times as great for Americans in the 19 to 65 age category.

The harsh reality is that the elderly now earn low out-of-pocket payments for medical care than the year before medicare became law. In fiscal 1972 their per capita direct payments amounted to $276, or $42 more than in fiscal 1966. These out-of-pocket payments, which still pose a serious threat to the economic well-being of the elderly.

For these reasons, I strongly urge the adoption of this amendment to freeze the part A deductible at $72 for 1974.

REFORMING CIVIL SERVICE LEAVE

Mr. MOSS. Mr. President, this morning the Senate Post Office and Civil Service Committee unanimously reported out H.R. 1284, a bill that would be an important step in reforming the leave system for our Federal employees. It makes no changes in the manner by which Federal employees accrue annual leave but it does involve several important changes in the administration and application of the leave system.

In the past we have, in effect, penalized persons who lost annual leave through clerical error. There have also been instances when employees have taken annual leave in excess of their allotted amounts and the Federal Government has had no recourse. This bill provides a mechanism by which both inequities would be corrected.

Another problem that would be alleviated by this bill is the occurrence of illness during a scheduled annual leave. Surely employees should not be penalized when illness occurs during their leave if they wish to take it on a later date. Another section of this bill would provide that civilian employees or their survivors who are missing or held captive would still be able to receive remuneration for leave which they are unable to utilize. Certainly we can find it within ourselves to award remuneration to these people who have suffered both mentally and physically in the course of their duties as employees of the Federal Government.

In my view, one of the most significant provisions of this bill is one that would apply to a large number of NASA employees. As chairman of the Aeronautical and Space Sciences Committee, it has come to my attention that, in these days of extended space flights, many employees are unable to take leave because they simply cannot be spared. Under present provisions of law, annual leave is lost if the employee is on duty during that leave. This bill provides a mechanism by which both inequities would be corrected.

APPOINTMENT OF A SPECIAL PROSECUTOR

Mr. MONDALE. Mr. President, much discussion has been in the past several days as to the power of the Congress to vest the appointment of a special prosecutor in a Federal court. The discussion has arisen as a result of the discharge of Archibald Cox as Special Prosecutor on October 20, 1973, and the introduction of several bills which would establish a new Special Prosecutor to be appointed by the judiciary.

I have received a memorandum prepared by Prof. Lee C. Bollinger, Jr., of the University of Michigan. The memorandum suggests that Professor Bollinger's views on the selection of the appointment power, as well as his views on the elimination of the appointment power, are well known. I believe that my colleagues will find Professor Bollinger's views on the power of the Congress most informative.

I ask unanimous consent that Professor Bollinger's memorandum be printed in the Record.

There being no objection, the memorandum was ordered to be printed in the Record, as follows:

**APPOINTMENT OF A SPECIAL PROSECUTOR**

**October 29, 1973.**

In the wake of President Nixon's decision to order the Attorney General to discharge Mr. Cox as the Watergate Special Prosecutor, a number of bills have been introduced for legislation creating a new independent prosecutor who would be immune from presidential control. It is a span of a few days to a week, for example, the duties of 17 law schools sign a petition urging Congress to vest the power to appoint a special prosecutor in a federal court. The deadly seriousness of this issue, in many minds, asserted that Congress was empowered to enact such a law by virtue of Article II, Section 2, of the Constitution. That Section reads in relevant part:

"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...such other public Ministers and Consuls, Judges of the..."
The Court in Siebold was also unpersuaded by an argument based on Article II, Section 2, that the statute was inconsistent with Article III in that it delegated powers to the courts. In both cases, the Court held that the statute was constitutional. In Siebold, the Court stated that the statute was not inconsistent with Article III because it did not necessarily preclude judicial appointment of a special prosecutor. It has long been recognized that a prosecutor is irremovable by the courts. The War Department, in particular, has always had a duty to appoint inferior officers, when required thereto by law, as a constitutional duty of the courts by virtue of Article II, Section 2. In Siebold, the Court held that the statute was constitutional. 

In this case, Congress long ago enacted a provision now contained in 28 U.S.C. § 546, which provides that the district court for a district in which the office of United States attorney is vacant, may appoint a United States attorney to serve until a successor is appointed. The order of appointment by the court shall be filed with the clerk of the court.

Similarly, a three judge court relied on Article II, Section 2, in upholding a congressional statute under which judges of the United States District Court for the District of Columbia were authorized to appoint members of the District of Columbia Board of Education. See Robertson v. Hansen, 265 F. Supp. 902, 911-16 (D.C. 1967).

The foregoing review of the relevant legal authorities would seem to indicate that there is strong support for the proposition that Congress could under Article II, Section 2, place the power of appointment of a special prosecutor in the executive branch. But accepting that conclusion as sound, however, we must consider the one major argument which can be anticipated in rebuttal: that it would be an unconstitutional usurpation of executive powers for Congress to delegate the appointment of executive officials to the judicial branch. Surely, it might be argued, the federal government would not be functioning properly if judges were involved in appointing executive officials. Such an argument is not to be lightly dismissed, it contains several flaws which make it utterly unpersuasive. First, insofar as the argument suggests that Congress may never vest courts with the power to select executive officials, it is based on a nonjudicial, or an "executive," function, it is squarely refuted by the Supreme Court's decision in Siebold, as well as by the lower federal court decisions mentioned previously. Congress itself, moreover, has rejected the suggestion; as we have seen, 28 U.S.C. § 546 provides for the interim appointment of inferior officers.