

Senator DANFORTH			8,	17,	18,	19,
20,	21,	23,	29,	31,	59,	63,
64,	66					
Senator FORD			2,	6,	7,	10,
21,	26,	27,	29,	30,	31,	32,
37,	38,	51,	52,	53,	54,	57,
58,	63,	64,	65,	66,	67,	75,
76,	77,	78				
Senator GORTON			13,	21,	24,	29,
49,	51,	52,	53,	54,	55,	57,
58,	64,	66				
Senator HEFLIN			25,	26,	29,	30,
46						
Senator KASSEBAUM			64,	66,	73	
Senator KASTEN			3,	4,	5,	9,
11,	14,	16,	18,	19,	20,	21,
25,	27,	29,	33,	36,	47,	56,
57,	62,	64,	66,	67,	75	
Senator LAUTENBERG			23,	24,	29,	30,
32,	33,	34,	35,	36,	38,	39,
40,	65,	67				
Senator LONG			64,	66,	67	
Senator PRESSLER			74,	75,	77	
Senator STEVENS			24,	25,	28,	29,
33,	34,	37,	38,	39,	40,	41,
42,	43,	44,	45,	47,	54,	55,
64,	65,	66,	69,	70,	72,	76
Senator TRIBIE			30,	54,	56	
THE CHAIRMAN			1,	2,	3,	4,
5,	6,	7,	8,	9,	11,	13,
14,	15,	15,	17,	18,	21,	23,
24,	25,	28,	29,	30,	31,	32,
33,	34,	36,	37,	38,	39,	40,
41,	42,	43,	44,	45,	46,	47,
49,	51,	52,	53,	54,	55,	56,
57,	58,	59,	62,	63,	65,	66,
67,	68,	69,	70,	71,	72,	73,
74,	75,	76,	77,	78		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXECUTIVE SESSION

- - -

TUESDAY, AUGUST 2, 1983

- - -

U.S. Senate
Committee on Commerce, Science,
and Transportation
Washington, D.C.

The committee met, pursuant to notice, at 9:35 a.m. in Room SR-253, Russell Senate Office Building, Hon. Bob Packwood [chairman of the committee] presiding.

Present: Senators Packwood [presiding], Danforth, Kassebaum, Pressler, Gorton, Stevens, Kasten, Tribble, Long, Ford, Heflin and Lautenberg.

- - -

The Chairman: The committee will come to order. I know Wendell is here and Frank Lautenberg is here, and although we do not have the six members yet for the adoption of amendments, I think we can at least try to discuss those things that I hope we are in agreement on.

For those that were not, Bob and Wendell, I will just pass over the ones that there was disagreement on for the moment, and see what we can agree on.

Where is Amy? Are you going to sit up there with Larry? No? You're going to sit back here? All right. I have lots

1 of questions to ask you.

2 Also, Chairman Miller is in the audience. I asked if he
3 would sit in today in case we ran across any technical
4 questions or any slight changes of position that we might
5 have had to find out what the Federal Trade Commission's
6 position may be on some of the issues.

7 Let us start, if we might, with the professions and the
8 exemption issue. I will take them in this order and we will
9 skip over those that are controversial as we come to them:
10 the professions, the agricultural co-ops, the public
11 participation funding, the Section 5(m) issue, the prevalence
12 issue, the stay of orders, the CID procedures, the definition
13 of "unfairness," the advertising, the legislative veto,
14 credit unions, trademarks, authorizations, the cap on
15 penalties, intervention, and resale price maintenance.

16 Senator Ford: Is that all that's controversial, Bob?

17 [Laughter.]

18 The Chairman: Well, let us start out with the
19 professions. As most at this table are aware and most of the
20 audience, I think, I hope we have reached a compromise on
21 what is known as the Miller AMA language. This is language
22 worked out in discussions. It is not limited to the American
23 Medical Association and Chairman Miller, but they were the
24 initiators of it.

25 It has been circulated rather widely and as far as I am

1 concerned it is acceptable to me. I might open it up for
2 discussion, Bob, on the Miller AMA compromise language.

3 Senator Kasten: I support the language that we have got
4 in the markup, and I think that Senator Rudman, who was
5 active in this effort in the last couple of months, has been
6 supportive also.

7 I would like to say that I have had a conversation with
8 Senator Stevens and he has some questions regarding the legal
9 bar association -- legal exemptions.

10 The Chairman: The Texas bar amendments?

11 Senator Kasten: Yes, some of the language. But I am not
12 sure at this point whether he has got any language drafted,
13 and I am also not sure if it would be his preference to
14 address this question in the committee or to address the
15 question once more in the full Senate.

16 It is also my understanding that the bar association is
17 today, tomorrow and the next day meeting, and they may or may
18 not take a position on this question at their ABA conference
19 or meeting.

20 The Chairman: I am advised that it is not -- I have not
21 talked to him, but the staff says he is not going to bring it
22 up today. Whether or not he subsequently brings it up on the
23 floor, he will decide.

24 You are right about the AMA. Jim Miller is going back to
25 Atlanta this afternoon to argue strongly against the Texas

1 Bar Association position.

2 Discussion on the professions compromise?

3 Senator Kasten: I would hope, Mr. Chairman, that we as a
4 committee could support the professions compromise.

5 The Chairman: I would hope we can, too, and we will wait
6 until we have another person here and then we will have at
7 least enough for the adoption of amendments, although there
8 is no amendment that needs to be adopted at the moment
9 because that is the staff language in the draft.

10 Let us move on to the agricultural co-op issue. This
11 issue basically involves two major issues: One is whether or
12 not the FTC can study and investigate and prosecute co-ops
13 for conduct exempt from the antitrust laws. The other
14 relates to a marketing order.

15 The draft bill makes permanent the language that would
16 otherwise expire, which prohibits the FTC from studying,
17 investigating and prosecuting co-ops for conduct exempt from
18 the antitrust laws under the Capper-Volsted Act. I would
19 support making that permanent.

20 And I believe, Bob, you have some additional amendments?

21 Senator Kasten: Thank you, Mr. Chairman.

22 I do have an amendment, which I believe the staff is
23 familiar with and I know you are familiar with. Basically,
24 this amendment is a compromise related to the FTC authority
25 over agricultural co-ops. It would basically do two things:

1 Number one, it would make permanent the two expiring
2 provisions of current law.

3 The Chairman: That is also the marketing order?

4 Senator Kasten: That is also the prohibition of FTC
5 studies, investigations, et cetera, and, as you said, the
6 Capper-Volsted Act.

7 Second, the marketing order question. Then the second
8 part of my amendment would require that if the FTC wants to
9 sue a cooperative for an antitrust violation, the FTC must
10 provide the Secretary of Agriculture with a copy of the
11 proposed complaint before the complaint is issued, consult
12 with the Secretary, consider the Secretary's comments, and
13 permit the Secretary to place written comments in the record
14 of the FTC's proceedings.

15 Now, Mr. Chairman, as you know, a year ago or in the last
16 reauthorization bill we went significantly further than
17 this. I think that this is a logical compromise. I know it
18 has the support of the other members of the committee, and if
19 you could accept this kind of middle ground agricultural
20 co-op language --

21 The Chairman: It was initially further than I wanted to
22 go. I will congratulate you. You have come a long way from
23 where you were last year on this. I am willing to move to
24 this. Last year we were almost going to give the Secretary
25 of Agriculture veto authority over the FTC in bringing any

1 kind of actions, and I really thought that would be too far
2 and untoward.

3 Further discussions on the agricultural co-op issue?

4 Senator Ford: This is an amendment to the markup
5 itself?

6 The Chairman: Yes.

7 Is there discussion?

8 [No response.]

9 The Chairman: If not -- well, we cannot even adopt it
10 yet. But as soon as we get one more here, we will.

11 Let us move on to the public participation funding. The
12 draft language simply repeals the public participation
13 funding. Is there discussion?

14 [No response.]

15 The Chairman: Is there any objection?

16 [No response.]

17 The Chairman: All right. We will move on to the Section
18 5(m)(1)(B) orders. This clarifies that when the Federal
19 Trade Commission sues one firm for a knowing violation of an
20 order entered against a different firm, the defendant can
21 challenge the legal basis of the FTC's prior order. In
22 essence, this codifies the Braswell case.

23 Let me say to Chairman Miller, Jim, do not hesitate, if I
24 misstate the FTC's position or misstate the law, to correct
25 me as we are going along.

1 I think there is no objection to this that I know of on
2 codifying the Braswell case. Is there objection?

3 [No response.]

4 The Chairman: Let us move on, then, to prevalence. This
5 simply provides that illegal conduct must be prevalent in an
6 industry before the FTC may initiate a rulemaking. Is there
7 any discussion on prevalence?

8 [No response.]

9 The Chairman: Without objection, we will adopt it.

10 The stay of orders eliminates the automatic stay of FTC
11 orders pending court appeal and provides instead for a
12 discretionary stay by the FTC or the courts.

13 Senator Ford: Mr. Chairman, do you want to go back and
14 pick up the other two?

15 The Chairman: Yes. Paul, now that you are here let me
16 go through and see if we can adopt the professions language,
17 which was the Miller AMA compromise. I think there is no
18 objection to it as I understand. The agricultural co-op
19 language as is in the bill and just amend the draft bill as
20 amended by Bob Kasten, which would add making permanent the
21 prohibition on the study of marketing orders, and there is
22 some language indicating that the FTC must discuss first with
23 the Secretary of Agriculture, discuss with the Secretary of
24 Agriculture -- he cannot veto -- any decisions involving
25 agriculture.

1 I know of no objections on the committee to public
2 participatory funding, to the staff draft of Section
3 5(m)(1)(B), or of the prevalence rule, or the stay of
4 orders. I think it has been discussed with everybody on the
5 staff.

6 And since we simply have six here, I would prefer to
7 adopt these as we go along. We will move on to CID
8 procedures.

9 Senator Danforth: So we have agreed to the Kasten
10 amendment?

11 The Chairman: Yes, on the co-ops.

12 On the CID procedures, provide that the civil
13 investigative demand subpoena procedures now applicable to
14 the FTC's consumer protection cases will also apply to the
15 FTC antitrust cases. Is there objection to the adoption of
16 that?

17 [No response.]

18 The Chairman: Without objection, it is adopted.

19 We will move on to the definition defining "unfairness."
20 We have defined "unfairness." There is argument as to
21 whether or not it is an exact definition of the law. There
22 are those who would say it is and those who would say it is
23 not. I am inclined to opt on the side of it is, but we have
24 reached agreement on the committee, in any event, on the
25 definition of unfairness.

1 Are there comments?

2 Senator Kasten: Mr. Chairman.

3 The Chairman: Bob.

4 Senator Kasten: I support the definition as it is in the
5 draft. As you know, we had hearings on this question a year,
6 a year and a half ago. The same definition was included in
7 the reauthorization bill that we had last time, and I think
8 that we can kind of congratulate everyone concerned for their
9 joint effort with the FTC, a number of outside groups, the
10 committee members and the staff, who could come together.

11 We have not had that kind of agreement as of this minute
12 on defining "deception." There has been some discussion of
13 that in hearings that we have had, but we right at this
14 moment do not seem to have the consensus of understanding a
15 definition of "deception" that we have been able to reach on
16 "unfairness."

17 So I think we can go forward with "unfairness" and hope
18 we can agree to it today, and over the next year I hope we
19 can agree on the same kind of consensus on "deception" as
20 well.

21 The Chairman: Is there any objection to adopting the
22 definition of "unfairness"?

23 [No response.]

24 The Chairman: It is adopted.

25 I would like, Bob and Wendell, just to skip over

1 advertising. I know he has an amendment. I think it is a
2 controversial topic, and I think we can finish everything up
3 in here. And if someone wants to call Slade, we will move on
4 to the legislative veto.

5 This is a movement that has been turned topsy-turvy since
6 we started hearings on this bill -- there he is.

7 My personal opinion is I have changed completely. I am
8 opposed to all legislative vetoes of any kind. I realize
9 that is not the position of Congress or the committee. My
10 preference would be to leave this subject blank at the
11 moment, to say nothing about it and wait until we get on the
12 floor with this bill.

13 For this reason, I am not quite sure what we are going to
14 have in the way of recommendations from the Department of
15 Justice or the Congressional Reference Service or other
16 committees. We may even have a conference on the consumer
17 products bill, which has a Congressional veto in it. I think
18 we will know a lot more than we know now six or eight weeks
19 from now as to what may or may not be constitutional and
20 legal in legislative vetoes.

21 No matter what we adopt now, we may be legislating in a
22 situation that would simply be more clear a month and a half
23 from now.

24 Senator Ford: You are just saying that we will be silent
25 as relates to the legislative veto or any substitute.

1 therefore? Of course, I have also been opposed to
2 legislative vetoes. That is nothing new with me, and I am
3 very pleased that we can leave it silent.

4 I am not sure we can find something, but we will be in a
5 better position to do that later on, and I agree with the
6 Chairman.

7 The Chairman: Whether or not we can find something
8 later, it will be offered on the floor anyway. I will make
9 no pretense, I will oppose it on the floor, but based on past
10 votes in the Senate I think something will be adopted. I
11 think we should try to craft it as carefully as possible so
12 we can meet whatever standard we think we have to meet.

13 Bob?

14 Senator Kastens: Mr. Chairman, I have developed a
15 proposal which would replace the legislative veto of AFDC
16 rules that were invalidated by the Supreme Court. Also, I am
17 a firm believer in the legislative veto. I think it is one
18 of the things we need.

19 I have also co-sponsored the Levin amendment -- excuse
20 me, the Levin legislation, which addresses this question. As
21 you know, Mr. Chairman, the Supreme Court found that the
22 legislative veto that did not involve two houses of Congress
23 and presentment to the President was unconstitutional.

24 I think it is now clear that we have a couple of
25 proposals that have been addressed that deal with the

1 constitutional problems that the current legislative veto
2 has. We are working toward some sort of a joint resolution
3 effort. So that can be done.

4 But I agree with you that right now the committee should
5 not address this question. As you know, the joint resolution
6 route was the route that was first proposed by the Senate. I
7 think it was in the spring of 1980. That was the way the
8 Senate wanted to do it from the very beginning. The vote, if
9 I recall my research -- I was not here then, but I think it
10 was 87 to 10 for the joint resolution route.

11 I think the votes are likely to be in the Senate once
12 more for that kind of a legislative veto mechanism. But I
13 agree with you that we ought to just simply not address that
14 question here today. There are a number of questions that
15 are still going to be determined by the Administration and
16 possibly by the courts.

17 So I think that we ought not to -- so I have therefore
18 decided not to try to offer my proposal as an amendment to
19 the FTC bill at this time, so that we may continue to consult
20 with and work with recommendations from our colleagues in the
21 Senate and also the administration.

22 I think it is fair to say that I or someone will be
23 offering a joint resolution kind of legislative veto. I am
24 hopeful that we will be successful, that it will pass, and we
25 can once more have a workable mechanism.

1 I would say, Mr. Chairman, that I am opposed to the
2 approach that was taken by some in the House of
3 Representatives, the so-called Levitas proposal, which I
4 think is too restrictive and really would be very, very
5 difficult for the Congress to be able to work through. If we
6 could find a middle ground, a joint resolution ground, a
7 Levin kind of proposal, I think it would pass in the Senate.
8 I would hope that it would be adopted by the House of
9 Representatives as well and that we would once more have a
10 workable legislative veto system in place.

11 Right now I think we should lay it aside.

12 The Chairman: Further discussion on the veto?

13 Senator Gorton: Mr. Chairman.

14 The Chairman: Slade?

15 Senator Gorton: I simply want to commend my friend from
16 Wisconsin on his thoughtful approach to this problem. I must
17 admit that I have never been quite able to make up my mind
18 whether I think a legislative veto is a good idea or not. I
19 did not like the system which has recently been found
20 unconstitutional by the Supreme Court, although that dislike
21 in part was due to my firm conviction that it was in fact
22 unconstitutional.

23 I believe that the kind of joint resolution approach
24 which Senator Kasten speaks to this morning almost certainly
25 is constitutional and that it probably does provide the

1 appropriate balance under which the Congress can oversee the
2 rulemaking practices of a number of agencies. I want to
3 commend him on his thoughtfulness in seeking input from as
4 many people as possible to come up with as fair an approach
5 as possible, and one quite different from the Levitas
6 approach in the Senate.

7 The Chairman: I concur in that totally.

8 Senator Kasten: Mr. Chairman.

9 The Chairman: Bob.

10 Senator Kasten: First of all, Slade, thank you for your
11 comments.

12 Mr. Chairman, secondly, I think what I will do today is
13 to put my proposal for a legislative veto in the
14 Congressional Record in order to circulate it to the general
15 public and my colleagues or our colleagues for comment. It
16 is slightly different than the Levin proposal, but it is the
17 joint resolution method. And I will put it in the
18 Congressional Record today with a brief introduction.

19 The Chairman: Good.

20 Any objection, then, at the moment to leaving legislative
21 veto out of the bill?

22 [No response.]

23 The Chairman: Let us move on to credit unions. The
24 draft bill exempts credit unions in identically the same way
25 that banks and savings and loans are now exempted. I know of

1 no objection that I have heard of to that provision. Any
2 objection?

3 [No response.]

4 The Chairman: Without objection, we will adopt it.

5 On trademarks, the draft bill provides that we will make
6 permanent the expiring prohibition on the FTC suits to
7 invalidate trademarks on grounds that they have become
8 descriptive names. Again, I know of no objection to that
9 provision in the draft bill.

10 [No response.]

11 The Chairman: Without objection, we will adopt it.

12 What I am doing, Slade and Bob, if I can, if we can adopt
13 everything else so that when one other person gets here we
14 will have nine and we will be on to the advertising issue.
15 Hopefully, when we resolve that we can report the bill out at
16 the same time.

17 Authorizations: the draft bill has \$69.9 million, \$71.1
18 million, and \$72.4 million for fiscal years '84, '85, and
19 '86. Those are the same figures we submitted to the Budget
20 Committee in our budget report earlier this year.

21

22

23

24

25

1 They are, on the average, about \$2 million higher than
2 the FTC approved authorization. They are significantly lower
3 than the bill that has passed the House. But in terms of if
4 they were readjusted for inflation, I am not sure that they
5 would be any different than the FTC-approved authorizations
6 right now.

7 Is there any discussion on the authorizations?

8 [No response.]

9 The Chairman: If not, they will be adopted.

10 Let's move on next to the cap on the civil penalties.

11 There is no provision in the bill for the cap on the
12 civil penalties.

13 I believe, Bob, you may have an amendment.

14 Senator Kasten: Mr. Chairman, I do have an amendment
15 which would put a section in the bill. The proposal would
16 amend this section of the FTC Act to provide that when the
17 commission seeks civil penalties for violation of commission
18 consumer protection rules and orders, the maximum civil
19 penalty for any related series of violations shall not exceed
20 \$1 million.

21 Mr. Chairman, as you know, we included this section in
22 the FTC reauthorization bill last time, and it was adopted.
23 It was accepted. This amendment would not in any way affect
24 the commission's authority to seek civil penalties for
25 violation of their rules and orders, based on its antitrust

1 authority. As I say, this amendment is the same as the
2 provision in last year's FTC bill.

3 There are large numbers of people that support this
4 effort.

5 As you know, there were certain people who wanted a cap
6 at \$500,000 or \$250,000. I think at this point I would like
7 to establish, or I would like to try with the committee to
8 establish the cap, the \$1 million cap. It is probably the
9 best that we can get today, and probably also the most
10 sensible level to try to achieve today.

11 So I would hope the committee would adopt a \$1 million
12 cap for civil penalties for any related series of
13 violations.

14 The Chairman: Discussion on the cap issue?

15 Senator Danforth: Mr. Chairman, does the commission have
16 a position on this?

17 The Chairman: Chairman Miller, position on the cap?

18 Mr. Miller: Mr. Chairman, I and one other commissioner
19 support the amendment supported by Senator Kasten. Two
20 commissioners would oppose it. One commissioner believes
21 that a cap of some kind would be appropriate. Perhaps \$1
22 million is too low. Given that the antitrust authority would
23 not be affected and also the consumer redress provision would
24 be available to us, I personally believe that this would be
25 appropriate.

1 The Chairman: That division sounds like some of the
2 Supreme Court decisions.

3 [General laughter.]

4 Senator Danforth: As I understand it, Mr. Chairman, the
5 cap is not only for an event but is also for a series of
6 violations?

7 Senator Kasten: That is correct.

8 Senator Danforth: A related series?

9 Senator Kasten: A related series. And I think that is
10 FTC language for basically one case or one problem.

11 The Chairman: And the issue will become whether they are
12 related or separate incidents?

13 Senator Kasten: I think they work with that question on
14 a number of different things in the FTC.

15 Senator Danforth: As I understand what you have told us,
16 even though it is a separate incident, if it is related or
17 part of a course of action, it would still be subject to the
18 \$1 million cap, is that right?

19 Senator Kasten: That is correct.

20 Senator Danforth: Everything within a series would be?

21 Senator Kasten: Within that related series of
22 violations.

23 Senator Danforth: This excludes the antitrust part of
24 the FTC's jurisdiction? It is only the consumers' part?

25 Senator Kasten: The amendment would not in any way

1 affect the commission's authority to seek civil penalties for
2 violations of rules based on their antitrust authority. We
3 do not seek to change that at all.

4 Senator Danforth: But on their consumer authority, why
5 would not, just as a matter of a business expense, why would
6 the business not just say, well, \$1 million is a minor
7 investment for advertising. We have spent many millions of
8 dollars on an advertising campaign, and we are willing to
9 spend another \$1 million just to get on with it? Would the
10 FTC not say, well, okay, that is fine, give us your \$1
11 million and proceed with the deceptive practice?

12 Senator Kasten: \$1 million is an awful lot to say that
13 is fine, we will just spend \$1 million. It would be very
14 unlikely that that would happen.

15 Under the FTC Act today, the commission may up the
16 penalty of up to \$10,000 for each violation; each violation,
17 each day of the continuing violation may be deemed a separate
18 offense. The "violation" is not otherwise defined.

19 What we are trying to do is get some reasonableness and
20 get a basic ground rule. One of the things people are
21 concerned about is the firm may be subject to not \$1 million
22 but millions of dollars of penalties if each involved in a
23 bulk mailing, for example, or each copy of a magazine
24 distributed would be found to be a so-called separate
25 violation of a commission rule.

1 Now, that has not happened exactly, but that is what they
2 are concerned about.

3 Senator Danforth: Has that ever happened in the history
4 of the FTC?

5 Senator Kasten: The closest would be the Reader's Digest
6 case in which I do not know the details of it, but that would
7 be the closest in which they had some kind of an offer, and
8 that was the way that the FTC pursued it.

9 But without a limit, what people are afraid of and what I
10 am afraid of is you may be reluctant, Jack, to exercise the
11 right to litigate in the face of potentially unlimited civil
12 penalties award.

13 For example, a small newspaper, a newspaper with, say, a
14 circulation of 100,000 could be subject to a civil penalty of
15 \$1 billion in violation of an FTC rule. In other words, just
16 take that 100,000, each one of those could be directly, could
17 be a separate so-called violation.

18 So what we are trying to do is put a cap on that for
19 related offenses so we know where we stand and people can go
20 forward and litigate.

21 I am hopeful that the committee will accept the
22 amendment.

23 Senator Danforth: So it seems to me just a very
24 theoretical basis for the limitation on penalties.

25 I am wondering, what is the highest penalty that has ever

1 been assessed by the FTC?

2 Senator Kasten: Larry, do you know that?

3 Mr. Fullerton: The highest is the Reader's Digest case,
4 which was \$1-1/4 million in civil penalty assessed by the
5 court. There was one other case where the penalty exceeded
6 \$1 million. Most are much lower, under \$100,000.

7 Senator Danforth: There have only been two cases of
8 exceeding \$1 million?

9 Mr. Fullerton: Yes.

10 Senator Ford: Were they awarded by the court?

11 Mr. Fullerton: Yes.

12 Senator Ford: They were court-awarded and not FTC, not
13 an agreement.

14 The Chairman: What this would do would put a limit on
15 what the court could award?

16 Mr. Fullerton: Yes.

17 The Chairman: So in essence, it is wrongly characterized
18 as just a limit on the FTC?

19 Mr. Fullerton: Yes. Typically, the FTC, adopting the
20 litigator's posture, will come in with some recommendation,
21 but it is the court that determines the level.

22 The Chairman: Slade?

23 Senator Gorton: Mr. Chairman, I think that Senator
24 Danforth has put his finger on the problem with this
25 amendment. In most consumer protection cases, \$1 million

1 would be much too great a civil penalty and entirely
2 disproportionate to whatever harm was caused, and of course,
3 a cap of \$1 million will not prevent that kind of injustice.

4 On the other hand, there are cases that evidently were,
5 and the court felt the Reader's Digest was such a case, in
6 which the court felt \$1 million was not a sufficient civil
7 sanction to make the violation anything other than an expense
8 of doing business.

9 When we deal with something like the Reader's Digest with
10 literally tens of millions of dollars of advertisements, it
11 would seem to me that there are cases in which penalties of
12 over \$1 million are appropriate, and evidently there have
13 been two such cases so far.

14 So since what we have here is solely a limitation on a
15 court, we are saying that we seriously fear that for an
16 advertisement in a small newspaper with a circulation of
17 100,000, some federal district court judge is going to impose
18 a \$1 million penalty.

19 Well, I do not fear that. It has not happened. It seems
20 to me unlikely that it will happen. I am certain that if it
21 did happen, it would be reversed on appeal. I do not believe
22 the Supreme Court would uphold such a penalty, but the
23 penalty should be proportionate to the offense.

24 This is simply a statement that under some circumstances,
25 the most egregious circumstances, ironically, that it cannot

1 be proportionate to the offense.

2 Senator Danforth: I do not know the answer, but are
3 penalties deductible for tax purpose?

4 Mr. Fullerton: I am afraid I do not know the answer.

5 Senator Lautenberg: No, I can tell you they are not.

6 [General laughter.]

7 Senator Lautenberg: Not as a payer, but as an observer.

8 [General laughter.]

9 The Chairman: Further discussion on the amendment?

10 Senator Lautenberg: Mr. Chairman, if I might, I share
11 the concerns of Senators Danforth and Gorton. I respect
12 Senator Kasten's view on trying to cap this thing in some way
13 so that there is not some whimsical penalty offered along the
14 way, but we are talking about the possibility of continuing
15 violations of the same deed. I think that it could be, and
16 perhaps stretching it a little bit, it could be in the minds
17 of the business manager to say, well, it is a small cost for
18 the risk, for the reward opportunity that we have out there.

19 So I would frankly have a problem with capping this.
20 Again, what we are talking about is a penalty. We are
21 talking about a violation, very clearly, and I do not think
22 there ought to be a cap on something like that. If there
23 was, and in view of the fact that our experience shows us
24 that there has only been one settlement over \$1 million -- is
25 that true, Mr. Miller?

1 Mr. Miller: Yes.

2 The Chairman: Slade?

3 Senator Lautenberg: One of \$2 million?

4 Mr. Miller: Larry was right, it is two of any such
5 amount.

6 Senator Lautenberg: Okay. Over a number of years. It
7 would seem to me that it is not a very serious problem to let
8 it be uncapped, or if capped, at a significantly higher
9 level, I think, than you are proposing.

10 The Chairman: Slade.

11 Senator Gorton: I have just been handed a copy of the
12 present statute which reads in this respect. In determining
13 the amount of such civil penalty, the court shall take into
14 account the degree of culpability, any history of prior such
15 conduct, ability to pay, affect on ability to continue to do
16 business, and such other matters as justice may require.

17 It seems to me that is an infinitely better standard than
18 a specific cap.

19 The Chairman: Ted?

20 Senator Stevens: The Kasten amendment does not take that
21 out. It just adds a cap. We discussed this at length last
22 year, and I think the decision last year was a good one.

23 As I understand the Reader's Digest situation, it is
24 different from this language because this talks about a
25 series of violations, significantly related in planning,

1 dissemination and time. To me that is a different standard
2 and one that is broad.

3 I continue to believe the FTC is reaching out and
4 reaching out and reaching out, and I think there ought to be
5 some reasonable limits on this agency, and this is one of
6 them. There should be a cap.

7 Senator Kasten: Mr. Chairman?

8 The Chairman: I want to say in defense of the agency at
9 the moment, under Chairman Miller, it has not been reaching
10 out and reaching out.

11 Senator Stevens: We will discuss that reaching out in a
12 minute.

13 Senator Heflin: Mr. Chairman, Mr. Chairman? Viewed from
14 a history of all types of laws, there are caps on fines.
15 Every criminal statute has a cap.

16 As I review and listen to the debate here, the debate is
17 that there could be some danger that some individual or some
18 company would flaunt the court by saying that therefore our
19 \$1 million cap, we can afford to run it. But I will
20 guarantee you that the courts have other ways to prevent
21 flaunting of their orders and decrees besides fines. It
22 seems to me that in keeping with some sort of realistic
23 approach, certainly if the history of criminal law has been
24 that there has been a maximum relative to a criminal fine,
25 there ought not to be any reason that we would not set a

1 maximum here.

2 I think that if someone wants to flaunt the court, they
3 are going to get the idea that \$1 million, we can afford to
4 pay that, they will find themselves in the pokey for a pretty
5 good while regarding these matters..

6 [General laughter.]

7 Senator Heflin: So I think that the only rationale that
8 I have heard yet that says we ought not to have a cap is that
9 somebody might flaunt the court.

10 Well --

11 Senator Ford: Would the distinguished jurist yield for a
12 question?

13 Senator Heflin: Yes.

14 Senator Ford: The criminal fines are based upon the
15 crime itself. Each step up the way, it increases based on
16 certain activities, and the law sets a penalty. If it is a
17 second offense, it is set up higher. We are not doing that
18 here. I do not know that we even have any schedule as it
19 relates to the offense.

20 Senator Heflin: Most of them do not have schedules.
21 They give you discretion. Most criminal statutes give you
22 discretion.

23 Senator Ford: Well, sure you have discretion up to
24 \$5000.

25 Senator Heflin: From \$5000 up to such amount, and I

1 think they follow similar criteria that Senator Gorton listed
2 in reading the present statute.

3 Senator Ford: Well, we have been awfully interested in
4 drunken driving around here, trying to prevent it and do
5 something about it. We tried to get into that very deeply.
6 If you go out into the general public, that is X, and
7 stealing a chicken is Y. It is all in the statute, and you
8 put the man in prison for stealing a chicken and take his
9 license away for six months for driving while intoxicated.
10 So you have a schedule out there.

11 I am not sure we need a cap here. I think the courts
12 have awarded or substantiated the fine, have they not? We
13 have always had to take it to court anyhow.

14 Senator Kasten: Would the Senator yield on that point?

15 Senator Ford: Yes.

16 Senator Kasten: We are not trying to change the
17 graduated scale -- we are still talking about \$10,000,
18 \$20,000, \$30,000, \$40,000.

19 Senator Ford: They can do what they want.

20 Senator Kasten: That is not being changed. \$1 million
21 is the cap, which is enough.

22 Senator Ford: What the gentleman from Alabama was
23 talking about is the crime. There is a judgment factor
24 here. We are just saying we are going to put a cap on it,
25 somewhere between zero and \$1 million they can jump on you.

1 I think that the penalty should be assessed based upon the
2 injury to the consumer.

3 I hate to take an opposite view from my friend from
4 Wisconsin because we have worked so well together, and I am
5 not sure that I am not going to vote with you yet -- I
6 probably will not, but --

7 [General laughter.]

8 The Chairman: I would like to suggest, I think we have
9 ample discussion of the issues.

10 Ted?

11 Senator Stevens: Mr. Chairman, this is a civil penalty.
12 We have all been talking about criminal matters.

13 Senator Ford: That was the analogy drawn.

14 Senator Stevens: I understand that, but I think for an
15 administrative agency this makes a lot of sense. If you have
16 a criminal action, it can go to court, it is another matter.
17 This is a limitation on an administrative tribunal dealing
18 with civil penalties.

19 Senator Ford: Does this not limit the court, though, in
20 its ability to approve or disapprove an amount?

21 The Chairman: Yes, it does.

22 Senator Stevens: The court would be limited similarly,
23 but in the first instance, it is still an FTC action.

24 Senator Heflin: That is right. He is a pretty good
25 lawyer.

1 Senator Lautenberg: Just a little analogy, if I might,
2 Mr. Chairman. That is, to the distinguished jurist and
3 Senator from Alabama, in the criminal penalties, I think
4 there is one maximum to which we are not subjecting the
5 violators of the rules here.

6 [General laughter.]

7 The Chairman: I think we had better have a roll call on
8 this. There are a number of proxies around.

9 Would the clerk call the roll on the Kasten amendment
10 which would put a \$1 million cap on the penalties?

11 The Clerk: Mr. Goldwater.

12 The Chairman: Aye by proxy.

13 The Clerk: Mr. Danforth.

14 Senator Danforth: No.

15 The Clerk: Mrs. Kassebaum.

16 The Chairman: Aye by proxy.

17 The Clerk: Mr. Pressler.

18 Senator Kasten: Aye by proxy.

19 The Clerk: Mr. Gorton.

20 Senator Gorton: No.

21 The Clerk: Mr. Stevens.

22 Senator Stevens: Aye.

23 The Clerk: Mr. Kasten.

24 Senator Kasten: Aye.

25 The Clerk: Mr. Tribble.

1 Senator Tribble: Aye.
2 The Clerk: Mr. Hollings.
3 [No response.]
4 The Clerk: Mr. Long.
5 [No response.]
6 The Clerk: Mr. Inouye.
7 [No response.]
8 The Clerk: Mr. Ford.
9 Senator Ford: No.
10 The Clerk: Mr. Riegle.
11 Senator Ford: No by proxy.
12 The Clerk: Mr. Exon.
13 Senator Ford: No by proxy.
14 The Clerk: Mr. Heflin.
15 Senator Heflin: Aye.
16 The Clerk: Mr. Lautenberg.
17 Senator Lautenberg: No.
18 The Clerk: Mr. Packwood?
19 The Chairman: No.
20 The Clerk: Seven yeas, seven nays.
21 Senator Ford: Sounds like the natural gas legislation.
22 [General laughter.]
23 The Chairman: The motion fails on a tie vote, although
24 my hunch will be that this will be like a legislative veto.
25 I have a feeling that we will see this on the floor again. I

1 think we would see it on the floor no matter how the vote
2 went today.

3 Senator Danforth: Mr. Chairman, let me inquire about the
4 rules of the committee.

5 Does voting remain open for some time after an amendment
6 is voted?

7 The Chairman: We have usually not followed the Finance
8 Committee rule of leaving it open for a day or two or three
9 based upon our sai experience. We have found, as you will
10 recall, some time ago votes being changed, one group thinking
11 they have won or lost. We have left the votes open by proxy,
12 but we have not normally polled absent members.

13 Senator Danforth: What is the cutoff time, when the bill
14 is reported out?

15 The Chairman: Yes. There are still four votes that have
16 not been reported in by proxy, and I do not know where they
17 stand.

18 Senator Danforth: So therefore, if a Senator were to
19 vote now by proxy, the bill not having been reported out, his
20 vote would be counted?

21 The Chairman: That is correct, that is correct.

22 Wendell?

23 Senator Ford: I do not want to get too technical, but at
24 some point various committees that I serve on, if the Senator
25 votes on the bill to be reported out and it is gone, and he

1 wants to be recorded, as long as he did not change, then he
2 could be recorded.

3 The Chairman: Yes. I should add that caveat, as long as
4 he did not change -- at this point, with the seven to seven
5 vote, any vote will change it. But they could still vote by
6 proxy up until the time we vote to report the bill out, which
7 I hope will not be too long from now.

8 Senator Ford: It is good to get it clear now, because we
9 went through this in Energy, and that was jut --

10 The Chairman: Well, I do not want it to be too clear
11 because I may want to change the rules.

12 [General laughter.]

13 Senator Ford: Well, we may go by Murphy's Law and not
14 Packwood's rule.

15 [General laughter.]

16 The Chairman: Let us move on to intervention.

17 We have no provision in the staff draft, and I know of no
18 objection that I have heard of to the staff draft.

19 If not, that will be adopted, and we will move on to
20 resale price maintenance.

21 We have no provision, but I believe, Frank, you may have
22 an amendment.

23 Senator Lautenberg: Right. Thank you, Mr. Chairman.

24 I have a simple amendment to gather information for the
25 committee. Senator Ford joins me in introducing it, and I

1 understand you are willing to accept it. It pertains to the
2 activities in the area of resale price maintenance.

3 Unless there are any questions, I would hope the
4 committee would accept it.

5 The Chairman: This is requiring the FTC to report every
6 six months on their activities?

7 Senator Lautenberg: Yes.

8 The Chairman: Not only do I accept it, but I would like
9 to be a co-sponsor on it.

10 Senator Lautenberg: Thank you.

11 Senator Kasten: Mr. Chairman?

12 The Chairman: Bob?

13 Senator Kasten: From what I know of the amendment, I
14 would also like to support it.

15 I wonder if we might get a sense from Jim Miller as to
16 what the FTC might feel about it.

17 The Chairman: Mr. Chairman?

18 Mr. Miller: Mr. Chairman, I have not seen the language.
19 I found out about it -- I have just been handed a copy.

20 [General laughter.]

21 Mr. Miller: If it is as you describe it, I am sure that
22 it would be -- I am sure the commission would not have a
23 problem with it.

24 The Chairman: Any further discussion on the amendment?

25 Senator Stevens: Mr. Chairman.

1 The Chairman: Ted?

2 Senator Stevens: What is the cost of this? The thing we
3 have to watch is we are continually not only giving agencies
4 like this not only additional responsibility, but then we are
5 asking them to report more frequently than in the past. My
6 experience has been that these reports come up to the
7 committee and they are looked at by a couple of dedicated
8 staff members and put on the shelf.

9 What is being accomplished by this? We get all kinds of
10 reports coming up there and we do nothing with them.

11 Senator Lautenberg: Well, I am opposed to getting
12 reports up here that we do nothing with, Ted. Frankly, what
13 I am looking for is to see that there is due diligence on the
14 part of the FTC. I do not think that, if there is any cost,
15 it would be significant. They would, and I am sure Chairman
16 Miller would agree, would be doing this regularly.

17 I just, for one, would like to see that it is taken care
18 of.

19 Senator Stevens: Well, do they not report to us annually
20 now? I seem to remember an annual report of the FTC.

21 Senator Lautenberg: Is there any schedule at all, Mr.
22 Miller?

23 Mr. Miller: We have an annual report sent to Congress
24 that gives certain information and in response to inquiries
25 from the Commission and the committee itself, we do provide

1 information from time to time.

2 Senator Lautenberg: It does not cover the detail that we
3 are talking about?

4 Mr. Miller: Not the detail that we have here.

5 Senator Lautenberg, I was just finishing one and a half
6 pages of a two-page document. The only question I would ask
7 that you might amplify to some extent, which I think goes to
8 Senator Stevens' question, how much detail would you be
9 requiring? Would this be -- how much in addition to the raw
10 facts, raw data?

11 Senator Lautenberg: Frankly, I would be satisfied with a
12 statement of the raw facts. I would like to see some
13 comparatives, you know, how many cases did we have in years
14 past for this period. I really do not see anything with Ted,
15 frankly, a lot of detail in it. I want to be sure that there
16 is some scheduled review of this very important section of
17 the rules.

18 Do you see any costs involved, significant costs
19 involved, Mr. Miller?

20 Mr. Miller: If it is as you are describing, Senator
21 Lautenberg, a provision of the raw data, a brief summary, I
22 do not see that as imposing a significant cost on the
23 commission. But if it were to mean, sir, a very extensive
24 report on each case and each complaint that might be
25 raised --

1 Senator Lautenberg: I do not think that would be
2 necessary unless there was a question, and you are prepared
3 to answer them anyway.

4 Senator Kasten: Mr. Chairman.

5 The Chairman: Bob?

6 Senator Kasten: I just have one question for the Senator
7 from New Jersey.

8 You said you wanted some kind of comparative data, but
9 you are asking from this year forward. You are not asking
10 them to go back ten years and put together some sort of
11 information that they have now. You are asking for what they
12 have now, that you will have comparative data in the future?

13 Senator Lautenberg: I would like the commission to use
14 its judgment here, Bob. That is, I think it would be helpful
15 if we went back two years in simply doing the statistical
16 reporting. We tried these cases, these were dismissed, these
17 resulted in penalties or some action. Again, I am not
18 looking for an extensive documentation. I am looking for
19 something that is informational, frankly, to keep us on guard
20 and to keep the FTC mindful of its responsibility.

21 Senator Kasten: Your legislation does not talk about
22 going back. It is going forward, prospectively.

23 Senator Lautenberg: Yes, and as we kind of develop the
24 dialogue here, I am saying it would be helpful, it is not
25 critical that we simply go prospectively. I would like in

1 there either a paragraph or two or a table saying that in the
2 last two or three years we have tried this number of cases
3 and these are the results.

4 Again, we are talking about summary information. I am
5 not looking to get into the testimony or anything of that
6 nature.

7 Senator Ford: Mr. Chairman.

8 The Chairman: Wendell.

9 Senator Ford: Mr. Chairman, I think we ought to try it
10 because the amendment only goes for the life of the
11 authorization. If at the end of that time it is too
12 burdensome or we need some corrections, I think it would give
13 us an opportunity to visit it.

14 I go back to the time when everybody thought we had gone
15 too far when I got an amendment in, we would have an
16 oversight hearing on the FTC every six months, and we wound
17 up having them up here about six times that year rather than
18 just the oversight twice. And it is a Senate provision for
19 the life of the authorization, I think we should give it a
20 try. I think it is significant, and I think most of us on
21 the committee are in concurrence with Senator Lautenberg.

22 The Chairman: Further discussion?

23 Senator Stevens: May I ask what happens to the annual
24 report now? This says every six months.

25 If I understand it, there is going to be an end of the

1 year report that is required by existing law is my memory.
2 This means there is going to be an annual report, but there
3 is going to be a report every six months, too.

4 So if this is passed in September, it means that in March
5 and in September they will be reporting, but they will also
6 be reporting at the end of the year for the beginning of the
7 next Congress.

8 The Chairman: I do not think Frank would raise any
9 objections if one of the six months reports was merged into
10 the annual report.

11 Senator Lautenberg: Not at all, not at all.

12 Senator Stevens: This does not tie in with the existing
13 report. This says six months after the date of enactment of
14 this act, and six months thereafter, during certain fiscal
15 years.

16 The Chairman: Can I indicate, Ted, we will put in report
17 language, and Frank has agreed that one of the six months
18 reports can come at the same time as their annual report.
19 They are not going to have to do these here and their annual
20 report.

21 Senator Ford: Can we say in the language also that it
22 would be six months beyond the date of the annual report? It
23 would be the midterm report?

24 The Chairman: That would be fine.

25 Senator Ford: That way they just have one. The rest of

1 the report would be there.

2 Senator Stevens: Well, I have got to tell you, I am just
3 opposed to giving these agencies money to do work, the duty
4 to report to us so frequently that it takes their people,
5 that they do not get their job done, and then we ask them why
6 do they not do their job.

7 It is time for us to start looking at these reports. If
8 you do it that way, this just means an additional report --
9 midterm, once a year for three years. We will see how it
10 works.

11 But I hope the commission will keep track of the costs
12 because I intend to inquire each year in the Appropriations
13 Committee what has been the cost. I will tell you gentlemen,
14 if you do not understand that miles and miles of reports we
15 are getting over at the Department of Defense every year
16 because of provisions like this that nobody pays any
17 attention to, and how much money it costs, then you will
18 understand my reluctance on this thing, because I think it is
19 good-intentioned, Frank. I do not have any question of your
20 intention. I just question the utility of it, and I will
21 watch the utility of it.

22 The Chairman: Further discussion?

23 - Senator Lautenberg: May I just respond to my colleague
24 from Alaska just to say that if we put everything on computer
25 and we have terminals in our offices, we could call it up and

1 it would not cost anybody anything.

2 Senator Stevens: Except that computers and people to put
3 in the reports and people to amend them and the people to
4 read the --

5 Senator Lauferberg: I will quit while I am ahead.

6 Thank you very much.

7 The Chairman: This committee has not been particularly
8 onerous in requiring different agencies over which we have
9 supervision to make reports, and I think this is one we can
10 adopt, I hope at the moment, without any further discussion.

11 So be it.

12 Now let us move on to the last issue we have, which is
13 advertising and whether or not they should be exempt from the
14 unfairness rules which we have codified.

15

16

17

18

19

20

21

22

23

24

25

1 I might ask Chairman Miller at the start of this, will
2 you --

3 Senator Stevens: Mr. Chairman, before you proceed, I do
4 want to ask, you said it was the last issue. I understand
5 advertising is the last issue left. The professions matter
6 was passed over before I came in. Does the Chairman intend
7 to go back to that?

8 The Chairman: It was not my intention to go back to it.
9 What we adopted was the Miller AMA compromise. It was
10 adopted unanimously by those that were here. It is not my
11 intention to go back to it. I was told you had no intention
12 at the moment of bringing up the Texas bar amendment, and I
13 did not know you had anything else you were interested in in
14 it.

15 Senator Stevens: I am still convinced that the record of
16 the FTC until 1975, during which period it had no
17 jurisdiction at all over the professions, did not demonstrate
18 that the best interests of the consumers were neglected. I
19 feel that the compromise has been made. That still leaves the
20 question of the legal profession. The ABA is voting on
21 Thursday. I would hope we would not take this bill up until
22 they have acted upon a recommendation by the Board of
23 Governors. It is my intention and, I believe, the intention
24 of others to raise the matter. I do not want to hold up this
25 bill. If it is the intention of the Committee to report it

1 today, I will not offer it today. But I would prefer to wait
2 and see what the American Bar Association in its convention
3 does on the recommendations it has received not only from the
4 Board of Governors but from the judicial conference and from
5 the trial lawyers and from the young lawyers of this bar
6 association.

7 The Chairman: It is my intention, Ted -- I hope we can
8 report the bill out today, because I would like to get an
9 authorization. We have been going on an annual appropriation
10 too long, but it does mean we will have to bring this bill up
11 some time in September on the floor. I expect we will have a
12 variety of amendments at that time, and the professions issue
13 may be one, but I would like to send it out as we have today
14 with the AMA Miller language intact.

15 Senator Stevens: Well, I have no objection to the AMA
16 language. I do not believe that it does not cover the Bar,
17 and I think that is unfortunate. I think this committee
18 should act on the relationship of the FTC's plan with the Bar
19 Association.

20 The Chairman: Well, it covers the Bar in the same sense
21 that it covers all other professions.

22 Senator Stevens: But the bar is regulated by the court
23 and by administrative agencies in every State, and we are
24 adding to the cost of that regulation. We are in effect
25 impliedly approving the FTC's declared intention to start

1 regulating not only commercial activities but professional
2 activities of the bar, and I think we should address that.

3 The Chairman: Well, as I look at the Miller AMA
4 language, and Mr. Chairman, correct me if I am wrong, you are
5 prohibited from regulating their professional conduct to the
6 extent that it relates to qualifications for practice. Am I
7 correct?

8 Mr. Miller: That's correct.

9 Senator Stevens: What about the practice of law itself?

10 The Chairman: To the extent that the State is
11 supervising it, again, I do not want to speak for the
12 Chairman, but I want to make sure I am right, to the extent
13 that the state is supervising the qualifications for
14 practice, the AMA Miller language will prohibit the FTC from
15 being involved. Correct, Jim?

16 Mr. Miller: Yes.

17 The Chairman: To the extent it relates to the commercial
18 side of the practice, the FTC would not be exempt.

19 Senator Stevens: Mr. Chairman, there is a professional
20 side and there is a commercial side to the practice of law.
21 The professional side of the practice of law is -- an
22 attorney is directly responsible to a court in any State in
23 the Union. Under the circumstances, I cannot believe that
24 this Committee would intend to give the FTC any jurisdiction
25 over the professional practice of law.

1 The Chairman: To the extent that what you mean is the
2 qualifications for practice --

3 Senator Stevens: I mean the carrying out of the
4 relationship of attorney to client and the conduct of the
5 professional practice of law as opposed to the commercial
6 activities they may get into, and in terms of owning a
7 building or investing in real estate or getting involved in
8 options or taking an interest in partnerships. There are
9 investments that they get into. There is a commercial side
10 to the practice of law that is separated from the
11 professional side of the practice of law in terms of fees,
12 responsibilities of attorney-client privileges. The whole
13 concept is beyond the admission and the licenture of
14 professionals involved.

15 The Chairman: I wonder if we might do this. If you are
16 not going to offer it today, clearly you may be offering it
17 on the floor, and we will have a debate on it then, but if we
18 are not going to bring it up today, I would like to get on to
19 "unfairness," because it is one of the controversial issues
20 we have, and I would just as soon get it out of the way. If
21 you want to offer it today, I am perfectly willing to vote on
22 it.

23 Senator Stevens: Well, what I am asking, there is no
24 possibility this bill will come up in the first or second
25 week after we come back. I can tell you what is on the

1 calendar and what is going to happen, but I do not see any
2 reason to not wait for the bar association vote and bring
3 this bill up on the first Wednesday after we come back. I am
4 not attempting to filibuster or anything, but I just think
5 the American Bar Association judgment on this matter is
6 something that we should await. That is all. There is very
7 serious debate going on down there at their convention, and I
8 would like to have their findings before we pass the bill out
9 of the Committee.

10 Mr. Chairman, would there be any receptiveness on the
11 part of the Chairman and the Committee to delay the final
12 vote on this until the Wednesday after we get back?

13 The Chairman: Ted, I would very much object. This has
14 been set for a long period of time. The Texas bar objections
15 have been known for a long time.

16 Senator Stevens: I am not a member of the Texas bar, Mr.
17 Chairman. I am a member of several bars, but not Texas.
18 Maybe I ought to be, but I am not.

19 The Chairman: I would object to putting it off any
20 longer. We have looked for a markup date for a long period
21 of time. We found one that is agreeable. Whether we can
22 find one that is agreeable the first day when we get back or
23 not, whether we will have a quorum on that day -- but we have
24 looked at this for a long time, and certainly the issue of
25 professional exemptions is not a new one. To the extent that

1 there will be debate on the floor on this issue --

2 Senator Heflin: I somewhat agree with Senator Stevens.
3 You have a distinction between this profession, then you have
4 relative to other professions. One, all lawyers are officers
5 of the court. You have the separation of powers doctrine
6 that comes into this. There are many aspects, I think, that
7 are different. The American Bar is not decisive in anything
8 that I do.

9 I have a lot of things that they state that they advocate
10 that I do not agree with. So, there are many, many different
11 things, but they have not taken a position on this matter,
12 and I believe that he is legitimately right that we ought to
13 at least see what their position is and their rationale on it
14 is. But you do have a unique situation here in that there is
15 an issue of the separation of powers.

16 Of course, I get back to my old thing that I wonder where
17 Federalism left. We get now into the last vestiges of
18 everything that the States do. Well, that gets into
19 professions as a whole. Maybe I do not want to get on my
20 horse on that, but here you are. You have not only State
21 courts that have separation of powers. You have the
22 separation of powers in the Federal Government, and I think
23 it is something that should be considered. I agree with
24 Senator Stevens.

25 The Chairman: I wonder, Hal, if we might do this. If no

1 one is going to bring up any further exemption today, I would
2 like to move on to "unfairness" and see if we can resolve it
3 while we have people here. That will be a close vote even
4 among the people we have here.

5 Senator Stevens: Mr. Chairman, again, I am not trying to
6 filibuster. I really believe that we owe them a chance to
7 resolve this issue within the bar association. It is a
8 serious debate going on. I thank the Chairman.

9 The Chairman: Let us move on to "unfairness." If I
10 could ask the Chairman to state what the position is before
11 we start, Mr. Chairman, what is the FTC's position on
12 advertising and "unfairness?"

13 Mr. Miller: The Commission is unanimous in opposing any
14 special exemption from the "unfairness" jurisdiction.

15 The Chairman: There is no provision in the bill
16 exempting advertising. I know that Senator Kasten has an
17 amendment, and I know Senator Gorton has a substitute to
18 offer. Bob?

19 Senator Kasten: Mr. Chairman, my amendment essentially
20 is the same as the Committee adopted last time on the FTC
21 reauthorization bill. I would vote to exempt commercial
22 advertising from the FTC regulation on "unfairness" grounds.
23 I want to point out that the Committee discussed this at
24 length last May, and we adopted this exemption by a vote of
25 13 to 2. I think this was a clear indication of the

1 Committee's position on the exemption at that time, and I
2 believe it still is the Committee's position.

3 As you pointed out, we have been under a continuing
4 resolution. We have been working under a continuing
5 resolution with the commercial advertisers exempt from part
6 of the unfairness category, but not all of us. I believe
7 that we ought to go forward. We ought to exempt commercial
8 advertising completely. I think that to permit the FTC to
9 regulate non-deceptive advertising on the open-ended grounds
10 that it is unfair is not only important policy, and it is
11 important policy, but I also believe that it conflicts with
12 First Amendment principles.

13 So, I believe that we ought to go forward and to exempt
14 commercial advertising from FTC regulation on unfairness
15 grounds.

16 I would like to point out, Mr. Chairman, that this in no
17 way would affect the FTC's ability to continue to regulate
18 advertising based on deception. We are not changing the
19 deception part of it at all. I believe that the FTC's
20 deception authority is broad enough to cover the instances
21 where there are problems, specifically advertising depicting
22 dangerous behavior that could be dangerous to children.
23 Advertising claims made without adequate substantiation.
24 These kinds of examples are covered adequately under C,
25 Deception Definition.

1 So, I do believe that we should clear this area up. I
2 believe that the FTC's authority to declare advertising
3 unfair right now is too broad. It is not defined. It
4 conflicts with the principles of First Amendment protection
5 for commercial speech, and we ought to exempt the commercial
6 advertisers on the "unfairness" grounds completely.

7 The Chairman: Senator Gorton?

8 Senator Gorton: Mr. Chairman, I have an amendment to the
9 amendment. Has it been distributed? While that distribution
10 is going on, I should like to state that the amendment to the
11 amendment simply would continue the law as it exists at the
12 present time. Personally, my own view is in accord with
13 those of the Chairman. I would prefer that there not be any
14 limitation in this area at all.

15 I do feel, however, that there is a legitimate
16 distinction between the rulemaking authority of the Federal
17 Trade Commission and its responsibility or the breadth of its
18 authority in connection with individual complaints about
19 individual alleged violations of an unfairness rule.

20 This amendment, which is the law under which the
21 Commission is working at the present time, would go along
22 with Senator Kasten's proposal in prohibiting general
23 rulemaking directed at advertising offered on the basis of
24 "unfairness." It would, however, continue to allow the
25 Commission to do what it has had the authority to do for many

1 years, that is, to make findings in specific cases that
2 advertising was unfair, and to prohibit it or to provide
3 sanctions against it on that ground.

4 I place this amendment for two reasons. The first is
5 that I think this is an appropriate division, an appropriate
6 settlement for a matter which is of some considerable
7 controversy. Second, because it is my hope that by reaching
8 this middle ground, we can have a united or an almost united
9 Committee position.

10 As I say, my own preference would be to have no
11 restrictions in this field at all. I can say, however, that
12 if this amendment is adopted, it would be my position, and I
13 believe it would be the Chairman's position, to defend it on
14 the floor and defend it in conference as an appropriate
15 compromise.

16 It is often stated, for example, that we tread on
17 Constitutional grounds in this "unfairness" area. That
18 simply is not the case. The Supreme Court of the United
19 States as recently as three years ago stated that the
20 government can regulate commercial speech consistent with the
21 First Amendment if the government asserts a substantial
22 interest to be served by the regulation, if the restriction
23 directly advances that and is no more extensive than is
24 necessary.

25 So, Constitutional restrictions on the misuse of this

1 power on the part of the Federal Trade Commission are very
2 real, but there is room for this authority to be exercised
3 most particularly in the case of specific advertising rather
4 than general rulemaking.

5 I would hope fervently that we could end this rather
6 divisive ~~controversy~~ on the middle ground, which is
7 reasonably utilized by the Federal Trade Commission over the
8 last few years at least, and move forward on a united basis
9 rather than continue the debate.

10 The Chairman: I would agree with Senator Gorton. My
11 preference would be to have no exemption at all, but I find
12 Senator Gorton's middle ground position one I can defend, and
13 I will defend it in conference. I cannot say it will be an
14 absolutely non-negotiable item no matter what might be agreed
15 to, that we would not in any way consider negotiating on
16 this, but I would put it at the bottom of the list of things
17 that I would give away and would defend it as strongly as
18 possible.

19 Senator Ford: Would the distinguished Senator from
20 Washington yield for a question?

21 Senator Gorton: Certainly.

22 Senator Ford: You have had a lot of experience as it
23 relates to the State, having been the Attorney General and a
24 very astute lawyer. Have we, or do we by passing your
25 so-called middle ground amendment give substantial interest

1 by the government and therefore put us in the posture of
2 giving the unelected bureaucrats the opportunity then to have
3 an unlimited concept of unfairness?

4 Senator Gorton: I think not. As a matter of fact, if
5 any restriction in this area is adopted, it will be a
6 restriction greater than that imposed by the FTC five, six,
7 seven years ago. This is precisely the restriction that has
8 been imposed. For how long? Can staff tell me how long?

9 Mr. Fullerton: The current law was enacted in February
10 of 1980.

11 Senator Gorton: Okay. So this is the restriction under
12 which the Federal Trade Commission has operated since early
13 1980. I believe that the combination of prohibition against
14 exercising rulemaking authority, which, of course, is
15 general, it is something that applies in the future to all
16 persons in all circumstances, of taking that away but
17 allowing the Federal Trade Commission to bring specific
18 actions against specific kinds of advertisements on the
19 grounds of "unfairness" subject to this triple limitation
20 which the Supreme Court laid out in 1980 seems to me to
21 rather narrowly restrict the scope of activities.

22 The Chairman: That is in the Hudson case, which is
23 really pretty severe and pretty tight?

24 Senator Gorton: Yes, it is.

25 Senator Ford: Well, under the Hudson case, the Supreme

1 Court has stated that truthful, non-deceptive advertising can
2 be banned if the State has a substantial interest. That is
3 just what I asked the distinguished Senator. And therefore
4 it is important that the Congress not appear under this case
5 to create a substantial interest in the FTC by allowing it to
6 regulate through a totally vague and limited concept such as
7 "unfairness."

8 We have never had a case, as I understand it, by the FTC
9 taken forward to court that they have ever been able to win
10 unless they have tied deceptive to it, I believe. Jim, is
11 that right? I am pretty close to being right.

12 [General laughter.]

13 Senator Ford: All he is doing is nodding his head. I
14 take that to be right.

15 The Chairman: I think he is shaking his head, but it
16 would be tough for the Reporter.

17 I think what they have done in every case is to plead
18 deception. It is hard to tell what the court's decision
19 would be.

20 Mr. Miller: [Nods in the affirmative.]

21 Senator Ford: Deception is well defined in the law, as I
22 understand it.

23 The Chairman: I think the FTC brings a suit and pleads
24 both --

25 Senator Gorton: Have we not codified the definition of

1 "unfairness?"

2 Senator Ford: Yes, we have done that, but why do we need
3 them, and put the substantial interest of this entity? It is
4 just another thing we are giving them the authority to get
5 out and move into.

6 The Chairman: I think the Chairman wants to say
7 something.

8 Mr. Miller: We have on occasion found advertisements to
9 be unfair, but it has been pointed out the authority of the
10 Commission would be restrained by the definition of
11 "unfairness" that you have approved.

12 Senator Stevens: May I inquire, Mr. Chairman?

13 The Chairman: Ted?

14 Senator Stevens: As I understand, this would prevent
15 rulemaking. There is nothing that would prohibit the
16 Commission from citing all the cereal makers in one
17 proceeding.

18 The Chairman: Well, if you are talking about
19 advertising, they are going to have to go on a case by case
20 basis.

21 Senator Stevens: What they advertise on the backs of
22 their boxes, okay? What I am saying is, the concept of
23 rulemaking can be avoided by just including everyone that is
24 involved in one proceeding, can it not?

25 Senator Gorton: It would seem to me --

1 The Chairman: Correct me if I am wrong on your
2 amendment. They are basically going to go after the
3 advertising on a case by case basis after the ad, and bring a
4 suit against -- prohibiting that ad, but they cannot
5 prospectively say all cereal makers on the back of their box
6 cannot do something. That involves rulemaking.

7 Senator Gorton: Mr. Chairman, I think that is correct.

8 Senator Stevens: I think a case by case action against
9 individuals in the same line of advertising would amount to a
10 precedent before the Commission, which is the same as
11 rulemaking, whether we like it or not. They haul themselves
12 up by their own bootstraps. Every time they make a decision,
13 it is treated like precedent just as though they were a
14 court.

15 The Chairman: Is that not true of everything they do?

16 Senator Gorton: Mr. Chairman, I think that is true. As
17 a matter of fact, I can relate to my own experience in that
18 respect as State Attorney General. I enforced a little FTC
19 act which is what my State and most other States with
20 consumer protection actions had. We had no rulemaking
21 authority. We could not in any area produce rules, general
22 rules of conduct. All of our enforcement activity was
23 handled on a case by case basis. Obviously, we brought cases
24 which we thought would have precedential value, which we
25 thought were important because of the impact they had on

1 consumers, and we thought once we had a ruling for a court
2 they could be utilized to provide guidance for business
3 enterprises. You want to do that on a case by case basis.

4 But it is quite different from general rulemaking
5 authority. I can tell you, I would love to have had general
6 rulemaking authority as the State Attorney General, but the
7 statement of Senator Stevens is equally applicable to every
8 other power which the Federal Trade Commission exercises.
9 You can do it through rulemaking or you can do it through
10 individual cases, and there is a real distinction in spite of
11 the fact that a specific case may set a precedent.

12 The Chairman: On a case by case is not different from
13 what most agencies do. The Department of Justice, the
14 Federal Trade Commission, they bring an antitrust suit, and
15 the other companies in the industry will look at that.

16 Senator Kasten: Mr. Chairman?

17 The Chairman: Bob?

18 Senator Kasten: I think it is important to point out
19 that the FTC could evade the restriction on the "unfairness"
20 rulemaking by adopting a certain policy case by case by case
21 by case, so that the fact that we have the restriction on the
22 rulemaking on an overall rule really does not deal with the
23 specific problem. That is the problem. They can simply
24 evade or get around the restriction on rulemaking by adopting
25 case by case by case.

1 Senator Gorton: As long as they win the cases.

2 Senator Kasten: Yes. And I am also not worried,
3 frankly, about this FTC. I think there have been abuses in
4 the past. There were people who were dangerously concerned
5 about the directions they were going. I think we have got --
6 What, if any, provision does the House have in this area
7 right now? They have been operating under the continuing
8 resolution?

9 The Chairman: Yes.

10 Senator Kasten: There is no provision at all?

The Chairman: Not as it came out of the Committee.

12 Mr. Fullerton: There is a definition of "unfairness,"
13 but no exemption.

14 Senator Ford: Mr. Chairman, I think -- excuse me. May I
15 be heard?

16 The Chairman: Yes.

17 Senator Ford: What we are getting into here, I think
18 Senator Gorton has kind of put his finger on it. If he
19 wanted to try cases, he wanted to set precedent, he needed to
20 get that out into the swim. Well, the FTC in the past, and I
21 am not sure what they are going to do in the future, have
22 gone beyond what they thought was the law, what they thought
23 was constitutional.

24 If somehow they won the case, well and good. If they did
25 not, they were trotting right back up here and saying, we do

1 not have enough authority. So what we are doing here, I
2 think, is giving them more authority. You have the proposed
3 definition of unfairness in the legislation, and I would hope
4 that would be enough. That is it. And just exempt them.
5 Take Senator Kasten's amendment, and they have got the
6 definition of unfairness.

7 Senator Gorton: But you are saying they cannot use it.

8 Senator Ford: Well, they will use it.

9 The Chairman: You will exempt advertising totally.

10 Senator Gorton: You will not --

11 Senator Ford: Well, maybe we should take the whole thing
12 out. That might make more sense.

13 The Chairman: Take what whole thing out?

14 Senator Ford: Take "unfairness" out. Take the
15 definition out, if you want to, but the courts -- I am just
16 kidding.

17 [General laughter.]

18 Senator Ford: I think we are treading pretty close until
19 we say to that little fellow who wants to cite City Hall out
20 there, if you win, you will be reimbursed. We have finally
21 put some brakes on the Federal agencies, and that is a
22 significant step, in my opinion, and if we do not take this
23 amendment of Senator Kasten's, then we are giving them the
24 opportunity to take that one word, "unfairness," which has
25 never been won in court. "Unfairness" is a description in

1 the eye of the beholder. There has never been a case brought
2 where they defined it. If they are going to be bad people,
3 they are going to be bad. You are going to take them to
4 court. "Unfairness," you could just go after them under
5 anything based on this definition.

6 The Chairman: Is there further discussion on the Corton
7 amendment?

8 Senator Danforth: Yes.

9 The Chairman: Jack?

10 Senator Danforth: Mr. Chairman, this is clearly a very
11 important issue, and it is an issue which will be aired on
12 the floor of the Senate, and is an issue which will go to a
13 conference with the House, and a record that will probably
14 come back. I would like to make my own views on this known,
15 which will make it not surprising to my Chairman or other
16 conferees.

17 The situation we now have is that the House would give
18 absolutely free rein to the FTC with respect to rulemaking,
19 and with respect to case by case adjudication on commercial
20 advertising with "unfairness," which is, while it is defined,
21 it is a very, very broad standard. That would be the
22 standard. I must say that I am troubled by restraints on
23 commercial advertising. I do view it as a Constitutional
24 issue. I do believe that speech encompasses commercial
25 speech as well as non-commercial speech. I do believe that

1 the tests of breath and danger are equally applicable to
2 commercial speech as any other kind of speech.

3 It seems to me that what we should be trying to do is to
4 fashion a statute which is sufficiently narrow to meet both
5 the Constitutional test and our own sense of what free speech
6 is all about. I believe that if we were to allow the FTC to
7 engage in rulemaking with "unfairness" as a criteria, or a
8 criterion for rulemaking, that the result of that would be to
9 give the FTC too much authority to impose itself into a
10 constitutionally protected area.

11 So, for that reason, I would adamantly oppose the FTC
12 being granted that kind of authority, and I want to say to
13 the Chairman that if a conference report comes back with that
14 kind of authority vested in the FTC, I would be compelled to
15 fight that conference report with all the energy that is in
16 me, and I would hope that whoever the conferees are on this
17 bill, they would take a very firm position.

18

19

20

21

22

23

24

25

ALDERSON REPORTING COMPANY, INC.

440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (302) 688-6300

1 Frankly, I think the Kasten provision is a little too
2 restrictive on the FTC and the Gorton position is a little
3 too loose with respect to the FTC. I can conceive of cases
4 where it would be appropriate on a case by case basis for the
5 FTC to involve itself in commercial advertising.

6 For example, if a television commercial for a motorcycle
7 company were to portray a very attractive person having a
8 wonderful time on a motorcycle without wearing a helmet, that
9 would not be deceptive, it would not be untrue. I would
10 think it would be unfair and I think somebody should be
11 empowered to step in in that kind of a situation.

12 On the other hand, I do not believe that the FTC has been
13 vested with the power by Congress to look into specific
14 product lines. For example, if the FTC were to determine
15 that McDonald hamburger commercials were unfair because in
16 the view of the FTC McDonald hamburgers are high in
17 cholesterol and bad for the blood supply and what-not, I do
18 not think the FTC is in the position to make that kind of
19 determination.

20 Therefore, if I were to have a perfect kind of statute I
21 would want some sort of constraints on what the FTC could
22 do. I spent some yesterday trying to figure out what the
23 perfect kind of statute would be. I tried out a variety of
24 alternatives on people and one by one my alternatives were
25 shot down with the usual kind of argument: Well, what about

1 the case in which, and I would have no answer to it.

2 So I have nothing better to suggest than the Gorton
3 approach, but I do want to say that in my view the Gorton
4 approach does run the risk of being too broad in granting
5 authority to the FTC.

6 I would further say that if we were to come out of
7 conference with a bill that would go as far as the House
8 bill, I think that would be a very, very bad situation.

9 The Chairman: I think I can assure you, based on what
10 others have said, it would be faced with a filibuster based
11 on the conference report if it came back with a total
12 exemption.

13 Senator Kasten: Mr. Chairman. It is my understanding,
14 Jack, that the example you picked, the motorcycle rider, high
15 speed without a helmet, that there is a way without using
16 unfairness. Basically, the theory is implied representation
17 that it is safe to ride a motorcycle at a high speed without
18 a helmet.

19 I am not a lawyer. I cannot understand all the details
20 of this, but my understanding is that it can get to all the
21 kinds of examples, to try to get the committee staff to try
22 to understand this. Am I correct, there is a way through
23 implied representation that they can get to a place that
24 Senator Danforth is trying to get to?

25 Mr. Fullerton: The theory would be that in representing

1 such a motorcycle rider, whatever the content of the ad with
2 respect to the motorcycle rider, it would carry with it an
3 additional representation or claim that riding a motorcycle
4 without a helmet is safe.

5 This particular example did not come up in our hearings.
6 Examples like it came up, and some members of the advertising
7 community asserted that such a claim could be found and the
8 deception law was broad enough to support liability. But
9 that is certainly something on which they are disagreeing.

10 Senator Ford: He just said deception. He just said the
11 deception law was broad enough.

12 Senator Danforth: I believe that would be arguable. I
13 do not know, but my view is I would like to give the FTC some
14 authority in extreme cases, on a case by case basis, to rifle
15 in on a specific really outrageous practice. But the
16 narrower that can be drafted, the better I would like it.
17 And I may yet come up with something, Mr. Chairman, on the
18 floor.

19 The Chairman: Further discussion on the Gorton
20 amendment?

21 [No response.]

22 The Chairman: If not, I will ask the Clerk to call the
23 roll.

24 The Clerk: Mr. Goldwater.

25 The Chairman: Aye by proxy.

1 The Clerk: Mr. Danforth.
2 Senator Danforth: Aye.
3 The Clerk: Mrs. Kassebaum.
4 Senator Kassebaum: Aye.
5 The Clerk: Mr. Pressler.
6 [No response.]
7 The Clerk: Mr. Gorton.
8 Senator Gorton: Aye.
9 The Clerk: Mr. Stevens.
10 Senator Stevens: Pass.
11 The Clerk: Mr. Kasten.
12 Senator Kasten: Aye.
13 The Clerk: Mr. Tribble.
14 Senator Tribble: Aye.
15 The Clerk: Mr. Hollings.
16 [No response.]
17 The Clerk: Mr. Long.
18 Senator Long: No.
19 Senator Ford: Mr. Hollings will vote no by proxy.
20 The Clerk: Mr. Inouye.
21 [No response.]
22 The Clerk: Mr. Ford.
23 Senator Ford: No.
24 The Clerk: Mr. Riegle.
25 Senator Ford: No by proxy.

1 The Clerk: Mr. Exon.
2 Senator Ford: No by proxy.
3 The Clerk: Mr. Heflin.
4 Senator Ford: No by proxy.
5 The Clerk: Mr. Lautenberg.
6 Senator Lautenberg: Aye.
7 The Clerk: Mr. Packwood.
8 The Chairman: Aye.
9 The Clerk: Eight yeas, six nays, one pass.
10 Senator Stevens: Record me as no.
11 The Chairman: The amendment is adopted -- excuse me.
12 The Clerk: Senator Stevens wanted to be recorded as no.
13 That makes it eight yeas and eight nays.
14 The Chairman: Eight to seven, is it not?
15 The Clerk: Mr. Stevens passed the first time.
16 The Chairman: You said "eight to six and a pass."
17 The Clerk: I am sorry; eight to eight.
18 The Chairman: What?
19 The Clerk: Eight to seven. Eight yeas, seven nays.
20 [Laughter.]
21 The Chairman: The amendment is adopted, and I believe
22 that finishes the amendments we have on the bill. Unless
23 there is further discussion, I would ask the Clerk to call
24 the roll on reporting the bill out.
25 The Clerk: Mr. Goldwater.

1 The Chairman: Aye by proxy.
2 The Clerk: Mr. Danforth.
3 Senator Danforth: Aye.
4 The Clerk: Mrs. Kassebaum.
5 Senator Kassebaum: Aye.
6 The Clerk: Mr. Pressler.
7 [No response.]
8 The Clerk: Mr. Gorton.
9 Senator Gorton: Aye.
10 The Clerk: Mr. Stevens.
11 Senator Stevens: Aye.
12 The Clerk: Mr. Kasten.
13 Senator Kasten: Aye.
14 The Clerk: Mr. Tribble.
15 Senator Tribble: Aye.
16 The Clerk: Mr. Hollings.
17 [No response.]
18 The Clerk: Mr. Long.
19 Senator Long: Aye.
20 The Clerk: Mr. Inouye.
21 [No response.]
22 The Clerk: Mr. Ford.
23 Senator Ford: Aye, and Senator Hollings is aye by proxy;
24 excuse me.
25 The Clerk: Mr. Riegle.

1 Senator Long: Aye.

2 The Clerk: Mr. Exon.

3 Senator Ford: Aye by proxy.

4 The Clerk: Mr. Heflin.

5 Senator Ford: Aye by proxy.

6 The Clerk: Mr. Lautenberg.

7 Senator Lautenberg: Aye.

8 The Clerk: Mr. Packwood.

9 The Chairman: Aye.

10 The Clerk: 15 yeas.

11 Senator Kasten: Mr. Chairman, Mr. Pressler votes aye by
12 proxy. And I would ask unanimous consent that his statement
13 on advertising co-ops be included as part of the record from
14 Senator Pressler.

15 The Chairman: Advertising co-ops?

16 [Laughter.]

17 Senator Kasten: Excuse me. Agricultural co-ops.

18 [Laughter.]

19 [The statement referred to follows:]

20

21

22

23

24

25

1 The Clark: 15 yeas, zero nays.

2 The Chairman: There may be such a thing, I'm not sure.

3 [Laughter.]

4 The Chairman: The bill is reported.

5 If I could have the committee's attention just a moment.

6 We have seven or eight other bills. I think they are
7 noncontroversial. Actually, there are ten others. We will
8 take about a five-minute break when we are done here. Then,
9 about September 20th or 21st or 22nd -- we have not arrived
10 at an exact date yet -- we will have a markup on this
11 committee for product liability, for Jack Danforth's highway
12 safety bill, and for any other bills that are on our calendar
13 at that time.

14 Let us take about a five-minute recess and we will take
15 the rest of the bills that we have.

16

17

18

19

20

21

22

23

24

25

1 The Chairman: The committee will come back to order.

2 We have ten other items which I think we can go through
3 with relative haste.

4 Let's take up first the Harry Porter Control Tower.

5 Kathy, are you ready for this one? This one may be over
6 before you get there.

7 This names the Air Traffic Control Tower at the
8 Chattanooga, Tennessee Airport the Harry Porter Control
9 Tower. I told Senator Baker yesterday that we would take up
10 this bill today. He got a big smile on his face, and he said
11 Harry Porter is 85 years of age and is one of the pioneers of
12 aviation in Tennessee, and he does not even like the idea of
13 using radios to contact the tower. And he may be surprised
14 to find that a tower is being named after him.

15 [Laughter.]

16 The Chairman: Is there any objection to the passage of
17 S. 1365?

18 [No response.]

19 The Chairman: Without objection.

20 Next, let us move on, Ted, to S. 1015, the Jones Act
21 Waiver on the Vessel La Jolie.

22 Senator Stevens: This is a vessel that the owner wishes
23 to use as a charter fishing boat on the Great Lakes. It was
24 once owned by a Canadian citizen. That is the reason for the
25 bill.

1 The Chairman: Any objections to the bill?

2 [No response.]

3 The Chairman: Without objection.

4 Let's move on to S. 1186, the Jones Act Waiver on the
5 Vessel Dai's Pai.

6 Senator Stevens: This is a similar situation. The owner
7 wishes to use the vessel as a fishing vessel off the coast of
8 New Hampshire and Massachusetts. It was also once owned by a
9 Canadian citizen.

10 The Chairman: Any objection?

11 [No response.]

12 The Chairman: Without objection.

13 Let's move on to S. 1689, the Jones Act waiver on the
14 Vessel Endless Summer.

15 Senator Stevens: This was a vessel that was forfeited to
16 the Commonwealth of Virginia because of smuggling, and
17 Virginia wishes to auction the vessel. The restriction of
18 the Jones Act will limit its value, and the reason is that
19 there was a prior British owner.

20 The Chairman: Is there objection?

21 [No response.]

22 The Chairman: Without objection.

23 Let's move on to S. 254, the Construction Funds for
24 Fishery Processing Facilities.

25 Senator Stevens: This is a bill that puts into statutory

1 law the amendments that we have on two occasions, three
2 occasions passed with the Senate to allow the benefits of the
3 capital construction funds to be used in the domestic fish
4 processing industry.

5 What it would mean is that those people who have the CCF
6 from fishing activities could invest in the processing
7 facilities. The trouble is right now that the fleet of the
8 U.S. fishing industry has expanded, but the real difficulties
9 are on shore because the U.S. processors are not capable of
10 meeting the increased volumes and that the types of fish are
11 brought ashore now by the domestic fishery under the 200 mile
12 zone bill. It was supported unanimously in the hearings we
13 held by all segments of the fishing industry, both vessel
14 owners, fishermen and the processing sectors.

15 The House has objected to the amendments in the past
16 because there was no authorization, and this is that bill.

17 The Chairman: Discussion?

18 [No response.]

19 The Chairman: Without objection.

20 I might ask here, before I forget it, unanimous consent
21 for both budget waivers on any of the bills we report that
22 would require budget waivers, and unanimous consent for the
23 staff to make technical corrections on any of the bills we
24 are reporting.

25 Without objection.

1 Let us move on to H.R. 2840, the Termination of Federal
2 Management of the Pribilof Islands.

3 Ted?

4 Senator Stevens: Under an international treaty, the
5 Federal Government is responsible for the management and
6 harvesting of fur seals on the Pribilof Islands off the
7 Bering Sea of Alaska. Those seals have been processed and
8 sold. The objections have been raised that the Federal
9 Government is directly involved in the sealing, and this bill
10 is to accomplish two objectives, ending the federal
11 government involvement as the employer, as the people who
12 carry out the sealing activities, and setting up a trust to
13 be used by the people on the islands who have been employed
14 in the past to enable them to conduct that business.

15 It carries out an agreement that was entered into by the
16 National Fisheries Service and the Pribilof Island people to
17 in effect continue the activities under the treaty but to
18 have those activities be carried out by the people on the
19 islands themselves rather than under the supervision of the
20 National Fisheries.

21 The Chairman: Discussion?

22 [No response.]

23 The Chairman: Without objection.

24 We move on now to Aviation Drug-Trafficking, S. 1146.

25 Nancy?

1 Senator Kassebaum: Mr. Chairman, this bill was a bill
2 introduced by Senators Bentsen and Domenici and DeConcini and
3 myself. Senator Bentsen initiated this. It is just a bill
4 that would facilitate the FAA's involvement in cracking down
5 on illegal drug trafficking through particularly the light
6 aircraft being used to land in abandoned airstrips, and just
7 on the plains in Kansas where you have a lot of flat lands,
8 in Texas and other areas.

9 What it would do, it would enable the FAA to revoke an
10 airman's certificate for five years. Up to this point,
11 conviction had to be made first. If, indeed, they were shown
12 to be carrying illegal drugs, they could revoke the aircraft
13 certification.

14 So I think it is just another means by which we can help
15 tighten efforts of various agencies to deal with illegal drug
16 traffic.

17 The Chairman: Discussion?

18 - [No response.]

19 The Chairman: Without objection, it will be reported.

20 Senator Kassebaum: Mr. Chairman, may I say there are
21 some amendments that have been added just for clarification
22 on this, and I think there is no problem with those
23 amendments.

24 I can go through them if anyone would wish to hear them.

25 The Chairman: I think they have been circulated. I do

1 not think there is objection to them.

2 Without objection.

3 Larry, S. Res. 167, the Olympics and travel.

4 Senator Pressler: Mr. Chairman, this expresses the sense
5 of the Senate --

6 The Chairman: Turn your mike on, I think, Larry.

7 Senator Pressler: Mr. Chairman, the resolution expresses
8 the sense of the Senate that the United States should promote
9 foreign travel to the United States for these two events.
10 The stated reasons for this position are that the promotion
11 of such travel, one, enhances international understanding and
12 cooperation; and two, provides considerable financial
13 benefits to the United States.

14 Foreign visitors spent nearly \$12 billion in goods and
15 services in the United States in 1982. This total could be
16 expanded considerably if we were able to attract large
17 numbers of foreign visitors for the 1984 Olympics and the
18 Louisiana World's Fair.

19 Mr. Chairman, I submit the remainder of the statement for
20 the record.

21 [The statement referred to follows:]

22 COMMITTEE INSERT

23

24

25

1 The Chairman: Is there objection to the adoption of S.
2 Res. 167?

3 [No response.]

4 The Chairman: Without objection.

5 Number ten are routine Coast Guard nominations.

6 Are there any objections to the nominations?

7 [No response.]

8 The Chairman: Number eleven, the nomination of Philip
9 Lader to the Travel and Tourism Industry Advisory Council.
10 Dennis?

11 Do you know that one, Larry? Do you know him?

12 Senator Pressler: I happen to know Phil Lader. He is a
13 democrat, but he was in Harvard Law School with me and placed
14 considerably above me in the class.

15 [Laughter.]

16 The Chairman: Do you have anything to add to that,
17 Dennis?

18 Mr. Phelan: I am not going to touch that.

19 The Chairman: Is there any objection to Mr. Lader?

20 [No response.]

21 The Chairman: Is there any other business to be brought
22 before the Committee?

23 Mr. Ford: Mr. Chairman?

24 The Chairman: Wendell.

25 Senator Ford: Two things. Did you finally make a ruling

1 on a Senator who had not voted, was not recorded on the vote,
2 that he was then excluded from voting if the bill had been
3 reported?

4 The Chairman: After the bill had been reported.

5 Senator Ford: Okay.

6 That means that Senator Pressler is unable to vote on the
7 Unfairness, even though -- your proxy was not voted and your
8 proxy is not recorded on the Unfairness. So that excludes
9 Senator Pressler, even though he is present without being
10 recorded.

11 Secondly, what was the schedule for Other Liability?

12 The Clerk: He was recorded on Civil Penalties but not on
13 Unfairness.

14 Senator Kasten: And on final passage.

15 I was not sure whether Senator Pressler was supporting my
16 position, but he also, I was told, was supporting the
17 compromise. So I did not know which -- and I did not have a
18 clear note in that case, so I did not vote Senator Pressler's
19 proxy on the question of the Gorton unfairness compromise.

20 Senator Stevens: I thought the ruling was a Senator
21 could record his vote only if the vote would not change the
22 outcome.

23 The Chairman: That is before the bill is reported out.

24 Senator Kasten: Senator Pressler has just said he wanted
25 to be with me. I supported the compromise. Therefore, if

1 Senator Pressler's vote had been cast, I assume it would have
2 been in support of the compromise.

3 Senator Pressler: I do not understand what is going on.
4 [Laughter.]

5 Senator Ford: The vote was eight to seven in favor of
6 the Gorton compromise. Had your proxy been voted one way, it
7 would have been nine to seven. Had it been voted the other
8 way, it would have been eight to eight. So, since the proxy
9 was here, and I knew the proxy was here, and it was voted on
10 one and not voted on the other, I just wanted to be sure of
11 the rules of the committee because I looked at the rules, and
12 the Chairman is correct. There is no delineation of what and
13 when. We could by unanimous consent delay --

14 The Chairman: There is exactly the problem. The bill
15 has been reported out. A fair number of members have left.
16 If we reopen it now, I think it just comes back to haunt us.

17 Senator Ford: The Chairman is absolutely correct, but I
18 just wanted to make that point because we are getting into
19 that in others, and I just went through all this, nine to
20 nine, ten to ten, nine to eleven, and it got to be very
21 sticky, and I think our committee went into detail by saying
22 we have to have an affirmative vote on this particular thing
23 in order to do it.

24 So I just brought that up.

25 The Chairman: When I announced on product liability, we

1 have not picked the exact date, but on September 20th, 21st
2 or 22nd -- and I will announce it before we leave for the
3 recess -- we will have --

4 Senator Ford: Mr. Chairman, I have very grave
5 reservations about bringing up product liability and would
6 like to be consulted on it before you make the final judgment
7 on the date, if you would, please.

8 The Chairman: I will consult you, but in fairness,
9 Wendell, we have put this off a long time, and the proponents
10 are entitled to have a markup.

11 Senator Ford: I understand that. All I ask is to be
12 considered, and I ask that publicly.

13 The Chairman: We also would have a mark-up on that day
14 of Senator Danforth's Highway Safety bill and any other bills
15 we might have.

16 The committee stands in adjournment.

17 [Whereupon, at 11:17 a.m., the committee recessed subject
18 to the call of the Chair.]

19
20
21
22
23
24
25