely,

JAMES A. PARKER.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF ARKANSAS,
Little Rock, AR, April 27, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you very much for your letter of April 6, 1995.

In the year and a half that I have been on the bench I have had no problem with frivolous litigation. I have sanctioned two lawyers for engaging in what I thought to be inappropriate discovery procedures, but have had no experience with FRCP 11 as a trial judge.

I am strongly opposed to the "loser pays" proposal. I am told by my scholarly friends that this is a British rule. With all due respect for our kinfolks across the Atlantic, many of our ancestors got on a ship and came to the United States because they were not particularly fond of the justice system in Britain. In all seriousness, I do have a lot of respect for some aspects of the system in England, but, in my opinion, ours is much superior.

The "loser pays" will obviously slam the courthouse door shut in the face of deserving citizens who are not well heeled financially.

It appears to me that the 1993 Amendment to FRCP 11 was much needed. The rule, before these changes, tended to be too rigid, at least on the surface. It encouraged satellite litigation. FRCP 11, as it now reads, gives a judge all she or he needs to handle improper conduct. And I think we should all keep in mind that we can't promulgate rules good enough to make a good judge out of a bad one.

Finally, I would like to comment on the "crisis" claims that are being made about the case load in federal district courts. I quote from Judge G. Thomas Eisele: *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. Rev. 1935 (1993):

. . . In 1985 the total case filings in all U.S. District Courts came to 299,164; in 1986, 282,074; in 1987, 268,023; in 1988, 269,174; in 1989, 263,896; in 1990, 251,113; in 1991, 241,420; and in 1992, 261,698. So in a period of seven years the total filings have fallen from 299,164 to 261,698. The number of civil filings per judgeship fell from 476 in 1985 to 379 in 1990—a period when the number of judgeships remained constant at 575. In 1991 the number of judgeships increased to 649 and the number of civil cases per judgeship fell to 320. For 1992 the figure is 350.

"We are frequently told that our criminal dockets are interfering with our civil dockets, and this has certainly been true in a few of our federal districts. But the number of felony filings per judgeship only increased from forty-four in 1985 to fifty-eight in 1990. In 1992, that number fell to fifty-three. The total filings per judgeship, criminal and civil, have been lower than they were in 1991 (372) in only two years since 1975. And the weighted filings per judgeship have likewise fallen in the past five years from 461 in 1986 to 405 in 1992.

"So there is not much support for the oft-repeated assertions that 'federal court system has entered a period of crisis;' that our courts are 'on the verge of buckling under the strain;' that 'our courts are swamped and unmanageable'. . . . The actual figures and trends simply do not support such doomsday hyperbole.

"On the issue of delay we find, as always, that a few district courts are having considerable trouble moving their dockets, but overall we find the same median time from filing to disposition in civil cases (nine months) for each year from 1985 until 1992. And the period between issue and trial in 1992 (fourteen months) is the same as it was in 1985. A Rand Corporation study confirms that the rhetoric about unconscionable and escalating delays in processing and trying cases in the federal district court system is nothing more than myth. . . ."

In other words, the sky is not falling down.

Again, thank you very much for permitting me to comment on these questions.

Cordially,

WM. R. WILSON, JR.

U.S. DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
Chicago, Illinois, May 5, 1995.

Senator ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: I respond to yours of April 19 inquiring about the need to strengthen Rule 11 of the Federal Rules of Civil Procedure.

1. In my 22 years on the federal trial bench I state unequivocally that there is not a significant problem with frivolous litigation in the federal courts warranting a "loser pays" sanction. I have encountered two or three repetitious/abusive plaintiffs. But their first complaints were not frivolous. They just had difficulty taking "No" for an answer.

Of course, in all litigation which is tried, somebody wins and somebody loses. But the losers are not frivolous complainers.

2. The 1993 amendment to Rule 11 of the Federal Rules of Civil Procedure did not "weaken" it. Quite the contrary: it made the

Rule bilateral, i.e., it applies to unfounded denials as well as unfounded contentions; it gives the judge greater flexibility in the imposition of sanctions; it affords the offending party the opportunity to correct his or her misdeed. The rule should not revert to 1983.

3. I suggest that Rule 11 be left just the way it is. It is working well. The collateral litigation provoked by the 1983 version has diminished.

Respectfully yours,

PRENTICE H. MARSHALL.

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW HAMPSHIRE,
Concord, NH, May 2, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: This is to acknowledge receipt of your letter dated April 24, 1995 with respect to the recently passed United States House of Representatives legislation providing for a form of "loser pays."

In response to question #1, I do not believe there is a significant problem with frivolous litigation in the Federal Courts to justify "loser pays."

With respect to question #2 FRCP 11 is working well. It gives the judge adequate discretion to deal with frivolous litigation and untoward conduct by attorneys.

Candidly, I hope that the Senate does not pass the "loser pays" legislation. I have one comment related to strengthening of FRCP 11. Although there may be and there is some justification for losers pay, I do not believe it is necessary. There are many cases where an indigent, well-intentioned litigant may be penalized by strict adherence to a rule that losers pay. I have been a New Hampshire Superior Court judge for sixteen years and a Federal Judge for an equal amount of time. While not strictly restricted to the Federal Courts, we are being inundated with paper, usually by the party who is well-off financially. This unfortunately sometimes puts pressure on the non-affluent litigant to settle or withdraw his or her claim.

Sincerely,

MARTIN F. LOUGHLIN.

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK,
New York, NY, May 10, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for your letter dated April 24 inquiring about frivolous litigation in the federal courts. I have been a federal trial judge for nine and one-half years in one of the busiest districts in the country. During that period, Fed.R.Civ.P. 11 has been both strengthened and weakened. I have not observed a significant problem that requires a legislative remedy.

The only noticeable effect of the weakening of Fed.R.Civ.P. 11 has been a welcome diminution in the number of Rule 11 motions. With respect to "loser pays," it is my strongly-held view that the founders of this Republic wisely chose to eliminate certain aspects of the English legal system as contrary to the egalitarian ideals of American democracy. Two of the most important of these reforms were the abolition of the distinction between barristers and solicitors and the elimination of the British practice of requiring the losing party in civil litigation to pay the lawyers fees of the winning party. Indeed, the system of having each party bear its own legal fees has come to be known as the American Rule. It is based on the belief that people of limited means would be deterred from suing on meritorious claims by the fear that if they were not successful, the costs would ruin them.

I have found the general supervisory power of the court as well as 38 U.S.C. §1927 and Rule 11 adequate sources of judicial authority to discourage frivolous litigation, and do not believe that the American Rule should be abolished.

Sincerely,

MIRIAM GOLDMAN CEDERBAUM.

UNITED STATES DISTRICT COURT,
DISTRICT OF MARYLAND,
Baltimore, Maryland, May 9, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for your letter of April 19, 1995, in which you solicit my views on a "loser pays" rule and the possible strengthening of FRCP 11.

There is, of course, a fair amount of frivolous litigation in the federal courts. However, the bulk of that litigation is conducted by impecunious litigants as to whom a "loser pay" rule would have no effect. Accordingly, I do not support the adoption of such a rule. I particularly oppose the rule in diversity cases since it would provide in such cases a significant incentive for attorneys to forum shop.

Similarly, I oppose any amendments to strengthen FRCP 11. I believe that as a general matter, Rule 11 is a valuable tool for judges to use, and I have occasionally imposed Rule 11 sanctions myself to punish or deter inappropriate behavior. However, I further believe that Rule 11, as it existed prior to the 1993 amendments, had a deleterious effect upon the professional relationships of members of the bar. Furthermore, I think that in its pre-1993 form the Rule was counterproductive in that it increased judges' workloads and contributed to litigation cost and delay by requiring judges to impose sanctions whenever a Rule 11 violation was found. Satellite litigation in which one lawyer or party sought fees from another became commonplace.

For these reasons I oppose any amendment to the Rule that would make imposition of sanctions mandatory; to a somewhat lesser extent, I also oppose elimination of the Rule's "safe harbor" provision provided in the 1993 amendments.

I hope that these comments are helpful to you. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

J. FREDERICK MOTZ,
United States District Judge.

U.S. COURT OF APPEALS
FOR THE SEVENTH CIRCUIT,
Chicago, IL, April 19, 1995.

Senator ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for your letter requesting my views on the "loser pays" and Rule 11 issues. I very much appreciate being given an opportunity to comment. My thoughts on the specific questions you pose are as follows:

(1) In my judgment, there is no significant problem with frivolous litigation in the federal courts such as would justify "loser pays" legislation or strengthening FRCP 11. The current Rule 11 gives the district court ample discretion to address frivolous litigation. If a given case is sufficiently frivolous, a court is not hampered from invoking Rule 11 to shift the entire cost of the case to the loser. Rule 11 also grants the district court discretion to impose more modest penalties or to refrain from a penalty, depending on what is appropriate in a given case.

(2) After the 1983 amendment, FRCP 11 created a cottage industry of satellite litigation which consumed an enormous amount of court time and did not succeed in improving the overall quality of litigation. The fact that penalties were mandatory if a violation was found simply raised the stakes of Rule 11 litigation and encouraged the filing of requests for sanctions, even if the breach was slight and the damage minimal. In many cases, it turned a dispute between the litigants into a dispute between the lawyers, and hampered or prevented altogether the pre-trial settlement of cases. The 1993 amendment has improved matters greatly by making sanctions discretionary. This permits much greater flexibility and has removed the incentive to file Rule 11 motions when the case for sanctions is weak.

(3) I strongly recommend that Congress leave Rule 11 as is and not adopt the "loser pays" rule. A "loser pays" provision will not add anything substantive to the district court's arsenal of tools to deal with frivolous litigation. It is likely merely to discourage litigants with limited resources to pursue their cases, particularly when the litigant seeks a change in the law. The ability to pursue such cases seems to me one of the fundamental protections of individual rights in this country, and I believe if we want to reduce litigation, rather than disincentives for pursuing novel theories we ought to introduce incentives for settlement. "Loser pays" would act as a disincentive to settlement by introducing the question of fees and costs into settlement discussions. It would also generate an enormous amount of fees litigation. The net effect would thus be deleterious to individual liberties without significantly reducing the amount of litigation, and would in my judgment merely exacerbate the core problem—the amount of time that judges are increasingly required to devote to non-substantive matters.

Thank you again for inviting me to comment. I hope that my thoughts will be of aid to you in your deliberations, and I send, as always, warmest good wishes and my thanks for your many kindnesses through the years.

With best regards,

ILANA DIAMOND ROVNER.

U.S. COURT OF APPEALS,
EIGHTH CIRCUIT,
Kansas City, MO, April 20, 1995.

Re FRCP 11.

Hon. ARLEN SPECTER,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: In reply to your letter of April 6, positing inquiry on three issues related to FRCP 11, I would like to respond as follows:

1. There is a significant problem with frivolous litigation in the Federal Courts. I think a trial run with "loser pays" proposal would be in order provided the district judge would have the discretion to apply or not to apply such sanction in any given case.

2. I think FRCP 11 worked better after the 1983 Amendment; and, has some difficulty since the 1993 Amendment.

3. I believe more discretion should be given to the district judge in the how and when to apply the sanctions authorized under FRCP 11(c) on sanction. Also, some revisions of subsection (d) might be in order relating to

discovery as there has been many abuses reported of extensive, unnecessary and costly discovery procedures which makes the whole legal system too expensive for many citizens to handle or even participate in the legal process.

I have been sitting with the Ninth Circuit in San Francisco since the receipt of your letter, hence my slight delay in reply.

Sincerely,

FLOYD R. GIBSON.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF MICHIGAN,
Detroit, MI, May 5, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Thank you for asking my views on pending "loser pays" legislation.

I firmly believe the Congress involves itself too deeply in the procedural aspects of the litigation process. Federal judges are capable of dealing with abusive lawyering. Legislation is not needed. I handle my docket just fine. I control abusive lawyering within the existing rules. Giving me more authority to deal with abusive lawyering is likely to make me more abusive.

Specifically,

1. There is no problem with frivolous litigation in the federal courts. FRCP 11 does not need to be strengthened and "loser pays" is not justified. We have gotten along very well for 220 years without much fee shifting and there is no need for it now.

2. FRCP 11 worked less well after the 1983 Amendment than it has since the 1993 Amendment. After the 1983 Amendment there were frequent occasions of overuse. That overuse no longer appears. Rarely is there a need for Rule 11 sanctions of any significant amount.

3. I suggest that Congress stay out of this area. What is pushing the Congress now is the better heeled part of society. More defendants win in court than plaintiffs. "Loser pays" and a stricter FRCP 11 would discourage otherwise potentially meritorious cases from coming to federal courts.

Lastly, published statistics show a 14% drop in the number of civil filings in federal courts between 1985 and 1994. Why all the excitement?

Sincerely yours,

AVERN COHN.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA,
New Orleans, LA, May 1, 1995.

Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: This is in response to your letter of April 19th, which I assume went to all members of the judiciary (unless our mutual good friend, Ed Becker, suggested that you write to me).

Let me say at the outset that after having been a lawyer who practiced principally in federal courts for some 26 years and a United States District Judge for nearly 12 years, I support some form of "loser pay" legislation.

There is indeed a problem with frivolous litigation in the Federal Courts which, in my view, justifies some form of "loser pay" rule. "Loser pay" legislation would serve as a deterrent to many lawsuits that ought not be filed, including suits by lawyers and pro se litigants. Moreover, "loser pay" legislation would also deter frivolous defenses in the early stages of the litigation. That, to me, is the main difference between "loser pay" and Rule 11.

I believe Rule 11 has worked after the 1983 Amendment, but its weakness is that Rule 11 addresses matters that might have occurred at the outset of litigation but that usually occur as an abuse of the adversary process in a later stage of the litigation. On the other hand, "loser pay" would serve as a deterrent from the very beginning of the litigation. I haven't had much involvement with Rule 11 since the 1993 Amendment, but I believe that giving district courts more discretion in applying the Rule was a good thing and I would not consider the 1993 Amendment to have been a weakening of the Rule.

As to specific suggestions, "loser pay" comes in many forms as you no doubt are aware. I don't have a specific model in mind, only a concept. I like the English rule but they have a much more sophisticated Legal Aid system. The question of whether or not pro se litigants should be dealt with the same way as lawyers and other litigants is a close call. I guess what I am saying is that there are several models of "loser pay" and your Committee would no doubt want to consider many of them and, perhaps, even a refinement of them that would accommodate the Federal system. But some form of "loser pay" is most appropriate now and I would be pleased to work with any group who was interested in drafting such legislation.

Thank you very much for writing me. You may also be interested to know that one of my present law clerks is Marc DuBois, whose father I understand is also a close friend of yours.

Sincerely,

MARTIN L.C. FELDMAN.

U.S. DISTRICT COURT,
WESTERN DISTRICT OF ARKANSAS,
Fort Smith, AR, April 20, 1995.

Re: Your Letter of April 6, 1995.

Senator ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: With respect to your request for comment, I would make the following observations:

(1) Is there a significant problem with frivolous litigation in the Federal Courts such as to justify "loser pays" and strengthening of FRCP 11?

Response: I cannot speak for all federal courts but, with respect to those with which I am involved, the answer is "no."

(2) How well did FRCP 11 work after the 1983 Amendment, which strengthened the rule, and since the 1993 Amendment, which weakened the rule?

Response: I did not commence my duties as a federal district judge until April 15, 1992. Accordingly, I don't feel qualified to make an appropriate comment on this issue.

(3) What suggestions, if any, do you have in relation to this issue?

Response: I am not sure the Congress needs to pass any legislation. I think courts, themselves, can handle this matter with the rules already in place and their inherent powers.

Respectfully,

JIMM LARRY HENDREN.

U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT,
Newark, NJ, April 24, 1995.

Hon. ARLEN SPECTER,
U.S. Senator, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: Your letter of April 6th asks for my comments respecting congressional proposals to strengthen Rule 11 and to enact "loser pays" legislation. I am pleased to respond to your inquiries as best I can.

The 1983 amendment to Rule 11 generated a rash of Rule 11 motions, which themselves often generated responding Rule 11 motions. These motions were frequently groundless. According to a 1989 Federal Judicial Center (FJC) survey, approximately 31 percent of judges believed that many or most Rule 11 motions for sanctions are themselves frivolous. Federal Judicial Center, Rule 11: Final Report of the Advisory Committee on Civil Rules §2A at 7 (1990). Indeed, the post-1983 Rule 11 jurisprudence gave rise, in my opinion, to tangential "satellite" proceedings which, in many instances, not only delayed but appeared to dwarf the controversy on the merits.

I make special reference here to the practice of counsel who file a Rule 11 motion in an attempt to recover fees, which is met with a Rule 11 motion by adversary counsel, claiming that the initial Rule 11 motion was itself frivolous. According to the Judicial Center, the majority of judges (and I count myself among them) believe that the possibility of "dueling" Rule 11 motions can make litigation even more contentious if the threat of cost shifting materializes. *Id.* §2A at 10. Further, judicial time spent defining what is "frivolous" and resolving arguments over the appropriate fee award, allowable costs, and the like deprives judges of time which they could otherwise devote to the merits of other matters.

Additionally, about 65 percent of judges believe that frivolous litigation represents a small or very small problem, accounting for only 1–10 cases per judge in a year. *Id.* §2A at page 2–3. In combination, these statistics suggest to me that the 1983 version of Rule 11 itself may have contributed to needless proceedings in the courts.

The 1993 Amendment, of course, altered Rule 11 so that district court judges may exercise their discretion over whether to impose sanctions. Further, it explicitly provides for the option of penalties (fines) paid to the court in lieu of attorney's fees, and incorporates a 21 day "safe harbor" provision. Each provision reduces the likelihood that attorneys will fine Rule 11 motions to shift costs while still permitting judges to target violators with appropriate sanctions aimed at deterring future frivolous proceedings.

In my opinion, abandoning mandatory sanctions and permitting district court judges to exercises their judicial discretion was a welcome measure. Some frivolous litigation will always exist, and judges should have the power and discretion to address such behavior. After experience on the district court and more than twenty years examining district court records on appeal, I am confident that district court judges through the exercise of their discretion can control the evil that Rule 11 was originally promulgated to cure. This is the same power and discretion which we in the Courts of Appeal exercise over litigants through Federal Rule of Appellate Procedure 38.

I am also of the opinion that there has not been sufficient time since the 1993 Amendment has gone into effect to assess the institutional and judicial problems that may have arisen. I think that before further amendment to Rule 11 is sought, or further legislation in this area is contemplated, there should be a period for judicial maturation, study and evaluation.

In this regard, let me state a final concern that I have with the proposed congressional changes to the Federal Rules. The procedure for Rule amendments provided in the Rules Enabling Act—consideration by committees, the Judicial Conference, and the Supreme

Court followed by submission to Congress—represents a prudent and conservative allocation of rulemaking authority between the judiciary and Congress. I am concerned that the initiation of rule changes by Congress without study and input from the judiciary, and without a developmental process involving the bench and bar, risks overlooking relevant considerations. Moreover, the ever-present separation of powers problems which lurk in the background of congressional attempts to fashion procedural rules for the Federal Courts suggests that Rules such as Rule 11 should be processed through traditional judicial channels before congressional action is taken.

As for my thoughts on the "loser pays" aspect of the Attorneys Accountability Act, I will be brief. It is clear to me that the primary results of such legislation can only be to (1) reduce the number of cases that go to trial, and (2) spur plaintiffs to take lower settlements than they would otherwise have accepted. However, this is just my opinion and it is not based on empirical data.

I note, for instance, that the Proposed Long Range Plan for the Federal Courts, in its March 1995 publication, recognizes that "appropriate data are needed to assess the potential impact of fee and cost shifting on users of the Federal Courts." *Id.* at 61. The Plan rejects the "English" rule but recommends continuing a study of the problem of fee shifting to decrease frivolous or abusive litigational conduct. I share those views.

I am generally of the opinion that the American Rule is consonant with our tradition of liberal access to the courts. I have always taken great pride in the fact that in our country, plaintiffs with legitimate claims may have their "day in court" without fear of sanctions should their suits prove unsuccessful. I am also concerned that public interest groups and civil rights claimants may be discouraged from filing meritorious complaints due to fears that they will be assessed "shifted" fees in excess of their ability to pay.

You have asked what suggestions I have with respect to these issues. I would retain the 1993 Amendment to Rule 11 in its present form and revisit the effect of the Amendment at some future time, perhaps in another five years. Because Federal Rule of Civil Procedure 11 and Federal Rule of Appellate Procedure 38 give the courts power to sanction frivolous actions when necessary, my inclination is not to remove that discretion, but to encourage it.

I am similarly conservative as to "loser pays." I note that even in Great Britain there has been recent criticism, both in the press and among scholars, of the English Rule. My experience tells me that "each side pays" has resulted in a just balance of interests. I am also a firm believer in the old adage, "if it ain't broke, don't fix it." I therefore recommend against abandoning our present system until such time as studies of the two system reveal the desirability of change.

I am certain that you and your office have considered all of the matters that I have written about before receiving this note, but I did want to respond and explain to you why I entertain the views that I have advanced with respect to Rule 11 and "loser pays" legislation. Certainly, I would be pleased to respond to any inquires you may have.

Thank you writing to me in this regard.

Sincerely,

LEONARD I. GARTH.

San Francisco, CA, May 1, 1995.

Hon. ARLEN SPECTER,

U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: This letter responds to yours of April 19 posing the following questions relating to legislation that would amend Rule 11 of the Federal Rules of Civil Procedure.

(1) Is there a significant problem with frivolous litigation in the Federal Courts such as to justify "loser pays" and strengthening of FRCP 11?

The short answer is that there is no significant problem with frivolous litigation in the federal courts. To the extent there is frivolous litigation, it consists mostly of cases brought by prisoners. Existing law adequately enables judges to dismiss those cases summarily with a minimum of work. And neither Rule 11 nor fee shifting would have any impact on prisoners filing cases.

More generally, it is a misconception to look at Rule 11 or fee shifting as a way to deter frivolous litigation. On the whole, Rule 11 has had a beneficial impact in making lawyers more careful about the pleadings they file, i.e. encouraging them to take a closer look to see whether a particular pleading is justified. Most frequently its application has been to motions and other procedural activities rather than to complaints or answers. But if it has been a deterrent at all, its impact has been mostly on persons who are risk averse-persons who may not want to take a chance that a borderline case will be found to be in violation of Rule 11 leading to possible sanctions. In this way, it functions not so much as a filter based on frivolity but as a gauge of risk averseness. I believe that it has functioned in this way in very few cases but the civil rights bar believes that it has deterred filing of some civil rights cases.

On the question of whether there is a justification for what you call a "loser pays" rule, in my view fee shifting has little to do with control of frivolous litigation. There are of course various ways in which to approach fee shifting. The so-called English rule is not practical for the United States for several reasons: (1) it impacts everyone, plaintiff and defendant alike, on the basis of risk averseness, not frivolity, i.e. perfectly non-frivolous cases are lost every day and it makes no sense to punish defendants or plaintiffs for losing a case; (2) a loser-pays rule, unless carefully drafted, would undermine contingent fee practice and over 100 federal fee-shifting statutes, and (3) to the extent it works in England, it is made possible by legal aid which pays attorneys fees for lower income litigants and exempts them from the rule.

A more constructive approach is to amend FRCP 68 to provide for fee-shifting offers of judgment but in a way that will make the rule serve as an incentive, not as a sanction. If you are interested in this, I refer you to the enclosed copies of an article I published on the subject and of a letter I wrote recently to Senator Hatch.

(2) How well did FRCP 11 work after the 1983 Amendment, which strengthened the rule, and since the 1993 Amendment, which weakened the rule?

The Federal Judicial Center undertook a study of the operation of the 1983 amendment. It showed, among other things, that Rule 11 activity occurred only rarely (in 2 percent of the cases) and that sanctions were imposed in only about a quarter of the affected cases, that eighty percent of the judges thought that its overall effect was positive but also that it had a potential for causing satellite litigation and exacerbating relations among lawyers, and that the rule probably had a disparate impact on plaintiffs, particularly in civil rights cases. This is discussed in some detail in the enclosed article.

While I believe that on the whole the 1983 rule worked well, there is wide agreement among bench and bar that the 1993 amendment is an improvement and ought to be given a chance to operate before further changes are considered. The rule, as amended, will preserve the incentive for lawyers to use care in filing pleadings while minimizing costly and unproductive satellite litigation over sanctions by making sanctions discretionary (which in practical effect they are anyway), by providing a safe harbor, and by lessening the emphasis on the rule as a fee shifting device. The amendment will moderate what on occasion had become excessive reliance on the rule. The amendment now pending in Congress will inevitably result in more expense and delay by stimulating Rule 11 litigation without giving any assurance that the people who are prone to file frivolous cases will be deterred from doing so. I believe that the amendment will be counterproductive and self-defeating and therefore recommend that Congress leave the rule alone and observe its operation for a few years.

Sincerely,

WILLIAM W. SCHWARZER.

Mr. BENNETT. Mr. President, as I have said earlier in this debate, I am unburdened with the blessing of having been to law school, and as a consequence feel myself inadequate to respond to the learned legal arguments of one of the Senate's best lawyers. As a consequence, Mr. President, I will leave that argument to be made by the chairman of the committee at some future point. I have no response at this time.

Mr. SPECTER. Mr. President, I ask unanimous consent that the amendment be set aside so that I may proceed to offer my second amendment.

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

AMENDMENT NO. 1484

(Purpose: To provide for a stay of discovery in certain circumstances, and for other purposes)

Mr. SPECTER. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER] proposes an amendment numbered 1484.

Beginning on page 108, strike line 24 and all that follows through page 109, line 4, and insert the following:

"(k) STAY OF DISCOVERY.—

"(1) IN GENERAL.—In any private action arising under this title, the court may stay discovery upon motion of any party only if the court determines that the stay of discovery—

"(A) would avoid waste, delay, duplication, or unnecessary expense; and

"(B) would not prejudice any plaintiff.

"(2) ADDITIONAL LIMITATIONS ON DISCOVERY.—In any private action arising under this title—

"(A) prior to the filing of a responsive pleading to the complaint, discovery shall be

limited to materials directly relevant to facts expressly pleaded in the complaint; and

"(B) except as provided in subparagraphs (A) and (B), or otherwise expressly provided in this title, discovery shall be conducted pursuant to the Federal Rules of Civil Procedure.".

On page 111, strike lines 1 through 7, and insert the following:

"(2) STAY OF DISCOVERY.—

"(A) IN GENERAL.—In any private action arising under this title, the court may stay discovery upon motion of any party only if the court determines that the stay of discovery—

"(i) would avoid waste, delay, duplication, or unnecessary expense; and

"(ii) would not prejudice any plaintiff.

"(B) ADDITIONAL LIMITATIONS ON DISCOVERY.—In any private action arising under this title—

"(i) notwithstanding any stay of discovery issued in accordance with subparagraph (A), the court may permit such discovery as may be necessary to permit a plaintiff to prepare an amended complaint in order to meet the pleading requirements of this section;

"(ii) prior to the filing of a responsive pleading to the complaint, discovery shall be limited to materials directly relevant to facts expressly pleaded in the complaint; and

"(iii) except as provided in clauses (i) and (ii), or otherwise expressly provided in this title, discovery shall be conducted pursuant to the Federal Rules of Civil Procedure.

Mr. SPECTER. Mr. President, this is the amendment which I referred to earlier dealing with a provision of the bill in its current form which prohibits any discovery after a motion to dismiss has been filed, except under very limited circumstances.

The general rule of Federal procedure is that discovery may proceed after a complaint has been filed and a motion to dismiss has been filed unless on application by the defendant the judge stays the discovery.

The current bill provides as follows:

In any private action arising under this title during the pendency of any motion to dismiss, all discovery proceedings shall be stayed unless the Court finds, upon the motion of any party, that a particularized discovery is necessary to preserve evidence or prevent undue prejudice to that party.

It is more than a little surprising, Mr. President, to find securities litigation separated out from all of the other litigation in the Federal courts. And for those who may be watching this matter on C–SPAN, while this may be viewed as somewhat esoteric, somewhat hypertechnical, it will not be hypertechnical if you are a stockholder and the stock goes down and you find you have been misled and defrauded by people who have made misrepresentations.

What this means in common parlance, common English, is that a lawsuit is started. It is a class action started, and this private right of action has been developed in order to protect shareholders, especially small shareholders who band together in a class, and after the complaint is filed the plaintiffs' attorney seeks to find out the details as to what happened with the defendant; the plaintiff does not know all the details of the facts at the time of filing suit. The corporation or the officers may have made some very fine promises which sounded very good when the promises were made but no one can tell about the details of the facts unless you go into the records of that party because those facts are not generally known.

In lawsuits, discovery is permitted where one party seeks to take the deposition, that is, to ask the other party questions, or propounds interrogatories, that is, submits written questions, or makes a motion for the discovery of documents to take a look at records.

In discussing this issue with the proponents of the legislation, I was given a response—it is a little disappointing not to find somebody to argue against here. It is not easy to make an argument when there is nobody to disagree. Perhaps my distinguished colleague from Iowa wishes to disagree with me. My distinguished colleague from Utah chooses not to.

The response I got was that it changes the mindset of the litigation, and I would say that the trial judge who is sitting on the spot has ample discretion, if it is inappropriate discovery, to say the discovery is not going to go on, instead of having a mandatory change singling out this legislation from all other legislation.

Well, may I defer to my distinguished colleague from Utah, who I know, having warning in advance, now has had ample opportunity to muster the legal arguments, or am I to infer that the managers of the bill have fled the scene because there is nothing to be said in response to the overwhelming arguments I have presented?

Mr. BENNETT. I would not concede that there is nothing to be said in response to the overwhelming arguments.

Mr. SPECTER. Good. Will the Senator yield for a question or two?

Mr. BENNETT. I will concede that this Senator is not prepared to mount that response. I suggest, Mr. President, that the Senator proceed in his scholarly and learned way.

Mr. SPECTER. It is a little difficult to proceed, Mr. President, without opposition. But permit me at this time, Mr. President—and may I note ascension to power of my distinguished colleague from Pennsylvania, Senator SANTORUM.

Mr. President, in the absence of a reply, I would ask unanimous consent to proceed with the third amendment which I propose to offer.

The PRESIDING OFFICER (Mr. SANTORUM). Without objection, the pending amendment is set aside.

AMENDMENT NO. 1485

(Purpose: To clarify the standard plaintiffs must meet in specifying the defendant's state of mind in private securities litigation)

Mr. SPECTER. Mr. President, I now send a third amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the amendment.

The bill clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER] proposes an amendment numbered 1485:

On page 110, strike lines 12 through 19, and insert the following:

"(b) REQUIRED STATE OF MIND.—

"(1) IN GENERAL.—In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, specifically allege facts giving rise to a strong inference that the defendant acted with the required state of mind.

"(2) STRONG INFERENCE OF FRAUDULENT INTENT.—For purposes of paragraph (1), a strong inference that the defendant acted with the required state of mind may be established either—

"(A) by alleging facts to show that the defendant had both motive and opportunity to commit fraud; or

"(B) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.

Mr. SPECTER. Mr. President, I thank the clerk. I sense that the clerk was surprised I had not asked unanimous consent and permitted the clerk to read the amendment. But I did so just for a change of scene on C–SPAN2. Since there is nobody here to argue with me, at least let there be some break in the action. The formulation of the amendment by my distinguished chief counsel, Richard Hertling, was as clear and succinct as I could have articulated it.

Mr. President, this again involves a question which might be viewed as being esoteric and legalistic unless you are someone who has lost money in the stock market and seek to make a recovery, unless you are one of the people who has participated in the stock transactions in excess of $3.5 trillion or have been among those who have bought stock in the market, more than $54 billion worth in 1993, the most recent year available for statistical summary. And what this amendment seeks to do, Mr. President, is to amplify the language of the bill which imposes a very difficult pleading burden on the plaintiff. Let me take just a moment or two to say what goes on in a lawsuit.

When somebody loses money because they bought stock where there has been a misrepresentation, and that person goes to a lawyer, they may have a relatively small amount of stock, say $1,000 worth, or $10,000 worth, or even $100,000 worth. That is not a sufficient sum to be able to carry forward litigation which is very, very costly on all

sides, so class actions are authorized under the rules of civil procedure where many plaintiffs can join together and there is a sufficient sum so that the lawsuit can be brought forward.

Then the lawyer—and I have been on both sides, filing complaints and filing motions to dismiss—has to prepare a complaint, and the complaint involves allegations. An allegation is a statement of what the party represents happened. And then there is an answer filed by the defendant or the defendant may file what is called a motion to dismiss, if the defendant makes the representation that even assuming everything in the complaint is true, there is not a sufficient statement to constitute a claim for relief under the Federal rules, to warrant a recovery.

When these rules of civil procedure were formulated back in the 1930's, and I had the good fortune in law school to have the distinguished author of the Federal Rules of Civil Procedure, Charles E. Clark, the former dean of Yale Law School who was then a judge on the Court of Appeals for the Second Circuit and came to the law school to instruct us law students—there was done what was called notice pleading so that there did not have to be any elaborate statement as to what the case was about. It could be very simple. There was a case called Jabari versus Durning, if my recollection is correct, where a person just scribbled some notes on a piece of paper, went to the clerk's office and filed it.

And the effort was made at that time to have a notice pleading, contrasted with a common law pleading under Chitty where the averments had to be very, very specific. If he did not say it exactly right, you were thrown out of court. It was very complicated. And I can recall the early days practicing, going to the prothonotary in the Philadelphia Court of Common Pleas, which draws a smile from my learned colleague who is also a lawyer. There was no way that I could draw the complaint with sufficient specificity to satisfy the clerks, who would take some delight in rejecting legal papers filed by young lawyers. So at any rate, this bill seeks to have a very tough standard for pleading. And I think that it is a good point.

And what the draftsmen have done is gone to the Court of Appeals for the second circuit, and they have drafted a type of pleading requirement which was articulated by the chief judge of the court of appeals by the name of John Newman, who was a classmate of mine in law school and studied at the same one as the distinguished jurist, Charles Clark, the chief judge. And now Judge Newman is chief judge in his place. And this required state of mind provides that:

> In any private action arising under this title, the plaintiff's complaint shall, with respect to each act or omission alleged to violate this title, specifically allege facts giving rise to a strong inference that the defendant acted with the required state of mind.

Now, that is the toughest standard around. And that is fine. We ought to move away from notice pleading and really make the plaintiff state with specificity the state of mind. But when the Court of Appeals for the second circuit handed down this very tough rule, they went just a little farther and said what would give rise to an inference so that there would not be guessing on the part of the plaintiffs. And this is what Judge John Newman, who established this standard in the case of Beck versus Manufacturers Hanover Trust Co., said:

> These factual allegations must give rise to a "strong inference" that the defendants possessed the requisite fraudulent intent.
>
> A common method for establishing a strong inference of scienter is to allege facts showing a motive for committing fraud and a clear opportunity for doing so. Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater.

Now, what my amendment seeks to do, Mr. President, is to put into the statute the same things that Judge Newman was citing when he posed this very tough standard pleading. Judge Newman and the court said that the strong inference that the defendant acted with the required state of mind may be established either:

> (a) alleging facts to show the defendant had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.

Now, in the committee report, which accompanies this bill, the committee says this:

> The Committee does not adopt a new and untested pleading standard that would generate additional litigation. Instead, the committee chose a uniform standard modeled upon the pleading standard of the second circuit. Regarded as the most stringent pleading standard, the second circuit requires that the plaintiff plead facts that give rise to a "strong inference" of the defendant's fraudulent intent. The committee does not intend to codify the second circuit's caselaw interpreting this pleading standard, although courts may find this body of law instructive.

Now, I am a little bit at a loss—and I know that the distinguished Senator from Utah will have a response at this time, or Senator GRASSLEY will, or the Chair will—as to why the—I am just joking about that because there is nobody here to argue with me about this. And it may create some change in my agreeing to the unanimous consent for 2 minutes tomorrow to discuss this with the managers of the bill.

But the committee does say here that they are not adopting a new and untested pleading standard. They are correct. This is tested by the second circuit. But the second circuit in the whole series of cases has found that the way to make this determination is through these inferences which I have added in this amendment. And the committee does say accurately that this is the most stringent pleading standard around. And then the committee says that it does not intend to "codify the second circuit's caselaw interpreting this pleading standard, although the courts may find this body of law instructive."

Well, if we do not have it the way the second circuit says you plead it, but only saying this is instructive, then this bill allows courts to interpret this tougher pleading standard anyway they choose, and courts may impose some standards which go far beyond what the second circuit and Judge Newman had in mind in imposing this tough pleading standard. And it is one thing for the committee to say that they are not adopting a new and untested pleading standard, but it is only halfway if it does not put into the statute but leaves open the question of how you meet this standard.

I do wish I had the managers here to question them about precisely what they have in mind. And I am going to have to figure out some way, Mr. President, to raise this issue. Maybe I will offer this amendment in another form later so we can have some discussion and debate on it, because there is not really any explanation or any way to respond to or to understand what the committee has done here, because what they have done in essence is say the second circuit has a tough pleading standard; let us take it. But when the second circuit amplifies and says how you meet that standard, the committee says no, no, we are not going to adopt that.

What I am trying the do in this amendment is simply complete the picture and have in the statute this standard so that people know what they are to do on the pleading. Now, I know my colleague from Utah will have a comprehensive reply on this substantive issue.

Mr. BENNETT. Comprehensive is in the eye of the beholder, Mr. President.

Mr. SPECTER. If the Senator will yield for a question?

Can you give me in a beholder's eye what you are about to say is comprehensive?

Mr. BENNETT. I would say——

Mr. SPECTER. I think that question may be even understandable on C-SPAN2.

Mr. BENNETT addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. The issue did come up. We did discuss it in the committee at some length. And even though I am not a lawyer, I think I did follow the conversation on this one. My understanding—which I think is what the

Senator has said, but I will repeat it so that we have a common basis here—my understanding is that there was concern about different standards and different circumstances. And the committee decided they wanted to codify the standard from the second circuit. Now, the committee intentionally did not provide language to give guidance on exactly what evidence would be sufficient to prove facts giving rise to a strong inference of fraud. They felt that adopting the standard would be sufficient.

Obviously, the Senator from Pennsylvania disagrees with that decision. But the decision was intentional. This is not an inadvertent thing that the committee did. And they felt that with the second circuit standard being written into the bill, it was best to stop at that point and allow the courts then the latitude that would come beyond that point.

Beyond assuring the Senator that this was a deliberate decision within the committee by the drafters of the bill, both staff and members, I probably cannot give him any further enlightened knowledge on this particular subject.

Mr. SPECTER. Mr. President, I thank my distinguished colleague for that response.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. But I must say, I do not understand the logic of what the committee has done when they utilize the second circuit standard which they say is the most stringent standard, and the second circuit is given a road map as to how you meet it.

The legislation might not say this is the only way to meet it, but this is one of the ways to meet it so that when somebody is drafting a pleading, a party has knowledge and notice as to how to go about it. When the committee takes credit here for not adopting a new and untested pleading standard, I give them credit, because it is something which has already been tested. It is not new, but is incomplete if it does not have the second part of what the second circuit said as to how you meet the standard. It simply to me does not follow.

I shall not pursue it because I understand the distinguished Senator from Utah is not the draftsman.

Mr. President, that concludes the argument, and I do not think there is any point at this late hour in keeping the staff here if we are not going to have any reply. So, Mr. President, I yield the floor. If my colleagues are here and intend to make some reply, if they are on the premises, I will wait a reasonable period of time, but only that, in view of the lateness of the hour.

Mr. DORGAN. Mr. President, I rise today to discuss briefly my thoughts about the securities litigation reform bill, S. 240 sponsored by Senators DODD and DOMENICI that is being considered on the Senate floor.

No one disagrees with the goals of S. 240, which are to help pull the plug on frivolous and unmeritorious securities fraud lawsuits and to secure greater protections for those innocent victims in fraud litigation. But regrettably this bill, as it is currently drafted, will make it more difficult for innocent fraud victims to bring legitimate fraud cases. It also limits their ability to recover all of their losses from fraud perpetrators in those cases that they win. For these reasons, I intend to vote no.

Some of the provisions in the bill are long overdue. The bill would limit unreasonable attorney's fees in securities fraud cases. It also prohibits bonus payments and referral fees which may create an incentive to file frivolous cases. Moreover, it requires lawyers to provide all plaintiffs with more information about the nature of a proposed settlement in class action cases—including a statement about the reasons for settlement, about an investor's average share of the award and the amount of the attorney's fees and costs. I support all of these provisions.

But other provisions in the bill could effectively shield from liability those perpetrators who knowingly mislead or defraud investors. And if there is one thing that the investors of this country have a right to expect, it is that those who commit fraud or those who substantially assist in fraud get punished and that they are forced to return their ill-gotten gains to honest victims of their misdeeds.

In the 1980's, a flood of S&L executives openly flouted the law and the trust of their investors and depositors. Some of them lived like maharajahs while building monuments of worthless paper. This charade perpetrated by these swindlers contributed to a bailout of the industry that is costing the taxpayers of America as much as $500 billion to clean up. Innocent investors were bilked out of tens of billions of dollars and their ability to recover their losses has been limited.

Congress enacted tough legislation to ensure that this debacle will not happen again. I recall legislation that I offered, which passed Congress, prohibiting S&L's from investing in risky junk bonds and requiring them to divest the ones they already own. Some S&L's were actually selling worthless junk bonds to investors out of their lobbies. It never should have happened. But still many unwary investors lost a bundle on junk bonds offered by these deceptive fast-buck artists before Congress acted to stop this activity.

We ought to pass tough, reformed-minded securities legislation that stops the abusive legal cases that are filed to simply line the financial pockets of unscrupulous lawyers and professional plaintiffs. The companies that are the targets of such lawsuits are rightfully concerned about frivolous lawsuits. Meritless cases unnecessarily divert the much-needed resources and attention of firm personnel to defending these cases rather than allowing the companies to focus on product improvement and on their global competitors.

But I think that S. 240 as drafted goes too far toward immunizing those who are guilty of securities violations from liability. The provisions that shield these wrongdoers in securities fraud cases from liability are unfair to the innocent victims of fraud. And it sends the wrong message to our securities market that fraudulent behavior will be tolerated, if not sanctioned.

We must not insulate the white collar crowd who would exploit unwary investors for their own personal gains. Those responsible for the S&L scandal and those responsible for fraud in the future should pay. That's why I will vote against S. 240, unless it is substantially improved before the Senate votes on final passage.

Mr. HATFIELD. Mr. President, the Private Securities Litigation Reform Act of 1995, of which I am a cosponsor, is not about aiding perpetrators of fraud in the financial markets or hurting small investors. This legislation is about curtailing the abuses in this country's securities litigation system and empowering defrauded investors with greater control over the class action process. This legislation would restore fairness and integrity to our securities litigation system.

This legislation assists small investors by requiring lawyers to provide greater disclosure of settlement terms, including reasons why plaintiffs should accept a settlement. This is a common sense approach which is often lacking under the current system. This legislation also incorporates public auditor disclosure language. S. 240 requires that independent public accountants report to their client's management any illegal act found during the course of an audit. If the management of the company or the board of directors fail to notify the Securities and Exchange Committee of the illegal act, the auditor is required to inform the SEC or face civil penalties. This is needed reform which assists all investors who rely on accountants to act in an independent manner on their behalf.

I would like to close my statement on the Private Securities Litigation Reform Act of 1995 by highlighting some statistics from an article in today's issue of the Wall Street Journal. The article notes that the net legal costs of accounting firms has increased from 8 percent of their total revenue in 1990 to 12 percent of revenue in 1993. That is a 50 percent increase in net legal costs in just 3 years. In one of the cases cited in the article, it notes that an accounting firm spent $7 million defending itself in a case where the jury

ruled in the accounting firms favor. That is $7 million spent just to prove that the firm was innocent. As these statistics show, common sense should be reintroduced to our securities litigation system, and this legislation does just that. Common sense benefits all parties in the securities litigation system, especially investors, which is fundamental to this legislation.

Ms. MIKULSKI. Mr. President, I rise today to speak in support of the Securities Litigation Reform Act. I like this bill for three reasons: It stops the bounty hunters, it puts people who have lost money in charge, and it penalizes people who commit fraud.

Mr. President, we are finally moving on this issue. We've moved beyond discussing whether or not there is a problem—to discussing exactly what reforms are needed.

Here is what I think. First, let us stop the bounty hunters. This bill says that lawyers can't shop around for clients. I mean—a lawyer will not be able to pay a commission to someone else to find them a client.

I have heard of instances where lawyers seek out clients just so they can have cases to litigate.

Second, I think the people who lose the most money should have the most to say. By that I mean—with this bill the court will be able to pick one person—who has lost a lot of money in a class action suit—to be the leader. This way the system works for investors instead of against them.

Third, Mr. President, I am all for ending fraud and protecting businesses that are just trying to create jobs. This bill will not apply to people who knowingly cheat investors.

I have talked to several investors and I have heard from the people of Maryland on this issue. Accountants tell me that some attorneys pay stockbrokers, and others, in return for information about possible lawsuits and possible clients. That is unacceptable. Courts are for protecting the rights of people and promoting fairness, not for frivolous lawsuits.

Companies are hit with higher insurance costs, time in court and are generally distracted from the mission of creating jobs. Lawsuits mean that companies are reluctant to provide the kind of public information that can benefit investors.

In Maryland, high-technology companies are hit the most by this problem. That means these unnecessary lawsuits are costing Maryland citizens—lost jobs and lost opportunities.

Mr. President, this is not about protecting some "savings and loan con artist" as the ads say. This bill is about saving jobs and keeping the courthouse doors open to those who really need to get inside.

I support this bill because I believe it will create jobs. We needs investors. We need new companies. We need new jobs. But we will not have any new jobs if companies cannot invest or ask people to invest in their future.

Mr. President, this legislation is long overdue. I am pleased this day has come, and I am pleased that this reform has overwhelming bipartisan support.

It is time we look at liability issues and liability reform not on a partisan basis but on an American basis. It is in the best interest of business and it is in the best interest of the consumers. We can do both, because this bill does both.

Mr. GRASSLEY addressed the Chair.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I ask unanimous consent to speak for 6 minutes as in morning business.

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

Mr. GRASSLEY. I thank the Chair.

(The remarks of Mr. GRASSLEY pertaining to the introduction of S. 974 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. GRASSLEY. 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. BENNETT. 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. BENNETT. Mr. President, I ask unanimous consent that the pending amendment be set aside.

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

AMENDMENT NO. 1486

(Purpose: To make certain technical amendments, and for other purposes)

Mr. BENNETT. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant clerk read as follows:

The Senator from Utah [Mr. BENNETT], for Mr. D'AMATO, for himself and Mr. SARBANES, proposes an amendment numbered 1486.

Mr. BENNETT. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 84, line 11, strike ", if" and insert "in which".

On page 111, beginning on line 2, strike "during the pendency of any motion to dismiss,".

On page 111, line 4, insert "during the pendency of any motion to dismiss," after "stayed".

On page 114, line 13, strike "has been,".

On page 114, strike line 15 and insert the following: "made—

"(i) was convicted of any felony or misdemeanor".

On page 114, strike line 17 and insert the following: "15(b)(4)(B); or

"(ii) has been made the subject of a ju-".

On page 114, line 20, strike "(i) prohibits" and insert the following:

"(I) prohibits".

On page 115, line 1, strike "(ii) requires" and insert the following:

"(II) requires".

On page 115, line 4, strike "(iii) determines" and insert the following:

"(III) determines".

On page 116, between lines 11 and 12, insert the following:

"(D) made in connection with an initial public offering;

On page 116, line 12, strike "(D)" and insert "(E)".

On page 116, line 17, strike "(E)" and insert "(F)".

On page 118, line 13, before the period insert "that are not compensated through final adjudication or settlement of a private action brought under this title arising from the same violation".

On page 121, line 7, strike "has been,".

On page 121, strike line 9, and insert the following: "made—

"(i) was convicted of any felony or misdemeanor".

On page 121, strike line 11 and insert the following: "15(b)(4)(B); or

"(ii) has been made the subject of a ju-".

On page 121, line 14, strike "(i) prohibits" and insert the following:

"(I) prohibits".

On page 121, line 16, strike "(ii) requires" and insert the following:

"(II) requires".

On page 121, line 19, strike "(iii) determines" and insert the following:

"(III) determines".

On page 122, between lines 20 and 21, insert the following:

"(D) made in connection with an initial public offering;

On page 122, line 21, strike "(D)" and insert "(E)".

On page 123, line 1, strike "(E)" and insert "(F)".

On page 124, line 21, insert before the period "that are not compensated through final adjudication or settlement of a private action brought under this title arising from the same violation".

On page 128, line 25, strike "the liability of" and insert "if".

On page 128, line 25, strike "offers or sells" and insert "offered or sold".

On page 129, line 1, strike "shall be limited to damages if that person".

On page 129, line 9, strike "and such portion or all of such amount" and insert "then such portion or amount, as the case may be,".

On page 131, lines 19 and 20, strike "that person's degree" and insert "the percentage".

On page 131, line 20, insert "of that person" before the comma.

Mr. BENNETT. Mr. President, I ask unanimous consent that the amendment be agreed to and that the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Without objection, the amendment is agreed to.

So the amendment (No. 1486) was agreed to.

MORNING BUSINESS

Mr. BENNETT. Mr. President, I ask unanimous consent that there now be a

period for the transaction of routine morning business, with Senators permitted to speak therein for up to 5 minutes each.

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

IS CONGRESS IRRESPONSIBLE? THE VOTERS HAVE SAID YES

Mr. HELMS. Mr. President, the impression simply will not go away: The existing $4.8 trillion Federal debt is a sort of grotesque parallel to the engerizer bunny that appears and appears and appears on television—the same way that the Federal debt keeps going and going and going—up, of course, always to the added burdens on the American taxpayers.

So many politicians talk a good game—and talk is the operative word—about reducing the Federal deficit and bringing the Federal debt under control.

In any event, Mr. President, as of yesterday, Monday, June 26, at the close of business, the total Federal debt stood—down to the penny—at exactly $4,889,052,929,226.24 or $18,558.93 per man, woman, child on a per capita basis. Res ipsa loquitur.

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.)

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-1130. A communication from the Secretary of Transportation, transmitting, a draft of proposed legislation entitled "The District of Columbia Emergency Highway Relief Act"; to the Committee on Environment and Public Works.

EC-1131. A communication from the Chairman of the National Labor Relations Board, transmitting, pursuant to law, the report under the Freedom of Information Act for calendar year 1993; to the Committee on the Judiciary.

EC-1132. A communication from the Chief Justice of the Supreme Court, transmitting, pursuant to law, the report of the proceedings of the Judicial Conference; to the Committee on the Judiciary.

EC-1133. A communication from the Board Members of the Railroad Retirement Board, transmitting, pursuant to law, the annual actuarial report for calendar year 1995; to the Committee on Labor and Human Resources.

EC-1134. A communication from the Secretary of Health and Human Services, transmitting, pursuant to law, a report entitled "Health, United States, 1994"; to the Committee on Labor and Human Resources.

EC-1135. A communication from the Chairman of the Federal Election Commission, transmitting, pursuant to law, a proposal relative to authorized committees of presidential and vice presidential candidates; to the Committee on Rules and Administration.

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. McCONNELL:

S. 968. A bill to require the Secretary of the Interior to prohibit the import, export, sale, purchase, and possession of bear viscera or products that contain or claim to contain bear viscera, and for other purposes; to the Committee on Finance.

By Mr. BRADLEY (for himself, Mrs. KASSEBAUM, and Mr. ROCKEFELLER):

S. 969. A bill to require that health plans provide coverage for a minimum hospital stay for a mother and child following the birth of the child, and for other purposes; to the Committee on Labor and Human Resources.

By Mrs. HUTCHISON:

S. 970. A bill to authorize the Administrator of General Services to enter into agreements for the construction and improvement of border stations on the United States international borders with Canada and Mexico, and for other purposes; to the Committee on Environment and Public Works.

By Mr. COATS (for himself, Mr. HELMS, Mr. GREGG, and Mr. ASHCROFT):

S. 971. A bill to amend the Public Health Service Act to prohibit governmental discrimination in the training and licensing of health professionals on the basis of the refusal to undergo or provide training in the performance of induced abortions, and for other purposes; to the Committee on Labor and Human Resources.

By Mr. DASCHLE (for himself, Mr. INOUYE, Mr. HARKIN, Mr. HOLLINGS, Mr. BINGAMAN, Mrs. BOXER, and Mr. AKAKA):

S. 972. A bill to amend title XIX of the Social Security Act to provide for medicaid coverage of all certified nurse practitioners and clinical nurse specialists services; to the Committee on Finance.

By Mr. INOUYE:

S. 973. A bill to amend the Internal Revenue Code of 1986 to provide for the tax treatment of residential ground rents, and for other purposes; to the Committee on Finance.

By Mr. GRASSLEY:

S. 974. A bill to prohibit certain acts involving the use of computers in the furtherance of crimes, and for other purposes; to the Committee on the Judiciary.

SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Mr. LAUTENBERG (for himself and Mr. BRADLEY):

S. Res. 142. A resolution to congratulate the New Jersey Devils for becoming the 1995 NHL champions and thus winning the Stanley Cup; considered and agreed to.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. McCONNELL:

S. 968. A bill to require the Secretary of the Interior to prohibit the import, export, sale, purchase, and possession of bear viscera or products that contain or claim to contain bear viscera, and for other purposes; to the Committee on Finance.

THE BEAR PROTECTION ACT

Mr. McCONNELL. Mr. President, I introduce the Bear Protection Act. This measure is aimed at controlling poaching of bears such as the American black bear which is found in Kentucky. It addresses several enforcement and jurisdictional loopholes that are caused by a patchwork of State laws. The current inconsistencies enable a wildly profitable underground black market for bear parts to flourish in the United States.

Mr. President, my bill would in no way affect legal hunting of bears. Hunters would still be allowed to keep trophies and furs of bears killed during legal hunts. This measure would only prohibit the sale or barter of the internal organs of the bear which are referred to as bear viscera.

This bill is made necessary because of the booming illegal trade in bear viscera. At least 18 Asian countries are known to participate in the illegal trade in bear parts. Bear viscera are also illegally sold and traded in large urban areas in the United States such as San Francisco, Seattle, Portland, and New York City. These cities serve as primary ports for export shipments of these goods.

Bear parts, such as gall bladders, are used in traditional Asian medicine to treat everything from diabetes to heart disease. Due to the increasing demand for bear viscera, the population of Asian black bears has been totally annihilated over the last few years. This has led poachers to turn to American bears to fill the increasing demand. I, for one, will not stand by and allow our own bear populations to be decimated by poachers.

Mr. President, it is estimated that Kentucky has only 50 to 100 black bears remaining in the wild. Black bears once roamed free across the Appalachian mountains, through the rolling hills of the bluegrass, all the way to the Mississippi river. Although we cannot restore the numbers we once had,

we can insure that the remaining bears are not sold for profit to the highest bidder.

Poaching has become an astoundingly profitable enterprise. It is estimated that over 40,000 bears are poached in the United States every year. That equals the number that are taken by legal hunting.

Mr. President, the main reason behind these astounding numbers is greed. In South Korea, bear gall bladders are worth their weight in gold, and an average bear gall bladder can bring as high as $10,000 on the black market.

Currently, U.S. law enforcement officials have little power to address the poaching of bears and the sale of their parts in an effective manner. The Department of the Interior has neither the manpower nor the budget to test all bear parts sold legally in the United States. Without extensive testing, law enforcement officials cannot determine if gall bladders or other parts have from threatened or endangered species. This problem perpetuates the poaching of endangered or threatened bears.

The Bear Protection Act will establish national guidelines for trade in bear parts, but it will not weaken any existing State laws that have been instituted to deal with this issue. My bill will also instruct the Secretary of the Interior and the U.S. Trade Representative to establish a dialog with the appropriate countries to coordinate efforts aimed at curtailing the international bear trade.

Mr. President, this measure is crafted narrowly enough to deal with the poaching of the American black bear for profit, while still ensuring the rights of American sportsmen. I urge my colleagues to join me in support of this much-needed legislation.

Mr. President, I ask unanimous consent that the full 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. 968

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 "Bear Protection Act".

SEC. 2. DEFINITION OF BEAR VISCERA.

In this Act, the term "bear viscera" means the body fluids or internal organs (including the gallbladder) of a species of bear.

SEC. 3. PROHIBITED ACTS.

The Secretary of the Interior shall prohibit—

(1) the import into the United States, or export from the United States, of bear viscera or products that contain or claim to contain bear viscera; and

(2) the sale, barter, offer of sale or barter, purchase, or possession with intent to sell or barter, in interstate or foreign commerce, of bear viscera or products that contain or claim to contain bear viscera.

SEC. 4. REPORT BY SECRETARY OF THE INTERIOR.

Not later than 180 days after the date of enactment of this Act, the Secretary of the Interior, in consultation with the Secretary of the Treasury, shall prepare and submit to Congress a report that describes—

(1) how to improve the effectiveness of the wildlife monitoring and inspection program of the Department of the Interior (including the computerized information system or any other system of the United States Fish and Wildlife Service or the United States Customs Service that records data) with respect to the importation or exportation of bear viscera and other bear and other wildlife body parts to and from the United States; and

(2) any plans of the United States Fish and Wildlife Service to monitor the illegal movement of, or commercial activity in, bear viscera or other bear body parts.

SEC. 5. DISCUSSIONS CONCERNING TRADE PRACTICES.

The United States Trade Representative and the Secretary of the Interior shall—

(1) discuss issues involving trade in bear viscera with the appropriate representatives of such countries trading with the United States as are determined jointly by the Secretary of Commerce and the Secretary of the Interior to be the leading importers, exporters, or consumers of bear viscera; and

(2) attempt to establish coordinated efforts with the countries to protect bears.

SEC. 6. RELATIONSHIP TO STATE LAW.

Nothing in this Act precludes the regulation under State law of the sale, barter, offer of sale or barter, purchase, or possession with intent to sell or barter, of bear viscera or products that contain or claim to contain bear viscera, if the regulation—

(1) does not authorize any sale, barter, offer of sale or barter, purchase, or possession with intent to sell or barter, of bear viscera or products that contain or claim to contain bear viscera, that is prohibited under this Act; and

(2) is consistent with the international obligations of the United States.●

By Mr. BRADLEY (for himself, Mrs. KASSEBAUM, and Mr. ROCKEFELLER):

S. 969. A bill to require that health plans provide coverage for a minimum hospital stay for a mother and child following the birth of the child, and for other purposes; to the Committee on Labor and Human Resources.

THE NEWBORNS' AND MOTHERS' HEALTH PROTECTION ACT

Mr. BRADLEY. Mr. President, I rise today with Senator KASSEBAUM, the distinguished chairwoman of the Labor and Human Resources Committee and Mr. ROCKEFELLER, to introduce legislation which seeks to ensure that newborn babies and their mothers receive adequate health care in the critical first few days following birth.

Mr. President, we all know that the first few days after birth are a critical and challenging time for both the infant and the mother. At this crucial stage in life, infants and their mothers truly need the support of health care providers. Yet, more and more families are finding their access to health providers at this time is being limited severely.

I say this because it is becoming common practice for health insurers to require that new mothers and their infants be discharged from the hospital 24 hours after an uncomplicated vaginal delivery, and 72 hours after a cesarean section. In some parts of the country, the hospital stay for a normal delivery is being reduced to 12 hours, and there is even talk of cutting it back to 6 hours. And in many cases, the mother and infant receive no professional follow-up care at home. The American Medical Association has dubbled these practices "drive-through deliveries."

Drive-through deliveries are not simply a matter of sending home mothers who are often exhausted and still in pain, and who may not have adequate social supports at home. They can also pose severe health risks for both the infant and the mother. National medical organizations, including the American Academy of Pediatrics, the American Medical Association, and the American College of Obstetricians and Gynecologists, have all stated that the trend toward shorter hospital stays is placing the health of many newborns and mothers at risk.

There are several reasons why they state this: First, numerous health problems faced by newborns, such as dehydration and jaundice, do not appear until after the first 24 hours of life. Since many of these illnesses can only be detected by health professionals, early hospital discharge can cause these conditions to go undetected, leading to brain damage, strokes, or even death.

Second, the mother can also develop many serious health problems, including pelvic infections, breast infections, and hemorrhaging.

Third, a 24-hour stay does not provide sufficient opportunity for the mother to be taught basic infant-care skills such as breastfeeding. This, combined with the fact that many mothers are simply too exhausted to care for their child 24 hours after delivery, often leads to newborns receiving inadequate care and nourishment during their crucial first few days of life.

Let me assure you that these concerns are not just theoretical. A range of anecdotal and scientific evidence indicates that these problems are real, and growing. A researcher at Dartmouth's medical school recently concluded that newborns discharged less than 2 days after birth are more likely to be readmitted for jaundice, malnutrition, and other problems. Physicians across the country have noted a resurgence in the number of jaundiced babies they are treating. And newspapers across the country in recent weeks have relayed devastating stories about how local mothers and infants have been affected by these policies.

Our bill seeks to counteract these negative effects of premature discharges by ensuring that newborns and

mothers receive adequate care during those critical first days. It does this by requiring health insurers to allow new mothers and their infants to remain in the hospital for a minimum of 48 hours after a normal birth and 96 hours after a caesarean section. Shorter hospital stays are permitted provided that neither the mother nor the attending physician object, and that follow-up home health care is provided for the mother and infant.

To those who would argue that a 48-hour stay is longer than is medically necessary, I would like to point out that this is a significantly shorter time than medical experts recommend for uncomplicated deliveries. In their guidelines for caring for newborns and mothers, the American College of Obstetricians and Gynecologists [ACOG] and the American Academy of Pediatrics recommend stays of 48 hours for uncomplicated vaginal birth, and 96 hours following a caesarean birth—in addition to the day of delivery. ACOG has also pointed out that there is inadequate evidence to prove that early discharge is safe, and therefore that the recent trend toward shorter stays "could be the equivalent of a large, uncontrolled, uninformed experiment" on newborns and their mothers.

A 48-hour minimum stay is also consistent with steps being considered by some States. For example, our bill is very similar to one which recently was passed unanimously by the New Jersey Legislature, and which should soon be signed into law. Maryland has also recently passed a law dealing with early discharges, and similar measures are being considered in New York and California.

Mr. President, insurers may argue that they will pay for stays beyond 24 hours if there is a valid medical reason. However, many physicians have told me—off the record—that it is very difficult to convince insurers to grant an extension, no matter how valid the reason. They also state that the final decision is often made by someone with no experience in obstetrics. Finally, they state that many doctors are under financial pressures to avoid having patients stay beyond the 24-hour limit, so they are faced with a real quandary when a patient needs an extension. A recent report by Maryland's Department of Health and Mental Hygiene raises further concerns about what is considered a valid medical reason. This report found that among babies who were born prematurely, who were not fully developed, or who were diagnosed with a significant problem, about 22 percent were discharged from the hospital within 24 hours of birth. This study was based on data from 1992. I can only assume that the situation has gotten worse in the 3 years since.

Mr. President, there is no greater advocate for controlling health care costs than this Senator. And I am impressed by some health insurers' success in slowing health inflation by reducing unnecessary care. At the same time, I also recognize that there is a very fine line between eliminating unnecessary care and reducing access to care which truly is needed. And when we end up on the wrong side of that line—as I think is happening in the case of newborns and their mothers—I believe it is both appropriate and necessary for us to take steps to protect the health of the American public. Concerns about controlling costs are justified, but they must not be allowed to outweigh concerns about doing what is best for patients. And let us not forget, Mr. President, that discharging mothers and newborns early creates its own costs, the cost to insurers of treating patients for conditions which could have been prevented or lessened if caught earlier, and the costs to the individual and society when a child suffers brain damage or other permanent disabilities because they did not receive adequate early care.

Mr. President, America's newborns deserve a better welcome to the world than they are getting under the present system. Their mothers also deserve better. It is very important that health care costs be controlled, but the ultimate decision about health care must be based on medical factors, not financial ones.

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. 969

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 "New Borns' and Mothers' Health Protection Act of 1995".

SEC. 2. REQUIRED COVERAGE FOR MINIMUM HOSPITAL STAY FOLLOWING BIRTH.

(a) IN GENERAL.—A health plan that provides maternity benefits, including benefits for child birth, shall ensure that coverage is provided for a minimum of 48 hours of in-patient care following a vaginal delivery and a minimum of 96 hours of in-patient care following a caesarean section for a mother and her newly born child in a health care facility.

(b) EXCEPTION.—

(1) IN GENERAL.—Notwithstanding subsection (a), a health plan that provides coverage for post-delivery care provided to a mother and her newly born child in the home shall not be required to provide coverage of in-patient care under subsection (a) unless such in-patient care is determined to be medically necessary by the attending physician or is requested by the mother.

(2) ATTENDING PHYSICIAN.—For purposes of paragraph (1), the term "attending physician" shall include the obstetrician, pediatrician, or other physician attending the mother or newly born child.

(c) PROHIBITION.—In implementing the requirements of this section, a health plan may not modify the terms and conditions of coverage based on the determination by an enrollee to request less than the minimum coverage required under subsection (a).

(d) NOTICE.—A health plan shall provide notice to each enrollee under such plan regarding the coverage required by this section in accordance with regulations promulgated by the Secretary of Health and Human Services, in consultation with the National Association of Insurance Commissioners. Such notice shall be in writing and prominently positioned in any literature or correspondence made available or distributed by the health plan and shall be transmitted—

(1) in the next mailing made by the plan to the employee;

(2) as part of the yearly informational packet sent to the enrollee; or

(3) not later than January 1, 1996;

whichever is earlier.

(e) HEALTH PLAN.—

(1) IN GENERAL.—As used in this Act, the term "health plan" means any plan or arrangement which provides, or pays the cost of, health benefits.

(2) EXCLUSIONS.—Such term does not include the following, or any combination thereof:

(A) Coverage only for accidental death or dismemberment.

(B) Coverage providing wages or payments in lieu of wages for any period during which the employee is absent from work on account of sickness or injury.

(C) A medicare supplemental policy (as defined in section 1882(g)(1) of the Social Security Act).

(D) Coverage issued as a supplement to liability insurance.

(E) Worker's compensation or similar insurance.

(F) Automobile medical-payment insurance.

(G) A long-term care policy, including a nursing home fixed indemnity policy (unless the Secretary determines that such a policy provides sufficiently comprehensive coverage of a benefit so that it should be treated as a health plan).

(H) Such other plan or arrangement as the Secretary of Health and Human Services determines is not a health plan.

(3) CERTAIN PLANS INCLUDED.—Such term includes any plan or arrangement not described in any subparagraph of paragraph (2) which provides for benefit payments, on a periodic basis, for—

(A) a specified disease or illness, or

(B) period of hospitalization,

without regard to the costs incurred or services rendered during the period to which the payments relate.

SEC. 3. EFFECTIVE DATE.

The provisions of section 2 shall apply to all health plans offered, sold, issued, or renewed after the date of enactment of this Act.

• Mrs. KASSEBAUM. Mr. President, I join today with my colleague from New Jersey, Senator BRADLEY, in introducing the Newborns' and Mothers' Health Protection Act of 1995.

This legislation seeks to ensure that adequate care is provided to mothers and newborns in the critical first few days following birth. Modeled after legislation recently considered in Maryland and passed unanimously by the New Jersey Legislature, it requires health insurers to allow new mothers and their infants to remain in the hospital for a minimum of 48 hours after a

normal birth, and 96 hours after a cesarean delivery. If the mother and the doctor agree, shorter hospital stays are permitted, provided that there is a follow-up visit.

"Guidelines for Perinatal Care" issued by the American Academy of Pediatrics [AAP] and the American College of Obstetricians and Gynecologists [ACOG] state that in uncomplicated deliveries the postpartum hospital stay should range from 48 hours for vaginal births to 96 hours for cesarean sections, exclusive of the day of delivery.

However, as hospitalization costs continue to climb, it has become increasingly common for health insurers to require that new mothers and their babies be discharged from the hospital 24 hours after birth. In some parts of the country, hospital stays for a routine delivery can be as short as 12 hours.

The American Medical Association [AMA], ACOG, and the Academy of Pediatrics all have stated that the trend toward shorter hospital stays is placing the health of newborns and their mothers at risk.

Early hospital discharges have caused conditions such as jaundice—that do not appear until after the first 24 hours of life and which may lead to brain damage—to go undetected.

A 24-hour stay is often too short for new mothers to be taught basic infant care skills, such as breastfeeding. And many mothers are not physically capable of providing for a newborn's needs 24 hours after giving birth. This can lead to inadequate nourishment during a child's crucial first few days of life.

Mr. President, I must say that I have agreed to cosponsor this legislation with some reservation. I generally view any effort to influence private contracting arrangements with great skepticism. However, I view this situation as limited and unique. What is at stake here is not merely an impediment to the traditional doctor-patient relationship, but instead the health and safety of millions of America's children.

My primary concern is that the most recent trend toward shorter hospital stays appears to be motivated primarily by financial considerations—instead of sound medicine.

In calling for a moratorium on shorter hospital stays last week, ACOG stated that:

> The routine imposition of a short and arbitrary time limit on hospital stays that does not take maternal and infant need into account could be equivalent to a large, uncontrolled, uninformed experiment that may potentially affect the health of American women and their babies.

Like ACOG, I fear that insurers may be acting prematurely, without sufficient information about the long-term health implications of shorter hospital stays. As more conclusive data becomes available, I would be open to revisiting this issue. Until then, I believe we should proceed with caution.

I strongly believe that decisions regarding early discharge must be individualized and should place primary emphasis on the health of a mother and her child. I believe that the legislation we are introducing today will help restore that perspective to this important decision.●

By Mr. COATS (for himself, Mr. GREGG, Mr. HELMS, and Mr. ASHCROFT):

S. 971. A bill to amend the Public Health Service Act to prohibit governmental discrimination in the training and licensing of health professionals on the basis of the refusal to undergo or provide training in the performance of induced abortions, and for other purposes; to the Committee on Labor and Human Resources.

THE MEDICAL TRAINING NONDISCRIMINATION ACT OF 1995

● Mr. COATS. Mr. President, I introduce the Medical Training Nondiscrimination Act of 1995. This bill would prevent any State or Federal Government from discriminating against a health care provider because that provider does not perform induced abortions or train its ob-gyn residents to perform induced abortions.

It is, quite frankly, disturbing to me that this legislation is even necessary. I would venture that few of my colleagues could believe that our society is anywhere near to condoning a requirement that any person or any hospital be required to perform abortions or offer training in abortions.

Indeed, as it stands now, our proud tradition of tolerance toward those who abhor abortion and any participation in that act, has generally protected hospitals from having to provide or train abortions. In fact, only 12 percent of hospitals now require training in induced abortion. A third more do not offer any such training and the rest offer it only as an option. Of course, those programs still are required to train residents to manage medical and surgical complications of pregnancy. And that includes training procedures than might in the case save the life of the mother, as well as training D and C procedures involving preborn children that died as a result of a spontaneous abortion, miscarriage, or stillbirth.

But all this will change now that the Accreditation Council for Graduate Medical Education [ACGME] has voted to require all hospitals to train or arrange for training in induced abortion. The press has indicated that training in late-term, second-trimester abortions would be required. The ACGME has proposed to make exceptions only in the case of an institution that can formulate a cohesive, institutional objection based on religious or moral principles.

What is particularly shocking is that the Federal Government not only condones this compulsion but actually punishes those who do not submit. Here's how: Failure to do the abortion training could result in loss of accreditation by the ACGME. Loss of accreditation would result in loss of Federal funding. For example, Medicare will not reimburse the Part A costs of intern and resident services if the teaching program is not accredited. Further, ob-gyn residents in a program not accredited by the ACGME are ineligible for deferral of repayment on Federal Health Education Assistance Loans [HEAL]. The HEAL loan program is reauthorized in S. 555, now before the Senate.

Why the change in the standards? Internal correspondence with the ACGME panel suggests that the policy change was motivated by concern over the declining number of doctors willing to perform abortions and the need to destigmatize abortion providers. This concern over the stigmatization of abortion providers was dramatically characterized during the debate on the Foster nomination when one "pro-choice" Senator demanded an apology from another pro-life Senator who had "defamed" Dr. Foster by calling him an abortionist. Would an apology have been demanded if Dr. Foster had been called a heart surgeon or a podiatrist? No, there remains substantial negative stigma associated with being an abortion provider—stigma that might be eliminated if all obstetricians and gynecologists had to perform abortions as part of their residency training.

The Medical Training Nondiscrimination Act of 1995 would protect the civil rights of health care providers by preventing the Government from discriminating against any health care provider on the basis that it will not perform, train, or undergo training to perform an induced abortion. Discriminatory actions include denial of any benefit, assistance, or license, and the conditioning of such benefit, assistance, or license on the provider's compliance with accredition standards that require the performance, training, or arranging for training of induced abortions. The amendment applies only to State action and does not proscribe a private accrediting body from requiring abortion training.

Providers who choose to offer abortion training, and individuals who seek abortion training, may continue to do so. The amendment does not prevent any program from offering abortion training.

Providers will continue to train the management of complications of induced abortion as well as train to handle situation involving miscarriage and stillbirth or a threat to the life of the mother. The amendment requires no change in the practice of good obstetrics and gynecology.

This legislation has broad bipartisan support. On the House side Congressman HOEKSTRA, LAFALCE, VOLKMER,

COBURN, and WELDON have introduced identical language in the House following hearings.

I urge my colleagues to join me and protect the rights of health providers against Federal and State government action that forces them to become involved in training or providing induced abortions against their will.

I ask unanimous consent that the text of the bill be inserted in the RECORD.

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

S. 971

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 "Medical Training Non-discrimination Act of 1995".

SEC. 2. ESTABLISHMENT OF PROHIBITION AGAINST ABORTION-RELATED DISCRIMINATION IN TRAINING AND LICENSING OF PHYSICIANS.

Part B of title II of the Public Health Service Act (42 U.S.C. 238 et seq.) is amended by adding at the end the following section:

"ABORTION-RELATED DISCRIMINATION IN GOVERNMENTAL ACTIVITIES REGARDING TRAINING AND LICENSING OF PHYSICIANS

"SEC. 245. (a) IN GENERAL.—The Federal Government, and any State that receives Federal financial assistance; may not subject any health care entity to discrimination on the basis that—

"(1) the entity refuses to undergo training in the performance of induced abortions, to provide such training, to perform such abortions, or to provide referrals for such abortions;

"(2) the entity refuses to make arrangements for any of the activities specified in paragraph (1); or

"(3) the entity attends (or attended) a postgraduate physician training program, or any other program of training in the health professions, that does not (or did not) require, provide or arrange for training in the performance of induced abortions, or make arrangements for the provision of such training.

"(b) ACCREDITATION OF POSTGRADUATE PHYSICIAN TRAINING PROGRAMS.—

"(1) IN GENERAL.—With respect to the State government involved, or the Federal Government, restrictions under subsection (a) include the restriction that, in granting a legal status to a health care entity (including a license or certificate), or in providing to the entity financial assistance, a service, or another benefit, the government may not require that the entity be an accredited postgraduate physician training program, or that the entity have completed or be attending such a program, if the applicable standards for accreditation of the program include the standard that the program must require, provide or arrange for training in the performance of induced abortions, or make arrangements for the provision of such training.

"(2) RULE OF CONSTRUCTION.—With respect to subclauses (I) and (II) of section 705(a)(2)(B)(i) (relating to a program of insured loans for training in the health professions), the requirements in such subclauses regarding accredited internship or residency programs are subject to paragraph (1) of this subsection.

"(c) DEFINITIONS.—For purposes of this section:

"(1) The term 'financial assistance', with respect to a government program, includes governmental payments provided as reimbursement for carrying out health-related activities.

"(2) The term 'health care entity' includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.

"(3) The term 'postgraduate physician training program' includes a residency training program.".●

By Mr. DASCHLE (for himself, Mr. INOUYE, Mr. HARKIN, Mr. HOLLINGS, Mr. BINGAMAN, Mrs. BOXER, and Mr. AKAKA):

S. 972. A bill to amend title XIX of the Social Security Act to provide for Medicaid coverage of all certified nurse practioners and clinical nurse specialists services; to the Committee on Finance.

THE MEDICAID NURSING INCENTIVE ACT OF 1995

Mr. DASCHLE. Mr. President, today I am introducing the Medicaid Nursing Incentive Act of 1995, a bill to provide direct Medicaid reimbursement to nurse practitioners.

The ultimate goal of this proposal is to enhance the availability of cost-effective primary care to our Nation's most needy citizens.

Studies have documented the fact that millions of Americans each year do without the health care services they need, because physicians simply are not available to care for them. This problem plagues rural and urban areas alike, in parts of the country as diverse as south central Los Angeles and Lemmon, SD.

Medicaid beneficiaries are particularly vulnerable, since in recent years an increasing number of health professionals have chosen not to care for them or have been unwilling to locate in the inner city and rural communities where they live. Fortunately, there is an exception to this trend: Nurse practitioners frequently accept patients whom others will not treat and serve in areas where others refuse to work.

Studies have shown that nurse practitioners provide care that both patients and cost cutters can praise. Their advanced clinical training enables them to assume responsibility for up to 80 percent of the primary care services usually performed by physicians, many times at a lower cost and with a high level of patient satisfaction.

Congress has already recognized the expanding contributions of nurse practitioners. For more than a decade, CHAMPUS has provided direct payment to nurse practioners. In 1990, Congress mandated direct payment for nurse practitioner services under the Federal employee health benefit plan. Recent legislation has required direct Medicare reimbursement for nurse practitioners practicing in rural areas and direct Medicaid reimbursement for family nurse practitioners.

Mr. President, the ramifications of this issue extend beyond the Medicaid program and its beneficiaries; there is a broader lesson here that applies to our search for ways to make cost-effective, high-quality health care services available and accessible to all of our citizens.

One of the cornerstones of this kind of care is the expansion of primary and preventive care, delivered to individuals in convenient, familiar places where they live, work, and go to school. More than 2 million of our Nation's nurses currently provide care in these sites—in home health agencies, nursing homes, ambulatory care clinics, and schools.

In places like my home State of South Dakota, nurses are often the only health care professionals available in the small towns and rural counties across the State.

These nurses and other nonphysican health professionals play an important role in the delivery of care. And, this role will increase as we move from a system that focuses on the costly treatment of illness to one that emphasizes primary care and health promotion.

But, first we must revaluate outdated attitudes and break down barriers that prevent nurses from using the full range of their training and skills in caring for patients. In 1994, the Pew Health Professions Commission concluded that nurse practitioners are not being fully utilized to deliver primary care services and recommended eliminating fiscal discrimination by paying them directly for the services they provide. This step will help nurse practitioners provide the access to primary care that so many communities currently lack.

Mr. President, I hope my colleagues will support the measure I am introducing today, recognizing the important role that nurse practitioners and other nonphysician health professionals can play in our health care delivery system and the increasing contribution they can make in the future. I ask unanimous consent that the full 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. 972

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. MEDICAID COVERAGE OF ALL CERTIFIED NURSE PRACTITIONER AND CLINICAL NURSE SPECIALIST SERVICES.

(a) IN GENERAL.—Section 1905(a)(21) of the Social Security Act (42 U.S.C. 1396d(a)(21)) is amended to read as follows:

"(21) services furnished by a certified nurse practitioner (as defined by the Secretary) or

clinical nurse specialist (as defined in subsection (t)) which the certified nurse practitioner or clinical nurse specialist is legally authorized to perform under State law (or the State regulatory mechanism provided by State law), whether or not the certified nurse practitioner or clinical nurse specialist is under the supervision of, or associated with, a physician or other health care provider;"

(b) CLINICAL NURSE SPECIALIST DEFINED.—Section 1905 of such Act (42 U.S.C. 1396d) is amended by adding at the end the following new subsection:

"(t) The term 'clinical nurse specialist' means an individual who—

"(1) is a registered nurse and is licensed to practice nursing in the State in which the clinical nurse specialist services are performed; and

"(2) holds a master's degree in a defined area of clinical nursing from an accredited educational institution.".

(c) EFFECTIVE DATE.—The amendments made by this section shall become effective with respect to payments for calendar quarters beginning on or after January 1, 1996.

• Mr. AKAKA. Mr. President, I am pleased to join Senator DASCHLE as a cosponsor of the Medicaid Nursing Incentive Act of 1995. This legislation would provide direct Medicaid reimbursement to nurse practitioners and clinical nurse specialists for services they provide within their scope of practice, regardless of whether these services are performed under the supervision of a physician.

With the current shortage of primary health care services in our Nation, millions of Americans are without essential health services. Medicaid recipients are particularly vulnerable.

By allowing direct Medicaid reimbursement to nurse practitioners and clinical nurse specialists, I believe that this legislation will not only improve access to much needed health care services, but will strengthen our health care delivery system. A number of recent studies have documented the important roles that nurse practitioners and clinical nurse specialists play in providing cost-effective, quality health care services. For example, a December 1986 study by the Office of Technology Assessment detailed the significant contributions nurse practitioners have made in reducing health care costs, improving the quality of care, and increasing the accessibility of services.

I urge my colleagues to support this legislation. It will enhance access to cost-effective, quality care for individuals with limited access to health care services.•

By Mr. INOUYE:

S. 973. A bill to amend the Internal Revenue Code of 1986 to provide for the tax treatment of residential ground rents, and for other purposes; to the Committee on Finance.

THE RESIDENTIAL GROUND RENTS ACT OF 1995

Mr. INOUYE. Mr. President, I rise today to speak on an issue of great importance to Hawaii's leasehold homeowners. In fiscal year 1992, at my request, the Congress appropriated $400,000 to study the feasibility of reforming the Internal Revenue Code to address ground lease rent payments and to determine what role, if any, the Federal Government should play in encouraging lease to fee conversions. The nationwide study was conducted by the Hawaii Real Estate and Research Center.

The legislation I am introducing today is based on the recommendations of this study. The bill would: First, provide a mortgage interest deduction for residential leasehold properties by allowing the nonredeemable ground lease rents to be claimed as an interest deduction; and, second, include a tax credit of up to $5,000 for certain transaction costs on the transfer of certain residential leasehold land for a 5-year period, ending on December 31, 1999. Transaction costs include closing costs, attorneys' fees, surveys, and appraisals, and telephone, office, and travel expenses.

In most private home ownership situations in this country, a homeowner owns both the building and land. Under a leasehold arrangement a homeowner owns the building—single-family home, condominium, or cooperative apartment—on leased land. The research conducted under the leasehold study shows that residential leaseholds are not uncommon in other parts of the United States and elsewhere in the world. Residential leaseholds exist in places such as Baltimore, MD, Irvine, CA, native American lands in Palm Springs, CA, Fairhope, AL, Pearl River Basin, MS, and New York, NY.

The study further indicates that there are few States that regulate residential leaseholds. Of those that do, the most common requirement applies only to condominium or time share units and is one requiring adequate disclosure of the lease terms. For the most part, States are unaware of any leasehold problems in their jurisdictions. However, residential leaseholds have proven to be problematic for the State of Hawaii.

The formation of Hawaii's land tenure system can be traced back to 1778 when British Capt. James Cook made his first contact with the Hawaiian civilization. Leasing was the preferred system to maintain control and retain a portfolio asset value. Residential leaseholds were first developed on the Island of Oahu after World War II. Population increases created a demand for housing and other types of real estate development. Federal income tax policy encouraged the retention of land to avoid payment of large capital gains taxes.

Hawaii's land tenure system is now anomalous to the rest of the United States because of the concentration of land in the hands of government, large charitable trusts, large agriculturally-based companies and owners of small parcels or urban properties.

High land prices and high renegotiated rents continue to create instability in Hawaii's residential leasehold system. In 1967, the Hawaii State legislature enacted a land reform act which did not become effective until the U.S. Supreme Court issued its 1984 decision, Hawaii Housing Authority versus Midkiff. The act and the Supreme Court decision basically divided the market into a "single-family home market in which leaseholds were subject to mandatory conversion, and a leasehold condominium market which did not come within the scope of the law."

Mandatory conversions on the single-family home market occurred from 1979 to 1982, and 1986 to 1990. As of 1992, there are approximately 4,600 single-family homes remaining in residential leaseholds. However, resolution over condominium leasehold reform remains uncertain. In 1990, the Honolulu City Council enacted legislation that would cap lease rent increases. The law was challenged in Federal district court as to its validity and eventually ruled as unconstitutional because the formula it used to arrive at permitted lease rent was irrational.

In 1991, due to the State legislature's unwillingness to address the leasehold problems, the Honolulu City Council again enacted a mandatory leasehold conversion law for leasehold condominiums (Ordinance 01-95). The law is currently being challenged in the Federal courts as to its constitutionality. Another bill which linked lease rent increases with the Consumer Price Index and the level of disposable income available to condominium owners was also considered. This bill, similar to the one enacted in 1990, was found to be unconstitutional.

The uncertainty in the residential leasehold market continues to create emotional distress for the leasehold residents of Hawaii. Voluntary conversion has helped to ease the situation and substantially reduce the stock of leasehold residential units in Hawaii. Yet, voluntary conversion is not enough to resolve the residential leasehold problems.

My legislation will help reduce the economic hardship due to the uncertainty in Hawaii's residential leasehold system. The leasehold study contains an analysis of the tax revenue effects of this legislation by allowing individual tax deductions for residential ground rent. The analysis suggests that there are potential revenues to the Federal Government if this legislation is enacted into law.

Mr. President, I ask unanimous consent that the text of my bill be printed in the RECORD.

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

S. 973

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. MORTGAGE INTEREST DEDUCTION FOR QUALIFIED NON-REDEEMABLE GROUND RENTS.

(a) IN GENERAL.—Section 163(c) of the Internal Revenue Code of 1986 is amended to read as follows:

"(c) GROUND RENTS.—For purposes of this subtitle, any annual or periodic rental under a redeemable ground rent (excluding amounts in redemption thereof) or a qualified non-redeemable ground rent shall be treated as interest on an indebtedness secured by a mortgage."

(b) TREATMENT OF QUALIFIED NON-REDEEMABLE GROUND RENTS.—

(1) IN GENERAL.—Subsections (a), (b), and (d) of section 1055 of the Internal Revenue Code of 1986 (relating to redeemable ground rents) are amended by inserting "or qualified non-redeemable" after "redeemable" each place it appears.

(2) DEFINITION.—Section 1055 of such Code is amended by redesignating subsection (d) as subsection (e) and by inserting after subsection (c) the following new subsection:

"(d) QUALIFIED NON-REDEEMABLE GROUND RENT.—For purposes of this subtitle, the term 'qualified non-redeemable ground rent' means a ground rent with respect to which—

"(1) there is a lease of land which is for a term in excess of 15 years,

"(2) no portion of any payment is allocable to the use of any property other than the land surface,

"(3) the lessor's interest in the land is primarily a security interest to protect the rental payments to which the lessor is entitled under the lease, and

"(4) the leased property must be used as the taxpayer's principal residence (within the meaning of section 1034)."

(3) CONFORMING AMENDMENTS.—

(A) The heading for section 1055 of such Code is amended by striking "redeemable".

(B) The item relating to section 1055 in the table of sections for part IV of subchapter O of chapter 1 of subtitle A of such Code is amended by striking "Redeemable ground" and inserting "Ground".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act, with respect to taxable years ending after such date.

SEC. 2. CREDIT FOR TRANSACTION COSTS ON THE TRANSFER OF LAND SUBJECT TO CERTAIN GROUND RENTS.

(a) IN GENERAL.—Subpart B of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1986 (relating to foreign tax credit, etc.) is amended by inserting after section 30 the following new section:

"SEC. 30A. CREDIT FOR TRANSACTION COSTS.

"(a) ALLOWANCE OF CREDIT.—

"(1) IN GENERAL.—At the election of the taxpayer, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the transaction costs relating to any sale or exchange of land subject to ground rents with respect to which immediately after and for at least 1 year prior to such sale or exchange—

"(A) the transferee is the lessee who owns a dwelling unit on the land being transferred, and

"(B) the transferor is the lessor.

"(2) CREDIT ALLOWED TO BOTH TRANSFEROR AND TRANSFEREE.—The credit allowed under paragraph (1) shall be allowed to both the transferor and the transferee.

"(b) LIMITATIONS.—

"(1) LIMITATION PER DWELLING UNIT.—The amount of the credit allowed to a taxpayer under subsection (a) for any taxable year shall not exceed the lesser of—

"(A) $5,000 per dwelling unit, or

"(B) 10 percent of the sale price of the land.

"(2) LIMITATION BASED ON TAXABLE INCOME.—The amount of the credit allowed to a taxpayer under subsection (a) for any taxable year shall not exceed the sum of—

"(A) 20 percent of the regular tax for the taxable year reduced by the sum of the credits allowable under subpart A and sections 27, 28, 29, and 30, plus

"(B) the alternative minimum tax imposed by section 55.

"(c) DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

"(1) TRANSACTION COSTS.—

"(A) IN GENERAL.—The term 'transaction costs' means any expenditure directly associated with a transaction, the purpose of which is to convey to the lessee, by the lessor, land subject to ground rents.

"(B) SPECIFIC EXPENDITURES.—Such term includes closing costs, attorney fees, surveys and appraisals, and telephone, office, and travel expenses incurred in negotiations with respect to such transaction.

"(C) LOST RENTS NOT INCLUDED.—Such term does not include lost rents due to the premature termination of an existing lease.

"(2) DWELLING UNIT.—A dwelling unit shall include any structure or portion of any structure which serves as the principal residence (within the meaning of section 1034) for the lessee.

"(3) REDUCTION IN BASIS.—The basis of property acquired in a transaction to which this section applies shall be reduced by the amount of credit allowed under subsection (a).

"(4) ELECTION.—This section shall apply to any taxpayer for the taxable year only if such taxpayer elects to have this section so apply.

"(d) CARRYOVER OF CREDIT.—

"(1) CARRYOVER PERIOD.—If the credit allowed to the taxpayer under subsection (a) for any taxable year exceeds the amount of the limitation imposed by subsection (b)(2) for such taxable year (hereafter in this subsection referred to as the 'unused credit year'), such excess shall be a carryover to each of the 5 succeeding taxable years.

"(2) AMOUNT CARRIED TO EACH YEAR.—

"(A) ENTIRE AMOUNT CARRIED TO FIRST YEAR.—The entire amount of the unused credit for an unused credit year shall be carried to the earliest of the 5 taxable years to which (by reason of paragraph (1)) such credit may be carried.

"(B) AMOUNT CARRIED TO OTHER 4 YEARS.—The amount of unused credit for the unused credit year shall be carried to each of the remaining 4 taxable years to the extent that such unused credit may not be taken into account for a prior taxable year because of the limitation imposed by subsection (b)(2).

"(e) TERMINATION.—This section shall not apply to any transaction cost paid or incurred in taxable years beginning after December 31, 1999."

(b) CLERICAL AMENDMENT.—The table of sections for such subpart B is amended by inserting after the item relating to section 30 the following new item:

"Sec. 30A. Credit for transaction costs on the transfer of land subject to certain ground rents."

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to expenditures paid or incurred in taxable years beginning after December 31, 1994.

By Mr. GRASSLEY:

S. 974. A bill to prohibit certain acts involving the use of computers in the furtherance of crimes, and for other purposes; to the Committee on the Judiciary.

THE ANTI-ELECTRONIC RACKETEERING ACT

Mr. GRASSLEY. Mr. President, I rise this evening to introduce the Anti-electronic Racketeering Act of 1995. This bill makes important changes to RICO and criminalizes deliberately using computer technology to engage in criminal activity. I believe this bill is a reasonable, measured and strong response to a growing problem. According to the computer emergency and response team at Carnegie-Mellon University, during 1994, about 40,000 computer users were attacked. Virus hacker, the FBI's national computer crime squad has investigated over 200 cases since 1991. So, computer crime is clearly on the rise.

Mr. President, I suppose that some of this is just natural. Whenever man develops a new technology, that technology will be abused by some. And that is why I have introduced this bill. I believe we need to seriously reconsider the Federal Criminal Code with an eye toward modernizing existing statutes and creating new ones. In other words, Mr. President, Elliot Ness needs to meet the Internet.

Mr. President, I sit on the Board of the Office of Technology Assessment. That Office has clearly indicated that organized crime has entered cyberspace in a big way. International drug cartels use computers to launder drug money and terrorists like the Oklahoma City bombers use computers to conspire to commit crimes.

Computer fraud accounts for the loss of millions of dollars per year. And often times, there is little that can be done about this because the computer used to commit the crimes is located overseas. So, under my bill, overseas computer users who employ their computers to commit fraud in the United States would be fully subject to the Federal criminal laws. Also under my bill, Mr. President, the wire fraud statute which has been successfully used by prosecutors for many users, will be amended to make fraudulent schemes which use computers a crime.

It is not enough to simply modernize the Criminal Code. We also have to reconsider many of the difficult procedural burdens that prosecutors must overcome. For instance, in the typical case, prosecutors must identify a location in order to get a wiretapping order. But in cyberspace, it is often impossible to determine the location. And so my bill corrects that so that if prosecutors cannot, with the exercise of effort, give the court a location, then those prosecutors can still get a wiretapping order. And for law enforcers—both State and Federal—who have seized a computer which contains both

contraband or evidence and purely private material, I have created a good-faith standard so that law enforcers are not shackled by undue restrictions but will also be punished for bad faith.

Mr. President, this brave new world of electronic communications and global computer networks holds much promise. But like almost anything, there is the potential for abuse and harm. That is why I urge my colleagues to support this bill and that is why I urge industry to support this bill.

On a final note, I would say that we should not be too scared of technology. After all, we are still just people and right is still right and wrong is still wrong. Some things change and some things do not. All that my bill does is say you can't use computers to steal, to threaten others or conceal criminal conduct.

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. 974

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 "Anti-Electronic Racketeering Act of 1995".

SEC. 2. PROHIBITED ACTIVITIES.

(a) DEFINITIONS.—Section 1961(1) of title 18, United States Code, is amended—

(1) by striking "1343 (relating to wire fraud)" and inserting "1343 (relating to wire and computer fraud)";

(2) by striking "that title" and inserting "this title";

(3) by striking "or (E)" and inserting "(E)"; and

(4) by inserting before the semicolon the following: "or (F) any act that is indictable under section 1030, 1030A, or 1962(d)(2)".

(b) USE OF COMPUTER TO FACILITATE RACKETEERING ENTERPRISE.—Section 1962 of title 18, United States Code, is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following new subsection:

"(d) It shall be unlawful for any person—

"(1) to use any computer or computer network in furtherance of a racketeering activity (as defined in section 1961(1)); or

"(2) to damage or threaten to damage electronically or digitally stored data.".

(c) CRIMINAL PENALTIES.—Section 1963(b) of title 18, United States Code, is amended—

(1) by striking "and" at the end of paragraph (1);

(2) by striking the period at the end of paragraph (2) and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(3) electronically or digitally stored data.".

(d) CIVIL REMEDIES.—Section 1964(c) of title 18, United States Code, is amended by striking "his property or business".

(e) USE AS EVIDENCE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS.—Section 2515 of title 18, United States Code, is amended by inserting before the period at the end the following: ", unless the authority in possession of the intercepted communication attempted in good faith to comply with this chapter. If the United States or any State of the United States, or subdivision thereof, possesses a communication intercepted by a nongovernmental actor, without the knowledge of the United States, that State, or that subdivision, the communication may be introduced into evidence".

(f) AUTHORIZATION FOR INTERCEPTION OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS.—Section 2516(1) of title 18, United States Code, is amended—

(1) by striking "and" at the end of paragraph (n);

(2) by striking the period at the end of paragraph (o) and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(p) any violation of section 1962 of title 18.".

(g) PROCEDURES FOR INTERCEPTION.—Section 2518(4)(b) of title 18, United States Code, is amended by inserting before the semicolon the following: "to the extent feasible".

(h) COMPUTER CRIMES.—

(1) NEW PROHIBITED ACTIVITIES.—Chapter 47 of title 18, United States Code, is amended by adding at the end the following new section:

"§ 1030A. Racketeering-related crimes involving computers

"(a) It shall be unlawful—

"(1) to use a computer or computer network to transfer unlicensed computer software, regardless of whether the transfer is performed for economic consideration;

"(2) to distribute computer software that encodes or encrypts electronic or digital communications to computer networks that the person distributing the software knows or reasonably should know, is accessible to foreign nationals and foreign governments, regardless of whether such software has been designated as nonexportable; and

"(3) to use a computer or computer network to transmit a communication intended to conceal or hide the origin of money or other assets, tangible or intangible, that were derived from racketeering activity; and

"(4) to operate a computer or computer network primarily to facilitate racketeering activity or primarily to engage in conduct prohibited by Federal or State law.

"(b) For purposes of this section, each act of distributing software is considered a separate predicate act. Each instance in which nonexportable software is accessed by a foreign government, an agent of a foreign government, a foreign national, or an agent of a foreign national, shall be considered as a separate predicate act.

"(c) It shall be an affirmative defense to prosecution under this section that the software at issue used a universal decoding device or program that was provided to the Department of Justice prior to the distribution.".

(2) CLERICAL AMENDMENT.—The analysis at the beginning of chapter 47, United States Code, is amended by adding at the end the following new item:

"1030A. Racketeering-related crimes involving computers.".

(3) JURISDICTION AND VENUE.—Section 1030 of title 18, United States Code, is amended by adding at the end the following new subsection:

"(g)(1)(A) Any act prohibited by this section that is committed using any computer, computer facility, or computer network that is physically located within the territorial jurisdiction of the United States shall be deemed to have been committed within the territorial jurisdiction of the United States.

"(B) Any action taken in furtherance of an act described in subparagraph (A) shall be deemed to have been committed in the territorial jurisdiction of the United States.

"(2) In any prosecution under this section involving acts deemed to be committed within the territorial jurisdiction of the United States under this subsection, venue shall be proper where the computer, computer facility, or computer network was physically situated at the time at least one of the wrongful acts was committed.".

(i) WIRE AND COMPUTER FRAUD.—Section 1343 of title 18, United States Code, is amended by striking "or television communication" and inserting "television communication, or computer network or facility".

(j) PRIVACY PROTECTION ACT.—Section 101 of the Privacy Protection Act of 1980 (42 U.S.C. 2000aa) is amended—

(1) in subsection (a)—

(A) by striking "or" at the end of paragraph (1);

(B) by striking the period at the end of paragraph (2) and inserting "; or"; and

(C) by adding at the end the following new paragraph:

"(3) there is reason to believe that the immediate seizure of such materials is necessary to prevent the destruction or altercation of such documents."; and

(2) in subsection (b)—

(A) by striking "or" at the end of paragraph (3);

(B) by striking the period at the end of paragraph (4) and inserting "; or"; and

(C) by adding at the end the following new paragraph:

"(5) in the case of electronically stored data, the seizure is incidental to an otherwise valid seizure, and the government officer or employee—

"(A) was not aware that work product material was among the data seized;

"(B) upon actual discovery of the existence of work product materials, the government officer or employee took reasonable steps to protect the privacy interests recognized by this section, including—

"(i) using utility software to seek and identify electronically stored data that may be commingled or combined with non-work product material; and

"(ii) upon actual identification of such material, taking reasonable steps to protect the privacy of the material, including seeking a search warrant.".

ADDITIONAL COSPONSORS

S. 256

At the request of Mr. DOLE, the name of the Senator from Rhode Island [Mr. CHAFEE] was added as a cosponsor of S. 256, a bill to amend title 10, United States Code, to establish procedures for determining the status of certain missing members of the Armed Forces and certain civilians, and for other purposes.

S. 267

At the request of Mr. STEVENS, the name of the Senator from Oregon [Mr. PACKWOOD] was added as a cosponsor of S. 267, a bill to establish a system of licensing, reporting, and regulation for vessels of the United States fishing on the high seas, and for other purposes.

S. 304

At the request of Mr. SANTORUM, the name of the Senator from Maine [Ms.

SNOWE] was added as a cosponsor of S. 304, a bill to amend the Internal Revenue Code of 1986 to repeal the transportation fuels tax applicable to commercial aviation.

S. 327

At the request of Mr. HATCH, the name of the Senator from Missouri [Mr. BOND] was added as a cosponsor of S. 327, a bill to amend the Internal Revenue Code of 1986 to provide clarification for the deductibility of expenses incurred by a taxpayer in connection with the business use of the home.

S. 426

At the request of Mr. SARBANES, the name of the Senator from Illinois [Ms. MOSELEY-BRAUN] was added as a cosponsor of S. 426, a bill to authorize the Alpha Phi Alpha Fraternity to establish a memorial to Martin Luther King, Jr., in the District of Columbia, and for other purposes.

S. 436

At the request of Mr. CAMPBELL, the names of the Senator from Kansas [Mrs. KASSEBAUM] and the Senator from Illinois [Mr. SIMON] were added as cosponsors of S. 436, a bill to improve the economic conditions and supply of housing in Native American communities by creating the Native American Financial Services Organization, and for other purposes.

S. 448

At the request of Mr. GRASSLEY, the name of the Senator from Rhode Island [Mr. CHAFEE] was added as a cosponsor of S. 448, a bill to amend section 118 of the Internal Revenue Code of 1986 to provide for certain exceptions from rules for determining contributions in aid of construction, and for other purposes.

S. 641

At the request of Mrs. KASSEBAUM, the name of the Senator from Maine [Ms. SNOWE] was added as a cosponsor of S. 641, a bill to reauthorize the Ryan White CARE Act of 1990, and for other purposes.

S. 892

At the request of Mr. GRASSLEY, the name of the Senator from Utah [Mr. HATCH] was added as a cosponsor of S. 892, a bill to amend section 1464 of title 18, United States Code, to punish transmission by computer of indecent material to minors.

S. 955

At the request of Mr. HATCH, the names of the Senator from Wisconsin [Mr. KOHL] and the Senator from Washington [Mr. GORTON] were added as cosponsors of S. 955, a bill to clarify the scope of coverage and amount of payment under the medicare program of items and services associated with the use in the furnishing of inpatient hospital services of certain medical devices approved for investigational use.

S. 959

At the request of Mr. HATCH, the name of the Senator from Idaho [Mr. KEMPTHORNE] was added as a cosponsor of S. 959, a bill to amend the Internal Revenue Code of 1986 to encourage capital formation through reductions in taxes on capital gains, and for other purposes.

SENATE RESOLUTION 103

At the request of Mr. DOMENICI, the name of the Senator from Washington [Mrs. MURRAY] was added as a cosponsor of Senate Resolution 103, a resolution to proclaim the week of October 15 through October 21, 1995, as National Character Counts Week, and for other purposes.

SENATE RESOLUTION 117

At the request of Mr. ROTH, the name of the Senator from Washington [Mr. GORTON] was added as a cosponsor of Senate Resolution 117, a resolution expressing the sense of the Senate that the current Federal income tax deduction for interest paid on debt secured by a first or second home located in the United States should not be further restricted.

SENATE RESOLUTION 142—TO CONGRATULATE THE NEW JERSEY DEVILS

Mr. LAUTENBERG (for himself and Mr. BRADLEY) submitted the following resolution; which was considered and agreed to:

S. RES. 142

Whereas on October 5, 1982, the New Jersey Devils played their first National Hockey League game in New Jersey, embarking on a quest for the Stanley Cup which was satisfied 13 years later;

Whereas the Devils epitomize New Jersey pride with their heart, stamina, and drive and thus have become a part of New Jersey culture;

Whereas the New Jersey Devils won 10 games on the road during the Stanley Cup playoffs, thus demolishing the previous record;

Whereas the Devils have implemented an ingenious system known as the "trap" that was designed by head coach Jacques Lemaire which constantly stifled and frustrated their opponents;

Whereas Conn Smythe trophy winner Claude Lemieux led the league with 13 playoff goals, three of which were game-winners, and goalie Martin Brodeur led the league with a 1.67 goals-against average during the playoffs;

Whereas the New Jersey hockey fans are the best fans in the nation and deserve commendation for helping build the team into championship caliber and for supporting the Devils during their drive for the Stanley Cup;

Whereas the New Jersey Devils during the playoffs beat Boston, Pittsburgh, Philadelphia and in the finals swept the heavily favored Detroit Red Wings in four games giving the state of New Jersey its first-ever championship for a major league team officially bearing the state's name: Now, therefore, be it

Resolved, That the Senate congratulates the New Jersey Devils for their outstanding discipline, determination, emotion, and ingenuity, in winning the 1995 NHL Stanley Cup.

AMENDMENTS SUBMITTED ON JUNE 26, 1995

THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

BRYAN AMENDMENT NO. 1474

Mr. BRYAN proposed an amendment to the bill (S. 240) to amend the Securities Exchange Act of 1934 to establish a filing deadline and to provide certain safeguards to ensure that the interests of investors are well protected under the implied private action provisions of the act; as follows:

On page 127, strike line 20 and all that follows through page 128, line 15, and insert the following:

SEC. 108. AUTHORITY OF COMMISSION TO PROSECUTE AIDING AND ABETTING.

(a) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following new subsection:

"(n) PROSECUTION OF PERSONS WHO AID OR ABET VIOLATIONS.—For purposes of subsections (b) and (d), any person who knowingly or recklessly provides substantial assistance to another person in the violation of a provision of this title, or of any rule or regulation promulgated under this title, shall be deemed to violate such provision to the same extent as the person to whom such assistance is provided. No person shall be liable under this subsection based on an omission or failure to act unless such omission or failure constituted a breach of a duty owed by such person.".

(b) SECURITIES EXCHANGE ACT OF 1934.—Section 20 of the securities exchange Act of 1934 (15 U.S.C. 78t) is amended—

(1) by adding at the end the following new subsection:

"(e) PROSECUTION OF PERSONS WHO AID OR ABET VIOLATIONS.—For purposes of paragraphs (1) and (3) of section 21(d), or an action by a self-regulatory organization, or an express or implied private right of action arising under this title, any person who knowingly or recklessly provides substantial assistance to another person in the violation of a provision of this title, or of any rule or regulation promulgated under this title, shall be deemed to violate such provision and shall be liable to the same extent as the person to whom such assistance is provided. No person shall be liable under this subsection based on an omission or failure to act unless such omission or failure constituted a breach of a duty owed by such person."; and

(2) by striking the section heading and inserting the following:

"SEC. 20. LIABILITY OF CONTROLLING PERSONS AND PERSONS WHO AID OR ABET VIOLATIONS.".

(c) INVESTMENT COMPANY ACT OF 1940.—Section 42 of the Investment Company Act of 1940 (15 U.S.C. 81a–41) is amended by adding at the end the following new subsection:

"(f) PROSECUTION OF PERSONS WHO AID OR ABET VIOLATIONS.—For purposes of subsections (d) and (e), any person who knowingly or recklessly provides substantial assistance to another person in the violation of a provision of this title, or of any rule, regulation, or order promulgated under this title, shall be deemed to violate such provision to the same extent as the person to whom such assistance is provided. No person shall be liable under this subsection based on an omission or failure to act unless such omission or

failure constituted a breach of a duty owed by such person.".

(d) INVESTMENT ADVISERS ACT OF 1940.—Section 209(d) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-9) is amended).

(1) in subsection (d)—

(A) by striking "or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation,"; and

(B) by striking "or in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice"; and

(2) by adding at the end the following new subsection:

"(f) PROSECUTION OF PERSONS WHO AID OR ABET VIOLATIONS.—For purposes of subsections (d) and (e), any person who knowingly or recklessly provides substantial assistance to another person in the violation of a provision of this title, or of any rule, regulation, or order promulgated under this title, shall be deemed to violate such provision to the same extent as the person to whom such assistance is provided. No person shall be liable under this subsection based on an omission or failure to act unless such omission or failure constituted a breach of duty owed by such person.".

BOXER (AND BINGAMAN) AMENDMENT NO. 1475

Mrs. BOXER (for herself and Mr. BINGAMAN) proposed an amendment to the bill, S. 240, supra; as follows:

On page 98, strike line 3, and all that follows through page 100, line 22, and insert the following:

"(2) APPOINTMENT OF LEAD PLAINTIFF OR PLAINTIFFS.—Not later than 90 days after the date on which a notice is published under subparagraph (A) or (B) of paragraph (1), the court shall determine whether all named plaintiffs acting on behalf of the purported plaintiff class who have moved the court to be appointed to serve as lead plaintiff under paragraph (1)(A)(ii) have unanimously selected a named plaintiff or plaintiffs to serve as lead plaintiff or plaintiffs of the purported plaintiff class, and—

"(A) if so, shall appoint such named plaintiff or plaintiffs to serve as lead plaintiff or plaintiffs of the purported plaintiff class; or

"(B) if not, after considering all relevant factors, including, but not limited to financial interest in the relief sought, work done to develop and prosecute the case, the quality of the claim, prior experience representing classes, possible conflicting interests, and exposure to unique defenses, shall select and appoint a named plaintiff or plaintiffs to serve as lead plaintiff or plaintiffs of the purported plaintiff class.

"(3) SELECTION OF LEAD COUNSEL.—The lead plaintiff or plaintiffs appointed under paragraph (2) shall, subject to the approval of the court, select and retain counsel to represent the class."

On page 102, strike line 3, and all that follows through page 104, line 22, and insert the following:

"(2) APPOINTMENT OF LEAD PLAINTIFF OR PLAINTIFFS.—Not later than 90 days after the date on which a notice is published under subparagraph (A) or (B) of paragraph (1), the court shall determine whether all named plaintiffs acting on behalf of the purported plaintiff class who have moved the court to be appointed to serve as lead plaintiff under paragraph (1)(A)(ii) have unanimously selected a named plaintiff or plaintiffs to serve as lead plaintiff or plaintiffs of the purported plaintiff class, and—

"(A) if so, shall appoint such named plaintiff or plaintiffs to serve as lead plaintiff or plaintiffs of the purported plaintiff class; or

"(B) if not, after considering all relevant factors, including, but not limited to financial interest in the relief sought, work done to develop and prosecute the case, the quality of the claim, prior experience representing classes, possible conflicting interests, and exposure to unique defenses, shall select and appoint a named plaintiff or plaintiffs to serve as lead plaintiff or plaintiffs of the purported plaintiff class.

"(3) SELECTION OF LEAD COUNSEL.—The lead plaintiff or plaintiffs appointed under paragraph (2) shall, subject to the approval of the court, select and retain counsel to represent the class.".

AMENDMENTS SUBMITTED ON JUNE 27, 1995

THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

D'AMATO AMENDMENT NO. 1476

Mr. D'AMATO proposed an amendment to the bill (S. 240) to amend the Securities Exchange Act of 1934 to establish a filing deadline and to provide certain safeguards to ensure that the interests of investors are well protected under the implied private action provisions of the act; as follows:

On page 121, line 1, delete the word "expectation,".

SARBANES (AND LAUTENBERG) AMENDMENT NO. 1477

Mr. SARBANES (for himself and Mr. LAUTENBERG) proposed an amendment to the bill S. 240, supra; as follows:

Beginning on page 112, strike line 1 and all that follows through page 126, line 14, and insert the following:

SEC. 105. SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS.

(a) CONSIDERATION OF REGULATORY OR LEGISLATIVE CHANGES.—In consultation with investors and issuers of securities, the Securities and Exchange Commission shall consider adopting or amending rules and regulations of the Commission, or making legislative recommendations, concerning—

(1) criteria that the Commission finds appropriate for the protection of investors by which forward-looking statements concerning the future economic performance of an issuer of securities registered under section 12 of the Securities Exchange Act of 1934 will be deemed not be in violation of section 10(b) of that Act; and

(2) procedures by which courts shall timely dismiss claims against such issuers of securities based on such forward-looking statements if such statements are in accordance with any criteria under paragraph (1).

(b) COMMISSION CONSIDERATIONS.—In developing rules or legislative recommendations in accordance with subsection (a), the Commission shall consider—

(1) appropriate limits to liability for forward-looking statements;

(2) procedures for making a summary determination of the applicability of any Commission rule for forward-looking statements early in a judicial proceeding to limit protracted litigation and expansive discovery;

(3) incorporating and reflecting the scienter requirements applicable to implied private actions under section 10(b); and

(4) providing clear guidance to issuers of securities and the judiciary.

(c) SECURITIES EXCHANGE ACT OF 1934.—Title I of the Securities Exchange Act of 1934 (15 U.S.C. 73a et seq.) is amended by inserting after section 13 the following new section:

"SEC. 37. APPLICATION OF SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS.

"(a) IN GENERAL.—In any implied private action arising under this title that alleges that a forward-looking statement concerning the future economic performance of an issuer registered under section 12 was materially false or misleading, if a party making a motion in accordance with subsection (b) requests a stay of discovery concerning the claims or defenses of that party, the court shall grant such a stay until the court has ruled on the motion.

"(b) SUMMARY JUDGMENT MOTIONS.—Subsection (a) shall apply to any motion for summary judgment made by a defendant asserting that a forward-looking statement was within the coverage of any rule which the Commission may have adopted concerning such predictive statements, if such motion is made not less than 60 days after the plaintiff commences discovery in the action.

"(c) DILATORY CONDUCT; DUPLICATIVE DISCOVERY.—Notwithstanding subsection (a) or (b), the time permitted for a plaintiff to conduct discovery under subsection (b) may be extended, or a stay of the proceedings may be denied, if the court finds that—

"(1) the defendant making a motion described in subsection (b) engaged in dilatory or obstructive conduct in taking or opposing any discovery; or

"(2) a stay of discovery pending a ruling on a motion under subsection (b) would be substantially unfair to the plaintiff or to any other party to the action.".

SARBANES (AND LAUTENBERG) AMENDMENT NO. 1478

Mr. SARBANES (for himself and Mr. LAUTENBERG) proposed an amendment to the bill S. 240, supra; as follows:

On page 114, strike lines 7 and 8, and insert the following:

"(1) made with the actual knowledge that it was false or misleading;

On page 121, strike lines 1 and 2, and insert the following:

"(1) made with the actual knowledge that it was false or misleading;

GRAHAM AMENDMENT NO. 1479

Mr. GRAHAM proposed an amendment to the bill S. 240, supra; as follows:

On page 104, after line 22, insert the following:

(c) EARLY EVALUATION PROCEDURES.—

(1) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following new subsection:

"(j) EARLY EVALUATION PROCEDURES IN CLASS ACTIONS.—

"(1) IN GENERAL.—In a private action arising under this title that is filed as a class action pursuant to the Federal Rules of Civil Procedure, if the class representatives and

each of the other parties to the action agree and any party so requests, or if the court upon motion of any party so decides, not later than 60 days after the filing of the class action, the court shall order an early evaluation procedure. The period of the early evaluation procedure shall not extend beyond 150 days after the filing of the first complaint subject to the procedure.

"(2) REQUIREMENTS.—During the early evaluation procedure described under paragraph (1)—

"(A) defendants shall not be required to answer or otherwise respond to any complaint;

"(B) plaintiffs may file a consolidated or amended complaint at any time and may dismiss the action or actions at any time without sanction;

"(C) unless otherwise ordered by the court, no formal discovery shall occur, except that parties may propound discovery requests to third parties to preserve evidence;

"(D) the parties shall evaluate the merits of the action under the supervision of a person (hereafter in this section referred to as the 'mediator') agreed upon by them or designated by the court in the absence of agreement, which person may be another district court judge, any magistrate-judge or a special master, each side having one peremptory challenge of a mediator designated by the court by filing a written notice of challenge not later than 5 days after receipt of an order designating the mediator;

"(E) the parties shall promptly provide access to or exchange all nonprivileged documents relating to the allegations in the complaint or complaints, and any documents withheld on the grounds of privilege shall be sufficiently identified so as to permit the mediator to determine if they are, in fact, privileged; and

"(F) the parties shall exchange damage studies and such other expert reports as may be helpful to an evaluation of the action on the merits, which materials shall be treated as prepared and used in the context of settlement negotiations.

"(3) FAILURE TO PRODUCE DOCUMENTS.—Any party that fails to produce documents relevant to the allegations of the complaint or complaints during the early evaluation procedure described in paragraph (1) may be sanctioned by the court pursuant to the Federal Rules of Civil Procedure. Notwithstanding paragraph (2), subject to review by the court, the mediator may order the production of evidence by any party and, to the extent necessary properly to evaluate the case, may permit discovery of nonparties and depositions of parties for good cause shown.

"(4) EVALUATION BY THE MEDIATOR.—

"(A) IN GENERAL.—If, at the end of the early evaluation procedure described in paragraph (1), the action has not been voluntarily dismissed or settled, the mediator shall evaluate the action as being—

"(i) clearly frivolous, such that it can only be further maintained in bad faith;

"(ii) clearly meritorious, such that it can only be further defended in bad faith; or

"(iii) described by neither clause (i) nor clause (ii).

"(B) WRITTEN EVALUATION.—An evaluation required by subparagraph (A) with respect to the claims against and defenses of each defendant shall be issued in writing not later than 10 days after the end of the early evaluation procedure and provided to the parties. The evaluation shall not be admissible in the action, and shall not be provided to the court until a motion for sanctions under paragraph (5) is timely filed.

"(5) MANDATORY SANCTIONS.—

"(A) CLEARLY FRIVOLOUS ACTIONS.—In an action that is evaluated by the mediator under paragraph (4)(A)(i), upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of rule 11(b) of the Federal Rules of Civil Procedure.

"(B) MANDATORY SANCTIONS.—If the court makes a finding under subparagraph (A) that a party or attorney violated any requirement of rule 11(b) of the Federal Rules of Civil Procedure, the court shall impose sanctions on such party or attorney in accordance with rule 11 of the Federal Rules of Civil Procedure.

"(C) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS.—

"(i) IN GENERAL.—Subject to clauses (ii) and (iii), for purposes of subparagraph (B), the court shall adopt a presumption that the appropriate sanction for failure of the complaint to comply with any requirement of rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

"(ii) REBUTTAL EVIDENCE.—The presumption described in clause (i) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

"(I) the award of attorneys' fees and other expenses will impose an undue burden on that party or attorney; or

"(II) the violation of rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

"(iii) SANCTIONS.—If the party or attorney against whom sanctions are to be imposed meets its burden under clause (ii), the court shall award the sanctions that the court deems appropriate pursuant to rule 11 of the Federal Rules of Civil Procedure.

"(6) EXTENSION OF EARLY EVALUATION PERIOD.—The period of the early evaluation procedure described in paragraph (1) may be extended by stipulation of all parties. At the conclusion of the period, the action shall proceed in accordance with Federal Rules of Civil Procedure.

"(7) FEES.—In a private action described in paragraph (1), each side shall bear equally the reasonable fees and expenses of the mediator agreed upon or designated under paragraph (2)(D), if the mediator is not a judicial officer.".

(2) SECURITIES EXCHANGE ACT OF 1934—Section 21 of the Securities Act of 1933 (15 U.S.C. 78a) is amended by adding at the end the following new subsection:

"(l) EARLY EVALUATION PROCEDURES IN CLASS ACTIONS.—

"(1) IN GENERAL.—In any private action arising under this title that is filed as a class action pursuant to the Federal Rules of Civil Procedure, if the class representatives and each of the other parties to the action agree and any party so requests, or if the court upon motion of any party so decides, not later than 60 days after the filing of the class action, the court shall order an early evaluation procedure. The period of the early evaluation procedure shall not extend beyond 150 days after the filing of the first complaint subject to the procedure.

"(2) REQUIREMENTS.—During the early evaluation procedure described under paragraph (1)—

"(A) defendants shall not be required to answer or otherwise respond to any complaint;

"(B) plaintiffs may file a consolidated or amended complaint at any time and may dismiss the action or actions at any time without sanction;

"(C) unless otherwise ordered by the court, no formal discovery shall occur, except that parties may propound discovery requests to third parties to preserve evidence;

"(D) the parties shall evaluate the merits of the action under the supervision of a person (hereafter in this section referred to as the 'mediator') agreed upon by them or designated by the court in the absence of agreement, which person may be another district court judge, any magistrate-judge or a special master, each side having one peremptory challenge of a mediator designated by the court by filing a written notice of challenge not later than 5 days after receipt of an order designating the mediator;

"(E) the parties shall promptly provide access to or exchange all nonprivileged documents relating to the allegations in the complaint or complaints, and any documents withheld on the grounds of privilege shall be sufficiently identified so as to permit the mediator to determine if they are, in fact, privileged; and

"(F) the parties shall exchange damage studies and such other expert reports as may be helpful to an evaluation of the action on the merits, which materials shall be treated as prepared and used in the context of settlement negotiations.

"(3) FAILURE TO PRODUCE DOCUMENTS.—Any party that fails to produce documents relevant to the allegations of the complaint or complaints during the early evaluation procedure described in paragraph (1) may be sanctioned by the court pursuant to the Federal Rules of Civil Procedure. Notwithstanding paragraph (2), subject to review by the court, the mediator may order the production of evidence by any party and, to the extent necessary properly to evaluate the case, may permit discovery of nonparties and depositions of parties for good cause shown.

"(4) EVALUATION BY THE MEDIATOR.—

"(A) IN GENERAL.—If, at the end of the early evaluation procedure described in paragraph (1), the action has not been voluntarily dismissed or settled, the mediator shall evaluate the action as being—

"(i) clearly frivolous, such that it can only be further maintained in bad faith;

"(ii) clearly meritorious, such that it can only be further defended in bad faith; or

"(iii) described by neither clause (i) nor clause (ii).

"(B) WRITTEN EVALUATION.—An evaluation required by subparagraph (A) with respect to the claims against and defenses of each defendant shall be issued in writing not later than 10 days after the end of the early evaluation procedure and provided to the parties. The evaluation shall not be admissible in the action, and shall not be provided to the court until a motion for sanctions under paragraph (5) is timely filed.

"(5) MANDATORY SANCTIONS.—

"(A) CLEARLY FRIVOLOUS ACTIONS.—In an action that is evaluated under paragraph (4)(A)(i) in which final judgment is entered against the plaintiff, the plaintiff or plaintiff's counsel shall be liable to the defendant for sanctions as awarded by the court, which may include an order to pay reasonable attorneys' fees and other expenses, if the court agrees, based on the entire record, that the action was clearly frivolous when filed and was maintained in bad faith.

"(B) CLEARLY MERITORIOUS ACTIONS.—In an action that is evaluated under paragraph (4)(A)(ii) in which final judgment is entered

against the defendant, the defendant or defendant's counsel shall be liable to the plaintiff for sanctions as awarded by the court, which may include an order to pay reasonable attorneys' fees and other expenses, if the court agrees, based on the entire record, that the action was clearly meritorious and was defended in bad faith.

"(6) EXTENSION OF EARLY EVALUATION PERIOD.—The period of the early evaluation procedure described in paragraph (1) may be extended by stipulation of all parties. At the conclusion of the period, the action shall proceed in accordance with Federal Rules of Civil Procedure.

"(7) FEES.—In a private action described in paragraph (1), each side shall bear equally the reasonable fees and expenses of the mediator agreed upon or designated under paragraph (2)(D), if the mediator is not a judicial officer.".

On page 105, line 5, strike "(j)" and insert "(l)".

On page 106, line 25, strike "(l)" and insert "(k)".

On page 108, line 24, strike "(k)" and insert "(j)".

On page 109, line 8, strike "(l)" and insert "(k)".

On page 126, line 19, strike "(m)" and insert "(l)".

On page 127, line 6, strike "(m)" and insert "(l)".

BOXER AMENDMENT NO. 1480

Mrs. BOXER proposed an amendment to the bill S. 240, supra; as follows:

At the appropriate place in title I, insert the following new section:

SEC. . CONSEQUENCES OF INSIDER TRADING.

(a) SECURITIES ACT OF 1933.—Section 13A of the Securities Act of 1933, as added by section 105 of this Act, is amended by adding at the end the following new subsection:

"(h) CONSEQUENCES OF INSIDER TRADING.—

"(1) IN GENERAL.—Notwithstanding subsection (c), the exclusion from liability provided for in subsection (a) does not apply to a false or misleading forward-looking statement if, in connection with the false or misleading forward-looking statement, the issuer or any officer or director of the issuer—

"(A) purchased or sold a material amount of the equity securities of the issuer (or derivatives thereof), as reflected in filings with the Commission; and

"(B) financially benefited from the forward-looking statement.

"(2) DEFINITION.—For purposes of this subsection, the term 'material amount' means—

"(A) with respect to an issuer, equity securities of the issuer of any class having a total value of not less than $1,000,000; and

"(B) with respect to an officer or director of an issuer, holdings of that officer or director of any class of the equity securities of the issuer having a total value of not less than $50,000.".

(b) SECURITIES EXCHANGE ACT OF 1934.—Section 37 of the Securities Exchange Act of 1934, as added by section 105 of this Act, is amended by adding at the end the following new subsection:

"(h) CONSEQUENCES OF INSIDER TRADING.—

"(1) CONSEQUENCES OF INSIDER TRADING.—Notwithstanding subsection (c), the exclusion from liability provided for in subsection (a) does not apply to a false or misleading forward-looking statement if, in connection with the false or misleading forward-looking statement, the issuer or any officer or director of the issuer—

"(A) purchased or sold a material amount of the equity securities of the issuer (or derivatives thereof), as reflected in filings with the Commission; and

"(B) financially benefited from the forward-looking statement.

"(2) DEFINITION.—For purposes of this subsection, the term 'material amount' means—

"(A) with respect to an issuer, $1,000,000 worth of any class of the equity securities of the issuer; and

"(B) with respect to an officer or director of an issuer, $50,000 worth of the holdings of that person of any class of the equity securities of the issuer.".

Amend the table of contents accordingly.

BIDEN AMENDMENT NO. 1481

Mr. BIDEN proposed an amendment to the bill S. 240, supra; as follows:

At the appropriate place insert:

SEC. . AMENDMENT TO RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.

Section 1964(c) of title 18, United States Code, is amended by inserting before the period ", except that no person may rely upon conduct that would have been actionable as fraud in the purchase of sale of securities to establish a violation of section 1962", provided however that this exception shall not apply if any participant in the fraud is criminally convicted in connection therewith, in which case the statute of limitations shall start to run on the date that the conviction became final.

BINGAMAN (AND BRYAN) AMENDMENT NO. 1482

Mr. BINGAMAN (for himself and Mr. BRYAN) proposed an amendment to the bill S. 240, supra; as follows:

On page 105, line 25, insert ", or the responsive pleading or motion" after "complaint".

On page 107, line 20, insert ", or the responsive pleading or motion" after "complaint".

SPECTER AMENDMENT NOS. 1483–1485

Mr. SPECTER proposed three amendments to the bill S. 240, supra; as follows:

AMENDMENT NO. 1483

Beginning on page 105, strike line 1 and all that follows through page 108, line 17, and insert the following:

SEC. 103. SANCTIONS FOR ABUSIVE LITIGATION.

(a) SECURITIES ACT OF 1933.—Section 20 of the Securities Act of 1933 (15 U.S.C. 77t) is amended by adding at the end the following new subsection:

"(j) SANCTIONS FOR ABUSIVE LITIGATION.—In any private action arising under this title, if an abusive litigation practice relating to the action is brought to the attention of the court, by motion or otherwise, the court shall promptly—

"(1) determine whether or not to impose sanctions under rule 11 or rule 26(g)(3) of the Federal Rules of Civil Procedure, section 1927 of title 28, United States Code, or other authority of the court; and

"(2) include in the record findings of fact and conclusions of law to support such determination.".

(b) SECURITIES EXCHANGE ACT OF 1934.—Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u) is amended by adding at the end the following new subsection:

"(l) SANCTIONS FOR ABUSIVE LITIGATION.—In any private action arising under this title, if an abusive litigation practice relating to the action is brought to the attention of the court, by motion or otherwise, the court shall promptly—

"(1) determine whether or not to impose sanctions under rule 11 or rule 26(g)(3) of the Federal Rules of Civil Procedure, section 1927 of title 28, United States Code, or other authority of the court; and

"(2) include in the record findings of fact and conclusions of law to support such determination.".

AMENDMENT NO. 1484

Beginning on page 108, strike line 24 and all that follows through page 109, line 4, and insert the following:

"(k) STAY OF DISCOVERY.—

"(1) IN GENERAL.—In any private action arising under this title, the court may stay discovery upon motion of any party only if the court determines that the stay of discovery—

"(A) would avoid waste, delay, duplication, or unnecessary expense; and

"(B) would not prejudice any plaintiff.

"(2) ADDITIONAL LIMITATIONS ON DISCOVERY.—In any private action arising under this title—

"(A) prior to the filing of a responsive pleading to the complaint, discovery shall be limited to materials directly relevant to facts expressly pleaded in the complaint; and

"(B) except as provided in subparagraphs (A) and (B), or otherwise expressly provided in this title, discovery shall be conducted pursuant to the Federal Rules of Civil Procedure.".

On page 111, strike lines 1 through 7, and insert the following:

"(2) STAY OF DISCOVERY.—

"(A) IN GENERAL.—In any private action arising under this title, the court may stay discovery upon motion of any party only if the court determines that the stay of discovery—

"(i) would avoid waste, delay, duplication, or unnecessary expense; and

"(ii) would not prejudice any plaintiff.

"(B) ADDITIONAL LIMITATIONS ON DISCOVERY.—In any private action arising under this title—

"(i) notwithstanding any stay of discovery issued in accordance with subparagraph (A), the court may permit such discovery as may be necessary to permit a plaintiff to prepare an amended complaint in order to meet the pleading requirements of this section;

"(ii) prior to the filing of a responsive pleading to the complaint, discovery shall be limited to materials directly relevant to facts expressly pleaded in the complaint; and

"(iii) except as provided in clauses (i) and (ii), or otherwise expressly provided in this title, discovery shall be conducted pursuant to the Federal Rules of Civil Procedure.".

AMENDMENT NO. 1485

On page 110, strike lines 12 through 19, and insert the following:

"(b) REQUIRED STATE OF MIND.—

"(1) IN GENERAL.—In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, specifically allege facts giving rise to a strong inference that the defendant acted with the requested state of mind.

"(2) STRONG INFERENCE OF FRAUDULENT INTENT.—For purposes of paragraph (1), a strong inference that the defendant acted with the required state of mind may be established either—

"(A) by alleging facts to show that the defendant had both motive and opportunity to commit fraud; or

"(B) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.".

D'AMATO (AND SARBANES) AMENDMENT NO. 1486

Mr. BENNETT (for Mr. D'AMATO for himself and Mr. SARBANES) proposed an amendment to the bill S. 240, supra; as follows:

On page 84, line 11, strike ", if" and insert "in which".

On page 111, beginning on line 2, strike "during the pendency of any motion to dismiss,".

On page 111, line 4, insert "during the pendency of any motion to dismiss," after "stayed".

On page 114, line 13, strike "has been,".

On page 114, strike line 15 and insert the following: "made—

"(i) was convicted of any felony or misdemeanor".

On page 114, strike line 17 and insert the following: "15(b)(4)(B); or

"(ii) has been made the subject of a ju-".

On page 114, line 20, strike "(i) prohibits" and insert the following:

"(I) prohibits".

On page 115, line 1, strike "(ii) requires" and insert the following:

"(II) requires".

On page 115, line 4, strike "(iii) determines" and insert the following:

"(III) determines".

On page 116, between lines 11 and 12, insert the following:

"(D) made in connection with an initial public offering;

On page 116, line 12, strike "(D)" and insert "(E)".

On page 116, line 17, strike "(E)" and insert "(F)".

On page 118, line 13, before the period insert "that are not compensated through final adjudication or settlement of a private action brought under this title arising from the same violation".

On page 121, line 7, strike "has been,".

On page 121, strike line 9, and insert the following: "made—

"(i) was convicted of any felony or misdemeanor".

On page 121, strike line 11 and insert the following: "15(b)(4)(B); or

"(ii) has been made the subject of a ju-".

On page 121, line 14, strike "(i) prohibits" and insert the following:

"(I) prohibits".

On page 121, line 16, strike "(ii) requires" and insert the following:

"(II) requires".

On page 121, line 19, strike "(iii) determines" and insert the following:

"(III) determines".

On page 122, between lines 20 and 21, insert the following:

"(D) made in connection with an initial public offering;

On page 122, line 21, strike "(D)" and insert "(E)".

On page 123, line 1, strike "(E)" and insert "(F)".

On page 124, line 21, insert before the period "that are not compensated through final adjudication or settlement of a private action brought under this title arising from the same violation".

On page 128, line 25, strike "the liability of" and insert "if".

On page 128, line 25, strike "offers or sells" and insert "offered or sold".

On page 129, line 1, strike "shall be limited to damages if that person".

On page 129, line 9, strike "and such portion or all of such amount" and insert "then such portion or amount, as the case may be,".

On page 131, lines 19 and 20, strike "that person's degree" and insert "the percentage".

On page 131, line 20, insert "of that person" before the comma.

NOTICE OF HEARING

COMMITTEE ON INDIAN AFFAIRS

Mr. MCCAIN. Mr. President, I would like to announce that the Senate Committee on Indian Affairs will be holding a hearing on Wednesday, June 28, 1995, beginning at 9:45 a.m., in room 485 of the Russell Senate Office Building on S. 814, a bill to provide for the reorganization of the Bureau of Indian Affairs, and for other purposes.

Those wishing additional information should contact the Committee on Indian Affairs at 224-2251.

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Mr. BENNETT. Mr. President, I ask unanimous consent that the full Committee on Environment and Public Works be granted permission to meet Tuesday, June 27, at 9:30 a.m., to conduct an oversight hearing on proposals to supplement the legal framework for private property interests, with primary emphasis on the operation of Federal environmental laws.

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

COMMITTEE ON THE JUDICIARY

Mr. BENNETT. Mr. President, I ask unanimous consent that the Committee on the Judiciary be authorized to meet during the session of the Senate on Tuesday, June 27, 1995, at 9:30 a.m., to hold a hearing on Department of Justice oversight.

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

COMMITTEE ON THE JUDICIARY

Mr. BENNETT. Mr. President, I ask unanimous consent that the Committee on the Judiciary be authorized to meet during the session of the Senate on Tuesday, June 27, 1995, at 2:15 p.m., to hold a hearing on judicial nominees.

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

SPECIAL COMMITTEE ON AGING

Mr. BENNETT. Mr. President, I ask unanimous consent that the Special Committee on Aging be authorized to meet during the session of the Senate on Tuesday, June 27, at 9:30 a.m., to hold a hearing to discuss neurological diseases.

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

SUBCOMMITTEE ON AIRLAND FORCES

Mr. BENNETT. Mr. President, I ask unanimous consent that the Subcommittee on Airland Forces be authorized to meet on Tuesday, June 27, 1995, at 2:00 p.m., to markup the Department of Defense Authorization Act for fiscal year 1996.

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

SUBCOMMITTEE ON READINESS

Mr. BENNETT. Mr. President, I ask unanimous consent that the Subcommittee on Readiness be authorized to meet on Tuesday, June 27, 1995, at 9:00 a.m., to markup the Department of Defense Authorization Act for fiscal year 1996.

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

SUBCOMMITTEE ON SEAPOWER

Mr. BENNETT. Mr. President, I ask unanimous consent that the Subcommittee on Seapower be authorized to meet on Tuesday, June 27, 1995, at 4:00 p.m., to markup the Department of Defense Authorization Act for fiscal year 1996.

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

SUBCOMMITTEE ON SOCIAL SECURITY AND FAMILY POLICY

Mr. BENNETT. Mr. President, I ask unanimous consent that the Subcommittee on Social Security and Family Policy of the Committee on Finance be permitted to meet on Tuesday, June 27, 1995, beginning at 10:00 a.m., in room SD-215, to conduct a hearing on the solvency of the Social Security Trust Funds.

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

SUBCOMMITTEE ON STRATEGIC FORCES

Mr. BENNETT. Mr. President, I ask unanimous consent that the Subcommittee on Strategic Forces be authorized to meet on Tuesday, June 27, 1995, at 6:00 p.m., to markup the Department of Defense Authorization Act for fiscal year 1996.

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

ADDITIONAL STATEMENTS

THE U.N. CHARTER—50 YEARS OF EXPERIENCE

• Mr. DODD. Mr. President, yesterday, June 26, 1995, marked the 50-year anniversary of the signing of the U.N. Charter. To commemorate the event, President Clinton traveled to San Francisco to participate in ceremonies at the very site where representatives of some 50 nations first gathered to hammer out that historic document.

Mr. President, I believed that President Clinton spoke for all of us yesterday when he said:

Today we honor the men and women who gave shape to the United Nations. We celebrate 50 years of achievement. We commit

ourselves to real reforms. We reject the siren song of the new isolationists. We set a clear agenda worthy of the visions of our founders. The measure of our generation will be whether we give up because we cannot achieve a perfect world or strive on to build a better world.

In recalling that historic day, President Clinton reminded listeners as well that, "The 50 nations who came here * * * to lift the world from the ashes of war * * * included giants of diplomacy and untested leaders of infant nations. They were separated by tradition, race and language, sharing only a vision of a better safer future." It was that shared vision, in the final analysis, that made it possible to set aside differences, grievances and suspicions. It was that shared vision that empowered conference participants to craft a charter that President Truman described as, "a declaration of great faith by the nations of the Earth—faith that war is not inevitable, faith that peace can be maintained." I believe that all freedom loving peoples of the world continue to share that same faith and vision today.

Much has transpired since that day, in 1945, when the 50 founding nations of the United Nations pledged their faith and cooperation in this new world organization. Today, the U.N. family has grown nearly fourfold to 184 member states. Many of the old threats to peace have receded only to be replaced by new and more intractable ones. And, despite the many criticisms leveled against the United Nations, member states have largely heeded the words expressed by President Truman, in speaking about the charter that had just been signed, "You have created a great instrument for peace and security and human progress in the world. The world must now use it".

Much has been accomplished by the United Nations during its first 50 years. Even its severest critics have to acknowledge that during the cold war, the United Nations served to mitigate the ideological conflict between East and West that threatened the world with nuclear chaos. It also smoothed the path for new nation states seeking to break with old, outdated colonial empires.

The United Nation's various affiliate agencies have served to make the world a better place to live. The world health organization, to mention but one, has been a major player in the world-wide campaign to eradicate smallpox, measles, polio, and other dreaded but preventable diseases. The accomplishments of the United Nations have been recognized and honored by the world community. On four separate occasions, U.N. activities and agencies have been recipients of Nobel peace prizes—the blue helmet peacekeepers, the U.N. Children's Fund, the U.N. Office of High Commissioner for Refugees.

Clearly the world is a different place than it was 50 years age. The acts of aggression and threats to peace once posed by the East/West conflict have been replaced by a growing number of equally bedeviling ethnic rivalries, civil wars and humanitarian calamities throughout the globe. The demands on the United Nations for policing these conflicts, for marshaling humanitarian aid, for dispensing economic and social services in response to these events, have grown geometrically—and so too have the financial costs associated with them.

Some of the criticism leveled against the United Nations have been unfair. In the final analysis, the United Nations is only as strong and decisive as its membership. In the final analysis it can only continue to undertake activities that its membership is willing and able to support, both financially and politically.

However, the United Nations and U.N. management must share some of the responsibility for the criticisms that have arisen. Some of the more problematic endeavors clearly fall in the peacekeeping arena—Bosnia, Somalia, and others. Organizationally and managerially there have been problems, as well, throughout the U.N. system. Historically, internal financial controls and safeguards have been inadequate and ineffective in ensuring that members' contributions have been judiciously spent, with U.N. procurement fairly allocated among contributors.

There is clearly consensus within the U.N. membership that reforms should and must be undertaken. The United Nations has already made progress in implementing some of these reforms. Still more will have to occur in order to strengthen its capacity to address the challenges of the coming decade. Despite its shortcomings and problems, however, I continue to believe, Mr. President, that President Truman's fundamental conclusion about the United Nations some 50 years ago remains true today: "The charter of the United Nations which you have signed is a solid structure upon which we can build a better world." We must endeavor to do just that—build a better and safer world for our children and grandchildren. A vibrant and effective United Nations can help us to accomplish that goal.

Mr. President, I ask that the full text of President Clinton's remarks yesterday in San Francisco be printed in the RECORD.

The remarks follow:

REMARKS BY THE PRESIDENT

Thank you very much. Secretary Christopher, Mr. Secretary General, Ambassador Albright, Bishop Tutu. My good friend, Maya Angelou, thank you for your magnificent poem. (Applause.) Delegates to the Charter Conference, distinguished members of the Diplomatic Corps, the President of Poland, members of Congress, honored guests, Mayor Jordan, Mr. Shorenstein, people of San Francisco, and friends of the United Nations:

The 800 delegates from 50 nations who came here 50 years ago to lift the world from the ashes of war and bring life to the dreams of peacemakers included both giants of diplomacy and untested leaders of infant nations. They were separated by tradition, race and language, sharing only a vision of a better, safer future. On this day 50 years ago, the dreams President Roosevelt did not live to see of a democratic organization of the world was launched.

The Charter the delegate signed reflected the harsh lessons of their experience; the experience of the '30s, in which the world watched and reacted too slowly to fascist aggression, bringing millions sacrificed on the battlefields and millions more murdered in the death chambers.

Those who had gone through this and the second world war knew that celebrating victory was not enough; that merely punishing the enemy was self-defeating; that instead the world needed an effective and permanent system to promote peace and freedom for everyone. Some of those who worked at that historic conference are still here today, including our own Senator Claiborne Pell, who to this very day, every day, carries a copy of the U.N. Charter in his pocket. (Applause.)

I would last like to ask all of the delegates to the original conference who are here today to rise and be recognized. Would you please stand? (Applause.)

San Francisco gave the world renewed confidence and hope for the future. On that day President Truman said, "This is proof that nations, like men, can state their differences, can face them, and then can find common ground on which to stand." Five decades later, we see how very much the world has changed. The Cold War has given way to freedom and cooperation. On this very day, a Russian spacecraft and an American spacecraft are preparing to link in orbit some 240 miles above the Earth. From Jericho to Belfast, ancient enemies are searching together for peace. On every continent nations are struggling to embrace democracy, freedom and prosperity. New technologies move people and ideas around the world, creating vast new reservoirs of opportunity.

Yet we know that these new forces of integration also carry within them the seeds of disintegration and destruction. New technologies and greater openness make all our borders more vulnerable to terrorists, to dangerous weapons, to drug traffickers. Newly-independent nations offer rip targets for international terminals and nuclear smugglers. Fluid capital markets make it easier for nations to build up their economies, but also make it much easier for one nation's troubles first to be exaggerated, then to spread to other nations.

Today, to be sure, we face no Hitler, no Stalin, but we do have enemies—enemies who share their contempt for human life and human dignity and the rule of law; enemies who put lethal technology to lethal use, who seek personal gains in age-old conflicts and new divisions.

Our generation's enemies are the terrorists and their outlaw nation sponsors—people who kill children or turn them into orphans; people who target innocent people in order to prevent peace; people who attack peacemakers, as our friend President Mubarak was attacked just a few hours ago; people who in the name of nationalism slaughter those of different faiths or tribes, and drive their survivors from their own homelands.

Their reach is increased by technology. Their communication is abetted by global media. Their actions reveal the age-old lack of conscience, scruples and morality which

have characterized the forces of destruction throughout history.

Today, the threat to our security is not in an enemy silo, but in the briefcase or the car bomb of a terrorist. Our enemies are also international criminals and drug traffickers who threaten the stability of new democracies and the future of our children. Our enemies are the force of natural destruction—encroaching deserts that threaten the Earth's balance, famines that test the human spirit, deadly new diseases that endanger whole societies.

So, my friends, in this increasingly interdependent world, we have more common opportunities and more common enemies than ever before. It is, therefore, in our interest to face them together as partners, sharing the burdens and costs, and increasing our chances of success.

Just months before his death, President Roosevelt said, "We have learned that we cannot live alone at peace, that our own well-being is dependent on the well-being of other nations far away." Today, more than ever, those words ring true. Yet some here in our own country, where the United Nations was founded, dismissed Roosevelt's wisdom. Some of them acknowledge that the United States must play a strong role overseas, but refuse to supply the nonmilitary resources our nation needs to carry on its responsibilities. Others believe that outside our border America should only act alone.

Well, of course, the United States must be prepared to act alone when necessary, but we dare not ignore the benefits that coalitions bring to this nation. We dare not reject decades of bipartisan wisdom. We dare not reject decades of bipartisan support for international cooperation. Those who would do so, these new isolationists, dismiss 50 years of hard evidence.

In those years we've seen the United Nations compile a remarkable record of progress that advances our nation's interest and, indeed, the interest of people everywhere. From President Truman in Korea to President Bush in the Persian Gulf, America has built United Nations' military coalitions to contain aggressors. U.N. forces also often pick up where United States' troops have taken the lead.

As the Secretary of State said, we saw it just yesterday, when Haiti held parliamentary and local elections with the help of U.N. personnel. We saw the U.N. work in partnership with the United States and the people of Haiti, as they labor to create a democracy. And they have now been given a second chance to renew that promise.

On every continent the United Nations has played a vital role in making people more free and more secure. For decades, the U.N. fought to isolate South Africa, as that regime perpetuated apartheid. Last year, under the watchful eyes of U.N. observers, millions of South Africans who had been disenfranchised for life cast their first votes for freedom.

In Namibia, Mozambique, and soon we hope in Angola, the United Nations is helping people to bury decades of civil strife and turn their energies into building new democratic nations. In Cambodia, where a brutal regime left more than one million dead in the Killing Fields, the U.N. helped hundreds of thousands of refugees return to their native land, and stood watch over democratic elections that brought 90 percent of the people to the polls. In El Salvador, the U.N. brokered an end to 12 years of bloody civil war, and stayed on to help reform the army and bring justice to the citizens and open the doors of democracy.

From the Persian Gulf to the Caribbean, U.N. economic and political sanctions have proved to be a valuable means short of military action to isolate regimes and to make aggressors and terrorists pay at least a price for their actions: In Iraq, to help stop that nation from developing weapons of mass destruction, or threatening its neighbors again. In the Balkans, to isolate aggressors; in North Africa, to pressure Libya to turn over for trial those indicted in the bombing of Pan Am flight 103.

The record of the United Nations includes a proud battle for child survival, and against human suffering and disease of all kinds. Every year UNICEF oral vaccines save the lives of three million children. Last year alone the World Food Program, using the contributions of many governments including our own, fed 57 million hungry people. The World Health Organization has eliminated smallpox from the face of the Earth, and is making great strides in its campaign to eliminate polio by the year 2000. It has helped to contain fatal diseases like the Ebola virus that could have threatened an entire continent.

To millions around the world, the United Nations is not what we see on our news programs at night. Instead it's the meal that keeps a child from going to bed hungry, the knowledge that helps a farmer coax strong crops from hard land, the shelter that keeps a family together when they're displaced by war or natural disasters.

In the last 50 years, these remarkable stories have been too obscured, and the capacity of the United Nations to act too limited by the Cold War. As colonial rule broke down, differences between developing and industrialized nations and regional rivalries added new tensions to the United Nations so that too often there was too much invective and too little debate in the general assembly.

But now the end of the Cold War, the strong trend toward democratic ideals among all nations, the emergence of so many problems that can best be met by collective action, all these things enable the United Nations at this 50-year point finally to fulfill the promise of its founders.

But if we want the U.N. to do so, we must face the fact that for all its successes and all its possibilities, it does not work as well as it should. The United Nations must be reformed. In this age of relentless change, successful governments and corporations are constantly reducing their bureaucracies, setting clearer priorities, focusing on targeted results.

In the United States we have eliminated hundreds of programs, thousands of regulations. We're reducing our government to its smallest size since President Kennedy served here, while increasing our efforts in areas most critical to our future. The U.N. must take similar steps.

Over the years it has grown too bloated, too often encouraging duplication, and spending resources on meetings rather than results. As its board of directors, all of us—we, the member states—must create a U.N. that is more flexible, that operates more rapidly, that wastes less and produces more, and most importantly, that inspires confidence among our governments and our people.

In the last few years we have seen some good reforms—a new oversight office to hold down costs, a new system to review personnel, a start toward modernization and privatization. But we must do more.

The United Nations supports the proposal of the President of the General Assembly, Mr. Essyi, who spoke so eloquently here earlier this morning, to prepare a blueprint for renewing the U.N. and to approve it before the 50th General Assembly finishes its work next fall.

We must consider major structural changes. The United Nations simply does not need a separate agency with its own acronym, stationery and bureaucracy for every problem. The new U.N. must peel off what doesn't work and get behind what will.

We must also realize, in particular, the limits to peacekeeping and not ask the Blue Helmets to undertake missions they cannot be expected to handle. Peacekeeping can only succeed when the parties to a conflict understand they cannot profit from war. We have too often asked our peacekeepers to work miracles while denying them the military and political support required, and the modern command-and-control systems they need to do their job as safely and effectively as possible. Today's U.N. must be ready to handle tomorrow's challenges. Those of us who most respect the U.N. must lead the charge of reform.

Not all the critics of today's United Nations are isolationists. Many are supporters who gladly would pay for the U.N.'s essential work if they were convinced their money was being well-spent. But I pledge to all of you, as we work together to improve the United Nations, I will continue to work to see that the United States takes the lead in paying its fair share of our common load. (Applause.)

Meanwhile, we must all remember that the United Nations is a reflection of the world it represents. Therefore, it will remain far from perfect. It will not be able to solve all problems. But even those it cannot solve, it may well be able to limit in terms of the scope and reach of the problem, and it may well be able to limit the loss of human life until the time for solution comes.

So just as withdrawing from the world is impossible, turning our backs on the U.N. is no solution. It would be shortsighted and self-destructive. It would strengthen the forces of global disintegration. It would threaten the security, the interest and the values of the American people. So I say especially to the opponents of the United Nations here in the United States, turning our back on the U.N. and going it alone will lead to far more economic, political and military burdens on our people in the future and would ignore the lessons of our own history. (Applause.)

Instead, on this 50th anniversary of the charter signing, let us renew our vow to live together as good neighbors. And let us agree on a new United Nations agenda to increase confidence and ensure support for the United Nations, and to advance peace and prosperity for the next 50 years.

First and foremost, the U.N. must strengthen its efforts to isolate states and people who traffic in terror, and support those who continue to take risks for peace in the face of violence. The bombing in Oklahoma City, the deadly gas attack in Tokyo, the struggles to establish peace in the Middle East and in Northern Ireland—all of these things remind us that we must stand against terror and support those who move away from it. Recent discoveries of laboratories working to produce biological weapons for terrorists demonstrate the dangerous link between terrorism and the weapons of mass destruction.

In 1937, President Roosevelt called for a quarantine against aggressions, to keep the infection of fascism from seeping into the bloodstream of humanity. Today, we should

quarantine the terrorists, the terrorist groups, and the nations that support terrorism. (Applause.)

Where nations and groups honestly seek to reform, to change, to move away from the killing of innocents, we should support them. But when they are unrepentant in the delivery of death, we should stand tall against them (Applause.) My friends, there is no easy way around the hard question: If nations and groups are not willing to move away from the delivery of death, we should put aside short-term profits for the people in our countries to stop, stop their conduct. (Applause.)

Second, the U.N. must continue our efforts to stem the proliferation of weapons of mass destruction. There are some things nations can do on their own. The U.S. and Russia today are destroying our nuclear arsenals rapidly. (Applause.) But the U.N. must also play a role. We were honored to help secure an indefinite extension of the Nuclear Non-Proliferation Treaty under U.N. auspices. (Applause.)

We rely on U.N. agencies to monitor nations bent on acquiring nuclear capabilities. We must work together on the Chemical Weapons Convention. We must strengthen our common efforts to fight biological weapons. We must do everything we can to limit the spread of fissile materials. We must work on conventional weapons like the land mines that are the curse of children the world over. (Applause.) And we must complete a comprehensive nuclear test ban treaty. (Applause.)

Third, we must support through the United Nations the fight against manmade and natural forces of disintegration, from crime syndicates and drug cartels, to new diseases and disappearing forests. These enemies are elusive; they cross borders at will. Nations can and must oppose them alone. But we know, and the Cairo Conference reaffirmed, that the most effective opposition requires strong international cooperation and mutual support.

Fourth, we must reaffirm our commitment to strengthen U.N. peacekeeping as an important tool for deterring, containing and ending violent conflict. The U.N. can never be an absolute guarantor of peace, but it can reduce human suffering and advance the odds of peace.

Fifth—you may clap for that—(applause.) Fifth, we must continue what is too often the least noticed of the U.N.'s missions; its unmatched efforts on the front lines of the battle for child survival and against disease and human suffering.

And finally, let us vote to make the United Nations an increasing strong voice for the protection of fundamental human dignity and human rights. After all, they were at the core of the founding of this great organization. (Applause.)

Today we honor the men and women who gave shape to the United Nations. We celebrate 50 years of achievement. We commit ourselves to real reforms. We reject the siren song of the new isolationists. We set a clear agenda worthy of the vision of our founders. The measure of our generation will be whether we give up because we cannot achieve a perfect world or strive on to build a better world.

Fifty years ago today, President Truman reminded the delegates that history had not ended with Hitler's defeat. He said, it is easier to remove tyrants and destroy concentration camps than it is to kill the ideas which give them birth. Victory on the battlefield was essential, but it is not good enough for a lasting, good peace. (Applause.)

Today we know that history has not ended with the Cold War. We know, and we have learned from painful evidence, that as long as there are people on the face of the Earth, imperfection and evil will be a part of human nature; there will be killing, cruelty, self-destructive abuse of our natural environment, denial of the problems that face us all. But we also know that here today, in this historic chamber, the challenge of building a good and lasting peace is in our hands and success is within our reach.

Let us not forget that each child saved, each refugee housed, each disease prevented, each barrier to justice brought down, each sword turned into a ploughshare, brings us closer to the vision of our founders—closer to peace, closer to freedom, closer to dignity. (Applause.)

So my fellow citizens of the world, let us not lose heart. Let us gain renewed strength and energy and vigor from the progress which has been made and the opportunities which are plainly before us. Let us say no to isolation, yes to reform; yes to a brave, ambitious new agenda; most of all, yes to the dream of the United Nations.

Thank you.●

TRIBUTE TO GEN. GORDON R. SULLIVAN, USA, ON HIS RETIREMENT

● Mr. NUNN. Mr. President, as the U.S. Army undergoes a change in its top military leadership, I would like to recognize the outstanding service of the Army's 32d Chief of Staff, Gen. Gordon R. Sullivan. Throughout his tenure as the Army Chief of Staff, General Sullivan has worked closely with the Congress and we have found his professional military advice invaluable. He is retiring from the Army after more than 35 years of service to our Nation.

General Sullivan has had the unenviable task of leading the Army through its largest downsizing in 50 years, while simultaneously preparing the Army for the new challenges of the next century. As a testament to the success of his efforts, General Sullivan is leaving an Army that is trained, disciplined, and proud. His focus on taking care of soldiers and their families, on education, and on promoting both realistic field exercises and increasing the use of simulation has made the Army ready for what the 21st century may bring. General Sullivan has put forth a vision of the Army for the 21st century that will be the guidepost for years to come. He can take great pride in both the Army's past accomplishments and future preparedness. General Sullivan has essentially led the Army into the 21st century.

Throughout his career, General Sullivan has distinguished himself in numerous command and staff positions with U.S. forces stationed both overseas and in the Continental United States. In Asia, he served a tour of duty in Korea and two tours of duty in Vietnam. In Europe, his assignments included 3d Armored Division's Chief of Staff and the VII Corps operations officer. From July 1985 to March 1987 General Sullivan served on the NATO staff as the Deputy Chief of Staff for Support of Central Army Group in Germany.

General Sullivan's stateside assignments included serving as the assistant commandant of the Armor School at Fort Knox, KY, and deputy commandant of the Command and General Staff College at Fort Leavenworth, KS. In addition, he served as the commanding general of the 1st Infantry Division, "The Big Red One," at Fort Riley, KS. Since June 1991, General Sullivan has served in his present assignment as the U.S. Army Chief of Staff.

Mr. President, I ask my colleagues to join me in thanking General Sullivan for his honorable service to the people and Army of the United States. We wish him and his family Godspeed and all the best in the future.●

TRIBUTE TO THE NEW JERSEY DEVILS

● Mr. BRADLEY. Mr. President, I rise today with great pleasure to congratulate New Jersey's very own Devils. As you may know, the New Jersey Devils have defeated the Detroit Red Wings to become the Stanley Cup Champions of the National Hockey League. This past Saturday night at the Meadowlands Arena in East Rutherford, NJ, the Devils concluded their courageous quest for the Stanley Cup with a 5 to 2 victory to sweep the four-game series.

The New Jersey Devils may not have superstar players like Detroit. However, it is clear that through their classic gritty team play and a foundation of discipline, unity, and hard work, they overcame all adversity to achieve their ultimate goal. After last year's heart-breaking exit from the playoffs at the hands of the New York Rangers, this year's team forged through the playoffs with a vengeance to complete their mission.

New Jersey's key players came through in the playoffs to inspire their team with clutch performances. Although it was forward Claude Lemieux who took the Conn Smythe Trophy as the Most Valuable Player throughout the Stanley Cup playoffs, there were a host of other heroes without whom the Devils would never have made it as far as they did. Captain and defenseman Scott Stevens, who shut down the opposition's superstars, goaltender Martin Brodeur, the second-year phenom who has emerged as one of the best goaltenders in the NHL, and native New Jerseyan Jim Dowd from Brick, who scored a clutch goal to win game two, are just a few examples.

The Devils played ultimate team hockey in winning the Stanley Cup. Their now infamous neutral-zone trap defensive system put the Red Wings in a stranglehold tighter than any octopi their fans could throw onto the ice.

In closing, Mr. President, I would like to once again offer congratulations to our Devils. Success in the professional sports arena, like many other endeavors, requires a great deal of dedication, hard work, and courage. And that is our New Jersey Devils. I am very proud to have them represent our State.●

THE DEATH OF FORMER CHIEF JUSTICE BURGER

● Mr. MOYNIHAN. Mr. President, yesterday's newspapers reported that former Chief Justice Warren E. Burger died on Sunday here in Washington. He was 87 years old.

Twenty-six years ago, President Nixon nominated Warren Burger to be Chief Justice with the hope of reversing the activism of the Warren Court. Yet history was not entirely cooperative: Chief Justice Burger presided over a 17-year period in which many of the era's most profound controversies had to be decided by the High Court. A number of those issues, including school busing to achieve desegregation: Swann versus Charlotte-Mecklenburg Board of Education, 1971; the separation of church and state as applicable to government aid to parochial schools, Lemon versus Kurtzman, 1971; and Executive privilege, United States versus Nixon, 1974, were decided in opinions written by Chief Justice Burger himself.

The Chief was somehow able to take all of this and more in stride. He relished his additional statutory duties as chancellor of the Board of Regents of the Smithsonian Institution, and as chairman of the board of trustees of the National Gallery of Art. Although my service as a regent of the Smithsonian Institution began just after Chief Justice Burger's tenure as chancellor ended in 1986, I did have the exhilarating honor, in September of 1985, to be presented the Joseph Henry Award by then-Chancellor Burger on one memorable evening at the Hirshhorn Museum and Sculpture Garden.

Following his retirement from the Court in 1986, Chief Justice Burger devoted himself on a full-time basis to his work as Chairman of the Commission on the Bicentennial of the U.S. Constitution, to which President Reagan had appointed him the previous year. Characteristically, the Chief threw himself into that effort with the great energy and enthusiasm he applied to all of his pursuits. I recall corresponding with him about the Commission's progress and his many ideas for increasing public appreciation for the Constitution in its bicentennial year. Among its good works, the Commission produced the excellent pocket-sized Constitutions that are available in Senate offices. I have taken to carrying a copy with me, and I know the distinguished Senator from West Virginia has as well.

In his Foreword to the pocket Constitution, Chief Justice Burger wrote that our constitutional system:

[D]oes not always provide tidy results; it depends on a clash of views in debate and on bargain and compromise. For 200 years this Constitution's ordered liberty has unleashed the energies and talents of people to create a good life.

Warren Burger created just such a good life through his own indomitable energies and talents. He came from humble roots in St. Paul, MN, attended college and law school at night, and ultimately rose to become Chief Justice of the United States.

Chief Justice Burger was a distinguished jurist and a patriot in the finest sense of the word. He was also a wonderful husband and father and, although it is not much in fashion to say so today, he was a gentleman. He was my friend for more than a quarter century, and he will be greatly missed.

Mr. President, I ask that the obituary by Linda Greenhouse from the New York Times of June 26th be printed in the RECORD.

The obituary follows:

[From the New York Times, June 26, 1995]

WARREN E. BURGER IS DEAD AT 87; WAS CHIEF JUSTICE FOR 17 YEARS

(By Linda Greenhouse)

Washington, June 25—Warren E. Burger, who retired in 1986 after 17 years as the 15th Chief Justice of the United States, died here today at age 87. The cause was congestive heart failure, a spokeswoman for the Supreme Court said.

An energetic court administrator, Chief Justice Burger was in some respects a transitional figure despite his long tenure. He presided over a Court that, while it grew steadily more conservative with subsequent appointments, nonetheless remained strongly influenced by the legacy of his liberal predecessor, Chief Justice Earl Warren. The constitutional right to abortion and the validity of busing as a remedy for school segregation were both established during Chief Justice Burger's tenure, and with his support.

The country knew Chief Justice Burger as a symbol before it knew much about him as a man or a judge.

He was President Richard M. Nixon's first Supreme Court nominee, and Mr. Nixon had campaigned on a pledge to find "strict constructionists" and "practitioners of judicial restraint" who would turn back the activist tide that the Court had built under Chief Justice Warren, its leader since 1953.

The nomination on May 21, 1969, immediately made Mr. Burger, a white-haired, 61-year-old Federal appeals court judge, lightening rod for those who welcomed as well as those who feared the end of an era of judicial activism.

It was a central contradiction of Mr. Burger's tenure as Chief Justice that long after he became one of the most visible and, in many ways, innovative Chief Justices in history he remained, for many people, the symbol of retrenchment that Mr. Nixon had presented to the public on nominating him.

In fact, the Supreme Court in the Burger years was in its way as activist as the Court that preceded it, creating new constitutional doctrine in areas like the right to privacy, due process and sexual equality that the Warren Court had only hinted at.

"All in all," one Supreme Court scholar, A. E. Dick Howard, wrote in the Wilson Quarterly in 1981, "the Court is today more of a center for the resolution of social issues than it has ever been before."

While there were some substantial changes of emphasis, the Burger Court—a label liberals tended to apply like an epithet—overruled no major decisions from the Warren era.

It was a further incongruity that despite Chief Justice Burger's high visibility and the evident relish with which he used his office to expound his views on everything from legal education to prison management, scholars and Supreme Court commentators continued to question the degree to which he actually led the institution over which he so energetically presided.

His important opinions for the Court included the decision that validated busing as a tool for school desegregation, the one that struck down the "legislative veto" used by Congress for 50 years to block executive branch actions, and the one that spurred President Nixon's resignation in 1974 by forcing him to turn over White House tape recordings for use in the Watergate investigations. Yet Chief Justice Burger was just as often in dissent on major decisions. In that, he differed from Chief Justice Warren, who voted with the majority in nearly all important cases.

Those seeking to identify the sources of intellectual leadership on the Court usually pointed to William H. Rehnquist, another Nixon appointee to whom Chief Justice Burger assigned many important opinions, and to William J. Brennan Jr., the Court's most senior and, with Thurgood Marshall, most liberal member.

As the senior Associate Justice, Justice Brennan had the right to assign the opinion in any case in which he was in the majority and the Chief Justice was in dissent, and he often exercised that prerogative by assigning major opinions to himself, particularly in the area of individual rights.

As the years passed, Chief Justice Burger seemed to assign himself the opinions in relatively straightforward and uncontroversial cases, avoiding those in which the Court was deeply split and in which it would have required considerable effort to marshal or hold a fragile majority. As a result, his personal imprint on the Court's jurisprudence was not always readily identifiable.

AN INNOVATOR IN ADMINISTRATION

But his imprint was distinct in the area to which he gave his most sustained attention, judicial administration.

Mr. Burger liked to say that he took his title seriously. He was Chief Justice of the United States, not just of the Supreme Court, and he took as his mandate the stewardship of the entire judicial system, state as well as Federal.

An array of institutions were created under his aegis, including the National Center for State Courts, the Institute for Court Management and the National Institute of Corrections. The common purpose of those organizations was to improve the education and training of participants in nearly all phases of the judicial process, whether judges, court clerks or prison guards.

The Chief Justice turned the small Federal Judicial Center, for which he served by statute as chairman of the board, into a major center for research and publishing about the courts.

He believed that judges could be helped to be more efficient if professional management techniques were imported to the courts, from

clerks' offices to judges' chambers. The Institute for Court Management set up a six-month program for training court managers and administrators.

The Supreme Court itself became one of the first fully computerized courts in the country; in 1981, the Justices all received computer terminals on which to compose their opinions.

The Chief Justice campaigned tirelessly for better pay for judges, better education for lawyers and help for the Court's evergrowing caseload. From his earliest years in office, he warned that the Federal courts and the Supreme Court in particular were becoming dangerously overworked.

In 1983, he asked Congress to create an appellate panel that could relieve some of the Supreme Court's caseload by resolving conflicting opinions among the Federal appeals courts.

MANY ADMIRERS, BUT DETRACTORS AS WELL

Judges and others interested in these long-ignored administrative issues responded with gratitude. One of the Chief Justice's warmest admirers on the Federal bench was Frank M. Johnson Jr., a Federal appeals court judge from Alabama who won praise from civil rights advocates for his orders on prison issues and other rulings.

"Warren Burger has redefined the nature of his office," Judge Johnson wrote in the early 1980's. "He has concentrated his energy not simply on exploring the subtleties of constitutional doctrine but on reforming the mechanics of American justice. More than any of his 14 predecessors, he has invested the prestige of the Chief Justiceship in efforts to make the American judicial system function more efficiently. He has used his position not as an excuse to withdraw from public affairs but as an opportunity to furnish public leadership."

But the priority that Chief Justice Burger assigned to administration also had its detractors, who complained that he trivialized his office by emphasizing the mechanics of justice at the expense of its substance.

Occasionally, too, his enthusiastic lobbying was seen as overbearing by those at whom it was directed. In 1978, for example, he became deeply involved in the effort in Congress to overhaul the bankruptcy system.

One Democratic Senator, Dennis DeConcini of Arizona, whose subcommittee had jurisdiction over the bill, complained publicly that a "very, very irate and rude" Chief Justice had telephoned him to object to a legislative development and "not only lobbied but pressured and attempted to be intimidating."

The Chief Justice could also be rather intimidating from the bench, particularly when a relatively inexperienced lawyer was arguing a position with which Mr. Burger disagreed. While Chief Justice Warren's favorite question from the bench was, "Yes, but was it fair?" Chief Justice Burger often asked: "Yes, but why is this case in the courts? Isn't this a matter for the Legislature to address?"

WORKING TO LIMIT THE JUDICIARY'S SCOPE

Chief Justice Burger believed in a limited role for the courts and reserved some of his sharpest criticism for those who looked to them to resolve social and political problems that, in his view, were not the province of judges. "If we get the notion that courts can cure all injustices, we're barking up the wrong tree," he liked to say.

A speech he gave while he was still a judge on the Court of Appeals for the District of Columbia provided a useful summary of the view he held throughout his career: "That courts encounter some problems for which they can supply no solution is not invariably an occasion for regret or concern. This is an essential limitation in a system of divided power."

Some of the more important decisions while he was Chief Justice were those that limited litigants' access to Federal court by using the doctrines of standing, mootness and deference to state courts.

He seemed to regard suits for small monetary stakes as a waste of judges' time, and many of his speeches complained about the disproportionate cost to the system of trying the lawsuits brought by prisoners or consumers over modest losses of money or property.

His questioning of one lawyer, who argued in 1982 on behalf of 168,000 consumers, each with a claim for $7.98 against the Gillette Company, was the talk of the Court for weeks. "What is the economic justification for this kind of lawsuit in the Federal courts under any circumstances?" the Chief Justice demanded.

"We are in state court, judge, in this case," the lawyer, Robert S. Atkins, replied.

"In state or Federal court?" the Chief Justice persisted.

"The problem," Mr. Atkins said, "is that if you cheat people a little bit but do it a lot, you can go free——"

The Chief Justice interrupted to interrogate him about the proportion of the recovery that would go for legal fees.

INVITING ATTENTION, SOME OF THE TIME

Chief Justice Burger's effort to police the moral character of lawyers who sought to become eligible to argue before the Court rankled some of the other Justices and in 1982 provided a rare public glimpse of internal disagreements over the Chief Justice's administrative approach.

He singled out several applicants by name and accused them of seeking membership in the Supreme Court bar to "launder" tarnished credentials. But he failed to persuade a majority of the Court to block the admissions and provoked one Justice, John Paul Stevens, to write that the Court should grant applicants with questionable credentials a "fair hearing" before publicly labeling them as unworthy.

There were contradictory strains in Chief Justice Burger's attitude toward the public, including the press. At times he seemed to welcome and even invite public attention. He took pride in having made the Supreme Court a more attractive place for tourists to visit, transforming the cold marble ground floor into an area for historical exhibits.

Yet he alone of all the Justice refused, when announcing one of his opinion from the bench, to provide tourists and lawyers in the audience with a brief oral description of the case and the decision.

The other Justices either read aloud from a memorandum explaining the case or gave a more casual oral account. When the Chief Justice's turn came, he would simply announce that in a case with a particular name, the judgement of the lower court was affirmed, or reversed. When asked why he refused to join the others in explaining his opinions, he once said, "It's a waste of time."

He was adamant about preserving the secrecy of the Court's internal operations, even to the extent of refusing to make public the names of his four law clerks. A law firm recruiter or other member of the public who called the Court's public information office seeking a list of the current law clerks would receive the names of all the clerks except the Chief Justice's.

He mailed copies of his speeches to hundreds of journalists around the country and would telephone particular columnists to make sure his message was clear.

DEFINING THE LIMITS OF SPEECH AND PRESS

Occasionally, usually in connection with his annual "State of the Judiciary" address to the American Bar Association, a tradition that he inaugurated, he would invite journalists for informal "deep background" briefings, sessions that were often relaxed and informative.

But he seemed to hold much of the press corps in low repute. Asked by a lawyer at a Smithsonian Institution symposium what he thought of the reporters who covered the Court, he replied, as he often did: "I admire those who do a good job, and I have sympathy for the rest, who are in the majority."

His special scorn was reserved for television, which he regarded as an intrusive annoyance. He once knocked a television camera out of the hand of a network cameraman who followed him into an elevator. He vowed that he would never allow oral arguments at the Supreme Court to be televised.

Yet he wrote the opinion for the Court in the 1981 case Chandler v. Florida, holding that a state could permit a criminal trial to be televised, even over the defendant's objection, without depriving the defendant of the constitutional right to a fair trial.

Chief Justice Burger wrote several of the Court's most important opinions interpreting the free speech and free press guarantees of the First Amendment.

His opinion in a 1976 case, Nebraska Press v. Stuart, effectively prohibited judges from ordering the press not to publish information in its possession about the crime, a confession or the like. The opinion said that judges could take less drastic steps to protect criminal defendants from negative pretrial publicity, like sequestering the jury or changing the site of the trial.

A 1973 opinion by the Chief Justice ended roughly 15 years of turmoil over the legal definition of obscenity by changing the focus to local communities, rather than the entire country.

That opinion, in Miller v. California, said obscene materials were "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." The Chief Justice added that it was up to local juries applying "contemporary community standards" to decide whether a particular work fit that definition.

"It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City," he wrote. "People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."

RELIGION, RIGHTS AND VETO POWER

Chief Justice Burger was also one of the Court's most prolific writers on another aspect of the First Amendment, the clause prohibiting an establishment of an official national religion. In a 1971 opinion, Lemon v. Kurtzman, he set forth the test for deciding whether a given law or government program that conferred some benefit on religion nonetheless passed muster under the First Amendment.

"First," he wrote, "the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." This "three-part test," as it came to be known through later refinements and elaborations, defined the Court's approach to the establishment clause in a variety of contexts.

The 1983 decision that struck down the legislative veto, Immigration Service v. Chadna, altered the balance of power between the executive and legislative branches.

It invalidated a procedure, which Congress had incorporated into some 200 laws, permitting one or both Houses to block executive branch action. The procedure, Chief Justice Burger wrote, was not within Congress' constitutional authority because it did not follow the rules the Constitution set out for "legislation": passage by both Houses and presentment to the President for his signature.

The Chadna opinion in many ways summarized the Chief Justice's view of American Government. He wrote, "With all the obvious flaws of delay, untidiness and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."

Chief Justice Burger wrote relatively few of the Court's criminal law decisions, and some of the more important decisions on the rights of criminal suspects found him in bitter dissent.

For example, in the 1977 case Brewer v. Williams the Court ruled, in a 5-to-4 opinion by Justice Potter Stewart, that the police had violated a murder suspect's constitutional right to counsel. The police officers, knowing that the suspect was deeply religious, delivered what came to be called the Christian burial speech, musing aloud on the wish of the victim's parents to give their daughter a Christian burial. The suspect, who had previously said he would talk only after seeing a lawyer, then led the officers to the victim's body.

The majority's decision overturning the murder conviction was "bizarre," the Chief Justice wrote in a dissent that was a stinging attack on the so-called exclusionary rule barring the use at trial of illegally seized evidence.

"The result reached by the Court in this case ought to be intolerable in any society which purports to call itself an organized society," he said. "Failure to have counsel in a pretrial setting should not lead to the 'knee-jerk' suppression of relevant and reliable evidence."

A CONSERVATIVE ON CRIME ISSUES

Although Chief Justice Burger's views on criminal law did not always garner a majority on the Supreme Court, those views had probably been more responsible for his being nominated to the High Court than any other factor.

He dissented from the Court's 1972 decision that invalidated all death penalty laws then in force. After the Court permitted executions to resume four years later, the Chief Justice grew increasingly impatient with the legal obstacles that lawyers and judges continued to place in the way of executions.

When the Court refused to block the execution of a murderer whose appeals had lasted 10 years, Chief Justice Burger wrote a concurring opinion excoriating lawyers for condemned inmates. He said the lawyers sought to turn the administration of justice into a "sporting contest."

In 13 years on the United States Court of Appeals for the District of Columbia Circuit, he was known as a conservative, law-and-order judge. He enhanced that reputation with speeches and articles. A speech in 1967 at Ripon College in Wisconsin came to Richard Nixon's attention after it was reprinted in U.S. News & World Report.

The White House distributed copies of the speech at the time of Judge Burger's nomination, and the Supreme Court press office handed it out for years when asked for information about his views. In the speech, he compared the American system of justice with the systems of Norway, Sweden, Denmark and the Netherlands.

"I assume that no one will take issue with me when I say that these North European countries are as enlightened as the United States in the value they place on the individual and on human dignity," he said.

Yet, he continued, those countries "do not consider it necessary to use a device like our Fifth Amendment, under which an accused person may not be required to testify."

"They go swiftly, efficiently and directly to the question of whether the accused is guilty," he added.

"No nation on earth," he said, "goes to such lengths or takes such pains to provide safeguards as we do, once an accused person is called before the bar of justice and until his case is completed."

A MODEST START IN MINNESOTA

Chief Justice Burger's speechmaking style changed little in subsequent years. He often returned to the theme and imagery of the Ripon speech and often used the Scandinavian countries, which he visited frequently, as benchmarks against which to compare the American system.

Warren Earl Burger was born Sept. 17, 1907, in St. Paul. His parents, of Swiss-German descent, were Charles Joseph Burger and the former Katharine Schnittger. His paternal grandfather, Joseph Burger, emigrated from Switzerland and joined the Union Army at the start of the Civil War, when he was 14. He was severely wounded in combat and received both a battlefield commission and the Medal of Honor.

Warren Burger was one of seven children. The family lived on a 20-acre truck farm on the outskirts of St. Paul. In addition to farming, his father sold weighing scales; the family's financial circumstances were modest.

At John A. Johnson High School, from which Warren Burger graduated in 1925, he edited the school newspaper, was president of the student council and earned letters in hockey, football, track and swimming. He earned extra money by selling articles on high school sports and other news to the St. Paul newspapers.

The rest of his formal education took place in night school while he worked days selling insurance for the Mutual Life Insurance Company of New York. He attended the night school division of the University of Minnesota for two years, then began night law classes at the St. Paul College of Law, now known as the William Mitchell College of Law. He received his degree with high honors in 1931.

He joined the faculty of the law school and taught for 12 years while practicing law with the firm of Boyesen, Otis & Faricy. He remained with the firm, one of the oldest in the state, for 22 years; after he became a partner, the firm was known as Faricy, Burger, Moore & Costello. He handled probate, trial and appellate cases, arguing more than a dozen before the United States Supreme Court and many more in the Minnesota Supreme Court.

He married Elvera Stromberg in 1933. They had a son, Wade Allen, and a daughter, Margaret Elizabeth.

As a young lawyer, Mr. Burger became active in community affairs. He was president of the Junior Chamber of Commerce and the first president of the St. Paul Council on Human Relations. That group, which he helped to organize, sponsored training programs for the police to improve relations with minority groups. For many years, he was a member of the Governor's Interracial Commission.

He also became involved in state politics, working on Harold E. Stassen's successful campaign for governor. He went to the 1948 Republican National Convention to help Governor Stassen's unsuccessful bid for the Presidential nomination.

MAKING THE MOVE TO WASHINGTON

In 1952, he was at the Republican convention again, still a Stassen supporter. But he helped Dwight D. Eisenhower's forces win a crucial credentials fight against Senator Robert A. Taft of Ohio. On the final day, with General Eisenhower lacking nine votes for the nomination, Mr. Burger helped swing the Minnesota delegation and gave Eisenhower the votes that put him over the top. Cheers broke out on the convention floor as an organ played the University of Minnesota fight song.

His reward was a job in Washington, as Assistant Attorney General in charge of the Civil Division of the Justice Department. He supervised all the Federal Government's civil and international litigation. He told a young Justice Department lawyer years later that he would have been content to continue running the Civil Division for the rest of his career.

One of his assignments was somewhat unusual for the Civil Division chief. He agreed to argue a case in the Supreme Court, usually the task of the Solicitor General's Office. The case involved a Yale University professor of medicine, John F. Peters, who had been discharged on loyalty grounds from his job as a part-time Federal health consultant.

The Solicitor General, Somin E. Soboloff, disagreed with the Government's position that the action by the Civil Service Commission's Loyalty Review Board was valid and refused to sign the brief or argue the case. Mr. Burger argued on behalf of the board and lost. Among the lawyers who filed briefs on the professor's behalf were two who would precede Mr. Burger on the Supreme Court, Abe Fortas and Arthur J. Goldberg.

After two years, Mr. Burger resigned from the Justice Department and was preparing to return to private practice in St. Paul when Judge Harold Stephens of the United States Court of Appeals for the District of Columbia Circuit died. President Eisenhower nominated him for the vacancy, and he joined the court in 1956.

His elevation to the Supreme Court 13 years later was made possible by President Lyndon B. Johnson's failure to persuade the Senate to accept Abe Fortas as Chief Justice.

A BENEFICIARY OF '68 ELECTION

On June 13, 1968, Earl Warren had announced his intention to resign after 15 years as Chief Justice. President Johnson nominated Mr. Fortas, then an Associate Justice, as Chief Justice. But the nomination became

a victim of the 1968 Presidential election campaign and was withdrawn on Oct. 2, the fourth day of a Senate filibuster that followed acrimonious confirmation hearings.

Chief Justice Warren agreed to delay his retirement, and it was clear that whoever won the Presidential election would choose the next Chief Justice. Justice Fortas remained on the Court until May 1969, when he resigned after the disclosure that he had accepted a $20,000 fee from a foundation controlled by Louis E. Wolfson, a friend and former client who was under Federal investigation for violating securities laws.

On May 21, a week after the Fortas resignation, President Nixon nominated Warren Burger to be Chief Justice. The nomination went smoothly in the Senate, and he was sworn in as Chief Justice on June 23, 1969.

The Chief Justice and his wife lived in a renovated pre-Civil War farmhouse on several acres in McLean, Va. According to the annual financial disclosure statements required of all Federal judges, he had assets of more than $1 million. His largest investment was the common stock of the Minnesota Mining and Manufacturing Company.

He was a gardener and a serious wine enthusiast who took pride in his wine cellar and occasionally sponsored wine-tasting dinners at the Supreme Court.

By statute, the Chief Justice is Chancellor of the Smithsonian Institution and chairman of the board of trustees of the National Gallery of Art, duties that, as an art and history buff, he enjoyed. He visited antiques stores to look for good pieces for the Court and took an active role in the Supreme Court Historical Society.

He and his wife led an active social life in Washington and spent part of nearly every summer in Europe, usually in connection with a conference or other official appearance.

Chief Justice Burger cut an imposing figure, and it was often said that he looked like Hollywood's image of a Chief Justice. He was nearly 6 feet tall, stocky but not heavy, with regular features, a square jaw and silvery hair.

Proper appearance was important to him. He once sent a note to the Solicitor General's Office complaining that a Deputy Solicitor General had worn a vest the wrong shade of gray with the formal morning attire required of Government lawyers who argue before the Court.

In 1976, he appeared at a Bicentennial commemoration in a billowing robe with scarlet trim, a reproduction of the robe worn by the first Chief Justice, John Jay. He later put the robe on display in the Court's exhibit area.

A book by Chief Justice Burger, "It Is So Ordered" (William Morrow), was published earlier this year. It is an account of 14 cases that, in his judgment, helped shaped the Constitution.

Mr. Burger's wife died in May 1994. He is survived by his son, of Arlington, Va.; his daughter, of Washington, and two grandchildren. Funeral arrangements were incomplete today.●

CONGRATULATING THE STUDENTS OF MAINE SOUTH HIGH SCHOOL

● Mr. SIMON. Mr. President, I wish to recognize a group of students from Maine South High School in Park Ridge, Illinois, who won the Unit 1 award for their expertise in the "History of Rights," in the national finals of the "We the People . . . The Citizen and the Constitution" program.

As the ranking member of the Senate Subcommittee on the Constitution, Federalism, and Property Rights, I have a keen interest in constitutional issues. It is exciting to recognize achievement in an area which is important both to me personally and to the entire Nation.

Pat Feicher taught the winning class which competed against 49 other classes from across the Nation. The following students participated in the program: Raymond Albin, Julie Asmar, Marla Burton, Kevin Byrne, William Dicks, Nicholas Doukas, Neil Gregie, Conrad Jakubow, Brian Kilmer, Kristin Klaczek, Joe Liss, Robert McVey, Daniel Maigler, Agnes Milewski, Manoj Mishra, Vicky Pappas, Devanshu Patel, Anne Marie Pontarelli, Caroline Prucnal, Todd Pytel, Seema Sabnani, Jennifer Sass, Scott Schwemin, Peter Sedivy, Richard Stasica, Angela Wallace, Andrea Wells, and Stephen Zibrat.

This fine group of students has demonstrated a remarkable understanding of the fundamental element of the American system of government.●

VACLAV HAVEL

● Mr. KERRY. Mr. President, earlier this month, Vaclav Havel, President of the Czech Republic, spoke at a luncheon in his honor at the John F. Kennedy Library in Boston. President Havel spoke eloquently about President Kennedy's New Frontier and the hopes it inspired in his own country and among peoples throughout the world. He quoted the famous words of President Kennedy's Inaugural Address, "Ask not what your country can do for you, ask what you can do for your country." He spoke as well of our failure to live up to those ideals, and of the importance of continuing to strive for them. "What we can never relinquish is hope," he said.

Present in the audience at the Kennedy Library to hear these inspiring words were many members of the Masaryk club in Boston, a nonprofit cultural and social organization for Americans of Czech or Slovak ethnic background. President Havel's own personal courage in leading his country to freedom and democracy after the fall of the Berlin Wall made his visit to Boston an especially moving occasion for them.

I believe President Havel's eloquent address will be of interest to all my colleagues in the Senate. I ask that it be printed in the RECORD, along with Senator KENNEDY'S introduction of President Havel.

REMARKS OF SENATOR EDWARD M. KENNEDY

I want to thank Paul Kirk for that generous introduction. Everyone in the Kennedy family and everyone associated with President Kennedy's Library is proud of Paul and his outstanding leadership as Chairman of the Library Foundation.

I also want to thank John Cullinane for his effective role in our Distinguished Foreign Visitors Program. John has been a dear friend to our family for many years, and we are grateful for all he's done for Jack's Library.

Today is a special day for the Library, and we are delighted that our guest of honor could be here.

The ties that bind the United States and the Czech people go back many years. We're proud to have with us today members of Boston's Masaryk Club, named for the great founder of modern Czechoslovakia.

In 1918, at the end of World War I and the collapse of the Austro-Hungarian Empire, the new independent nation of Czechoslovakia was born. Thomas Masaryk drafted its Declaration of Independence, and he used America's Declaration of Independence as his model. He adopted the red, white and blue colors of our flag for the Czech flag and he declared the birth of the new nation. At the time, he was in Pittsburgh, Pennsylvania, seeking support for his native land, a true patriot for his people.

Masaryk's Declaration of Independence had a fascinating subsequent history. Masaryk died in 1937, and left the document to his private secretary, who gave it to the Library of Congress for safe keeping, until it could one day be returned to a free Czechoslovakia

When I first met President Havel in 1990, the Berlin Wall had been down for several months, and I mentioned to him that it might be time to return the document to Czechoslovakia. But Czechoslovakia's democracy was still very new, and it's future was uncertain. So President Havel thought is best for the document to remain at the Library of Congress a little longer. In 1991, with democracy firmly established, it was a great honor and privilege for all of us in Congress to return that historic document to President Havel and the people of Czechoslovakia.

As all of us know, our guest of honor has had an extraordinary and very inspiring career. As a student in the 1950's in Prague, he was attracted to the theater. After completing his compulsory military service, he started work for an avant-garde theater company as a stagehand and electrician. With his talent for writing and his strong sense of the stage, he quickly rose to the position of manuscript reader, and then resident playwright.

His rise coincided with the increasing political thaw in his country in the 1960's, and he became well-known for his vivid plays about the dehumanizing and repressive bureaucracy of communist regimes.

President Havel's relationship with the Kennedy family goes back to 1968, when he visited the United States in connection with the first American production of one of his most famous plays. Due to restrictions on visitors from Iron Curtain countries at the time, his visa limited him to New York City. His friends in the literary and theater community contacted Senator Robert Kennedy, and, with Bobby's help, President Havel was given permission to visit Washington.

But the thaw in Czechoslovakia was only temporary, and the Soviet invasion of 1968 ended the famous Prague Spring. President Havel's works were banned and his passport was confiscated.

Repression and harassment followed. In 1975, after his production of "The Beggar's Opera," even the members of his theater audiences became targets of police harassment.

But President Havel never wavered. He did not remain silent or flee the country during

the repressive Communist rule. He was forced to take menial jobs, but he continued writing, speaking out for human rights, and standing up against the Communist dictatorship.

In 1977, he became a leader of Charter 77, a manifesto signed by hundreds of artists and intellectuals protesting the government's refusal to abide by the Helsinki Agreement on Civil and Political Rights. For his continuing courage, he was jailed several different times, and spent five years in prison.

In his visit to this country in 1990, President Havel told me that during those dark years in prison, the most important and most sustaining book he had read was "Profiles in Courage" by President Kennedy.

After the fall of the Berlin Wall, President Havel became the leader of the Civic Forum, an organization of groups opposed to the Communist Government. In November 1989, massive crowds gathered in Wenceslas Square to challenge that government and there was real dangers of violence. President Havel showed great leadership in bringing about a peaceful transition. It was called the Velvet Resolution, and in December he became the first president of the new, free Czechoslovakia.

In 1993, when Czechoslovakia peacefully split into two independent nations, he became the first President of the new Czech Republic.

During President Havel's earlier visit, we happened to be together at a large dinner party in his honor. As it was ending, I mentioned that one of the most beautiful and moving places to visit in Washington was the Lincoln Memorial at night. He was intrigued, and so we drove over there together. I read out loud the beautiful words inscribed on the walls—the text of Lincoln's Gettysburg Address and his Second Inaugural Address—and his interpreter translated them for President Havel.

It was a deeply moving few moments. He wrote down several of the great phrases, and he turned to me and said, "I am not able to understand the language, but I can understand the poetry."

Finally, I want to quote briefly from some of President Havel's own words, describing his life. Here is what he said: "You do not become a 'dissent' just because you decide one day to take up this most unusual career. You are thrown into it by your personal sense of responsibility, combined with a complex set of external circumstances. You are cast out of the existing structures and placed in a position of conflict with them. It begins as an attempt to do your work well, and ends with being branded an enemy of society."

But that label could not stick. No friend of freedom can be an enemy of society. President Havel's heroic opposition to repression won him many admirers throughout the world, including the great Irish playwright, Samuel Beckett. In 1982, in a unique political action, Beckett dedicated a play to Havel, about the suffering of a martyr in an oppressive country.

I know that President Havel regards that as one of the finest tributes he has ever received, and he eminently deserved it. Through many years of hardship and repression, he kept the idea of freedom alive, and he successfully led his people to it.

As Robert Kennedy said, "Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current that can sweep down the mightiest walls of oppression and resistance."

Those words eloquently describe the extraordinary life of our guest of honor and the ripples of hope he has set forth across the world. He is a symbol of the aspirations of peoples everywhere for liberty and an end to oppression.

I am honored to introduce him now, a man for all seasons, an inspiring leader for our times, President Havel of the Czech Republic.

REMARKS OF VACLAV HAVEL

Dear Mr. Senator, dear guests, the name of the President for whom this library is named, your name, Mr. Senator, and the name of your family, evokes as powerful an echo as few other names do. For several generations, this name has been inseparably linked with the history of Boston, the Commonwealth of Massachusetts, the United States of America and, indeed, of the whole world.

For me and many others, this name is primarily linked with a period which had profoundly influenced a whole generation in various parts of the world, a period whose aftereffects we are still feeling today. I am speaking, of course, about the sixties. I will never forget my sense of elation at the election of President Kennedy. I will never forget my sense of shock at the news of his assassination. It was then that I realized that there are dark forces operating in the human nature and in the world at large. And I will never forget the few weeks I spent in the United States at the end of the sixties, my own taste of the unrepeatable atmosphere of the times in this country.

The historical dimensions of a decade do not always coincide with its chronological dimensions. The sixties began right on time in 1960, on a wave of hope with the election of your brother John Fitzgerald Kennedy as the 35th President of the United States. The same sixties, however, ended prematurely in the chaos and disillusion of 1968, with the student riots in Paris, the assassination of your brother Robert Kennedy in Los Angeles, the demonstrations against the war in Vietnam in Washington, and with the invasion of Czechoslovakia by the Warsaw Pact. What remained of the sixties chronologically after that, did not really belong there. Even the last joyful moment of the decade, the landing of Man on the Moon "before the decade was out," seemed to be a mere legacy of the late President who had turned the eyes of the nation toward the New Frontier but was murdered before he could witness the breakthrough.

Few decades in the history of mankind have been the focus of so much energy, joy and hope as well as of so much pain, bitterness and disappointment. It is then no wonder that few decades have left behind a legacy so controversial. It is hard to imagine a more suitable place for a small reflection on this legacy and what it might mean today than the Kennedy library.

From the very beginning of the sixties we hear the great call of the dead President for a new step forward, for courage and personal responsibility: "Ask not what your country can do for you—ask what you can do for your country." In the course of the sixties the civil rights movement triumphed and eliminated much of the heavy burden of the past. The turmoil of the sixties destroyed the barriers between the sexes and opened a new realm of freedom—sexual freedom. The creative impulse of the sixties produced an unprecedented number of original works in literature, music and arts. The technological progress, accelerated by the effort to conquer the space, set off an information revolution whose fruit we are in full extent reaping only today. In the communist part of the world the end of the decade witnessed an outburst of popular will against the absurdity of the totalitarian dictatorship in Czechoslovakia.

If it all stayed at that, we would now be remembering the sixties as a golden age of mankind. However, the hope that had ushered it in remained largely unfulfilled. The removal of barriers did not automatically bring about universal prosperity or universal harmony. A large part of the creative impulse of the times dissipated in disillusion or succumbed to commercial interests. The newfound individual freedom spent itself in hedonism, arbitrariness and in drugs. Technological progress also helped to build a new generation of ever more destructive weapons which were prevented from being used only by the certainty of mutually assured destruction. And the Czechoslovak rebellion against totalitarianism collapsed, in part because of the ambivalence of its efforts, under the avalanche of half a million troops of occupation while the rest of the world could only stand by and watch.

It would be too simple to attribute the failure of our hopes at the time only to unfavorable circumstances, to assassins or to the military might of the totalitarian regime. It would be equally simple to say that our hopes had been false from the very beginning, that they were nothing more than a result of the euphoria of youth or inexperience.

Our hopes did not come true because, as many times before in history, we failed to heed that call for personal responsibility and for a service to common interests. The opportunity to work together for the common good gradually degenerated into a service to group interests, sectarian interests and ultimately purely individual interests. The loving sixties were followed by the selfish eighties.

I do not think we should tear our garments here as if this were some exceptional and unforgivable failure. The service to one's own interests, the tendency to use one's own potential for one's own good is an inseparable part of human nature and the motivation which ultimately drives the world forward. At the same time it is equally an inseparable part of human nature to love and be loved, to be capable of solidarity, altruism, even of self-sacrifice. Some scientists like E. O. Wilson and some theologians think of both these tendencies as being a part of a single elementary life force. The question of a talmudistic scholar: "If I am not for myself, who will be for me? And if I am only for myself, who am I?" still demands an answer.

Today we are all thirty years older and hopefully—though this is far from certain—wiser. Much of that crazy decade we remember with a smile and sometimes even with some embarrassment. Much of that decade we can relinquish as unrepeatable, mistaken or misconceived. What we can never relinquish is hope.●

REGULATORY REFORM

● Mr. BAUCUS. Mr. President, in the next few days, the Senate will begin to debate regulatory reform legislation to make regulations more sensible, less burdensome, and more efficient.

This debate is long overdue. Because while passing laws is important, real

people are affected not by congressional debates but by implementation of the law by agencies.

And all too often, agencies implement laws with too much paperwork, too much harassment and too little common sense. It is time to set things straight, and I congratulate the leadership for bringing this issue to the floor.

At the same time, however, we must remember that preventing pollution, ensuring food safety and keeping our rivers clean are critically important to a good life for Americans.

Unfortunately, some special interest groups do not see it that way. All over Washington, they are trying to get loopholes and special relief that will let them get away with polluting the air and water. And they are calling their loopholes regulatory reform. They should not get away with it.

So let us watch what is coming aboard pretty carefully. Let us reform Government rules and regulations to make them work better. But let us not use regulatory reform to weaken protection of public health and safety and to lower the quality of life.

THE NEED FOR REFORM

Government has to treat people like adults. It has to understand that most people are good people. They don't need to fill out a lot of forms to do the right thing.

As the debate unfolds, we will hear theories about so-called super mandates. About judicial review. About esoteric provisions of the Administrative Procedures Act. About how many permissible statutory constructions can dance on the head of a pin.

But when most Montanans think about Government regulations, they are more straightforward. Montanans want common sense. Montanans believe most Federal rules and regulations cost too much. They accomplish too little. They make responsible business owners fill out too many forms. And they just plain make people angry.

OSHA LOGGING REGULATIONS

I will give you an example. Earlier this year, OSHA, the Occupational Safety and Health Administration, proposed a rule that would make loggers wear steel-toed boots.

Seems to make sense—unless you are actually out in the Montana woods in winter, on a steep slope and frozen ground. In that case, steel-toed boots can make the job more dangerous, not less. They make your feet go numb, so it is harder to hold your grip. And if you are holding a live chainsaw at the time, you are in a lot of trouble.

So the people this regulation was meant to help knew it made no sense at all. And to add injury to insult, it threatened their jobs. OSHA told them to buy the boots in 2 weeks or take a furlough.

Another example was the EPA's decision 2 years ago to ban some kinds of bear sprays—pepper sprays that help people avoid injury from bear attacks—because they might irritate the nasal tissues of an attacking grizzly. Yet another was the Forest Service's decision to bar loud speech and inappropriate noises in national forests.

Most regulations are not as ridiculous or offensive as these. But even so, the sheer volume of regulation is a big problem. Small business owners often give up all of Friday afternoon to fill out OSHA forms and IRS withholding documents just to comply with existing regulations, let alone keep up with all the new ones.

Today, we are only half-way through 1995. And the Federal Register, in which the Government publishes its rules and regulations, is about to hit the 33,000-page mark. That is about 200 pages of rules, regulations, comments, revisions, and rerevisions every day.

KEY ELEMENTS OF REFORM

So I congratulate the leadership for moving ahead with regulatory reform. The effort is only beginning, but at the end I believe a good bill will include five key elements.

First, we should open up the regulatory process. It should be easier for people to comment on proposed rules. They should get more notice when a rule will affect their job or business. You simply cannot expect a hard-working gas station owner or restaurant manager to subscribe to the Federal Register and track all the changes and revisions in the OSHA code.

And while they are at it, agencies should explain their rules in plain English. For example, look at a sentence from an EPA rule in the December 29, 1994, Federal Register. It means to say treated hazardous wastes are exempt from disposal regulations under two conditions. But what it actually says is this:

> Currently, hazardous wastes that are used in a manner constituting disposal (applied to or placed on land), including waste-derived products that are produced in whole or in part from hazardous wastes and used in a manner constituting disposal, are not subject to hazardous waste disposal regulations provided the products produced meet two conditions.

Imagine handing that in to a high school English teacher.

Second, we should use new statistical tools like risk assessment and cost-benefit analysis when appropriate. They can help agencies set priorities, so we spend our money wisely and solve the biggest problems first. And they can help make sure agencies think creatively and consider all the options before charging ahead. But we must also understand their limitations—because I do not believe we can place a dollar value on things like the survival of the bald eagle or brain damage in children from lead in drinking water.

Third, Congress should conduct more oversight. Passing a law is only a small part of the job. It is implementation of the law that affects real people at home and in business. But too often, Congress passes a law and then walks away, leaving implementation entirely to bureaucrats who do not always have practical experience. The OSHA logging regulation is a good example. Congress should review major new regulations closely, so the mistakes are corrected before they start to threaten jobs and businesses.

Fourth, we should strengthen the Regulatory Flexibility Act. This law requires agencies to pay special attention to the effects of their regulations on small business. A good goal—but one agencies sometimes ignore.

Today, small businesses have no right to challenge an agency, in court, when it fails to comply with the Act. By establishing a streamlined process for judicial review, we can help small businesses protect themselves.

And fifth, we must continue strong and effective protection of public health, public safety and our natural heritage. Clean air, clean water and clean neighborhoods are basic American values. They are essential to a high quality of life in our country. Regulatory reform should get them for us more efficiently. It must not run away from these goals, and allow more contamination of rivers and streams, more urban smog, or greater threats to the public health and safety.

CONCLUSION

With these five steps, Mr. President, we will make federal rules and regulations more effective. And we will do something even more important. Americans will be more confident that their tax dollars are being spent wisely, and that we are guaranteeing public health and safety with the absolute minimum of bureaucracy and paperwork.

So I look forward to the debate on this bill, and to working with my colleagues to meet these goals.●

CONGRATULATING THE NEW JERSEY DEVILS FOR WINNING 1995 NHL STANLEY CUP

Mr. SARBANES. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Senate Resolution 142, a resolution to congratulate the New Jersey Devils for winning the 1995 NHL Stanley Cup, a resolution submitted earlier today by Senators LAUTENBERG and BRADLEY; that the resolution and preamble be agreed to, en bloc, and the motion to reconsider be laid upon the table, and that any statements appear in the RECORD as if read.

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

So the resolution (S. Res. 142) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, is as follows:

S. RES. 142

Whereas on October 5, 1982, the New Jersey Devils played their first National Hockey League game in New Jersey, embarking on a quest for the Stanley Cup which was satisfied 13 years later;

Whereas the Devils epitomize New Jersey pride with their heart, stamina, and drive and thus have become a part of New Jersey culture;

Whereas the New Jersey Devils won 10 games on the road during the Stanley Cup playoffs, thus demolishing the previous record;

Whereas the Devils have implemented an ingenious system known as the "trap" that was designed by head coach Jacques Lemaire which constantly stifled and frustrated their opponents;

Whereas Conn Smythe trophy winner Claude Lemieux led the league with 13 playoff goals, three of which were game-winners, and goalie Martin Brodeur led the league with a 1.67 goals-against average during the playoffs;

Whereas the New Jersey hockey fans are the best fans in the nation and deserve commendation for helping build the team into championship caliber and for supporting the Devils during their drive for the Stanley Cup;

Whereas the New Jersey Devils during the playoffs beat Boston, Pittsburgh, Philadelphia and in the finals swept the heavily favored Detroit Red Wings in four games giving the state of New Jersey its first-ever championship for a major league team officially bearing the state's name: Now, therefore, be it

Resolved, That the Senate congratulates the New Jersey Devils for their outstanding discipline, determination, emotion, and ingenuity, in winning the 1995 NHL Stanley Cup.

Mr. LAUTENBERG. Mr. President, I stand here proud of the New Jersey Devils' accomplishment in winning hockey's most treasured prize, the Stanley Cup. I congratulate the players and their coaches for an inspiring series with four straight victories over the Detroit Red Wings.

This capped an impressive string of playoff victories over Boston, Pittsburgh, and Philadelphia—victories that resulted in the Devils bringing the Stanley Cup to my home State for the first time in history. It is the first time in history that a national professional championship was won by a team with "New Jersey" in its name.

Mr. President, it took a great deal of determination, courage, drive, and discipline—and no small amount of prayer on the part of fervent fans—for the Devils to bring this cup home.

And they did this despite the fact that no one thought they could win it. Not when the playoffs started. Not when they reached the finals. No one gave them a chance against the Red Wings.

But, under the guidance of Head Coach Jacques Lemaire and with the great help of Claude Lemieux, the Cup's Most Valuable Player, and Martin Brodeur, the Devils demonstrated everything great about New Jerseyans—we have the heart, the drive, and the stamina to do it when we have to.

I will take a moment to mention other outstanding Devils players—Ken Daneyko, Bruce Driver, and John MacLean who have each been with the Devils since 1983 and have helped start the team's long journey to the top. Also we must commend Jim Dowd, a New Jersey native hailing from the town of Brick, who scored the winning goal in game two.

Mr. President, anyone who has been in New Jersey knows that the Devils—like our shoreline—are an integral part of our culture. And I, along with 8 million other New Jerseyans look forward to seeing them defend their cup title in the Byrne Arena next year and the year after as well.

Once again, I would like to congratulate them on their remarkable accomplishment, and to thank them for the hard fight they fought to bring the Stanley Cup to the great State of New Jersey.

ORDERS FOR WEDNESDAY, JUNE 28, 1995

Mr. BENNETT. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until the hour of 8:40 a.m. on Wednesday, June 28, 1995; that following the prayer, the Journal of the proceedings be deemed approved to date, the time for the two leaders be reserved for their use later in the day, and the Senate then immediately resume consideration of S. 240, the securities litigation bill, under the provisions of the previous agreement.

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

PROGRAM

Mr. BENNETT. For the information of all Senators, the Senate will resume consideration of the securities bill tomorrow at 8:40 a.m. All Senators should be aware there will be a rollcall vote beginning at 8:45 a.m. on or in relation to the Specter amendment. Following that vote, there will be a series of votes with a brief period of debate between each vote. The first vote will be 15 minutes in length, and the remaining votes in the series will be only 10 minutes in length. Following the series of votes and 30 minutes of debate, there will be a 15-minute vote on final passage of the securities litigation.

ORDER TO RECESS

Mr. BENNETT. Mr. President, if there is no further business to come before the Senate, I now ask unanimous consent that at the conclusion of Senator PELL's morning business speech, the Senate stand in recess under the previous order.

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

The Senator from Rhode Island is recognized.

U.S. RATIFICATION OF THE LAW OF THE SEA CONVENTION WILL ENHANCE OUR NATIONAL SECURITY INTERESTS

Mr. PELL. Mr. President, in the past few months, I have taken the floor on several occasions to highlight how the U.N. Convention on the Law of the Sea would protect the national interests of the United States with regard to our fisheries and our economic activities. Today, I wish to address how U.S. ratification of the convention will enhance our most important interest: national security.

The convention establishes as a matter of international law freedom of navigation rights that are critical to our military forces. This was highlighted by the President in his Message to Congress, transmitting the Convention on the Law of the Sea:

The United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea. . . . Each succeeding U.S. Administration has recognized this as the cornerstone of U.S. ocean policy. . . . The Convention advances the interests of the United States as a global maritime power. It preserves the right of the U.S. military to use the world's oceans to meet national security requirements and of commercial vessels to carry sea-going cargoes. . . . Early adherence by the United States to the Convention and the Agreement is important to maintain a stable legal regime for all uses of the sea, which covers more than 70 percent of the surface of the globe. Maintenance of such stability is vital to U.S. national security and economic strength." (Treaty Doc. 103-39, p.iii-iv)

Secretary of Defense William Perry and Secretary of State Warren Christopher emphasized in a joint letter to the Congress last year that:

As one of the world's major maritime powers, the United States has a manifest national security interest in the ability to navigate and overfly the oceans freely.

A recent Department of Defense Report on National Security and the Convention on the Law of the Sea concluded that the United States

. . . national security interests in having a stable oceans regime are, if anything, even more important today than in 1982 when the world had a roughly bipolar political dimension and the U.S. had more abundant forces to project power to wherever it was needed." (Hearing before the Committee on Foreign Relations on the Current Status of the Convention on the Law of the Sea, S. Hrg. 103-737, pp.61-75)

In his letter to the Senate accompanying that report Secretary Perry declared that:

. . . the Convention establishes a universal regime for governance of the oceans which is needed to safeguard United States security and economic interests, as well as to defuse

those situations in which competing uses of the oceans are likely to result in conflict. . . . Historically, this nation's security has depended upon the ability to conduct military operations over, under and on the oceans. . . . To send a strong signal that the United States is committed to an ocean regulatory regime that is guided by the rule of law, General Shalikashvili and I urge your support in securing early advice and consent of the United Nations Convention on the Law of the Sea and implementing Agreement.

I ask unanimous consent that Secretary Perry's letter be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered. (See exhibit 1.)

Mr. PELL. With the end of the cold war, both our vital interests and our ability to defend them have shifted. In these fiscally difficult times, the convention allows us to concentrate our resources on the most strategic points of our national security. Illustrations of this phenomenon can be found in the provisions of the Law of the Sea Convention that provide for innocent passage, transit passage, and archipelagic passage.

The convention allows a coastal State to claim a territorial sea that shall not exceed 12 nautical miles measured from the baseline. While this provision recognizes the special rights of the coastal state in the area immediately adjacent to its coastline, it also provides specifically for the right of innocent passage for ships, including warships and submarines, to transit through the territorial sea.

Likewise, in some areas, archipelagic states have been allowed to enclose waters located between the various islands of an archipelago, and to claim them as national waters. Unfortunately, some of these instances involve islands located in international straits or along routes used for international navigation and overflight of the highest strategic importance. Here again, the convention strikes the perfect balance by guaranteeing to all ships and aircraft, including warships, submarines, and military aircraft a right of passage on, over and under international straits and archipelagic sea lanes.

The need to protect freedom of navigation is not merely a theoretical issue. There have been recent situations where even U.S. allies denied our Armed Forces transit rights in times of need. Such an instance was the 1973 Yom Kippur war when our ability to resupply Israel was critically dependent on transit rights through the Strait of Gibraltar. Again, in 1986, United States aircraft passed through the Strait to strike Libyan targets in response to that government's acts of terrorism directed against the United States, after some of our allies had denied us the right to transit through their airspace.

In April 1992, Peruvian fighters strafed a United States C–130 aircraft that was 60 nautical miles off the Peruvian coast, well within Peru's claimed 200-nautical-mile territorial sea, but well outside the 12-nautical-mile limit recognized by the Law of the Sea Convention and the United States. This incident resulted in the death of one U.S. service member and the wounding of several others, as well as the loss of the aircraft. Peru continues to challenge United States aircraft flying over its claimed territorial sea.

There are a number of other situations where having the Law of the Sea in effect might have made a difference. I ask unanimous consent that a summary of such instances be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered. (See exhibit 2.)

Mr. PELL. Another way in which the convention protects our national security interests is by bringing an incredible amount of stability and certainty with regard to multiple and sometimes divergent ocean uses. Most importantly the convention provides the most effective brake on excessive coastal state maritime claims in ocean areas adjacent to their coasts.

If the United States is not a party to the convention, preserving our navigational rights in nonwartime situations becomes increasingly costly. The Law of the Sea provides very clear rules and circumstances according to which these claims need to be recognized. In addition, if the rights of a transiting nation are impeded, the Law of the Sea provides all parties with a very clear set of rules for the peaceful settlement of disputes.

Only a few weeks ago, a potential conflict threatened to erupt over Greek territorial claims around its islands in the Aegean Sea. Turkey has warned against the transformation of this area into a "Greek Lake" and many have warned of the possibility of conflict over this issue. The Law of the Sea specifically calls for peaceful resolution of such disputes and, when the Hamburg Tribunal on the Law of the Sea is convened, it could be seized to address disputes such as this one.

Another potential point of conflict is to be found in the South China Sea, where conflicting claims have been staked over the Spratly Islands. These islands have been claimed by the People's Republic of China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei. Recently, some of those claimants have engaged in aggressive activities. The location of the Spratlys is of paramount importance, as the islands lie along strategic sea lanes that connect the Indian Ocean and the Persian Gulf to the Pacific Ocean. Seventy percent of Japan's oil imports travel through this route and both the United States and its allies would stand to lose if armed conflict erupted as a result of these conflicting claims. The administration recently advised the various claimants that the United States would view with serious concern any maritime claim or restriction on maritime activity in the South China Sea that was not consistent with the Law of the Sea Convention.

In that regard, on June 20, 1995, the Committee on Foreign Relations reported, and on June 22 the Senate agreed to, Senate Resolution 97, introduced by Senator THOMAS and Senator ROBB, which I cosponsored. This resolution calls on the parties involved in this dispute to solve their differences in a manner that is consistent with international law.

I would like to bring to the attention of my colleagues an op ed piece that was published on May 26, 1995 in the Washington Times and I ask unanimous consent that it be printed in the RECORD at the conclusion of my remarks.

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

(See exhibit 3.)

Mr. PELL. In it, Keith Eirinberg, a Fellow in the Asian Studies Program at the Center for Strategic and International Studies, calls the Law of the Sea Convention perhaps the world's greatest diplomatic achievement for having established internationally accepted laws for three fourths of the earth's surface. He also clearly demonstrates that excessive claims have no standing under the Convention and that the U.S. ability to influence a peaceful settlement of the dispute over the Spratly Islands would be enhanced by U.S. ratification of the treaty.

In addition, on June 22, 1995, Rear Adm. Lloyd R. Vasey (Ret.), a senior strategist specializing in Asia-Pacific security, wrote in the Christian Science Monitor that the claims over the Spratly Islands should be resolved through international law and the UN Convention on the Law of the Sea. He added that for its own credibility the U.S. needs to complete ratification of the Law of the Sea Treaty. I ask unanimous consent that this article be printed in the RECORD at the end of my remarks.

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

(See exhibit 4.)

Mr. PELL. There are scores of other instances where maritime boundary disputes were solved in a peaceful manner, precisely because the Law of the Sea establishes such clear rules and limitations. If it does not ratify the Convention, the United States will stand at risk of being left out of the enforcement of this Constitution for the Oceans, and will be subject to the uncertainties of customary international law.

I have heard arguments that the Convention's provisions on freedom of

navigation are not really important because they reflect customary international law. I disagree with that argument.

Customary international law is inherently unstable. Governments can be less scrupulous about flouting the precedents of customary law than they would be if such actions were seen as a violation of their treaty obligations.

Moreover, not all governments and scholars agree that all of the critical navigation rights protected by the Convention are also protected by customary law. They regard many of those rights as contractual and, as such, available only to parties to the Convention.

The concordant judgment of those charged with responsibility for the national security of our Nation is reflected in the report of the Department of Defense on National Security and the Law of the Sea, which states:

Our principal judgement is that public order of the oceans is best established by a universally accepted Law of the Sea treaty that is in the U.S. national interest. . . . Reliance upon customary international law in the absence of the modified Convention would represent a necessarily imprecise approach to the problem as well as one which requires the United States to put forces in harm's way when principles of law are not universally understood or accepted. A universal Convention is the best guarantee of avoiding situations in which U.S. forces must be used to assert navigational freedoms, as well as the best method of fostering the growth and use of various conflict avoidance schemes which are contained in the Convention.

Mr. President, this is not merely my opinion but that of the professionals whose job it is to protect our Nation's security. We must not ignore their advice: United States ratification of the Law of the Sea Convention will enhance our national security interests.

EXHIBIT 1

THE SECRETARY OF DEFENSE,
Washington, DC, July 29, 1994.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: In 1982, the United States made a decision that it would not become a party to the United Nations Convention on the Law of the Sea because of its concerns about the deep seabed mining provisions, contained in Part XI of the Convention. The Convention is due to enter into force on November 16, 1994, now that the requisite number of other states (60) have ratified it. However, consultations were recently concluded which resulted in an Agreement to correct what the United States has long viewed as the Convention's flawed deep seabed mining provisions. The United States now intends to sign the Agreement at the United Nations on July 29, 1994. Accordingly, the Convention as modified will be transmitted to the Senate for its advice and consent at the end of the 103rd Congress.

The Department of Defense fully supports U.S. signature of the Agreement, and ratification of the Convention as modified by the Agreement. In the Administration's view, the new Agreement satisfactorily resolves the issues that the U.S. Government and ocean mining interests raised in the early 1980's during deliberations over whether the United States should sign the Law of the Sea Convention. The new Agreement meets these objections by correcting the serious institutional and free market deficiencies in the original Convention. We have received indications from other industrialized nations that, with adoption of the new Agreement, they will soon accede to the modified Convention.

The Convention establishes a universal regime for governance of the oceans which is needed to safeguard U.S. security and economic interests, as well as to defuse those situations in which competing uses of the oceans are likely to result in conflict. In addition to strongly supporting our interests in freedom of navigation, the Convention provides an effective framework for serious efforts to address land and sea-based sources of pollution and overfishing. Moreover, the Agreement provides us with an opportunity to participate with other industrialized nations in a widely accepted international order to regulate and safeguard the many diverse activities, interests, and resources in the world's oceans. Historically, this nation's security has depended upon the ability to conduct military operations over, under, and on the oceans. The best guarantee that this free and unfettered access to the high seas will continue in the years ahead is for the U.S. to become a party to the Convention, as modified by the Agreement, at the earliest possible time.

In the coming months, we anticipate heightened public debate of the merits of the Law of the Sea Convention. To put that debate into perspective, you will find enclosed a paper which briefly outlines the history of the original Convention, the steps leading to the formalization of the Part XI Agreement, and the nation's vital national security and other interests in becoming bound by the modified Convention.

To send a strong signal that the United States is committed to an ocean regulatory regime that is guided by the rule of law, General Shalikashvili and I urge your support in securing early advice and consent of the United Nations Convention on the Law of the Sea and implementing Agreement.

Sincerely,

WILLIAM J. PERRY.

EXHIBIT 2

PARTICULAR CASES WHERE HAVING THE LAW OF THE SEA CONVENTION IN EFFECT MIGHT HAVE MADE A DIFFERENCE:

Between 1961 and 1970, Peru seized 74 U.S. fishing vessels over disputed tuna fisheries.

In 1986, Ecuador interfered with a USAF aircraft flight over the high seas 175 miles from the Ecuadorian coast.

Since 1986, Peru has repeatedly challenged U.S. aircraft flying over its claimed 200 nautical mile territorial sea. During several of these challenges, the Peruvian aircraft operated in a manner that unnecessarily and intentionally endangered the safety of the transiting U.S. aircraft and its crew. This includes an incident where a U.S. C–130 was fired upon and a U.S. service member was killed.

In 1986, two Cuban MIG–21 aircraft intercepted a USCG HU–25A Falcon flying outside of its 12 nautical mile territorial sea, claiming it had entered Cuban Flight Information Region (FIR) without permission.

In 1988, Soviet warships intentionally "bumped" two U.S. warships engaged in innocent passage south of Sevastopol in the Black Sea.

In 1984, Mexican Navy vessels approached U.S. Coast Guard vessels operating outside Mexican territorial waters and interfered with valid USCG law enforcement activities.

Libyan claims to the Gulf of Sidra have resulted in repeated challenges and hostile action against U.S. forces operating in high seas.

During the 1980's, transits of the Northwest Passage by the USCG POLAR SEA and POLAR STAR were challenged by the Canadian Government.

EXHIBIT 3

[From the Washington Times, May 26, 1995]

U.N. MARITIME PACT COULD PRODUCE SOUTH CHINA SEA SOLUTION

(By Keith W. Eirinberg)

The recent Clinton administration statement on the Spratly Islands dispute, urging negotiations instead of force, is the strongest declaration yet of U.S. interests in the South China Sea.

While critics of the administration argue that the United States should "draw a line in the sand" against Chinese aggression in the Spratlys, U.S. interests are better served by efforts to persuade the contesting parties to follow international law, including the newly effective 1982 U.N. Convention on the Law of the Sea, and find a diplomatic solution.

The Republican-controlled Senate can help America's efforts to protect these interests by ratifying the Law of the Sea accord, giving this country greater standing as it encourages a peaceful resolution of the dispute.

The Spratly Islands imbroglio is essentially a maritime controversy centered on the question of sovereignty and jurisdiction over geologic features and adjacent waters in the South China Sea.

Six nations claim part or all of the Spratlys: the People's Republic of China, Taiwan, Vietnam, the Philippines, Malaysia and Brunei. The dispute has direct implications for U.S. interests: freedom of navigation and overflight and the maintenance of peace and stability in Southeast Asia.

The sovereignty issue appears intractable, so many of the parties have voiced a desire to shelve this point and look to joint development of the area's resources. China, in a "divide and conquer" strategy, insists on negotiating bilaterally and rejects a regional or international approach. The Association of Southeast Asian Nations, which includes some of the claimants, is interested in a regional solution.

The parties to the dispute, except Brunei, claim ownership over islands, reefs, atolls, rocks and cays in the Spratlys. The Spratlys are important because they lie along strategic sea lanes and lines of communication that connect the Indian and Pacific oceans. More than 70 percent of Japan's oil imports and a large volume of global commerce travel along this maritime route. The Spratlys are domestically important to the claimants because of the politics and patriotism reflected in ownership.

It is the potential of vast hydrocarbon resources beneath the seabed that has caused this dispute to become a flash point in East Asia. The energy needs of the developing claimants have made the exploitation of oil and gas beneath the South China Sea especially attractive.

The U.N. Convention on the Law of the Sea—perhaps the world's greatest diplomatic achievement for having established internationally accepted laws for three-fourths of the earth's surface—can provide the framework for a diplomatic solution. For example,

it prescribes the methods for determining boundaries. Of the claimants, the Philippines and Vietnam have ratified the convention.

To Beijing, however, ownership is nine-tenths of the law. While advocating a diplomatic solution, it has aggressively placed encampments and markers in contested areas of the Spratlys. This "talk and take" pattern was most recently illustrated in China's occupation of Mischief Reef in Philippine-claimed territory.

China's cavalier attitude to international law is also shown by its 1992 territorial sea law. This declares Chinese jurisdiction over virtually all of the South China Sea—a claim that has no basis in modern international law.

China must play by the rules. Washington encourages Beijing to join the international community in many different areas, from nuclear proliferation to human rights. But Washington finds itself in a poor position to persuade Beijing to ratify the Law of the Sea accord without having done so itself.

U.S. administrations had resisted ratification because of inequities in the deep-seabed-mining provisions. But changes to the convention have addressed U.S. objections.

Last year, with strong Defense Department backing, the White House signed the amended Convention on the Law of the Sea and sent it to the Senate for ratification.

America's ability to influence a peaceful settlement of the Spratly Islands dispute would be enhanced by U.S. ratification of the treaty. In light of the tensions in the South China Sea, this step should be taken soon.

EXHIBIT 4

[From The Christian Science Monitor, June 22, 1995]

COLLISION IN THE CHINA SEA—WORLD OIL AND SHIPPING LANES AT STAKE IN MULTINATION DISPUTE

(By Lloyd R. Vasey)

East Asia's economic momentum may grind to a premature halt unless political leaders find a way to defuse tensions over territorial disputes in the South China Sea. With several countries on a collision course, a major regional crisis is waiting to happen.

At issue are claims of sovereignty over the Spratly and Paracel Islands—hundreds of islets and reefs and surrounding seas believed to be rich in oil, gas, and other resources. China, which urgently needs new energy sources, is the central disputant; others include Vietnam, Brunei, Malaysia, the Philippines, and Taiwan. China's claims are historically based, going back several centuries when the South China Sea was an area of preeminent Chinese influence and power. Currently they have no basis in international law, and claims of some of the other countries are also questionable.

The prevailing view in Asia is that China is deliberately expanding its geopolitical influence in the region. This perception was dramatically reinforced in 1992 when the Chinese People's Congress declared ownership of the waters around the Spratlys and Paracels and readiness to use military power to defend its interests. The claim would make the South China Sea a virtual Chinese lake straddling shipping lanes carrying huge volumes of global trade, including the oil lifelines of Japan and South Korea.

Indonesia and other countries of the Association of Southeast Asian Nations (ASEAN) have convened unofficial forums seeking to resolve the disputes, but progress on the issues has stalled.

Regional tensions escalated last month when Philippine president Fidel Ramos challenged China's "illegal" occupation of a small atoll in the Spratlys aptly named Mischief Reef.

It lies well within the Philippine's 200 mile Exclusive Economic Zone but also within the area claimed by Beijing.

China hasn't hesitated to use force in asserting territorial claims. In 1974 it seized most of the Paracel islands east of Vietnam. In 1988, the two engaged in bloody clashes over the Spratlys.

Indonesians are deeply suspicious of China's revision of a map that now depicts part of the maritime area around Natuna island, hundreds of miles south of the Spratlys, to be under Chinese jurisdiction. Indonesia's military leaders have announced that they will defend their national interests by force if necessary. What makes the issue particularly irksome to Indonesia is that a $35 billion deal involving a United States oil company was signed last year to help develop the Natuna gas field, possibly one of the world's largest.

Such colliding claims ought to alert Washington to pay much closer attention to this high-stakes strategic game. The implications for American interests are disturbing: future access to resources, freedom of the seas, the balance of power, and regional stability are all involved.

The US should now revamp its policy of relying on ASEAN even when important American interests are involved. Instead, the US should volunteer to act as honest broker to work out production-sharing agreements for joint development of resources in contested areas, and request disputants to put sovereignty claims on hold. These claims should be resolved through international law and the UN Convention on the Law of the Sea. For its own credibility the US needs to complete ratification of the Law of the Sea Treaty, now in the Senate. Leadership won't cost Washington an extra dime, nor will it require any troops. Crisis prevention is what it's all about.

RECESS UNTIL 8:40 A.M. TOMORROW

The PRESIDING OFFICER. Under the previous order, the Senate stands in recess until 8:40 tomorrow morning.

There being no objection, the Senate, at 9:38 p.m., recessed until Wednesday, June 28, 1995, at 8:40 a.m.

NOMINATIONS

Executive nominations received by the Senate June 27, 1995:

THE JUDICIARY

TODD J. CAMPBELL, OF TENNESSEE, TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF TENNESSEE, VICE THOMAS A. WISEMAN, JR., RETIRED.

JAMES M. MOODY, OF ARKANSAS, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF ARKANSAS, VICE HENRY WOODS, RETIRED.

EVAN J. WALLACH, OF NEVADA, TO BE A JUDGE OF THE U.S. COURT OF INTERNATIONAL TRADE, VICE EDWARD D. RE, RETIRED.

U.S. INFORMATION AGENCY

ALBERTO J. MORA, OF FLORIDA, TO BE A MEMBER OF THE BROADCASTING BOARD OF GOVERNORS FOR A TERM OF 2 YEARS. (NEW POSITION.)