STATEMENT OF SENATOR STROM THURMOND (D-SC) PROPOSING AN AMENDMENT TO THE CONSTITUTION RELATING TO THE PLEA OF DOUBLE JEOPARDY MAY 8, 1958.

MR. PRESIDENT:

I send to the desk, for appropriate reference, a Joint Resolution proposing an amendment to the Constitution of the United States relating to the plea of double jeopardy.

I ask unanimous consent that the Joint Resolution be printed in the Record at this point in my remarks.

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Mr. President, the Supreme Court in recent years has usurped the powers of Congress and the legislatures of the several States by repeatedly engaging in judicial legislation. Judicial rewriting of Congressional acts has become a common occurrence. Worse by far, however, are the increasingly frequent judicial amendments to the Constitution. The joint resolution I introduce today is necessary to undo one of the latest "unconstitutional" judicial amendments. This amendment was effectuated by five justices over the objection of four in the case of Green v. United States, 335 U.S. 184, decided December 16, 1957.

William Green, the appellant, was indicted in the Federal District Court in the District of Columbia for arson and murder, the offenses having arisen out of the same incident - the death of a woman in the house which Green is alleged to have maliciously burned. On trial, Green was convicted of arson and murder in the second degree. The conviction of second degree murder was appealed by Green on the ground that there was no evidence to sustain a jury charge on, or a conviction of, second degree murder. In reversing and remanding the case for a new trial, the Court said:
...In seeking a new trial at which - if the evidence is substantially as before - the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance. He may suffer the death penalty. At oral argument we inquired of his counsel whether Green clearly understood the possible consequence of success on this appeal, and were told the appellant, who is 64 years of age, says he prefers death to spending the rest of his life in prison. He is entitled to a new trial. (95 U.S. App. D.C. 45, 48, 218 F. 2d 856, 859.)

Upon retrial upon the indictment of first degree murder, Green was convicted and sentenced to death. Again he appealed to the circuit court, this time on the ground that he had been put twice in jeopardy of his life in violation of the fifth amendment to the Federal Constitution. The Court of Appeals, nine judges sitting en banc, affirmed the conviction and Green appealed to the Supreme Court.

The Supreme Court, by a minimum majority, in absolute disregard of the expressed intention of the First Congress, which initiated the Bill of Rights, and in defiance of the doctrine of stare decisis, amended the double jeopardy clause of the Constitution and set aside the conviction of Green, on the ground that he had been put twice in jeopardy for the same offense.

Mr. President, the debate in the House of Representatives of the First Congress, in the Committee of the Whole on Madison's draft of the Fifth Amendment, leaves no doubt as to the intention of the Congress. As Justice Frankfurter pointed out in his able dissent in Green v. United States, the members of the First Congress.

...evidenced a concern that the language should express what the members understood to be the established common-law principle. There was fear that, as proposed by Madison, it might be taken to prohibit a second trial even when sought by a defendant who had been convicted.
It was made clear, particularly in the remarks of Representative Benson of New York, the State which proposed this amendment, that the Congress did not intend any such result as reached in the Green case.

The Court cannot be excused on the basis that this was a decision of first impression. The Court clearly and succinctly set forth the controlling principle in the early case of United States v. Ball, 162 U.S. 662, where it said:

...it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.

The precise question here faced the Court in Trono v. United States, 199 U.S. 521, at which time, the Court in reaching the diametrically opposite result said:

...the Constitutional provision was really never intended to, and, properly construed, does not cover, the case of a judgment under these circumstances, which had been annulled by the Court at the request of the accused.

Thus the Court not only fabricated an intent of Congress in the face of overwhelming evidence to the contrary, but also again ignored the wisdom and legal scholarship of the great Supreme Court justices of the past by flagrantly violating the laudatory principle of stare decisis.

It is a shocking thing, in my opinion, that it should be necessary to adopt a Constitutional Amendment to make that great document apply in the way that it has applied down through the years. The fact that the Constitution has been amended by a 5 to 4 vote of the Supreme Court should be something to alarm and dismay every citizen. I devoutly believe that the Constitution should be
amended only by the processes set out in the Constitution itself.

The resolution which I offer today proposes an amendment to the Constitution, which would restore to the double jeopardy clause of the fifth amendment of that great document, the meaning which was originally intended, and which was adhered to by the Court prior to last December 16. In simple terms, it would insure that when a defendant is granted the right to a new trial on his own motion, he must accept the risks that accompany a new trial.

The effect of the Green case presents a clear danger to the interest of the American public. Once again the Court has rationalized the release on society of criminals about whose guilt there can be no doubt. The decision is even more appalling, since decided by a 5 to 4 vote. Even were this an isolated instance, I would be alarmed. But this is not an isolated instance; it is an increasingly regular occurrence, and my alarm has long since ripened into intense concern, which I am sure is shared by many well informed persons. Recently, no less authority than the esteemed Judge Learned Hand made this comment on the legislative activities of the Supreme Court:

...For myself, it would be most irksome to be ruled by a bevy of platonic guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

Of course, I know how illusory would be the belief that my vote determined anything; but, nevertheless, when I go to the polls, I have a satisfaction in the sense that we are all engaged in a common venture.

I am unable to determine what prompts the Court to reach such unprecedented, unwise, illegal, and unconstitutional
decisions. Perhaps the reason lies somewhere in the loose system of appointment of professional assistants to the justices. This system should certainly be reviewed by the Congress, as the distinguished junior Senator from Mississippi so ably pointed out in his remarks on this floor on last Tuesday.

Whatever the reason or reasons, it is imperative that Congress act to prevent our government from becoming a government by men rather than a government by laws. The Court is presuming to act as a legislative body. As such, it is a chamber whose activities are not subject to Presidential veto; whose acts are not subject to the restraint of another legislative body. It is a legislative chamber that does not have to answer to the people on election day. By every standard of Democracy, the Supreme Court is a body inherently unfit to produce legislation. The Court's legislative activities present the gravest problem confronting this country today.

There are other measures before the Congress to right other specific wrongs, and other measures to limit the Court to its judicial function. The Green case should give the Congress added incentive to hasten action on these measures. The amendment I have proposed today will right a specific wrong. I sincerely hope that it will receive favorable consideration of the Congress and the legislatures of the several States, so that this specific decision will be corrected and the Court warned to stay within its designated functions of adjudicating.