United States
of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE *108th* CONGRESS, SECOND SESSION

Vol. 150 WASHINGTON, WEDNESDAY, NOVEMBER 24, 2004 *No. 136*

Senate

The Senate met at 5 p.m. and was called to order by the Honorable DON NICKLES, a Senator from the State of Oklahoma.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Wondrous sovereign God, giver of every good and perfect gift, in this Thanksgiving season we express gratitude for Your many blessings. Thank You for military people in harm's way who sacrifice to keep us free. Be with their families during this season of gratitude. Thank You for emergency personnel who will work this Thanksgiving to keep America safe. Bless them with Your peace. Give prayerful mercies to the many who will journey to see loved ones.

In these challenging times, Lord, rule our world by Your wise providence. Sustain our Senators, enabling them to leave a legacy of excellence. As you remind them of Your precepts, guide them with righteousness and integrity. You are our help and our shield, and we wait in hope for You. Amen

PLEDGE OF ALLEGIANCE

The Honorable DON NICKLES led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will read a communication to the Senate.

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, November 24, 2004.

To the Senate:

Under the provisions of rule 1, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable DON NICKLES a Senator from the State of Oklahoma, to perform the duties of the Chair.

TED STEVENS,
President pro tempore.

Mr. NICKLES thereupon assumed the Chair as Acting President pro tempore.

RECOGNITION OF THE ACTING MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The Senator from Kentucky is recognized.

Mr. MCCONNELL. I thank the occupant of the chair.

SCHEDULE

Mr. MCCONNELL. Mr. President, Senator REID and I did not expect to be back so soon, but we are here again for a very brief session. We convene to consider two housekeeping matters that have been received from the House. The House has not yet acted on the concurrent resolution which will correct the enrollment of the consolidated or Omnibus appropriations measure. Without that House action we will be unable to transmit the conference report to the House so that they may then transmit the bill to the President. Therefore, we are here today to pass a short-term continuing resolution which is at the desk.

MAKING FURTHER CONTINUING APPROPRIATIONS FOR FISCAL YEAR 2005

Mr. MCCONNELL. Having said that, I now ask consent that the Senate proceed to the consideration of House Joint Resolution 115 which is at the desk; provided further that the joint resolution be read three times and passed, that the motion to reconsider be laid upon the table.

The ACTING PRESIDENT pro tempore. Is there objection? The Chair hears none, and it is so ordered.

The joint resolution (H.J. Res. 115) was read the third time and passed.

CONDITIONAL RECESS OR ADJOURNMENT OF THE HOUSE AND SENATE

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the Senate proceed to the House message accompanying the adjournment resolution.

The ACTING PRESIDENT pro tempore laid before the Senate the following message from the House of Representatives:

H. CON. RES. 529

Resolved, That the House agree to the amendment of the Senate to the resolution (H. Con. Res. 529) entitled ''Concurrent resolution providing for a conditional adjournment of the House of Representatives and a conditional recess or adjournment of the Senate'', with the following House amendments to Senate amendment:

(1) On page 1, line 2, before ''on a motion'' insert ''or on Saturday, November 27, 2004,''.

(2) On page 1, line 8, strike ''Wednesday, November 24'' and insert in lieu thereof ''Saturday, November 27''.

Mr. MCCONNELL. I further ask the Senate concur in the amendments of the House.

The ACTING PRESIDENT pro tempore. Is there objection? The Chair hears none, and it is so ordered.

AMENDING THE DISTRICT OF COLUMBIA COLLEGE ACCESS ACT OF 1999

Mr. MCCONNELL. I ask unanimous consent that the Senate now proceed to the immediate consideration of Calendar No. 659, H.R. 4012.

The ACTING PRESIDENT pro tempore. The clerk will report the bill by title.

The legislative clerk read as follows:

A bill (H.R. 4012) to amend the District of Columbia College Access Act of 1999 to reauthorize for five additional years the public school and private school tuition assistance programs established under the Act.

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

There being no objection, the Senate proceeded to consider the bill.

AMENDMENTS NOS. 4080 AND 4081

Mr. MCCONNELL. I ask unanimous consent the amendments at the desk be agreed to, the bill as amended be read a third time and passed, the motions to reconsider be laid upon the table, and any statements relating to the bill be printed in the RECORD.

The ACTING PRESIDENT pro tempore. Is there objection? The Chair hears none, and it is so ordered.

The amendments were agreed to, as follows:

AMENDMENT NO. 4080

(Purpose: To reduce extension to 2 years)

In section 1(a) strike ''10 succeeding'' and insert ''7 succeeding''.

In section 1(b) strike ''10 succeeding'' and insert ''7 succeeding''.

AMENDMENT NO. 4081

(Purpose: To amend the title of the bill)

Amend the title to read as follows:

''To amend the District of Columbia College Access Act of 1999 to reauthorize for 2 additional years the public school and private school tuition assistance programs established under the Act.''.

The bill (H.R. 4012), as amended, was read the third time and passed.

SENATOR FRIST'S REMARKS TO FEDERALIST SOCIETY

Mr. MCCONNELL. Mr. President, I ask unanimous consent to place in the RECORD a speech delivered on November 11 by the majority leader, Senator FRIST, to the Federalist Society regarding the treatment of judicial nominations in the 108th Congress.

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

REMARKS AS PREPARED FOR MAJORITY LEADER BILL FRIST, MD, THE FEDERALIST SOCIETY 2004 NATIONAL CONVENTION

WARDMAN PARK MARRIOTT HOTEL, Nov. 11.—Thank you all for that warm welcome. You've succeeded at an almost impossible task: you've put a doctor at ease in a room filled with a thousand lawyers.

I take great pride in being a citizen legislator—someone who sets aside a career for a period of time to serve in public office.

Perhaps the most famous citizen legislator of modern times was Jefferson Smith. Or, as he's better known: ''Mr. Smith'' in the classic American film, ''Mr. Smith Goes to Washington.''

One of my favorite scenes in that movie is when Mr. Smith takes the oath of office. He raises his right hand. And the Senate President reads the oath.

Mr. Smith pledges: ''I do.'' Then the Senate President says with a less than subtle touch of sarcasm: ''Senator, you can talk all you want to, now.''

United States Senators do talk all they want. And, with only one Senator and the presiding officer in the chamber during many debates, you often see them talking just to themselves.

It makes me think that I'd be a lot better prepared as Majority Leader with 20 years of experience, not as a heart surgeon, but as a psychiatrist.

The right to talk—the right to unlimited debate—is a tradition as old as the Senate itself.

It's unique to the institution. It shapes the character of the institution.

It's why the United States Senate is the world's greatest deliberative body. And, as James Madison wrote in Federalist No. 63, ''History informs us of no long lived republic which had not a senate.''

From time to time Senators use the right to unlimited debate to stop a bill. A Senator takes the floor, is recognized, starts talking, and doesn't stop talking.

This brings Senate business to a halt. And it's called a filibuster.

Senators have used the filibuster throughout much of Senate history. The first was launched in 1841 to block a banking bill. Civil rights legislation was filibustered throughout the 1950s and 60s.

The flamboyant Huey Long once took the floor and filibustered for over 15 hours straight.

When Senator Long suggested that his colleagues—many of whom were dozing off—be forced to listen to his speech, the presiding officer replied, ''That would be unusual cruelty under the Bill of Rights.''

The current Minority has not hesitated to use the filibuster to bring Senate business to a halt in the current Congress.

I have grave concerns, however, about one particular and unprecedented use of the filibuster.

I know it concerns you, as well. And it should concern every American who values our institutions and our constitutional system of government.

Tonight I want to share with you my thoughts about the filibuster of judicial nominees: it is radical; it is dangerous; and it must be overcome.

The Senate must be allowed to confirm judges who fairly, justly and independently interpret the law.

The current Minority has filibustered 10—and threatened to filibuster another 6—nominees to federal appeals courts.

This is unprecedented in over 200 years of Senate history.

Never before has a Minority blocked a judicial nominee that has majority support for an up-or-down vote on the Senate floor.

Never.

Now the Minority says the filibuster is their only choice, because the Majority controls both the White House and the Senate. But that fails the test of history.

The same party controlled the White House and the Senate for 70 percent of the 20th Century. No Minority filibustered judicial nominees then.

Howard Baker's Republican Minority didn't filibuster Democrat Jimmy Carter's nominees.

Robert Byrd's Democrat Minority didn't filibuster Republican Ronald Reagan's nominees.

Bob Dole's Republican Minority didn't filibuster Democrat Bill Clinton's nominees.

Now there's nothing specific in the formal Rules of the Senate that restrained those Minorities from filibustering. They simply used self-restraint.

Those Senators didn't filibuster, because it wasn't something Senators did.

They understood the Senate's role in the appointments process. And they heeded the intent and deferred to the greater wisdom of the Framers of the Constitution.

Then came the 108th Congress.

Majority control of the Senate switched hands. And one month later—in February 2003—the Minority radically broke with tradition and precedent and launched the first-ever filibuster of a judicial nominee who had majority support.

That nominee was Miguel Estrada—a member of this society.

You know first-hand that Miguel Estrada is an extraordinary human being.

He's an inspiration to all Americans and all people who aspire to one day live the American dream.

Miguel Estrada immigrated to the United States from Honduras as a teenager. He spoke little English.

But with a strong heart and a brilliant mind, he worked his way up to the highest levels of the legal profession.

He graduated magna cum laude and Phi Beta Kappa from Columbia College in New York. He earned his J.D. from Harvard Law School—where he served as editor of the Harvard Law Review.

He clerked in the Second Circuit Court of Appeals and for Supreme Court Justice Anthony Kennedy. He worked as a Deputy Chief U.S. Attorney and as an Assistant to the Solicitor General of the United States.

Miguel Estrada would have been a superb addition to the D.C. Circuit court. He's considered to be among the best of the best legal minds in America.

The American Bar Association gave him their highest rating.

But after two years, more than 100 hours of debate, and a record 7 attempts to move to an up-or-down vote, Miguel Estrada withdrew his name from consideration.

A sad chapter in the Senate's history came to a close. But, unfortunately, it was just the beginning.

The Minority extended its obstruction to Priscilla Owen, Carolyn Kuhl, William Pryor,

Charles Pickering, Janice Rogers Brown, Bill Myers, Henry Saad, Richard Griffin and David McKeague.

With the filibuster of Miguel Estrada, the subsequent filibuster of 9 other judicial nominees, and the threat of 6 more filibusters, the Minority has abandoned over 200 years of Senate tradition and precedent.

This radical action presents a serious challenge to the Senate as an institution and the principle so essential to our general liberty—the separation of powers.

It would be easy to attribute the Minority's actions to mere partisanship. But there is much more at work.

The Minority seeks nothing less than to realign the relationship between our three branches of government.

The Minority has not been satisfied with simply voting against the nominees—which is their right. They want to require a supermajority of 60 votes for confirmation.

This would establish a new threshold that would defy the clear intent of the Framers.

After much debate and compromise, the Framers concluded that the President should have the power to appoint. And the Senate should confirm or reject appointments by a simple majority vote.

This is ''advice and consent.'' And it's an essential check in the appointment process.

But the Minority's filibuster prevents the Senate from giving ''advice and consent.'' They deny the Senate the right to carry out its Constitutional duty.

This diminishes the role of the Senate as envisioned by the Framers. It silences the American people and the voices of their elected representatives.

And that is wrong.

This filibuster is nothing less than a formula for tyranny by the minority.

The President would have to make appointments that not just win a majority vote, but also pass the litmus tests of an obstructionist minority.

If this is allowed to stand, the Minority will have effectively seized from the President the power to appoint judges.

Never mind the Constitution.

Never mind the separation of powers.

Never mind the most recent election—in which the American people agreed that obstruction must end.

The Senate cannot allow the filibuster of circuit court nominees to continue. Nor can we allow the filibuster to extend to potential Supreme Court nominees.

Senators must be able to debate the merits of nominees on the floor and have the opportunity to publicly and permanently record a yes or no vote.

We must leave this obstruction behind. And we can—as an aberration in Senate history and a relic of a closely divided body during a challenging time for America.

The American people have re-elected a President and significantly expanded the Senate majority.

It would be wrong to allow a Minority to defy the will of a clear and decisive Majority that supports a judicial nominee.

And it would be wrong to allow a Senate Minority to erode the traditions of our body and undermine the separation of powers.

To tolerate continued filibusters would be to accept obstruction and harden the destructive precedents established in the current Congress.

With its judicial filibusters, the Minority has taken radical action. Now the damage must be undone.

American government must be allowed to function. And America must be allowed to move forward.

Senate rules and procedures have been shaped and molded throughout the body's history.

They're not set in stone. They can be changed to fit the governing climate, to respond to emerging challenges, and to restore vital constitutional traditions.

So when it became clear that the Minority was intent on abusing the filibuster in this Congress, we proposed to reform the rules.

In May 2003, Senator Zell Miller and I—joined by every member of the Majority leadership—proposed a new way to end debate and move to an up-or-down vote on nominations over a reasonable period of time.

A first attempt would require 60 votes, the next 57, the next 54, then 51, and finally we could end debate by a simple majority.

The Frist-Miller resolution went to the Rules Committee. Senator Lott chaired a hearing and the committee approved it in June.

For the remainder of 2003 and all of this year, Frist-Miller has sat on the Senate calendar—facing a certain filibuster by those who want to continue to filibuster judges.

The Frist-Miller reforms would be a civil, constructive and cooperative way to end the filibuster of judicial nominees.

The Senate now faces a choice: either we accept a new and destructive practice, or we act to restore constitutional balance.

We are the stewards of rich Senate traditions and constitutional principles that must be respected. We are the leaders elected by the American people to move this country forward.

As my colleague, Senator Feinstein said, ''A nominee is entitled to a vote. Vote them up; vote them down. . . . If we don't like them, we can vote against them. That is the honest thing to do.''

I fervently believe in the principles of the American Founding.

And I know you do too. Because I serve and work closely with 4 members of this society: Mitch McConnell, John Kyl, Jeff Sessions and Orrin Hatch.

Let me say this about these Senators: there are no more passionate defenders of America's founding principles anywhere in our government. They are true patriots.

They know that the principles enshrined in our Constitution have guided a miraculous experiment that has matured into the most stable form of government in human history.

And if we truly desire lasting solutions to the challenges of the 21st century, those same principles must guide us today and in the future.

The filibuster of judicial nominees is about Senate tradition. It's about the separation of powers. It's about our constitutional system of government.

But, at the most fundamental level, this filibuster is about our legacy as the leaders of the greatest people and nation on the face of the Earth.

What will we accomplish over the next four years? What will we do with the time and the trust that the American people have so generously given us?

One way or another, the filibuster of judicial nominees must end. The Senate must do what is good, what is right, what is reasonable, and what is honorable.

The Senate must do its duty.

And, when we do, we will preserve and vindicate America's founding principles for our time and for generations to come.

ADDITIONAL STATEMENTS

TAX RETURN PRIVACY

● Mr. CONRAD. On Saturday, November 20, 2004, the American taxpayers dodged a bullet. The Congress came close, much too close, to passing legislation that would have stripped every American of their right to privacy with regard to their tax returns.

The Senate averted this dangerous step, in part, because members of my staff—and one staffer in particular—came in to work on Saturday and read through more than 3,646 pages of a bill and its explanatory text.

As my colleagues know, we were called to the Chamber on Saturday to debate and vote on the conference report on H.R. 4818, the Omnibus appropriations bill. This so-called ''catch-all spending'' package included nine different appropriations bills costing some $388 billion for fiscal year 2005.

Many Members of Congress were familiar with some elements of the individual appropriations bills, including funding levels for programs and projects important to our States. But few, if any, Members were able to carefully analyze the bill in its entirety. Because the bill was delivered to each Senator and House Member at 6 a.m., we did not have much time to review the massive bill before we were asked to vote on it.

When the bill arrived I asked members of my staff to pore over the bill, each tasked with finding and reviewing sections of the bill where they have policy expertise. It was during this effort to review the bill that one of my staff members discovered an egregious tax provision. Steve Bailey, my tax counsel on the Senate Budget Committee, reading the Transportation-Treasury section of the bill, spotted section 222 and immediately realized it was a huge problem. The paragraph read:

Notwithstanding any other provision of law governing the disclosure of income tax returns or return information, upon written request of the Chairman of the House or Senate Committee on Appropriations, the Commissioner of the Internal Revenue Service shall hereafter allow agents designated by such Chairman access to Internal Revenue Service facilities and any tax returns or return information contained therein.

Mr. Bailey, who has worked on tax issues for more than 20 years, knew that if enacted, the provision would endanger the right and expectation of every American. This provision held the very real promise that the privacy of their tax returns could be compromised.

Thanks to Mr. Bailey's close reading of the bill and his quick recognition of the negative implications of that 60-word paragraph, I was able to bring the paragraph's existence to the attention of my colleagues. Fortunately, the Senate then firmly and unanimously rejected the paragraph and demanded that the House of Representatives remove the offending language before the bill could be sent to the President's desk for his signature.

At the conclusion of my remarks, I would like to have printed in the RECORD at the conclusion of my remarks an editorial from today's New York Times, ''Snookering the Taxpayers.'' This editorial mentions ''a sharp-eyed Democratic staff member [who] spotted the terse paragraph sitting like a toxic clam in the muck of the omnibus spending bill. . . .'' This editorial concludes with a clear understatement, ''Taxpayers can only hope someone keeps reading.''

Well, I can assure my constituents in North Dakota that my staff and I will keep on reading. But I also hope this experience will lead to a new method of doing business next year. The Senate should never again tolerate a process by which we are given a 3,600-page bill and are then asked to vote upon that bill several hours later. As my colleague from Arizona, Senator JOHN MCCAIN, has noted, this process is broken and it must change. I will be working with my colleagues to accomplish that goal next year.

I wanted to take this opportunity to recognize and thank Mr. Steve Bailey for his outstanding work and service to me and to the Senate. This past week, his hard work made a big difference to millions of American taxpayers.

The editorial follows.

[From the New York Times, Nov. 24, 2004]

SNOOKERING THE TAXPAYERS

It is called a snooker clause in legislative parlance—a last-minute insert into a dense and hurried midnight bill that, if ever disclosed after passage, always leaves legislators shocked, shocked at how such an undemocratic bit of mischief ever came to be. ''No earthly idea how that got in there,'' said Bill Frist, the Senate majority leader, after the impenetrable, 14-inch-thick omnibus budget bill turned out to have a provision giving Congressional chairmen and staff members entree to Americans' tax returns without regard to privacy protections.

This has been a sacrosanct area ever since the Watergate scandals. Severe civil and criminal penalties were enacted after the Nixon administration's rifling of private tax returns to build the ''enemies list'' aimed at government harassment.

A sharp-eyed Democratic staff member spotted the terse paragraph sitting like a toxic clam in the muck of the omnibus spending bill, a 3,000-page disgrace in its own right that capped months of Capitol procrastination. Once the provision was found, everyone felt compelled to denounce it. Senator Charles Grassley, the Iowa Republican, growled that it summoned ''the dark days in our history when taxpayer information was used against political enemies.'' The Senate declared the clause void, forcing G.O.P. leaders in the House, where the gambit originated, to sheepishly follow suit. House leaders insisted there was never an intent to pry into taxpayers' lives. The goal, they said, was simply to establish better oversight of the tax collection bureaucracy. Really? Then how come anyone bothering to read the bill (and that did not include many members of Congress) could see what an outrageous license it provided for the appropriations committees to look into tax offices ''and any tax returns or return information contained therein.''

Embarrassed solons had to admit they had no idea what other dangerous items might be in the bill. Taxpayers can only hope someone keeps reading.●

IDEA

● Mr. HARKIN. Mr. President, I wish to thank my colleagues, Chairman GREGG and Senator KENNEDY, as well as Chairman BOEHNER and Representative MILLER, for conducting a truly bipartisan conference. When the legislative process is working properly, we have a fair negotiation, and more often than not, that produces a better bill. Not a bill that gives each of us everything we wanted, but a fair result given the two bills that we are charged with reconciling. And that is what we have here.

Last week, Washington Post's internet site ran a cartoon by Ted Rall that was one of the most egregious things I have ever seen. I don't know if many of you saw it, but it showed a student in a wheelchair with crossed eyes and drool coming from his mouth. He had joined a class of students without disabilities and here is what one of the panels of the cartoon read: ''The special needs kids make people uncomfortable and slow the pace of learning.'' The cartoon showed the class changing from higher level math to simple addition because of the special education student.

The cartoon was supposed to be some kind of analogy to the United States, but it was very hard to understand the point. What was crystal clear, however, was the author's bigotry and stereotyping of children with disabilities. I understand that the Post will no longer run cartoons by Mr. Rall because cartoons like this are not funny. They are hurtful and serve as a stark reminder of why we are here and why IDEA is such important civil rights legislation.

I was here in Congress in 1975, as were some of my Senate colleagues, when IDEA was enacted. It is important to remember why we passed this legislation in the first place. We passed it because bigotry and discrimination were keeping a million children with disabilities completely out of school. Those children were locked out of an education and denied the bright future that comes with an education. IDEA opened the doors of opportunity for those children.

I have participated in many subsequent revisions to the law over the past 29 years, and I am supporting this reauthorization because we continue our proud tradition of ensuring that children with disabilities have the right to a free, appropriate public education (FAPE). In addition, we improve the enforcement of that right.

Over the years, I have been involved in the debate about disciplining students with disabilities—and this was a major issue for the conferees. I know parents were very concerned about changes to this section of the law. I appreciate and understand those concerns because I have shared them.

While this reauthorization streamlines the discipline provisions, it continues several key principles. We will continue to consider the impact of the disability on what the child is doing, and we will not punish children for behavior that is related to their disability. It is also important that we continue to require that children receive educational services when they are being disciplined so they do not fall further behind. We also continue to emphasize that an assessment and services must be provided to children who have more serious behaviors so we can prevent future discipline problems.

I believe that discipline will become less and less of an issue over time as schools implement positive behavior supports more widely. Section 614(d)(3)(B), entitled Consideration of Special Factors, was added in 1997 to provide special emphasis on certain related services, modifications, and auxiliary aides which were not being considered by IEP teams and therefore not provided. The Senate bill modified subsection 614(d)(3)(B)(i) to state that behavioral supports must be provided when the child's behavior impeded his/her education or that of others. In conference, current law was reinstated in order to make the subsection consistent with the other special consideration subsections.

By instructing the IEP team to consider the specified services, it goes without saying that the services must be provided if the IEP team finds that the services will assist the child in benefiting from his/her educational program. In the case of behavioral interventions, the section sets forth the circumstances when the services would be required.

The regulations to IDEA specify that ''if, in considering the special factors . . . the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP.'' 34 C.F.R. Sec. 346(c). And IEP services must be provided to the student. See Office of Special Education Programs Letter to Osterhout, 35 IDELR 9 (2000).

There has been widespread noncompliance with this requirement. However with reauthorization's increased emphasis on monitoring and enforcement, we expect this implementation will improve. Children whose behavior is impeding them or others from learning should get the positive behavioral supports they need when the IEP team considers this issue and finds that the services are part of FAPE for that child.

In addition, we allow schools to use up to 15 percent of their funds to address behavior issues for children who have not been identified as special education students. Also, Senator CLINTON has worked to include authorization for a program that would provide funding for systemic positive behavioral supports in schools.

Research by Dr. George Sugai and others indicates that the implementation of positive behavioral supports can have a dramatic impact on disciplinary problems. Dr. Sugai testified in 2002 before the Health, Education, and Labor Committee that by shifting to schoolwide positive behavioral supports, an urban elementary school decreased its office referrals from 600 to 100. It also decreased in 1 year its days of suspension from 80 to 35. Schools can save administrators' time and resources and cut down on discipline problems by implementing these programs.

Another area that generated discussion in this reauthorization is litigation and attorneys fees. However, the facts show that there is very little litigation under IDEA. GAO examined the data and concluded that the use of ''formal dispute resolution mechanisms has been generally low relative to the number of children with disabilities,'' according to a 2003 report titled, ''Special Education: Numbers of Formal Disputes are Low and States are Using Mediation and Other Strategies to Resolve Conflicts.''

My own State of Iowa follows the general trend of very low hearings and court cases. A graduate student in Iowa did a thorough analysis of due process hearings in Iowa from 1989–2001. Since the amendments in 1997, there were three hearings in 1998; three also in 1999 and four hearings in 2000. The Department of Education informs me that this trend continues, with only three hearings in each of the past 2 years. And there are thousands of children in special education in the State of Iowa.

Given the fact that litigation is generally not a problem in IDEA, in this reauthorization we merely include a standard that is used in other civil rights contexts—it is generally referred to by the case, *Christiansburg Garment Company* vs. *Equal Employment Opportunity Commission*, 98 S.Ct. 694 (1978). Both prongs of the Christiansburg

standard (filing or pursuing litigation that is groundless or for bad faith/improper purpose) adopted today are very high standards, and prevailing defendants are rarely able to meet them. They are designed for only the most egregious cases.

Also, in deciding cases under this standard, courts have considered the party's ability to pay. This is important because Congress does not intend to impose a harsh financial penalty on parents who are merely trying to help their child get needed services and supports. So in applying this standard and deciding whether to grant defendants fees, the court must also consider the ability of the parents to pay.

A school district would be foolhardy to try to use these provisions in any but the most egregious cases. Not only would the school be wasting its own resources if it did not prevail, but it would be liable for the parents' fees defending the action.

Unlike parents who are entitled to attorney fees if they win the case, the fact that a LEA ultimately prevailed is not grounds for assessing fees against a parent or parent's attorney. As the Supreme Court concluded in Christiansburg, courts should not engage in ''post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.''

As GAO found, there has been a low incidence of litigation under IDEA. The cases that are filed are generally pursued because parents have no other choice. Congress does not intend to discourage these parents from enforcing their child's right to a free, appropriate, public education. This is merely to address the most egregious type of behavior in very rare circumstances where it might arise.

In this reauthorization, we also include a 2-year statute of limitations on claims. However, it should be noted that this limitation is not designed to have any impact on the ability of a child to receive compensatory damages for the entire period in which he or she has been deprived of services. The statute of limitations goes only to the filing of the complaint, not the crafting of remedy. This is important because it is only fair that if a school district repeatedly failed to provide services to a child, they should be required to provide compensatory services to rectify this problem and help the child achieve despite the school's failings.

Therefore, compensatory education must cover the entire period and must belatedly provide all education and related services previously denied and needed to make the child whole. Children whose parents can't afford to pay for special education and related services when school districts fail to provide FAPE should be treated the same as children whose parents can. Children whose parents have the funds can be fully reimbursed under the Supreme Courts decisions in Burlington and Florence County, subject to certain equitable considerations, and children whose parents lack the funds should not be treated differently.

I also want to discuss the monitoring and enforcement sections of this bill. I want to thank Senator KENNEDY for his leadership on this issue. Again, GAO has issued a report that has informed our deliberations around this issue. They noted that the Department of Education found violations of IDEA in 30 of the 31 States monitored. In addition, GAO found that the majority of these violations were for failure to provide actual services to children. That report, issued this year, is titled, ''Special Education: Improved Timeliness and Better Use of Enforcement Actions Could Strengthen Education's Monitoring System.''

When we passed the Americans with Disabilities Act, we said that our four national goals for people with disabilities were equality of opportunity, full participation, independent living, and economic self-sufficiency. But children with disabilities are never going to meet any of those goals if they don't get the tools they need when they are young. So if we truly want equal opportunity for individuals with disabilities, it has to start with IDEA, and with our youth, who are our future. The law must be enforced so they receive the services and supports they need to get a quality education and a brighter future.

As part of the enforcement of this law, States must ensure that local education agencies are meeting their targets to provide a free, appropriate public education. If they fail to do so, the State must take action, including prohibiting the flexible use of any of the local education agency's resources.

In addition to monitoring and enforcement, there are other improvements in this bill. I will mention one area that is near and dear to my heart because of my brother Frank, who, as many of you know, was deaf. In this bill, we add interpreter services to the list of related services, a change that is long overdue and we continue to require the Department of Education to fund captioning so deaf and hard-of-hearing individuals will have equal access to the media.

While I support the bill, I must point out, however, that I am deeply disappointed that this bill does not include mandatory full funding of IDEA. We fought for this on the floor of the Senate. Even though a majority of the Senate agreed, we did not have the needed 60 votes, and it did not become part of the Senate bill. I continue to believe that mandatory funding is required to give schools the resources they need to ensure that all children get a quality education.

This bill does, however, have specific authorized levels that will get us to full funding in 7 years. If we fail to meet these levels, I will continue to argue that Congress should provide mandatory funding to ensure we meet the commitment we made almost 30 years ago.

This is a bill about children. We all tell our children to keep their promises, to fulfill any commitments they make. Yet Congress has not kept its word to these children and their families. We have not provided the resources we said we would. We must fully fund IDEA. This is important to children, to schools, and to our communities. And it is the right thing to do.

I want to thank the staff who worked so hard on this bill. On my staff, I would like to thank Mary Giliberti, Julie Carter, Erik Fatemi, and Justin Chappell. I especially thank Senator KENNEDY's staff for their dedication to children with disabilities, including Connie Garner, Kent Mitchell, Michael Dannenberg, Roberto Rodriguez, and Jeremy Buzzell.

I would also like to thank Denzel McGuire, Annie White, Bill Lucia, and Courtney Brown on Senator GREGG's staff for their efforts to ensure a bipartisan process.

Also, thanks go to Sally Lovejoy and David Cleary with Congressman BOEHNER; Alex Nock with Congressman MILLER; Michael Yudin with Senator BINGAMAN; Carmel Martin, formerly with Senator BINGAMAN's staff; Jamie Fasteau, with Senator MURRAY's; Bethany Little, formerly with Senator MURRAY's staff; Catherine Brown, with Senator CLINTON; Justin King with Senator JEFFORDS; Rebecca Litt, with Senator MIKULSKI; Elyse Wasch, with Senator REED; Maryellen McGuire and Jim Fenton with Senator DODD; Joan Huffer, with Senator DASCHLE; Bethany Dickerson with the Democratic Policy Committee; and Erica Buehrens, with Senator EDWARDS.

Mr. President, IDEA is fundamentally a civil rights statute for children with disabilities. I have worked with my colleagues on this conference to ensure that core rights are protected and enforced.●

NAMING OF JAMES R. BROWNING FEDERAL COURTHOUSE

● Mr. BAUCUS. Mr. President, I would like to speak briefly about legislation to rename the U.S. Courthouse in San Francisco after Judge James R. Browning. This legislation cleared Congress over the weekend. It is a long overdue honor for one of the Nation's finest public servants.

I would like to thank my Senate friends and colleagues for their hard work and support, particularly Senator BOXER, who sponsored the Browning courthouse naming legislation. I would also like to recognize and thank Senator HATCH and Senator STEVENS. Their efforts were crucial in moving this legislation across the finish line in the 109th Congress.

Let me tell you about Judge James R. Browning. First, he is a great man

and a fine judge who has committed the better part of his life to promoting and improving the administration of justice. Montana is proud to call him one of their own, and I am proud to call him my friend.

Judge Browning was born in Great Falls, MT, just like another famous Montana son—former Senate Majority Leader and Ambassador to Japan, Mike Mansfield. Judge Browning grew up in the small town of Belt, MT, and married his high-school sweetheart Marie Rose from Belfry, MT. Judge Browning received his law degree from the University of Montana in 1941, graduating at the top of his class. He worked for the Antitrust Division of the Department of Justice before joining the U.S. Army where he served in Military Intelligence for 3 years, attaining the rank of first lieutenant and winning the Bronze Star.

After the war, he returned to the Justice Department, eventually rising through the ranks to become Executive Assistant to the Attorney General. In 1953, he entered private practice, leaving after 5 years to serve as the Clerk of the U.S. Supreme Court at the request of Chief Justice Earl Warren. In that position, he held the Bible during President John F. Kennedy's inauguration.

In 1961, President Kennedy named James Browning to be a Circuit Judge of the U.S. Court of Appeals for the Ninth Circuit. Judge Browning has served on that court with distinction and honor for more than 40 years, longer than any other judge in Ninth Circuit history. He was still working 6 days a week as an active federal judge when he turned 80 in 1998, and he did not take senior status until November of 2000. He has participated in nearly 1000 published appellate decisions.

Judge Browning was named chief judge of the Ninth Circuit in 1976. During his 12-year tenure as the chief judge, the Ninth Circuit expanded from 23 to 28 judges, eliminated its case backlog entirely, and reduced by half the time needed to decide appeals. He worked tirelessly to improve the administration of the courts, dramatically increasing the efficiency and productivity of the Ninth Circuit, all the while emphasizing collegiality and civility among his colleagues on the Ninth Circuit. Judge Browning's leadership and innovation sparked similar administrative reforms throughout the country.

Judge Browning is held in the highest regard by both bench and bar across California, in Montana, and within the Ninth Circuit legal community. His rich and distinguished career spans more than six decades—most of it spent in public service. We have finally recognized his long service to his country and the Ninth Circuit by renaming the U.S. Courthouse in San Francisco in his honor. It is a long way from Belt, MT, but Judge Browning never forgot his roots, and now neither will the Ninth Circuit that he helped to build.●

FAMILY ENTERTAINMENT AND COPYRIGHT ACT OF 2004

● Mr. CORNYN. Mr. President, would the chairman yield for a question?

Mr. HATCH. I would be happy to yield for a question from the distinguished Senator from Texas.

Mr. CORNYN. As the chairman knows, he and I and our other co-sponsors have worked throughout this Congress on the provisions of the Family Entertainment and Copyright Act of 2004 that we have introduced today. I just want to confirm what I believe to be our mutual understanding about the effect of certain provisions of the Family Movie Act. Title II of the Family Entertainment and Copyright Act of 2004 that we introduced today modifies slightly the Family Movie Act provisions of H.R. 4077 as passed by the House of Representatives. That bill created a new exemption in section 110(11) of the Copyright Act for skipping and muting audio and video content in motion pictures during performances that take place in the course of a private viewing in a household from an authorized copy of the motion picture. The House-passed version specifically excluded from the scope of the new copyright exemption computer programs or technologies that make changes, deletions, or additions to commercial advertisements or to network or station promotional announcements that would otherwise be displayed before, during, or after the performance of the motion picture.

My understanding is that this provision reflected a ''belt and suspenders'' approach that was adopted to quiet the concerns of some Members in the House who were concerned that a court might misread the statute to apply to ''ad-skipping'' cases. Some Senators, however, expressed concern that the inclusion of such explicit language could create unwanted inferences as to the ''ad-skipping'' issues at the heart of the recent litigation. Those issues remain unsettled, and it was never the intent of this legislation to resolve or affect those issues. In the meantime, the Copyright Office has confirmed that such a provision is unnecessary to achieve the intent of the bill, which is to avoid application of this new exemption in potential future cases involving ''ad-skipping'' devices; therefore, the Senate amendment we offer removes the unnecessary exclusionary language.

Would the chairman confirm for the Senators present his understanding of the intent and effect, or perhaps stated more appropriately, the lack of any effect, of the Senate amendment on the scope of this bill?

Mr. HATCH. My cosponsor, Senator CORNYN, raises an important point. While we removed the ''ad-skipping'' language from the statute to avoid this unnecessary controversy, you are absolutely correct that this does not in any way change the scope of the bill. The bill protects the ''making imperceptible . . . limited portions of audio or video content of a motion picture . . .'' An advertisement, under the Copyright Act, is itself a ''motion picture,'' and thus a product or service that enables the skipping of an entire advertisement, in any media, would be beyond the scope of the exemption. Moreover, the phrase ''limited portions'' is intended to refer to portions that are both quantitatively and qualitatively insubstantial in relation to the work as a whole. Where any substantial part of a complete work, such as a commercial advertisement, is made imperceptible, the new section 110(11) exemption would not apply.

The limited scope of this exemption does not, however, imply or show that such a product would be infringing. This legislation does not in any way deal with that issue. It means simply that such a product is not immunized from liability by this exemption.

Mr. CORNYN. I thank the chairman. I am pleased that we share a common understanding. If the chairman would yield for one more question about the Family Movie Act?

Mr. HATCH. Certainly.

Mr. CORNYN. This bill also differs from the House-passed version because it adds two ''savings clauses.'' As I understand it, the ''copyright'' savings clause makes clear that there should be no ''spillover effect'' from the passage of this law: that is, nothing shall be construed to have any effect on rights, defenses, or limitations on rights granted under title 17, other than those explicitly provided for in the new section 110(11) exemption. The second, relating to trademark, clarifies that no inference can be drawn that a person or company who fails to qualify for the exemption from trademark infringement found in this provision is therefore liable for trademark infringement. Is that the chairman's understanding as well?

Mr. HATCH. Yes it is. Let me ask that a copy of the section-by-section analysis of the Family Movie Act as amended by the Senate be included in the RECORD. This section-by-section analysis contains a more complete analysis of the bill as proposed today in the Senate, including the limited changes made by the bill Senators LEAHY, CORNYN, BIDEN, and I offer today.

The analysis follows.

SECTION-BY-SECTION ANALYSIS OF THE FAMILY MOVIE ACT OF 2004, AMENDED AND PASSED BY THE SENATE

OVERVIEW

Title II of the Family Entertainment and Copyright Act of 2004 incorporates the House-passed provision of the Family Movie Act of 2004, with limited changes as reflected in this section-by-section analysis. As discussed herein, these changes are not intended to and do not affect the scope, effect or application of the bill.

The purpose of the Family Movie Act is to empower private individuals to use technology to skip and mute material that they find objectionable in movies, without impacting established doctrines of copyright or

trademark law or those whose business models depend upon advertising. This amendment to the law should be narrowly construed to effect its intended purpose only. The sponsors of the legislation have been careful to tailor narrowly the legislation to clearly allow specific, consumer-directed activity and not to open or decide collateral issues or to affect any other potential or actual disputes in the law.

The bill as proposed in the Senate makes clear that, under certain conditions, ''making imperceptible'' of limited portions of audio or video content of a motion picture—that is, skipping and muting limited portions of movies without adding any content—as well as the creation or provision of a computer program or other technology that enables such making imperceptible, does not violate existing copyright or trademark laws. That is true whether the movie is on prerecorded media, like a DVD, or is transmitted to the home, as through pay-per-view and ''video-on-demand'' services.

Subsection (a): Short Title

Subsection (a) sets forth the short title of the bill as the Family Movie Act of 2004.

Subsection (b): Exemption From Copyright and Trademark Infringement for Skipping of Audio or Video Content of Motion Pictures

Subsection (b) is the Family Movie Act's core provision and creates a new exemption at section 110(11) of the Copyright Act for the ''making imperceptible'' of limited portions of audio or video content of a motion picture during a performance in a private household. This new exemption sets forth a number of conditions to ensure that it achieves its intended effect while remaining carefully circumscribed and avoiding any unintended consequences. The conditions that allow an exemption, which are discussed in more detail below, consist of the following:

The making imperceptible must be ''by or at the direction of a member of a private household.'' This legislation contemplates that any altered performances of the motion picture would be made either directly by the viewer or at the direction of a viewer where the viewer is exercising substantial choice over the types of content they choose to skip or mute.

The making imperceptible must occur ''during a performance in or transmitted to the household for private home viewing.'' Thus, this provision does not exempt an unauthorized ''public performance'' of an altered version.

The making imperceptible must be ''from an authorized copy of a motion picture.'' Thus, skipping and muting from an unauthorized or ''bootleg'' copy of a motion picture would not be exempt.

No ''fixed copy'' of the altered version of the motion picture may be created by the computer program or other technology that makes imperceptible portions of the audio or video content of the motion picture. This provision makes clear that services or technologies that make a fixed copy of the altered version are not afforded the benefit of this exemption.

The ''making imperceptible'' of limited portions of a motion picture does not include the addition of audio or video content over or in place of other content, such as placing a modified image of a person, a product, or an advertisement in place of another, or adding content of any kind.

These limitations, and other operative provisions of this new section 110(11) exemption, merit further elaboration as to their purposes and effects.

The bill makes clear that the ''making imperceptible'' of limited portions of audio or video content of a motion picture must be done by or at the direction of a member of a private household. While this limitation does not require that the individual member of the private household exercise ultimate decision-making over each and every scene or element of dialog in the motion picture that is to be made imperceptible, it does require that the making imperceptible be made at the direction of that individual in response to the individualized preferences expressed by that individual. The test of ''at the direction of an individual'' would be satisfied when an individual selects preferences from among options that are offered by the technology.

An example is the C1earPlay model. C1earPlay provides so-called ''filter files'' that allow a viewer to express his or her preferences in a number of different categories, including language, violence, drug content, sexual content, and several others. The version of the movie that the viewer sees depends upon the preferences expressed by that viewer. Such a model would fall under the liability limitation of the Family Movie Act.

This limitation, however, would not allow a program distributor, such as a provider of video-on-demand services, a cable or satellite channel, or a broadcaster, to make imperceptible limited portions of a movie in order to provide an altered version of that movie to all of its customers, which could violate a number of the copyright owner's exclusive rights, or to make a determination of scenes to be skipped or dialog to be muted and to offer to its viewers no more of a choice than to view an original or an altered version of that film. Some element of individualized preferences and control must be present such that the viewer exercises substantial choice over the types of content they choose to skip or mute.

It is also important to emphasize that the new section 110(11) exemption is targeted narrowly and specifically at the act of ''making imperceptible'' limited portions of audio or video content of a motion picture during a performance that occurs in, or that is transmitted to, a private household for private home viewing. This section would not exempt from liability an otherwise infringing performance, or a transmission of a performance, during which limited portions of audio or video content of the motion picture are made imperceptible. In other words, where a performance in a household or a transmission of a performance to a household is done lawfully, the making imperceptible limited portions of audio or video content of the motion picture during that performance, consistent with the requirements of this new section, will not result in infringement liability. Similarly, an infringing performance in a household, or an infringing transmission of a performance to a household, are not rendered non-infringing by section 110(11) by virtue of the fact that limited portions of audio or video content of the motion picture being performed are made imperceptible during such performance or transmission in a manner consistent with that section.

The bill also provides additional guidance, if not an exact definition, of what the term ''making imperceptible'' means. The bill provides specifically that the term ''making imperceptible'' does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture. This is intended to make clear in the text of the statute what has been expressed throughout the consideration of this legislation, which is that the Family Movie Act does not enable the addition of content of any kind, including the making imperceptible of audio or video content by replacing it or by superimposing other content over it. In other words, for purposes of section 110(11), ''making imperceptible'' refers solely to skipping scenes and portions of scenes or muting audio content from the original, commercially available version of the motion picture. No other modifications of the content are addressed or immunized by this legislation.

The House sponsor of this legislation noted in his explanation of his bill, and the Senate is also aware, that some copy protection technologies rely on matter placed into the audio or video signal. The phrase ''limited portions of audio or video content of a motion picture'' means what it would naturally seem to mean (i.e., the actual content of the motion picture) and does not refer to any component of a copy protection scheme or technology. This provision does not allow the skipping of technologies or other copy-protection-related matter for the purpose of defeating copy protection. Rather, it is expected that skipping and muting of content in the actual motion picture will be skipped or muted at the direction of the viewer based on that viewer's desire to avoid seeing or hearing the action or sound in the motion picture. Skipping or muting done for the purpose of or having the effect of avoiding copy protection technologies would be an abuse of the safe harbor outlined in this legislation and may violate section 1201 of title 17.

Violating the Digital Millennium Copyright Act, and particularly its anti-circumvention provisions, is not necessary to enable technology of the kind contemplated under the Family Movie Act. Although the amendment to section 110 provides that it is not an infringement of copyright to engage in the conduct that is the subject of the Family Movie Act, the Act does not provide any exemption from the anti-circumvention provisions of section 1201 of title 17, or from any other provision of chapter 12 of title 17. It would not be a defense to a claim of violation of section 1201 that the circumvention is for the purpose of engaging in the conduct covered by this new exemption in section 110(11), just as it is not a defense under section 1201 that the circumvention is for the purpose of engaging in any other non-infringing conduct.

There are a number of companies currently providing the type of products and services covered by this Act. The Family Movie Act is intended to facilitate the offering of such products and services, and it certainly creates no impediment to the technology employed by those companies. Indeed, it is important to underscore the fact that the support for such technology and consumer offerings that is reflected in this legislation is driven in some measure by the desire for copyright law to be respected and to ensure that technology is deployed in a way that supports the continued creation and protection of entertainment and information products that rely on copyright protection. This legislation reflects the firm expectation that those rights and the interests of viewers in their homes can work together in the context defined in this bill. Any suggestion that support for the exercise of viewer choice in modifying their viewing experience of copyrighted works requires violation of either the copyright in the work or of the copy protection schemes that provide protection for such work should be rejected as counter to legislative intent or technological necessity.

The House-passed bill included an explicit exclusion to the new section 110(11) exemption in cases involving the making imperceptible of commercial advertisements or network or station promotional announcements. This provision was added on the House floor to respond to concerns expressed by Members during the House Judiciary Committee markup that the bill might be

read somehow to exempt from copyright infringement liability devices that allow for skipping of advertisements in the playback of recorded television (so called ''ad-skipping'' devices). Such a reading is not consistent with the language of the bill or its intent.

The phrase ''limited portions of audio or video content of a motion picture'' applies only to the skipping and muting of scenes or dialog that are part of the motion picture itself, and not to the skipping of commercial advertisements, which are themselves considered motions pictures under the Copyright Act. It also should be noted that the phrase ''limited portions'' is intended to refer to portions that are both quantitatively and qualitatively insubstantial in relation to the work as a whole. Where any substantial part of a complete work (including a commercial advertisement) is made imperceptible, the section 110(11) exemption would not apply.

The House-passed bill adopted a ''belt and suspenders'' approach to this question by adding exclusionary language in the statute itself. Ultimately that provision raised concerns in the Senate that such exclusionary language would result in an inference that the bill somehow expresses an opinion, or even decides, the unresolved legal questions underlying recent litigation related to these so-called ''ad-skipping'' devices. In the meantime, the Copyright Office also made clear that such exclusionary language is not necessary. In other words, the exclusionary language created unnecessary controversy without adding any needed clarity to the statute.

Thus, the Senate amendment omits the exclusionary language while leaving the scope and application of the bill exactly as it was when it passed the House. The legislation does not provide a defense in cases involving so-called ''ad-skipping'' devices, and it also does not affect the legal issues underlying such litigation, one way or another. Consistent with the intent of the legislation to fix a narrow and specific copyright issue, this bill seeks very clearly to avoid unnecessarily interfering with current business models, especially with respect to advertising, promotional announcements, and the like. Simply put, the bill as amended in the Senate is narrowly targeted to the use of technologies and services that filter out content in movies that a viewer finds objectionable, and it in no way relates to or affects the legality of so-called ''ad-skipping'' technologies.

There are a variety of services currently in litigation that distribute actual copies of altered movies. This type of activity is not covered by the section 110(11) exemption created by the Family Movie Act. There is a basic distinction between a viewer choosing to alter what is visible or audible when viewing a film, the focus of this legislation, and a separate entity choosing to create and distribute a single, altered version to members of the public. The section 110(11) exemption only applies to viewer directed changes to the viewing experience, and not the making or distribution of actual altered copies of the motion picture.

Related to this point, during consideration of this legislation in the House there were conflicting expert opinions on whether fixation is required to infringe the derivative work right under the Copyright Act, as well as whether evidence of Congressional intent in enacting the 1976 Copyright Act supports the notion that fixation should not be a prerequisite for the preparation of an infringing derivative work. This legislation should not be construed to be predicated on or to take a position on whether fixation is necessary to violate the derivative work right, or whether the conduct that is immunized by this legislation would be infringing in the absence of this legislation.

Subsection (b) also provides a savings clause to make clear that the newly-created copyright exemption is not to be construed to have any effect on rights, defenses, or limitations on rights granted under title 17, other than those explicitly provided for in the new section 110(11) exemption.

Subsection (c): Exemption From Trademark Infringement

Subsection (c) provides for a limited exemption from trademark infringement for those engaged in the conduct described in the new section 110(11) of the Copyright Act.

In short, this subsection makes clear that a person engaging in the conduct described in section 110(11)—the ''making imperceptible'' of portions of audio or video content of a motion picture or the creation or provision of technology to enable such making available—is not subject to trademark infringement liability based on that conduct, provided that person's conduct complies with the requirements of section 110(11). This section provides a similar exemption for a manufacturer, licensee or licensor of technology that enables such making imperceptible, but such manufacturer, licensee or licensor is subject to the additional requirement that it ensure that the technology provides a clear and conspicuous notice at the beginning of each performance that the performance of the motion picture is altered from the performance intended by the director or the copyright holder.

Of course, nothing in this section would immunize someone whose conduct, apart from the narrow conduct described by 110(11), rises to the level of a Lanham Act violation. For example, someone who provides technology to enable the making imperceptible limited portions of a motion picture consistent with section 110(11) could not be held liable on account of such conduct under the Trademark Act, but if in providing such technology the person also makes an infringing use of a protected mark or engages in other ancillary conduct that is infringing, such conduct would not be subject to the exemption provided here. As amended by the Senate, the bill also makes clear that failure by a manufacturer, licensee, or licensor of technology to qualify for the exemption created by this subsection is not, by itself, enough to establish trademark infringement. Failure to qualify for the safe harbor from trademark liability merely means that the manufacturer, licensee, or other licensor of technology cannot assert an affirmative defense based on this exemption in a case where trademark infringement or some other violation of the Trademark Act is established.

Subsection (d): Definition

Subsection (d) provides definitional clarification regarding short-hand references throughout this section to the ''Trademark Act of 1946.''●

MESSAGE FROM THE HOUSE DURING ADJOURNMENT

Under the authority of the order of January 7, 2003, the Secretary of the Senate, on November 24, 2004, during the adjournment of the Senate, received a message from the House of Representatives, announcing that the House has passed the following joint resolution, in which it requests the concurrence of the Senate:

H.J. Res. 115. Joint resolution making further continuing appropriations for the fiscal year 2005, and for other purposes.

The message also announced that the House has agreed to the amendment of the Senate to the resolution (H. Con. Res. 529) providing for a conditional adjournment of the House of Representatives and a conditional recess or adjournment of the Senate, with amendments.

ENROLLED BILLS SIGNED

Under authority of the order of the Senate of January 7, 2003, the Secretary of the Senate, on November 24, 2004, during the adjournment of the Senate, received a message from the House of Representatives announcing that the Speaker has signed the following enrolled bills:

S. 434. An act to authorize the Secretary of Agriculture to sell or exchange all or part of certain parcels of National Forest System land in the State of Idaho and use the proceeds derived from the sale or exchange for National Forest System purposes.

S. 1146. An act to implement the recommendations of the Garrison Unit Joint Tribal Advisory Committee by providing authorization for the construction of a rural health care facility on the Fort Berthold Indian Reservation, North Dakota.

S. 1241. An act to establish the Kate Mullany National Historic Site in the State of New York, and for other purposes.

S. 1727. An act to authorize additional appropriations for the Reclamation Safety of Dams Act of 1978.

S. 2042. An act for the relief of Rocco A. Trecosta of Fort Lauderdale, Florida.

S. 2214. An act to designate the facility of the United States Postal Service located at 3150 Great Northern Avenue in Missoula, Montana, as the ''Mike Mansfield Post Office''.

S. 2302. An act to improve access to physicians in medically underserved areas.

S. 2484. An act to amend title 38, United States Code, to simplify and improve pay provisions for physicians and dentists and to authorize alternate work schedules and executive pay for nurses, and for other purposes.

S. 2640. An act to designate the facility of the United States Postal Service located at 1050 North Hills Boulevard in Reno, Nevada, as the ''Guardians of Freedom Memorial Post Office Building'' and to authorize the installation of a plaque at such site, and for other purposes.

S. 2693. An act to designate the facility of the United States Postal Service located at 1475 Western Avenue, Suite 45, in Albany, New York, as the ''Lieutenant John F. Finn Post Office''.

S. 2965. An act to amend the Livestock Mandatory Price Reporting Act of 1999 to modify the termination date for mandatory price reporting.

Under the authority of the order of January 7, 2003, the enrolled bills were signed by the President pro tempore (Mr. STEVENS) on November 24, 2004.

ENROLLED BILLS PRESENTED DURING ADJOURNMENT

The Secretary of the Senate reported that on November 24, 2003, she had presented to the President of the United States the following enrolled bills:

S. 434. An act to authorize the Secretary of Agriculture to sell or exchange all or part of certain parcels of National Forest System land in the State of Idaho and use the proceeds derived from the sale or exchange for National Forest System purposes.

S. 1146. An act to implement the recommendations of the Garrison Unit Joint Tribal Advisory Committee by providing authorization for the construction of a rural health care facility on the Fort Berthold Indian Reservation, North Dakota.

S. 1241. An act to establish the Kate Mullany National Historic Site in the State of New York, and for other purposes.

S. 1727. An act to authorize additional appropriations for the Reclamation Safety of Dams Act of 1978.

S. 2042. An act for the relief of Rocco A. Trecosta of Fort Lauderdale, Florida.

S. 2214. An act to designate the facility of the United States Postal Service located at 3150 Great Northern Avenue in Missoula, Montana, as the ''Mike Mansfield Post Office''.

S. 2302. An act to improve access to physicians in medically underserved areas.

S. 2484. An act to amend title 238, United States Code, to simplify and improve pay provisions for physicians and dentists and to authorize alternate work schedules and executive pay for nurses, and for other purposes.

S. 2640. An act to designate the facility of the United States Postal Service located at 1050 North Hills Boulevard in Reno, Nevada, as the ''Guardians of Freedom Memorial Post Office Building'' and to authorize the installation of a plaque at such site, and for other purposes.

S. 2693. An act to designate the facility of the United States Postal Service located at 1475 Western Avenue, Suite 45, in Albany, New York, as the ''Lieutenant John F. Finn Post Office''.

S. 2965. An act to amend the Livestock Mandatory Price Reporting Act of 1999 to modify the termination date for mandatory price reporting.

ADDITIONAL COSPONSORS

S. 3021

At the request of Mr. CORNYN, his name and the names of the Senator from California (Mrs. FEINSTEIN) and the Senator from Delaware (Mr. BIDEN) were added as cosponsors of S. 3021, a bill to provide for the protection of intellectual property rights, and for other purposes.

AMENDMENTS SUBMITTED AND PROPOSED

SA 4080. Mr. MCCONNELL (for Mr. VOINOVICH) proposed an amendment to the bill H.R. 4012, to amend the District of Columbia College Access Act of 1999 to reauthorize for five additional years the public school and private school tuition assistance programs established under the Act.

SA 4081. Mr. MCCONNELL (for Mr. VOINOVICH) proposed an amendment to the bill H.R. 4012, supra.

TEXT OF AMENDMENTS

SA. 4080. Mr. MCCONNELL (for Mr. VOINOVICH) proposed an amendment to the bill H.R. 4012, to amend the District of Columbia College Access Act of 1999 to reauthorize for five additional years the public school and private school tuition assistance programs established under the Act; as follows:

In section 1(a) strike ''10 succeeding'' and insert ''7 succeeding''.

In section 1(b) strike ''10 succeeding'' and insert ''7 succeeding''.

SA. 4081. Mr. MCCONNELL (for Mr. VOINOVICH) proposed an amendment to the bill H.R. 4012, to amend the District of Columbia College Access Act of 1999 to reauthorize for five additional years the public school and private school tuition assistance programs established under the Act; as follows:

Amend the title to read as follows:

''To amend the District of Columbia College Access Act of 1999 to reauthorize for 2 additional years the public school and private school tuition assistance programs established under the Act.''.

ORDERS FOR TUESDAY, DECEMBER 7, 2004

Mr. MCCONNELL. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand adjourned under the provisions of H. Con. Res. 529 until 9:30 a.m. on Tuesday, December 7, 2004. I further ask that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, the time for the two leaders be reserved, and there then be a period of morning business until the hour of 12:30 with Senators permitted to speak for up to 10 minutes each.

The ACTING PRESIDENT pro tempore. Is there objection? The Chair hears none, and it is so ordered.

PROGRAM

Mr. MCCONNELL. That completes our business for today's session. I thank the Democratic leadership for their assistance today. Even though our work this afternoon took only a few moments, I also thank the staff and everyone around the Chamber for being here, this day before Thanksgiving.

With that said and if there is nothing further from my colleague, I wish everyone a happy and safe Thanksgiving.

ADJOURNMENT UNTIL TUESDAY, DECEMBER 7, 2004, AT 9:30 A.M.

Mr. MCCONNELL. Mr. President, if there is no further business to come before the Senate, I ask unanimous consent that the Senate stand in adjournment under the provisions of H. Con. Res. 529.

There being no objection, the Senate, at 5:06 p.m. adjourned until Tuesday, December 7, 2004, at 9:30 a.m.