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recess appointment file

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Message: This is the recent recess appointment case. On page 16 there is reference to the Chadha decision.

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UNITED STATES v. "WOODLEY," C.A.Hawaii,1983. ^

UNITED STATES of America, Plaintiff-Appellee, v. James WOODLEY, Defendant-Appellant. No. 82-1026. United States Court of Appeals, Ninth Circuit. Argued and Submitted Oct. 19, 1982. Decided Dec. 8, 1983.

JUDGES: recess appointee to federal bench cannot exercise judicial power of the United States.

Defendant was convicted in the United States District Court for the District of Hawaii, Walter M. Heen, Jr., and Martin Pence, Senior District Judges, of narcotics offenses and she appealed. The Court of Appeals, Norris, Circuit Judge, held that recess appointee to the federal judiciary may not exercise the judicial power of the United States because they lack the essential attributes of Article III judges.

Vacated and remanded.

Elliot Enoki, Honolulu, Hawaii, for plaintiff-appellee.

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Pamela J. Burman, Honolulu, Hawaii, for defendant-appellant.

Appeal from the United States District Court for the District of Hawaii. ^

1. Judges 24"

Only those judges endowed Article III protections may exercise the " judicial power of the United States. U.S.C.A. Const. Art. 3, 1 et seq.

2. Judges 3"

The recess appointment clause is not such an explicit constitutional provision as to be applied in disregard of the command of Article III that the judicial power be exercised only by those enjoying Article III protection. U.S.C.A. Const. Art. 2, § 2; Art. 3, § 1 et seq.

3. Constitutional Law 67"

Although members of both the legislative and executive branches are sworn to uphold the Constitution, the courts alone are the final arbiters of its meaning.

4. Constitutional Law 17"

Historical acceptance and governmental efficiency will not cause a practice if it is contrary to the Constitution.

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3. Judges 24

Recess appointee to the federal bench cannot exercise the judicial power of the United States because such an appointee lacks the essential attributes of an Article III judge; i.e., life tenure and protection

Before CANBY, NORRIS and REINHARDT, Circuit Judges.

NORRIS, Circuit Judge.

This case presents a question of substantial constitutional importance: whether a person lacking the essential attributes of an Article III judge's tenure and protection against diminution of compensation may nonetheless exercise the judicial power of the United States by virtue of a recess appointment made pursuant to Article II, Section 2 of the Constitution. /1/ We are thus called upon to harmonize the inherent tension between the so-called recess appointment clause, which on its face applies to vacancies in any government officer, and Section 1 of Article III which provides that only judges with Article III protection may exercise the judicial power of the United States. /2/ We

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are required to decide, in other words, whether the recess appointment power of the President applies to vacancies in the judicial as well as the executive branch of government.

I

Appellant Janet Woodley was indicted on September 18, 1981 for importing, intending to distribute, and conspiring to distribute heroin in violation of title 21, sections 841(a)(1), 952(a), and 960(a)(1) of the United States Code. Woodley filed motions to suppress evidence allegedly obtained in violation of the fourth amendment. A hearing was held on Woodley's suppression motions before Judge Walter Heen on November 16, 1981. Judge Heen denied the suppression motions and presided over a bench trial conducted on stipulated facts at which Woodley was found guilty on all three counts. /3/

Judge Heen had been nominated to fill a judicial vacancy in the district of Hawaii on February 28, 1980. On September 23, 1980, the Senate Judiciary Committee began confirmation hearings on Heen's nomination. Although testimony and hearings were complete, no vote had been taken when the Senate recessed on December 16, 1980. On December 31, 1980, while the Senate was still in recess, President Carter

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conferred a commission on Heen who then began to sit as a district judge. Less than one month later, on January 21, 1981, President Reagan withdrew Heen's nomination. Heen continued to sit as a district judge, however, until December 16, 1981, when the First Session of the 97th Congress ended. Thus, at the time he ruled on Woodley's suppression motions and presided over her trial in November and December 1981, Heen sat only by virtue of his recess appointment. During this period, he possessed neither life tenure nor guaranteed compensation--the essential attributes of an Article III judge. On appeal this court must resolve the question whether this fact rendered Heen's appointments and hence all decisions of the judiciary unconstitutional. /4/

Strong arguments can be marshaled both for and against application of the recess appointment clause to the judiciary. On the one hand, the recess appointment clause applies to judicial vacancies, a forum may exercise the judicial power without the institutional protections of Article III that the Framers considered essential to judicial independence, a judge receiving his commission under the recess appointment clause may be called upon to make politically unpopular

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officials. Such a judge will scarcely be oblivious to the effect his decision may have on the vote of these officials. Professor Freund articulated the problem when he referred to the recess appointee as a judge sitting "with one eye over his shoulder on Congress." Harvard Law School Record, October 8, 1953, at 1.

Questions of governmental efficiency must, however, also be considered. Application of the recess appointment clause to the judiciary arguably ensures that the nation's judicial business is not delayed because of lengthy vacancies in judicial office. In this case, for example, two and one-half years passed before a judge enjoying the protections of article III filled the vacancy temporarily occupied by Judge Keen. A mechanism by which judicial offices may be filled within a reasonable time is obviously of great practical value in assuring the continued smooth operation of the courts.

II

(1) In resolving the conflict between article II and article III we look to the language of the Constitution viewed in light of accepted principles of statutory construction, to the history of both articles, and to the Supreme Court decisions interpreting them. Despite long

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historical practice to the contrary, see infra at slip op. at ----, ----, these considerations persuade us that only those judges enjoying article III protections may exercise the judicial power of the United States.

A

Under familiar principles of statutory construction, the very specific language of article III would, absent a countervailing reason, prevail over the general language of article II. See Buckley v. United States, 446 U.S. 398, 406, 100 S.Ct. 1747, 1752, 64 L.Ed.2d 381 (1980); Preiser v. Rodriguez, 411 U.S. 475, 489-90, 93 S.Ct. 1827, 1836-37, 36 L.Ed.2d 439 (1973). Article III states explicitly and unambiguously that the judicial power is to be exercised by those holding "their Offices during good Behavior and ... at stated Times, receiving, for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. This language is unusually specific. As Justice Frankfurter noted:

> [t]he provisions of the Constitution, barring only those that draw on arithmetic, as in prescribing the qualifications for a President and members of Congress or the length of tenure of offices, are more explicit and specific than those pertaining to

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> courts established under article III. The judicial power which is "vested" in these tribunals and the safeguards under which judges function are enumerated with particularity. Their salary and compensation are controversies which may be brought before them, and the distribution of original and appellate jurisdiction among these tribunals are defined and circumscribed, not left at

emphasized these portions of Article III as in striking contrast to the imprecision of so many other provisions of the Constitution...."

National Mutual Insurance Co. v. Tidewater Transfer Co., Inc., 337 U.S. 582, 646, 69 S.Ct. 1173, 1209, 93 L.Ed. 1556 (1949) (Frankfurter, J., dissenting).

We cannot disregard such an explicit constitutional requirement, for

> when the Constitution ... gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the translation. Precisely because "it is a constitution we are expounding," M'Culloch v. Maryland, 4 Wheat. 316, 407 (4 L.Ed. 579), we ought not to take liberties with it.

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Id. at 646-47, 69 S.Ct. at 1196. Only an even more explicit constitutional provision could justify disregard of article III's command that the judicial power shall be exercised only by those enjoying article III protection.

(2) The recess appointment clause is not such a constitutional provision. The clause does not mention the judicial branch at all. It is phrased in the most general language, stating only that its provisions apply to "all vacancies that may happen during the recess of the Senate." U.S. Const. art. II, § 2, cl. 3. This language appears insufficient to overcome the explicit command of article III.

B

Second, a careful examination of the records and writings of the constitutional period leads us to conclude that the Framers did not intend to allow the housekeeping provisions of the recess appointment clause to impinge on their paramount concern for judicial independence.

The experience of the Framers with the colonial judiciary had not been a happy one. Prior to the Glorious Revolution of 1688, English judges had been "lions under the throne," creatures of the King. The Act of Settlement of 1701 had remedied this situation in England by granting

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English judges life tenure and undiminishable compensation. But the Act had no effect in the colonies. In their lack of independence from the Executive, the colonial judiciaries remained similar to those of the England of Charles I. Courts were constituted by the colonial governors under authority of the crown. Any attempt by the governors or the colonial assemblies to free judges from royal control was [illegible] quashed. E. Russell, Review of Colonial Legislation 189 (1915). Colonial history is replete with examples of royal abuse of judicial power. Judges who did not follow the wishes of the King or royal governor were summarily discharged. See Pittman, The Emancipated Judiciary in America: Its Colonial and Constitutional History, 37 A.B.A.J. 485, 488 & n. 5 (1951) (citing 6 North Carolina Colonial Records 391; 9 New Jersey Archives 321; 7 New York Colonial Documents 474; [illegible] Board of Trade Journal 229-232). The signers of the Declaration of Independence charged that the King

> obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary powers. He has made Judges dependent on his Will alone for the tenure of their offices and the amount and payment of their salaries.

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The Declaration of Independence para. 13 (U.S.1776).

In reaction to the excesses of the colonial courts, the Framers emphasized strongly and repeatedly the need for an independent judiciary. Hamilton, for instance, stated:

> (I) agree that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.
>
> The complete independence of the courts of justice is peculiarly

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> essential in a limited Constitution.

The Federalist No. 78, at 523-24 (A. Hamilton) (J.E. Cooke ed. 1961). To translate their concern for judicial independence into practice, the Framers included in article III the requirement that federal judges have life tenure and undiminishable compensation. The Framers recognized that these protections had freed the English judges from royal control. Pittman, supra, at 485. The Framers similarly sought to make the federal judges servants not of the Executive but only of their consciences.

Yet the Framers also recognized, in adopting the recess appointment clause, the need to ensure the continued functioning of government when vacancies in office occurred. Article II, section 2 was thus adopted as a housekeeping measure. It provided that the President could fill vacancies in government that occurred during a recess of the Senate by granting a temporary commission which would expire at the end of the next Senate session.

The Framers, however, never explicitly addressed the question whether the recess appointment clause applied to the judicial branch. The clause was apparently adopted without debate. An examination of the origins of the clause has uncovered no evidence that the Framers intended it to

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apply to the judiciary.

The recess appointment clause was apparently modeled on a similar provision in the South Carolina Constitution of 1776. C. Warren, The Making of the Constitution 330-31 (1929). That constitution provided that South Carolina ordinaries, the equivalent of judges, were to be chosen by a joint vote of the state House and Senate and were to have tenure during good behavior. S.C. Const. art. XXIV (1776). The South Carolina Constitution provided also that "the Governor could make a recess"

legislature. The appointed would hold office until the next election to the state legislature. S.C. Const. art. XXVI (1776). There is evidence that the South Carolina recess appointments clause was not intended to apply to judicial officers. The South Carolina legislature passed legislation in 1813 authorizing the Governor to make temporary appointments to the office of ordinary. State v. Watson, 1 S.C.L. (1 McCord) 240 (Const.Ct.1821). Such legislation would have been unnecessary if ordinaries had been covered by the recess appointments clause of the Constitution of 1776.

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The final reason for concluding that the recess appointment clause does not permit judges lacking article III protection to exercise article III power is that Supreme Court precedent seems to mandate that result.

The Supreme Court has long emphasized the overriding importance of an independent judiciary. In 1920, the Court considered whether application of the federal income tax to the salaries of federal judges constituted diminution of income. Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920). The Court, quoting Washington, Hamilton, Marshall, and Wilson at great length, concluded that "independence of action and judgment"

> is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

Id. at 253, 40 S.Ct. at 553. The Court stressed that, in order to ensure the integrity of the judiciary, judges must not only be independent of outside influence in fact, but must also be "above even the suspicion of any influence." Id. at 247, 40 S.Ct. at 554 (quoting Chief Justice Taney in letter to Secretary of Treasury). Thirteen years later, in O'Donoghue

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v. United States, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356 (1933), the Court stated that

> the acts of each [department should] never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.'

Id. at 530, 53 S.Ct. at 743. Other cases contain similar language. See, e.g., American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 543, 7 L.Ed. 242 (1828) (courts whose judges do not have article III protection are "incapable of rendering" the judicial power conferred by the Constitution on the judicial branch of government).

The requirements of the constitutional requirement that article III power not be exercised by judges lacking article III protection has been reaffirmed in two more recent cases in which the Court held unconstitutional statutory schemes designed to promote judicial efficiency. In Glidden Co. v. Zdanok, 370 U.S. 530, 82 S.Ct. 1459, 8

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80.2d 671 (1982), the question presented was whether Joseph Jackson, a judge of the United States Court of Customs and Patent Appeals, could preside over a criminal trial in a United States District Court. Jackson sat by virtue of 28 U.S.C. § 294(d) (1976) which authorizes retired judges to sit by designation of the Chief Justice on either the courts of appeals or the district courts. Lurk, the defendant, alleged that as a member of the Court of Customs and Patent Appeals, Judge Jackson enjoyed only statutory assurance of tenure and compensation. Thus, Lurk claimed, in being tried by such a judge he had been "denied protection of judges with tenure and compensation guaranteed by Article III." Id. at 535, 82 S.Ct. at 1464.

The Court held that Judge Jackson could preside over Lurk's trial because the Court of Customs and Patent Appeals was, in fact, a court constituted under article III whose judges enjoyed article III protection. The opinion strongly indicates that had the Court not found that Judge Jackson enjoyed the constitutional protections of life tenure and undiminished compensation it would have reached a contrary result. The Court first noted that the "necessity for an (article III) judge is uncontested." Id. at 537, 82 S.Ct. at 1466. Regardless whether Lurk's WORKING

trial was conducted fairly, the Court held,"

> Article III, § 1 ... is explicit and gives the petitioners ... a basis for complaint without requiring them to point to particular instances of mistreatment in the record.

Id. at 533, 82 S.Ct. at 1464. The essential question, therefore, was not whether 28 U.S.C. § 294(d) provided a useful mechanism by which to lessen the workload of the district courts. The question instead was whether the members of courts from which § 294(d) judges were drawn enjoyed article III protections. Thus, the Court held that only upon a determination that they did enjoy such protections would they be allowed to exercise article III powers."

In Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), the Court once again stressed the importance of judicial independence in the constitutional scheme. That case presented a challenge to the constitutionality of the Bankruptcy Reform Act of 1978, which granted to judges without article III protection jurisdiction over all bankruptcy matters. Bankruptcy Judges were appointed for fourteen year terms, could be removed by the judicial council of the circuit in which they sat on grounds of WORKING

"incompetence, misconduct, neglect of duty or physical or mental disability," and were not protected from salary diminution by Congress. Id. 102 S.Ct. at 2862. The appellees claimed that they were thus not article III judges and could not exercise article III powers. Id. at 2864.

The Marathon Court, in a plurality opinion by Justice Brennan, held that that Congress could not delegate article III powers to the bankruptcy courts without granting the judges of those courts article III protection. In dissent, Justice White argued strongly that Congress, in creating the bankruptcy courts, had created an efficient, workable system"

disrupting the worthiness of Congress' goals or the efficiency of the system Congress had designed; the plurality stated unequivocally:

> The unquestionable command of Article III is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III. Those attributes are also clearly set forth:
>
> "The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behavior and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office." Art. III, § 1.

Id. at 2865. The plurality specifically tied its holding to the mandate of the Constitution that the federal courts be absolutely independent. It noted:

> In sum, our Constitution unambiguously enunciates a fundamental principle--that the "Judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

Id. at 2866. Because the Bankruptcy Act vested judicial power in judges without Article III protection it violated the constitutional command that such power be vested only in judges who enjoy those safeguards. Thus, Marathon clearly demonstrates that the imperatives of Article III take precedence over a statute providing an indisputable efficient solution to a pressing judicial problem. See also Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983), reh'g en banc granted, 718 F.2d 971 (9th Cir.1983).

In sum, the plain language of the Constitution, the history of the

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abortion of Article II and Article III, and decisions of the Supreme Court emphasizing in the strongest terms the necessity of a judiciary independent both in fact and in appearance all demand that we adhere strictly to the constitutional command that only those who enjoy Article III protections may exercise Article III power. The government argues, however, that the long and accepted practice of recess appointments to Article III courts has created a "historical gloss" that judicial appointments made pursuant to the recess appointment clause are not subject to the requirements of Article III. It is to that argument that we now turn.

IV

The recess appointment clause was used with some frequency to fill judicial vacancies during the late eighteenth and early nineteenth centuries. By the end of 1823, five recess appointments had been made to the Supreme Court while twenty had been made to the inferior federal courts. Chief Justice Rutledge not only sat on the Supreme Court by virtue of a recess commission but also gathered a decision of the Court before his confirmation by the Senate. See United States v. Packard, 3 U.S. (3 Dall.) 120, 1 L.Ed. 535 (1795) (Rutledge, J.). In Evans v. United

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that the constitutional propriety of these appointments was ever " questioned. This fact suggests that recess appointments to the Judiciary if not contemplated or particularly sanctioned by the Framers, were nonetheless not considered highly objectionable by them. As one author has noted: "

> During that period, when those who wrote the Constitution were alive and active, not one discernible voice was raised against the practice. It would seem that the framers must have looked upon recess appointments as an exercise of authority to fill vacancies on the Court and not as a violation of article III. "

Note, Recess Appointments to the Supreme Court-Constitutional But Unwise?" 10 Stan.L.Rev. 124, 132 (1957). "

Recess appointments were made to the federal judiciary as frequently after the constitutional period as during it. In all, 283 recess " appointments were made to the federal bench-six of these to the Supreme Court-between 1823 and 1964. The practice, however, fell into disuse a " generation ago. Judge Hoan's appointment in 1980 was the only recess " appointment in the past twenty years. See Appellee's Second Supplemental" Brief at A1-A23.
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Executive acceptance of the power to make recess appointments to the " Judiciary is evidenced not only by frequent use of the power, but also by" some twenty four opinions of the attorneys general. That of Attorney " General Stanberry in 1868 is one of the more elaborate; "

> For it seems a greater evil to be without officers altogether, " than to have officers who hold only by the temporary appointment of" the President. I say by the temporary appointment of the " President, for, in strict language, the President cannot invest any" officer with a full title to the office without the concurrence of " the Senate. Whether the President appoints in the session or in " the recess, he cannot and does not fill the office without the " concurrence of the Senate. He may fill the vacancy in the recess, " but only by an appointment which lasts until the end of the next " session. "
>
> For instance, in filling a vacancy in the office of Judge, whose" tenure is in effect for life, his appointee can only hold for a " fraction of time. "

12 Op.Atty.Gen. 82, 41 (1868) (emphasis in original). "

Congressional acceptance of presidential power to make recess judicial";
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appointments is equally indistinguishable. The statute authorizing the " payment of recess appointees to all offices makes no exception for " Judges, and Senator Pfeifer duly in support of a resolution requesting the President to use his recess appointment power sparingly in filling judicial vacancies, noted that"

> (I)f there ever was ground for the argument that the more " specific language of Article III of the Constitution would be construed as excluding judiciary appointments from the general " authorization given the President in article II, time has answered it. The President does have that power and this Resolution does not argue otherwise.

106 Cong.Rec. 18,130 (1960).

of the President to make recess appointments to the federal bench. But while the members of both the legislative and executive branches are sworn to uphold the Constitution, the courts alone are the final arbiters of its meaning. United States v. Nixon, 418 U.S. 683, 703, 94 S.Ct. 3090, 3103, 41 L.Ed.2d 1039 (1974); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). The question before us, then, is WORKING

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what weight to attach to these legislative and executive interpretations of the scope of presidential power to make recess appointments."

Early Supreme Court authority suggested that great weight was to be given to historical practice. In Stuart v. Laird, 5 U.S. (1 Cranch) 298, 2 L.Ed. 115 (1803), the Court considered the question whether judges of the Supreme Court could sit as circuit judges without having a separate commission to sit on the circuit court. The Court held that

> practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.

Id. at 308."

The view that a long and continuous practice is entitled to a presumption of constitutionality gained further currency in the early part of this century. Several Supreme Court cases during this period considered historical practice in resolving constitutional questions. WORKING

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/4/ The Court best enunciated the theory of these decisions in United States v. Midwest Oil Co., 236 U.S. 459, 472-73, 35 S.Ct. 309, 312-13, 59" L.Ed. 673 (1915), stating that"

> government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice.

This early line of Supreme Court authority, holding that unchallenged historical practice is sufficient evidence of constitutionality, no longer, however, represents the thinking of the Court. Recent Supreme Court discussions of the issue indicate that any practice, no matter how fully asserted or efficient, is "subject to the demands of the Constitution which defines powers and ... sets out just how those powers are to be exercised." INS v. Chadha, --- U.S. ----, ----, 103 S.Ct. 2764, 2781, 77 L.Ed.2d 317 (1983).

In INS v. Chadha, the Court considered the constitutionality of a statute authorizing one house of Congress to invalidate by resolution a decision of an agency of the executive branch made pursuant to WORKING

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Chadha, the practice of including a one-house veto provision in legislation has become so common as to have indisputable become a practice of long and continuous acceptance. As the dissent notes, over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, welfare, energy, the environment, and the economy.

Id. at ----, 103 S.Ct. at 2793 (White, J., dissenting) (footnote omitted). Moreover, the practice of one-house vetoes, according to our decisions in Presidents since World War II, id., had become a central tool of the legislative process. It was more than 'efficient, convenient, and useful,' it was 'an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking.' Id., at ----, 103 S.Ct. at 2795.

Yet, this historic acceptance of the one-house veto did not prevent WORKING

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the Court from holding the practice unconstitutional. In fact, Chief Justice Burger noted for the majority that 'our inquiry is charmed, rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies.' Id. at ----, 103 S.Ct. at 2781. The Court stated that, regardless of historical practice, 'policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.' Id.

The Court also dispensed quickly with arguments based on governmental efficiency. Claims that the one-house veto had become central in the relationship between the President and Congress would not override constitutional commands. Chief Justice Burger stated emphatically that

> 'convenience and efficiency are not the primary objectives or the hallmarks of democratic government....'
>
> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government

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> that permitted arbitrary governmental acts to go unchecked. There is no warrant in the Constitution or decisions of this Court for the proposition that the inconvenience and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153, (1952). With all the obvious flaws of delay, untidiness, and potential for abuse, we have not been persuaded that there was a better way to preserve freedom than by making the exercise of power subject to the carefully drafted restraints spelled out in the Constitution.

Id. at ----, ----, 103 S.Ct. at 2780, 2788.

(4, 5) The dissents of Chadha is clear. Historical acceptance and governmental efficiency are not dispositive. They will not, however,

103 S.Ct. at 2781. It is undisputed that the practice of recess " appointments to the Judiciary is widely accepted and may in some " situations contribute to judicial efficiency. Such appointments, " however, offend the explicit and unambiguous command of Article III that ", WORKING

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the Judicial Power be exercised only by those enjoying life tenure and " protection against diminution of compensation. A practice condemned by " the Constitution cannot be saved by historical acceptance and present " convenience. /5/ We therefore hold that because he lacks the essential " attributes of an Article III Judge, a recess appointee to the federal " bench cannot exercise the judicial power of the United States. "

We recognize that the only other court to consider the question we " decide today reached a result contrary to ours. In United States v. " Allocco, 305 F.2d 704 (2d Cir.1962), the Second Circuit held that Article" III does not require the exclusion of judicial offices from the scope of " the recess appointment clause. It based this conclusion in part on " historical practice and in part on the need for governmental efficiency. " Id. at 708-709. But INS v. Chadha, --- U.S. at ----, 103 S.Ct. at 2780, " decided over two decades after Allocco, makes it clear that even " consistent acceptance of a practice over many years will not suffice to " render an unconstitutional action constitutional. In addition, other " recent Supreme Court cases demonstrate that the Article III requirement " of judicial independence outweighs arguments made in the name of " efficiency. See Northern Pipeline Construction Co. v. Marathon Pipeline", WORKING

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Co., 102 S.Ct. at 2865-2866; Glidden Co. v. Zdanok, 370 U.S. at 533, 82 " S.Ct. at 1463. "

We believe the Allocco decision also reflects a misapplication of " accepted principles of statutory and constitutional construction. The " Second Circuit's opinion implies that the general language of the recess " appointment clause takes precedence over the specific language of Article" III. United States v. Allocco, 305 F.2d at 708. Precedent is to the " contrary. The unusually specific language of Article III must supersede " the general language of the Article II recess appointment clause, which " does not mention the judicial office at all. See supra slip op. at ----," at ----. "

Finally, Allocco rests on an overly limited view of the historical " record. The Second Circuit commented that "the evils of legislative and " executive coercion which petitioner foresees have no support in our " nation's history." United States v. Allocco, 305 F.2d at 709. In fact, " the Framers themselves were profoundly influenced by the sorry history of" a colonial judiciary which lacked the most basic requisites of judicial " independence. The Framers based their judgments regarding the " protections required in Article III on the experience of the colonies and", WORKING

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of England. It is precisely because of their command in Article III that" the "coercion" which the Second Circuit finds absent in more recent "

Of. at ----, at ----. "

Thus, we reject the holding of Allocco and find that a recess " appointee to the federal bench cannot exercise the judicial power of the " United States. /6/"

The conviction is VACATED and the case remanded to the United States " District Court for the District of Hawaii. "

ALL FOOTNOTES FOLLOW

1. The recess appointment clause provides: "

The President shall have Power to fill up all Vacancies that may " happen during the Recess of the Senate, by granting Commissions which " shall expire at the End of their next Session. "

U.S. Const. art. II, § 2. "

2. The relevant portion of article III provides: "

The Judges, both of the supreme and inferior Courts, shall hold their " Offices during good Behaviour, and shall, at stated Times, receive for ", WORKING

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their Services, a Compensation, which shall not be diminished during " their Continuance in Office. "

U.S. Const. art. III, § 1. "

3. We note that the Judgment and Probation Commitment Order was issued" not by Judge Heen but by Judge Martin Pence. The government does not " argue that that fact should affect our treatment of the issues in this " case. In any event, we believe that it would not. "

4. See, e.g., Myers v. United States, 272 U.S. 52, 175, 47 S.Ct. 21, " 45, 71 L.Ed. 160 (1926); Ex parte Grossman, 267 U.S. 87, 118, 45 S.Ct. " 332, 336, 69 L.Ed. 527 (1925); Fairbank v. United States, 181 U.S. 283," 307, 21 S.Ct. 648, 657, 45 L.Ed. 862 (1901). "

5. The government argues that the recent decision of the Supreme Court" in Marsh v. Chambers, --- U.S. ----, 103 S.Ct. 3330, 77 L.Ed.2d 1019 " (1983), dictates that we accord controlling weight to the fact that " recess appointments to the judiciary were made during the early " constitutional period. We disagree. "

In Marsh, the Court was faced with the question whether the practice " of the Nebraska legislature of opening each of its sessions with a prayer" offered by a state-paid chaplain violated the establishment clause. In ", WORKING

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holding that legislative prayer does not offend the first amendment, the " Court relied on a unique full historical record indicating that the " practice was extensively considered and approved by the Founding Fathers. We have no such record in this case. "

The first legislative chaplain was appointed during the first " Congress. Indeed, three days before final agreement was reached on the language of the Bill of Rights, Congress enacted legislation providing " for the appointment of a chaplain. That legislation was not adopted lightly. An extensive debate took place in Congress. The bill to " provide chaplains drew opposition from both John Jay and John Rutledge on the ground that the delegates, "were so divided in religious sentiments ... that they could not join in the same act of worship." Id. 103 S.Ct. at 3333. The Court in Marsh cited this record of debate and opposition " as evidence that the "practice was considered carefully and the action not" taken thoughtlessly." Id. The relationship between the first amendment " and the practice of legislative prayer in the thought of the first "

Court in Marsh. "

In striking contrast, there is no evidence that the Framers ever "
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considered the question whether the recess appointment clause applied to "
judicial appointments. The clause was adopted without debate, and the "
provision of the South Carolina constitution upon which it was modeled "
did not apply to judicial vacancies. In Marsh, the Court stated that it "
"accept(s) the interpretation of the First Amendment draftsmen" regarding "
the practice of legislative prayer and the establishment clause. Id. We "
have no comparable record of explicit interpretation and debate before "
us. Mute acquiescence is clearly distinguishable from the affirmative "
contemporaneous construction of the first amendment available to the "
Court in Marsh. "

6. The issue of whether our holding should be applied retroactively or"
merely prospectively is not properly before us and should not be decided "
today. We leave that issue for another day. See, e.g., Michigan v. "
Payne, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973) (determining "
whether or not to give retroactive effect to a rule formulated in an "
earlier decision); Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L."
Ed.2d 29 (1973) (same); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, "
18 L.Ed.2d 1199 (1967) (same); Tehan v. Shott, 382 U.S. 406, 86 S.Ct. "
459, 15 L.Ed.2d 453 (1965) (same); Johnson v. New Jersey, 384 U.S. 719, ",
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86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) (same); Linkletter v. Walker, 381 "
U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1964) (same).

The Washington Post

recess appointments

Verdict Handed Down By Recess U.S. Judge Overturned on Appeal

SAN FRANCISCO, Dec. 9 (AP)—A federal appeals court, saying the president has no power to fill vacant judgeships while the Senate is in recess, has overturned a heroin smuggling conviction on grounds that the judge in the case was improperly appointed.

The 9th U.S. Circuit Court of Appeals called the matter a question of "substantial constitutional importance." The court said the recess appointment power does not apply to judicial vacancies and rejected a contrary 1962 decision by the 2nd U.S. Circuit Court of Appeals in New York City.

The case involves Walter Heen, then a U.S. District Court judge in Hawaii, who presided over the trial of Janet Woodley.

Woodley was convicted of smuggling six ounces of heroin into the United States from Japan and was sentenced by another judge to five years in prison. Her case was sent back to the Honolulu court for further action, presumably a new trial.

The appeals court tossed out the conviction because Heen was only a recess appointee at the time. His nomination was withdrawn by President Reagan before it was confirmed by the Senate.

Heen's was the only recess appointment of a federal judge in the past 20 years. There were 282 recess appointments to the federal bench between 1823 and 1964, six of them to the Supreme Court.

The appeals court said it was leaving "for another day" the issue of whether its ruling should be made retroactive.

51

The Washington Post

DATE: 10-17-85
PAGE: A21

Senate Clears Thousands of Nominations

Byrd-White House Dispute Resolved

Associated Press

The Senate gave routine confirmation yesterday to more than 5,000 presidential appointees, most of them military promotions, marking the end of a dispute between the White House and Minority Leader Robert C. Byrd (D-W.Va.).

The vote followed the second Reagan administration attack in several days on Byrd, with spokesman Larry Speakes saying numerous nominations were being blocked on the "whim of one individual."

Byrd had held up votes on the nominations to protest seven recess appointments by President Reagan during the August congressional vacation. Recess appointees may serve until the end of a congressional session without confirmation, and Byrd complained that Reagan was circumventing the Senate's prerogatives to vote on nominations.

Byrd met last week with two White House officials to discuss the standoff. "I was satisfied that the matter had been resolved," he said.

Speakes attacked Byrd again yesterday, saying he had put a "hold" on dozens of executive branch and judicial appointees "at a time when we are receiving criticism for not having fully staffed positions" and when "caseloads are backing up in federal courts."

An aide said Byrd offered last week to release the judicial nominations and military promotions.

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From: Pat

Time to Permanently Recess the Appointments Battle

By Ed Winsten

President Reagan and Senate Minority Leader Robert Byrd recently engaged in a war over the Constitution. They have made up, sort of, but several questions linger.

At issue is the president's right to make recess appointments, a right firmly stated in the Constitution. Even George Washington — the father of our country, the man who never lied (according to the history books) and the man with the stern visage on the dollar bill — made a couple of recess appointments.

Commentary

So they can't be all that bad. What they do is allow the chief executive to make an appointment he deems especially needed when Congress is on a recess. The appointees can serve through the next congressional session, meaning a mid-year appointee is good for about 18 months in office. An appointee intent on mayhem can create quite a bit in 18 months.

Each president probably has made several such appointments, although not many people keep count because to this point it had never become an issue. But the current incumbent of the land's highest office has made an art form out of the process. In his five years, the president has slipped more than 140 people through this constitutional keyhole, keeping some shaky appointees from Senate view.

There are people who wonder whether the president is using the back door to get unqualified people into office.

As is his wont, the president made seven recess appointments in August while Congress was out.

Byrd thought he and the White House had an agreement that the president wasn't going to make any more of those appointments, so he rebelled. He put 5000 appointments — most of them military promotions that take Senate approval — on hold. Seventeen of the 76 civilian appointments were to positions in the judiciary.

Then presidential press secretary Larry Speakes chimed in with: "One man is holding the entire 5000 hostages in the United States Senate. We call on the minority leader, one man, to release these hostages — set them free."

To the president's credit, he did relent slightly. After making the recess appointments in August, he resubmitted the names through normal channels for Senate confirmation in September.

But that wasn't enough for Byrd. He wanted the president to say he wasn't going to use the end-run tactic anymore.

The logjam finally broke after some White House staffers met with Byrd, who was quoted as saying, "I was satisfied that the matter had been resolved." So he let the 5000 nominations proceed.

But nowhere does it say that the president vowed not to use the trick again.

He abused the system to the extent that several controversial people have managed to put in a year or more in key positions without Senate scrutiny. Robert Rowland, formerly head of the Occupational Safety and Health Administration, for example, managed to get through a "career" of one year.

Rowland bowed out July 1 after a contentious year. His public stand was that he wanted to return to the quiet life in Texas. But to continue in his job much longer, he would have had to face a Senate confirmation battle. Even "non-sinners" can get a good going over at one of those roasts.

The president's selections last December seemed to be particularly dreary. Because they were inserted before Congress started a new session, their appointments come to a close this December.

There are people who wonder whether the president is using the back door to get unqualified people into office.

One of those recess appointments was Ralph Kennickell to be head of the Government Printing Office. Kennickell had a skimpy background and a strange SF-171 that has gotten him into trouble.

Through a simple oversight on his part, he says, somehow he misstated his income one year by a mere $30,000 — a mistake that he perpetuated on several re-filings of his SF-171. The simple mistake helped get him a job he wasn't qualified for and got him a salary much greater than any he had earned in his father's printing operation in Georgia.

Now he's being investigated by the Justice Department to see if he lied on the SF-171, which is against the law.

Another selection last December was Terrence M. Scanlon to be chairman of the Consumer Product Safety Commission.

Scanlon is getting a good going-over by Joan Claybrook, president of Public Citizen, a Ralph Nader spinoff. Her charge that he is "anti-regulatory" is the mildest of her attacks.

Claybrook also charges that Scanlon may have used his office facilities to promote the Right to Life cause and that he was in improper contact with companies targeted for investigations by the CPSC.

Her allegations brought a suspension of confirmation hearings of Scanlon and another board member by a Senate Commerce, Science and Transportation Committee. The subcommittee is seeking more information from Scanlon and a study by the General Accounting Office before continuing with the hearings.

And then there is William McGinnis, of the Federal Labor Relations Authority. He has about 10 months in his job, trying his best to uphold the administration's principle that unions can be all bad. He also drew some flack recently when it was discovered that he treated his top aides quite lavishly through the incentive awards program.

It will be interesting to see if McGinnis and the other December recess appointees opt for the "quiet life" of Podunk at the end of the year. It certainly will be calmer than facing the Senate and having to answer some hard questions.

The result of this sad, rather tawdry tale is that the bureaucracy is taking it in the chops. The president is wrong if he thinks his constitutional right is at issue. Leadership is at issue, and he's failing.

Ed Winsten is the managing editor of Federal Times.

The following information on recess appointments has been extracted from the attached court case.

Pg. 2 - recess appointee's nomination withdrawn by the President but he continues to serve until the end of the next session of the Senate Justice confirmed that he was paid during this service as U.S. District Judge. Also, see page 12 re pay for Heen.

Pg. 5 - during the recess between the sessions of the First Congress, George Washington conferred 3 recess appointments to individuals as district judges. These 3 judges were subsequently confirmed by the Senate, without any objection to their recess appointments.

Pg. 6 - recess appointment by Washington to the Supreme Court. By the end of 1823, there had been 5 recess appointments to the Court. These appointments went unchallenged.

- approximately 300 judicial recess appointments have been made in our Nation's history.

- Presidents Eisenhower & Kennedy alone made 53 such appointments

Pg. 7 - the only other direct challenge, prior to this case, to the President's power to make judicial recess appointments was rejected by the 2d Circuit in U.S. v. Allocco in 1962

- Supreme Court has never passed on the issue of recess appointments

- a total of 15 recess appointments have been made to the Supreme Court

Pg. 9 & 10 - vacancies that "happen to occur" or happen to exist "during a recess of the Senate"

Pg. 11 - wherever there is a vacancy there is a power to fill it - AG opinion of 1889

Pg. 12 - recognizes the President's power to fill <u>all</u> vacancies that <u>exist</u> during a recess of the Senate. (There is no discussion in this case regarding the length of time a recess must be before the President can make a recess appointment)

Pg. 25 & 26 - indicates that last judicial recess appointment was in 1964

Ron Geisler
4/18/85

For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JANET WOODLEY, Defendant-Appellant.	C.A. No. 82-1028 D.C. No. CR 81-1285-2-MP OPINION

Appeal from the United States District Court for the District of Hawaii

The Honorable Walter M. Heen, Presiding

Argued and Submitted En Banc August 16, 1984

Before: BROWNING, Chief Judge, SNEED, SKOPIL, FLETCHER, FARRIS, ALARCON, POOLE, FERGUSON, NORRIS, REINHARDT, and BEEZER, Circuit Judges

BEEZER, Circuit Judge:

We take this case en banc to address the constitutionality of a practice followed by the Executive for nearly 200 years. The question before us is whether the President of the United States may constitutionally confer temporary federal judicial commissions during a recess of the Senate pursuant to article II, section 2 of the Constitution.

I

On February 28, 1980, Walter Heen was nominated to fill a judicial vacancy in the United States District Court for Hawaii. The Senate Judiciary Committee began confirmation hearings on his nomination on September 25, 1980. When the Senate recessed on December 16, 1980, testimony and hearings on the nomination were

[illegible] until House Democrats pick the new chairmen of the labor subcommittees.

Rep. George Miller (D-Calif.) is expected to leave the labor standards subcommittee and

that in most cases, the stairs were wet and "nearly two-thirds of the workers were not using handrails when they fell, most often because of a lack of railings."

—Peter Perl

Department, the Soviet Union and Iran hold the largest shares of natural gas reserves. The Soviet Union controls 44 percent; Iran, 15 percent. The United States is third with 6 percent.

The Federal Triangle

Post, 1/15/85

Recess Appointments of Judges Upheld

A president's power to make one-year appointments of federal judges while Congress is in recess was upheld yesterday by a federal appeals court, which rejected arguments that such appointments subject judges to political pressure.

The unilateral appointment power, first used by George Washington in 1789, "prevents the executive from being incapacitated during the recess of the Senate," said Judge Robert Beezer of Seattle in a 7-to-4 decision of the 9th U.S. Circuit Court of Appeals.

Federal judges normally must be confirmed by the Senate before taking office and then can serve for life unless impeached. A recess appointee can serve only until the end of that year's congressional session, unless confirmed to a life term.

The court said there have been about 300 judicial recess appointees in the nation's history. Yesterday's case concerned the most recent one, Walter Heen.

President Carter nominated Heen to a a U.S. District Court vacancy in Hawaii, but the Senate never acted on the nomination. In December 1980, Carter made Heen a recess appointee, and he served until the next December, when he was replaced by an appointee of President Reagan.

A woman whom Heen had found guilty of drug offenses appealed one of his rulings. A panel of the appeals court used the case to conclude in 1983 that judicial recess appointments are unconstitutional. That decision was reversed yesterday.

Tribes Seek Rejection of Plan

■ Leaders of the nation's Indian tribes have voted to reject the proposals of a presidential commission to scale back the federal role on Indian reservations.

Yesterday, the tribal chiefs also sent Reagan a telegram asking him to hold a special "summit conference" with the tribes to discuss the proposals, which would abolish the Interior Department's Bureau of Indian Affairs and give tribes "block grants" and allow them to contract out for the diverse services now provided by the BIA.

Meeting last week in Reno, Nev., members of the National Tribal Chairmen's Association, which represents the leaders of the federally recognized tribal governments, formed a commission to come up with alternatives to the Reagan commission's proposals.

Those proposals, listed in the November report of the President's Commission on Indian Reservation Economies, provoked criticism from the Indians, who fear that Reagan's brand of "less government" will lead to the government severing its ties to the tribes.

The White House has not commented on the proposals officially, and the Interior Department is studying them before making recommendations. But a spokesman there said last week that the opinion of the chiefs would "certainly be a factor" in any decision.

Merger Proposal Delayed

■ The Reagan administration will not try to come up with a specific proposal for merging the Energy and Interior departments until after the Senate holds hearings on the president's two nominees to head the agencies, Energy Secretary Donald P. Hodel said yesterday.

"We're not going to do any of that work until we've had our day in court," Hodel said of a merger plan.

Thursday Reagan announced his intention to move Hodel to Interior and White House personnel director John S. Herrington to Energy, and directed the two to look at "reorganization options" as part of the administration's longtime goal of eliminating the Energy Department.

Hodel told reporters that the "simplest form of merger" would be to combine the two departments into a "Department of Energy and Natural Resources [with] an assistant secretary for energy and an assistant secretary for interior."

"But I want to emphasize that at this time, there is no plan; there is no study in existence which does or will recommend anything," he said.

'Secular Humanism' Rule Hit

■ The American Jewish Congress yesterday urged the Education Department to amend its proposed rules on "secular humanism," arguing that the concept could be used as an excuse to incorporate religion into public classrooms.

The rules, which implement legislation that sets aside funds for school districts being desegregated, prohibit using the money to fund courses that teach "secular humanism."

Under the proposed regulation, the burden of defining "secular humanism"—a catchall phrase often used by conservatives and fundamentalist Christians to describe elements of public school education with which they disagree—is left up to local school districts.

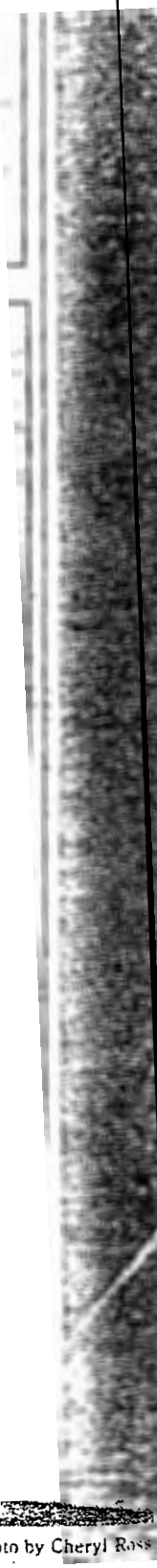

Photo by Cheryl Ross

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THE WHITE HOUSE

WASHINGTON

December 17, 1985

MEMORANDUM FOR M. B. OGLESBY, JR.
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Recess Appointments

Attached is a draft reply, for your signature, to the December 16 letter from Senators Dole and Byrd on recess appointments. The reply reflects my and Max Friedersdorf's recollection (memorialized in a memorandum at the time of the meeting) that we agreed only to advise Dole and Byrd of recess appointments before they were made, not before the Senate adjourned.

cc: Robert H. Tuttle

FFF:JGR:aea 12/17/85
bcc: FFFielding
JGRoberts ✓
Subj
Chron

THE WHITE HOUSE

WASHINGTON

December 17, 1985

Dear Bob:

This is in response to your letter of December 16 to the President, concerning recess appointments during the upcoming adjournment of the Senate.

At this time, the President has no plans to make any recess appointments during the adjournment, assuming that there are votes before adjournment on those nominations currently pending before the Senate. There can be no doubt, however, that the adjournment will be of sufficient duration to permit recess appointments to be made, as envisioned by the Constitution. If for any reason we should decide it is necessary to make recess appointments during the upcoming adjournment, we will, pursuant to previous discussions you have had with Administration officials on this issue, advise you of those appointments before they are made.

With best wishes for a joyous holiday season,

Sincerely,

M.B. Oglesby, Jr.
Assistant to the President

The Honorable Robert C. Byrd
United States Senate
Washington, D.C. 20510

MBO:JGR:aea 12/17/85
bcc: FFFielding
JGRoberts
Subj
Chron

BOB DOLE
KANSAS

United States Senate

OFFICE OF THE MAJORITY LEADER
WASHINGTON, DC 20510

December 16, 1985

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

In the past, the issue of recess appointments has generated considerable controversy that has disrupted the expeditious handling of nonrecess appointments in the Senate. As we approach sine die adjournment, we would like to be advised of any plans the Administration has for making recess appointments before the Senate returns on January 21 of next year.

This request for notice prior to making the recess appointments is in accordance with the discussions we had earlier in the year on this subject.

Sincerely yours,

ROBERT C. BYRD
Minority Leader

BOB DOLE
Majority Leader

Diana —

Since we have only 2 days left before sine die, I'm sending the original for Fred to respond to.

NL

THE WHITE HOUSE

WASHINGTON

October 17, 1985

MEMORANDUM FOR THE FILES

FROM: MAX L. FRIEDERSDORF
FRED F. FIELDING

SUBJECT: Recess Appointments

This is to clarify Senator Robert Byrd's statement in the Congressional Record of October 16, 1985, page S.13337, column 2, paragraph two.

We informed Senators Byrd and Dole in our meeting of October 10, 1985 that a week or more prior to a recess of the Senate we (the White House) would advise them of any nominations deemed urgent by the Administration. At no time did we pledge to advise Senator Byrd of plans to recess appoint before the recess occurs. We did indicate that he (Byrd) would be advised at the time of the recess appointments.

cc: Donald T. Regan
Robert Tuttle
Pamela Turner
Larry Harlow

The additional $3.385 million I am proposing would enable the FDA to carry out effectively its work in the screening, testing, and approving of drugs for treating AIDS, of vaccines, and of blood-screening tests.

Mr. President last year, at just about the same time, we were faced with a similar situation. The Senate had recently completed action on the fiscal year 1985 Labor/HHS Appropriations Act. I had offered an amendment to that measure, which was accepted, to add $14.6 million for AIDS research. (CONGRESSIONAL RECORD, S11800 daily ed. Sept. 25, 1984.) These funds had been recommended by the then-Assistant Secretary for Health, Dr. Edward N. Brandt, Jr., in a May, 1984 memorandum. Although Dr. Brandt's request for additional AIDS funding was never formally transmitted to Congress, Congress recognized his expertise, as the highest ranking individual in the Federal Government, in assessing the overall needs of the Federal AIDS Research Program and heeded his recommendations. When the continuing resolution was considered on October 3, 1984, I offered an amendment to increase the FDA's budget for AIDS by $8.35 million. This amendment, too, was derived from Dr. Brandt's recommendation, and, again, it was accepted. (CONGRESSIONAL RECORD, S13003, daily ed. Oct. 3, 1984.) Those funds were urgently needed to fill out the research package that Dr. Brandt had compiled; the additional funding gave FDA the capacity to keep pace with the rapid movement then underway on AIDS.

Mr. President, in a similar fashion, the amendment I offer today will serve to bring the budget for FDA's AIDS activities in line with that of the other Public Health Service agencies. It would be tragic if our ability to provide AIDS patients with effective treatments were needlessly delayed because the FDA did not have the means to screen and approve the necessary drug applications.

Mr. President, the additional amount I am seeking is modest, but the stakes are very high. It is absolutely essential to finding the means to treat and, ultimately, prevent and cure the AIDS. As our Nation's biomedical scientists move forward in finding treatments for AIDS, the FDA must have the resources to facilitate that progress.

Therefore, Mr. President, I urge my colleagues to support this vitally important amendment. Adoption of this amendment is one more important step in our efforts to halt the spread of this killer disease.

Mr. COCHRAN. Mr. President, I understand that this amendment would provide funding for 31 full-time employees to conduct in-house work and to provide funds for related equipment and support.

I further understand that there is a request for this funding now pending at the Office of Management and Budget.

We have no objection to the amendment, Mr. President, and we urge the Senate to approve it.

Mr. CRANSTON. Mr. President, I am very grateful to the distinguished floor managers for their assistance on this amendment and for agreeing to it.

The PRESIDING OFFICER. Is there further debate? If not, the question is on agreeing to the amendment of the Senator from California.

The amendment (No. 782) was agreed to.

Mr. CRANSTON. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. COCHRAN. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. SASSER. Mr. President, earlier this year, the junior Senator from Tennessee [Mr. GORE] and I brought a proposal to the attention of the chairman of the Agriculture Subcommittee to initiate funding for a Center for Appropriate Technology Transfer for Rural Areas.

Mr. President, an ATTRA Center would proving a useful and cost-effective tool to the American farmer at a time of severe need for assistance, including technical assistance. After careful study, I have concluded that such a center would be a wise expenditure of taxpayers' dollars and would yield substantial benefit to the American farmer and, thus, the American consumer.

Mr. GORE. If the distinguished senior Senator will yield, I would like to add my strong support for a Center for Appropriate Technology Transfer for Rural Areas. This Center would establish a much needed data base of national and international technologies on rural resource management, including soil and water conservation, energy efficiency, sustainable agriculture, water quality management, and land management. The center would further provide specialized, site-specific technical assistance on these resource management technologies. The center staff would work closely with existing agencies and would complement their activities. A complete data base of this nature and a staff of specialists trained to work with rural communities, farmers, extension agents, and others in applying appropriate technologies currently do not exist.

Mr. SASSER. I thank the Senator for his comments. Let me say that I endorse his comments and would add that I hope the chairman of the subcommittee will carefully consider our proposal in a later appropriations measure.

Mr. COCHRAN. I thank the Senators from Tennessee for bringing this matter to my attention. As you are aware, the appropriations committee has had to make some difficult decisions in order to live within the budget resolution constraints. Unfortunately, we have had to make reductions in many USDA programs. In view of the need to cut the Federal budget, the committee was unable to approve funding the proposal for an ATTRA Center. However, I do want to assure my colleagues from Tennessee that we will carefully consider this matter when the opportunity to initiate new programs is established.

Mr. SASSER. I thank the chairman of the subcommittee for his comments. Many valuable programs are going unfunded this year because of the severity of the budget crisis. The ATTRA Center is one of them. I just want the chairman to know that I believe such a center could provide American farmers some very valuable and necessary assistance. The American farmer faces an uncertain future. He will need every tool at his disposal. He will need to adopt appropriate technologies and will need the kind of assistance that would be provided by an ATTRA Center.

Mr. GORE. If the Senator would yield further, I would add that an ATTRA Center would provide farmers and rural communities valuable assistance about cost-saving technological developments at a time when the Nation's farmers clearly would benefit from such assistance. I understand that because of the extremely serious nature of the current deficit, many worthy programs cannot be funded and others will have their funding reduced. However, I thank the chairman for having given this proposal the serious consideration it deserves and for his willingness to consider it further at the appropriate time.

Mr. COCHRAN. Mr. President, we have under the unanimous-consent agreement limited amendments that can be offered.

I might state to the Senate that the colloquy that was entered into the RECORD a few moments ago between Senator LEVIN and myself took care of the issue that was to be raised by the distinguished Senator from Michigan.

I understand that we have two or three other amendments under this agreement that have not been offered, that may be offered: An amendment to be offered by the Senator from Indiana, Senator QUAYLE, dealing with cargo preference; an amendment to be offered by Senator DIXON, of Illinois, dealing with a plant and animal science research center; and an amendment to be offered by the Senator from Iowa [Mr. GRASSLEY] which deals with the Agricultural Policy Institute.

We have now completed action on all of the other amendments in the unanimous-consent agreement.

I hope that we can now complete action on these remaining three amendments and then go to final passage of the bill.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

AMENDMENT NO. 776

Mr. DIXON. Mr. President, I wonder if the distinguished manager of the bill would yield for a series of questions?

Mr. COCHRAN. Mr. President, I am happy to yield to the Senator from Illinois. I understand the Senator has an amendment which would provide for a $3 million appropriation for a plant and animal science research center. We are hoping that we can discuss that proposal and that the Senator will agree to withhold the offering of the amendment or to withdraw the amendment. I do not think the amendment is at the desk.

Mr. DIXON. I say to my colleague, the manager of the bill, that the amendment is at the desk. It is amendment No.776 to H.R. 3037.

Mr. President, I say to the distinguished manager, I express on behalf of my colleague, the junior Senator from Illinois [Mr. SIMON] and myself the profound respect for the important work that he and the manager on this side, Mr. BURDICK, are doing in respect to this legislation.

I think my colleague knows that this particular subject matter is included in the House bill. My understanding is that my colleague and friend from Mississippi has talked to his old friend and colleague from the House side, Representative ED MADIGAN, who supports this amendment with great enthusiasm. I believe this $3 million, to be used for the planning, design, and development of a plant and animal sciences research center at the University of Illinois—located in Champaign-Urbana, IL, which, I tell my colleague, is my alma mater—is of great importance to our State. My colleagues on the House side, particularly his old friend, ED MADIGAN, has suggested that I talk to him about the importance and the merits of this legislation.

Mr. COCHRAN. Mr. President, let me say to my colleague that I had an opportunity to talk by telephone just a few minutes ago with my good friend, Representative ED MADIGAN, who had requested an appropriation on the House side for this plant and animal science research center. He tells me that this is an important project. I am sure that it is and could provide many benefits in the area of plant and animal science research.

Our problem with the amendment here is not whether this is worthy project or has merit; I am sure that it does. We are constrained by the budget resolution and the 302(b) allocation that we have had imposed upon the subcommittee's prerogatives. We have tried to live within those guidelines and targets, and we have, by and large

Let me say, Mr. President, that in spite of that, we will have an opportunity to discuss this issue with the House conferees when we meet to work out the differences between the House-and Senate-passed bills. I hope we can reach agreement on many of the differences that do exist in the bill. That is one that will be subject to discussion.

Let me say to my friend that it will have a high priority in our discussions. I am not able to make a commitment that we will come out of conference with an agreement to provide these funds, but for my part, I shall have an open mind about it and shall remember the discussions that I have had with the Senator from Illinois [Mr. DIXON] about the project and his interest in it and his strong feeling that it is important that it be included in the bill.

Mr. President, I hope the amendment can be withdrawn with the assurance that it will be looked at carefully, it will be a matter of discussion with the House conferees, and we shall try to work out something that is satisfactory. I hope we can. If he could accommodate us on this, it would be appreciated.

Mr. DIXON. Mr. President, may I say to my warm friend from Mississippi that all of us have such great and profound respect for him as the manager of this bill and for the manager on our side, the distinguished Senator from North Dakota [Mr. BURDICK], and I appreciate the expressions of interest in this matter by the Senator from Mississippi. I express the thanks of my colleague [Mr. SIMON] and myself and Representative ED MADIGAN and others on the House side, Representative BRUCE from the affected district and others, and Representaive DURBIN as well. We thank the Senator for his indication that this will have a high priority and will receive his careful evaluation in the conference.

On that basis, Mr. President, we are willing at this time to withdraw this amendment with our profound appreciation for the managers' consideration of the matter in conference.

Mr. COCHRAN. Mr. President, I thank the Senator.

The amendment (No. 776) was withdrawn.

Mr. COCHRAN. 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. COCHRAN. 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. COCHRAN. Mr. President, we have been operating under a unanimous-consent agreement providing that certain amendments would be the only amendments in order to H.R. 3037, the agriculture appropriation bill. All of them have been disposed of except an amendment to be offered by the Senator from Indiana [Mr. QUAYLE], and an amendment to be offered by the Senator from Iowa [Mr. GRASSLEY].

The managers of the bill have been advised that neither Senator QUAYLE nor Senator GRASSLEY intend to call up and offer their amendments. We had been advised by the Senator from Washington [Mr. GORTON], that he had an amendment that he was interested in offering. His amendment is not listed among those amendments that are in order to be offered.

At this point we are prepared to go to third reading. But I do not want to cut anyone off, or to in any way impinge upon the rights of any Senator either under the unanimous-consent agreement or otherwise. It is my purpose in rising to address the Senate now to state that it will be the intention of the managers of the bill, unless otherwise notified by those who are listed in the unanimous-consent agreement, to go on to third reading, and dispose of the bill. If there is any further debate on the bill, of course, Senators are not cut off. We have a right to discuss the provisions of the bill.

But I make that announcement, Mr. President, and say that it is the intention of the manager to go to third reading, unless we are notified that there are other amendments.

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

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

EXECUTIVE SESSION

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate go into executive session to consider the following nominations on the Executive Calendar: under the Navy, Calendar Nos. 372, 373, 374, 375, and 376, under the Judiciary, Calendar Nos. 380 through 386; Calendar No. 387, No. 388, Nos. 389 through 391, No. 392, Nos. 396, 397, and 398, No. 399, Nos. 400 through 406, No. 407, No. 408, Nos. 409 through 413, No. 417, skipping 414, 415, and 416; Calendar Nos. 417, 418, 419, and No. 421.

The PRESIDING OFFICER. Is there objection?

Mr. BYRD. Mr. President, reserving the right to object.

Mr. DOLE. Calendar Nos. 423, 424, 425, 426, and 427; Nos. 428, 429, and 430; Nos. 431, 434, 435, 437, 438, 441, 442, 443, 444, 445, 446, 447, 448, 449.

..., 451, 452, 453, 454, 455, 456, 457, ...8, 459, 460, and 461.

Under the Army, Calendar No. 463 ... all nominations placed on the Sec... ...ary's desk.

Mr. BYRD. Mr. President, reserving ... right to object, if the distinguished majority leader would indulge ..., I wrote a letter to the President ...t year and I also wrote to the Presi...nt in July of this year expressing ...ncern about recess appointments, at ... instructions of the Democratic ...nference. I received no response to ... letters, the last of which, I think, ...s dated July 30 of this year.

I spoke to the distinguished majority ...ader about the matter and indicated ...at the White House had not responded to the letter which I had written at the instruction of the Democratic Conference.

About 1 or 2 days after I had spoken to the distinguished majority leader, I received a response from the White House, for which I was grateful, and for which I thank the majority leader. I am not at all sanguine as to whether or not, but for the majority leader's intervention, the White House would have responded at all.

I had indicated a readiness to discuss the subject of recess appointments with representatives of the White House and on two occasions I had had to cancel such appointments because of business on the floor which kept me occupied. On last Thursday a meeting was arranged in my office with Mr. Fielding and Mr. Friedersdorf. I invited the distinguished majority leader, and he came and was there awhile and then he had to leave.

The representatives who were in my office from the White House, Mr. Friedersdorf and Mr. Fielding, indicated, in response to a question that I asked as to whether or not there were any recess appointments planned during the Columbus Day break, that they knew of none but would double check. Indeed, no such appointments were planned and no recess appointments occurred.

They also, in response to a request that I voiced, indicated that in the future, prior to any recess breaks, the White House would inform the majority leader and me of any recess appointment which might be contemplated during such recess. They would do so in advance sufficiently to allow the leadership on both sides to perhaps take action to fill whatever vacancies that might be imperative during such a break.

As I stated to Messrs. Friedersdorf and Fielding, I did not question or challenge the President's right under the Constitution to fill vacancies that may happen during such a recess; however, I did not feel that the Senate should be circumvented in its constitutional role of advice and consent; that I felt on behalf of my colleagues, there have been entirely too many recess appointments and all to often they had been made in situations which were not of an emergent nature or of a nature that such recess appointments could be justified.

The White House response was satisfactory to me, and that response was made while the distinguished majority leader was present; namely, that he and I would be informed in the future, prior to a recess, if there were any plans to make recess appointments or if there were any offices, the filling of which constituted an emergency or it were imperative that action be taken before the Senate would return from its recess. My colleagues and I thought the responses were satisfactory. I brought them to the attention of my conference earlier today and there seemed to be all-around satisfaction as to the work that had been done and the results that had been produced. Mr. METZENBAUM was present in my office upon that occasion. Mr. INOUYE and Mr. CRANSTON were there—that having been the ad hoc committee which I appointed in conference to work with me on this matter.

Now, on last Thursday, late in the day, following that meeting with administration officials, the distinguished majority leader and I had a colloquy on the Senate floor about the appointments of certain nominees that were on the calendar. I indicated that we on this side were ready to give our approval to 16 out of 17 judgeship nominations that were on the calendar, also to 5,000, perhaps, 5,600—in any event, circa 5,000—military nominations. We were ready to confirm them. I also indicated that we were ready to confirm the nominee for the Ambassadorship to the People's Republic of China. As it turned out, however, that particular nominee had not been cleared on the other side of the aisle.

Mr. DOLE stated that the White House had requested of him that unless all of the nominations on the calendar—with the possible exception of one here or one there, against whom a particular Senator or group of Senators had placed a hold—none should be confirmed. The White House felt that all of the other nominations ought to be cleared and that if all could not be cleared then the White House would not want any to be confirmed as of that date. The indication was that the White House felt that to confirm some and leave others on the calendar would be prejudicial or discriminatory toward those remaining on the calendar.

The majority leader was not, as far as I am concerned, voicing his personal opinion. I think he was voicing the White House's wishes. I do not find any fault with him for that. He had been in touch with the White House and that was the position that they took, that is, all or nothing. So I said, "Well, OK, if that is the way they want it, it is OK with me. We are ready to go forward on 16 out of 17 judges and 5,000 who are military nominations." I also indicated that I, as an agent of my conference, would bring the matter to the attention of the conference today—at that point I said next Wednesday—and I expressed a feeling there would not be any problem with respect to most of the other nominees because our discussions with the White House representatives led to a satisfactory resolution of the matter by which we Democrats had been concerned, namely the recess appointments.

I wish to thank the distinguished majority leader for his courtesies, No. 1, of telling the White House that they ought to answer their mail and, No. 2, in helping to arrange meetings. In every way he has been helpful and understanding.

Now, today I was somewhat amused by the following excerpt from today's White House briefing.

I am reading from the excerpt:

Mr. SPEAKES. Okay. It's our understanding that Senator Byrd, the Minority Leader, is meeting today, perhaps even at this hour, wtih the Democratic Caucus, to discuss whether he will release more than 5,000 "hostages" that he is holding—(laughter)—that one man is holding, that one man is holding, in the United States Senate. These include more than 100 Executive Branch appointees, at a time when we're receiving criticism for not having fully staffed positions in the government. They are holding 17—about 20 judges, when caseloads are backing up in the federal courts, and they are holding 5,000 military promotions, innocent people, who are being denied pay raises——

Q. This is a job for the Delta Force.

Mr. SPEAKES [continuing]. Being denied pay raises and promotions, all because of the whim of one individual sitting up there in Congress, who has put a hold on 'em.

Q. Are you putting a warrant out for Byrd? [Laughter.]

Mr. SPEAKES. When Jesse Helms decided to hold——

Mr. DONALDSON. Yeah, he did.

Mr. SPEAKES [continuing]. A handful of nominees, it was big front page news. When Bob Byrd——

Q. He helped make it so.

Mr. SPEAKES [continuing]. When Bob Byrd decides to—well, what about this?

Mr. PLANTZ. Helms was in the same party as the President.

Mr. SPEAKES. When have you ever heard me stand here and talk about the Minority Leader of the Senate in this fashion?

Mr. WALLACE. About a week ago.

Mr. SPEAKES. One man is taking—and it didn't scratch. It didn't scratch.

Mr. DONALDSON. Is he a terrorist? Are you saying he's a terrorist?

Mr. SPEAKES. One man is holding the entire 5,000 "hostages" in the United States Senate. We call on the Minority Leader, one man, to release these hostages, set them free.

Mr. WALLACE. "Let my people go." [Laughter.]

Mr. SPEAKES. All right, let's see what kind of reporting. A wire guy didn't make a single note, and I expected only the wires to do it. The Post put it on the bottom of the federal page. The Times put it on page A or B-18, wasn't it?

[Several speak at once.]

Mr. SPEAKES. Yes, we do want our Ambassador to China appointed.

Ms. MITCHELL. Helms——

Mr. SPEAKES. It's over 5,000, compared to one.

Q. Thanks.
Q. Let's go.

Mr. President, I realize that President Reagan used to be associated with a television program about the old frontier—"Death Valley Days," but I did not realize that the President was so fond of the program or that period of history that he had returned the White House to the days of frontier communications. Apparently, the news of what happened here in the Senate Chamber last Thursday evening, to which I have alluded earlier, in open view of the world, has not yet reached the White House, 6 days later. Even the pony express could deliver a message faster than that on "Death Valley Days."

I have already discussed the meeting that occurred in my office, and I would close by saying that if there are any "hostages" in this case, they have been held by the White House, in their refusal to allow the distinguished majority leader to proceed on last Thursday. Or, maybe the pony express rider who delivers information to the White House about what happens 16 blocks away in the Capitol, is being held "hostage" somewhere along that wild and wooly frontier route known as Pennsylvania Avenue.

Well, I hope that the administration will be able to find all these today, together with the pony express rider, and I hope that we hear from him soon that the fearsome wilderness passage known as Pennsylvania Avenue has been reopened to allow the vital communications flow on which the most powerful Nation on the face of the Earth must depend.

Mr. President, I ask unanimous consent to have printed in the RECORD letters which I wrote to the President on July 30, 1985, and August 6, 1984, together with the September 19 White House response to my letter, written by Richard A. Hauser, Deputy Counsel to the President; a statement by the principal Deputy Press Secretary as of October 8, 1985; a reprint of the colloquies between the distinguished majority leader and myself on last Thursday; and an editorial which appeared in the New York Times on Thursday, October 10, carrying the caption "Who Has the Power To Appoint?"

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

U.S. SENATE,
OFFICE OF THE DEMOCRATIC LEADER,
Washington, DC, July 30, 1985.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: As the Congress approaches adjournment for the August break, I would like once again to convey my views, and those of the Democratic Conference, on the subject of recess appointments. This same matter was the subject of my letter to you on August 6 of last year when I expressed my deep concern about the number of recess appointments which had been made during our brief July 1984 recess.

The forthcoming August recess should not, in our judgment, be considered the kind of extended recess contemplated by Article III, Section 2, Clause 3, of the Constitution. Rather, recess appointments should be limited to circumstances when the Senate, by reason of a protracted recess, is incapable of confirming a vitally needed public officer. Any other interpretation of the Recess Appointments clause could be seen as a deliberate effort to circumvent the Constitutional responsibility of the Senate to advise and consent to such appointments.

I would therefore ask that you refrain from making any recess appointments during the August break.

Your personal attention to this matter would be appreciated.

Sincerely,

ROBERT C. BYRD.

U.S. SENATE,
DEMOCRATIC POLICY COMMITTEE,
August 6, 1984.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: I am writing to express my deep concern about the number of recent recess appointments and to urge you to refrain from making similar appointments when the Senate is fully capable of exercising its constitutional function of advising and consenting to executive nominations.

The latest in a series of recess appointments was made on July 20, scarcely 72 hours before the Senate reconvened following the July 4 and Democratic Convention recess. At the beginning of the same recess, sixteen recess appointments were made to a number of different federal bodies. In my view, none of the most recent recess appointments were made in the circumstances that induced the Framers to allow for appointments "that may happen during the recess of the Senate". As indicated in a long line of opinions by Attorneys General, presidential powers arising in the event of an adjournment of the Congress are to be determined by the ability of the Senate to perform its functions. In overturning an exercise of the presidential pocket veto power during an abbreviated congressional recess, the Court of Appeals for the District of Columbia Circuit in 1974 observed that "(t)he modern practice of Congress with respect to intra-session adjournments creates neither . . . the hazards (of) long delays (nor) public uncertainty. . . ." At no time has the Senate been out of session long enough to prevent the filling of vacancies which, in the public interest, may not be left open for any protracted period.

In brief, the appointments of Dr. Martha Seger to the Federal Reserve Board, Vice Admiral Lando N. Zech, Jr., to the Nuclear Regulatory Commission, six members of the National Council on the Humanities, and other recent appointments could and should have followed the constitutionally prescribed manner. In the words of the Supreme Court:

"The Appointments Clause could, of course, be read as merely dealing with the etiquette or protocol in describing 'Officers of the United States,' but the drafters had a less frivolous purpose in mind. . . . We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by S 2, cl. 2, of . . . Article (II)."

Over the course of the last three and one-half years, some 80 recess appointments have been made to a wide variety of agencies and commissions. The Senate has demonstrated its willingness to support these selections by subsequently confirming the bulk of the recess appointments.

In the early days of the Republic, a recess was interpreted to mean the period between the first and the second sessions of a Congress. More recently, recess appointments have been made during intra-session recesses of several weeks duration. But the unstated rationale has remained the same. Recess appointments should be made when the Senate is recessed for a protracted period and where the lack of an appointee will seriously hamper the operations of the government.

The line between what is and what is not an extended recess during which an appointment can be made has not been clearly delineated by the courts. Most of the doctrine on the matter has emerged from historical practice and infrequent opinions from the Justice Department. No doubt that line should be more carefully defined at some point in the future.

The occasion for making a recess appointment can be questioned on practical as well as constitutional grounds. Both grounds are involved when a recess appointment is made to evade the proper role of the Senate or to avoid controversy surrounding a nominee.

I am especially concerned about the appointment of Dr. Martha Seger whose nomination is a case in point. At stake is a fourteen-year appointment to what many consider the country's most influential economic body, the institution that controls the money supply, and plays a lead role in regulating the nation's financial system. A July 2, 1984 recess appointment to the Board of Governors of the Federal Reserve System, Dr. Seger's nomination was sent forward only a month earlier on June 2, 1984. The Senate Banking, Housing and Urban Affairs Committee held four days of hearings and favorably reported her nomination on June 28. The Senate then recessed for twenty-three days. The recess appointment was made the following Monday.

I know of no compelling reasons that justify Dr. Seger's appointment on that basis. There are six other sitting Governors on the Federal Reserve Board. Her presence was not required at the July Federal Open Market Committee meeting to make a quorum or to debate policy. Because of doubts regarding her qualifications, Dr. Seger's nomination was highly controversial. All the Democratic Committee members opposed her nomination and several indicated they would oppose her nomination on the floor. A recess appointment sidesteps a full and timely airing of such controversies in a manner that does not, in my view, serve the nation's best interests. And, as you may know, there have been similar objections raised to several of the recess appointments to the National Council on the Humanities.

Because a recess appointee can be removed by a subsequent, differing nomination by the President or rejected by the Senate, there is a real danger that the independence of the appointee could be undermined by his or her recess status. It is just this kind of objection that has been raised to a recent recess appointment to the Nuclear Regulatory Commission. According to press reports, ". . . both officials and critics of the . . . nuclear industry questioned the appointment . . . saying the Commission's ruling would be more credible if its members were confirmed normally." The appointment to the Nuclear Regulatory Commission is rendered all the more questionable because the committee of jurisdiction was not even given an opportunity to hold hearings on the nominee.

I must again emphasize my objection to the excessive use of the recess appointment power, and urge that no recess appointment be made to circumvent the constitutional function of the Senate. Instead, I urge that recess appointments be limited to circumstances when the Senate, by reason of a protracted recess, is incapable of confirming a vitally needed public officer. Existing law gives the Executive more than ample authority to shift personnel about to fill vacancies for temporary periods. Resort to recess appointments in questionable circumstances serves neither the Constitution nor the appointee. It fuels cynicism and builds disrespect for law and deprives the appointee of the national perspective that inheres in senatorial confirmation.

Sincerely yours,

ROBERT C. BYRD.

THE WHITE HOUSE,
Washington, DC, September 19, 1985.

Hon. ROBERT C. BYRD,
U.S. Senate,
Washington, DC.

DEAR SENATOR BYRD: I have been asked to respond to your letter to the President dated July 30, 1985, concerning recess appointments.

In your letter, you expressed the view that the recent August recess "should not * * * be considered the kind of extended recess contemplated by Article III [sic], Section 2, Clause 3, of the Constitution," and that "recess appointments should be limited to circumstances when the Senate, by reason of a protracted recess, is incapable of confirming a vitally needed public officer." Such limitations on the President's power, however, do not appear in the Constitution. Article II, Section 2, Clause 3 of the Constitution simply provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

The courts have rejected the suggestion that the recess appointment power was intended to be used only in rare and exceptional cases. Perhaps the clearest statement may be found in an opinion rejecting a challenge to one of former President Carter's recess appointments:

"There is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity. * * * There is no justification for implying additional restrictions not supported by the Constitutional language. Recess appointments have traditionally not been made only in exceptional circumstances, but whenever Congress was not in session." *Staebler v. Carter*, 464 F. Supp. 585, 597 (D.D.C. 1979).

Your letter also suggests that use of the recess appointment power is somehow an improper circumvention of the advice and consent role of the Senate. We do not share this view. The power to make recess appointments is found in the Constitution, as is the Senate's advice and consent role. As the Supreme Court has stated, "The Constitution * * * must be regarded as one instrument, all of whose provisions are to be deemed of equal validity." *Prout v. Starr*, 188 U.S. 537, 543 (1903). In no way is the provision for Senate confirmation constitutionally superior to the provision for recess appointments.

In conclusion, the decision to make a recess appointment is not made lightly. For example, there were over ninety-seven nominations pending when the Senate recessed in August, but only seven recess appointments were made. The power to make such appointments, however, is an important part of the system of checks and balances crafted by the Framers, and the President would do a disservice to that system and the institution of the Presidency were he to acquiesce in the reading of the Recess Appointments Clause set forth in your letter.

Sincerely,

RICHARD A. HAUSER,
Deputy Counsel
to the President.

STATEMENT BY THE PRINCIPAL DEPUTY PRESS SECRETARY

The President is deeply displeased that 70 key appointments touching virtually every area of the Executive Branch are being deliberately held up by Senate Democratic Leader Robert Byrd. These are Assistant Secretaries, Ambassadors, Federal Circuit and District Judges, and members of important agencies, commissions and boards. Over 5,000 mid-level career military personnel alone are being denied promotions and pay raises. It is the largest backlog of Presidential appointments in modern history.

Senator Byrd has decided to block these and other nominations because of what he terms his "deep concern" about the seven recess appointments made last August.

The President's power to make recess appointments is grounded in the Constitution, and this issue was decided long ago. George Washington made three recess appointments between the sessions of the First Congress. President Carter made 17 direct appointments during temporary Senate breaks, including a Cabinet member. Fifteen recess appointments have been made to the United States Supreme Court, including one sitting Justice.

President Reagan did not evade the Senate's power to confirm. The individuals he appointed had already been nominated before the recent Senate recess—the Senate just hadn't acted on the nominations. And those appointees were renominated when the Senate returned.

The Constitution speaks without equivocation on the power and right of the President to make recess appointments. The courts have held the President has the power. And history dating to the First President confirms it. These individuals stand ready to serve.

The President respectfully requests Senator Byrd's cooperation in freeing up his nominations without further delay.

[From the CONGRESSIONAL RECORD, Oct. 10, 1985]

EXECUTIVE CALENDAR

Mr. DOLE. Mr. President, earlier today at the request of the distinguished minority leader or the suggestion of the distinguished minority leader, I attended a meeting in his office concerning nominations on the Executive Calendar, and present were Senator Byrd, myself, Senator Inouye, Senator Ford, Senator Thurmond, Senator Metzenbaum, and White House representative Mr. Friedersdorf, and the counsel at the White House, Mr. Fielding.

The discussion concerned recess appointments, and it seemed to me that we had reached some general agreement that there would be notice given to the majority and minority leaders prior to the time of a recess and enough in advance so that if we had comments on any of the recess appointments which would be made, both minority and majority leaders would have an opportunity to comment on those potential recess appointments.

I believe that the meeting was satisfactory, and I would hope that we would now be in position to clear the nominations on the Executive Calendar, including military and judicial and all other nominations except in cases where we are waiting further information on a certain nominee or certain Senators have asked for additional information or have asked to hold a nomination.

I know on this side a number of Senators have a hold on the nomination of Winston Lord to be Ambassador to the People's Republic of China. There may be similar requests on the other side of the aisle. But it would be my hope that we might be able to take action on the nominations.

Mr. MOYNIHAN. Mr. President, will the majority leader yield for a comment?

Mr. DOLE. Yes.

Mr. MOYNIHAN. Mr. President, the Vice President of the United States is to visit the People's Republic of China. For him to do so without being accompanied by the President's newest nominee for the ambassadorship to China would be, in my view, a disservice to our country.

The Vice President has an opportunity to introduce Mr. Lord as a friend of the President, as he is, a representative of our country, as he would be, and not to do that seems to me a serious disservice to our Nation.

And I hope this can be done.

Mr. DOLE. Mr. President, I share the view expressed by the Senator from New York. I understood there is still a chance that might be resolved today, that the President had taken a personal interest in the matter, and was going to contact Senators on this side.

But I share the view that it does not reflect well on the system, that the Vice President arrives and we have no ambassador.

Mr. BYRD. Mr. President, the following calendar items under the Judiciary have been approved on this side of the aisle. As a matter of fact, all nominees on the calendar listed under the Judiciary have been cleared on this side of the aisle, with the exception of one, and that would be Calendar Order No. 379 on page 3. The rest, Calendar Order Nos. 380, 381, 382, 383, 384, 385, 386, 396, 397, 398, 425, 426, 427, 449, 450, and 451—in other words 16 out of the 17 nominations under the Judiciary—are cleared on this side.

Additionally, Calendar No. 436, Winston Lord of New York to be Ambassador, Extraordinary and Plenipotentiary of the United States of America to the People's Republic of China has been cleared; all nominations placed on the Secretary's desk in the Air Force, Army, Coast Guard, Marine Corps, Navy—a little over 5,000—are cleared on this side of the aisle.

Mr. DOLE. Mr. President, I thank the distinguished minority leader. I earlier had indicated to the White House representatives that there might be a possibility of confirming the military, and maybe all or nearly all off the judiciary. As I understand it, a call was then made to Air Force One which is coming back from Chicago. The Chief of Staff talked with the President. The President said that he wanted his nominees, they were all important, and he felt there was no reason to hold any of the nominees except where there were specific objections. I was advised that unless that could be accommodated they would all remain on the executive calendar.

Mr. BYRD. Mr. President, Mr. Friedersdorf called me back after the meeting in my office, and indicated he had been in touch, I believe, with Mr. Reagan. My understanding off what Mr. Friedersdorf said was that the President was pleased that the nominees for the judiciary and the military were going to be cleared, and that he would hope that all

the other nominees on the calendar could also be cleared. And I told Mr. Friedersdorf that I was an agent of the conference, that those nominees which we had indicated in our meeting in my office earlier in the afternoon were being cleared, and that it would be necessary for me to report back to my conference with respect to the remaining nominees. So I should think that I would have some further word when my conference meets at sometime on Wednesday of next week. It usually meets on Tuesday. But inasmuch as there will be no rollcall votes on Tuesday, I doubt that our conference attendance would justify a meeting. We probably would not have a quorum.

In any event, we will have a conference on Wednesday, and at that time I will make a report to the conference. I would hope that the rest of the nominees can be cleared at that time. The ad hoc group that I appointed earlier in conference to advise me on the nominations proposed that the judiciary members be cleared, and that the military nominations—numbering I believe about 5,000—be cleared. And that is why I have been pleased to announce their clearance to the distinguished majority leader.

Mr. DOLE. I again thank the distinguished minority leader. I double checked. I again called after the President had landed, and they were in the White House. I called the Chief of Staff, Mr. Regan, to ask him again if it had been discussed with the President. He said it had. The President felt very strongly that these nominations had been available for some time, been on the calendar, and if no one had raised objections—they have in some cases—they felt that it would discriminate against a number of people who have done nothing but wait and wait if we started selecting out certain judicial or military nominees, and leave others—whether it be the Commodity Futures Trading Commission, or the Department of Energy, or a number of others. I guess the point is they feel they are all equally as important, and they would rather not do it on a piecemeal basis unless there are specific objections to one or more of the nominations. So perhaps we should take it up again next week.

Mr. BYRD. Mr. President, may I ask, is the nomination of Winston Lord cleared on the other side? It is cleared on this side.

Mr. DOLE. That is the one that we have not cleared on this side. There is specific objection. There was to be a phone call to certain Senators on our side. I understand that phone call was made but it was not completed. So that nomination is being held up on this side. I think one of those who was holding is the Senator from South Carolina, who just removed his hold. There could be others.

Mr. BYRD. Mr. President, the Senate often confirms some nominees very quickly and just as often leaves other nominees on the calendar to another day. They are not being discriminated against. However, it is entirely up to the majority leader.

The White House will be taking the wrong position in thinking that other nominations on the calendar are being discriminated against just because they have not been cleared tonight.

As I say, I will be glad on Wednesday to take the matter up with my conference and through the regular procedures, try to get cleared the remaining nominations on the calendar. I do not anticipate at the moment any great problem in that regard.

If the White House feels that way, it is not the majority leader's fault nor is it mine. We will just leave it the way they want it.

We did have a good meeting, may I say, with Mr. Fielding and Mr. Friedersdorf. The majority leader was able to attend a part of the meeting. He was not able to stay for the entire meeting.

At the meeting there was a good understanding, and I feel certain that come Wednesday there may not be any problem.

I would hope that the nominees who have been cleared for tonight can be confirmed, but I cannot do anything about that if the majority leader feels he cannot go forward with them because the White House has asked him not to do so.

[From the New York Times, October 10, 1985]

WHO HAS THE POWER TO APPOINT

"The President is deeply displeased" with Senate Democrats for holding up 70 appointments to executive and judicial posts, says a spokesman. Well, Robert Byrd, the minority leader, is displeased too. He's blocking some Senate confirmations because the President keeps ignoring his plea to stop making appointments when Congress is in brief recess.

President Reagan, having tried the Senate's patience with his misuse of the recess-appointment power, would be well advised to seek an accommodation rather than confrontation.

The Constitution lets the President "fill up all vacancies that may happen during the recess of the Senate." These recess appointments expire at the end of the following session of Congress, ousting the officeholders unless they are by then nominated and confirmed.

That provision, in Senator Byrd's judgment, was designed for the long Congressional absences common early in the nation's history. Plainly they don't apply to the vacation breaks of today's year-round Congress. They certainly should not be used to circumvent the Senate's constitutional duty to advise on and consent to appointments.

That is what Mr. Reagan tried to do concerning the Legal Services Corporation. He used the recess appointment power 40 times in an attempt to destroy Legal Services by appointing directors unacceptable to the Senate to run it into the ground. He has, additionally, used the recess-appointment authority almost casually, 146 times in five years.

Senator Byrd's specific protest concerns seven appointments made in August, following a similar ruse during last year's summer recess. The seven are not crucial. They fill vacancies at a safety review commission, the Agriculture Department, a farm agency and the United Nations delegation.

This contest between two branches can't be resolved by the third; courts can only confirm that each side has considerable power to check the other. Mr. Reagan could make his cause more appealing by finally acknowledging that the power to fill vacancies is not his alone. He may not like the Senate's advice, but he is bound to secure its consent.

Mr. BYRD. Mr. President, I apologize to the distinguished majority leader for not responding immediately and to the point to his request. I am now ready to respond.

Mr. President, cleared on this side of the aisle are the following calendar order numbers: 372, 373, 376, 380, 381, 382, 383, 384, 385, 386—in other words, all nominees on pages 2 and 3 of the executive calendar, with the exception of Calendar Order No. 379.

On pages 4 and 5, all nominees have been cleared on this side of the aisle—namely, Calendar Order Nos. 387, 388, 389, 390, 391, 392, 394, 395.

All nominees on pages 6 and 7: Calendar Order Nos. 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407.

All nominees on pages 8 and 9: Calendar Order Nos. 407, 408, 409, 410, 411, 412.

On page 10: 412 and 413.

On page 11: Calendar Order Nos. 417, 418, 419.

On page 12: Calendar Order Nos. 420, 421, and 423.

On page 13: All nominees—424, 425, 426, 427, 428, 429, 430.

On page 14: 431; skip 433. Cleared are 434, 435, 436, 437.

On page 15: Calendar Order [illegible] 438, 439, 440, 441.

On page 16, Calendar Order No. 442, 443, 444, 445, 446, 447, 448.

On page 17, Calendar Order Nos. 449, 450, 451, 452, 453, 454, and 455.

All nominees on page 18, Calendar Order Nos. 456, 457, 458, 459, 460, and 461. Delete for the moment, pass over 462.

I said all nominees on page 18. I was in error. All except 462.

Then on page 19, all nominees, Calendar Order Nos. 463 and 464.

Mr. PROXMIRE will have a statement that he will make in connection with 464.

On page 20 and page 21, all nominations placed on the Secretary's desk in the Air Force, Army, Coast Guard, Marine Corps, and Navy.

I am glad to respond to the distinguished majority leader's request. I am glad that the stumbling block to confirmations of these nominees has been removed—rather late in the instances to which I addressed my remarks earlier which occurred on last Thursday when the White House said all or nothing after they had gone public and had been critical of the Senate Democrats for having held up some appointments.

All is well that ends well, and I think it has ended well, so all is well.

Mr. DOLE. Mr. President, I wonder if the distinguished Senator from Wisconsin might wish to speak to Calendar No. 464, William Seidman.

Mr. PROXMIRE. I would like to speak to that. Is this the time to offer that?

Mr. DOLE. Yes.

Mr. PROXMIRE. I thank the majority leader.

NOMINATION OF WILLIAM SEIDMAN TO THE FDIC

Mr. PROXMIRE. Mr. President, I rise in opposition to the nomination of Mr. William Seidman to the Board of Directors of the Federal Deposit Insurance Corporation. Mr. Seidman is a man of considerable ability and talent with an excellent educational and business background. He has served with distinction in the Ford administration. In many ways, the Government will be fortunate to get a man of his ability and experience. Nonetheless, I will reluctantly vote against this nomination.

...ny?

...reasons for opposing the nomi...on are twofold: First, his former ...unting firm, Seidman and Seid... was strongly criticized by the ...C in 1976 for not fulfilling its re...nsibilities in the manner required ...the standards of the accounting ...fession. As the firm's managing di...tor when the failures occurred, Mr. ...man must bear ultimate responsi...ty. Second, he was deficient in re...nding to a question from Chairman ...RN asking whether he was ever de...ed by the SEC in connection with ... accounting firm's difficulties. A ...re detailed explanation of these ... incidents follows.

THE 1976 SEC REPORT

In 1974, the SEC began an investiga...n of fraudulent activity on the part ... several of Seidman and Seidman cli...ts including Equity Funding, Omni... and SaCom. The collapse of Equity ...nding in 1973 involving $120 million ...fictitious assets was one of the ...ajor financial scandals of the decade. ...o employees of Seidman and Seid...an were eventually convicted of ...riminal fraud for their role in the ...uity Funding scandal. These em...oyees were formerly with a smaller ...ounting firm, Wolfson and Weiner, ...quired by Seidman and Seidman in ...rly 1972 along with the Equity Fund ...ccount managed formerly by Wolfson ...d Weiner.

The SEC eventually expanded its in...stigation to include an investigation ... Seidman and Seidman itself. In ...976, the SEC reached a settlement ...reement with Seidman and Seid...an. Without admitting or denying ...ilt, the firm agreed to appoint a spe...al committee to review its auditing ...actices and to implement any rea...nable recommendations of the spe...al committee. The firm also agreed ...ot to accept any new auditing clients ...r 6 months and to submit to another ...EC inspection following the report of ...e special committee.

The SEC release announcing the set...ment agreement with Seidman and ...idman includes the following deter...inations by the SEC: (SEC release ...o. 196, Sept. 1, 1976; Exchange Act ...elease No. 12752)

...idman and Seidman did not fulfill its re...sibilities in the manner required by the ...andards of the profession.

Seidman and Seidman's conduct repre...ented a breach of its ethical and profes...nal responsibilities in practicing before ...e Commission.

Seidman and Seidman failed to undertake ...reasonable investigation prior to the com...nation of the firms and failed to properly ...view practices and professional qualifica...ns of staff members of the Wolfson/...ner office or to adequately inquire into ...tors bearing on their independence from ...nts. After the combination, Seidman and ...idman failed to take reasonable steps to ...sure the maintenance of professional ...ent review practices and independence in ...nnection with former Wolfson/Weiner cli...ts.

There is no evidence that Mr. William Seidman or other partners or employees of Seidman and Seidman—other than the convicted former Wolfson/Weiner personnel—had any personal knowledge of the fraudulent activities at Equity Funding. Nor is there any indication of any other troubles with the SEC on the part of Seidman and Seidman. Nonetheless, Mr. Seidman was the managing director of the firm during the time the SEC's criticisms were directed. As managing director, I believe the ultimate responsibility for failing to maintain proper standards must rest on his shoulders.

COMMITTEE REQUEST FOR INFORMATION

Following his nomination hearing before the Senate Banking Committee, Mr. Seidman was given the following written question by Mr. GARN.

QUESTION. Were you ever deposed by the SEC in connection with this case? Could you tell us what the substance of your testimony was? Was this the only time you were deposed in this matter?

ANSWER. I do not recall that I was ever deposed in the SEC investigation of Equity Funding. I believe that my testimony in the stockholder actions v. S&S, et al., is the only testimony I gave in the Equity Funding matter. Seidman & Seidman states that they can find no other deposition in their records.

In fact, Mr. Seidman was deposed twice by the SEC in connection with its investigation of Omni-RX and SaCom. The deposition also covered Equity Funding and went at length into the circumstances surrounding the purchase of Equity Funding's former accounting firm, Wolfson and Weiner, by Seidman and Seidman. The first deposition was taken on October 2 of 1974 and the second on August 4, 1975. The entire deposition runs 137 pages. It is true that Mr. Seidman qualified his negative answer with the statement that he did not recall any deposition. Nonetheless, considering the fact that he was responding to a committee of the U.S. Senate in connection with his nomination to a responsible position within the Federal Government, I believe he should have made a greater effort to ensure that his reply to this question was accurate and complete. I feel strongly on this point even though a review of the SEC deposition does not implicate Mr. Seidman in any fraudulent activity or indicate personal knowledge of such activity.

Under the Constitution, the Senate has an important duty in the nomination process. I take that responsibility seriously, especially for independent regulatory agencies such as the FDIC which are not under the direct supervision of the President. By his careless response to the committee's inquiry, I believe Mr. Seidman demonstrated a less than full appreciation of the seriousness of the advise and consent process. He had ample time to refresh his memory and search his records in response to the committee's inquiry and yet he failed to do so. I know of no better way to express my deep concern on this failure other than to vote no on the nomination.

Mr. President, I will do so.

Mr. President, I yield the floor.

Mr. DOLE. Mr. President, I thank the distinguished colleague from Wisconsin and I also thank the distinguished minority leader.

I think we then do have an agreement now that we can follow on recess appointments. It did result from the meeting in the minority leader's office with Mr. Fielding, White House Counsel, Mr. Friedersdorf, Assistant to the President for Legislative Affairs, and I would hope that we can avoid any future problems.

Obviously from time to time Senators have strong feelings on a nominee and they have a perfect right to express those concerns. In fact, even after the minority leader's efforts today there will still be six nominees who are being held on this side by different Senators for different reasons.

Again, as I understand it, we may be able to clear two or three additional nominees if not today, tomorrow on the Senator's side.

Mr. BYRD. Mr. President, I call attention to the one nominee on which I either misstated myself or an objection came in following.

Mr. DOLE. That is Calendar No. 439?

Mr. BYRD. 439, yes.

Mr. DOLE. Yes; we will withhold that one.

Mr. BYRD. Yes; so I cannot clear that.

I have since, however, been able to clear two which I did not name earlier, Calendar No. 414 and Calendar No. 415, the Commodity Future Trading Commission and the Farm Credit Administration, respectively.

Mr. DOLE. Then I would ask unanimous consent that Calendar No. 414 and 415 be added.

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

Mr. DOLE. Also, I think the distinguished minority leader pointed out Calendar No. 440 is now cleared, is that correct, but not Calendar No. 439?

Mr. BYRD. Not Calendar No. 439, that is correct; 440, yes.

Mr. DOLE. And also I add to my request Calendar No. 464, which was not being held but just awaiting comment by the distinguished Senator from Wisconsin.

Mr. BYRD. The distinguished majority leader is correct.

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

Mr. DOLE. Mr. President, I ask unanimous consent that all Members may be entitled to insert statements in support of particular nominees at this point.

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

Mr. DOLE. Mr. President, I would also indicate that Calendar Order Nos. 394, 395, 420, and 436, which have been cleared by the minority leader, have not been cleared on this side, so

he might want to make that notation on his list.

Mr. BYRD. I thank the majority leader.

Mr. DOLE. Mr. President, I ask unanimous consent that the nominations just identified be considered en bloc and confirmed en bloc.

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

The nominations considered and confirmed en bloc are as follows:

IN THE NAVY

The following-named officer for appointment as Vice Chief of Naval Operations pursuant to title 10, United States Code, section 5085:

Vice Adm. James B. Busey IV, 332-26-3214/1310, U.S. Navy.

The following-named officer having been designated for command and other duties of importance and responsibility within the contemplation of title 10, United States Code, section 601, for appointment to the grade of admiral while so serving:

Vice Adm. James B. Busey IV, 332-26-3214/1310, U.S. Navy.

The following-named officer, under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be admiral

Adm. Lee Baggett, Jr., 425-40-6909/1110, U.S. Navy.

The following-named officer, under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be admiral

Vice Adm. Arthur S. Moreau, Jr., 228-32-2434, U.S. Navy.

THE JUDICIARY

Ralph B. Guy, Jr., of Michigan, to be U.S. circuit judge for the sixth circuit.

Stephen H. Anderson, of Utah, to be U.S. circuit judge for the 10th circuit.

Ferdinand F. Fernandez, of California, to be U.S. district judge for the central district of California.

Glen H. Davidson, of Mississippi, to be U.S. district judge for the northern district of Mississippi.

Robert B. Maloney, of Texas, to be U.S. district judge for the northern district of Texas.

David Bryan Sentelle, of North Carolina, to be U.S. district judge for the western district of North Carolina.

Brian B. Duff, of Illinois, to be U.S. district judge for the northern district of Illinois.

DEPARTMENT OF COMMERCE

Donald James Quigg, of Virginia, to be Commissioner of Patents and Trademarks.

DEPARTMENT OF DEFENSE

Robert B. Sims, of Tennessee, to be an Assistant Secretary of Defense.

IN THE NAVY

The following-named officer to be placed on the retired list in the grade indicated under the provisions of title 10, United States Code, section 1370:

To be admiral

Adm. Sylvester R. Foley, Jr., 573-26-0943/1310, U.S. Navy.

The following-named commodore of the line of the Navy for promotion to the permanent grade of rear admiral, pursuant to title 10, United States Code, section 624, subject to qualification therefor as provided by law:

RESTRICTED LINE—SPECIAL DUTY OFFICER (CRYPTOLOGY)

Charles Francis Clark.

The following-named captains of the U.S. Navy for promotion to the permanent grade of commodore, pursuant to title 10, United States Code, section 624, subject to qualifications therefor as provided by law:

MEDICAL CORPS

Lewis Mantel.

SUPPLY CORPS

James Edward Miller.
James Elton Eckelberger.
William Egbert Powell, Jr.

CHAPLAIN CORPS

Alvin Berthold Koeneman.

CIVIL ENGINEER CORPS

Benjamin Franklin Montoya.

DEPARTMENT OF JUSTICE

Richard Kennon Willard, of Virginia, to be an Assistant Attorney General.

THE JUDICIARY

Edmund V. Ludwig, of Pennsylvania, to be U.S. district judge for the eastern district of Pennsylvania.

Stephen V. Wilson, of California, to be U.S. district judge for the central district of California.

David Sam, of Utah, to be U.S district judge for the district of Utah.

COPYRIGHT ROYALTY TRIBUNAL

J.C. Argetsinger, of Virginia, to be a Commissioner of the Copyright Royalty Tribunal for the term of 7 years.

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

William Barclay Allen, of California, to be a member of the National Council on the Humanities.

Mary Joseph Conrad Cresimore, of North Carolina, to be a member of the National Council on the Humanities.

Leon Richard Kass, of Illinois, to be a member of the National Council on the Humanities.

Kathleen S. Kilpatrick, of Connecticut to be a member of the National Council on the Humanities.

Robert Laxalt, of Nevada, to be a member of the National Council on the Humanities.

James V. Schall, of California, to be a member of the National Council on the Humanities.

George D. Hart, of California, to be a member of the National Council on the Humanities.

IN THE AIR FORCE

The following officers for appointment in the U.S. Air Force to the grades indicated, under the provisions of section 624, title 10 of the United States Code:

To be major general

Brig. Gen. Stuart E. Barstad, 392-24-1240FR, U.S. Air Force, chaplain.

To be brigadier general

Col. John P. McDonough, 021-20-5989FR, U.S. Air Force, chaplain.

IN THE ARMY

The following-named Army Medical Service Corps officer for appointment in the U.S. Army to the grade indicated under the provisions of title 10, United States Code, sections 611(a) and 624:

To be permanent brigadier general

Col. Walter F. Johnson, III, 247-62-9936, Medical Service Corps, U.S. Army.

IN THE NAVY

The following-named officer to be placed on the retired list in the grade indicated under title 10, United States Code, section 1370:

To be vice admiral

Vice Adm. Richard A. Miller, 150-18-2838/1310, U.S Navy.

The following named officer, under the provisions of title 10, United States Code, section 711, to be reassigned in his current grade to be senior Navy member of the Military Staff Committee of the United Nations and to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

Vice Adm. Donald S. Jones, 391-22-4694/1310, U.S. Navy.

The following-named officer, under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under Title 10, United States Code, section 601:

To be vice admiral

Rear Adm. Joseph B. Wilkinson, Jr., 467-42-0315/1310, U.S. Navy.

The following-named captains of the Reserve of the U.S. Navy for permanent promotion to the grade of commodore in the line and staff corps, as indicated, pursuant to the provisions of title 10, United States Code, section 5912:

UNRESTRICTED LINE OFFICERS

John William Gates, Jr.
Stephen Gordon Yusem.
Richard Squier Fitzgerald.
Samuel Edward McWilliams.

ENGINEERING DUTY OFFICER

Paul Keith Arthur.

MEDICAL CORPS OFFICERS

Robert Layman Summitt.
Robert Conrad Nuss.

SUPPLY CORPS OFFICER

James Hock Mayer.

The following-named officer to be placed on the retired list in the grade indicated under the provisions of title 10, United States Code, section 1370:

To be vice admiral

Vice Adm. Thomas R. Kinnebrew, 254-44-6391/1110, U.S. Navy.

COMMODITY FUTURES TRADING COMMISSION

Susan Meredith Phillips, of Iowa, to be a Commissioner of the Commodity Futures Trading Commission.

FARM CREDIT ADMINISTRATION

Larry L. DeVuyst, of Michigan, to be a member of the Federal Farm Credit Board, Farm Credit Administration.

INTERNATIONAL ATOMIC ENERGY AGENCY

The following-named persons to be the Representative and Alternate Representatives of the United States of America to the 29th session of the General Conference of the International Atomic Energy Agency:

Representative:

Danny J. Boggs of Kentucky.

Alternate Representatives:

Richard T. Kennedy of the District of Columbia.

Richard J. Palladino of Pennsylvania.

Bruce Chapman of Washington.

DEPARTMENT OF TRANSPORTATION

Leo C. McKenna, of New York, to be a member of the Advisory Board of the Saint Lawrence Seaway Development Corporation.

DEPARTMENT OF STATE

Jean Broward Shevlin Gerard, of New York, to be Ambassador Extraordinary and

Plenipotentiary of the United States of America to Luxembourg.

UNITED NATIONS

The following-named persons to be Representatives and Alternate Representatives of the United States of America to the 40th session of the General Assembly of the United Nations:

Representatives:

Vernon A. Walters of Florida.

Herbert Stuart Okun of the District of Columbia.

Daniel A. Mica, U.S. Representative from the State of Florida.

Gerald B. H. Solomon, U.S. Representative from the State of New York.

John Davis Lodge of Connecticut.

Alternate Representatives:

Patricia Mary Byrne of Ohio.

Hugh Montgomery of Virginia.

Joseph Verner Reed of New York.

Robinson Risner of Texas.

INTER-AMERICAN FOUNDATION

Elliott Abrams, of the District of Columbia, to be a member of the Board of Directors of the Inter-American Foundation.

AFRICAN DEVELOPMENT FOUNDATION

Mark L. Edelman, an Assistant Administrator of the Agency for International Development, to be a member of the Board of Directors of the African Development Foundation.

THE JUDICIARY

David A. Nelson, of Ohio, to be U.S. circuit judge for the sixth circuit.

James L. Ryan, of Michigan to be U.S. circuit judge for the sixth circuit.

Henry T. Wingate, of Mississippi, to be U.S. district judge for the southern district of Mississippi.

DEPARTMENT OF JUSTICE

Brian P. Joffrion, of Louisiana, to be U.S. Marshal for the western district of Louisiana for the term of 4 years.

Stepehn M. McNamee, of Arizona, to be U.S. attorney for the district of Arizona for the term of 4 years.

Patrick M. McLaughlin, of Ohio, to be U.S. attorney for the northern district of Ohio for the term of 4 years.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Marshall Jordan Breger, of the District of Columbia, to be chairman of the Administrative Conference of the United States for the term of 5 years.

NATIONAL CREDIT UNION ADMINISTRATION

Elizabeth Flores Burkhart, of Texas, to be a member of the National Credit Union Administration Board for the term of 6 years.

DEPARTMENT OF STATE

Patricia Mary Byrne, of Ohio, a career member of the Senior Foreign Service, class of Minister-Counselor, to be Deputy Representative of the United States of America in the Security Council of the United Nations, with the rank of Ambassador.

Hugh Montgomery, of Virginia, to be the Alternate Representative of the United States of America for Special Political Affairs in the United Nations, with the rank of Ambassador.

Herbert Stuart Okun, of the District of Columbia, a career member of the Senior Foreign Service, class of Minister-Counselor, to be the Deputy Representative of the United States of America to the United Nations, with the rank and status of Ambassador Extraordinary and Plenipotentiary.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Bill D. Colvin, of Virginia, to be Inspector General, National Aeronautics and Space Administration.

U.S. SENTENCING COMMISSION

Stephen G. Breyer, of Massachusetts, to be a member of the U.S. Sentencing Commission for a term of 2 years.

Paul H. Robinson, of New Jersey, to be a member of the U.S. Sentencing Commission for a term of 2 years.

Michael K. Block, of Arizona, to be a member of the U.S. Sentencing Commission for a term of 4 years.

Helen G. Corrothers, of Arkansas, to be a member of the U.S. Sentencing Commission for a term of 4 years.

George E. MacKinnon, of Maryland, to be a member of the U.S. Sentencing Commission for a term of 4 years.

Ilene H. Nagel, of Indiana, to be a member of the U.S. Sentencing Commission for a term of 6 years.

William W. Wilkins, Jr., of South Carolina, to be a member of the U.S. Sentencing Commission for a term of 6 years.

William W. Wilkins, Jr., of South Carolina, to be chairman of the U.S. Sentencing Commission.

THE JUDICIARY

Alan H. Nevas, of Connecticut, to be U.S. district judge for the district of Connecticut.

Paul N. Brown, of Texas, to be U.S. district judge for the eastern district of Texas.

Alan A. McDonald, of Washington, to be U.S. district judge for the eastern district of Washington.

DEPARTMENT OF JUSTICE

William A. Maddox, of Nevada, to be U.S. attorney for the district of Nevada for the term of 4 years.

Roger Hilfiger, of Oklahoma, to be U.S. attorney for the eastern district of Oklahoma for the term of 4 years.

DEPARTMENT OF LABOR

Roger Dale Semerad, of Maryland, to be an Assistant Secretary of Labor.

NATIONAL LABOR RELATIONS BOARD

James M. Stephens, of Virginia, to be a member of the National Labor Relations Board for the term of 5 years.

NATIONAL CREDIT UNION ADMINISTRATION

Roger William Jepsen, of Iowa, to be a member of the National Credit Union Administration Board.

ENVIRONMENTAL PROTECTION AGENCY

Lawrence J. Jensen, of Virginia, to be an Assistant Administrator of the Environmental Protection Agency.

Jennifer Joy Manson, of Virginia, to be an Assistant Administrator of the Environmental Protection Agency.

NATIONAL SCIENCE FOUNDATION

Craig C. Black, of California, to be a member of the National Science Board, National Science Foundation.

Charles L. Hosler, of Pennsylvania, to be a member of the National Science Board, National Science Foundation.

William J. Merrell, Jr. of Texas, to be an Assistant Director of the National Science Foundation.

IN THE ARMY

The following officers for appointment as Reserve commissioned officers in the Adjutant General's Corps, Army National Guard of the United States, Reserve of the Army, under the provisions of title 10, United States Code, Sections 593(a) and 3392:

To be major general

Brig. Gen. Edward D. Baca, 525-74-2555.

Brig. Gen. Alfredo J. Mora, 582-66-8387.

Brig. Gen. Ernest R. Morgan, 225-38-9199.

Brig. Gen. Nathaniel G. Troutt, 428-38-1553.

FEDERAL DEPOSIT INSURANCE CORPORATION

L. William Seidman, of Arizona, to be a member of the Board of Directors of the Federal Deposit Insurance Corporation for a term of 6 years.

NOMINATIONS PLACED ON THE SECRETARY'S DESK IN THE AIR FORCE, ARMY, COAST GUARD, MARINE CORPS, NAVY

Air Force nominations beginning Theodore M. Saho, and ending James M. Kinsella, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Air Force nominations beginning Charles D. Ables, and ending Kenneth W. Welsh, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Air Force nominations beginning Maj. Dennis M. Anderson, and ending Maj. John H. Elledge, Jr., which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Air Force nomination of James M. Kinsella, which was received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Air Force nominations beginning Raymond A. Abole, and ending Daniel R. Zink, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Air Force nomination of Lt. Col. Richard O. Covey, which was received by the Senate and appeared in the CONGRESSIONAL RECORD of September 11, 1985.

Air Force nominations beginning Maj. John M. Lounge, and ending Maj. James D. Vanhoften, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 20, 1985.

Army nominations beginning William F. Norris, and ending Loraine G. Goodman, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Army nominations beginning Johnny R. Abbott, and ending Donald B. Zamora, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Army nominations beginning Marc A. Abramowitz, and ending Henry J. Zielinski, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 16, 1985.

Army nominations beginning William F. Reade, and ending James L. Yates, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 17, 1985.

Army nominations beginning Jon W. Day, and ending Gary B. Williamson, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 20, 1985.

Army nominations beginning Henry W. Adams, and ending Joseph A. Siegel, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 20, 1985.

Army nominations beginning Giorgio S. Tureila, and ending William J. Howard III which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 20, 1985.

Coast Guard nominations beginning Thomas P. Vieten, and ending Neal D. Shadix, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 16, 1985.

Marine Corps nominations beginning Paul D. Allen, Jr., and ending Robin F. Wirching, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of July 30, 1985.

Marine Corps nomination of James M. Johnson, which was received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Marine Corps nominations beginning Harold D. Jones, and ending Wellington Y. Wneaton, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Navy nominations beginning Robert P. Burroughs, and ending Walter P. Threlkeld, Jr., which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Navy nominations beginning Nicholas Sabalos, and ending George J. Thielemann III, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Navy nominations beginning Orlando A. Alfrec, and ending James W. Crawford, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 9, 1985.

Navy nominations beginning Donald Jacob Beyer, Jr., and ending Edwin Frank Zupinski, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of September 11, 1985.

Navy nominations beginning Robert A. Fabrini, and ending Lewis L. Ware, which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD of October 2, 1985.

Mr. DOLE. Mr. President, I move to reconsider the vote by which the nominations were confirmed.

Mr. BYRD. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. DOLE. Mr. President, I ask unanimous consent that the President be immediately notified that the Senate has given its consent to these nominations.

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

NOMINATION OF GLEN H. DAVIDSON, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Mr. COCHRAN. Mr. President, it gives me great pleasure to endorse the Senate Judiciary Committee's recommendation of Mr. Glen H. Davidson for confirmation as U.S. district judge for the northern district of Mississippi.

I was honored to have recommended this fine young attorney to the President for this position, and I urge the Senate to support his nomination.

Glen Davidson is eminently qualified for service on the Federal bench. He is a graduate of the University of Mississippi, where he earned both his undergraduate and law degrees. His experience as an attorney includes both public service and private practice, civil and criminal cases, in Federal and State courts.

Mr. Davidson's career includes 3 years active duty in the U.S. Air Force Judge Advocate Corps, where he earned the rank of captain. For a number of years, he was in private law practice in Tupelo, MS. In the public sector, he served terms as city prosecutor, assistant district attorney, and later, as district attorney for the First Judicial District of Mississippi. In 1973, he formed a partnership that resulted in extensive trial practice experience. In 1981, I was honored to recommend Mr. Davidson to the President to serve as U.S. attorney for the northern district of Mississippi, and he has served in that position with distinction.

In addition to his exemplary performance as an attorney and as a public servant, the nominee has been a leader in community groups such as the Boy Scouts and the chamber of commerce. He has a keen intellect and a willingness to work hard and effectively in any job he undertakes.

Glen Davidson possesses the sense of fairness, good judgement, judicial temperament, and solid reputation among his fellow citizens which will enable him to be an outstanding Federal judge.

I commend the chairman and the Judiciary Committee for their prompt approval of this nomination.

NOMINATION OF ROBERT B. SIMS, TO BE ASSISTANT SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS

Mr. SASSER. Mr. President, I am pleased to rise today to endorse the nomination of Mr. Robert B. Sims to be Assistant Secretary of Defense for Public Affairs. Bob Sims is a native of Alamo, TN. Since October 1983, he has served at the White House as Deputy Press Secretary for Foreign Affairs.

Bob Sims' career in journalism began in the printing rooms of the Crockett County Times, then owned by his father. He started at the bottom and worked his way to the top. The insights and perspectives gained from experiences in all aspects of journalism have served him well over his career in the Government as a public affairs officer. He understands the ways of reporters and appreciates the role a free press plays in a democratic society.

Bob Sims is a professional military officer. He joined the Navy in 1958 and retired in 1984 with the rank of captain. His service in the Navy has been primarily in the public affairs field, including positions as deputy chief of information for the Navy in 1978 to 1981 and special assistant for public affairs to the Secretary of the Navy from 1974 to 1978. This military service provides valuable insight into the operation of the military.

Finally, Mr. President, Bob Sims is a scholar and an author. He holds a masters degree in both political science and journalism from the University of Wisconsin. He was a Rotary Foundation Fellow at the University of Sydney, Australia. And, he is a graduate of the National War College. While at the war college he wrote "The Pentagon Reporters" a book describing the reporters who cover the Pentagon. The purpose of his book was to enlighten Government officials on the news services and reporters who cover the Pentagon, and the role played by the press.

Not only will the Government be well served by Bob Sims, but the press knows that it has an official who is honest, fair, and straightforward. Charles Corddry, of the Baltimore Sun, describes Bob Sims as, "undeviatingly pleasant. He is low key in that: he never tries to sell you anything. He simply tells you as he sees it."

As the new Assistant Secretary for Public Affairs, Bob Sims is uniquely qualified. He will be an asset to the press and to his Government.

In closing, my statement, I would like to read a passage from Bob Sims book, "The Pentagon Reporters." I think the following passage provides a good assessment of how he will approach his position. In addition it is wise advice to all public officials who interact with the press.

In the final analysis, policies and programs that cannot be successfully explained to the public are usually ill-conceived. Therefore, a realistic policy of dealing with the media makes good sense. Some things can not and should not be discussed with reporters: some American military battlefields of the future may be closed to the immediacy of modern news coverage. But the major subjects of keenest interest to defense reporters can be discussed with them, and should be. Good policies and good programs ought to be explainable—and good officials ought to know how to do the explaining.

Mr. President, I urge my colleagues to approve the nomination of Robert Sims as the Assistant Secretary of Defense for Public Affairs.

NOMINATION OF HENRY T. WINGATE, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Mr. COCHRAN. Mr. President, I commend the chairman and Judiciary Committee for its recommendation of Mr. Henry T. Wingate for confirmation as U.S. district judge for the southern district of Mississippi.

It was with utmost confidence in his abilities that I recommended Mr. Wingate to the President for this position. I urge the Senate to confirm him.

Mr. Wingate's legal experience clearly demonstrates that he is well qualified to serve in this position. He is a graduate of Grinnell College and Yale Law School, and has extensive trial experience in both the State and Federal court systems.

Mr. Wingate served for 3 years as a criminal trial attorney and senior assistant defense counsel for the Judge Advocate General's Corps in the U.S. Navy. He continues to serve as a lieutenant commander in the U.S. Navy Reserve.

Following his release from active duty, the nominee served 4 years as special assistant attorney general for the State of Mississippi, and 4 years as assistant district attorney for the seventh circuit court district. Since 1984, Mr. Wingate has served as assistant U.S. attorney for the southern district of Mississippi.

In addition to his exemplary performance as an attorney and public servant, the nominee serves as an adjunct professor of law and as a lecturer on criminal law and procedure, and

has been published in these areas. He is a community leader and member of numerous charitable and service organizations.

Henry Wingate is highly regarded among his peers and fellow citizens as an individual of great intellect, sense of fairness, and moral character. I am confident that his service will reflect credit on the Federal bench.

NOMINATION OF STEPHEN H. ANDERSON TO BE UNITED STATES CIRCUIT JUDGE FOR THE TENTH CIRCUIT COURT OF APPEALS

Mr. HATCH. Mr. President, it is with great pleasure that I recommend to this body Mr. Stephen H. Anderson of Salt Lake City, UT, for appointment to the Tenth Circuit Court of Appeals. I was proud and happy when President Reagan nominated Mr. Anderson for this position, and I am now proud to urge my colleagues in the Senate to enthusiastically confirm his nomination.

Having known Steve for many years, I have developed the highest respect and admiration for his professional skills and his interpersonal qualities. He is a man of extraordinary character. His dedication to law and justice is exemplary. In a legal career spanning over 25 years, he has served in a wide variety of positions, public, private, and philanthropic. In every one, he has served with distinction.

He has been President of the Utah State Bar, president of the Salt Lake County Bar Association, and has served as an active participant on dozens of important commissions, committees, and organizations. Throughout them all, Steve has demonstrated a consistent dedication to the well-being and improvement of our judicial system. He was responsible for establishing a small claims court program in Utah which utilized the voluntary services of practicing lawyers as part-time judges in the evening hours. In so doing, he opened the courtroom doors to thousands of good, hardworking citizens whose disputes were genuine and who very much needed a civilized place for litigation resolution. If it is true that plagiarism is the purest form of compliment, then Mr. Anderson's small claims court program was an unqualified masterpiece, because it has been copied in a large number of other jurisdictions.

There is no question in my mind that Steve Anderson, who is the managing partner of one of Salt Lake City's largest, oldest, and most prestigious firms, is making a financial sacrifice to accept a judgeship on our Federal appellate bench. But I am also sure that he has a genuine desire to take the bench and serve the public. He really wants to help, to continue to do what he can to improve the judicial system.

Because I feel he is extraordinarily well qualified for the job, I vigorously support Mr. Anderson's nomination and ask my fellow Senators that we now give him our unanimous bipartisan consent. He will be a significant asset on our Federal appellate bench.

NOMINATION OF DAVID SAM TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF UTAH

Mr. HATCH. Mr. President, I would like to take this opportunity to recommend to my fellow Senators, Judge David Sam of Springville, Utah for appointment to the U.S. District Court for the district of Utah. David Sam is one of the most outstanding Americans I know. He is hardworking, dedicated, and scrupulously honest. From personal experience and association with this fine gentleman, I know for a fact he is especially deserving of our respect and admiration. In my estimation he is extremely well qualified to serve as a Federal district judge.

Throughout an illustrious legal career, David Sam has consistently distinguished himself. Early in his professional career, he spent years honing his skills while representing the ranchers and the farmers of the mostly agrarian communities of Utah's Uintah Basin. He knows and understands the common man. Then, in 1976, he accepted a prestigious appointment to the State district bench in Provo, UT, where he has served with distinction for the past 10 years.

To sum up my feelings about David Sam's suitability for the Federal bench, I would simply say that Mr. Sam is one of those rare individuals who I am absolutely convinced will bring a temperament to the trial bench that is perfectly suited for the task at hand. He will be fair while being just, and he will treat every man or woman, regardless of rank or stature, with courtesy and patience.

More than most people I know, David Sam really cherishes his citizenship as an American. It is not something he takes for granted. For it wasn't all that long ago that a young Romanian by the name of Andrew Sirb traveled by foot across the entire country of Romania to escape the ravages and hopelessness of a freedom-destroying monarchy to start all over again with his new wife in a land across the Atlantic where hope and freedom were allged to be in abundance.

Fortunately for us, Andrew Sirb successfully made that journey, crossing the border into Austria, then Germany, then abroad a steamer to the United States where he finally fulfilled his dream. He selected the most American name he could possibly find—Sam, in honor of his newest favorite uncle—and Andrew Sirb became Andrew Sam. Then, he and his wife settled in Gary, IN, and had 11 children. A little boy named David was No. 11.

Now David Sam appears before this body for confirmation to the Federal bench. He and his family have been through a lot to get him here; and I am satisfied that the end result will be a credit to Utah's Federal district bench. I strongly support his nomination and ask my colleagues that we now give him our unanimous bipartisan consent.

NOMINATION OF JENNIFER JOY MANSON TO BE ASSISTANT ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

Mr. WARNER. Mr. President, I rise today in strong support of the nomination of Jennifer Joy Manson, a resident of Alexandria, VA, who has been nominated by President Reagan to be the Assistant Administrator of EPA for External Affairs.

Leading EPA's communications and legislative activities will be a heavy responsibility and I am confident Miss Manson will rise to the challenge.

I have known Miss Manson for nearly 9 years and have always been impressed with her professionalism, intelligence, honesty, and dedication to serving the public.

She is an effective and organized manager who knows how to work on a bipartisan basis to achieve the best policy results.

Mr. Chairman, Miss Manson brings to EPA an impressive and varied background of achievement.

She attended high school in Norfolk, VA, and then graduated from the University of North Carolina.

As a member of the White House staff, she has worked on national domestic issues.

She was the chief of staff for the former distinguished Governor of Virginia John Dalton.

Subsequently, she joined my staff and became my senior legislative strategist and advisor.

Miss Manson's ability to quickly grasp complex issues has enabled her to effectively go to the heart of a policy debate.

I can't think of any better qualifications to manage the Office of External Affairs for EPA.

I also want to take this opportunity to commend her parents, Captain and Mrs. Frank Manson, who deserve so much of the credit for providing the values and judgement by which their daughter lives.

I know I speak for the Members of the Virginia Congressional Delegation, Governor Dalton, and especially myself, in providing Miss Jennifer Joy Manson our highest recommendation.

She will undertake her responsibilities, as she has in the past, with the utmost dedication and integrity.

I am confident she will do a truly outstanding job for the people of the United States, the President, and the distinguished Administrator . Lee Thomas.

I urge my colleagues to support this nomination.

NOMINATION OF PAUL ROBINSON

Mr. BRADLEY. Mr. President, I am pleased that the Senate today has confirmed the appointment of Prof. Paul Robinson to serve on the Federal Sentencing Commission.

Professor Robinson is a resident of New Jersey and a professor at the

Rutgers University School of Law; where he has achieved a level of recognition for his outstanding criminal law scholarship which is remarkable for a person his age. Rutgers has promoted him to the rank of distinguished professor, its highest rank. I am told that he is the youngest person holding that position in the university. He also has an extremely broad background in the criminal justice system, having served as an attorney with the Department of Justice, with the U.S. Attorney's Office and with the Senate Judiciary Committee. He has also written extensively on a wide range of criminal law and criminal procedure issues.

I look forward to the contribution the Sentencing Commission will hopefully make to rationalize the often irrational differences in sentencing and parole practices for similar crimes. Hopefully, the Commission will establish guidelines that will not only help the Federal judiciary, but will give the public greater confidence that fair, impartial, yet firm dispensation will be made where individuals have been convicted of crimes. I am sure that Professor Robinson can contribute greatly to the work of the new Commission.

LEGISLATIVE SESSION

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate resume legislative session.

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

Mr. DOLE. Mr. President, I thank my colleagues from Mississippi and North Dakota for yielding.

Mr. BYRD. I thank the distinguished majority leader.

AGRICULTURE APPROPRIATIONS, 1986

The Senate resumed consideration of the bill (H.R. 3037).

Mr. COCHRAN. Mr. President, while there will be no other amendments to dispose of in connection with the agriculture appropriations bill and we will be ready to go to third reading very shortly, we did want to indicate before we went to third reading that the distinguished Senator from Washington [Mr. GORTON] had brought to the attention of the committee earlier in the year and we had considered a funding request for a facility in his State. I want to, at this time, thank him for bringing that to the attention of the committee and express my hope that we can work out some accommodation of his request at a later time.

For the purpose of discussing the proposal and whatever other comments the Senator would like to make, I yield to the distinguished Senator from Washington at this time.

Mr. GORTON. Mr. President, I thank the distinguished Senator from Mississippi, the manager of the bill.

Washington State University in Pullman, WA, has for some time been seeking funding under the Research Facilities Act for a research facility of immense importance to the Pacific Northwest. The university has proposed the creation of a food-human nutrition facility in the heart of the Northwest wheat country. The regional support for this facility is very strong and its construction is vital to the future of the Northwest agriculture economy. The State of Washington has already appropriated $12.9 million in matching funds for the facility which is, of course, an indication of its strong support there.

The food-human nutrition center will provide the region with invaluable research in the areas of food marketing, processing, and animal and plant biotechnology. The result of this research will help the wheat and feed grain industry to establish new markets around the world and, just as important, to reestablish the markets we have lost to subsidized foreign competition. The WSU center has the support of the National Association of Wheat Growers, the Department of Agriculture, and universities in the Northwest.

Mr. President, the difficulty has been that the Research Facilities Act has been inadequate to facilitate either this kind of project or any other. The Research Facilities Act has been substantially amended or rather proposals substantially to amend it are included in both the farm bill which has passed the House and the farm bill which is about to come before the Senate. That authorization is, of course, not complete and is one of the primary reasons that no appropriation is included either in the House bill or in the Senate bill for carrying out the purposes of the Research Facilities Act.

I would like the Senator from Mississippi to assure me, if he can, that appropriations for these purposes and specifically for Washington State University will be considered very seriously and as priority matters, either in any supplemental appropriations bill which should come along later or, alternatively, in next year's agriculture appropriations bill.

Mr. COCHRAN. Mr. President, if the Senator will yield, I am happy to respond in this way. The Research Facilities Act, under which funding is being urged by the Senator from Washington, is included in the farm bill that has been approved by the Senate Agriculture Committee, and will be considered by the Senate maybe next week. Under that authorization, the first $4 million of appropriations must be divided among the land grant colleges and universities which are eligible for funding under that authorization.

It is my hope that we will be able to secure funding of that program. It is an important program. This Senator supported its inclusion in the farm bill. However, it is not possible at this time to provide funding. It could be, as we take up a supplemental appropriations bill, that it would be ripe for consideration, and we might be able to add funds at that time for facilities under that authority.

I am convinced from my conversations with the Senator from the State of Washington that this is a project that is meritorious, and that it is a facility that could provide important benefits and information in the areas that would be included in its research activities.

So I commend the Senator for bringing to the attention of the Senate the need for funds for this project. I wish we had money available to fund this project and the projects that have been discussed earlier today, which were not included in the bill. But we are operating under some severe budget constraints. We know that, and the distinguished Senator from Washington is aware of that. I appreciate his understanding of our inability to provide funding at this time in this bill for this project. But I hope we can find a way to provide funds later on. We will work with the Senator. We will have hearings next year, if we do not include it in the supplemental appropriations bill, and we will try to get the support of the Department of Agriculture for this project.

But I pledge to the Senator to work with him to try our best to find ways to help ensure the construction of this facility.

Mr. GORTON. I thank the Senator from Mississippi.

THE SOIL CONSERVATION SERVICE'S WORK IN THE CHESAPEAKE BAY

Mr. MATHIAS. Mr. President, with the passage of the fiscal year 1986 Agriculture appropriations bill, we assure the continuation of the important work by the Department of Agriculture's Soil Conservation Service to help save Chesapeake Bay. I am pleased to share with my colleagues information on what the SCS is doing to control nonpoint sources of pollution—a major culprit of the problems of the bay.

Last November, the Soil Conservation Service signed a memorandum of understanding with the Environmental Protection Agency, pleading to devote its resources to the Chesapeake Bay Cleanup Program. To effectively and immediately carry out its bay responsibilities, SCS needs 21 more positions to provide technical assistance to farmers and landowners. This is in addition to 10 staff positions, which Congress last year directed the SCS to devote to the bay cleanup. On September 24, the Appropriations Committee approved $840,000 for the 21 positions. With 21 new field positions, SCS will have a total of 31 additional staffers working with State, county, and local people on alleviating the bay's pollution.

Earlier this year, the SCS celebrated 50 years of dedicated service to the citizens of the United States. The SCS grew out of the turbulent Dust Bowl

era when much of the Nation's agricultural productivity was threatened by natural disaster and detrimental farming practices on fragile lands. The pollution problems we face today in the Chesapeake Bay are akin to those earlier experiences on the land. Our desire to enjoy the bay and make a living from it has pushed the bay beyond its carrying capacity and capability to restore itself to its former productivity.

A significant part of the bay's recent decline results from adverse effects of sediment, nutrients, and animal waste, and their detrimental interaction on the bay's ecosystem. In July, my colleague, the Senator from Maryland, Mr. SARBANES, the EPA Administrator, Lee Thomas, Secretary of the Interior, Donald Hodel, SCS Chief, Wilson Scaling, the Governors of Maryland and Virginia, and others joined me for a tour of Chesapeake Bay. We viewed the problems of the bay and the progress being made by the Federal agencies working on those problems. We saw firsthand those problems related to sediment and nutrients.

Sediment is a ferry, delivering toxic cargoes to the bay every day. The bay has over 6,000 miles of shoreline, with much of it eroding at a rapid rate. Additionally, large amounts of sediment from distant parts of the bay's six-State watershed are carried to the bay by the Susquehanna, Potomac, James, and other rivers. Sediment particles attract and tightly hold substances, such as phosphate nutrients and many pesticides. Thus, every time a sediment particle is delivered to the bay, it potentially carries thousands or even millions of attached pollutant molecules.

In its report on the Chesapeake Bay, the EPA stated that farmland is a major contributor of sediment to the bay. The SCS estimates that gross erosion from Maryland cropland exceeds 9 million tons of soil annually. Of this amount, more than 1½ million tons were lost last year from cropland at the "T" or "tolerance" level up to twice "T".

Obviously, not all of this soil reaches the bay, but the sediment problem is significant in all the States bordering the bay. This does not mean that the SCS is sitting idly by. Last year, the SCS in Maryland prevented the loss of more than 600,000 tons of soil, an amount equivalent to a line of loaded dump trucks stretching across the 4-mile Chesapeake Bay bridge 80 times.

Animal waste is another bay concern. Animal wastes, high in nutrient value and organic matter, have been used for generations as a source of fertilizer. Spreading manure on fields eliminates the immediate problem of what to do with tons of animal waste, but the number of livestock in the bay watershed has increased dramatically in recent years, creating local situations of too much manure for the available land. Excess nutrients and organic matter make their way to the bay, further degrading it.

To help combat nonpoint source pollution entering the bay, the State of Maryland has started a new 5-year $40 million Agricultural Erosion Control Program. But Maryland must depend on the SCS to help train all the new people working in this program. The SCS has the only readily available expertise and training capability needed for the newly hired personnel of the States, counties, and soil conservation districts.

Sediment, nutrients, and animal wastes—a deadly trio—can and must be controlled if Chesapeake Bay is to be restored to its former role as the Nation's most productive estuary. The Soil Conservation Service has the technology and capability to help control nonpoint source pollution problems in the Chesapeake Bay—including keeping erosion rates on agricultural lands within tolerances compatible with good water quality, a safe environment, and high productivity.

Mr. DOMENICI. Mr. President, I rise in support of H.R. 3037, the fiscal year 1986 Agriculture and related agencies appropriation bill, as reported by the Senate Appropriations Committee.

Mr. President, H.R. 3037 as reported provides $28.2 billion in budget authority and $23.0 billion in outlays for fiscal year 1986 for important programs of the Department of Agriculture and related agencies. The bill, together with outlays from prior-year budget authority and other adjustments, is at the subcommittee's 302(b) allocation.

I want to congratulate the chairman of the subcommittee, Senator COCHRAN, for a number of tough decisions he had to make in bringing this bill to the floor today. I particularly want to congratulate the chairman on his courageous efforts to reduce expenditures in the rural housing accounts. I know this was difficult for him.

Let me also congratulate the chairman of the subcommittee for reporting a bill that is devoid of the usual budget gimmicks we have come to know in this bill. The bill fully funds those things that have to be funded, such as the losses incurred in the credit funds, and, unlike past years, it provides full year funding for the nutrition programs.

Most importantly, the bill does something that has long been sought after by budget process people, it recognizes the limited control the Appropriations Committee has over CCC expenditures. The bill makes funding for CCC a current indefinite appropriation. I hope the Senate can prevail in this position when it goes to conference with the House.

The bill does provide for a major reexpansion in FmHA direct farm operating loans. While I understand the pressures that have developed for this, I do believe that the issue of farm credit will need to be addressed again in the authorizing bill we will be debating shortly.

Mr. President, I ask unanimous consent that two tables showing the relationship of the reported bill to the congressional budget, the House-passed bill, and the President's budget request, and a summary of total appropriations action to date, be printed in the RECORD at the conclusion of my remarks.

There being no objection, the tables were ordered to be printed in the RECORD, as follows:

SPENDING TOTALS—SENATE-REPORTED BILL

[Dollars in billions]

	Fiscal year 1986	
	BA	O
Outlays from prior-year budget authority and other action completed	$0.4	$2.2
H.R. 3037, as reported in the Senate	28.2	23.0
Possible later requirement:		
Agricultural Stabilization and Conservation Service—salaries and expenses	0.1	.....
Adjustment to conform mandatory programs to Budget Resolution assumptions	−0.5	−0.1
Subcommittee total	28.2	25.2
Subcommittee 302(b) allocation	28.2	25.2
House-passed level [1]	28.2	25.2
President's request [1]	27.6	24.1
Subcommittee total compared to:		
Subcommittee 302(b) allocation	−(*)	−(*)
House-passed level [1]	+(*)	−(*)
President's request [1]	+0.5	+1.1

(*) Less than $50 million
[1] Reflects CCC adjustment for comparability with Senate crosswalk.
Note. Details may not add to totals due to rounding.

STATUS OF APPROPRIATION BILLS IN THE SENATE

[In billions of dollars]

Subcommittee	Appropriations Committee's 302(b) allocation		Adjusted bill totals [1]		Bill compared to crosswalk		Bill status
	Budget authority	Outlays	Budget authority	Outlays	Budget authority	Outlays	
Agriculture	28.2	25.2	28.27	25.2	−(*)	−(*)	Senate-reported.
Commerce-Justice	12.0	11.9	11.59	12.0	−0.1	+0.1	Senate-reported.
Defense	285.5	252.2	.....	.....	.....	.....	
District of Columbia	0.5	0.5	0.55	0.5	+(*)	+(*)	Senate-reported.
Energy-Water	15.3	15.6	15.33	15.6	−(*)	−(*)	Conference.
Foreign Ops.	15.2	14.7	.....	.....	.....	.....	
HUD-Independent	58.7	61.2	58.77	62.0	+(*)	+0.8	Senate-reported.
Interior	8.2	8.9	8.22	9.3	+(*)	+0.4	Senate-reported.

STATUS OF APPROPRIATION BILLS IN THE SENATE—Continued

[In billions of dollars]

Subcommittee	Appropriations Committee's 302(b) allocation		Adjusted bill totals		Bill compared to crosswalk		Bill status
	Budget authority	Outlays	Budget authority	Outlays	Budget authority	Outlays	
Labor-HHS	108.0	115.3	108.0	115.3	—[*]	—[*]	Senate-reported
Legislative Branch	1.7	1.7	1.7	1.7	—[*]	+[*]	Senate-passed
Military Construction	9.0	7.6					
Transportation	10.5	26.6	10.0	26.7	—0.5	+0.1	Senate-reported
Treasury-Postal	13.1	13.1	13.1	13.1	—[*]	—[*]	Senate-passed
Unassigned	1.2	—0.4			—1.2	+0.4	
Total, Appropriations Committee	567.1	554.1	265.6	281.5	—1.7	+1.6	

[1] In addition to the bill, includes outlays from budget authority enacted in prior years, possible later requirements, adjustments to conform mandatory items to the budget resolution level, and other adjustments.
[*] Less than $50 million.

Note.—Details may not add to totals due to rounding.

Source: Senate Budget Committee Staff

Mr. LAUTENBERG. Mr. President, H.R. 3037, the fiscal year 1986 Agriculture appropriations bill, contains several provisions which are of special concern to New Jersey.

Mr. President, The Department of Agriculture has considered closing New Jersey's Agricultural Stabilization and Conservation Service [ASCS] office and consolidating it with Maryland's office into an office in Delaware. I am concerned about the adverse impact a regionalization of agriculture centers could have on the agricultural community in New Jersey.

The New Jersey ASCS Center in Robbinsville serves as a valuable link between the U.S. Department of Agriculture and the State of New Jersey. The center has worked closely with the New Jersey Department of Agriculture and the Department of Environmental Protection to ensure that New Jersey's agricultural needs are addressed. Conservation programs, water quality assessments, and price stabilization plans, all vital to the health of the New Jersey farm community, have been effectively administered through the ASCS State office. The individual needs and interests of each State's agricultural community require the maintenance of individual State offices.

I am pleased that language I sought concerning the closing of New Jersey's ASCS offices was included in the committee report which accompanies this bill. The committee report states that the committee is concerned about the closing of any State or county offices and expects the Department of Agriculture to notify the Congress at least 4 months in advance of any changes in organization or location of offices. The inclusion of this language insures that if the Department of Agriculture decides to move ahead with plans to consolidate New Jersey's ASCS office, we will have sufficient notice to react to such a plan.

I am also pleased, Mr. President, that language I sought directing the U.S. Department of Agriculture's Agricultural Plant and Animal Health Inspection Service [APHIS] to continue its program of certifying logs as free of gypsy moths was included in the committee report. APHIS had announced that as of october 1, 1985, it would discontinue its program of certifying that logs traveling to Canada or interstate are free of gypsy moths. The State of New Jersey notified me that if APHIS had discontinued this program, the State could not set up its own certification program. Since Canada and some States refuse to accept any logs without certification, the discontinuation would have posed a real problem for New Jersey businesses which ship about $3 million worth of logs to Canada and interstate each year.

Another provision of this bill which I strongly supported was funding for programs to reduce the use of pesticides. The committee approved $7.531 million in the Extension Service account and $10.117 million in the Agricultural Research Service account for the Integrated Pest Management [IPM] Program. IPM has been instrumental in helping New Jersey to reduce pesticides. Although currently only a relatively small percentage of the 1 million acres under cultivation in new Jersey benefit from IPM, the volume of pesticides used in the State has been reduced by over 500,000 pounds per year as a result of this program. Reductions in pesticide nationally are estimated to be 50 million pounds per year. In New Jersey, the program is run through the New Jersey Agricultural Experiment Station and the Cooperative Extension Service of Cook College at Rutgers University.

The decreased use of pesticides resulting from the IPM programs has saved New Jersey farmers $1.08 million and farmers throughout the country $100.8 million per year in production costs. IPM has also had a beneficial impact on the environment by decreasing the deposit of excess residues. New Jersey's farmers support for the IPM program is demonstrated by the fact that they contribute to the IPM effort each year.

Finally, Mr. President, I call the Senate's attention to an unusual but worthwhile program provided for in this bill: the Urban Gardening Program. In the Appropriations Committee, I sought funding for the Urban Gardening Program, and am pleased that at least $1.75 million was included for this program. The Urban Gardening Program has made it possible for urban dwellers in Newark, NJ, and 20 other cities to grow their own fruit and vegetables in community gardens. It has created an additional food source for inner city residents, and fostered community pride by teaching its participants to transform urban waste land and unused city plots into productive vegetable gardens. By growing their own fruits and vegetables last year, 186,000 program participants added fresh foods to their diet that are not always readily available or affordable.

Mr. President, last year, the $3.5 million allocated for the program enabled 186,000 urban gardeners to grow $20 million worth of produce, a 5 to 1 return on the Federal dollar. The program also attracted $1 million in contributions from private companies and city governments and 2,000 volunteers last year, a reflection of the program's recognized value to the community. The House of Representatives has approved $3.5 million, a freeze at last year's level, for this program.

Mr. President, I am pleased to support the 1986 Agriculture appropriations bill, and urge my colleagues to approve it. I very much appreciate the consideration of our chairman, Senator COCHRAN, and our ranking minority member, Senator LEAHY, in accommodating my requests.

Mr. COCHRAN. Mr. President, I know of no other amendments to the bill and no other Senator seeking to offer amendments. I think we are ready for third reading.

The PRESIDING OFFICER. If there be no further amendments to be proposed, the question is on the engrossment of the amendments and the third reading of the bill.

The amendments were ordered to be engrossed and the bill to be read a third time.

The bill was read the third time.

Mr. COCHRAN. Mr. President, I ask for the yeas and nays on the bill.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall it pass? The yeas and nays have been ordered and the clerk will call the roll.

The legislative clerk called the roll.