

the substitute which was passed by the House of Representatives, sent to the Senate, and called up and laid before the Senate. That is the bill which first saw the light of day in the Senate, as I understand it, on or about the early morning hours of this last Wednesday, this past Wednesday of last week. Is that the amendment, the Thompson substitute amendment, that is the House bill which I, on a number of occasions, have referred to as being a bill of 484 pages?

The PRESIDING OFFICER. The amendment does contain that number of pages.

Mr. BYRD. I just wanted to be sure to establish in my own mind and call to the Senate's attention that that will be the third vote, then, on that bill as we come to tomorrow morning, Tuesday of this week.

Now, Mr. President, a further parliamentary inquiry: Am I correct in stating that cloture on the bill, H.R. 5005, is not vitiated by question of the adoption of the substitute?

The PRESIDING OFFICER. Cloture on the bill is not vitiated by that action.

Mr. BYRD. I thank the Chair.

Further parliamentary inquiry: Is it not a fact that if cloture is invoked on H.R. 5005, under the rule, 30 hours then will ensue under that cloture measure?

If cloture is invoked, there will be 30 hours on H.R. 5005, am I correct?

The PRESIDING OFFICER. Cloture under this consideration is 30 hours.

Mr. BYRD. I thank the Chair. In this instance, if the Thompson substitute, the House bill No. 4901, if that substitute is adopted and cloture then is invoked on H.R. 5005, will amendments be in order during those 30 hours?

The PRESIDING OFFICER. The adoption of the Thompson substitute precludes amendments.

Mr. BYRD. I thought that was the case.

The adoption of the Thompson substitute means as far as further amendments are concerned, the ball game is over; am I correct in putting it in that form?

The PRESIDING OFFICER. The Senator is correct.

Mr. BYRD. I say all that, Mr. President, to say this: On last Friday when the Senate invoked cloture, what was cloture invoked on, may I ask of the Chair? On what did the Senate then invoke cloture?

I see my loss of memory is not too bad after all. It seems to be shared by others. Of course, I am 85—almost.

The PRESIDING OFFICER. We are checking the record.

Mr. BYRD. I say that with all respect, due respect and ample respect to the Chair, the Parliamentarian, and others.

The PRESIDING OFFICER. Cloture has been invoked on amendment No. 4901, the Thompson amendment.

Mr. BYRD. I thank the Chair.

Now, Mr. President, the point I am trying to make here is—and I wanted it in the RECORD, and I wanted Senators to be aware of what they did when they voted to invoke cloture on last Friday.

The distinguished occupant of the chair did not vote to invoke cloture, nor did this Senator, who now is speaking.

There were 29 Democrats who voted against cloture last Friday. There were 17 Democrats who voted for cloture last Friday. As I note—and this may have been a cursory examination I have made—but I have noted, in a cursory examination, I believe two Republicans who were absent would have voted with me against cloture and I believe four Democrats who were absent would have voted with me against cloture.

In any event, had 6 of the 17 Democrats who voted for cloture voted against cloture last Friday, we would not be under cloture at this point because the number of Senators voting for cloture on last Friday would have been only 59 and the number, therefore, would have fallen 1 vote short of cloture.

Now, I tried to get my fellow Democrats to vote against cloture because I felt that we ought to have more time to discuss this homeland security bill, which had been dropped on our desks virtually out of the shades of the early morning as they were lifting and the golden fingers of dawn were streaking across the land. I tried to get several Senators to vote against cloture, my plea being: "Don't vote for cloture today. Give us a little more time. If we don't vote for cloture today, it will be voted next week"—meaning this week, which we have now started. "Don't vote for cloture today."

One or two Senators listened to my importunings and voted against cloture.

Mr. President, I ask for an additional 3 minutes.

The PRESIDING OFFICER. Without objection, the Senator is granted an additional 3 minutes.

Mr. BYRD. Mr. President, one or two Senators listened and voted against cloture. Some others listened and didn't vote against cloture but voted for cloture, which was their right to do. But let me just show what happened there.

They voted for cloture. Cloture was invoked. Some of those Senators with whom I talked said: "You have 30 hours in which amendments can be offered, and some of the problems that you outlined, you can get a vote on them, and possibly those can be amended and corrected."

As we have seen, only one amendment—one amendment—was offered. It filled up that particular tree, so that no other amendments could be offered while that amendment was pending. But our good friends on the other side said: This far, no farther. You have offered an amendment—meaning Mr. DASCHLE had offered an amendment on behalf of Mr. LIEBERMAN; that amendment was pending—you have offered this amendment. That's the amendment we are going to vote on. You are not going to get to to offer any more amendments. The 30 hours will be run on that one amendment.

So I hope Senators in the future will remember. Of course, I knew that could be done. But I have to say I think that is the first time in my memory—and I have been here during the great civil rights debates of the 1960s—I believe that is the first time—and I don't say it critically of the Republicans; they had that right, they played by the rules. Our problem is we don't all know the rules. But they played by the rules. We have one amendment. The 30 hours will be gone Tuesday morning, and that one amendment is it, and I mean "it."

Now, when cloture is invoked on H.R. 5005, as amended, if amended, we won't be able to offer any amendments. We can talk, but the ball game is over when we adopt the Thompson substitute. That substitute wipes out everything. It wipes out H.R. 5005, as far as that is concerned.

So the point is, we voted cloture on ourselves. We did it to ourselves on this side. I knew every Republican would vote for cloture, but I hoped that at least enough Democrats would vote against cloture—we only needed six more votes in opposition. But we did it. We did it to ourselves. We have had a chance to offer only one amendment. That is it. The Republicans say: That is it, no more amendments, and we will vote on Tuesday.

I just say this so that our friends on my side of the aisle in particular will know what their vote for cloture on Friday has done to defeat our chances to have other amendments voted on.

I thank the Chair and I yield the floor.

Mr. REID. Mr. President, I have spoken to the two leaders. There will be no cloture vote this afternoon, and likely no other votes this afternoon. Members will have all the opportunity they want to debate the Shedd nomination or, of course, the homeland security matter.

The PRESIDING OFFICER (Mr. LEVIN). The Senator from Texas.

Mr. GRAMM. Mr. President, what is the pending business?

The PRESIDING OFFICER. We have 1 minute and a half left in morning business.

Mr. GRAMM. Mr. President, I ask unanimous consent that I might have 10 additional minutes in morning business.

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

HOMELAND SECURITY

Mr. GRAMM. Mr. President, I wish to talk for just a moment about where we are on the homeland security bill. I wish to talk about the amendment on which we will be voting tomorrow morning because I think it is important for people to look at the issue, in terms of understanding the full picture, at least given each of our abilities to see the full picture.

We now have debated homeland security, I think, for seven or even eight weeks. It is obviously an important issue. When you are creating a new Department that will have 170,000 members—the largest reorganization of Government since the creation of the Defense Department—I think having a pretty extended debate is justified.

I say to people who are opposed to the bill that I hope they will recognize that the debate has had an effect. The distinguished Senator from West Virginia, who has been perhaps the most outspoken opponent of the bill, I think would agree that a major problem with the bill has been changed—that being, it would have transferred to the President a substantial ability to change the appropriation levels set by Congress, and as such would have redistributed power from the legislative branch to the executive branch.

Mr. BYRD. Mr. President, will the Senator yield? I ask that 2 minutes of my inquiry not be charged against his 10.

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

Mr. BYRD. Mr. President, may I say right at that point that the Senator is correct. That was the major constitutional flaw. That was a major constitutional flaw. It dealt with the power over the purse which under the Constitution is vested here in Congress. Senator STEVENS, I would have to say, was himself the foremost proponent of a change, backed by some degree of constitutionality. He is the major proponent on that side of the aisle of our veering away from that precipice and bringing us back to leaving control in the hands of the appropriations committees, and in the hands of Congress in large part.

Second, I would say one of the foremost proponents of recognizing that constitutional flaw was the distinguished Senator from Texas, Mr. GRAMM. I am convinced in my own mind—although I was not a little fly on the wall down at the White House listening in—that the Senator from Texas was a major, major proponent of bringing us back to our senses—or at least the administration back to its senses—with respect to that constitutional flaw. I have to believe in my own mind that he argued with them to that effect.

Listen, that is at least the one—that is the one in the Senator's mind, I would guess—unassailable point that the Senators from West Virginia and the Senator from Alaska make; that is, with respect to the power of the purse. You had better back off.

Those are my own words. But I have reason to believe the Senator from Texas is responsible in great measure for what occurred down at the White House with respect to its backing off on that point.

I thank the Senator.

If I am correct, or if I have failed and my guesswork is incorrect, please say so.

I thank the Senator for yielding.

Mr. GRAMM. Mr. President, the point I want to make—and I think it is a specific lesson of how government works—is that those who have followed this long debate, who have listened to the Senator from West Virginia, and know he has been on the losing side of vote after vote may say: What effect does he have?

He has had a profound effect. Even though he is not a supporter of the bill today and won't be at the end of the day—and I have been in a similar position on many issues, as the distinguished Senator from West Virginia knows—his major concern about the bill has been resolved. The debate and the clarity of the argument we have had on the issue of the power of the purse has had a profound effect on the bill. So you can be on the losing side of the votes and yet have a profound effect on the end product.

That is the point I wanted to make. The Senator is right. I thought it was a change that should be made, and it is a change that has been made. I think it represents an improvement.

I want to talk very briefly about the bill. I think I have a copy of it right here. Let me remind people what happened. I think everybody will understand the dilemma we were in.

We adjourned for the election with this issue unfinished. The President came back from the election with what I believe and what I think the public perceives to be a strong mandate that this is the important issue that should be dealt with.

The President could have said: Well, I will wait until the new Congress when my party will be in control, and I will write this bill exactly like I want to write it. He could have done that. He did not do that. And I believe that is wise. Instead, he sat down with three members of the opposition party and negotiated out additional clarifications in the bill. These clarifications are not profound, but they are important.

As this reorganization process goes forward, and as 170,000 people are moved into one agency, these changes the President agreed to will assure that these workers and their representatives will have an opportunity to give input. They will have a due process procedure, but in the end the reorganization will go forward. The President will have the right to exercise the same national security waiver that every President—first through executive order, and from the Carter administration forward under law—since John Kennedy has been able to exercise.

The next thing we had to do to get into a position to pass this bill is make clear what the final version of the bill would look like. We didn't want to end up with a week or two weeks of a conference with the House during this session where Congress is meeting after the election—sometimes referred to as a lame duck session. Many Democrats who are supportive of the bill wanted to be sure in negotiating with the

President and in negotiating with the authors of the bill that they wouldn't end up having to negotiate again with Republican leaders in the House. Over the weekend—not this weekend, but the weekend before—we sat down with the House leaders on this issue, and we negotiated out a final product.

I would say of this 484 page bill, 98 percent of it is the Gramm-Miller substitute which we debated for weeks. There were several changes made that have been much discussed. I believe there is a more efficient way of characterizing those changes than the way they have been characterized. I want to try to explain them.

Let me just first start by saying when the House writes a bill and the Senate writes a bill, there are often differences in the bill, and there is always give and take. Some have talked about extraneous material in the bill. I would have to say that in my 24 years in Congress, there are almost always issues dealt with in a bill that some people view as extraneous. I would say there are relatively few in this bill. But let me talk about the issues that are subject to the amendment Senator LIEBERMAN has offered. This amendment strikes provisions in the compromise—I think there are seven of them. I don't have my notes with me, but I remember them well enough to talk about them.

Three of these provisions have to do with liability. Let me remind my colleagues that since the Civil War, we have had provisions of law that have dealt with liability for people who were producing new products for war efforts. One of the ways of encouraging people to be innovative and one of the ways to get products from the drawing board to the battlefield quickly is to protect people from liability.

There was a provision in the original Senate amendment, the Gramm-Miller amendment, that the Senators from Virginia were responsible for. That was a provision whereby the Federal Government would indemnify manufacturers of products that would be used in the war on terrorism, so that if a liability issue arose, the Federal Government would step in and basically cover the liability. I would have to say that was not my preferred option, but in putting the amendment together we accepted it.

The House had another approach, which was to basically limit liability, require that lawsuits occur in Federal court, and set up a procedure to deal with liability that arose in these issues.

In putting together the compromise with the House, we took something between the two that did not have the liability limits the House adopted but was a movement toward reducing runaway liability and removing the taxpayer from the line of fire.

That accounts for three of the criticisms made. I want to address the one that is most discussed, and that is the one that has to do with mercury-based injections and smallpox vaccine.

Under the bill, as it is now written, we are treating smallpox vaccine as an instrument of the war on terrorism. Before, we had dealt with it as a response to a disease. We had a liability fund for vaccines in the past, but now that we have eradicated smallpox, the only fear we have of it is the reintroduction by terrorist elements. So we bring smallpox vaccine under this liability limit.

Those of my age will remember, if you get a smallpox shot, you get a skin reaction which produces a permanent scar. I say to my colleagues that this is pretty terrorism specific because no one would take a smallpox vaccination except for the terrorist threat because there are risks involved. Some small percentage of people have very negative reactions, some people die, and almost everybody has a scar from smallpox.

This bill would require people who sue to enter into a negotiation with the Justice Department before they file suit, and to negotiate the possibility of a payment out of an indemnity fund.

Some of our colleagues have said: Why did you make it retroactive? Wasn't that some kind of benefit to some vaccine producer? I remind my colleagues that nobody is taking smallpox vaccine now, nor would anybody take it unless there was an imminent threat. But we do have some of the vaccine stockpiled.

Why would you make it retroactive to cover that stockpile that has already been produced? The reason you do that is, if you give a protection against liability for all vaccine produced in the future but not for what we have stockpiled, the manufacturers will destroy the stockpile and produce more vaccine. And if we had a sudden threat, we would not have the stockpile.

So if this were a vaccine that was routinely taken, then I think the criticism would be well founded. But I think it is a total mischaracterization to say this is some kind of pharmaceutical bailout when it is targeted toward smallpox vaccine and the stockpile now has relevance only in terms of terrorism.

In terms of manufactured products to use in the war on terrorism, I simply say, in every major conflict in modern history, we have had some liability limits for the people producing things for wartime use.

The fourth provision that would be stricken has to do with the Wellstone amendment. Senator Wellstone offered an amendment to the bill that said, if you had a company that had ever been domiciled in the United States, and it was now domiciled anywhere else in the world, that company could not participate in contracts for the war on terrorism. In the bill that is before us, a couple of provisions were added to the Wellstone amendment that allows the President some flexibility in cases where the application of the Wellstone amendment would actually cost Amer-

ican jobs, where it might leave only a sole bidder, or where the absence of competition could drive up costs.

You might say, how could it cost America jobs? Well, let's say you have a company that was once based in America and still has very heavy presence in America but has its headquarters in France. Many companies are now international companies and where their home office is has ceased to have a lot of relevance, in my mind. In any case, the product made by the French-headquartered company might actually be produced in America. We could not buy it because the company is now domiciled in France but once was domiciled in America—maybe in 1812—but yet we could buy a product that was produced in another country by a company that never had an American presence.

There might be national security reasons or job reasons to have a waiver. The amendment before us would strike that waiver. I think it is a good waiver. I think it is a good government provision. And I think it is one we should have.

Another amendment has to do with advisory committees. I couldn't care less about advisory committees. I think sometimes they serve a productive purpose. I think in most cases they do not. But I think we are foolish to be striking advisory committees when the House has adjourned and may not come back to agree to the change if we make it. I do not think we ought to jeopardize this bill.

Finally, there is a provision that establishes a broad authorization outline. No funds are appropriated for participating in the management of research. There is a definition that is written into the law that, as I understand it, would cover roughly 12 major research universities.

I just ask my colleagues to look at these overall seven provisions, and to ask themselves a question: Would the bill be better off without all seven, because they are all stricken in one amendment? I think the answer is no. I think there is a logical justification for the amendments in general. And I urge my colleagues to get the whole story before they cast their vote.

Finally—and I think this is of equal importance—this is an important bill. We are getting toward the end. This has been progress that has been hard coming. And I think we take a risk, one that we should not take, by making these changes. I do not think they are good changes.

I think, overall, we are better off with these seven provisions in the bill than we are without them. I think, overall, they are defensible. Any changes you get in bringing the two Houses together in negotiation often are subject to criticism, but I think these are defensible.

I think we would be taking an unnecessary risk by changing the bill. I hope we will not do it.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada.

EXTENSION OF MORNING BUSINESS

Mr. REID. Mr. President, I ask unanimous consent that morning business be extended until the hour of 1 o'clock today.

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

UNANIMOUS CONSENT REQUEST

Mr. REID. Mr. President, as in executive session, I ask unanimous consent that the cloture vote on the Shedd nomination be vitiated and that following today's debate on the nomination, the nomination be laid aside, and that upon the disposition of H.R. 5005, the homeland defense bill, the Senate proceed to executive session and vote, with no intervening action or debate, on confirmation of Dennis Shedd to be a United States Circuit Judge; further, that if the nomination is confirmed, the motion to reconsider be laid on the table, the President be immediately notified of the Senate's action, and the Senate return to legislative session; that if the nomination is not confirmed, the Senate return to legislative session with no intervening action or debate.

I extend my appreciation to the Presiding Officer with whom we worked for several hours Friday and this morning. I have spoken personally with the minority leader, and he has acknowledged that this is the best way to proceed. I ask that the consent be granted.

The PRESIDING OFFICER. Is there objection? The Senator from West Virginia.

Mr. BYRD. Reserving the right to object, I did not understand the distinguished whip's request with respect to H.R. 5005.

Mr. REID. What I said is that when that debate is completed, we would move forward to vote on the Shedd nomination.

Mr. BYRD. Even if that debate entails 30 hours in the train of a favorable vote on cloture on H.R. 5005?

Mr. REID. That is right.

Mr. BYRD. So that, indeed, the request has no impact whatsoever on H.R. 5005.

Mr. REID. I would also ask that the previous order with respect to terrorism insurance remain in effect following the Shedd vote. The order in effect now is that we would do the terrorism bill immediately following homeland security. Now what we would like to do is dispose of the Shedd nomination and then finish terrorism.

Mr. BYRD. Very well. I have no reservation.

The PRESIDING OFFICER. Is there objection? The Senator from Texas.

Mr. GRAMM. Mr. President, it is my understanding that our staffs are talking. Someone just handed me this. If the Senator could wait for about 2 minutes, I think we are trying to run one