

United States

LITIGATION RELATING TO ATOMIC TESTING



HEARING

BEFORE THE

**SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS**

OF THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 2797

LITIGATION RELATING TO ATOMIC TESTING

JUNE 7, 1983

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LITIGATION RELATING TO ATOMIC TESTING

TUESDAY, JUNE 7, 1983

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 3:06 p.m. in room 2226 of the Rayburn House Office Building, Hon. Sam B. Hall, Jr. (chairman of the subcommittee) presiding.

Present: Representatives Hall, Mazzoli, Frank, Berman, Kindness, McCollum, Shaw, and Boucher.

Staff present: William P. Shattuck, counsel; Wade James Harrison, assistant counsel; Dave Karmol, associate counsel; and Florence McGrady, legal assistant.

Mr. HALL. The Subcommittee on Administrative Law and Governmental Relations will come to order. Today we will have a hearing on H.R. 2797 which has been sequentially referred to the committee. This is a bill to authorize appropriations for the Department of Energy for national security purposes for fiscal year 1984 and further purposes.

[The text of H.R. 2797 follows:]

(1)

98TH CONGRESS
1ST SESSION

H. R. 2797

[Report No. 98-124, Part I]

To authorize appropriations for the Department of Energy for national security programs for fiscal year 1984, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 27, 1983

Mr. STRATTON (for himself and Mrs. HOLT) introduced the following bill; which was referred to the Committee on Armed Services

MAY 13, 1983

Reported with amendments, referred to the Committees on Energy and Commerce and Interior and Insular Affairs for a period ending not later than June 15, 1983, for consideration of such provisions of the bill as fall within the jurisdictions of those committees pursuant to clauses 1(h) and (1) of rule X, respectively

[Insert the part printed in italic]

A BILL

To authorize appropriations for the Department of Energy for national security programs for fiscal year 1984, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Department of Energy
4 National Security and Military Applications of Nuclear
5 Energy Authorization Act of 1984".

1 TITLE I—NATIONAL SECURITY PROGRAMS

2 OPERATING EXPENSES

3 SEC. 101. Funds are authorized to be appropriated to
4 the Department of Energy for fiscal year 1984 for operating
5 expenses incurred in carrying out national security programs
6 (including scientific research and development in support of
7 the Armed Forces, strategic and critical materials necessary
8 for the common defense, and military applications of nuclear
9 energy and related management and support activities) as
10 follows:

11 (1) For naval reactors development program,
12 \$370,000,000.

13 (2) For weapons activities, \$3,022,260,000, to be
14 allocated as follows:

15 (A) For research and development,
16 \$714,480,000.

17 (B) For weapons testing, \$475,900,000.

18 (C) For the defense inertial confinement
19 fusion program, \$154,000,000, of which—

20 (i) \$85,000,000 shall be used for glass
21 laser experiments;

22 (ii) \$46,000,000 shall be used for gas
23 laser experiments; and

24 (iii) \$23,000,000 shall be used for
25 pulsed power experiments.

1 (D) For production and surveillance,
2 \$1,621,950,000.

3 (E) For program direction, \$55,930,000.

4 (3) For verification and control technology,
5 \$59,900,000.

6 (4) For defense nuclear materials production,
7 \$1,235,840,000, to be allocated as follows:

8 (A) For uranium enriching, \$190,000,000.

9 (B) For production reactor operations,
10 \$497,745,000.

11 (C) For processing of defense nuclear materi-
12 als, \$287,595,000.

13 (D) For special isotope separation,
14 \$40,000,000.

15 (E) For supporting services, \$203,000,000,
16 of which \$2,000,000 shall be used for activities to
17 support conceptual, feasibility, and requirement
18 studies on a new production reactor and
19 \$5,000,000 shall be used to complete the concep-
20 tual design for a proposed processing facility
21 modification at the Purex Plant, Richland, Wash-
22 ington.

23 (F) For program direction, \$17,500,000.

24 (5) For defense nuclear waste, \$328,900,000, to
25 be allocated as follows:

1 (A) For interim waste management,
2 \$210,526,000.

3 (B) For long-term waste management tech-
4 nology, \$58,149,000.

5 (C) For terminal waste storage,
6 \$30,800,000.

7 (D) For byproducts beneficial uses,
8 \$10,000,000.

9 (E) For decontamination and decommission-
10 ing, \$10,500,000.

11 (F) For transportation research and develop-
12 ment, \$6,455,000.

13 (G) For program direction, \$2,470,000.

14 (6) For nuclear materials safeguards and security
15 technology development program, \$48,000,000.

16 (7) For security investigations, \$29,500,000.

17 PLANT AND CAPITAL EQUIPMENT

18 SEC. 102. Funds are authorized to be appropriated to
19 the Department of Energy for fiscal year 1984 for plant and
20 capital equipment (including planning, construction, acquisi-
21 tion, and modification of facilities, land acquisition related
22 thereto, and acquisition and fabrication of capital equipment
23 not related to construction) necessary for national security
24 programs as follows:

25 (1) For naval reactors development:

1 Project 84-N-101, general plant projects,
2 various locations, \$2,500,000.

3 Project 83-N-102, addition to the radioac-
4 tive materials laboratory, Knolls Atomic Power
5 Laboratory, Schenectady, New York, \$6,500,000,
6 for a total project authorization of \$8,000,000.

7 Project 82-N-111, materials facility, Savan-
8 nah River, South Carolina, \$70,000,000, for a
9 total project authorization of \$125,000,000.

10 Project 81-T-112, modifications and addi-
11 tions to prototype facilities, various locations,
12 \$1,000,000, for a total authorization of
13 \$104,000,000.

14 (2) For weapons activities:

15 Project 84-D-101, general plant projects,
16 various locations, \$27,100,000.

17 Project 84-D-102, radiation hardened inte-
18 grated circuits laboratory, Sandia National Labo-
19 ratories, Albuquerque, New Mexico, \$2,000,000
20 (for AE and long-lead items only).

21 Project 84-D-103, hardened central guard
22 force facility, Los Alamos National Laboratory,
23 Los Alamos, New Mexico, \$600,000.

1 Project 84-D-104, nuclear materials storage
2 facility, Los Alamos National Laboratory, Los
3 Alamos, New Mexico, \$700,000.

4 Project 84-D-107, nuclear testing facilities
5 revitalization, various locations, \$38,500,000.

6 Project 84-D-111, general plant projects,
7 various locations, \$25,000,000.

8 Project 84-D-114, consolidated nonnuclear
9 manufacturing facility, Rocky Flats Plant, Golden,
10 Colorado, \$24,100,000.

11 Project 84-D-115, electrical system expan-
12 sion, Pantex Plant, Amarillo, Texas, \$1,500,000.

13 Project 84-D-117, inert assembly and test
14 facility, Pantex Plant, Amarillo, Texas,
15 \$1,500,000.

16 Project 84-D-118, high-explosive subassem-
17 bly facility, Pantex Plant, Amarillo, Texas,
18 \$7,000,000.

19 Project 84-D-119, railroad track replace-
20 ment and upgrade, Pantex Plant, Amarillo,
21 Texas, \$800,000.

22 Project 84-D-120, explosive component test
23 facility, Mound Facility, Miamisburg, Ohio,
24 \$13,100,000.

1 Project 84-D-121, safeguards and site secu-
2 rity upgrading, Rocky Flats Plant, Golden, Colo-
3 rado, \$10,000,000.

4 Project 83-D-124, standard missile-2 (SM-
5 2) warhead production facilities, various locations,
6 \$3,000,000, for a total authorization of
7 \$5,000,000.

8 *Project 83-D-199, buffer land acquisition,*
9 *various locations, \$7,000,000.*

10 Project 82-D-107, utilities and equipment
11 restoration, replacement, and upgrade, phase III,
12 various locations, \$229,200,000, for a total
13 project authorization of \$449,600,000.

14 Project 82-D-108, nuclear weapons stock-
15 pile improvement, various locations, \$4,000,000,
16 for a total project authorization of \$46,800,000.

17 Project 82-D-111, interactive graphics sys-
18 tems, various locations, \$15,600,000, for a total
19 project authorization of \$24,600,000.

20 Project 82-D-144, simulation technology
21 laboratory, Sandia National Laboratories, Albu-
22 querque, New Mexico, \$8,000,000, for a total
23 project authorization of \$12,200,000.

24 Project 82-D-146, weapons production and
25 production support facilities, various locations,

1 \$14,200,000, for a total project authorization of
2 \$62,200,000.

3 Project 82-D-150, weapons materials re-
4 search and development facility, Lawrence Liver-
5 more National Laboratory, Livermore, California,
6 \$2,900,000, for a total project authorization of
7 \$10,400,000.

8 Project 81-D-101, particle beam fusion ac-
9 celerator-II, Sandia National Laboratories, Albu-
10 querque, New Mexico, \$5,400,000, for a total
11 project authorization of \$42,150,000.

12 Project 81-D-115, missile X warhead pro-
13 duction facilities, various locations, \$20,000,000,
14 for a total project authorization of \$94,100,000.
15 (3) For materials production:

16 Project 84-D-125, general plant projects,
17 various locations, \$28,000,000.

18 Project 84-D-126, plant engineering and
19 design, various locations, \$2,000,000.

20 Project 84-D-130, modification processing
21 facility substations, Savannah River, South Caro-
22 lina, \$5,600,000.

23 Project 84-D-135, process facility modifica-
24 tions, Purex Plant, Richland, Washington,
25 \$15,000,000 (AE and long-lead items only).

1 Project 83-D-138, Purex filter systems im-
2 provements, Richland, Washington, \$8,500,000,
3 for a total project authorization of \$12,750,000.

4 Project 83-D-142, fuel dissolver off-gas
5 transfer and treatment system, Idaho Fuels Proc-
6 essing Facility, Idaho National Engineering Labo-
7 ratory, Idaho, \$4,100,000, for a total project au-
8 thorization of \$7,600,000.

9 Project 83-D-146, water pollution control,
10 Feed Materials Production Center, Fernald, Ohio,
11 \$4,000,000, for a total project authorization of
12 \$5,400,000.

13 Project 83-D-147, pollution discharge elimi-
14 nation, Savannah River, South Carolina,
15 \$2,000,000, for a total project authorization of
16 \$3,000,000.

17 Project 83-D-148, nonradioactive hazardous
18 waste management, Savannah River, South Caro-
19 lina, \$3,000,000, for a total project authorization
20 of \$4,000,000.

21 Project 83-D-180, facility storage modifica-
22 tions, various locations, \$6,500,000, for a total
23 project authorization of \$15,800,000.

1 Project 82-D-118, N plant security and sur-
2 veillance, Richland, Washington, \$400,000, for a
3 total project authorization of \$4,400,000.

4 Project 82-D-124, restoration of production
5 capabilities, phases II, III, and IV, various loca-
6 tions, \$118,600,000, for a total project authoriza-
7 tion of \$253,300,000.

8 Project 82-D-136, fuel processing facilities
9 upgrade, Idaho Fuels Processing Facility, Idaho
10 National Engineering Laboratory, Idaho,
11 \$6,000,000, for a total project authorization of
12 \$46,000,000.

13 Project 82-D-201, special plutonium recov-
14 ery facilities, JB-Line, Savannah River, South
15 Carolina, \$26,000,000, for a total project authori-
16 zation of \$37,000,000.

17 Project 81-D-142, steam transfer header,
18 Savannah River, South Carolina, \$7,400,000, for
19 a total project authorization of \$18,400,000.

20 (4) For defense waste and byproducts manage-
21 ment:

22 Project 84-D-150, general plant projects,
23 interim waste operations and long-term waste
24 management technology, various locations,
25 \$25,830,000.

1 Project 84-D-200, byproducts beneficial
2 uses cooperative demonstration plants, various lo-
3 cations, \$5,000,000.

4 Project 83-D-157, additional radioactive
5 waste storage facilities, Richland, Washington,
6 \$31,000,000, for a total project authorization of
7 \$50,000,000.

8 Project 81-T-104, radioactive waste facili-
9 ties improvements, Oak Ridge National Labora-
10 tory, Tennessee, \$1,000,000 for a total project
11 authorization of \$21,000,000.

12 Project 81-T-105, defense waste processing
13 facility, Savannah River, South Carolina,
14 \$142,000,000, for a total project authorization of
15 \$212,000,000.

16 Project 77-13-f, waste isolation pilot plant,
17 Delaware Basin, Southeast, New Mexico,
18 \$109,700,000, for a total project authorization of
19 \$343,500,000.

20 (5) For capital equipment not related to construc-
21 tion—

22 (A) for naval reactors development,
23 \$20,000,000;

24 (B) for weapons activities, \$234,600,000;

1 (C) for verification and control technology,
2 \$1,750,000;

3 (D) for materials production, \$102,500,000;

4 (E) for defense waste and byproducts man-
5 agement, \$34,500,000; and

6 (F) for nuclear safeguards and security
7 \$4,000,000.

8 TITLE II—GENERAL PROVISIONS

9 REPROGRAMING

10 SEC. 201. Except as otherwise provided in this Act—

11 (1) no amount appropriated pursuant to this Act
12 may be used for any program in excess of 105 per
13 centum of the amount authorized for that program by
14 this Act or \$10,000,000 more than the amount author-
15 ized for that program by this Act, whichever is the
16 lesser, and

17 (2) no amount appropriated pursuant to this Act
18 may be used for any program which has not been pre-
19 sented to, or requested of, the Congress, unless a
20 period of thirty calendar days (not including any day in
21 which either House of Congress is not in session be-
22 cause of adjournment of more than three calendar days
23 to a day certain) has passed after receipt by the appro-
24 priate committees of Congress of notice from the Sec-
25 retary of the Department of Energy (hereinafter in this

1 title referred to as the "Secretary") containing a full
2 and complete statement of the action proposed to be
3 taken and the facts and circumstances relied upon in
4 support of the proposed action, or unless each commit-
5 tee before the expiration of the period has transmitted
6 to the Secretary written notice to the effect that the
7 committee has no objection to the proposed action.

8 **LIMITS ON GENERAL PLANT PROJECTS**

9 **SEC. 202.** (a) The Secretary may carry out any con-
10 struction project under the general plant projects provisions
11 authorized by this Act if the total estimated cost of the con-
12 struction project does not exceed \$1,200,000.

13 (b) If, at any time during the construction of any general
14 plant project authorized by this Act, the estimated cost of the
15 project is revised because of unforeseen cost variations and
16 the revised cost of the project exceeds \$1,200,000, the Sec-
17 retary shall immediately furnish a complete report to the ap-
18 propriate committees of Congress explaining the reasons for
19 the cost variation.

20 **LIMITS ON CONSTRUCTION PROJECTS**

21 **SEC. 203.** (a) Whenever the current estimated cost of a
22 construction project which is authorized by section 102 of
23 this Act, or which is in support of national security programs
24 of the Department of Energy and was authorized by any pre-
25 vious Act, exceeds by more than 25 per centum the higher of

1 (1) the amount authorized for the project, or (2) the amount
2 of the total estimated cost for the project as shown in the
3 most recent budget justification data submitted to Congress,
4 construction may not be started or additional obligations in-
5 curred in connection with the project above the total estimat-
6 ed cost, as the case may be, unless a period of thirty calendar
7 days (not including any day in which either House of Con-
8 gress is not in session because of adjournment of more than
9 three days to a day certain) has passed after receipt by the
10 appropriate committees of the Congress of written notice
11 from the Secretary containing a full and complete statement
12 of the action proposed to be taken and the facts and circum-
13 stances relied upon in support of the action, or unless each
14 committee before the expiration of the period has notified the
15 Secretary it has no objection to the proposed action.

16 (b) Subsection (a) shall not apply to any construction
17 project which has a current estimated cost of less than
18 \$5,000,000.

19 FUND TRANSFER AUTHORITY

20 SEC. 204. To the extent specified in appropriation Acts,
21 funds appropriated pursuant to this Act may be transferred to
22 other agencies of the Government for the performance of the
23 work for which the funds were appropriated, and funds so
24 transferred may be merged with the appropriations of the
25 agency to which the funds are transferred.

1 **AUTHORITY FOR CONSTRUCTION DESIGN**

2 **SEC. 205.** (a) Within the amounts authorized by this
3 Act for plant engineering and design, the Secretary may
4 carry out advance planning and construction designs (includ-
5 ing architectural and engineering services) in connection with
6 any proposed construction project.

7 (b) In any case in which the total estimated cost for such
8 planning and design exceeds \$1,000,000, the Secretary shall
9 notify the appropriate committees of Congress in writing of
10 the details of the project at least thirty days before any funds
11 are obligated for design services for the project.

12 **AUTHORITY FOR EMERGENCY CONSTRUCTION DESIGN**

13 **SEC. 206.** In addition to the advance planning and con-
14 struction design authorized by section 102, the Secretary
15 may perform planning and design utilizing available funds for
16 any Department of Energy national security program con-
17 struction project whenever the Secretary determines that the
18 design must proceed expeditiously in order to meet the needs
19 of national defense or to protect property or human life.

20 **FUNDS AVAILABLE FOR ALL NATIONAL SECURITY**21 **PROGRAMS OF THE DEPARTMENT OF ENERGY**

22 **SEC. 207.** Subject to the provisions of appropriation
23 Acts, amounts appropriated pursuant to this Act for manage-
24 ment and support activities and for general plant projects are

1 available for use, when necessary, in connection with all na-
2 tional security programs of the Department of Energy.

3 ADJUSTMENTS FOR PAY INCREASES

4 SEC. 208. Appropriations authorized by this Act for
5 salary, pay, retirement, or other benefits for Federal employ-
6 ees may be increased by such amounts as may be necessary
7 for increases in benefits authorized by law.

8 AVAILABILITY OF FUNDS

9 SEC. 209. When so specified in an appropriation Act,
10 amounts appropriated for "Operating Expenses" or for
11 "Plant and Capital Equipment" may remain available until
12 expended.

13 PUBLIC HEALTH AND SAFETY

14 SEC. 210. (a) The Secretary of Energy may not take
15 any action to implement a requirement (including a regula-
16 tion, rule, or ordinance) relating to public health and safety
17 until the Secretary has submitted to the appropriate commit-
18 tees of Congress a notice in writing containing—

19 (1) a full and complete statement of the action
20 proposed to be taken;

21 (2) the facts and circumstances relied upon in sup-
22 port of such proposed action, including a scientifically
23 based analysis and assessment of the risk to which the
24 requirement is addressed; and

1 Act of 1954 as requiring protection against unauthorized dis-
2 closure except to the extent authorized by the head of the
3 executive agency that is responsible for establishing classifi-
4 cation policy under that Act.

5 *STATUS OF CERTAIN CONTRACTORS OPERATING*
6 *GOVERNMENT-OWNED FACILITIES*

7 *SEC. 213. A contractor operating a Government-owned*
8 *facility under a contract entered into under any Act relating*
9 *to atomic energy national defense activities of the Depart-*
10 *ment of Energy (or any predecessor agency) for the operation*
11 *of such facility shall be considered to be a corporation pri-*
12 *marily acting as an instrumentality of the United States for*
13 *the purpose of determining civil liability arising from any act*
14 *or omission of the contractor in connection with nuclear test-*
15 *ing in carrying out the contract without regard to when the*
16 *act or omission occurred.*

Mr. HALL. I think we have representing the Department of Justice, Mr. Bernard W. Vance, Deputy Assistant Attorney General for Civil Division and a panel of Mr. George Dacey, Mr. William Degarmo, and Mr. W. R. Hughes.

Mr. Vance, your may come forward, please. You may proceed, sir.

TESTIMONY OF BERNARD W. VANCE, DEPUTY ASSISTANT ATTORNEY GENERAL FOR CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. VANCE. Thank you, Mr. Chairman. Mr. Chairman and members of the subcommittee, thank you for the opportunity to come and speak to you about section 213 of H.R. 2797. The purpose of this section is to substitute the United States as the sole party in suits alleging damages arising from radiation exposure in the U.S. testing of atomic weapons.

At present, there is widespread litigation against independent contractors or contractors who worked closely with the United States in carrying out its atomic weapons testing program. These contractors at present employ outside counsel and in addition to being subject to normal damages awards they are also subject to punitive damage awards.

In turn, the United States would indemnify these contractors for all damage awards and for all expenses associated with that litigation.

This administration does not oppose the purposes of section 213. We do not oppose the purposes of section 213 because we believe this situation is truly unique and narrowly confined. There is, we believe, no function more governmental than that of the development and testing of nuclear weapons. We believe, too, that this could not be done by this Government without the assistance of these contractors.

The situation here is unlike the situation of the typical Government procurement from independent contractors of goods and services including other conventional weapons from commercial suppliers. In this particular situation involving this particular issue, that is, the testing—development and testing—of atomic weapons, we believe that the United States indeed is appropriately the sole defendant in this litigation.

While we do not oppose section 213, we would advise that it be revised and I have attached to my testimony those revisions. Those revisions would align these suits under the Federal Tort Claims Act amendment, although the legislation itself would stand alone, not as an amendment to the FTCA, and that revision would be narrowly drawn to fit only this unique situation. I would emphasize, as I have in my prepared statement, that it does not expand contractor indemnity provisions or the allowance of Government procurers to procure with indemnity. It does not envision an inclusion of other activities or tort claims against other contractors, and it does not legitimate the Government contractor defense.

With that, I will be glad to answer any questions that the subcommittee may have.

Mr. HALL. Thank you, Mr. Vance. How many contractors would be covered under this amendment, under section 213, and how many cases are pending against those contractors, and how many plaintiffs are involved?

Mr. VANCE. I don't know the exact number of the contractors that would be covered. That I would leave to response from the Department of Energy, who could supply you, I am sure, the exact number.

The cases I believe that involve contractors are approximately 50 in number, and those cases involve, I believe, thousands of claimants.

Mr. HALL. Both section 213 and your substitute would include all negligence of the contractors in connection with radiation claims arising out of their contract, not just negligence at the site of the test.

Mr. VANCE. It would include all acts or omissions of the contractors relating to the testing of atomic weapons. It does not include a provision for actual site location.

Mr. HALL. Why shouldn't the contractor defend himself in those cases?

Mr. VANCE. If those things that we're concerned with in a particular piece of litigation would be involved with the development or testing of the nuclear weapons, I believe, still, the United States would be the proper party, and it wouldn't require the actual site locations.

Mr. HALL. Do you believe that there is substantial likelihood that the contractors could be found liable for damages as a result of their contractual activity and that by virtue of the indemnity agreement the United States would have to pay any damages?

Mr. VANCE. By virtue of the present indemnity agreement?

Mr. HALL. Yes.

Mr. VANCE. I am not sure quite what kind of contractual activities you are speaking of.

Mr. HALL. Isn't there an indemnity agreement with the contractors now, entered into between the contractors and the U.S. Government?

Mr. VANCE. Yes; there is.

Mr. HALL. Are many of these cases we're talking about not only in Federal court but in State courts?

Mr. VANCE. To my knowledge, there is only one case in State court, in the California State court.

Mr. HALL. Now, the right to a jury trial has attached in all of the pending cases; is that not correct?

Mr. VANCE. I don't know the particulars of all pending cases. But typically, cases brought against these contractors would have attached the right to a jury trial, as long as the United States is not a party.

Mr. HALL. If these cases are removed to Federal court and litigated under the Federal Tort Claims Act, won't we be depriving these plaintiffs of their right to a trial by jury?

Mr. VANCE. They would be subject to the provisions, and the exclusions, of the Federal Tort Claims Act, and that would include, as it stands, trial without a jury. Trial to judge, as any other suit, typically, that is brought against the United States.

Mr. HALL. Doesn't sovereign immunity bar claims of this type brought against the United States under the Federal Tort Claims Act? Doesn't the Feres doctrine preclude suits by active duty military personnel, and the discretionary function exemption and the other exceptions in 28 U.S.C. 2680 would preclude many if not all of the other claims; is that not correct?

Mr. VANCE. The defenses available under the Federal Tort Claims Act, as we envision it, would stay in place, and if the Feres

doctrine would apply to particular plaintiffs, we believe it would apply here; yes.

Mr. HALL. Now, the United States has been a party to lawsuits of this type in the past, and has successfully asserted its sovereign immunity to avoid all liability, I believe. I believe that's a correct statement.

Mr. VANCE. No.

Mr. HALL. It's not?

Mr. VANCE. The United States has been a party defendant to lawsuits brought by persons, and in one case in particular I can mention, the *Allen* case in Utah, the arguments were closed in that in December of this year, I believe. The United States was the sole party defendant in that case.

Mr. HALL. All right. Which agency of the United States would handle administrative claims under your proposal? And do you have enough people to handle these claims?

Mr. VANCE. I am sure that there would be enough people to handle the claims, but exactly what agency—within what agency it would fall, I am not sure. I would expect the Department of Energy, though, would be the appropriate agency.

Mr. HALL. In both the original section 213 that I was given yesterday and the amendment that I have today is not the statute of limitations as to any occurrence disregarded? Specifically I am looking at a letter setting out this amendment. In a letter from John Dingle to the General Counsel for the Department of Energy, it sets out section 213 and says, quoting toward the last three lines of the amendment:

Primarily acting as an instrumentality of the United States for the purpose of determining civil liability arising from any act or omission of the contractor in connection with nuclear testing in carrying out the contract, without regard to when the act or omission occurred.

Now, in the copy that I received a few minutes ago, the amendment that you have submitted, do you still waive the statute of limitations in that amendment, in your substitute?

Mr. VANCE. Well, we—in the first place, we didn't author the first section 213, and would not support any section that had no statute of limitations in it whatsoever. Under this revised statute, it would have the standard Federal Tort Claims Act statute of limitations.

Mr. HALL. Under your amendment, does your amendment enlarge from the original section 213, in any way?

Mr. VANCE. I think it clarifies the original section 213 to do what I believe was intended by the original section 213, and that is to substitute the United States as the sole party defendant. We have tried to do this in a careful manner in the revised provision, and in doing so be careful, too, to set out all the parameters that would normally be available in suits under the Federal Tort Claims Act.

Mr. HALL. Let me read to you, if I might, a statement:

The amendment is grossly unfair to the plaintiffs in radiation cases. One, the amendment will effectively bar thousands of plaintiffs, most of them disabled veterans, from any recovery against these contractors. The discretionary function exemption exception and other exceptions in 28 U.S.C. 2680 would bar all such suits against the United States. Suits by military personnel on active duty would be barred under the *Feres* doctrine.

Is that a correct statement?

Mr. VANCE. As written, the Feres doctrine would stand and would be a bar to suits for those persons in the military service at the time that they received—if they received, the alleged radiation incident to their military service.

Mr. HALL. It barred the military but not the civilian, not those civilian plaintiffs?

Mr. VANCE. No, no; the Feres doctrine wouldn't apply to civilians, and there would be no exclusion, generally, of civilians' suits.

Mr. HALL [reading]:

No. 2, it would frustrate the intent of Congress that the United States indemnify contractors and thereby create an equitable remedy for damages proven to have been caused by nuclear tests.

Mr. VANCE. Could you read that statement again—there is—well, let me say this: There is an indemnity provision in the contracts now, as it stands, as I mentioned earlier, so indemnity really is not a question.

Mr. HALL [reading]:

It would provide a precedent and request for further extensions of de facto sovereign immunity to Government contractor—that is, agent orange manufacturers—a policy long avoided by the Congress and steadfastly until now opposed by the Department of Justice.

Is that correct?

Mr. VANCE. Well, let me emphasize again that we intend for this to be—for there to be no application or implication arising from this that would apply to other contractors in other situations. We would want it—and tried to draw into our revisions—taken as narrowly as possible to fit only the testing of nuclear weapons.

Mr. HALL. What is the purpose behind this amendment? Where did it originate?

Mr. VANCE. I am afraid I can't say exactly where it originated, because I don't know. I can say that it did not originate with the Department of Justice—that is, section 213. We did author the proposal attached to my statement.

Mr. HALL. We have a full attendance at this subcommittee meeting. This has never happened before. [Laughter.]

VOICE. It's because we love you so much.

VOICE. I was going to say, who are all these people? [Laughter.]

Mr. HALL. We have one new member, Mr. Boucher. I am glad to have you. As a matter of fact, this is the first time I have seen you here—we're glad to have you.

Mr. BOUCHER. Thank you, Mr. Chairman.

Mr. HALL. I don't mean that the way it sounded. He is just recently added to this subcommittee and to the full committee. We are very glad to have you.

Mr. BOUCHER. Thank you, sir.

Mr. HALL. I yield to the gentleman from Ohio, Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman. Mr. Vance, I apologize for having been tardy, but I didn't seem to miss a whole lot in terms of time, I guess, because of that vote that occurred, and I have reviewed your statement.

But I don't get a sense or a feel from it as to why this topic comes up at this particular time in the Armed Services Commit-

tee—or, that is, why it did. Could you explain the timing of this matter?

Mr. VANCE. Well, not having authored it, I can't speak from my own sense of how it might have been timed, properly or improperly, or what it might have arisen from. I think that it would have arisen, though, because the contractors, if it came from there, find themselves at a critical juncture in litigation brought against them in various Federal and State courts in the country.

Mr. KINDNESS. You don't happen to know that there is a particular event that precipitated action during this markup of H.R. 2797, though?

Mr. VANCE. Nothing other than the litigation that we have been discussing, its nature and its existence.

Mr. KINDNESS. And it is correct that the Price-Anderson Act does apply in these cases we are talking about; is that—am I correct there?

Mr. VANCE. This should not affect Price-Anderson whatsoever.

Mr. KINDNESS. But there is an indemnification of the contractor by the United States in these contracts under which the services are performed?

Mr. VANCE. At present, in the present contracts, there is an indemnification provision; yes.

Mr. KINDNESS. You know, it does appear that there is a—well, the chairman has sort of touched on it, that the essential difference in the condition of the law that would occur if either of these amendments were—to the existing law were to take effect, would be to remove the jury trial from the picture, and there are some other factors, but that is one of the things that seems to me to possibly be a lot of what is behind the—either form. Would you care to comment on that jury trial aspect?

Mr. VANCE. Well, I think that, as I tried to show in my statement, or indicate in the statement, and in my formal statement before the questions, I believe that this is very much a function of the U.S. Government, very much a governmental function. I can think of no more governmental function than the testing of nuclear or atomic weapons. That being so, the suit, I think, would be properly brought against the United States. The suit being properly brought against the United States, then I think that all provisions and exclusions for actions brought against the United States should apply. Suits against the United States are typically tried to a judge and not a jury. I think that is appropriate, and I think it would be appropriate in this circumstance.

Mr. KINDNESS. I follow the reasoning, all except for this being such a governmental function that we turn to nongovernmental entities to do it, or to participate in it. That part, I don't quite understand. But I take it that there would be some concern on the part of those who contract with the United States for the performance of these services that they not be involved in the litigation as directly as they are, and have the reputation of those private entities affected in some degree or another by the publicity attendant upon those cases. Is that some part of what's involved here?

Mr. VANCE. I feel sure that's a factor. I am sure that that would be a question that could be answered by the panel that will follow, but I feel sure that that is a factor, and appropriately so.

Mr. KINDNESS. I wonder, to put it bluntly, if the position of the Department or the administration has been formulated with respect to this question: What if H.R. 2797 did not include any amendment in the nature of section 213 at this time? Is there a position of the administration on that? Just not take this action in this bill at all, any actions?

Mr. VANCE. We would not oppose this bill, and we also—section 213, and I believe that it is a proper or appropriate answer to an existing problem, and that is the litigation against contractors for activities essentially arising from the United States and its policies. If this were not included, then litigation would go on as it has been going on.

I am not sure if I—

Mr. KINDNESS. I guess, really, my question, bluntly, is: Is the administration pushing for an amendment in the nature of that which is attached to your testimony, even if the chances were better that nothing would be included by way of section 213, in the legislative process?

Mr. VANCE. What is our position if nothing were to be done in the way of section 213? We—this—

Mr. KINDNESS. At this time, I mean.

Mr. VANCE. At this time. Section 213, as we have revised it, has our support. We would rather have it than not have it.

Mr. KINDNESS. You would? OK. Would the administration oppose an amendment to strike section 213? I guess that's the clearest way to put it.

Mr. VANCE. I am sure having supported this the administration would oppose such an amendment.

Mr. KINDNESS. Thank you. That's clear enough, I guess. That might gain some support on the subcommittee for a motion to strike section 213.

I yield back, Mr. Chairman.

Mr. HALL. Thank you. I am going to yield to the members in a manner in which I think I saw them coming in. Next I yield to Mr. Frank, the gentleman from Massachusetts.

Mr. FRANK. Thank you, Mr. Chairman. Mr. Vance, I want to talk about the Feres doctrine. Explicitly in your redraft there's reference to existing limitations.

Mr. VANCE. Yes; the Feres doctrine.

Mr. FRANK. Subject to the limitations of exceptions applicable.

Mr. VANCE. Yes.

Mr. FRANK. So the Feres doctrine would specifically apply, it would apply to pending cases, as I understand it.

Mr. VANCE. As—

Mr. FRANK. Now the effect then of the amendment you're presenting would be for us to go into pending cases and say to plaintiffs who may have a case, "you no longer have a case, you're out of court; is that correct?"

Mr. VANCE. If the Feres doctrine—

Mr. FRANK. Not if, Mr. Vance. Is that correct?

Mr. VANCE. The Feres doctrine applying, we would have that.

Mr. FRANK. All right. Let's not be hypothetical; I'm talking about concrete cases—plaintiffs Kirbo, Baker, Roper, Noley, and Vin—now, the Federal Government has, I noticed in the *Kapula* case,

moved to dismiss on several grounds, among them the Feres doctrine. So the Federal Government has in some of these cases where ex-service people or their survivors were involved invoked the Feres doctrine, correct?

Mr. VANCE. That has been done; yes.

Mr. FRANK. And I assume it was the intention of the Government to do that in the future? Invoke the Feres doctrine?

Mr. VANCE. I believe we would; yes.

Mr. FRANK. But we have cases now, looking at several of the cases here, at least it does and it would appear in the pending summary where the plaintiffs are either servicemen or survivors suing from on a serviceman's claim, both of those subject to the Feres doctrine; correct?

Mr. VANCE. Yes.

Mr. FRANK. And in several of the pending cases if we pass this bill the way you've presented it to us, the Government could then walk in and say, "Time out, new defendant; we're now the defendant. Those people are not the defendant, and there is something called the Feres doctrine and you're out of court." Is that correct?

Mr. VANCE. Yes; and I believe the United States would be the proper defendants.

Mr. FRANK. And you think it's proper to go with regard to pending cases which were brought under a different set of statutes, and in the midst of that case, while it's pending, prior to final judgment, pending, maybe the jury's out, maybe the judge is just charging them and we could pass a law, sign it and you go back in and say, "Jury is dismissed with thanks to the court; there's suddenly no more suable defendant."

Does that seem—

Mr. VANCE. The reason that the United States is the proper defendant—

Mr. FRANK. No; please drop the if, Mr. Vance. We're talking now about a situation after this bill has passed. Is there any question in some of these cases that the United States would be a proper defendant?

The purpose of this bill was to make United States a defendant, correct?

Mr. VANCE. Yes; as I believe it should be.

Mr. FRANK. So that you then think that it's OK with regard to a pending case having already been tried, jury's out, we go in and say, "Due defendant and this case is moot." And I take it back, there's no case, you—

Mr. VANCE. I believe that is appropriate for the United States as a proper defendant, and it is the proper defendant.

Mr. FRANK. All right I will stipulate that the United States will be the proper defendant if we say it is by statute. You would agree that if we don't say it is by statute, then there are other defendants as well, correct?

Mr. VANCE. That's correct.

Mr. FRANK. OK. So that what you're saying is that by statute we should change the nature of the case, after the case has been brought, trial's proceeding, and I am distressed by the implications of that.

It seems to me to have ex-post facto implications which are unfortunate to have let the trial go, and at the very last minute or some slightly less than last minute, the U.S. Government goes in, and a large number of these plaintiffs would then be thrown out with no recourse whatsoever, correct?

Mr. VANCE. They certainly could question the constitutionality of that if they will—if they are constitutional questions then.

Mr. FRANK. Well, do you think it's constitutional or not?

Mr. VANCE. I believe it would be found constitutional.

Mr. FRANK. So they could question it, but you think they would lose. So it's your position—

Mr. VANCE. My opinion.

Mr. FRANK. Yes; if your position were upheld, if your position were upheld by the courts, we have plaintiffs who now have at least a coverable claim that's being tried in court who would lose that claim and have no other remedy if we passed this statute; is that correct?

That is, former servicemen and their survivors now have a coverable claim and are in court on it, would, if we passed this statute, according to the Justice Department's interpretation, be thrown out of court and have absolutely no remedy whatsoever.

Mr. VANCE. Cases could be dismissed on the basis of the Feres doctrine.

Mr. FRANK. And if they were, would there be any other remedy available to the servicemen, the ex-servicemen or their survivors?

Mr. VANCE. Those remedies that might be available administratively through the military or the Veterans' Administration, or private bills. Other than that I don't know—

Mr. FRANK. Private bills, I think, is not a terrific prospect. There would be no judicial remedy, would be what they could get at the VA—is there a special VA program for people who were exposed to atomic—

Mr. VANCE. I can't answer that.

Mr. FRANK. Let me go back again. So we do agree that the effect of passing the statute, we're going to take some people who are now in court and have them thrown out of court and they would have no judicial remedy?

Mr. VANCE. That can happen.

Mr. FRANK. Yes; well, I think that's the intent that it would happen. It better be, because otherwise somebody didn't know what he was doing, because there are cases pending where the only plaintiff is a serviceman or a survivor of that serviceman where there are defendants who would be dismissed and the Federal Government would be the only defendant and you would invoke the Feres doctrine.

I am wondering if your opinion, staff suggested to me, I guess it's *Mullane v. Central Hanover Bank*, which I must say I haven't thought about since civil procedure, which held that a course of action was a species of property.

Would that be a problem here if I have a cause of action? Would you agree that in the current state of the law, if we don't pass this statute, ex-servicemen and their survivors do now have a cause of action in some cases?

Mr. VANCE. They do have, as you call it, a colorable cause of action.

Mr. FRANK. And you don't see any problem in taking away from them by statute that cause of action well after the fact involved in the controversy?

Mr. VANCE. It constitutionally would stand, in my opinion.

Mr. FRANK. But it is a cause of action that we're taking away without compensation. There's no need to compensate for taking away this property in this case?

Mr. VANCE. There would be a substitution of parties, and if an action could not be brought against that second party, that action well might be dismissed; that's correct.

Mr. FRANK. Mr. Chairman, I have no further questions—I do have one further question. Suppose we decided—there seem to be two purposes that are at work here: One is to hold harmless the private contractor. An entirely separate one is to take away rights of jury trial, and indeed the whole cause of action. I guess not having a jury trial is the lesser part of the problem if you don't in fact have a court to go to.

What if we separated those? What if the subcommittee recommended that that part which would protect and indemnify and remove from the case the private contractor, but would when the Federal Government not allow the Federal Government to avail itself of the Feres doctrine to provide a jury trial?

In other words, if we separated out those two wishes, what would the position of Justice—

Mr. VANCE. I would have to come back to you with the formal position of the Justice Department. However, presently, we would support suits against the United States being brought, as suits now are brought against the United States.

Mr. FRANK. I understand that because you've said that and I haven't dismissed that.

Mr. VANCE. I can't give you a formal response to that.

Mr. FRANK. So you can't tell us what the position of the Justice Department would be if we decided to allow suits only against the U.S. Government but remove those limitations and exceptions which would prevent the suit from going forward.

Mr. VANCE. I cannot tell you at this time that we will support such an amendment.

Mr. FRANK. So you would allow suits that you know you're going to win, but you're not sure about suits that might have to be contested.

I yield back to the chairman.

Mr. HALL. Thank you. The gentleman from Florida, Mr. McCollum.

Mr. McCOLLUM. Thank you, Mr. Chairman. It occurs to me in reading the material that's been put before me that the indemnification which is presently the system that is being used in these contractual matters is a pretty absolute indemnification—all kinds of indemnifications, partial, and some in which there is insurance and so forth. But it appears that at least in the sample contract I've seen that the staff has provided, that in most of these cases that we're dealing with under this amendment 213 under the

present system the United States has made itself totally liable with almost no ifs, ands, or buts; is that correct?

Mr. VANCE. That is my understanding.

Mr. McCOLLUM. Therefore, am I correct in concluding that whatever was done with regard to the proposed amendment here of whether we modified in some small way or not, we're probably not, from a taxpayer-cost standpoint increasing the cost at all, and we may be saving the taxpayers some money if we adopt the procedures that you suggested; is that correct?

Mr. VANCE. Correct.

Mr. McCOLLUM. Why do we have this absolute indemnity, do you know, in the contracts now?

Mr. VANCE. That absolute indemnity arose with the birth of those contracts many, many years ago, and I can't really give you the history of it. There are provisions for allowing indemnity in—hazardous-related context, related to defense projects.

This I believe arose even before those present—

Mr. McCOLLUM. But there is no requirement of insurance to be carried by the person who's doing the contracting with the Government in these type cases and no basic requirement that there be a deductible or anything of that nature.

We're absolutely from dollar one liable, as I understand it.

Mr. VANCE. That's correct.

Mr. McCOLLUM. You were prompted to make the offer of the substitute amendment after the fact; in other words, after the bill that was in the other committee was amended to include this type of language; is that correct?

Mr. VANCE. That's correct.

Mr. McCOLLUM. But it's not something that's really new to you, I gather. This had been thought of or thought about before at the Department of Justice sometime?

Mr. VANCE. In my working on this issue, and I have been acquainted with this issue for some time, I have never discussed to my knowledge the idea of legislation to substitute the United States as a party per se. Others may have.

Mr. McCOLLUM. You state in your testimony originally that it was not your intent to have this open the door to a lot of other things. I assume that includes the toxic waste questions, the agent orange questions the chairman asked about, the issues that might arise under all kinds of other contractual arrangements where the United States is dealing with highly hazardous and toxic substances by contractual arrangements.

Is that the policy of the Department of Justice, or is that just your personal interpretation of what you're proposing today?

Mr. VANCE. Mine and policy.

Mr. McCOLLUM. Both?

Mr. VANCE. Yes.

Mr. McCOLLUM. I have no further questions; I yield back.

Mr. HALL. Mr. Mazzoli.

Mr. MAZZOLI. No questions.

Mr. BERMAN. I yield—

Mr. HALL. Mr. Boucher.

Mr. BOUCHER. I'm trying to understand—I don't understand. You gave no reasons for why it would be—it's justified to pull the con-

tractors out as defendants and substitute the United States and then not eliminate the doctrine which prohibits certain individuals from suing the United States.

You said you thought it was fine, it didn't bother you, but you didn't say why. What's the reasoning that says this is a justified thing to do through legislative process?

Mr. VANCE. Because I believe the United States, because the matter at issue is what it is, in fact is the appropriate defendant in these cases.

Mr. BOUCHER. Fine, and then why is it appropriate for them, for some people to be prevented from suing the United States in those situations?

Mr. VANCE. I believe that suits should be brought against the United States under the present provisions of bringing suits against the United States where sovereign immunity has not been foregone. I do not believe it should not be foregone here.

Mr. BOUCHER. Even though the people who brought the suits originally were bringing it against defendants that they were authorized to bring them against?

Mr. VANCE. I suppose the United States would be the proper party.

Mr. BOUCHER. Is the nature of these contracts, they involve some kind of indemnification provision, or whatever judgments now go against the private contractors are paid for by the United States?

Mr. VANCE. That's correct.

Mr. BOUCHER. And how is that described? What contractors are covered, if it's the caterer for the people working on the test site, and tell me the scope of the contracts covered with that kind of a provision.

Mr. VANCE. What kind of contracts——

Mr. BOUCHER. That's not a normal provision in contracts between agencies of the U.S. Government and private contractors, is it?

Mr. VANCE. These are unique, I would suppose, in that they are truly very broad in their coverage of liabilities for these contractors.

But I'm not speaking——

Mr. BOUCHER. For which contractors, say.

Mr. VANCE. Contractors who operate the facilities for the development and testing of atomic weapons.

Mr. BOUCHER. And they're indemnified even if they acted negligently?

Mr. VANCE. They are indemnified for all acts or omissions; that's correct.

Mr. BOUCHER. And even if their actions had nothing to do with whatever dangers might accrue from these nuclear tests?

Mr. VANCE. I'm sorry?

Mr. BOUCHER. Even if their actions were so far removed, had nothing to do with the consequences of the testing. If the caterer included a rusty nail in the food they were preparing who were working in the test site, they'd be indemnified?

Mr. VANCE. I would have to read that indemnity provision and then answer that question. To my knowledge, that wouldn't be included, but it may be in the operation of that facility.

Mr. HALL. The gentleman from Florida, Mr. Shaw.

Mr. SHAW. Mr. Chairman, I don't have a question, but I do have an observation—no, excuse me, I do have a question. Is there a precedent for this in any other area where the immunity of the United States would be passed on to private contractors?

Mr. VANCE. Where the United States would itself assume liability or put itself in the place of others?

Mr. SHAW. Therefore really lending the immunity applicable to the United States to the private sector.

Mr. VANCE. There is stand-alone—when I say stand alone, that is, not an amendment to the Federal Court Claims Act, but for its own purposes. My understanding is there is stand-alone legislation for the purposes of swine flu litigation, Civil Air Patrol, and I believe there's also legislation regarding the National Guard.

I can't give you all the details on that, but I believe those three are exempt.

Mr. SHAW. The observation I'd just like to make is the far-reaching effect of this, and I think it's not only a question of viewing the savings to the Federal Government, but I think also the basic fairness to the claimants in this situation.

I think Mr. Frank was right on point where it may be a gray area as to the constitutionality, but putting that aside, even assuming that it is perfectly constitutional—which it may very well be, and I'm not arguing that point—it just seems like just basic fairness once somebody is operating under one set of laws, that we take one area where the Federal Government is involved and pull the rug out from under them and say, "Nowhere else in litigation, no other litigant would enjoy this particular privilege, but you're out of court."

Just basically I just cannot support such a set of laws such as that, and I do believe that we have to be very cautious as not only to consider the side of this that involves the savings to the Federal Government, but also consider what we are doing to the rights of those who would seek some relief from the court.

Now I yield back, Mr. Chairman.

[Pause.]

Mr. SHAW. Mr. Chairman, if I might for one second, counsel here has indicated a different view with regard to the precedent question that I asked. If I might ask the witness if he would look into that matter and if he feels that his answer should be in any way changed, he should contact back.

Mr. HALL. It would be perfectly all right.

Mr. VANCE. Let me be sure that I understand the question. The question was whether there is legislative precedent for the United States assuming or becoming the defendant in a situation that might have involved those who without that legislative change persons or institutions that could have been directly pursuing their own—

Mr. SHAW. Directly as lending its immunity to the private sector. And I believe that's what this does.

Mr. VANCE. Well, it may operate to have those exemptions and exclusions available to the United States through litigation, but I would describe it generally for as putting the United States in place of the defendants.

I believe there is other precedent to that.

Mr. SHAW. So——

Mr. VANCE. And if that other precedent would include the immunities and exclusions, then that may answer your question. And I will——

Mr. SHAW. Thank you, Mr. Chairman, I yield.

Mr. HALL. We have a vote on—we have 10 minutes on a vote on final passage of a bill and we have, we think, five suspension votes which will take 5 minutes each.

I am going to recess this committee until about 4:15. It may take that long.

[Recess.]

[The written statement for the record by Deputy Assistant Attorney General B. Wayne Vance on behalf of the Department of Justice is as follows:]

[The following statement of behalf of the Department of Energy was filed with the committee and made part of the record:]



STATEMENT

OF

B. WAYNE VANCE
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 2797
TO AUTHORIZE APPROPRIATIONS FOR THE
DEPARTMENT OF ENERGY FOR NATIONAL SECURITY
PROGRAMS FOR FISCAL YEAR 1984, AND FOR OTHER PURPOSES

ON

JUNE 7, 1983

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I am pleased to appear before you today in response to your invitation to discuss Section 213 of H.R. 2797. Section 213 would clarify the status of certain contractors operating government-owned facilities relating to atomic energy national defense activities in litigation arising from those activities. Many actions recently have been brought against these contractors who have invaluablely assisted the Government of the United States in carrying out its nuclear weapons testing program. The actions allege exposure to radiation and consequent injury or death as a result of the United States atomic weapons testing.

The provisions of the Federal Tort Claims Act determine the rights of individuals and corporate litigants to seek monetary recovery from the United States for alleged torts. Typically, the United States cannot be sued for and is not liable for the acts of independent contractors providing goods or services to the United States. However, contractors who operate nuclear weapons testing facilities for the Department of Energy or its predecessor agencies and who, as a result, have participated in the atomic weapons testing program are unique. They are not typical contract suppliers of commercially provided goods or services to the government. These contractors were and are

utilized by the United States as instruments of national policy to assist in an entirely governmental task--nuclear weapons research, development and testing. Further, the government reimburses these contractors for any liability arising out of their assistance in the weapons program, including the costs of litigation. The use of the contractors to implement national policy and perform a uniquely governmental function cannot be disputed. Therefore, it should be perfectly clear that, for the purposes of civil litigation arising from atomic weapons testing, the proper party defendant is the government. Only the government sets policy, makes decisions, and controls activities and circumstances regarding atomic weapons testing. Section 213 guarantees this distinction. Because the United States, through the Department of Energy's predecessor agencies, was exclusively responsible for, and in control of, the atomic weapons testing program, the Administration does not oppose amendment of H.R. 2797, with the modification described below, to recognize and give effect to the unique role of these contractors.

As drafted, Section 213 of H.R. 2797 seeks, but does not achieve, the result suggested above. The Administration, therefore, believes that Section 213 should be revised to avoid any ambiguities in operation of the provision and effect. To this end, I am submitting with my Statement a proposed substitute

for Section 213 as it presently stands. This substitute would cause all litigation, including suits now filed against contractors to be maintained against the United States pursuant to the provisions of the Federal Tort Claims Act. The substantive provisions of the Tort Claims Act would not be affected. Thus, suits would proceed to the extent that the Tort Claims Act permits, subject to the substantive and procedural provisions of that general statute. Thereafter, the exceptions and limitations in the Act, including the doctrine enunciated in Feres v. United States, 340 U.S. 135 (1960), would apply in each suit covered by Section 213 in which a final judgment had not been entered as of the date of enactment. Accordingly, under our proposed revision, the Federal Tort Claims Act would exclusively determine the liability of the United States for acts or omissions, including any allegations against these contractors, in the conduct of the atomic weapons testing program. Because the United States conducted the tests and because the existing contracts require the United States to reimburse the contractors for any judgments entered against them, the proposed Section 213 would sensibly clarify the status of the contractors in relation to litigation or potential litigation; the Federal Tort Claims Act provides a time-tested framework for effecting this result.

It is important to understand what the proposed Section 213, as revised, would not do. It does not expand the scope of the government's indemnification authority with respect to its contractors. In addition, this amendment is based on the unique status of these contractors and the atomic weapons testing program and does not provide any justification for considering other types of contractors as instrumentalities of the government. In sum, if legislation to clarify the status of these unique contractors is deemed desirable by Congress, the Administration believes this revised version of Section 213 should be adopted.

SUBJECT: Amendment to Proposed Section 213 of H.R. 2797

Proposed section 213 should be amended to read as follows:

(a) The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 of the United States Code for injury or loss of property or personal injury or death shall apply to any civil action for injury or loss of property or personal injury or death due to exposure to radiation based on acts or omissions by a contractor in carrying out a contract in the conduct of the United States atomic weapons testing program. This remedy shall be exclusive of any other civil action or proceeding for the purpose of determining civil liability arising from any act or omission of the contractor without regard to when the act or omission occurred. The employees of such a contractor shall be considered to be employees of the Government, as specified in 28 U.S.C. §2671, for the purpose of any such civil action or proceeding and the civil action or proceeding shall proceed in the same manner as any action against the United States filed pursuant to 28 U.S.C §1346(b), and shall be subject to the limitations and exceptions applicable to those actions.

(b) A contractor against whom a civil action or proceeding described in subsection (a) is brought shall promptly deliver all process served upon that contractor to the Attorney General. Upon certification by the Attorney General that the suit against the contractor is within the provisions of subsection (a) of this section, a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings shall be deemed a tort action brought against the United States under the provisions of Section 1346(b), 2401(b), 2402, 2671-2680, of Title 28 of the United States Code, and all references thereto. For purposes of removal, the certification by the Attorney General under this subsection establishes contractor status conclusively.

(c) The provisions of this section shall apply to any action now pending or hereafter commenced which is an action within the provisions of subsection (a) of this section. Notwithstanding section 2401(b) of Title 28, United States Code, if a civil action or proceeding pending on the date of enactment of this section is dismissed because the plaintiff in such action or proceeding did not file an administrative claim as required by section 2672 of that Title, the plaintiff in that action or proceeding shall have 30 days from the date of the dismissal or two years from the date upon which the claim accrued, whichever is later, to file an administrative claim and any claim or subsequent civil action or proceeding shall thereafter be subject to the provisions of section 2401(b) of Title 28.

(d) For purposes of this section, "contractor" includes a contractor or cost reimbursement subcontractor of any tier participating in the conduct of the United States atomic weapons testing program for the Department of Energy (or its predecessor agencies, including the Manhattan Engineer District, the Atomic Energy Commission, and the Energy Research and Development Administration). "Contractor" also includes facilities which conduct or have conducted research concerning health effects of ionizing radiation in connection with the testing under contract with the Department of Energy (or its predecessor agencies.)

STATEMENT FOR THE RECORD

OF

**THEODORE J. GARRISH
GENERAL COUNSEL
DEPARTMENT OF ENERGY**

RELATING TO THE JUNE 7, 1983, HEARING

before the

**SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS**

HOUSE JUDICIARY COMMITTEE

The Department of Energy is pleased to have an opportunity to comment on section 213 of H.R. 2797. Section 213 addresses a unique problem being experienced by this Department's several contractors who have been intimately engaged in the government's research, development and testing of atomic weapons. Several of these contractors have become involved in extensive litigation in which Plaintiffs are alleging specifically that radioactive fallout from the United States' testing of nuclear devices in the Pacific and in the continental United States caused cancers and other injuries.

Although the merits of the allegations in these suits have been the subject of much study and controversy in the public and among members of the scientific community, the problems addressed in this litigation are uniquely governmental. These national defense activities could only have been conducted by the federal government, and it, therefore, is the proper entity to answer such challenges. Moreover, the time and the expense required by the contractors to defend these government programs have disrupted their important research mission.

Some of these contractors accepted their responsibilities at a time of national crisis when the first atomic weapons were being developed to meet the dangers of World War II. They and others have continued to provide special and close assistance to this Department and its predecessors in performing this extraordinary task. The United States called on these private corporations and universities in order to enlist the experience

and skills which were and continue to be essential to our national security objectives in building these weapons.

The Department of Energy would welcome a remedy to this circumstance that would alleviate the burden on these government contractors to defend the atomic weapons testing programs and decisions, and it shares the contractors' concerns in this regard.

The Department does not oppose the goal of section 213 to clarify the role of such contractors when acting under federal authority and direction in the performance of work supporting atomic weapons development and testing. The Department believes, however, that the language of the Section should be amended to avoid uncertainty and ensure that it can effectively and efficiently accomplish its objective. In his testimony, B. Wayne Vance, Deputy Assistant Attorney General, Civil Division, Department of Justice, proposes a substitute with such alternative language. We fully endorse that testimony and support the adoption of that section as revised. The substituted language would provide a simpler and more direct solution that would both be consonant with the federal nature of the atomic weapons program and substitute the real party in interest, the United States, in defending its decisions and its programs in this unique area of national defense.

It is important to understand what the proposed section 213, as revised, would not do. It does not expand the scope of the government's indemnification authority with respect to its contractors. In addition, this amendment is based on the unique status of these contractors and the atomic weapons testing program and does not provide any justification for considering other types of contractors as instrumentalities of the government.

TESTIMONY OF GEORGE DACEY, PRESIDENT, SANDIA NATIONAL LABORATORIES; WILLIAM DEGARMO, LABORATORY COUNSEL, LAWRENCE LIVERMORE NATIONAL LABORATORY; AND W. R. HUGHES, ASSISTANT DIRECTOR/LABORATORY COUNSEL, LOS ALAMOS NATIONAL LABORATORY

Mr. HALL. You may proceed as you see fit.

Dr. DACEY. Thank you, Mr. Chairman. I will begin.

Mr. HALL. If you would identify yourselves for the record, so we will know who it is.

Dr. DACEY. I am Dr. George C. Dacey, president of Sandia National Laboratories.

Mr. DEGARMO. I am William Degarmo, laboratory counsel, Lawrence Livermore National Laboratory.

Mr. HUGHES. I am W. R. Hughes, laboratory counsel at Los Alamos.

Dr. DACEY. My compatriots from Los Alamos and Livermore couldn't be with us today. They have sent able counsel to represent them.

My testimony here will be somewhat different, I believe, than what you've been hearing so far. I'm going to speak from the standpoint of management, and particularly I hope to divert the line of questioning from the legal issues, which I certainly am not able to speak to, to the national interest issues, which I think are paramount here.

This whole matter is a very important matter of national interest. If, in fact, the wrong decisions are made in some of these radiation cases, it may be impossible for us to continue the national nuclear weapons testing program, and let me speak a little bit to that.

In the first place, some concerns were expressed earlier that the laboratories' contract management appeared to have a rather unique position in this sort of proposed legislation. And in fact, that position is, indeed, unique. Let me mention a couple of features which make it so. One, the national laboratories are owned by the U.S. Government. They are not private contractor owned. Two, the management of the national laboratories, the so-called GOCO laboratories is, in many instances, on a nonprofit, no-fee basis.

For example, Sandia National Laboratories is operated for the Government by the Bell System at no profit and no fee. After Bell refused to manage Sandia in 1949 because of the ultrahazards which stem from nuclear testing, President Truman wrote to the then chairman of the board of AT&T, saying it was to be considered a matter of national importance that they take on this task. And of course, under those circumstances, the Bell System agreed to do so at no profit and no fee. I think that is a unique feature.

But perhaps the most unique feature of all is that the Atomic Energy Act itself, in section 91, holds to the Government, exclusively, the right to own, possess, manufacture, test, or otherwise deal in nuclear weapons. Therefore, it has always been our assumption, we, the Bell System in the case of Sandia, the University of California in the case of the other weapon laboratories that we were in fact operating on behalf of the Government. That has never been

an issue either between us, the AEC, the ERDA or any of the successor agencies, for example, the present DOE.

Now it is important, I think, that one recognizes that we must act on behalf of the Government if we are to continue our role, and for a number of reasons. In the first place, we as contractors have maintained to our stockholders, as recently as the April stockholders meeting of the AT&T at which a dissident stockholder proposal to drop the Sandia contract was introduced, that this would not be the right thing to do, because we were performing a public service on behalf of the Government. Therefore, I think it is important both from the standpoint of fairness and of longstanding understanding and faith between ourselves and the Atomic Energy Commission that we be so recognized.

But more importantly than that, it is unlikely that we could prevail in some of these cases if we were not perceived as acting on behalf of the Government. What is the reason for that? The reason is that is why these cases were filed as they were in the State courts rather than in Federal court. The plaintiffs in these cases know very well that they can't prevail if they're suing the Government, who is the real party in interest. And so they are seeking to evade that situation by suing under State law and with a variety of different kinds of arguments as to the kinds of damages for which they should be redressed.

For example, in some instances, they're suing under the theory of dangerous product liability. In California law, as I understand it—my colleagues can explain this more fully than I—if you are dealing with an ultrahazardous product and someone is injured, then under those laws you need prove nothing more, simply that the product was ultrahazardous and someone was injured.

We don't deny that nuclear weapons are ultrahazardous. They are, indeed, ultrahazardous, and that is the reason—I think, one of the reasons—why we feel that we must be acting on behalf of the Government here. It was mentioned earlier, and I believe it is true, that these cases could be much more effectively defended on behalf of the United States, if, rather than each of us asserting in various courts here and there throughout the land, against various plaintiffs and in various circumstances that we were acting on behalf of the Government, for the Government to assume its role as a real party of interest and consolidate these cases. That would be a more effective way of prosecuting these cases.

But the last point I'd like to make, and I think in many ways it is the most important of all, is that without a clear legal recognition of the role that weapon laboratories have always played in the nuclear weapons testing program, it might become well nigh impossible to carry on the nuclear weapon testing program at all, and the reason for that is the following: Suppose that in a case—in California—it were held that Sandia Corp., Western Electric, the Bell System, AT&T, was not acting on behalf of the Government, it did have a dangerous liability situation, and damages were awarded. It wouldn't cost the Bell System anything. We have an absolute indemnification. We have that absolute indemnification for the very reasons that we are now discussing—because of the peculiar and unique nature of nuclear weapons.

So it wouldn't cost us money, but what it would do would be to open the door to endless suits by antinuclear people, who would say the Atomic Energy Act requires that only the Government test nuclear weapons. They would say, "This case in California just said you're not the Government. Therefore, you can't test nuclear weapons, and we'll get an injunction."

It's very hard for me to see how we could possibly conduct a nuclear weapons test, or series tests, as private contractors. You can only do it as an instrumentality of the Government, required by law, and any other way, it seems to me. It would become an impractical situation. It seems clear to me—I'm not a lawyer, I want to speak to this from the management standpoint—that it's a violation of commonsense to suppose that the University of California, for example, is guilty of cultural genocide against 2,000 Marshall Islanders. It wasn't the University of California that tested nuclear weapons in the Pacific; it was the U.S. Government. I think that it is crucial that in some way we recognize that responsibility, in order to permit us to carry out our job on behalf of the national security as we have done over these many years.

I don't have any personal brief for the way in which we do that, whether we do it through the Tort Claims Act, whether we do it in some other way, whether it becomes a part of an authorization bill or a separate bill. I think those issues are far less serious than that we recognize that a matter of national security is at issue here and not simply a matter of fairness to plaintiffs or of product liability. And it certainly is not a matter of financial rescue of the contractors, because we have, with the wisdom of many of my predecessors, as evidenced, I think, by the present situation, these absolute indemnifications. That was the reason they were there.

So in short, I think, we are certainly in support, if not of the actual legislation, of the intent of these sections, 213, because, I think, some sort of recognition that the Government is, in fact, the real party in interest in nuclear testing, is essential to the nuclear testing program itself.

Mr. HALL. Just proceed.

Mr. DEGARMO. We'd like to thank you for the opportunity of addressing this subcommittee on a matter which is of urgent concern to Lawrence Livermore National Laboratory.

H.R. 2797 is a program authorization act. The programs authorized have been submitted by the Department of Energy, and hearings were held by the Armed Services Committee. Even as this act proceeds through the Congress, these programs are threatened by litigation now and potentially in force.

Between 1946 and 1962, the United States conducted atmospheric nuclear testing. The University of California, through Los Alamos National Laboratories and Lawrence Livermore National Laboratories, participated as a contractor in each of these series. Large numbers of servicemen were utilized by the Department of Defense in support of and as witnesses to those tests. All military exercises were conducted in the Nevada desert in conjunction with the testing program. Three years ago there were no legal actions against the University of California and its laboratories regarding atmospheric testing. Now we have more than 40 cases representing approximately 3,500 plaintiffs.

Now Mr. McCollum, I believe, raised a question regarding insurance. We are nonprofit contractors. We have no money which is not Treasury money. The cost of any insurance would be paid by the United States. We have no facilities which do not belong to the United States. Every dollar that we spent, every facility that we use, belongs to the United States. We do not make a profit and have never made a profit.

These cases which are presently on file show a statistical predominance toward the older test series. We must anticipate that the cases grow as the participants age in the upcoming years. It is an unfortunate statistical fact that nearly 20 percent of all adult Americans will die of cancer in one form or another. And that number is based upon there being absolutely no correlation between anything that any individual does and the incidence of cancer.

The number of troops that we're talking about in Nevada alone gives rise to tens of thousands of potential claims.

We see several reasons for the laboratory to support a legislative solution to these cases. First, that the relationship between the United States and its contractors in the area of nuclear weapons' testing is unique, and I believe Dr. Dacey has spoken very well to that point.

Second, the United States is the real party in interest in these cases.

And third, the cases are nationwide and a just outcome requires some form of a uniform national solution.

Now the relationship between the United States and the University of California is somewhat older than that with Sandia. It began in 1943 under the original War Powers Act. The question arose as how this indemnification came to be. It came under the original War Powers Act in 1941. The contract was part of the famous Manhattan Project which resulted in the testing of the first nuclear weapon at Almagordo, N. Mex., in 1945. Now with the end of World War II, nuclear weaponry was provided for by Congress in the Atomic Energy Act of 1946. Under that act, the Atomic Energy Commission, acting on behalf of the United States, contracted with the University of California for continued testing.

From that time, through 1980, the United States has conducted 693 announced nuclear tests, of which 212 were conducted in the atmosphere. The contract between the United States and the University of California, which contains this indemnification language, also speaks of the two as acting in a spirit of partnership. This contract has been modified again and again by the AEC, then by ERDA, and finally by the Department of Energy. Through all these contractual changes, the relationship has remained the same, and there are two aspects which are clear in their overriding importance.

The first is that no weapon may be tested without the prior approval of the President of the United States. This approval flows through the operating agency, which is now the DOE. Previously it was ERDA, and before that, the AEC. That approval flows to the resident test manager for tests in Nevada or to a task force commander for the tests in the Pacific.

These individuals and only these individuals could order the execution of a test. The resident test manager is now and has always been an employee of the United States. The task force commander in the Pacific was always a flag-rank officer of the U.S. military. The operations order under which each test took place were given through the resident test manager or the task force commander. These orders provided for test safety in monitoring. That responsibility was always ultimately with an employee of the United States.

In addition, the soldiers employed in the Nevada tests and the vessels employed in the Pacific were always under the sole direction of the Department of Defense. No laboratory personnel ever positioned or directed any military personnel for these tests.

The unique relationship between the laboratories and the United States remains the same to this day.

The second fundamental element of these contracts is that the University of California has always been fully indemnified against any judgments entered against it in performance of contract. The United States is the real party in interest in these cases. Since the university is fully indemnified, the cost of defending all of this litigation is borne by the funds which are provided by the Department of Energy for program work.

Both the Congress and the courts have limited recourse to the U.S. Government in the area of nuclear testing. In order to avoid these limitations, plaintiffs have brought actions against contractors for activities which were under the control of the United States. It is not that we are depriving anyone of anything. It is that we are standing in as surrogates for the United States. If these actions are successful, the indemnification clause in the contract will, in effect, permit the United States to be sued in every State jurisdiction and every Federal jurisdiction and be bound by the varied results of those judgments.

Mr. HALL. Repeat that last statement again, if you would.

Mr. DEGARMO. Under the indemnification clause, since the United States will pay any judgments, and since we can be sued virtually anywhere, in effect, the United States is permitting itself to be sued in every State jurisdiction and every Federal jurisdiction before juries, and under our indemnification clause, will be bound to pay the resulting judgments.

In addition, this bill is an authorization bill to provide funds for programs which the Armed Services Committee has seen fit to report out. Each dollar spent in defending this litigation must be taken from these program dollars. As the caseload grows, more and more program money must be diverted to provide the defense. Thus, the United States must currently pay for defending these cases through dollars allocated for other purposes and must pay for any judgments from as yet unallocated funds.

To have each of a large number of potential claims tried separately invites varied and inherently unfair results. Two individuals who took part in the same event at the same time may bring actions in different jurisdictions before different courts with different juries. Different results in this case are not only probable, but almost certain. This Congress is already considering legislation to provide uniform access to relief by claimants in this area. The

present system forces a piecemeal defense of a vital national program. Only a uniform approach can insure adequate representation of the Government's interest as well as a fair result to the individuals involved. It is because of this that the University of California and the Lawrence Livermore National Laboratory strongly support a legislative solution to the entire problem.

Mr. HUGHES. Thank you for asking us to come in and provide some comments from Los Alamos, as well, and I would like to say that the presentation by Mr. Degarmo has shortened my remarks somewhat, because of the description of the operations through the years. I would say that in April of this year, Los Alamos celebrated its 40th anniversary, and very many of the things that are still done through this arrangement that we have with the Government, and that is a word of art that is used in the Atomic Energy Act, arrangements, including contracts, has worked, I believe, successfully now for 40 years. It has provided for a mechanism by which things can be done, which I believe will be seen to have been reasonably successful over the years.

At Los Alamos, we believe that the growing volume of this litigation, based on our participation in the Government's nuclear weapons testing national security program, pose at least four very general problems, and I would list these not in any order of ascending or descending importance.

No. 1, we see an impact on current and future programs in terms of the diversion of resources, both human and financial.

We see, No. 2, an impact on national security policy, in terms of renewed debate in the courts and in the media and as it should be debated in Congress. But we see the other potential legal ramifications that Dr. Dacey described earlier as having an impact on these programs.

No. 3, we believe there may be a significant impact on the Federal Treasury if judgments are awarded, in view of the indemnity and allowable cost provisions in our contract.

No. 4, the litigation may also lead to a significant disparity in results, as Mr. Degarmo describes, in so many different forums that are going to be available, and so many different sets of trial counsel, I might add, representing individual contractors. We are, accordingly, encouraged at Los Alamos with the objectives of the proposal by the Justice Department, and we were encouraged by the original section 213, but we see this Justice Department proposal as a significant improvement. We believe the language recognizes the realities inherent in the actual testing of a nuclear device, and that is the fact that it is an exclusively Government show. It is managed and operated with an express authorization of the President for each and every shot, and contrary to the way we operate the research and development functions at the laboratories, which is based upon general and annual approvals by the Department of Energy and this Congress, the entire protocol for the activity at the test sites from 1946 at Operation Crossroads to today when we still do them, when we now do them underground, is ultimately and on the site a Government operation.

We believe that the Atomic Energy Act and our contract providing, as it does, for this type of activity, are recognized in the Jus-

tice Department's language, and in fact, would make it more on the order of a Federal tort claim, in fact.

The nature and extent of the Government's control over this process, as I indicated earlier, is vastly greater than it is over the normal activities inside the laboratories on a day-to-day basis.

The proposal, in our view, recognizes the explicitly governmental nature of this fact. It recognizes, I believe and coordinates the national defense policy inherent in the decisions to conduct such tests. And I think the proposal would unify and centralize coordination of the defense of this litigation, and the national policy ramifications that we see there, without two, or three, or five, or eight different contractors trying to get together and try to formulate what might be considered by Congress, and the Justice Department, or DOE to be the best defense strategy. And I believe that there would be a significant saving to the taxpayer. Although we're not talking in terms of the dollars that might impact the Federal Treasury from several judgments, I think there will be a substantial savings in connection with addressing the defense of this litigation, because we won't have to have so many outside law firms involved. We will have one law firm, and that would be the Justice Department.

The support, of course, will have to come from the laboratories, in terms of the people who are still available to testify, the documents which are all still there at Los Alamos, and Livermore, and Sandia. That support effort will still continue, regardless of who the law firm is, whether it's Justice or four private law firms. But there will still be, I believe, probably a halving of the amount of money that might be required to address the defense costs of this litigation. And that's basically, the complete amount of money.

Mr. HALL. I'll direct these questions to any of the three or all of you, for that matter.

Do you believe that the laboratories and, thus, the United States may be vulnerable to potential liability as the results of these suits that you're talking about?

Mr. DEGARMO. Yes; we are vulnerable to defending a growing number of cases.

Mr. HALL. Why do you think it necessary or desirable to extend sovereign immunity to the contractors, especially since your contract totally reimburses you for litigation expenses?

Dr. DACEY. Well, I'd like to speak to that. I believe that the issue is not a dollar issue. Speaking for the Bell System, we understand that we have complete dollar indemnification. What we don't have is indemnification of public perceptions of the role of the Bell System in nuclear testing. I can't imagine that the Bell System would be willing to associate itself with cancer deaths, if it were held that it was the Bell System that tested weapons in Nevada and killed 40,000 servicemen. Absurd though that might sound, if some court of law were to hold that, I can't imagine the Bell System being willing to continue in such a contract, nor as I indicated earlier, can I imagine that the antinuclear forces wouldn't seize upon that as a means of stopping nuclear testing altogether. It is not a dollar matter at all.

Mr. HALL. Well, why couldn't the Department of Justice represent you in these cases, pursuant to your contractual contract that you have now or your contractual agreement?

Dr. DACEY. In our contract, they can. Our indemnification clause specifically has language in there which permits the Department of Justice to assume the defense.

Mr. DEGARMO. As does ours. The difficulty here is, what defenses the Department of Justice brings with them. What we are talking about here is the reality of what went on. As Dr. Dacey pointed out, these laboratories have always considered themselves as acting hand in hand with the United States, not as contractors, in the sense of somebody who makes money. These laboratories have never made a dollar in dealing with the United States. Each time that the university must renew its contracts, it talks in terms of public service obligation. The University of California does not make money from these contracts. So this question of perception is extremely important.

Mr. HALL. How many of these pending lawsuits are by servicemen or by employees, any of you?

Mr. HUGHES. I believe, if I am not mistaken, the last count we had, not counting the Marshall Islanders lawsuit, which has approximately 2,600 plaintiffs, it's running about half and half, if I'm not mistaken. And there are about 45 lawsuits, of which probably 25 or 30 are servicemen and 20 or so are civilians. Potentially, it's immense, however, because it is our understanding that there were possibly 150,000 civilian people who participated in atmospheric tests and approximately 250,000 military people.

Mr. HALL. Have any of those cases reached the trial stages yet?

Mr. HUGHES. No, sir, we're not. We're going through the initial stages now—

Mr. HALL. Of discovery.

Mr. HUGHES [continuing]. Of the older cases that have been filed 2½ years ago.

Mr. HALL. In your view, would section 213 of this Justice proposal cover negligence other than negligence at the test site?

Dr. DACEY. The language of both, I think, is restricted to activities involved with nuclear test activities. Questions often arise as to whether or not we would claim Government immunity if an employee got hit on the head with a hammer that fell off of a paint ladder or something. And the answer is, certainly not. Those are acts of management. They are things that we would defend on their merit in the normal course of business.

Mr. HALL. Well, Doctor, as I read this amendment, this proposed amendment, that's not what it says. It said: "The employees of such a contract shall be considered to be employees of the Government."

Dr. DACEY. Except that if you look a sentence or two earlier, it says: "For purposes of atomic testing." The entire amendment, as I understand it, intends to limit this sort of sovereign immunity to atomic testing, weapon testing.

Mr. HALL. The sentence preceding what I just read says, "This remedy"—this is following "the carrying out of a contract in the conduct of the U.S. Atomic Weapons Testing Program"—"This remedy shall be exclusive of any other civil action or proceeding

for the purpose of determining civil liability arising from any act or omission of the contractor without regard to when the act or omission occurred." Now that says two things to me, one is that this matter would be subject to litigation regardless of when it occurred. If it occurred from the Manhattan project, this way you could still file a lawsuit.

Dr. DACEY. I think I misspoke. I'm sorry, sir. The first sentence is, in my view, the operative sentence. It says that the remedy provided by all of this is for injury or loss based on acts in the conduct of the U.S. atomic weapon testing program. Everything else is saying what they don't mean. They don't mean any other kind of civil liability. They don't mean this and they don't mean that. This whole thing is restricted activities in carrying out the U.S. atomic weapon testing program.

Mr. KINDNESS. Excuse me, Mr. Chairman, would you yield.

Mr. HALL. Yes.

Mr. KINDNESS. Isn't a further restriction in that first sentence? We're talking about "Civil actions for injury or loss of property or personal injury or death due to exposure or radiation," based on—

Mr. DEGARMO. Yes; Mr. Kindness, that is such an important point, because when we're talking exposure to radiation, that prevents the hammer falling off the ladder type of case. The question is about whether or not it is someplace other than the test site. The device is typically assembled at the test site.

Mr. HUGHES. There is a very formal and recognizable starting point for the procedure that is gone through in these tests. To me, it would seem that once that procedure starts, when the Department of Energy says—let's go start on this test. Here's the protocol. We'll get the President's signature when everything's in place. That's a very recognizable set of facts that have to take place. It would be easy to limit it to that starting point.

One of the things that has been inherent throughout all of this litigation is, we now have somewhere between 8 and 13 cases which involve servicemen from Operation Crossroads alone. That series were two shots in July 1946.

Mr. HALL. Now is Operations Crossroads a Manhattan project or a Los Alamos?

Mr. HUGHES. It was still a Manhattan project, and it was in July 1946, about the time of the passage of the 1946 act, which was effective in January 1947. So the latency period for these tumors is what drags this out so long. It may take 30 or 40 years for someone who is exposed to a very large dose, if it is a result of radiation exposure, to manifest itself. So a lot of these cases are going to be based on 30- and 40-year-old facts. That is because they only recently discovered the tumor in the last 2 or 3 years.

Mr. HALL. Doctor, you made a comment a moment ago. Plaintiffs know they can't prevail if they're suing the Government. I don't understand that statement.

Dr. DACEY. I was referring—in my layman's way, to the difference between product liability cases, where all you have to prove is that there is a dangerous product and somebody got hurt, and a matter of national policy, nuclear weapon testing. If, in fact, many of these plaintiffs felt that they could prevail against the United

States, I assume they would sue the United States. The fact that they're not doing so, but are suing under a variety of State laws in—I don't want to use inflammatory language, but in some cases, rather trumped-up kinds of cases, I think indicates that they feel that they can prevail under these other circumstances where they couldn't if they were trying to sue the United States.

Mr. HALL. But as I understand it, we have been operating under the procedures that we are operating under now for a period of many years.

Dr. DACEY. Since the beginning.

Mr. HALL. Yes; what is it that has happened all at once to cause such a rush to judgment on this amendment?

Mr. DEGARMO. Age. If you assume—

Mr. HALL. Age of what?

Mr. DEGARMO. Of the participants involved. If you assume that most of the servicemen were in their twenties, and remembering that 20 percent, roughly, of American adults will eventually die of cancer, they are entering the periods of their life when cancer becomes a significant factor, whether it's caused by radiation or whether it's caused by some other factor. You sue at the time that you sustain the injury. So what's happened is, as these men pass through the middle years of their lives, and their risk of cancer becomes greater and greater. Obviously, there are more people contracting cancer at 50 than at 30. Therefore, this number is progressively increasing with age. Suddenly, we find ourselves confronted with a type of litigation that we weren't confronted with before—

Mr. HALL. Is that the only justification that you can submit for this amendment? Age?

Mr. DEGARMO. You mean for the amendment now?

Mr. HALL. This 213, the one we're considering here today. I asked what has happened that has caused this rush to judgment at this time, and you say age.

Mr. DEGARMO. I misunderstood your question, Mr. Chairman. I thought that the question was directed at why do we suddenly have a large influx of cases.

Mr. HALL. No; I said why do we have such a rush to judgment to pass this amendment, when in the past the Department of Justice has—I mean, your indemnification takes care of any liability that you might sustain; is that not correct?

Mr. DEGARMO. We haven't had these cases before, Mr. Chairman. This is a new breed of case for us.

Mr. HALL. But I thought you said they're all in the discovery stage now, some going back to the Manhattan project or the Marshall Islands—it happened, what, 40 years ago?

Mr. DEGARMO. Yes.

Mr. HALL. More or less?

Mr. DEGARMO. The thing is, the plaintiffs in these recently filed cases are alleging they were exposed 35 years ago, but they're just now bringing the cases.

Mr. HUGHES. We've had all these cases filed in the last 2½ years.

Dr. DACEY. What I think is new is that there have been a rash of radiation cases filed, for a variety of reasons. Some people, I think, may think they have genuine injuries. Other people, through their lawyers feel that there is some way of getting some money. It is

kind of a popular thing nowadays among the antinuclear people to file cases just to disrupt the nuclear testing program.

There are a whole variety of reasons why we now have radiation cases and we haven't had them for all these many, many years.

Mr. HALL. Well, this amendment is not going to keep antinuclear persons from filing a lawsuit, if it's passed, as I see it.

Dr. DACEY. Mr. Hall, that it is not, in my view, a matter of whether or not cases are filed. It is not a matter of whether or not your contractors are indemnified, because they are. It's a matter of recognizing that nuclear testing is an activity of the U.S. Government, and that only the U.S. Government can carry out these tests. And if you want to stop the tests, you can't do it in the civil courts without involving the U.S. Government.

Mr. HALL. I yield to Mr. Boucher for any questions he might have.

Mr. BOUCHER. I'll pass for the moment, Mr. Chairman. Thank you.

Mr. HALL. Yield to Mr. McCollum from Florida.

Mr. McCOLLUM. I just have a comment to make. I think these gentlemen have, along with Mr. Vance's testimony, changed my opinion completely, 365 degrees or 180-plus, or whatever. I came into this hearing convinced that this was not the thing to do, but I did not have the background, and I suppose that's the benefit of having hearings in the first place. It seems to me that it's only logical that we have truth-in-court like we have truth-in-lending, and we're going to present these cases to a jury, they ought to know it's the U.S. Government that they're called upon to render verdicts against, and we ought to use the U.S. Government as the party involved, and our system. It just seems to me that that's the case.

I don't have any questions, but I want to thank you and commend you for your coming here and giving us your testimony today.

Mr. HALL. Yield to Mr. Frank, Massachusetts.

Mr. FRANK. Thank you. I would have no objection to these going to the jury in proper form, except that the amendment offered by the Justice Department would, among other things, keep any case from going to any jury, because of the change.

I think it is important for us to sort out several things. Dr. Dacey, I apologize for missing your opening statement. One point you made was that you think it's unfair. And I think that there is a lot to be said for that position for a corporation or a university which has agreed, out of a sense of public service, to participate in an important national security program, to be accused as if it were something which, for its own purposes, it did.

That I understand, but it seems to me the amendment goes far beyond that. What would you gentlemen think if we were, in fact, to make it clear that the United States was the real defendant but did not allow the United States in those instances to, for instance, use the Feres doctrine, which says that any serviceman or his or her survivors simply couldn't bring the suit at all? And also the question of jury trials. Consolidating into a Federal court, trying to provide a common forum. All those are perfectly relevant things to do. But the Government's position goes far beyond that. Would you

think that it would be useful for us to do part of this, but not everything the Government wants?

Dr. DACEY. I think it would be presumptive of me, as the head of a national laboratory, to presume to advise the Government as to how it ought to defend itself.

My main point, and I think the main point of the laboratories, is that the Government is the real party of interest. That is terribly important to us. Now whether or not, having crossed that Rubicon, the proper way to defend the cases is with jury trials, with or without the Feres doctrine under the Tort Claims Act or in some other way, I think, is a matter for the Congress and the Department of Justice to decide.

Mr. FRANK. I guess I'm a little surprised to hear you say that, because some of your earlier statements did not betray to me an unwillingness to speak out. I don't generally think that's a bad thing. Because, for instance, you suggested that the State courts were prepared to not only entertain but to decide for plaintiffs in trumped-up cases. I was a little surprised at that. Perhaps there is a basis for it, but it did seem to me that you had views over than just this. So I was just—

Dr. DACEY. You were asking for a personal view, I take it, then, rather than a legal opinion, because I can't offer a legal opinion.

In my opinion, every issue ought to be settled on its just and fair merits. And if a citizen of the United States has a fair case against the U.S. Government, he should find some way of—

Mr. FRANK. That would mean that the Feres doctrine should not be invoked in this kind of a situation.

Dr. DACEY. The Feres doctrine is a much broader issue than just nuclear testing.

Mr. FRANK. I understand that, but I'm only talking about its application in this. I am not asking for your opinion on the Feres doctrine as a whole, though I am perfectly prepared to accept it. In our business, we accept opinions from all manner of people on all manner of things. I just read in the paper that the trees were warning each other about something, and I figured next I was going to get a letter from me telling me that there was a problem.

Dr. DACEY. Let me give you a frank view, Mr. Frank.

Mr. FRANK. Yes.

Dr. DACEY. That's not intended as a pun.

It is puzzling to me, since I am not a lawyer, to understand why redress of all sorts sought by servicemen are lumped into one thing with no possible recourse except to the Veterans's Administration. It does seem to me that acts of the Government against servicemen vary. Some are acts of war where you are expected to obey your commander, and if you get shot, that's too bad, and you shouldn't be able to sue. On the other hand, other acts may be closer to a civil situation. The Feres doctrine, apparently, as it has been explained to me, does not distinguish between those cases and that, I think, is unfair. Nevertheless, that's the law of the land, and it seems to me that it is irrelevant to issue which I'm concerned about, which is that we were acting on behalf of the Government.

Mr. FRANK. Well, Dr. Dacey, I have to correct you on that, because it's relevant, if you say it is, but as your testimony came to us, the amendment as presented to us says, let them sue the Gov-

ernment, but with the Feres doctrine and other things. And that's precisely what I'm trying to settle spell out. In other words, the purpose which you come here for, and I assume, your colleagues, though if I am incorrect, I would like you to tell, preserving the Feres doctrine as a barrier to suits by servicemen and their survivors in this class of cases is not part of the argument is that right? I gather that's what Dr. Dacey says?

Mr. DEGARMO. That goes a little far. I guess—I'm sorry, I'm a little confused. What I think I hear you saying is, you wish to carve out an exception in the Feres doctrine to permit suits against the Government if the serviceman was injured by radiation in nuclear testing, even though a serviceman—

Mr. FRANK. No, I'm asking the other way around. I'm asking you—unless you differ from Dr. Dacey. He said—and obviously, you don't all have to speak with one voice, but my question is, you come here on behalf of Livermore, I guess, and have certain purposes to be served. I am asking you whether we would serve the purpose in your instance by saying, OK, you can't sue Livermore Laboratory. You have to sue the U.S. Government, but we then went on to say that you could, in fact, sue the U.S. Government, even if you were a serviceman.

Would that interfere with the purposes you come to tell us about to help your institution?

Mr. DEGARMO. Again, that's rather broad, and it's the kind of thing that I naturally would like to consult with the University of California on.

Mr. FRANK. Well, let me ask you then, and perhaps you could summarize for me, what is the interest of the University of California that you are here to defend? I thought it was to prevent you being sued.

Mr. DEGARMO. In effect; yes.

Mr. FRANK. How would your interest be damaged, if we said that an ex-serviceman could not sue the University of California, but could, in fact, bring a suit against the Federal Government in Federal court claiming that he or she had been negligently exposed to radiation. How would that hurt the University of California?

Mr. DEGARMO. It hurts the programs in two respects. First, again I hear you carving an exception to Feres.

Mr. FRANK. Yes.

Mr. DEGARMO. And if that's what you wish to do, if you carve an exception to Feres and you are permitting suit in a narrow area by servicemen, it still puts a burden on the laboratory to defend. We would have the Department of Justice making the defense, but our people, our program people would still be called upon for testimony, records and so on.

More importantly, we at the labs have always believed that we were acting with the United States in an area of national security. If there is any area where the United States behaves as a sovereign it is here. To waive sovereign immunity in this area, while claiming it for automobile accidents on Army posts, seems a strange choice.

Mr. FRANK. So your purpose then is not to prevent the university from being sued, but, in fact, to prevent many of these suits from ever being brought?

Mr. DEGARMO. If possible—

Mr. FRANK. If possible? To the extent that this amendment would prevent some of these suits from being brought by roughly half of the plaintiffs in the non-Marshall Island's cases, I take it, from what we were told, that that is something you are in favor of, preventing roughly half the plaintiffs from being able to sue in any form, because that would save time and energy of the people in the laboratories from having to be involved in the rather bothersome processes of being deposed, and et cetera?

Mr. DEGARMO. No, sir, that's a little broader than I had intended. Our purpose is, as Dr. Dacey states, to seek to have the United States become the real party in interest in defending these cases.

Mr. FRANK. Is that better than the present situation, even though they can still bring an action against the United States? Yes, we all understand your answer to that would be yes, but I want to get beyond that.

Mr. DEGARMO. That's correct.

Mr. FRANK. We're all clear about that.

Mr. DEGARMO. But if the question about whether one should carve an exception to Feres, that is one that I would rather consult with the university on and—

Mr. FRANK. Well, what interest would the university have, though you've suggested one? You're saying that the university, in fact, has an interest not only in not being sued itself, but in having no suits brought, because it is a considerable bother to be involved in the defense of a suit. I understand that it is, but is that the university's position, or do you want to withdraw that one?

Mr. DEGARMO. I cannot speak for the university to that matter.

Dr. DACEY. I can speak for Sandia, and I think that is not our reasoning. I think one must understand that the factual basis for many of these cases is not a scientifically factual basis.

Mr. FRANK. It was "trumped up" was the phrase.

Dr. DACEY. Well, yes, and let me explain to you why that's the case. At the time of these nuclear tests, every person who—

Mr. FRANK. Let me just say at this point, it's not my intention to try the cases here, I don't think we have time, be honest, I don't want to—

Dr. DACEY. No; I understand.

Mr. FRANK. And we would get too far afield. I expressed absolutely no opinion as to the merits of any of these cases one way or the other, because I am not familiar with them and I am not technically competent to, so I don't think the merits of the case are relevant.

Dr. DACEY. Only to the extent that it reads upon one's willingness to engage in nuisance cases. Obviously, we want to carry on with the testing.

Mr. FRANK. My own preference would be a scheme that would allow for the consolidation of the cases, so that we would have the same issue tried and retried. If we get them over in the Federal court, we would over in the Federal court, we would deal with some of those problems, and I would be prepared to be supportive, based on what I've heard, of some special legislation which would consolidate the appeals, for instance, if that was to happen. So I'd

see some of that, but I would not want to see any of the cases brought—

Dr. DACEY. There is also a question of integrity. The laboratories—I was not personally present at the earliest stage, but I have talked with many people who were. The laboratories took enormous precautions to be sure that no one was, in fact, injured, it is, in fact, the belief, I think, of most of the experts that there was no harm to anyone through radiation in these cases.

Now the statistical occurrence of cancer is something that happens. There is no question that there were people involved in the tests, who now have cancer. The question is, is there any causal relationship between those two things? I believe that if a causal relationship were established in court, it wouldn't change the opinion of the scientists. They would still doubt there was a relationship, but it would impact upon the public perception of what those men were doing at that time to their fellow citizens.

Mr. FRANK. Are you saying that we shouldn't allow the suit to go ahead—

Dr. DACEY. No; I am not saying that

Mr. FRANK. Because it might come with a—OK. Well, you're really getting me a little bothered with that.

Dr. DACEY. Well, you asked the question as to whether or not—

Mr. FRANK. Whether or not it was your purpose to prevent the suits from being brought at all.

Dr. DACEY [continuing]. Or not it was our purpose to prevent the suits from being brought at all.

Mr. FRANK. But that was not your purpose.

Dr. DACEY. I said that was not our purpose.

Mr. FRANK. I think there is an unfortunate suggestion in what you just said, that some people don't want the suits to go forward, because the result might be to have a legal finding of causality which would then reflect badly retroactively on the people who did it, and I don't think that's an adequate basis to deny people the right to into court.

Dr. DACEY. Of course not.

Mr. FRANK. OK. Well, I may have read more into your statement then.

Dr. DACEY. No; all I was saying was you were asking what possible impact on the laboratories would allowing all of these cases to go forward have?

Mr. FRANK. Oh, I do not doubt that if I were involved, it is always better not to—usually better not to—have been sued even in a derivative way than to be sued. But I said I appreciate what you said, that you are not trying to prevent this.

Let me ask, on behalf of Los Alamos.

Mr. HUGHES. No, sir.

I would have to say that it would not matter one way or the other to Los Alamos whether the Congress intended to provide juries for these kinds of—

Mr. FRANK. Or to exempt these cases from the Feres doctrine? So you have no objection to the suits going forward?

Mr. HUGHES. I would think that would be interesting one way or the other.

Mr. FRANK. Right. Although I could obviously see that there would be something to be said from the standpoint of saving time and for your people who have to testify, to having some kind of a consolidation mechanism and a common form. But as to preventing the suits over and above that, you have no interest in trying to do that?

Mr. HUGHES. No, sir.

Mr. FRANK. Thank you. I have no other questions.

Mr. HALL. Ken.

Mr. KINDNESS. Thank you, Mr. Chairman.

And gentlemen, we appreciate very much your presentations this afternoon. I would like to clarify the position just a little bit here on the point as to how the Congress deals with the question that we have been discussing.

I have, and I think it is shared by some other members of the subcommittee, quite a bit of concern that in a short timeframe we are dealing with a rather complex question which is a part of a question that is otherwise before the subcommittee in other legislation.

And I personally feel that section 213 in H.R. 2797 is just the wrong way for Congress to approach this matter logically and reasonably.

Was there a point in time at which you or any of you or the organizations with which you are associated asked for this legislation to be included in the defense authorization bill? And was it for the fiscal year 1984 or last year or the prior year? Has there been action before the Armed Services Committee on this matter before that did not result in section 213 being included in their authorization bill?

Dr. DACEY. Not that I am aware of, sir. My impression is that this situation has become increasingly important over the past several weeks and months. It is particularly so because many of the cases are now reaching particularly critical times in the legal process. Quint can remind me of some of the dates. But it is within this next week or 2 that defenses must be filed in some of these cases. Up until now it has been a matter of taking depositions, interrogatories, and so on. So the nature of the defense which we will in fact use is just now becoming important, and I believe that that has been an issue which is thoroughly understood throughout the Department of Justice, throughout the Department of Energy, throughout the legal community, and certainly in our minds, as to what kind of defense will we in fact mount—we the contractors, we the United States of America—against these cases which have now reached that stage.

I think that well-meaning people are concerned, as we are, that the resolution of these cases be done in such a way as to preserve the nuclear testing program. That is the main issue that I am concerned about. And I believe that some way—whether it be legislative or judicial or what not, I am not qualified to say—of making it perfectly clear that the United States is the party in interest in nuclear testing, is the issue which we are all trying to find some way of coming to grips with.

Whether it be done by the original 213 language, by Justice's proposal, or by some other proposals of the kind that Mr. Frank

and others have made, I think is of lesser importance than that we do something rather than let these cases go just by default.

Mr. KINDNESS. To put it another way, would we hear a lot of opposition from the contractors involved if section 213 were to be removed from H.R. 2797 on the House floor and an approach taken which is, hopefully, a more thoroughgoing approach which might follow by weeks or some time in excess of weeks perhaps but which might pass when a defense authorization bill might not clearly pass?

Mr. HUGHES. Congressman, if I could, the only thing that I could see, speaking as the Los Alamos representative, would be just a matter of timing. We are already getting into some things where decisions have to be made about defense strategy. We are facing several lawsuits with total allegations or prayers for damages somewhere around \$6 or \$7 billion, of which \$3 billion of that is punitive damages filed in the *Marshall Islanders* case.

But the problem is timing. I do not know how this got started here with the Justice Department submitting this proposal or how section 213 got started originally over in Armed Services. But my director and I have always talked about how this is really going to need legislative attention of some kind somehow, working with Justice and DOE.

Mr. KINDNESS. It might even require a program of compensation more akin to a workman's comp sort of approach.

Mr. HUGHES. That is exactly right, sir. And if you have to balance the national security problems inherent in us contractors trying to make decisions how to defend these cases, with the Government's interest in making sure no one is deprived of a remedy, I think those kinds of considerations will crop up in terms of some kind of administrative attention.

In the *Dalchite* case, which was approximately the first discretionary function case under the Federal Claims Act, the only remedy, as it turned out there, after the Supreme Court dismissed all the claims was congressional relief. There may be other mechanisms that are more—that facilitate these claims and attending to these claims than having each one of these people come to Congress to ask for the money.

But we have always felt that it required some kind of legislative attention ultimately, because there are going to be a large number of cases with a large number of policy issues involved.

Mr. KINDNESS. Well, we have agent orange cases building and other related considerations, that frankly it seems to me a somewhat more comprehensive approach does need to be taken than what is embodied in this section 213.

But I appreciate very much the testimony and helpfulness that has been provided by the panel.

Mr. HUGHES. If I could make one more point, sir, I believe that the Atomic Energy Act does create some kind of special consideration for activities involving the testing of nuclear weapons which some of these other types of contractor matters and cases do not necessarily—are not necessarily dictated by legislation. And that is the only reason why—it is not only just because we are the defendants that we are interested in this type of approach or a similar

type of approach; it is because we do not see any other legislation that brings these things into play either.

Dr. DACEY. I think that is a point that ought to be emphasized, Mr. Congressman, because if the cases were fought one by one on their merits, I think my feeling is that they would be fought in very much the same way, with the contractors claiming under the Atomic Energy Act section 91 the equivalent immunities of Government as if this section 213 had taken effect. So it is not really something new, I believe, in terms of the law. What I am worried about is that the court might be ignorant of the will of Congress on this matter and come out with some sort of adverse judgment which would give legal backing to these other kinds of theories as to who can be sued in terms of nuclear testing. And that could be very harmful to the actual test program.

Mr. KINDNESS. I thank you very much, Mr. Chairman. Before I yield back, noting that we have lost the quorum for the markup, today I am wondering if the chairman is interested in having a motion to recess until a period at a point in time that is somewhat before the beginning of our hearing time tomorrow, which is 1:30.

Mr. HALL. I do not think we are ready to mark up this afternoon. But now whether or not we could do that by tomorrow, we just have to get the staff to see if we can work out a schedule because we have regulatory reform starting—

Mr. KINDNESS. Tomorrow afternoon.

Mr. HALL [continuing]. Tomorrow afternoon. And that is going to take up some time. I do not want to delay this. But I do not think that I am ready today to say we will have the markup tomorrow. We may after getting this over with. We may work something out along that line.

Mr. KINDNESS. I might, if I may, Mr. Chairman, indicate that I am quite concerned that we be in a position to report it to the House from the Judiciary Committee a recommendation that H.R. 2797 have section 213 stricken from it for purposes of that legislative vehicle.

But I think there has been quite a bit of interest expressed in the subcommittee in promptly trying to approach this.

Mr. HALL. I see no reason, if the gentleman would yield, why we cannot complete markup at some time before this week is over.

Mr. KINDNESS. Well, I was just going to offer to make the motion to recess instead of adjourn if that was sought.

Mr. HALL. We could recess until 2 o'clock Thursday. But I want to ask a question before you—

Mr. KINDNESS. Oh, excuse me. I did not mean to jump the gun.

Mr. HALL [continuing]. Move for a recess here.

I understand that many of these cases that are in the discovery stage are awaiting the outcome of what this committee does before they proceed with the methods of discovery, that they may change if this amendment passed?

Mr. HUGHES. I do not know of anything that is—I did not know that this committee was going to be meeting until Friday about noon.

Mr. HALL. Of course, we did not know about this amendment until Thursday. [Laughter.]

Mr. HUGHES. I did not really know about that until yesterday afternoon, sir.

Mr. HALL. It was up for referral.

Mr. HUGHES. I do not think of anything that is of—

Mr. HALL. I kind of feel like maybe I am overstating this, but I feel a little bit like we are being used as a pry pole here, to pass an amendment or to pass judgment on that amendment. It might change up the manner in which these cases that are pending would proceed. And frankly, I do not want to be a party to passing something that at one fell swoop might prevent plaintiffs who are presently in the throes of preparing for a lawsuit being told that they cannot file a suit against the Government, which is what this would amount to if this amendment passes, unless there are some areas of exception to Feres that would carve an exception out here.

I am a little concerned about the timing of this entire proceeding. But be that as it may, we appreciate very much your being here and going through this session we have had, with us having to get up and leave and come back. That is just part of the process.

So this committee will stand recessed until Thursday at 2 o'clock in room B-352, at which time we will mark it up.

Mr. HUGHES. I take it, though, you have no further need for our testimony?

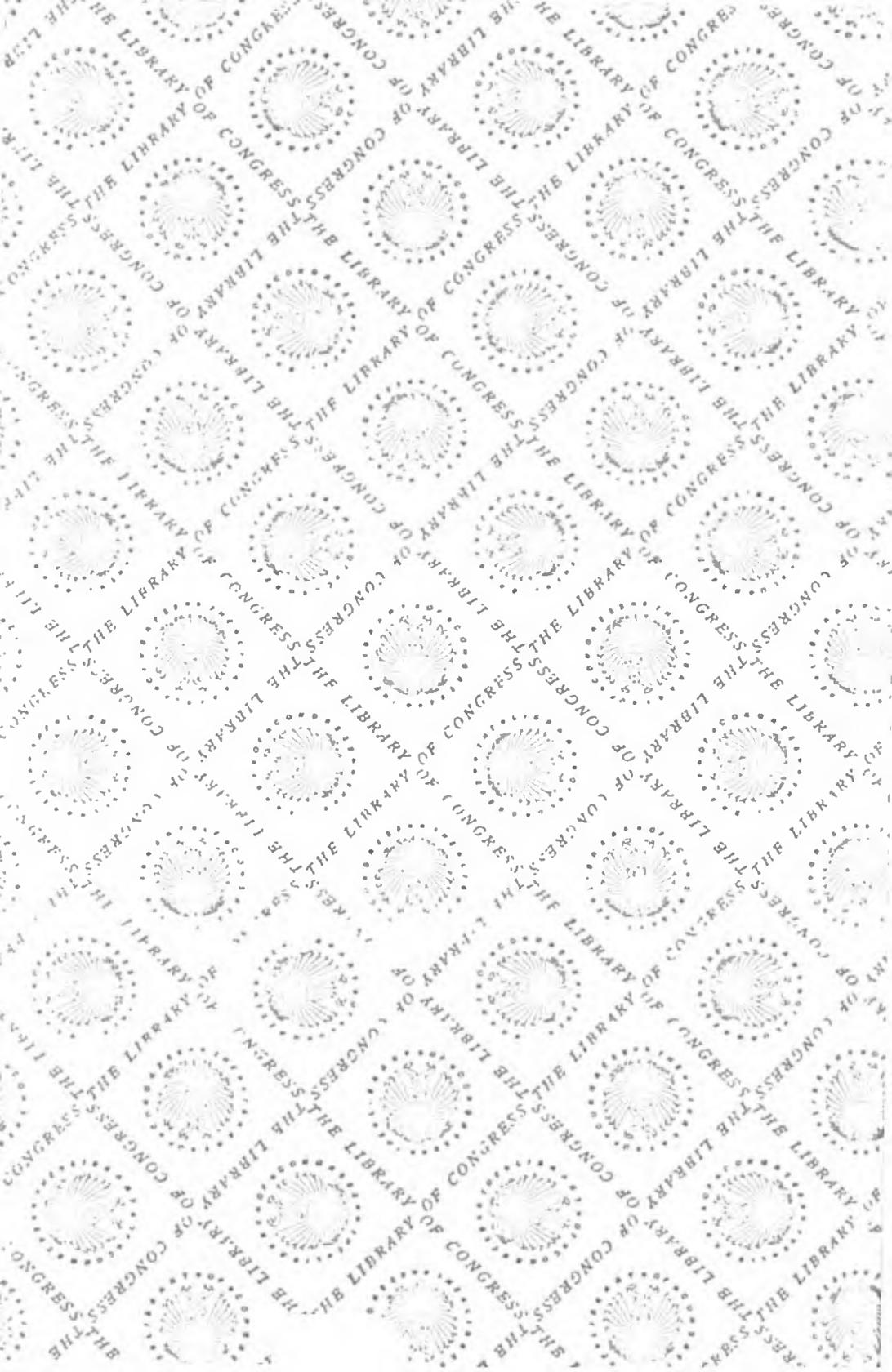
Mr. HALL. No, sir.

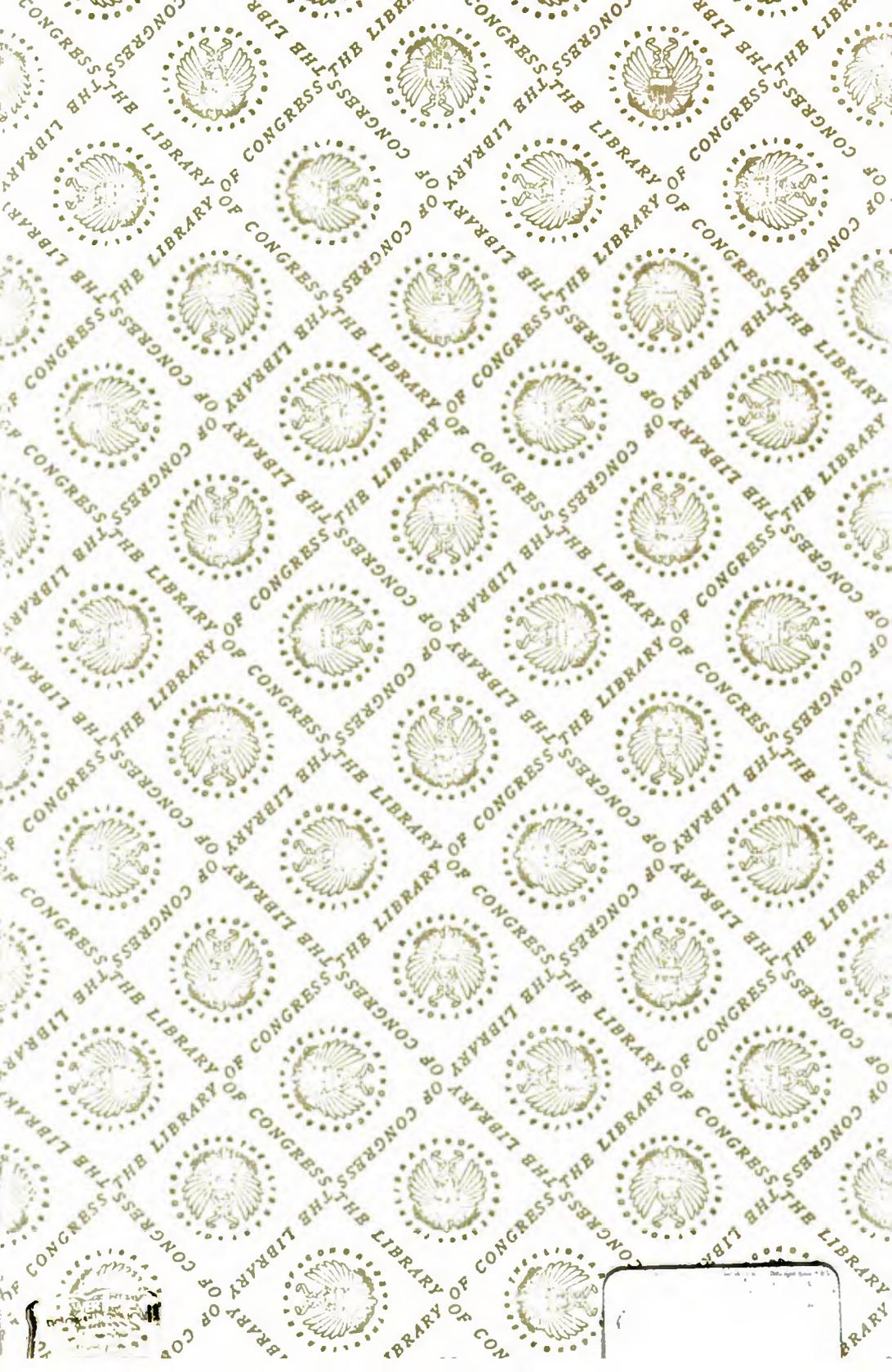
Mr. HUGHES. Thank you.

Mr. HALL. Thank you very much.

[Whereupon, at 5:49 p.m., the hearing was adjourned.]







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