The Senate met at 8:30 a.m., on the expiration of the recess, and was called to order by the Honorable Kent Conrad, a Senator from the State of North Dakota.

PRAYER

The Chaplain, the Reverend Richard Halverson, D.D., offered the following prayer:

Let us pray.

Though I speak with the tongues of men and of angels, and have not love, I am become as sounding brass, or a tinkling cymbal. And though I have the gift of prophecy, and understand all mysteries, and all knowledge; and though I have all faith, so that I could remove mountains, and have not love, I am nothing. And though I bestow all my goods to feed the poor, and though I give my body to be burned, and have not love, it profiteth me nothing. —1 Corinthians 13:1-3.

Loving Father in heaven, in the light of Paul’s classic statement about love, my prayer is expressed in the words of a simple spiritual song: “Bind us together, Lord; bind us together, Lord; bind us together in love.” In His name who is Incarnate love. Amen.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. Stennis).

The Assistant legislative clerk read the following letter:

To the Senate:

Under the provisions of rule I, section 3, of the Standing Rules of the Senate, I hereby appoint the Honorable Kent Conrad, a Senator from the State of North Dakota, to perform the duties of the Chair.

President pro tempore.

Mr. CONRAD thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. Under the standing order, the majority leader is recognized.

THE PRESIDENT DISPLAYED THE RIGHT ATTITUDE

Mr. BYRD. Mr. President, the President last evening in his news conference I think displayed the right attitude as we look toward the problems that immediately afflict our country. The President had several opportunities to drop the ball, but he held on to it. It was a tough news conference. He faced a battery of tough questions dealing with the budget deficit. I think now is the time to forget the finger pointing and to be nonpartisan and to be Americans in working together to cope with this difficult problem. We can be Democrats and we can be Republicans some other time.

So I was encouraged by the President’s words. I would urge the President to convene a meeting this weekend. These are unusual times. They are unusual days. And I think we have to put aside business as usual and work and work together. So I would urge the President to call us together this weekend and work through the weekend, Saturday and Sunday.

I do not know anything that would give the markets and the American people a greater shot in the arm, a greater feeling of confidence and trust that their Government really intends to govern and we intend to go out and do our work. I do not think anything could give our country a greater stimulation of encouragement and belief and confidence in the future than if the President would sit down with us tomorrow and Sunday. I do not think we have time to wait or time to waste. And I hope that the President will do that. I am willing; not only willing, but eager. Let us roll up our sleeves now and to go work and let us come together and return, as the President said, leave everything on the table with the exception of Social Security, which the President correctly removed from the table.

But I take the President at his word when he indicated that he is willing to sit down and consider all the options and not have any preconditions to such a meeting.

Mr. President, I yield the floor.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of morning business for not to extend beyond the hour of 9 a.m., with Senators permitted to speak thereon for not to exceed 5 minutes each.

Mr. BYRD. Mr. President, I ask unanimous consent that the distinguished Republican leader have his time reserved.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. BYRD. Mr. President, I yield the remainder of my time to Mr. PROXMIRE.

The ACTING PRESIDENT pro tempore. The Senator from Wisconsin.

CONGRATULATIONS TO THE MAJORITY LEADER

Mr. PROXMIRE. Mr. President, I thank my good friend, the majority leader. I congratulate him on his very statesmanlike remarks this morning about cooperating with the President and the President’s news conference this evening. It is characteristic of our leader that he takes this kind of position.

All of us are proud of our party, but the leader, I think, properly pointed out that this is the time that we must recognize that the interests of the country must come first.

A NO VOTE ON THE BORK CONFIRMATION

Mr. PROXMIRE. Mr. President, this Senator has decided to vote against the confirmation of Robert Bork to the Supreme Court. Here’s why:

I will not vote to confirm a nominee for Associate Justice of the Supreme Court who has called the 1964 Civil Rights Act, “an act of unsurpassed ugliness.” This Senator has served in this body for more than 30 years. In that period the most single contribution to the advancement of justice in this country was the 1964 Civil Rights Act. This Senator would call that enactment an act of unsurpassed beauty. This Senator is proud to recall that I voted for that act. And of the more than 12,000 votes I have cast in this body, in none do I take greater pride or satisfaction. How can anyone who believes in fair and equal treatment under the law make such a demeaning judgment of a Civil Rights Act that for the first time in American history gave black Americans the same rights enjoyed by the rest of us to enter theaters, restaurants, places of culture and enlightenment, to sit freely where they want to sit in vehicles of public transportation, and enjoy the other freedoms available to all other Americans? Mr. President, this country freed...
black slaves in 1863 with the Emancipation Proclamation. But for the next 100 years the prejudice and discrimination against our black sisters and brothers constituted an international scandal, a national shame. In 1964, the Civil Rights Act of that year went a very long way toward ending that gross unfairness. I cannot vote for the confirmation of a man to serve on the Supreme Court, a court that is the Nation's final arbiter on the civil rights of all Americans when that man has taken the view Robert Bork has taken toward a law advancing justice in America, a law passed by the Congress and signed by the President of the United States.

Mr. President, the single most cherished affirmation in our great charter, the Constitution—is the first amendment. Most Americans cherish freedom even above the abundant economic opportunities in this blessed land. And, of course, as the reason for our freedom is the absolute guarantee set forth and spelled out in the first amendment.

Yesterday, I discussed with Chairman Bnse and placed in the record a detailed note by former Senator Vincent Blasi of the Law School of Columbia University. That letter documented very thoroughly the contention that led to Professor Blasi's conclusion that:

* * *

Robert Bork would pose a threat of uncertain proportions to * * * one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constitu­tions to • • • one of our grandest constituti
will continue to learn and profit from these sterling attributes during the remainder of Senator Stennis' current term.

Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

Mr. BYRD. Mr. President, I ask that morning business be closed and that the Senate proceed to executive session on the Bork nomination.

The ACTING PRESIDENT pro tempore. Morning business is closed.

EXECUTIVE SESSION

The ACTING PRESIDENT pro tempore. Under the previous order, the hour of 9 a.m. having arrived, the Senate will now go into executive session to resume consideration of the nomination of Robert H. Bork to be Associate Justice of the Supreme Court. The clerk will report the nomination.

SUPREME COURT OF THE UNITED STATES

The legislative clerk read the nomination of Robert H. Bork, of the District of Columbia, to be an Associate Justice.

The Senate resumed consideration of the nomination.

Mr. DOMENICI addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from New Mexico.

Mr. DOMENICI. Mr. President, a parliamentary inquiry. Are there any time restraints on the Senator from New Mexico with reference to speaking to the nomination?

The ACTING PRESIDENT pro tempore. The proponent of the nomination of Judge Bork have 3 hours under the control of Senator Thurmond.

Mr. DOMENICI. I yield myself 15 minutes, Mr. President.

The ACTING PRESIDENT pro tempore. The Senator from New Mexico.

Mr. DOMENICI. Mr. President, a funny thing happened to Robert H. Bork on his way to the Supreme Court.

For close to 40 years, this distinguished scholar, attorney, and jurist compiled what looked to be the perfect resume for an Associate Justice of the Supreme Court of the United States:

He is a brilliant and provocative legal scholar.

He was as fine a Solicitor General as we have had in recent years.

He has served with distinction on the second most important court in the land.

Now Robert Bork is about to become a footnote in history.

What happened? How did a lifetime dedicated to justice and the rule of law—achievements matched at best by a handful of persons in our lifetime—turn sour?

Why are we, in the words of some of our colleagues, about to bury this gentleman?

This Senator is convinced that the Senate has just participated in a process that has added a new verb to our language: "To Bork," which means to destroy by innuendo or distortion. Judge Bork got borked.

This is not simply my view. The Washington Post said in an editorial that the anti-Bork campaign "did not resemble an argument so much as a lynching." The New York Times review of the "intellectual vulgarization and personal savagery" of the attacks on Judge Bork, "profundly distorting the record and the nature of the man."

Before trying to explain this tornado of terror that has swept over us, we need to review the record of Robert Bork, a record that is surely as brilliant as any the legal profession has produced.

If there is such a thing as predetermination in the legal profession, Robert Bork was predestined to the Supreme Court.

Robert Bork received his undergraduate degree at the University of Chicago, where he was elected to Phi Beta Kappa.

He went on to earn a law degree at the University of Chicago, where he graduated with honors and was managing editor of the law review.

Robert Bork then went to work for the prestigious law firm of Kirkland & Ellis. He was clearly on a path upward.

He joined the faculty of the Yale University Law School, certainly one of the most august legal teaching positions in the Nation.

Robert Bork taught at Yale for a number of years until he was asked to come to Washington in 1973 to serve as Solicitor General, a position that stands very close to the pinnacle of the American legal profession.

The job of Solicitor General goes only to the very, very best legal minds. It is not a job for a political crony. Nor is it a slot for a big contributor of a job requiring legal excellence, maybe the most professionally demanding job in this city.

At most, a handful of attorneys can hope to qualify to become America's chief advocate, setting the strategy on cases, then arguing the most difficult ones before the Supreme Court.

When he was nominated to be Solicitor General in 1973, Robert Bork was approved unanimously by the Senate; 25 Members of the current Senate were here then and voted for Robert Bork.

Robert Bork served in that post for 8 years—4 distinguished years, 4 demanding years.

It was Mr. Bork who, as Solicitor General, fought for a broad interpretation of the Voting Rights Act, and urged the Supreme Court to outlaw employment tests and seniority systems that had discriminatory effects.

It was Mr. Bork who, as Solicitor General, concluded that the evidence against Vice President Agnew warranted his indictment on criminal charges.

It was Mr. Bork who, as Solicitor General, opposed expansion of the pocket veto, and persuaded President Ford to restrict its use.

It was Mr. Bork who, as Solicitor General, argued that the civil rights laws prevented private schools from denying admission to black students solely because of their race.

Elliot Richardson, Attorney General over Judge Bork, described him as a man of "integrity, courage, and uncommon intellectual honesty." Edward Levi, later Attorney General, termed Mr. Bork's service as "outstanding."

Paul Bator, a University of Chicago law professor, testified that Mr. Bork "performed in the highest traditions of that office."

Interestingly, the Judiciary Committee reported barely notices Mr. Bork's performance as Solicitor General. Remember the old law school axiom: "When the facts are against you, argue the law. When the law is against you, argue the facts." In this case, it's: "When both the law and facts are against you, ignore them both."

In 1977, Robert Bork returned to Yale Law School, holding for 2 years the chair as Chancellor Kent professor of law, then held the chair as the Alexander M. Bickel professor of public law for another 2 years.

What is the role of a professor? It is to teach, to stretch the minds of students; it is to be both learned and provocative. Of course Robert Bork offered ideas that were stimulating and challenging; that is what teaching is all about. If he had been the timid gnome some might prefer, he would have been lucky to teach at Podunk University.

America neither wants nor needs the leadership of the timid.

In 1981, Robert Bork resumed the private practice of law.
A year later, he was selected by President Reagan to serve on the U.S. Court of Appeals for the District of Columbia Circuit, the second most influential court of the Nation.

When did the Senate last have before it a Supreme Court nominee with a pedigree like this?

When Robert Bork was nominated to the circuit court, the American Bar Association rated him as "exceptionally well qualified," the highest rating for a circuit court nominee.

Seventy-three members of the current U.S. Senate were here then to approve Robert Bork, to approve him unanimously.

How did he do as a judge?

My colleagues know all the numbers and facts: Judge Bork was in the majority in 95 percent of the cases he heard. Not 1 of the more than 400 opinions that Judge Bork wrote or joined has been reversed by the Supreme Court. In the six cases where Judge Bork dissented and the Supreme Court reviewed the case, the Supreme Court agreed with Judge Bork in every single one.

He voted 98 percent of the time with Justice Scalia when he was on the circuit court; he voted 82 percent of the time with his philosophical opposite, the very liberal Judge Abner Mikva.

Clearly, Judge Bork was smack in the mainstream of that court.

Judge Bork's critics say he is unlike Justice Powell, the distinguished jurist he was nominated to replace. Yet, in the 10 cases in which Judge Bork was involved and which Justice Powell reviewed, Justice Powell agreed with Judge Bork's position 9 times. In the lone remaining case, Justice Powell agreed with Judge Bork in part, disagreed with him in part.

Judge Bork was a strong defender of the first amendment. He wrote an opinion that expanded the protection has achieved, in a very effective way, for those who possess the qualities that our Constitution also values. He extended the first amendment to protect them against lead-paint hazards. America has a right to expect in the mainstream of American legal thinking?

With such a resume, it came as no surprise that President Reagan nominated Judge Bork to the Supreme Court.

And, for a time, it appeared that the Senate would confirm the nomination. The chairman of the Judiciary Committee had stated that he would support the nomination, no matter what kind of a fuss his liberal supporters put up.

Former President Ford, former Chief Justice Warren Burger, Supreme Court Justice John Paul Stevens, seven former Attorneys General of the United States, and eight former members of the American Bar Association came forward to support the nomination.

The American Bar Association proclaimed Judge Bork "well qualified," its highest rating for a Supreme Court nominee.

Clearly, Judge Bork was on his way to the Supreme Court.

Yet, now we are poised to reject the nomination.

Again, I ask, what happened?

Before seeking to examine the vitriolic campaign against Judge Bork, it might be instructive to review the Senate's role, as this Senator seeks it, in processing nominees submitted by the White House.

Under the Constitution, the Senate has the duty to offer "advice and consent" on Court nominees, as well as on Presidential appointments. That is not a power to select nominees; that responsibility goes to the person elected by the entire Nation, the President.

The Founding Fathers rejected the idea of giving the Senate the power of appointment because they were afraid of precisely what has happened here. They were afraid that partisan concerns would overshadow a candidate's merits. The drafters of our Constitution also rejected a referendum on judges. They saw it as dangerous and impractical.

Yet the opposition to Robert Bork has achieved, in a very effective way, to pull down a government by a member of the committee's majority if they should dare to vote to confirm Judge Bork.

That duty, of course, is not one of blind subservience. Rather, it is to scrutinize Court nominees to determine if they possess the qualities that America has a right to expect in its judges. But the Senate needs to respect a President's right to appoint qualified persons to the judiciary.

So long as a nominee is otherwise qualified, one who respects the fundamental principles of our constitutional system—particularly the separation of powers—that nominee's personal philosophy becomes irrelevant. I have voted to confirm nominees, right and left. While I may have disagreed with their political philosophy, they were qualified.

But since he really stands in the mainstream, why all the turmoil over Judge Bork?

Part of the answer is to paraphrase a famed mountaineer: Because he was there.

He had written and said enough things about the "four corners" of the Constitution that he became a lightning rod.

Pity the next nominee, if he or she has a record.

To achieve the destruction of Robert Bork and promote a special-interest agenda, the opposition unleashed as negative a campaign as anything I have seen. It was a campaign that cost, I understand, $15 million.

Since the anti-Bork campaign could find no fault with his intellect, his experience, his morals, or his integrity, it turned to distortion for the buoyancy of the campaign.

President John Adams a long time ago wrote that "it is much easier to build a government * * * than to build up."

So it is with judicial nominees.

The standards of the campaign were full-page advertisements denouncing Mr. Bork in the most outrageous terms. One said Mr. Bork would likely allow States to "impose family quotas for population purposes * * * or sterilize anyone they choose." They said he would take away your privacy, that he would return blacks to the shadows of segregation, that he defended poll taxes and literacy tests that restricted the right to vote.

If it were not so serious, it would be laughable.

Behind these ads have come waves of junk-mail letters attacking Judge Bork, and, not incidentally, requesting a donation of "$25, $50, or $100" to go into the bank accounts of this or that special interest. Judge Bork, the constitutional bogey-man, became a fundraising tool.

One group raised an estimated $1.5 million spreading fear about Judge Bork.

And the TV ads! Ads as slick as any peddling soap or soft drink, twisting a life in 30 seconds. This isn't advice and consent. This is electronic assassination.

This is a firestorm of fear. Certain special interest groups went to members of this body and threatened them with assassination if they should dare to vote to confirm Judge Bork. That may be perfectly legal. But remember what Winston Churchill said about polls and doing right.

And we have learned of the black supporter of Judge Bork who was told by a member of the committee's ma-
majority staff that his record would be dragged through the mud if he testify didn’t.

Should we prostrate ourselves before these campaigns of excess?
The campaign portrayed Judge Bork as antifeminist, antihomosexual, anticult every­ing. Look at the record: that is not the real Robert Bork. That is the Robert Bork of the advertisements fi­nanced by the merchants of fear who have taken over this issue.

The committee report made what may be the most un­precedented comment of all: Judge Bork’s “jurisprudence fails to incorporate the ennobling concepts of the Constitution.”

As a New Mexico Senator, with our wide cultural and ethnic diversity, I would be leading the campaign against Judge Bork if there was the slightest suspicion that Judge Bork would roll back the progress made in civil rights, prejudices that went all the way from Indians, blacks, women, and other groups to share in the American dream.

But what has been missing in the campaign to bork Judge Bork was that precious word “perspective.” I asked Judge Bork what had bother­ed him the most personally about his ordeal. He told me that it was the way his views on civil rights had been distorted, painting him so unfairly as insensitive to the concerns of minorities.

This is a man with a good record on civil rights, a proud record. As a young law firm associate, he led the fight that overturned the firm’s ban on hiring Jews.

While he was Solicitor General, Mr. Bork and the NAACP Legal Defense Fund on 10 occasions filed briefs on the same substantive civil rights cases; that is, cases that we all hold dear.

In fact, Mr. Bork argued cases before the Supreme Court on behalf of the rights of minorities more often than any nominee since Thurgood Marshall.

While he was Solicitor General, Mr. Bork filed with the Supreme Court 19 amicus briefs involving civil rights issues. What is significant about these “friend of the court” pleas is the dis­­re­ction that the Solicitor General holds in deciding whether or not to enter a case as a third party. It is his call, not something he is required to do.

Out of those 19 cases, Mr. Bork urged the Supreme Court 17 times to construc­tly the law or rule so that it would favor the minority inter­est.

In the eight cases that came before him on the court of appeals involving substantive questions of civil rights, Judge Bork voted for the civil rights claimant in seven of the eight cases.

These involved such things as claims of racial discrimination against the Navy, sex discrimination against an airline, sex discrimination against the State Department, violations of voting rights, and equal pay. Judge Bork ruled in favor of a homosexual who had been fired illegally.

Is that a man who wants to turn back the clock? Not at all.

What about the “perspective” attack on Judge Bork? Did he really not care about our privacy, our freedom to live our own lives behind closed doors? Certainly not.

That is what deserves careful review because the “privacy” issue is the one that probably really sunk Judge Bork. It is a complex and difficult issue.

Difficult? How could a basic concept like “privacy” be difficult? It means “my home is my castle.” It means “leave me alone.” We know that.

But in the eyes of the Supreme Court, the word “privacy” has a differ­ent meaning, one that has really ex­isted until the Connecticut case involving contraceptives, and, later, the Roe versus Wade abortion ruling.

What bothered Judge Bork—as well as a great many other legal scholars— is how to define the word in its legal sense. His concern was that the Court used the word, but never articulated a principle that other courts, and later Justices, might follow to determine just what right is covered by this “right.”

Would it cover wife beating or child molestation in “the privacy of one’s home”? I pray not, but we don’t know. As long as that “right” is floating about, undefined, it is ripe for interpre­tation any old way that a judge might want to interpret it. That con­cerns this Senator, and it concerned Judge Bork.

Aspects of this debate have extract­ed expressions of concern from indi­viduals as diverse as the late Justice Hugo Black, Professor Archibald Cox, the late Justice Potter Stewart, and Professor Gerald Gunther.

In discussing the privacy controversy, the editorial page editor of the Washington Post, Meg Greenfield, noted that Mr. Bork’s “positions were deformed beyond recognition in the retelling.

What happened was that Judge Bork asked some tough questions, and he got clobbered for asking them.

Where was our “fairness,” our “balance,” our “perspective”?

On numerous occasions, Judge Bork wrote about decisions, as any scholar must, and analyzed those decisions. On many occasions, he criticized the “reasoning” for those decisions, an en­tirely different thing than criticizing the “results” of the deci­sion.

It seems that the critics of Judge Bork are saying this: If you engage in the debate, watch out. And you would be smart never to mention any concerns you might have for how we get to cer­tain laudable public goals; the ends always justify the means.

Judge Bork has argued that the courts should abide by their constitu­tional role of interpreting the law, not making it. I agree.

Are we, as a body, going to second­guess how every Court nominee will vote on a particular issue 15 or 20 years from now? If so, we may quickly find ourselves in very dangerous waters.

Like Judge Bork, I harbor no illu­sions about the outcome of this debate. Yet, it is important that we ex­amine what has gone on here, for what is at stake is the Senate’s sense of decency and fair play, aspects of our civility that vanished in the rush by many to batter Bork, in hopes the next nominee will favor—or at least not object to—a special-interest agenda.

And there are other disturbing as­pects of the Bork spectacle. For example, what ever happened to “debate” in what we call the world’s greatest de­liberative body?

Many of our colleagues will say they were willing to “debate” the Bork nomination all last week. But, by defini­tion, a debate assumes the outcome hangs in the balance. How do you “debate” an issue on which 54 Mem­bers announced their firm opposition before a single copy of the 407-page committee report became available?

There is nothing this Senator can do to prevent my colleagues from an­nouncing their decision whenever they want to. I had voted twice before to con­firm Mr. Bork, so I was certainly predisposed to support him again, unless something came along during the committee hearings to alter that view.

I announced my own decision nearly 2 weeks ago, when it was clear that Judge Bork could not be approved. The rush to judgment had swept us aside before the process had even pro­duced a written report.

What does all this portend for the future? In this year of the Constitution’s bi­centennial, which many of us celebrat­ed in Philadelphia not long ago, is it not ironic that the Senate, as an insti­tution, has undermined the independ­ence of the judiciary?

By allowing a negative media blitz to determine who we put onto our courts, we may have undone much of what was accomplished that special summer 200 years ago.

Let some fairness and truth return to our evaluation of judicial nominees before others are subjected to such in­judicious judgment.

Mr. THURMOND. Mr. President, will the distinguished Senator yield?

Mr. DOMENICI. I yield.

Mr. THURMOND. Mr. President, I want to take this opportunity to com­mend the able Senator from New
Mr. President, before I yield 15 minutes to my colleague from Nebraska, I want to take 1 minute.

The Senator from New Mexico talked about distortions. He unwittingly engaged in the most preposterous distortion I have heard—the notion that he has heard that $15 million was spent. I do not know where he heard that. Maybe God came down and whispered it in his ear.

I believe that is true. That is what looks like the distortion. There are some little theories around—close calls and attempts to stretch this and that. But, essentially, that is what lost him this nomination. And that distortion has done this today a disservice.

Mr. BIDEN. Mr. President, if I may, before I yield time to my colleague from Nebraska, I want to take 1 minute.

Let me just repeat in closing: I believe that anyone who will review Judge Bork's record as Solicitor General and on the circuit court, with reference to civil rights and the contention that he will take us backward in time, and draw the inference from my words, that he sat in my office and said, "The thing that saddens me most is the distortion of my civil rights record.

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I believe that is true. That is what looks like the distortion. There are some little theories around—close calls and attempts to stretch this and that. But, essentially, that is what lost him this nomination. And that distortion has done this today a disservice.

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I believe that is true. That is what looks like the distortion. There are some little theories around—close calls and attempts to stretch this and that. But, essentially, that is what lost him this nomination. And that distortion has done this today a disservice.
This debate and subsequent vote on the Bork nomination as demanded by the nominee who has conceded, as has the President and his Senate supporters, will indeed result in certain defeat. The Senate is reversed and we vote to confirm him.

What legitimate national interest is to be served? The continuing bleeding of America will be further drawn out. Right or wrong, the deeply felt racial and human rights overtones of this nomination will continue to tear at the social and political fabric of America and Americans. The procedures to begin consideration of the next nominee are being needlessly delayed.

The entire Senate is somehow perceived as responsible for some public injustices possibly done Judge Bork during the confirmation process. Barring the at-times questionable legal linen of Bork’s past pronouncements supposedly will cleanse him in the Senate’s wash. Regardless of Bork’s merit as an intellect and legal scholar of note, whether he is a good or bad man—I believe the former—the central question is whether he is the individual to join the Highest Court of the land at this juncture. Let us think for a moment. Suppose the current will of the Senate is reversed and we vote to confirm. What would happen then? Chaos, I suggest, certain chaos. Every future decision of the Court in the years ahead would be suspect by the citizens at large. The Court would be crippled beyond belief and lose further credibility with the people. As I stated here on October 7—Congressional Record pages 26848-26850—enough is enough of this exercise in futility.

This Senator was initially impressed with Judge Bork’s nomination. His academic and legal credentials were impressive. I liked his law and order record. I liked his basic stated view, “that the Court’s place is not in the schools.” His purported abortion views were not unlike mine, but the National Catholic Register questioned his clarity of position even on this issue. Yet, I knew the Court made over 3,000 decisions a year and any evaluation of his merit needed a broad-based review. I wanted the confirmation process to work, and kept an open mind. As it evolved, my question was not that Judge Bork would interpret the Constitution and laws as he saw them, but whether he had 20/20 vision with or without blinders.

On Friday, October 2, at his request, I discussed this matter with the President. I was then undecided but convinced the confirmation was impossible, notwithstanding what my eventual position might be. Concerned that the “holy war” intensity of the national debate that was raging in America was not good for the country, the Court, or the Presidency, I urged withdrawal of the nomination. I was concerned then that we might needlessly be eventually involved in the confrontation that now engulfs us.

My considerable study of Judge Bork’s views and his previous positions on almost everything raised as many questions as it answered. What manner of man was this that had so many changing concepts it took him within the last 4 months to announce his acceptance of the equal protection clause of the 14th amendment?

Since I never saw or heard any of the negative media commercials about him, they did not affect my judgment. Secondhand information that has come to my attention on these concerns me they were overdone and not fair. Nevertheless, supporting or opposing the nomination on what was said or not said in paid commercials of any kind would be abdicating my responsibility as a U.S. Senator.

As a Senator who earlier thought I would support the nominee—no one was more surprised than the Senate’s chief vote counter Alan Cranston when I told him—when I saw in the final determination against was motivated primarily by Judge Bork’s unbounded determination signaled early to wreck all if he could not gain what he determined was rightfully his, his seat on the Supreme Court. His personal crusade in plunging America into this further confrontation was not surprising and confirmed what I had previously determined—he lacks judicial temperament. A potential jurist who lacks that, regardless of all other attributes, should not sit on the Highest Court in the land. He seems so enmeshed in his own aspirations and so disappointed in the known outcome that he has displayed an amazing side of his own stated motto of life, “wreak yourself upon the world.”

Notwithstanding Judge Bork’s significant legal credentials, we do not need one with his temperament to confront the Supreme Court. Certainly there must be others of his philosophical persuasion and intellect somewhere in the land who will serve with distinction. He cannot be the individual to separate completely the executive and judicial branches of the new form of Government. Early on there was discussion that there be no Presidential involvement in the selection of judges. A compromise was struck that provided that the President nominates, but that the Senate should approve or decline on all court appointments. In this specific regard, Alexander Hamilton said in 1788 in his Federalist Paper No. 78:

* * * Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the departments.

Notwithstanding the wishes of the President, notwithstanding the cries of unfairness, notwithstanding the demands of the nominee that a debate and vote may “vindicate” him, I hope and expect the Senate will reach the right decision. In this Senator’s view, the right decision, as politically painful as it may be, may preserve democracy. In so doing we will send the message loud and clear to the Presi-
dent and future Presidents, Judge Bork and his well-meaning supporters, that true to the Founding Fathers' doctrine, the people's Senate rejects the "monarch's" dictates and those of his nominee. The system worked. The President cannot "award" a Supreme Court appointment and no one "owns" a seat. We remain a constitutional dem­ocracy.

Mr. President, I reserve the remainder of my time and yield it back to the Senator who is in charge of time, and I yield the floor.

The PRESIDING OFFICER (Mr. SANFORD). The Senator from Alabama.

Mr. HEFLIN. Mr. President, it is time to bring reason and respect back into this confirmation process. Over the past 2 weeks, I think we, as Members of the Senate, have lost sight of our original purpose. The Senate is required to either grant or withhold our consent to the nomination of Judge Robert Bork to be an Associate Justice of the Supreme Court.

This responsibility goes to the heart of our duty as U.S. Senators because, with this duty, we are asked to examine our own commitment to equality and justice.

Much has been said over the past few weeks about the politicization of the nomination process. Well, the process has been politicized. But it has been politicized by both Democrats and Republicans and outside right-wing groups and left-wing groups. Neither side or group can cast blame without first accepting it. Before the President sent up the nomination of Judge Bork he knew the confirmation fight would be fierce. The President considered Judge Bork to be the most qualified person he could nominate. Others considered Judge Bork to be the most extreme.

Many of my colleagues have been angered by the solicitations, mass media campaigns and organized efforts of "outside groups" to generate constituent calls and letters. And they have said that because of these efforts, Members have been pressured and persuaded to vote in a certain way.

To be honest, many factors influence how a Senator votes. Among these are: How his or her constituents feel, the views of outside groups, and the opinions of colleagues. But while these factors may influence how a Senator votes, they do not dictate how a Senator votes. My vote is mine alone. I made the ultimate decision and I stand behind it. I have to live with my conscience.

For those who are willing to listen, I would like to explain why I voted as I did in committee and how I intend to vote in the full Senate. Before the hearings began, I cautioned my colleagues to keep an open mind and not prejudge this nominee. I have been criticized by some for fence straddling and not taking a position sooner. Yet, I believe the hearing process is meaningless if the verdict is in before the nominee has a chance to speak or before all of the witnesses have had an opportunity to participate. Doubts remained silent for two reasons: First, because I was truly undecided before and during the hearings—and second—out of respect for the process and the nominee.

In my opening statement I said:

"In determining the fitness of this nominee, let no mind be closed by either blind party allegiance or rigid ideological adherence. Let no Senator approach these hearings with anything less than an awesome sense of responsibility to do what is right in his or her own mind. We must each follow the mandates of our own conscience."

Since my committee vote, many of my colleagues have asked, some rather angrily, why I voted as I did. My answer is simple. Doubts were generated by a record compiled by the nominee, himself. The confirmation hearings of Judge Bork began on Sep­tember 15 and Judge Bork testified for 4 1/2 days. For the next week and a half the committee heard from 112 witnesses who either supported or opposed the nomination. I observed the demeanor of all the witnesses and especially that of the nominee. I read many of his opinions as well as his speeches and other writings. I went back and read a considerable portion of his testimony. When it was time to make my decision my mind was full of doubts about what this man would do if he was on the Supreme Court. I could not vote yes in view of my many doubts and because of the risks involved.

A lifetime position of the Supreme Court is too important to risk to a person who has exhibited—and may still possess—a proclivity for misreading the Constitution, I think it's your duty to go back and correct it. Moreover, you will from time to time get willful courts in an area of law and create judges that have nothing to do with the name of the Constitution. And if a new court comes in and says: Well, I respect that. What you have is a ratchet effect, with original meaning, because some judges feel free to make up new constitu­tionals and other judicial restraint follow precedent. I don't think precedent is all that important. I think the importance is what the framers were driving at, and to go back to that.

(Canisius College speech, October 8, 1985, quoted in committee print draft, vol. 1, at 523-24) (emphasis added.)

Judge Bork explained that this statement was made during a question and answer period and that it did not fully reflect his position on precedent.

But this statement and others were not made when Robert Bork was a professor, a lawyer, or a layman. They were made when he was a judge on the U.S. Court of Appeals for the D.C. Circuit.

In a January 1987 speech to the Federalist Society, Judge Bork stated:

"Certainly at the least, I would think an originalist judge would have no problem in overruling precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the Framers intended.

I don't think that in the field of constitutional law precedent is all that important. I do think that, for two reasons. One is historical and traditional. The court has never thought constitutional precedent was all that important. The reason being that no one ever thought that precedent was the tail that wags the dog. It is only a guide. It is a guide that may help one in the interpretation of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether for a judge to ignore or overturn a decision. That requires much careful thought.

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I have read and reread his speech to the Philadelphia Society which some have labeled "Bork's Wave Theory of Law Reform," made in April of 1987, approximately 3 months before he was nominated. Parts of the speech reflect carefully considered portions of that speech read like a speech of an extremist with an agenda. While it was an after-dinner speech; nevertheless, it was a carefully prepared 18-page address that can leave a person with the impression that he is advocating a movement to sweep the debris of nonoriginalist decisions of the Supreme Court off the books and out to sea.

Judge Bork has stated that there are certain areas of the law that are so settled in the lives of the American people and the traditions of society that he would not undo those decisions. He has mentioned the commerce clause, the legal tender cases, some first-amendment protections and the application of the equal-protection clause.

But in those crucial areas of the law which guarantee people's rights, where Judge Bork has criticized past decisions, and where he cannot find a constitutional basis for those decisions, it seems to me to place Judge Bork in a difficult dilemma. For, if a judge does not believe that the law he is asked to uphold is constitutional, then the precedent itself is on very shaky ground. A judge cannot build upon a foundation he cannot find.

I am fearful that, in adhering to a rigid judicial philosophy, Judge Bork would be tempted to play havoc with these decisions. Havoc can be played in many different ways, particularly in distinguishing constitutional principles in different factual settings. A few jurists consider it an "intellectual feast" to make distinctions between distinctions in order to further their particular agenda. But a jurist has an agenda, he can find ways to give an appearance of intellectual honesty through wordy and vague rationalizations. It is uncertain, in my mind, how he would treat essential fundamental rights.

As I said in my opening statement, the Supreme Court is indeed the people's Court. And the Court deals with real life issues that affect people. We are talking about fundamental rights—call it liberty—call it freedom—call it justice—the term can never capture the value it reflects.

I do not question Judge Bork's strong belief in the Constitution. I question his rigid adherence to a judicial philosophy that seems to ignore compassion for the individual embodied in the Constitution.

Do not misunderstand me. I do not believe in judicial activism. But I do believe a judge has a duty to stand firm behind the Constitution and this country. My Constitution finds room for those who have traveled a path far more difficult than that which I have traveled. And it allows for the growth of our Nation. The institutions of our Government must accommodate this growth. The words of Thomas Jefferson and others in the founding of the United States make it clear that philosophy may dictate his positions in the decisions of that court which would cause me great concern.

I want conservatives on the Federal bench. I hope, in time, when temper is more relaxed, people will realize that the fact I have supported all but two of President Reagan's judicial nominees will establish my record as supporting a conservative court. My opposition has come only when I had serious doubts about fairness, impartiality, and extremism.

"The die is cast." And the time has come for us to move ahead. This has been a week of both history and hysteria. We have been engaged in the Persian Gulf and we have witnessed a historic drop in the stock market. Now is not the time for this country to be divided or torn apart by emotion or anger. The battle has been fought. Some will claim victory. But, in my estimation, this week there are no winners—only survivors.

Let us vote and move on. Let the President forthwith nominate another conservative jurist. The American people will realize that the fact I have supported all but two of President Reagan's judicial nominees will establish my record as supporting a conservative court. My opposition has come only when I had serious doubts about fairness, impartiality, and extremism.

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Thank you, Mr. President.

The PRESIDING OFFICER. Who yields?

Mr. THURMOND. Mr. President, how long does the Senator want?

Mr. RUDMAN. I wonder if the distinguished ranking member of the committee would comment on me 20 minutes?

Mr. THURMOND. Mr. President, I approve 20 minutes.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. RUDMAN. Thank you, Mr. President, for the distinguished Senator from South Carolina.

Mr. President, when I decided to come over here this morning, I intended to come over here and give a fairly lengthy discussion of Judge Bork's record, but I believe that the judge himself now wishes these proceedings to come to a close, and I certainly respect that and, thus, do not intend to speak at any length this morning.

I am glad to see that there appears to be some civility that is returning to this process. I must say, without pointing fingers at anyone in particular, there are the casual opponents and opponents of this nomination, I, as a lawyer, as a former attorney general in my State, as one with great reverence for that court, am not comfortable with the way this matter has been handled.

I find it very unseemly—whether it was $1 or $2 million, that we have seen television ads featuring movie actors, published polls, newspaper ads on the one hand; and on the other hand statements from people who I would describe as being ultraconservative forecasting that this man would somehow change the agenda of America—and people on the talk shows saying that that is not any kind of an atmosphere in which to confirm a Justice of the U.S. Supreme Court.

I am delighted that here on the floor of the Senate, at least, in the main the discussions have been civilized. I respect each of my colleagues' right to analyze this as he or she wishes.

There are several things that have been said during the course of this debate that, it seems to me, need some further discussion. First, there has been great criticism of Judge Bork's writings as a law professor.

Well, evidently it has been a long, long time since most Members of this Chamber have been in a law school class. I would submit that if anyone here would like to go up to, let us say, the Harvard Law School, and listen to either Professor Miller or Professor Nisen challenge the class with what are legally outrageous ideas—and, yes, Mr. President, convince most of those immature minds of the correctness of their positions, in many cases, for the very purpose of evoking controversy and thought, they might have a different view. As a matter of fact, I think that Judge Bork made one big mistake in his life. He is far too intellectual, writes too much, is willing to provoke argument and is willing to challenge established principle. Judge Bork, I daresay, if judged on his writings might be judged to be something other than he is. But I choose not to judge him on his extracurricular writings or his law school record as a professor. I choose to judge him only on what he has done as a judge of the United States.

Mr. President, there have been some popular misstatements, and, I think, lack of understanding of what a circuit court does in this country. I have heard over and over again that circuit court's opinions are before the Supreme Court and that Judge Bork's actions on that court somehow do not
mean anything. If that were true, we would not need circuit courts. We could have a district court that would make the decision and then a computer which would decide whether the decision comported with the U.S. Supreme Court holdings. The fact is that more than 80 percent of the law in this country is still being established by circuit courts. It is, in my view, in many ways more important than the Supreme Court, because it is there that most Americans who have a dispute have their final hearing. And Judge Bork has made numerous decisions on that court.

I want to discuss some of those this morning and then talk about one case which seems to be the bellringer in the minds of some of my colleagues, Brandenburg versus Ohio, and discuss it in real terms.

I want to talk about four charges about Judge Bork which, it seems to me, are totally without any foundation. The first charge is that Judge Bork is unrepresentative of the mainstream on first amendment issues.

I am not going into the Ollman and Evans case at great length. I am just going to read the Judge's own words because they ought to be in the record. This is not a judge who is simply following stare decisis, the prior decisions of the U.S. Supreme Court.

In that case, a first amendment case, this is what he said:

"When we read charges and countercharges about a person in the midst of such a controversy we read them as hyperbolic, as part of the combat, and not as factual assertions we read them as hyperbolic, charges about a person in the midst of such a controversy." Then he continued: "That action can be characterized as "prior restraint," which comes before us bearing a presumption of unconstitutionality.

Those are the key pronouncements of Robert Bork in the first amendment cases. I submit that they are not only mainstream but I think to the core of his very conservative support. In this Senator's view, more liberal, in their construction than the U.S. Supreme Court cases upon which they are written.

Then there was the question of standing. To put that in terms so that the average American can understand it, that means that if I do not like what the Congress did today that I can sue the President, or if I do not like what the President does in the Persian Gulf we can sue the President, or the Secretary of Defense can sue the Congress, or the Secretary of Defense might even sue the Secretary of State. That is what standing is all about, who has the right to go into court.

Let me remind my colleagues. Mr. President, that this Congress can create standing for itself any time it wishes to do so by statute. We did so in Gramm-Rudman-Hollings. We gave the Congress standing and expedited procedures. We have that right.

Judge Bork does not believe that in this society we ought to have the unseemly event of various branches suing each other. He said, among other things:

"Every time a court expands the definition of standing, the definition of interest, it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts."

What he is saying is that the people's elected representatives ought to settle disputes. Courts should not settle those disputes.

That is a very reasonable point of view. And yet Judge Bork has been beatened about the head and shoulders for the position that standing ought to be granted sparingly within the three branches of Government.

Justice Powell stated:

I also believe that repeated and especially head-on confrontations between the lifetime-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence in the judiciary and the legitimacy of the judicial process are enhanced when judges and juries are able to act on their own unique sensitivities to the particular case before them, rather than that which is particularly those who are bordering on the frivolous be controlled so as to minimize their adverse impact upon the press freedom.

Then, of course, is the Washington Metropolitan Transit case, which has been discussed by the committee, in which someone wished to put posters on the Washington Metro system in opposition to the President and other matters. There was an attempt at prior restraint and the Judge said:

"That action can be characterized as "prior restraint," which comes before us bearing a presumption of unconstitutionality."

Is that the view of an extremist? Is Justice Powell out of the mainstream? As a matter of fact, that is the view, I believe, of a majority of thoughtful Federal judges who do not believe the proliferation of lawsuits can be brought by one branch upon the other.

Who knows what the future may hold in that area?

Another charge: Judge Bork is hostile to the minorities.

The Emory case, a circuit court decision reversing a lower court decision, in which a black naval officer asserted that the failure to promote him to the position of rear admiral was a result of racial discrimination. The court stated:

Where it is alleged, as it is here, that the Armed Forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempt from the civil rights provisions that protect the right of individuals.

In his dissent in the Hohri case, involving Japanese Americans who were interned, Judge Bork said:

So sweeping is the panel majority's new rule, the executive branch may remove American citizens from their homes and imprison them in camps, solely on the grounds of race, and the courts will not interfere, no consideration is given to the former and the violation of civil rights is ignored. So powerful is this rule that courts will not reexamine what was done even when facts establishing the absence of military necessity, or of any possible belief in its existence, become public and the period of military emergency is long past. So potent is the rule that it applies to all cases of discrimination or neglects as to which no claim of military necessity was made or could be made.

An extremist?

I will say once more that many of my conservative colleagues, I think, would have been somewhat disappoint
ed Robert Bork gotten to the U.S. Supreme Court.

Mr. President, the last thing I want to discuss—and I am sorry the chairman of the Judiciary Committee is not on the floor to hear it and I am sorry that my friend from Pennsylvania, Senator Harris W. F., who was scheduled to speak on May 5, the killings took place. I remember that.

It is curious to read Justice Douglas' views, who clearly would be thought of as a liberal member of the Court. He said about this whole issue:

The Judge remembers above all else that it is the Constitution which he swore to support and to defend, not the gloss which his predecessors have put on it. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him.

That is as good a paraphrase of what Robert Bork said in hours of testimony on this subject before the committee.

So, Mr. President, on the matter of precedent, hostility to minorities, views out of the mainstream, and disregard of the first amendment, I think there is an overwhelming conclusion that Robert Bork as a member of the circuit court has not only faithfully followed the law but has done. In one view, beyond what the Supreme Court has said in protecting the rights of minorities, the first amendment, and discrimination of all sorts.

Mr. President, that is what Judge Bork was concerned about in Brandenburg versus Ohio case.

That is what Judge Bork was concerned about in Brandenburg versus Ohio case.

As a matter of fact, in a discussion with Senator Leahy, he talked about his concerns about students who would be hurt in demonstrations on campus. Senator Leahy responded that he recalled that time.

Brandenburg versus Ohio places an enormously difficult test on law enforcement officials, Governors, and deans, as to whether to allow situations to go forth. Basically, I believe that first amendment restraint should be sparingly used, but I am not sure that Brandenburg is the only test. I do not have a better one and I do not think Judge Bork does yet, but all he was saying was there ought to be a better way to measure clear and present danger.

I guarantee you, had we had 100 students killed that night at the University of New Hampshire, the people of this country would have had a different view on prior restraint and I dare say so would I.

At any rate, I thought it was a story worth telling because so many of my friends in this Chamber have talked about Brandenburg versus Ohio like it is a laboratory test. Mr. President, I lived with that. Luckily I came out of it in one piece. Luckily no young New Hampshire students were killed that night.

But the fact is that that case allowed the event to go forward under circumstances which I believed were less than prudent. That is what the Supreme Court must decide. That is what the Senate has decided.

I say to my friend from Delaware, my friend in this Chamber, let me conclude by saying that the vote will be held today. Judge Bork will not be confirmed. I hope in the future people will learn something from this debate but more than from the debate from what happened outside of this Chamber.

I will repeat at the end what I said at the beginning. I do not think that the atmosphere in which this nominating process has been conducted has been fair. It has not been reasonable. It has been conducted with hyperbole, with accusations, with falsehoods.

To my friend Senator B. and my friends from South Carolina, that is not directed at the Judiciary Committee or its chairman or its ranking member. I think they held a hearing that was fair. The atmosphere outside of that committee was deplorable. If we intend to turn selecting Justices to the U.S. Supreme Court into an
election process, let us change the Constitution and let us elect Supreme Court Judges of the United States. Then they can be treated to the same delights that we get treated to as we campaign for reelection every 6 years. I thank the Chair.

The PRESIDING OFFICER (Mr. Graf) Who yields time?

Mr. BIDEN. I yield 5 minutes to the Senator from Michigan.

The PRESIDING OFFICER. The Senator from Delaware has yielded 5 minutes to the Senator from Michigan.

Mr. LEVIN. I thank the Senator from Delaware.

Mr. President, I will vote against the confirmation of Robert Bork to serve on the Supreme Court.

Too much of what I've seen and read of and by Judge Bork convinces me that while he may have earned a reputation as a legal scholar and a quick mind, he lacks the sense of justice and public spirit needed for service on our highest Court.

Equal rights and equal treatment for all Americans under our laws are cornerstones of so much that is sacred and meaningful to the country we call a democracy. The Constitution is broad enough, flexible enough, artfully enough drafted, to guarantee for all making it possible for us to celebrate this basic understanding of the free society. In fact, it is that very understanding of the Constitution that is always true, Judge Bork

Judge Bork sees the Constitution as a legal scholar and a quick mind, he lacks the sense of justice and public spirit needed for service on our highest Court.

The Constitution and the fundamental rights it guarantees defies our experience and our wisdoms. We know better and, thankfully, so have the vast majority of former and current Supreme Court Justices.

It is not only Judge Bork's unpalatable and unacceptable view of the Constitution and the individual rights afforded under it that disturbs me—it is also the way he has expressed those views. He regularly accompanies his views with rhetoric which is dogmatic and injudicious, at times incendiary and extreme. For example, Judge Bork found the Griswold decision protecting the right to privacy to be "an unprincipled decision." "Unprincipled," he said, and said further that "the Court could not reach the result in Griswold through principle." The Supreme Court decision, he said, forcing one person, one vote, in his view, was based on "no reputable theory." Justice Holmes' view of the first amendment, which Judge Bork concedes has shaped the modern view of free speech guarantees, is described by him as expressing a "terrible frivolity," and shaped a view of the first amendment which contains a "strange solicitude for subversive speech.

Judge Bork uses these extreme descriptions and ominous hints relative to the views of one of the greatest revered Supreme Court Justices and his opinions, which are cornerstones of some of our most basic freedoms.

Judge Bork has said that the "first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended." He has said that he doubted the poll tax which limited access to the polls "had much impact on the welfare of the Nation one way or the other." He said that the minimum wage legislation"is an article of faith with collectivist liberals." He condemned the Supreme Court decision banning literacy tests as "pernicious constitutional law." He said that nondiscrimination to public accommodations was based on a "principle of unsurpassed ugliness."

Some of Judge Bork's opinions have changed over time. But what seems not to have changed is his inflexible view of constitutional rights. For him, unlike Justice Holmes, the life of the law is logic, not experience. His view of the Constitution allows for little accommodation to changes in technology or history. Many important Supreme Court decisions which reflect an evolving view of the Constitution—decisions, which have resulted in the protection of important rights these past three decades—are, in Judge Bork's words, "pernicious," "improper," and "unprincipled" or "contrary to the law's purpose." That last bit of rhetoric is not only extreme, Judge Bork's description of Supreme Court opinions as "unconstitutional" tends to breed disrespect for the law and for the law's final arbiter in this country.

Judge Bork's strong denunciation of so much of the Supreme Court's work over these past 30 years is not merely injudicious. It also reveals a mindset that would seek to undo these decisions. Add to that chilling recent comment about "unconstitutional behavior by the Supreme Court." Judge Bork's statement in January 1987 that "Certainly, at the least, * * * an originalist Judge would have no problem whatever in overruling a nonoriginalist precedent before that precedent, by the very basis of his judicial philosophy, has no legitimacy.

In those telling words, Judge Bork does not mean an originalist judge, because of his originalist ideology, "certainly"—his words—"at the least"—his words—"would have no problem whatever"—again his words—in overturning much prece-
dent which I believed helped us achieve gains in the protection of rights now viewed as fundamental.

Judge Bork's approach is strikingly different from that of the Supreme Court Justice whose place he would take. Attorney General Edward H. Stennis wrote: "I never think of myself as having a judicial philosophy. I try to be careful to do justice to the particular case, rather than to try to write principles that will be new, or original."

Justice Benjamin Kaplan of Massachusetts' Supreme Judicial Court, put it this way: "The working judge is not and never has been a philosopher. He has no coherent system, no problem solver for all seasons, to which he can straightway refer the normative issues. Indeed, if he could envision such a system for himself, he would doubt that, as a judge, he was entitled to resort to it."

Judge Bork seems to have no such doubts.

Judge Bork's approach has been consistent. He has described himself at various stages of his life and professional career as a Socialist, a Libertarian, a Conservative, a strict Constructionist, an Originalist. His has been a constant quest for an overarching ideology that can govern the outcome of legal issues. His views seem to be unaffected by the anguishing complexities of a particular problem but seem governed, rather, by what he sees as the human consequences of his logical constructs. In the words of former Judge Shirley Hufstedler, Judge Bork has been marked by a determination "to develop constitutional litmus tests" so he can "avoid having to confront the grief and untidiness of the human condition."

I cannot give my consent to this nomination not because I doubt Judge Bork's honesty or intelligence. I do not. But to me one vital aspect of judicial philosophy has been marked by a determination "to develop constitutional litmus tests" so he can "avoid having to confront the grief and untidiness of the human condition."

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But like a majority of this body, I have found this nomination to be extremely troubling. Robert Bork is not merely a conservative. He is a man who has disagreed with the Supreme Court time and time again in matters of fundamental constitutional law. These disagreements I believe, go to the heart of how we read our Constitution, and I believe his appointment would be viewed as a repudiation by the Executive who nominated him and the Senate which confirmed him of what the Supreme Court has said the Constitution means in many areas.

I believe Judge Bork should be rejected by the Senate principally for four reasons, each of which is adequate to justify his rejection.

First, there is the substantive direction of his views on a variety of constitutional issues, from first amendment to privacy to voting rights to antitrust.

Second, there is Judge Bork's judicial philosophy—as opposed to ideology—which demonstrates an inappropriate deference to those with authority or power at the expense of individual liberties, not a true philosophy of "neutral principles" as he has professed.

Third, there are Judge Bork's re formulations, modifications, and newly expressed doubts concerning his previous views, and leaving doubt in this Senator's mind. Fourth, there is Judge Bork's troubling statements about precedent, some as recent as this year, which are especially disturbing in light of the number of Supreme Court decisions he has said were wrong.

On many matters of substance, one has a choice to make. Either Judge Bork is wrong, or the Supreme Court has been wrong. Moreover, the Supreme Court has on many occasions been exceedingly wrong if one agrees with him. But a review of his writings and opinions suggests that his writings were unconstitutional "pernicious." He has called the Supreme Court's outlawing of a Virginia State poll tax "wrongly decided." And when the Court held that universities may not use raw racial quotas but may consider race, among other factors, in making admissions decisions, Judge Bork disagreed and wrote a biting critique of the carefully crafted opinion written by Justice Powell.

We have a choice—the Supreme Court's position on civil rights, or Judge Bork's. I choose the Supreme Court and not Judge Bork.

We can make the same choice on matters of whether individuals have rights in connection with public education. The Supreme Court has said they do. Judge Bork has said they don't.

The Supreme Court held that public school officials may not require students to recite a State-sanctioned prayer at the beginning of each day. Judge Bork disagrees. Once again we can choose the Supreme Court or Judge Bork? I choose the Court.

Judge Bork has said the Supreme Court was wrong on antitrust matters, too, wrong when it found a constitutional intent under the antitrust laws to protect small businesses, and that the Congress is wrong on antitrust, accusing Congressmen of being "constitutionally incapable of the sustained rigor and consistent through that the fashioning of a rational antitrust policy requires."

I am concerned also by Judge Bork's refusal to recognize a right of privacy as implicit in the Constitution. The Supreme Court has long found such a right and this should be settled doctrine, no longer subject to dispute.

In an age of high-technology, of computerized data bases, of high-speed telecommunications, of sophisticated electronic surveillance techniques, it is absolutely essential that the privacy rights of all Americans be not only recognized, but protected. A judge who refuses to even recognize a right of privacy, is not a man whom I would feel safe entrusting with the responsibilities of protecting those rights in the late 20th century and beyond.

A full review of Judge Bork's criticisms of the Supreme Court reveal a judge who does not have minor disagreements with a few areas of constitutional doctrine. His writings, taken as a whole, suggest that he believes the Supreme Court has been seriously out of step with the Constitution. These are not political choices, nor even ideological. These are substantive judgments about judicial philosophy and attitude.

Judges Bork's elevation to the Court would constitute a decision by us to support the renunciation of much of the work the Supreme Court has done over several decades. To confirm to the Supreme Court a man who has opposed so many of the Court's decisions, decisions which remain the law of the land, is to send by such a confirmation a clear signal to the Court and to Nation alike that we, like Judge Bork, believe those decisions have been wrong.

The second reason Judge Bork should not be confirmed is his position that individual liberties cannot exist except insofar as they can be found according to a "neutral" reading of the Constitution.

Judge Bork has described these beliefs as a consequence of the need for judicial restraint. In Judge Bork's view, a judge's role is, in his own words, "to achieve the very results-oriented philosophy-as opposed to ideology-which demonstrates an inappropriate deference to those with authority or power at the expense of individual liberties, not a true philosophy of "neutral principles" as he has professed."

To discern how the framers' values, defined in the context of the world they knew, apply in the world we know.

But a review of his writings and opinions suggest however, that this "neutral" principle has not been followed by him in practice. Instead, he has shown selective allegiance to original intent jurisprudence in order to achieve the very results-oriented jurisprudence he has disavowed.

This is particularly apparent in the area of individual rights. Where he says there is a very limited scope to constitutionally protectable personal liberties, because only a few are clearly described in the text of the Constitution.

Yet in order to make this argument, Judge Bork has to ignore the plain language of the ninth amendment which says starkly that the listing of the rights in the Constitution do not disparage the people's inherent "unenumerated rights."

There is historical evidence that many of the framers were concerned that the adoption of a Bill of Rights, by its express inclusion of some rights, could be interpreted to exclude all
others, and that this was the reason the ninth amendment was adopted. While there is significant scholarly debate about the meaning and purpose of the ninth amendment, it has meaning. It cannot simply be disregarded. The propounder of "neutral" jurisprudence, Judge Bork, would do just that, relegating the ninth amendment to nothing more than, in Judge Bork’s words a “water blot” on the Constitution.

It is wondered how Judge Bork would justify this statement with his current view of himself as one adhering to the “original intent” of the framers, when Samuel Adams, Thomas Jefferson, John Hancock, and James Madison among others of our Founding Fathers emphasized the importance of the Bill of Rights, and urged its incorporation into the Constitution.

The third issue which merits Judge Bork’s rejection is his shifts of position during his confirmation hearings. Many have remarked on the almost casual disavowal of views which he has expressed strongly and frequently in his writings. A Supreme Court Justice is a lifetime appointment, and the shifts are not on small matters.

Perhaps the most significant shift appears in the context of the first amendment. In his now famous 1971 Indiana Law Review article, Judge Bork explicitly stated that, in his view, the First Amendment was adopted to protect “pornographic” speech. When Judge Bork wrote this article, he was a full professor at Yale Law School. He wrote that constitutional protection should be given “only to speech that is explicitly political.” He wrote that courts should not “protect any other form of expression, be it scientific, literary, or that variety of expression we call obscene or pornographic.”

In 1979, Judge Bork reaffirmed these views in a speech in Michigan. He said that “There is no occasion • • • for constitutional protection around forms of expression that do not directly feed the democratic process.” This is not a mainstream view of the first amendment.

Yet in the hearings, Judge Bork for the first time disavowed all of his earlier position on that. Not only does he say that he doesn’t believe it now, he says that he never really did believe it. When Chairman Biden asked him “When did you drop that idea?” Judge Bork responded, “Oh, in class right away.” He also said that “I have since been persuaded—in fact I was persuaded by my colleagues very quickly, that a bright line made no sense.” Judge Bork now tells us that “There is now a vast corpus of first amendment decisions that I accept as law. It does not disturb me. I have no desire to disturb that.”

Any reading of Judge Bork’s statements in 1971, in 1979, in 1984, and in 1987 prior to his nomination shows us clearly that Judge Bork did advocate constitutional protection for speech that was not protected by the First Amendment. It is hard to accept that only now has he seen the light and that is in the context of a Supreme Court nomination that he has shifted his views so substantially from what they were before.

We come at last to the issue of precedent. As my review of Judge Bork’s many disagreements with the Supreme Court indicates, there are a lot of decisions the Supreme Court has made which he never accepted. Anyone trained as a lawyer, or working in the legal system knows of the respect, indeed reverence, which must be given to precedent and to past decisions of the Supreme Court. We know that the principle of stare decisis is the cornerstone and foundation of our legal tradition.

But Judge Bork’s own words cast doubt as to how much he accepts this view when it comes to constitutional issues, the heart of the difficult work of a Supreme Court Justice.

Judge Bork has argued as recently as this year that—

“The role of precedent in constitutional law is less important than it is in a proper common law or statutory mode. * * If a constitutional judge comes to a firm conviction that the courts have misunderstood the intentions of the founders, the basic principle they voted, he is freer than when acting in his capacity as an interpreter of the common law or of a statute to overturn the precedent.”

Judge Bork went on to say further that—

“An original judge would have no problem whatever in overruling a nonoriginalist precedent, because that precedent by the very basis of his judicial philosophy has no legitimacy.

In other words, if Judge Bork believes the Supreme Court wrongly decided a constitutional case—any constitutional case—precedent need not be respected. He would have “no problem whatever in overruling a nonoriginalist precedent,” because that precedent was illegitimate.

We have seen that Robert Bork has disagreed with the Supreme Court on many constitutional matters precisely on this ground, that the rulings have been contrary to the supposed “original intent” of our Founding Fathers. Given these public pronouncements that a “constitutional judge” should feel free to overturn precedents he disagrees with, how can we do anything but take Judge Bork at his word and assume that for him such precedents are illegitimate, and may be overturned.

For this reason particularly, I believe his confirmation by the Senate would send a signal to the Supreme Court itself that is unmistakable and unmistakably wrong. It would be that we want to change the direction of the Court, that we want the Court to rethink the fundamental meaning of the Constitution on these issues, along the lines of the scholarly writings and legal position of Robert Bork.

Judge Bork has been nominated to the United States Supreme Court. He has rejected Supreme Court precedents dating back to the beginning of this century in several important areas of law. Perhaps Judge Bork is right in all of these cases, and the Supreme Court is wrong. Perhaps courts are unable to deal with economic and other important issues. Perhaps Congress is institutionally incapable of the sustained analysis and intellectual rigor which is essential for good lawmaking. Perhaps Judge Bork’s vision is clearer than that of Justices Holms, Brandeis, Douglas, and Powell. Perhaps all of these cases should be overturned. But perhaps Judge Bork is wrong.

I, for one, am not willing to take that chance. I cannot believe that a whole body of Supreme Court precedents, in vital areas such as civil rights, free speech, privacy, and so many other areas, should be overturned. I am not willing to substitute one man’s opinions for the whole body of law, a constitutional tradition of respect for precedent, which we have built in this country over the past 200 years.

There are other areas in which I also have serious problems with Judge Bork—on the War Powers Act, on his deference to the executive branch, on his rejection of congressional standing, and on his actions during Watergate. These issues have been discussed at length by my colleagues. I will not repeat all of those arguments now. But suffice it to say that the Senate has an obligation to take a very close look at this nominee, and to determine whether a man who has expressed such views throughout his legal career is a man whom we trust with the high responsibilities of an Associate Justice of the Supreme Court of the United States.

As Prof. Laurence Tribe of Harvard has written:

There has arisen the myth of the spineless Senate, which says that Senators always rubberstamp nominations and Presidents always get their way.

This has not been true historically. It is not true today. The Senate has a duty to closely examine the views, the writings, and the character of any man or woman nominated to the bench of our highest Court. To do any less would not be true to the original intent of the framers of our Constitution.

I believe that a careful examination of Judge Bork’s record reveals that he is neither a moderate, nor a conservative. He has consistently rejected precedents of the Supreme Court and settled areas of law. To place this man on the Supreme Court would be to reopen old wounds and to refight old
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battles. And for these reasons I oppose this nomination.

Mr. THURMOND. Mr. President, I yield 5 minutes to the distinguished Senator from Idaho [Mr. MCCLEURE].

The PRESIDING OFFICER. The Senator from Idaho is recognized.

Mr. MCCLEURE. I thank the Senator from South Carolina for yielding.

HOW THE PROGRAM OF DISINFORMATION CORRUPTED THE CONFIRMATION PROCESS

Mr. President, there is still time. But is there courage? Is there statesmanship? These things would be necessary, too. And as Judge Bork himself has said, we have no illusions.

WHY THE FEAR OF DEBATE?

We are told that this debate is “unnecessary.” Worse still, it is “political.” “Why the fear of debate?” asked the Senate. “Don’t bother with the facts.” “That nomination is history.” “Let’s move on.” We wonder why is it that those who have declared their intention to vote against Judge Bork—and who wish that the record they are a lynching mob—are so afraid of this debate. Are they afraid their minds will be changed? I doubt it. Are they afraid they will not be able to defend on the merits their rush to judgment? Probably. Are they afraid the truth about Judge Bork and about this process might actually get through to the American people? Absolutely.

I am frankly startled by the attitude of my colleagues who sought to avoid this debate. Except for the interest groups themselves, who are the perpetrators, almost no one has tried to deny that Judge Bork has been the target of a malicious, deceitful campaign—that an “evil caricature,” as his son put it, has been created through a sophisticated and highly cynical program of disinformation. Even the Washington Post, hardly an organ of rightwing orthodoxy, was moved to comment that “there has been an intellectual vulgarization and personal savagery of the attack, profoundly distorting the record and nature of the man.” And that is what the Post said about it. The Post. Given the near-universal recognition that the man has been grievously wronged and slandered in the public arena during this process, I would have thought my colleagues would not resist, but instead would insist, that this debate go forward so that the whole record would be appropriately vindicated. Surely, if the disinformation campaign has not guided Senators’ decisions on this nominee, as they contend, there could be no risk for my colleagues in having the record set straight. But there is risk—great risk.

There are Members of this body who are desperate—absolutely desperate—to keep from the American people the truth revealed here about just as the real record of Robert Bork has been kept from the American people. If our constituents only knew. If they only knew how of few of us took the time to look at the record before this nomination. If they only knew how of us walked onto this floor and parroted the very same distortions and lies that were exploded as false during the hearings and before and after the hearings. If they only knew how cowardly the submission to interest group pressure has been. If they only knew how all the contrived and rationalizations have been used to explain negative votes. If they knew, I think a lot of us wouldn’t be here after the next election.

So it is vital to keep up the front. The opponents of Judge Bork have to stick by their guns and stick together:

There’s only one way to beat him. What do we do? The guy is at the top of his field. He’s distinguished himself in every job he has ever held. There’s only one way to beat him. We’ll take his more controversial statements, buy some slick ads, and Bork him.

The expression may be so incomparably descriptive that judicial scholars decades from now, bemoaning the mediocrity of the once independent and respected American judiciary, will be moved to write that the loss of excellence came about because, whenever an exceptional nominee, liberal or conservative, was sent up here for confirmation, one side or the other “Borked” him.

It might be amusing if it were not such a real prospect based on what has happened here in the last 3 months. The President is right. This process has been a “political joke”—an insulting, demeaning, discrediting, bad, political joke. And the only people laughing today are the special-interest wizards and media gurus who plotted the strategy, waged the hate- and fearmongering campaign across the country, and now are confidently poised to celebrate the lynching here in this Chamber.

They are highly amused. And I am sure they find most hilarious of all the oh-so-solemn suggestion from the other side of the aisle that nothing the interest groups did—one of their millions spent on blatantly false advertising, none of the careful orchestration of the hearings, none of their incendiary rhetoric—had any impact at all on the Members of this body. It is one of the most absurd things I have ever heard come out of my colleagues’
The opposition * * * started its campaign with a meeting on Tuesday morning, June 30, at the Washington office of the Leadership Conference on Civil Rights. It brought together 45 organizations that would play central roles in the debate to come. The Bork nomination would trigger an epic battle, and Bork could be defeated.

The activity of the outside groups was coordinated with the initial activity inside the Senate. "The announcement of the nomination was made just before the July 4 recess," recalled an aide to one senior Judiciary Committee Democrat.

The opposition feared that senators would be asked about the nomination while they were home over the weekend, and that if there was not a strong alarm sounded, senators might not realize the danger and take action. Critics called Kennedy's statement shrill, but it appeared to have had the intended effect: "Freezing people into place," as one aide put it.

Over the next few days, only one Democrat, Sen. Ernest F. Hollings of South Carolina, and Bill Clinton, declared for Bork.

In the next week, the core of groups opposing Bork more than doubled. "The coalition," as members began calling it, met for a second time a few days after the nomination was announced.

"I was shocked," recalled one longtime liberal activist. "I had never seen a turnout like I saw on that day." The Leadership Conference's meeting room was "filled to capacity. Ralph Nader had to stand out in the hallway." Ultimately, the coalition would encompass the entire liberal spectrum: civil rights groups, women's organizations, consumer advocates, environmentalists, labor unions.

Within the Senate, Kennedy, Biden, Alan Cranston (D-Calif.), Howard M. Metzenbaum (D-Ohio) and Daniel K. Inouye (D-Hawaii) began to discuss organizing their fellow Democrats and the Senate's moderate Republicans against Bork.

Inouye dropped out of a leadership role because he is the Senate's Iran-contra investigating committee. The other four divided up the Senate and began personally lobbying their undecided senators about their concerns and responded with briefing books and papers prepared by their staffs and law professors who had agreed to work in the anti-Bork effort.

Beginning with a meeting on August 6 in Kennedy's office, Senate staff members met each Thursday afternoon with coalition representatives to map strategy and share information. The opposition was denied the usual strategy for attacking nominees. For more than half a century, the Senate had rejected presidential nominees only on grounds of ethical problems or a lack of qualifications. Bork, a former law professor now on the federal Court of Appeals for the District of Columbia, seemed immune to such attacks.

That left the opposition only one choice: to challenge Bork on the basis of his judicial philosophy. The first goal was to overcome the L.A. Times' observation that on wages, their campaign wage on such grounds was not only futile but improper. To that end, Biden delivered a major Senate speech on July 23, and People for the American Way, the best financed of the anti-Bork groups, sponsored a radio campaign in Washington urging senators to take a "close look" at Bork's record and ideas. The advertisements were the first installment in a million-dollar campaign to rally public opposition to Bork.

The next step of the campaign was to determine which parts of Bork's philosophy to emphasize. In early September, Gerald McEntee, president of the American Federation of State, County and Municipal Employees, one of the nation's largest unions and the one most likely to finance that effort, met with representatives of the Leadership Conference and other anti-Bork groups to pledge $40,000 that would be used to hire a polling firm to address that initial hurdle.

The firm, Martilla & Kiley, which was also closely linked to Biden's presidential campaign, delivered a poll and a confidential report to anti-Bork leaders that showed a potentially fatal weakness in the Administration's strategy and pointed to two themes that Bork's opponents would exploit. * * * * To defeat Bork, they said, opponents should make him receptive to skepticism about his "fair-mindedness." Bork's "civil rights record, more than anything else in his background," could create that skepticism, they suggested.

That conclusion led to what Bork's opponents now call their "Southern strategy." By emphasizing Bork's opposition to several themes in his career, his nomination, and the campaign would play on the concern held by both southern blacks and whites about "reopening old wounds" and "old battles."国民党 conservative Democrats could not afford to ignore.

Separately, the opposition coalition hit upon what became its "Yuppy strategy," emphasizing Bork's opposition to the idea of a constitutionally guaranteed right of privacy. That argument, opponents correctly guessed, would have particular appeal to the suburban constituents of moderate Republican senators from the Northeast and Northwest.

At the same time, Kennedy and Biden vigorously worked the telephones to line up witnesses for the Judiciary Committee's confirmation hearings, which were set to begin September 15. "Kennedy has a very strong network of people around the country," said an aide. "He worked that network very hard.

At first, "we couldn't find anybody who wanted to weigh in with a fist fight," said a Biden aide. But as the senators worked the phones, key witnesses began to fall into place. * * * *

After the first day of testimony, Bork supporters now say, they were (overmatched. The second day, they say, he began to improve. But as the hearings stretched on, Bork's opponents appeared to gain confidence and sharpen their questioning.

At the daily 8:30 a.m. meetings of leaders of the anti-Bork coalition at the American Civil Liberties Union, reports began to come in that increasing numbers of senators were expressing doubts about the nominee.

The reports were logged into a computer that kept a record of each senator's position. Working off a continuous transcript of the hearings, lawyers for the anti-Bork effort delivered analyses to reporters covering the hearings. By the end of Bork's testimony, the still-wobbly anti-Bork coalition now say, the campaign against the nomination was safely on the downhill slope.

That was the L.A. Times. They did a very thorough job. So did the Washington Post on October 4.

In early September, Michael Donilon, the president of a Boston polling firm and younger brother of a senior political adviser to Senate Judiciary Committee Chairman Joseph R. Biden, Jr. (D-Del.), drafted a strategy memo on the battle over confirmation of Supreme Court nominee Robert H. Bork.

Based on polling data collected in August by another Boston firm, Martilla & Kiley, Donilon's memo, entitled, "The Bork Nomination and the South," argued that the preponderance of opinion, that Bork would be "a popular choice among conservative southern whites was "just plain wrong."

"In fact," Donilon wrote, "the potential for the development of intense opposition to
Bork is perhaps greater in the South than in any other region."

Less than a month later, the Bork nomination was attacked largely because the potential opposition Donlon identified was mobilized by a massive public campaign built around three compelling themes.

"Bork poses the risk of reopening race relations battles which have been fought and put to rest," Donlon wrote. "Bork finds the southern tradition of populism. And (perhaps most surprising to some) Bork poses a challenge to a very strong pro-privacy movement among northern voters."

With Democrats in control of the Senate Judiciary Committee, the Bork confirmation hearings were built around these themes. As a result, the battle has been fought on terms dictated by Bork's opponents, throwing him and his Republican allies on the defensive from the start. **

Above all, it is the civil rights issues that turned the political tide against the nomination in the region of the country that held the key to the outcome. Bork, his opponents said repeatedly, threatened to "turn back the clock" to the days of turmoil and strife during the civil rights movement, out of which emerged a more stable and prosperous South.

The message was directed less at blacks, whose intense opposition to Bork was assumed, than to southern whites who have benefited from the new stability and who could tip the balance against Bork across the region.

That was the strategy, and it worked. So let's be honest about it. Let us stop telling our colleagues and the American people that disinformation campaign hasn't affected this confirmation process. When you do so, you are insulting their intelligence. The plain fact is the ad campaign, the hearings, and this process in general have been choreographed down to the last detail by the same group of people. One project, one goal, and one result—period.

KNUCKLING UNDER TO INTEREST GROUP PRESSURE

Now, with all due respect to the distinguished chairman of the Judiciary Committee, I would say that he is hardly in a position to speak with credibility about the role of the interests in this confirmation process. In November, 1986, he said, "Say the administration sends up Bork, and after our investigation he looks a lot like another Scalia. I'd have to vote for him, and if my colleagues earnestly insist to me, that's the medicine I'll have to take. I'm not TEDDY KENNEDY. My colleagues' investigation of Judge Bork must have been an amazingly quick one, based on those articles we just read, because the ink was barely dry on this nomination when he denounced it. Way back in July, the distinguished committee chairman said, "I don't have an open mind because I see no way, based on my knowledge of Bork's record, that I could vote for him." One newspaper reporter reported that the distinguished Senator met with "a group of civil rights leaders and other liberal activists" and came out "pledging to lead the fight against the nomination." Presumably, they gave the Senate the same completely objective description of the Bork record that they have shared with the American people in those television advertisements which have been so busy receiving liberal accolades for this victory—even a network's plaudit as "Person of the Week"—that he reportedly has been late for several strategy sessions on how to defeat the administration's next nominee. It is a busy, busy time for those in the special-interest disinformation business.

So when my colleagues earnestly insist to us that the folks back home that the interest groups' shameful disinformation campaign didn't pervert this process, they are saying it with a wink. They know the interest groups won't mind. The groups know how the game must be played. If they understand anything, they understand the necessity of hoodwinking and American people. They figured that out after their candidates for President carried a total of five States in a decade's worth of national elections.

Of course, every once in a while they slip up and we see how their world really works. For example, in early July one of my colleagues protested his independence and open mind on the issue of Judge Bork, only to have one of the leaders of his State's NAACP tell the Senate that the Senator's vote against Judge Bork was a foregone conclusion. "I have the votes in [this State] to defeat him," the NAACP leader said of the Senator. "When I get with my staff I'll get what I want. It's strictly politics." That is exactly what the opposition to Judge Bork is—strictly politics.

TWO PHONY LINES ABOUT THE HEARINGS

Now, the distinguished committee chairman is quick to point out the consensus from both sides of the aisle that the hearings were—to use his word—"fair." There is no denying that the Chair was a model of procedural fairness and personal politeness throughout those hearings. All agree on that. But the fairness of the process has nothing to do with the content of the statements made to the Senate. The Bar—friends, colleagues, and I—were doing our best to vigorously mislead—nor with the behavior of certain committee members, whose tirades directed at Judge Bork often sounded remarkably like People for the American Way newspaper ads and Gregory Peck scripts. When witnesses and Senators reject intellectual argument for emotion appeal, as leaders of the opposition repeatedly did—when a brilliant record is dissected disingenuously and even the most well-informed observers of perspective—there has not been a "fair" hearing in any realistic sense of the word.

As one columnist put it:

"There's nothing inherently wrong with a sufficiently voting "false." As one columnist put it:"

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cover up what has really happened here.

The Floor Speeches Tell the Story

Mr. President, if there was any doubt that the pressure groups and their well-financed disinformation program has had on this process, it was eliminated last week and the week before that. I was there when the ad was run and was present for the judgment on this nomination. Senator after Senator came to this Chamber and what the same slogans and the same distortions that have been peddled by the disinformers. I have studied the ads and the propaganda so widely circulated by the interest groups, and I have studied the record of Judge Bork. I have also studied the statements made by Senators on the floor and in the press in announcing their opposition to this nomination. My colleagues are men and women of goodwill, but I must tell you that in the last 2 weeks their words have been many of them.

Time and again charges exploded by Judge Bork and others during the hearings were repeated as fact on this floor. Time and again, the thoroughly disinformers. I have studied the ads and the propaganda so widely circulated by the interest groups, and I have studied the record of Judge Bork. I have also studied the statements made by Senators on the floor and in the press in announcing their opposition to this nomination. My colleagues are men and women of goodwill, but I must tell you that in the last 2 weeks their words have been many of them.

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October 23, 1987

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The reasoning of this bizarre and imaginary case, like that of Roe versus Wade, has been widely criticized by many respected legal scholars other than Judge Bork. There is little doubt that last year we unanimously confirmed one of its critics for the Supreme Court, Justice Sandra O'Connor, who has been quite strident in her opposition to Roe versus Wade.

But none of that matters. This judge somehow is different. He wants to invade the marital bedroom, comprehensively regulate reproduction, sterilize us, and who knows what else. That's the horrendous line that has been peddled: "Reproductive rights: You don't have any." "State-controlled pregnancy? It's not as far-fetched as it sounds." Or, as one especially inspired put it, "[S]tates could ** impose family quotas for population purposes, make abortion a crime, or sterilize anyone they choose."

Of course, none of those hysterical ravings has had a thing to do with what has gone on inside this Chamber.

One comment by a colleague I found especially interesting. In announcing his opposition to Judge Bork, this Southern Senator said,

I have found in Judge Bork's decisions a disturbing pattern that would sacrifice family relationships and the rights of children and parents to the perceived needs of the state.

Wow. If the Senator would step forward, I would like to take a look at those decisions because, if that is correct, I would consider a change of heart on this nomination myself. I am from a Southern State that for 30 years has struggled to heal the ugly wounds of racial strife. Can I vote to take a chance or a gamble with a man we do not know?

Another Senator from the South said bluntly: "It may be unfair to Judge Bork, but I can't take the risk." Well, it is unfair to Judge Bork, grossly unfair, especially since there is no risk. If the risk, the gamble, the chance is really there and those words are not just a smokescreen for a purely political vote, the Members who believe that owe it to Judge Bork and the Senate to come out from behind their rhetoric and show us where it is in the record. They won't because they can't.

STRIPPING US OF OUR PRIVACY

Mr. President, the disinfranchisement strategists latched on to privacy as another theme to target, and their success in that is also reflected in the floor speeches. One of my colleagues, for example, actually stated: "Mr. President, I am not prepared to vote for a Supreme Court nominee who has steadfastly refused to acknowledge that the people of America have constitutional rights to privacy—especially in the home." Do you suppose the Senator didn't bother to read or simply chose to ignore Judge Bork's testimony before the Judiciary Committee, in which he said:

No civilized person wants to live in a society without a lot of privacy in it. And the Framers, in fact, of the Constitution protected privacy in a variety of ways.

The first amendment protects the individual's freedom of speech, of religion. The free speech provision of the first amendment has been held to protect the privacy of membership lists and a person's associations in order to make the free exercise of religion. The free speech provision of the first amendment has been held to protect the privacy of membership lists and a person's associations in order to make the free exercise of religion effective. The fourth amendment protects the individual's home and office from unreasonable searches and seizures, and usually requires a warrant. The fifth amendment has a right against self-incrimination.

There is much more. There is a lot of privacy in the Constitution. Griswold, in which we were talking about a Connecticut statute which was unenforced against any individual except one, we have heard. Griswold involved a Connecticut statute which banned the use of contraceptives. And Justice Douglas entered that opinion, which said, with rather eloquent statement of how awful it would be to lose the police pounding into the marital bedroom. And it would be awful, and it would have been there in the fourth amendment.

Nobody ever tried to enforce that statute, but the police simply could not get into the marital bedroom. It is as if the legislatures are going to give the police a warrant to go into search, and if what map legislation is going to give the police a warrant to go in to search for signs of the use of contraceptives? I mean it is a wholly bizarre and imaginary case.

Big Business against the Little Guy

The third theme—besides civil rights and privacy—which the anti-Bork strategists targeted was the claim that Judge Bork always sides with big business against the little guy. Ralph Nader's group conducted a study and trotted out some statistics they
said supported that claim. But a response by the Justice Department showed how phony the Nader statistics were—such as including a labor union whose members do not have the same interests and so forth—and neither Ralph Nader nor anyone else tried to make much of a case for the probusiness allegation at the hearings.

Leveraging People for the American Way from using the phony statistics in an ad under the title, “Big Business is Always Right.” Nor did it keep one of my colleagues from lifting a chunk of his floor speech from the discredited Nader report. There they were again, Nader’s contrived statistics and his phony conclusions, right there in the Congressional Record, offered as justification for a “no” vote on Bork: “[He] voted against individuals and workers and in favor of the Government in 26 of 28 * * *”; “in favor of business and against the executive in 8 out of 8 * * *”; “in cases where individuals voted against their party, of which there were 14 in 14 split cases.” All contrived and demonstrably false.

I wonder how one explains to his colleagues it, as transparent as the glass on that door—is a massive amount of rationalization to cover up a massive submission to interest group pressure. What that makes it all the more alarming is that almost everyone concedes the pressure has been brought to bear on us through a premeditated campaign of distortion and deceit. I have never seen anything more unseemly in my time here. All the senators grasping at straws. Senators erecting straw men and then piously knocking them down. Senators trying to avoid the cleaning exercise of a genuine debate on the issues at hand. The right to a fair hearing. The right to have that hearing count for something. The right to be judged by impartial men and women willing and able to discern the truth, and to apply it, even if it means confronting the angry mob. Nothing that has been said or done up to now matters. Every Senator will have an opportunity to vote, and that vote is what will count. Our fellow citizen are watching us, and I want to share with you, in closing, a letter-to-the-editor that reveals how many of them view what we are about to do:

It is no wonder that public opinion polls show a majority of opposition to Judge Bork’s confirmation, almost surprising that he has as much support as he has, given the imagery that has been conveyed to the public at large. It is no wonder that a mob has gathered around the willow tree, after Senator Biden’s drumhead court, watching Senator Kennedy prepare the question. All the more shocking, they do not even feel a sense of shame, because of the comfort of the crowd itself. By forcing the senators to vote, to put their names in the history book, the president is forcing these good men to dig deeper into their consciences before they give the final word to Senator Kennedy to put the noose around Judge Bork’s neck, and with a final shout, kick Judge Bork under him. They should have to watch their fellow citizen, knowing he is innocent of all the foul charges raised against him, dangle from the noose, knowing that they did it to him. As with a lynching mob, a silence will follow, and these U.S. senators will have the rest of their lives and their grandchildren’s lives with the gnawing guilt of what they have done.

Mr. President, there is still time.

EXHIBIT 1

THE FRANKENSTEINING OF BORK

(By L. Gordon Crovitz)

Last July, the 45 groups plotting strategy against Judge Bork assigned one member the task of spending $40,000 on an opinion poll. The Los Angeles Times reports that the survey by the American Federation of State, County and Municipal Employees found political issues that could be exploited. The best prospects were civil rights. The conclusions were civil rights, aimed at Southerners fearful of “reopening old wounds,” and privacy rights, which the anti-Bork forces dubbed the Yuppie strategy. The campaign to defeat Judge Bork immediately became a campaign to distort his record to fit these public images.

The special interests may not consider themselves bound to honest debate, but the Judiciary Committee senators who echoed the groups’ distortions are in a bind. Judge Bork’s refusal to die a death of a thousand libels means they will have to explain on the Senate floor the stark contrast between their claims and his testimony.

Civil Rights. In his summary, Sen. Edward Kennedy (D., Mass.) issued a tirade raising the specter of Jim Crow laws. Judge Bork angrily replied, “If those charges were not so serious, the discrepancy between the evidence and what you say would be highly amusing.”

Judge Bork did write a magazine article in 1963 making the libertarian argument against coerced desegregation of private establishments almost 10 years ago. He cited his record, “I have upheld laws that outlaw racial discrimination. I have consistently supported Brown v. Board of Education.”

Instead, Judge Bork called this decision desegregating schools “perhaps the greatest moral achievement of our constitutional law.”

Does Judge Bork favor forced sterilization? This shocking claim was based on his unanimous ruling in Oil, Chemical and Atomic Workers International v. American Cyanamid. The Occupational Safety and Health Administration requires employers to prevent risks to fetuses. A pigmentation plant discovered lead levels in the air that could damage fetuses, but that could not possibly be reduced to safe levels. “Every woman of child-bearing age are hereby fired,” Judge Bork said. “What the company did was give women a choice: You can be transferred to another job, or we’ll transfer you. If you want to, surgical sterilization is available.”

Judge Bork said, “I think that is not a very difficult choice. When you are in a lower paying job, or if you want to, surgical sterilization is available.”
October 23, 1987

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question was, should they be given a choice? And is giving them a choice a hazard? We did not have a rule in place whether he was the one who made the complaint. But I have read the ruling suggested the women sued instead for unfair labor practices or sex discrimination. That case was eventually settled on those grounds.

Equal Protection. Several senators grilled Judge Bork on the 14th Amendment, which prohibits states from "denying to any person within its jurisdiction the equal protection of the laws." Sens. Biden, Kennedy and Metzenbaum insisted that he did not think the equal-protection clause applied to women. Sen. Arlen Specter (R., Penn.) engaged Judge Bork on the issue. Judge Bork said that the two judges Bork could allow was reasonable so that I would think that no group could be excluded." Sen. Specter then asked how much protection he would give women. Judge Bork's analysis turns out to be much more helpful to women than the current court approach.

The group criticized the Supreme Court for using different levels of scrutiny depending on the plaintiff. He prefers Justice John Paul Stevens' test that simply asks whether a reasonable difference exists between classes of people. He said he knew of only one situation where discrimination by race was reasonable, a case of a prison warder who after a race riot segregated the inmates by race.

Judge Bork said this reasonable-basis test was "very strange," but he disapproved of the 1948 opinion upholding a law denying bar licenses to women unless they were wives or daughters of male bar owners. "Discrimination between genders in the 19th century and which we assumed to be reasonable then," Judge Bork said, "no longer seem to anybody to be reasonable." As for Congress's prohibition on women in combat and the practice of public nudity in public areas, Judge Bork ruled only that as a procedural matter the 19th-century law could not stand. In Planned Parenthood's New Haven branch conspired with a politically friendly prosecutor to get a 1948 opinion upholding a law denying a case brought against it for unfair labor practices or sex discrimination. That case was eventually settled on those grounds.

The critics claim Judge Bork has a crabbed view of free speech. He testified that while he thought the Founders' main purpose was to protect political speech, other speech is also covered. He said about the Supreme Court, "The critical point starts from the political speech core, and that is the most strongly protected. . . . Moral speech and scientific speech, into fiction and so forth are also protected. Speech or print which is purely for sexual gratification, pornography or obscenity. . . .

What about school prayer? The Senate opponents cited a Washington Post report about a speech he gave in 1983 at the Brookings Institution. Judge Bork denied ever endorsing school prayer and cited a letter to the editor from Rabbi Joshua Handler. "Your reporter was not present at the meeting, I was," Rabbi Handler wrote. "I would have been greatly alarmed if Judge Bork had expressed any tendency to move away from Supreme Court rulings that say the separation of church and state was ordained at the Constitutional Convention. . . .

Perhaps Judge Bork denied there could be any absolute privacy right. Is there a right to incest, wife beating or price-fixing if done in private? he asked. He said there were respectable grounds for deciding the case. The Fourth Amendment means no police would ever have to go into bedrooms to check if a married couple was using contraceptives because no prosecutor would ever ask for, or allow, a warrant. If a prosecutor did bring a case, Judge Bork said it would be dismissed because of "desuetude." There was no fair warning of enforcement of an office romance. Judge Bork's civil-rights record is not as impressive as that of his predecessors. Judge Bork said he changed his views too often (he was a Marxist in his youth!) and his opinions were "utterly silly," brought a case, Judge Bork said it would be dismissed because of "desuetude." There was no fair warning of enforcement of an office romance. Judge Bork's civil-rights record is not as impressive as that of his predecessors. Judge Bork said he changed his views too often (he was a Marxist in his youth!) and his opinions were "utterly silly," but because the law was not being enforced and there was no prospect of its being enforced. The case was brought by Yale law professors who wanted to give the court a chance to consider the constitutionality of the law. Planned Parenthood's New Haven branch conspired with a politically friendly prosecutor to get a 1948 opinion upholding a law denying a case brought against it for unfair labor practices or sex discrimination. That case was eventually settled on those grounds.

The very next day was the beginning of my attending so many briefings," Ms. LaFontant said. "I don't know whether I would want to reopen such old national wounds?"

Robert Bork was the young associate in a Chicago law firm who in 1957 demanded that stewardesses get paid the same for equal work. Perhaps Judge Bork is who one wants to see his problem is simply that he became "divisive."

Judge Bork's alleged extremism and divisiveness are due to intentional distortions that made him appear what he is not and has never been. There is still time for senators to reconsider whether the brazen purveyors of disinformation deserve the reward of Judge Bork's scalp.

The Jim Crowing of Bork

(By L. Gordon Crovitz)

Who is this man a multi-million dollar ad campaign and a senator called "divisive"? He said would turn back the clock on civil rights to the days of segregated lunch counters. Who is this man who would want to reopen such old national wounds? Robert Bork was the young associate in a Chicago law firm who in 1957 demanded that stewardesses get paid the same for equal work. Perhaps Judge Bork is who one wants to see his problem is simply that he became "divisive."

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the Supreme Court making the winning arguments. Indeed, perhaps the most important development of Bork's civil rights record is his four years as the government's chief litigator. Solicitors general have great freedom to file and keep the claims of private litigants out of the courts in cases where they are not required to act as the government's defense lawyer. Mr. Bork used his position to argue more exclusively and more successfully against the dangers of government intervention into private relations even for a cause as noble as desegregation. He went to great lengths to defend the principle of freedom in this context," he wrote, "but the task ought not to be left to those Southern politicians who only a short while ago were defending laws that enforced racial segregation."

Robert Bork long ago rejected the extreme libertarian argument. The Civil Rights Act of 1964 "did an enormous amount to bring the country together and bring blacks into the mainstream," he said at his 1973 confirmation hearings as solicitor general. "That is the way I should have judged the statute in the first place instead of on the abstract libertarian principle. Does this sound like someone who would undo racial progress?"

**Voting Rights.** Critics of Judge Bork make the strong point that he has never blocked the device once used to deny blacks their right to vote. Judge Bork told the Judiciary Committee that it was his desire to bring the poll tax back into existence "not by force of will but by force of reason."

"He has criticized Harper v. Virginia Board of Education, the 1966 case that invalidated state poll taxes. But the case had nothing to do with race. The high court in Harper explicitly said that there was no evidence of any racially discriminatory application of the tax."

"Judge Bork told the committee that if the tax had been applied in a discriminatory fashion, it would have clearly been unconstitutional."

"Judge Bork's point was that if there is no racial discrimination, then there can be no equal-protection-clause justification to invalidate a state poll tax. The 24th Amendment, he noted, prohibited only federal poll taxes, intentionally leaving states free to assess such taxes if they chose. Judge Bork has said that if a state legislature adopted a poll tax it would be no worse than any state with a sales tax or a property tax."

**BLACK OPPRESSION BY ACTIVIST JUDGES**

Apart from Judge Bork's extraordinary civil-rights record, there is a strong argument that the nature of the man's views on the nature of the law should demand judicial restraint and an honest reading of the Constitution and its civil rights amendments. If justices of the Supreme Court make the Constitution mean what they like it to mean, the Supreme Court becomes another branch of government subject to buffeting by public opinion. The preponderance of powerful reasons to support Judge Bork was fatally undermined by a second factor in Judge Bork's favor was a fraction of the compassion for the truth that Robert Bork has shown for minorities. As it is, senators who take the time to review his record will find no honest argument that they or the country have anything to fear from a Justice Bork.
events pave the way to a demagogue, highbrow politicalized future where confirmation proceedings are concerned.

And finally there is the intelligence and propulsion of the movement of the man. On the opposite page today we print a piece by Judge Bork's journalist son, expressing fury and frustration that his father has been so crucially warped by the fight for his appointment. Robert Bork Jr. is surely right in protesting that his father is neither a "neanderthal" nor a "racist," nor the rest of that litany, and that the man is far from being the caricature presented. Judge Bork is also, on the evidence, one of the most thoroughly schooled and knowledgeable students of constitutional law ever nominated.

What, then, is enough to overcome all this? The impression, never disturbed throughout the hearing and never refuted by the nominee no matter how many questions just begged for such refutation, that he did not change in the one respect that matters, that the appointment has retained from his academic days an almost frightening trance.

The senators—all Republican—arrived at the Capitol through the law library of the Senate, where they crowded around the stocky federal appellate judge. It was an elaborate pep rally, "one participant called it.

The opposition had started its campaign with near-total silence. To all this, the pro-Bork side responded with a mixture of dread and anticipation. Judge Bork seemed to be soliciting their advice without heed—"freezing people into a hall to prevent them from speaking," one aide put it.

But the rally, if it buoyed Bork's spirits as its sponsors hoped, was an empty charade. They had agreed to work in the Senate's Liberal Group, and it was a man admired for his unpretentious style and personal wit—was nonetheless, in the words of Sen. Robert T. Stafford (R-Vt.), the wrong man at "the wrong time for the wrong place."

For both sides, the debate over putting Judge Robert H. Bork on the high court began months before Associate Justice Lewis F. Powell Jr. announced his retirement.

As long as last summer, when he nominated Judge Bork to the court. President Reagan sent a personal promise to Bork that he would be next, Administration officials said that the other side of the battle, liberal senators, their staffs and the outside groups that had battled Reagan on civil rights and social policy issues throughout his Administration had not been expecting a Bork nomination with a mixture of dread and anticipation.

Howard Baker

Baker was confirmed by the Senate in 1983 after a bruising battle with liberal senators, who had been expecting a Bork nomination with a mixture of dread and anticipation. Judge Bork seemed to be soliciting their advice without heed—"freezing people into a hall to prevent them from speaking," one aide put it.

But the rally, if it buoyed Bork's spirits as its sponsors hoped, was an empty charade. They had agreed to work in the Senate's Liberal Group, and it was a man admired for his unpretentious style and personal wit—was Nonetheless, in the words of Senate Majority Leader Robert C. Byrd (D-W.Va.), say they warned Baker that a Bork nomination would be controversial.

NOR WERE ALL REPUBLICANS ENTHUSIASTIC ABOUT BORK. Ten Republican senators, including Thurmond (R-S.C.), the senior Republican on the Judiciary Committee, for example, pushed the name of the man who in 1982 had been a federal appellate judge on the 4th Circuit in Richmond, Va.

Wilkins' name was submitted to the FBI for a check, along with Bork and federal appeals court judges Patrick J. Higginbotham of Dallas and J. Clifford Wallace of San Diego. But, senators later complained, Baker seemed to be soliciting their advice without heed. As Thurmond later was told, the President had made a promise to Bork.

Reagan redeemed that promise on July 1, Tuesday, the Administration almost immediately, and the opposition had started its campaign with near-total silence. To all this, the pro-Bork side responded with a mixture of dread and anticipation. Judge Bork seemed to be soliciting their advice without heed—"freezing people into a hall to prevent them from speaking," one aide put it.

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KENNEDY "FREEZES" COLLEAGUES

To forestall that possibility, Sen. Edward M. Kennedy (D-Mass.) issued a harsh statement opposing the nomination. It implied that putting Bork on the court could bring back the days of "back alley abortions" for women and "forced segregated lunch counters for blacks. Critics called Kennedy's statement shrill, but it appears to have had the intended effect—"freezing people into place," as one aide put it.

Over the next few days, only one Democ rat, Sen. Ernest F. Hollings of South Carolina, said that he would vote for Bork. The next week, the pro-Bork forces opposing Bork more than doubled. "The coalition," as members began calling it, met for a second time a few days after the nomination was announced.

"I was shocked," recalled one longtime liberal activist. "I had never seen a turnout like this. It was incredible."

Within the Senate, Kennedy, Biden, and Alan Cranston (D-Calif.), Howard M. Metzenbaum (D-Ohio) and Daniel K. Inouye (D-Hawaii) sought to discern their fellow Democrats and the Senate's moderate Republicans against Bork.

Inouye dropped out of a leadership role backing Bork. He was chairing a subcommittee of an overall Senate contra investigating committee. The other four divided up the Senate and began personally lobbying against Bork. They asked undecided senators about their concerns and responded with briefing books and papers prepared by their staffs and law professors who had agreed to work in the anti-Bork effort.

Beginning with a meeting on Aug. 6 in Kennedy's office, Senate staff members met with all senators to map strategy and share information. To all this, the pro-Bork side responded with a mixture of dread and anticipation. Judge Bork seemed to be soliciting their advice without heed—"freezing people into a hall to prevent them from speaking," one aide put it.

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"THAT'S NOT GOOD ENOUGH"

On the day the nomination was announced, Korolos said that Chief of Staff Baker asked him: "Do you think he can get by?" and I said: "I don't think he can."

"He said: 'That's not good enough.' And I said: 'Yes.'"

Throughout July and early August, Reagan and his top aides were occupied with the Iran-contra hearings, then Central America, the Persian Gulf and arms control. The looming threat that Bork might not do what United States Supreme Court Justice Byron White had said would not succeed, the firm reported. "When it comes to the Supreme Court, most Americans are not informed by the handwriting on the wall that "you have been weighed in the balance and found wanting.""

Bork's opponents declined to fight the nomination on the ground that it was not worth the effort. Bork's supporters now say, they were worried. The second day, they say, he began to improve. But as the hearings stretched on, Bork's opponents appeared to gain confidence and sharpen their questions.

At the 6:30 a.m. meetings of leaders of the anti-Bork coalition at the American Civil Liberties Union, reports began to come in that increasing numbers of lawmakers were expressing doubts about the nominee. The reports were logged into a computer that kept a record of each senator's position. Working off a continuous transcript of the hearings, lawyers for the anti-Bork effort analyzed the meetings to determine if the vote could be close and if there were expressing doubts about the nominee. The reports were logged into a computer that kept a record of each senator's position. Working off a continuous transcript of the hearings, lawyers for the anti-Bork effort analyzed the meetings to determine if the vote could be close and if there were expressing doubts about the nominee.

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With Democrats in control of the Senate Judiciary Committee, the Bork confirmation hearings were built around these themes, despite warnings that the party had fought on terms dictated by Bork's opponents, throwing him and his Republican allies on the defensive from the start.

Democrats patiently waited to keep fighting for confirmation. And the majority of southern Democratic senators with the Party's pro-business views that run counter to the Bork's automobile industry which is an important employer of the South's largest employer. ... Had Judge Bork's view of the Constitution prevailed over the past 30 years, my mouth would have been too busy to hate, but a city too oppressed to create.

The success of this campaign that focused on Bork's writings on civil rights and privacy issues was reflected in the corridor comments of southern Democrats and their formal statements announcing that they would vote against confirmation.

"There's a perception in Alabama—from a lot of whites as well as blacks—that Bork could bring an unsettling effect to the hotel and convention industry which is Atlanta's lifeblood and the city's number one economic engine that might never have found foot on American soil," Young told the committee.

Said that his own views-set out in a 25-year project for... "That's how he's driven the Bork nomination. A native of Alabama—made from a southern state that for many years has struggled to heal the ugly wounds of Jim Crow, he would instead be serving the national hero—he would instead be serving a jail sentence in Alabama and the nation's highest court began to fade.

But the trend against Bork in the South is clear and danger even then.

With blacks adamantly opposed to Bork and whites at best divided and moving strongly toward opposition, it was clear and manifestly put Bork's name to the Ford administration.

Had Judge Bork's truncated view of the Constitution, an interpretation that his critics said provided scant protection for unstat...tions are consistent with that calling, and the Bork's constitutional philosophy is a threat to civil rights because he believes in...
What's at stake is the integrity of the process by which we choose the nine justices of the Supreme Court, as well as the maintenance of our liberties. In the final analysis, the moral authority of that court is part of the Constitution itself, just as the Constitution is the bulwark of our liberties.

The key to the court's moral authority is its insulation from the corrosive forms of partisan or electoral politics. And that's why the massive multimedia campaign against Judge Bork was an offense against both court and Constitution.

As Judge Bork himself put it in insisting on a Senate vote, "Federal judges are not appointed to decide cases according to the latest opinion polls. They are appointed to decide cases impartially according to law."

If judicial nominees are treated like political candidates, "the effect will be to chill the climate in which judicial deliberations take place, to erode public confidence in the impartiality of courts and to endanger the independence of the judiciary."

In the course of a long intellectual odyssey, Judge Bork surely knew that words on paper—articles, speeches, debates—are the mark of his restless, inquiring mind that are rife with contradictions; he freely defended them, having tried them; he found them wanting.

But what The New Republic has colorfully described as his "wild ideological fumades followed by midcourse corrections" were fired in his role as a practitioner of the controversial arts, as a professor, writer and lecturer, often to provoke further thought on his own part and that of others. As solicitor general and as a Circuit Court of Appeals judge, he has been a model of meticulous, restrained jurisprudence.

His "conservatism" has consisted primarily of a firm belief that the role of judges is to interpret and apply the law, not to make it.

As a vigorous advocate of judicial restraint, his sharpest criticism of the courts has been for stepping their bounds and arrogating to themselves authority he believed they did not properly have.

This is not the record of a zealot out to impose his own agenda. It's the mark of a constitutionalist determined to preserve the authority of the Constitution and the integrity of the court.

In examining the record of Judge Bork's earlier years as intellectual provocateur, a senator might genuinely conclude that appointment is a better choice than a constitutionalist who never used the Ninth Amendment in the way he advocates.

What's at issue here is Mr. Tribe's pet phraseology, often a Pyrrhic victory rather than a precedent.

As senators judge on Judge Bork, let's understand what former Chief Justice Warren Burger meant when he told the Judiciary Committee that there's never been a confirmation hearing on a nomination for the Supreme Court that was free from political improprieties, misinformation."

Or what former University of Chicago Law Dean Gerhard Casper meant by accusing the committee of "political dishonesty" for using the latest techniques of distortion and deceit on a massive scale.

If Judge Bork loses the final floor vote, the campaign will have claimed its success. But it will then be doubly important to turn it into a Pyrrhic victory rather than a precedent.

[From the Washington Times]

WATCHING THE CEMENT CRUMBLE UNDER STRESS

(By Raymond Price)

There's nothing inherently wrong with a senator's voting "no" on a Supreme Court nomination because of a principled disagreement over constitutional interpretation. But there's a wry sense that organized protest groups might be using a public campaign of lies and slander, spreading deliberate disinformation and stirring hysteria, in order to block Senate consideration of a Supreme Court nomination even though they know the charges are false.

It's an even greater scandal when that campaign is run out of a "war room" (the operators' own term) in the Senate Office Building itself, helpfully provided for the purpose by Democratic members of the Judiciary Committee, and carefully scrutinized by the conduct of the committee's own hearings.

But here's what happened to the nomination of Robert H. Bork. The organized left hijacked the confirmation process, turning it into a media circus and using the latest techniques of distortion and manipulation.

It was a campaign consciously aimed at circumventing the normal deliberative processes of the Senate and substituting raw pressure from the streets, with vulnerable senators' constituencies whipped into hysteria by a new wave of lies.

If Judge Bork loses the final floor vote, the campaign will have claimed its success. But it will then be doubly important to turn it into a Pyrrhic victory rather than a precedent.
CONGRESSIONAL RECORD—SENATE

October 23, 1987

Whether or not Judge Bork is confirmed, this shabby treatment of the nation's most distinguished legal scholar and judge will not soon be forgotten. Both conservatives and liberals who hold dear the ideals of rational discourse and honest scholarship will be diminished in the eyes of the world. The result is likely to have lasting intellectual and political effects.

[Letters to the Editor]

The Lynching of Judge Bork

I'm pleased to see the president is determined to follow through on his nomination of Judge Bork to the Supreme Court, not withstanding it even though it appears the Senate will vote against the nomination.

The climate surrounding the nomination is that of an intellectual lynching mob. Sen. Kennedy, the American Civil Liberties Union, the National Association for the Advancement of Colored People and other elements of the establishment have whipped their constituents into a frenzy of hate for this good man, whom I have known for 10 years, characterizing him as almost beyond redemption for basic liberties, for his racism, his sexism, his determination to twist the will of the people in the mainstream, for common sense tells us that the only possible way he can have an impact is if the mainstream agrees with him.

After all, not even Robert Bork can turn a 1-0-8 vote into law.

NEW BRAUNFELS, TX.

Mr. McClure. Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Idaho has yielded the floor.

The Senator from Delaware.

Mr. BIDEN. Mr. President, I yield myself 2 minutes.

Lynch mobs—I have heard that phrase time and again here. It is posthumous. Let us talk just for the minute and a half that I have given myself about lynching mobs, public opinion polls, Judge Bork was doing very, very well with the public, until he testified. Then 499 million people watched him on television for 32 hours and when it was all over, I said to myself, "We do not like Judge Bork. He might be a fine man. We do not want him on the Court."

Senator Brokaw did not do that. The Senate did not do that. The committee did not do that.

For 32 hours he testified with the cameras on and if what the press tell me is correct up to 40 million people watched him.

I yield myself an additional minute.

Forty million people watched him.

He spoke. Time and again I raised the gavel and asked: Are you certain, Judge, you have had enough time to respond to the questions?

And when it was all over, I said to Judge Bork, Now, Judge Bork, do you think you got a fair hearing?

He said yes.

Anything else you want to say, Judge Bork?

No.

Anything at all you want to clarify? No.

Then the public opinion polls were taken and then the American people said Judge Bork should not be on the Supreme Court.

That should not in any way direct us here how we should vote. I do not care if all the American people say he should not be on the Court, if I thought he should be I would vote for him.

That is my sworn responsibility.

But this notion I heard this morning, lynching mobs, and I heard from another Senator this morning, $15 million, and I asked where I found them, they call that making things up out of whole cloth. It is bizarre. It is ridiculous.

Look at the record. Look at the polls that proponents of Judge Bork love to cite so much. We are not citing; they are citing.

After 32 hours of his testimony out of his mouth, his own words, the American public opinion polls changed.

But how in the world can Judge Bork be on the floor. I yield to my friend from Michigan 5 minutes.

Mr. RIEGEL. I thank the chairman of the committee for yielding to me.

Mr. President, I rise today to indicate my decision to vote against Judge Bork's nomination to the Supreme Court.

A growing bipartisan majority has reached the same conclusion here in the Senate.

I find it very striking that five of our Republican colleagues have come out in opposition to Judge Bork. It was obviously very difficult for them to do so, given the fact that the nomination comes from a President in their party.

I applaud them for their independence of mind and being willing to cast the vote that their conscience dictates.

But I think it is a very powerful showing of why this nomination is defective to have distinguished Senators on both sides of the aisle standing up with the rest of us to oppose Judge Bork.

Now, this is President Reagan's third nominee to the Supreme Court.

Like my colleagues I voted to confirm the first two, Sandra Day O'Connor and Antonin Scalia, both highly respected, conservative jurists.

It is significant I think that both O'Connor and Scalia were confirmed by the Senate without a single dissenting vote.

The Bork nomination, however, is profoundly different. It is highly controversial. It has split the Senate and caused great division across the country.

For the first time in history the American Bar Association's judicial screening panel was divided in its endorsement vote with several panel members finding him unqualified and voting that he not be seated.

This deep concern about Judge Bork stems from his long-held and emphatically stated views on many key subjects, including civil rights, the right to privacy, economic rights, women's rights, executive branch power, economic concentration, the environment and many others.

For example, Judge Bork does not believe that individuals have a constitutional right to privacy even in their own homes. This view could lead to a
tremendous expansion of Government power into people's lives.

On civil rights his views over a lifetime show a remarkable insensitivity to the pain and suffering, and it is not surprising that these groups find the prospect of Judge Bork on the Supreme Court personally threatening. These deep anxieties are something that Judge Bork has created himself with strong written and spoken words over many years that do suggest that the clock be turned back to notions long since rejected by our citizenry and our legal system.

And one only needs to read the powerful testimony of William Coleman, Transportation Secretary, in a previous Republican administration, and former Congresswoman, Barbara Jordan, to understand the power of the apprehension and the soundness for that apprehension coming from people in minority circumstances.

His stated ideas about changing long-standing precedent exemplified by the Supreme Court have caused many noted individuals and national organizations to come forward to oppose his nomination. It is highly unusual to find such diverse groups as the YWCA, the Sierra Club, the National Council of Churches and the National Council of Senior Citizens joining many other groups in coming out in opposition to Judge Bork as a Supreme Court nominee. This is a crucial vacancy on the Supreme Court and one of extraordinary importance to every citizen of our land.

I believe this position has to be filled by someone capable of hearing and holding the confidence and support of a very broad cross-section of the American people.

I think there are many prospective nominees today who are available that could unite the country and not cause such intense division and anxiety.

Former Senator Howard Baker is just one example, but there are many others.

It is essential that the deciding vote on a divided nine-person Court be a person of extraordinary legal skill with a mind fully open to hearing and weighing the complex arguments presented to the Court, because these cases and decisions go to the very heart of what life will be like for our people now and in the future.

The Supreme Court is also unique in that the judge is also a jury. As in any jury trial it is vital that a member of the jury not have a closed mind on the issue being presented before the facts in the case are even heard.

After hearing Judge Bork's testimony before the Judiciary Committee and before his legal writings over the years, it is clear he has rigid views, in some areas very extreme views on many complex legal issues, and I have serious doubts as to whether he can give a fair evaluation to a case if he has already made up his mind on the issue.

If a judge comes to the Court with a fixed view, then the whole process of opposing sides presenting a case is rendered meaningless.

I am also concerned about his central role in the Saturday night massacre.

The PRESIDING OFFICER. The Senator's 5 minutes have expired.

Mr. RIEGLE. I ask my colleagues for 3 additional minutes.

The PRESIDING OFFICER. The Senator from Delaware?

Mr. BIDEN. I yield 1 additional minute.

Mr. RIEGLE. I thank the Senator. I think his role in carrying out the firing of Archibald Cox was clearly part of an effort to obstruct justice at the time, as later events showed us.

Finally, let me say this in reference to some of the charges that have been made about the handling of this nomination.

There has been no lynching party here. None at all. This man has hung himself, and he has done it with his own words and writings of an extreme sort over many, many years. That is what has happened here. That is why there are at least five Republicans on the other side of the aisle that will vote against this nomination and an overwhelming number of the Members on this side of the aisle.

This man does not have the confidence of the American people because he is just too far out. And we cannot afford to have that on the Supreme Court, particularly at this time.

So I hope the President will send us a nomination that we can confirm. It is important that we move ahead and afford to have that on the Supreme Court.

The PRESIDING OFFICER. The Senator from Michigan yields the floor. Who yields time?

Mr. THURMOND. Mr. President, I yield 10 minutes to the distinguished Senator from Kansas.

The PRESIDING OFFICER. The Senator from South Carolina has yielded 10 minutes to the Senator from Kansas.

Mrs. KASSEBAUM. I thank the ranking member of the Judiciary Committee.

Mr. President, I want to express my support for the nomination of Judge Robert Bork as an Associate Justice of the Supreme Court. I am not a lawyer. I am not a constitutional scholar. I have not been one who has been weighing this decision for weeks of uncertainty.

I have looked at Robert Bork and have come to the conclusion he is an honest and decent man of great ability. While I disagree with some of his past views and even with some of his current thinking, I see no evidence that Judge Bork is a radical or an extremist who should be disqualified from service on the Court.

Mr. President, it goes without saying that this is a highly controversial nomination. It also is the first Supreme Court appointment to be subjected to all of the techniques we have been forced to accept in our political campaigns—30-second television ads, shallow sloganizing, distortion, innuendo, and the hysteria that can be generated only by skilled use of the mass media.

Judge Bork, a man of great intellect and substance whose views demand careful and reasoned debate, has been reduced to a symbol. Judge Bork's right and judicial decisions genuinely controversial statements as a private citizen and complex legal decisions as an appeals court judge, has been reduced to a prop for the use of competing factions.

Mr. President, I do not question the right of each Senator to make an independent decision about a nomination of this importance—it is imperative—not do I question the grounds other Senators have used in explaining their decisions, I am disturbed, however, by the terms of the public debate over this appointment, elements of which have shown up in our discussions in this Chamber.

One of the most troubling features of this public debate has been a profound distortion of the role of the judiciary. This distortion comes from a deliberate, or inadvertent, connection that some make between political motives and judicial decisions.

Mr. President, judges in our society frequently must make difficult and complicated decisions that clearly have political implications. It also is not unknown for a judge to apply his own political agenda to his interpretation of the law. However, we should not casually assume that any and every decision a judge makes is based on his political views.

For example, a judge might be called upon to decide whether the Nazi party, or the Communists or some other radical group, has a right to freedom of speech. In upholding that right, the judge clearly is ruling in favor of Nazis or Communists. We should not, however, make a leap to the conclusion that the judge therefore must support Nazis or Communists.

Unfortunately, Mr. President, this is the very kind of distortion that has too frequently entered the debate over Judge Bork. Some focus entirely on the result of his legal opinions and ignore or deliberately twist the legal reasoning that underlies his decisions.
In the shorthand used in this debate, if Judge Bork had ever ruled that basic usage in a right to freedom of speech, he would now be accused of supporting Nazis. The basis for such a decision—the constitutional guarantee of freedom of speech—would be ign­ 000, sideline or mechanistic reason­ 019, that was used as mere window dressing for his supposed personal prejudice.

A real-life example of this kind of distortion comes from a case we all have now heard a great deal about—Griswold versus Connecticut. In this case, the State of Connecticut passed a law banning the use of contraceptives even by married couples. The Supreme Court struck down this law as an unconstitutional violation of the right of privacy and the case became a precedent for other key decisions on the right of privacy, such as Roe versus Wade.

Judge Bork has strongly disagreed with this decision. He has said the Connecticut law was nutty and he could not possibly support it, but he said he could find no general right of privacy in the Constitution that would bar a State legislature from enacting such a law. In Judge Bork’s view, Congress or a legislature should be free to make political, policy-making decisions so long as they do not violate a fundamental constitutional principle.

Mr. President, I am no expert on constitutional law, but I suspect we could argue the merits and demerits of Griswold versus Connecticut, and Judge Bork’s view of that decision, for weeks. In fact, legal scholars have been arguing about it since it was handed down, and there are eminent, highly respected scholars on both sides of the issue.

However, in fairness to Judge Bork, and to ourselves, we should keep the debate on the real issue, not the phrasing or the personal support or the personal opposition. It is preposterous to suggest that Judge Bork’s view of Griswold demonstrates that he wants to put Federal police in every bedroom in America. It is also preposterous to say that Judge Bork believes that Americans have no right to privacy when he in fact has said that the Bill of Rights provides specific protections to our privacy.

What Judge Bork has said, as I understand it, is that there is no general constitutional provision that prohibits Government action against some types of private behavior. This certainly is a conservative view but it is not radical or extremist.

The real issue, and it is a difficult one, is where to draw the line. What is appropriate Government action and what is not? If we are to have an answer to this, it is a political and moral question that must be answered by our political institutions, the Congress and the legislatures, not from the bench unless government is violating protections laid down in the Bill of Rights.

This view is the core of Judge Bork’s philosophy of judicial restraint. That philosophy and Judge Bork’s use or misuse of it in making judicial decisions deserves full and fair examination. In fact, it surely is more than short-cuts arguments that Judge Bork believes legislatures have a right to pass nutty laws, therefore he wants more nutty laws.

In short, Mr. President, we should weigh the words and actions of Judge Bork, his record as Solicitor General, and his decisions as an appeals court judge.

In such vital areas of the law as civil rights, we should not limit our analysis to Judge Bork’s provocative statements in 1963 opposing the Public Accommodations Act or his criticisms of the legal reasoning used to strike down poll taxes, literacy tests, and other laws as a society have found objectionable.

Judge Bork’s past statements in this area raise legitimate concerns, but those concerns can only be addressed by carrying the analysis through to the present. We should also weigh the fact that as Solicitor General in the 1970’s, Judge Bork in several Government actions argued for a broader and fuller application of our civil rights laws to root out discrimination—broadening and deepening, rather than limiting, the Supreme Court was then willing to go.

We should also weigh his record on the bench in handing down decisions that affirmed the rights of minorities and women for equal opportunity and equal pay wherever it was denied, whether a private airline, the Department of State, the U.S. Navy.

Judge Bork’s record on civil rights is complex and may be open to fair consideration, but it is more than dis­ torted descriptions of him as a defend­ er of poll taxes and an advocate for returning to the days of segregated lunch counters.

Mr. President, I believe that the best indicator we have for how a Justice Bork would proceed on the Supreme Court is his record of the past 5 years as a member of the D.C. Court of Appeals. In 1982, we elevated Judge Bork to that high bench without a single dissenting vote, despite all of the past statements, articles, and writings that now have assumed such disproportion­ ate importance in this debate.

I am not a great fan of statistical analysis of judicial decisions, but it seems clear to me that over the past 5 years, Judge Bork has compiled some impressive statistics.

Of the 106 majority opinions written by Judge Bork, none has been overturned by the Supreme Court. Of the 295 other majority opinions Judge Bork joined, none has been overturned by the Supreme Court.

Whatever one wants to make of such statistics, I think it would be difficult to make a case that Judge Bork is a radical extremist. It would seem odd to me that a radical could vote with the circuit court majority 94 percent of the time and never be reversed by the Supreme Court.

Some dismiss these statistics as simply evidence that Judge Bork has been bound, as an appeals court judge, by Supreme Court precedents. In short, Judge Bork’s record demonstrates that he has followed the law and Supreme Court rulings, with near perfect fidelity, and yet he somehow would do just the opposite if confirmed to the Supreme Court.

Mr. President, in my own experi­ ence, an extremist or an ideologue never cares at all about maintaining the status quo or guarding precedent. The essence of a radical is the belief that he, and only he, is right. He cares nothing about the status quo except to bend it to his viewpoint, regardless of who opposes him.

Judge Bork’s record demonstrates that he is not such a radical or extremist. It demonstrates, instead, a clear understanding of the law and the role of the courts and great respect for both. This record indicates that while Judge Bork is on the con­ servative side of the spectrum, he is clearly within the mainstream of current judicial thought.

The PRESIDING OFFICER. Who yields time?

Mr. BIDEN. Mr. President, I yield to the distinguished Senator from Maryland, 5 minutes.

Ms. MIKULSKI. Thank you Mr. President. I rise to oppose the confirmation of Robert Bork to the Supreme Court. I do so after the most thorough consideration of the record—of Judge Bork, based on the testimony before the Judiciary Committee. I reviewed that testimony, as well as the testimony of several of the other witnesses who appeared before the committee.

The committee hearings and report, and the debate now proceeding in this body, vividly reflect the importance of this nomination, whatever the outcome may be. We have, for several months now, been engaged in a debate about the meaning of our Constitution—about its relevance to American society as it is today, has been in the past and as we hope it will be in the future. This nomination has forced us to reexamine the great truths our forefathers held self-evident: That all persons are created equal and endowed with inalienable rights to life, liberty, and the pursuit of happiness.

Of the 106 majority opinions written by Judge Bork, none has been overturned by the Supreme Court. Of the 295 other majority opinions Judge Bork joined, none has been overturned by the Supreme Court.

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proceedings. For 30 hours, the committee took testimony from the nominee himself.

Who could possibly be in a better position than the nominee himself to explain his views and philosophy, to demonstrate his judicial temperament, to establish for all concerned his understanding of the Constitution and of the freedoms we all cherish: Freedom of speech, freedom from government interference in the intimate details of our lives. Mr. Bork failed to persuade me that his view of the Constitution in any way is the same as the issue we all have been discussing.

But Mr. Bork was not alone before the committee. Overall, the committee took testimony from 112 witnesses: 62 supported the nomination, 48 opposed it, and two presented the evaluation of the American Bar Association's Standing Committee on Federal Judiciary. All told, the committee heard 87 hours of testimony. This remarkable record prompted the ranking minority member of the Committee, Senator THURMOND, to acknowledge that the hearings had, indeed, been fair.

Much has been said about whether the confirmation process through which Mr. Bork has gone has been a fair one. The extraordinary efforts made by the committee to assure a fair process answer that question with a resounding yes.

I submit, Mr. President, given the record, that the only issue now remaining is the very same issue we all have been discussing: Whether Mr. Bork has gone through a fair process.

I see no place on the Court for someone who would allow an employer to force its women employees to choose between being sterilized and keeping their jobs.

I see no place on the Court for someone who would close the courthouse doors to the veteran and the handicapped, denying that they have standing to sue in a court of law.

And I see no place on the Supreme Court for someone who would interpret the individual rights of women in a narrow way, and would turn back the clock 200 years ago, was the principle that ours was a Government of limited power. It is for these reasons that I see no room on the Supreme Court for Robert Bork.

If of the thousands of votes I will cast as a U.S. Senator, a vote on the confirmation of a nominee for the Supreme Court is among the most important and far reaching. It is the only vote I will ever cast that is irrevocable and ir-retrievable.

I approached this appointment with an open mind about the nominee. I have been convinced, however, that the appointment of Robert Bork to the Supreme Court would be a tragic step backward on the long, hard road this Nation has traveled to fulfill the promise of our Constitution. I believe we cannot afford a retreat. Neither can we afford to gamble with the precious constitutional guarantees that we Americans cherish. We, you the American people, deserve better.

I yield the floor.

The PRESIDING OFFICER (Mr. ADAMS). The Senator from Maryland has yielded the floor. Who yields time? The Senator from South Carolina?

Mr. THURMOND. The Senator from South Carolina yields 10 minutes.

The PRESIDING OFFICER. The Senator yields 10 minutes. The Senator from Wisconsin is recognized.

Mr. KASTEN. I thank the distinguished Senator for yielding.

Mr. President, I support Judge Bork's nomination to the Supreme Court, as I supported his nomination to the D.C. Circuit Court 5 years ago. Five years ago I was joined by 97 of my colleagues in confirming then-Professor Bork to the circuit court. There was no opposition.

Since I have been in the Senate, I have voted to confirm two Supreme Court Justices. Both were confirmed unanimously. One was Sandra Day O'Connor. The other was Antonin Scalia.

Both O'Connor and Scalia are "conservative justices." Both are advocates of judicial restraint. Both adhere to the view that it is the role of the people's elected representatives to make laws; the role of judges is to interpret the law and the Constitution.

Mr. President, what is the difference this time?

Judge Bork's intellect and incisive analysis of the Constitution on the D.C. circuit have been widely praised, even by his opponents. Have his opinions ever been overruled by the Supreme Court? No—not one opinion. Judge Bork has been associated with the D.C. circuit has been overturned by the Supreme Court. Not 1 out of over 400 cases.

I am not a lawyer. I am glad to leave detailed analysis of legal issues to those who have training in that field. But I have been here long enough to know when a nominee is being judged on his qualifications and when he is not.

Judge Bork has not been. He has not even been judged on his political views or the merit of his judicial philosophy. He has been subjected to a massive, highly organized campaign designed to convince Senators of a number of things about Judge Bork which are not now and never have been true.

It has been asserted repeatedly that Judge Bork is insensitive to the civil rights of blacks; is insensitive to the rights of women; takes a narrow view of the first amendment; opposes separation of church and state; is an automatic vote for business against consumers, and for government against the individual; does not recognize constitutional protection of privacy.

The record does not support any of these contentions. Nor does the record support the much more extreme charges that have been raised in the campaign against Judge Bork: That he favors forced sterilization of women, rogue police breaking down doors in the middle of the night, back-alley abortions, and government prohibition of family planning.

The record shows that these charges can only be the products of malice or fantasy. If Judge Bork were running for political office, he could respond in kind.

But Supreme Court Justices are not politicians. This Senate should not treat nominations to the Court as occasions for political campaigns. Senators should decide on Supreme Court nominations based on the record of hearings in the Judiciary Committee and on debate here on the Senate floor.

But this has not happened. Everyone has said that the hearings in the committee were fairly conducted. But
I wonder how much significance that has.

Many Senators announced their opposition to Judge Bork within days after the hearing ended, before the report had even been published. And immediately after they announced their opposition, we all started asking whether that the Senate debate should not take much time — after all, most Senators had already announced their positions.

The question must be asked, did Senators make up their minds based on the hearings, or in response to the public campaign against Judge Bork? Throughout his career in private practice, in the Justice Department, and as a Federal judge, Robert Bork’s primary concern has been to uphold the constitutional process. A court decision is never right or wrong to him simply because he agrees or disagrees with the result. One of the questions above is whether the court arrived at its conclusion for reasons soundly based on the Constitution and on the law.

Mr. President, I submit that this is precisely what the Supreme Court is supposed to do.

It would be easy to hold, as do so many of Judge Bork’s detractors, that what counts is the result of a court decision — if one doesn’t agree with the result, the decision is wrong and the court “insensitive.” These detractors appear to have two things in common:

First, they strongly believe in policies that most Americans and their elected representatives don’t agree with. Indeed, Judge Bork’s most vehement critics come from the extreme of the American political spectrum. It is no surprise that they favor activist judges creating new rights and overruling the people’s more conservative elected representatives. It is the only way they can win.

Second, they take the constitutional process for granted. I believe this is a chilling thought. American democracy is founded on this process. It has been us through two centuries of democracy — a history unequalled anywhere in the world.

It makes as much sense to take the land, water or air of this country for granted as to disregard the fundamental principles of the constitutional process — respect for the intent of the framers of the Constitution and respect for the principle that when the law needs to be changed it is the job of the legislature to change it.

These are the principles that lie at the core of Judge Bork’s record. Because he believes in these principles, I am sure that he will not arrive at some of the conclusions that his extreme critics would like him to. I am sure I will disagree with some of his conclusions myself.

But I am not looking for a Supreme Court Justice who will always agree with me. I am not looking for a Justice whose decisions I can predict with perfect accuracy 10 years down the road. I am looking for the ablest, soundest, most forceful legal mind we can find to uphold the constitutional process on the Supreme Court. Mr. President, Robert Bork has that kind of legal mind.

To reject Judge Bork’s nomination would do the Court no service; it would do this Senate no honor. He should be confirmed.

The PRESIDING OFFICER. Who yields time?

The Senator from South Carolina. Mr. THURMOND. Mr. President, I yield 1 hour, or as much of that time as may be required, to the Senator from Missouri.

The PRESIDING OFFICER. The Senator from Missouri, Senator DANFORTH, is recognized for 1 hour.

Mr. DANFORTH. Mr. President, I suppose when any Senator takes the floor of the Senate he hopes that somehow his speech will be a momentous event that will continue people’s minds and will influence the outcome of a vote. I have no such illusions whatever. I know that most, maybe all Senators, have now taken public positions on how they are going to vote on this nomination, and that the result is a foregone conclusion.

Yet this seems to me to be an immensely important subject and, therefore, I have asked the Senate’s indulgence and have asked that I be reserved for me. I want to assure everyone that I am not going to take any unnecessary time, but I do want to say what is very much on my mind.

Mr. President, I think that what has happened to the Senate and what has happened to Judge Bork is most unfortunate.

I think that it is unfortunate that we have cast aspersions on the reputation of this very good person, and I think that it is unfortunate that all of us — I am not pointing at one Senator or one side of this argument — have succeeded in transforming the nomination and the confirmation of a nominee to the U.S. Supreme Court into quite a political process in which everything goes, apparently, to win your point, either for or against Judge Bork.

It has had the earmarks of a political campaign, including 30-second television commercials and full-page newspaper ads, computerized telephone calls, and the like.

I think what has happened is unfair to Judge Bork, and I also think that it affects — threatens, really — the independence of the judiciary and particularly of the Supreme Court, and, therefore, I think it deserves our attention today.

Mr. President, when Judge Bork was first nominated by the President, I have to say I looked forward to the hearing in particular, and also the debate on the floor of the Senate, with great anticipation, because I thought that we were reserved for an event that was in store for us as a country. I thought we had the opportunity on nationwide television — because the hearings were televised gavel to gavel — to consider a very fundamental question for this country.

The question was the role and the scope and the power of the U.S. Supreme Court in particular, and of the Federal judiciary in general. I thought it was going to be a wonderful debate for several reasons. First, because Judge Bork is so bright and so articulate that I believed he would present his views with great force, with great intellectual power, and indeed he did. And I also believed that it was fitting that this debate on the role of the Supreme Court take place during the bicentennial year of our Constitution, because the fundamental constitutional question is, as it has always been, whose business is it to determine what laws reside in the Government? To what extent is it in the judiciary? To what extent is it in the legislative branch? To what extent is it in the executive?

I believed that this nomination and this televised hearing and this articulate spokesman for a point of view would give us an opportunity in our bicentennial year to reflect on the question of judicial power.

I believed it was an important opportunity to do that because, as Judge Bork himself wrote not too long ago, “We appear to be at a tipping point in the relationship between judicial power and democracy.”

We appear to be at a tipping point because the membership of the Supreme Court, the votes on the Supreme Court are in a balance and because, increasingly, questions are raised throughout the country about the role of the judiciary and about the role of the Supreme Court. So far all of those reasons I looked forward to this process with tremendous anticipation.

Of all the people in this country, Robert Bork is perhaps the foremost advocate of the concept of judicial restraint. Now, the concept of judicial restraint is not the only position in American jurisprudence. There is a range of thinking on what restraints, if any, should exist with respect to the Supreme Court. Some people believe that desirable objectives for the country must be achieved one way or another, and if they are not to be achieved through the legislative process then the Court should be active. That is not a sinister position. That is a position that has been taken by a lot of people. It has a distinguished lineage. But Judge Bork has been a person who has advocated a restrained Federal judiciary as opposed to an active
Federal judiciary. Judge Bork has written:

To the degree that the Constitution is not treated as law to be interpreted in convention with the legislative and judicial review is real. It is also serious. When the judiciary imposes upon democracy limits not found in the Constitution, it deprives Americans of a right that is found there, the right to make the laws to govern themselves. As courts intervene more frequently to set aside majoritarian outcomes, they teach the lesson that democratic processes are suspect, essentially unprincipled and untrustworthy.

That statement is the essence of Judge Bork. He views the issue as one concerning the power of the judiciary as opposed to the power of elected officials, the legislative branch of both the Federal and the State government, to make decisions relating to the values of the country. Judge Bork believes, and has been very forceful in stating his belief, that unless it is very clear that the Constitution precludes elected officials from acting, then the will of the people should be carried out through elected officials and not by appointed judges exercising their own philosophical beliefs.

Judge Bork also wrote:

Judges sometimes act because their conscience is shocked—even though the Constitution doesn’t give them the power to act. In such cases, they’re overriding democratic process in ways they are not authorized to do.

In other words, what Judge Bork has said is that it is not enough that a Federal judge is trying to be a fair person or a good person or do the right thing or the decent thing. That is not sufficient. If democracy is to work, even the most well-meaning judge must restrain himself even against the most ignorant legislature. The question is not, according to Judge Bork, the wisdom of the legislature, but who is the question is one of power. And he believes that unelected officials, judges, should not be supplanting their own views on political matters in place of the views of people who are elected and serve in the legislature.

That is what the debate should have been about, Mr. President, in the opinion of this Senator. That is what we should have been discussing: what is the role of the Supreme Court? What is the power, what is the restraint to be applied by the Court? If a court expands its interpretation of the Constitution, it thereby can restrict what the legislative branch can do. It was Justice Hugo Black who wrote that the Constitution is what the Supreme Court says it is. The Court can interpret the Constitution in any way it wants. We cannot do anything about it. And so the issue is the degree to which a judge is willing to respect the views of the elected officials with his own views. Will he be restrained by the words of the Constitution or, instead, will he attempt to read novel meanings into the Constitution so as to give greater latitude to its own opinions.

Now, Judge Bork’s view of judicial restraint has been described as extremist, as far out, but it has a very, very distinguished heritage in our country. Justice John Marshall said that the words of the Constitution are not to be interpreted in accordance with “objects not contemplated by the founders.”

Oliver Wendell Holmes said:

I think that the proper course is to recognize that a Supreme Court can do what ever it sees fit to do unless it is restrained by some expressed prohibition of the Constitution of the United States or of the State, thereby usurping powers belonging to the Congress and the legislatures of the several States.

With increasing frequency, a majority of the Court have not hesitated to exercise a negative power over any legislation, State or Federal, which does not conform to their economic notions.

Justice Hugo Black wrote:

There is no provision in the Constitution which empowers the Court to even confer the power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and to set aside their laws because of the Court’s belief that the legislative policies adopted are unreasonable, undue, arbitrary, capricious, or irrational. The adoption of such a loose, flexible, controlled standard for judicial restraint has been described as judicial freedom or judicial license.

The question on the fundamental question of whether the judicial power is to be limited to its judicial function, or whether, in the name of judicial freedom, it is to be dissolved into something else, as far out, but it has a very, very distinguished heritage in our country. As Justice Hugo Black once said that the Constitution is what the Supreme Court has said is that it is not enough that a Federal and the State courts should have been discussing: what is it that courts should be careful not to do. It was done with a judicial nomination before. Maybe it has. It was done with this one—frontal attack, and a frontal attack waging by various groups. I do not deny them the right to do it. But I say that it was peculiar, I think, when it took place with respect to a judicial nomination.

There was an article several weeks ago in the Boston Globe. And the article reports that one of the most distinguished and highly respected Members of this body, a man of obvious national reputation, Senator Kennedy, got on the phone last summer, and he made a whole series of phone calls. He made phone calls to black politicians in the South. He made phone calls to the Southern Christian Leadership Conference immediately before its convention began. He made calls to several dozen major labor leaders in the country enlisting their support in the campaign against Judge Bork.

So all of these groups were enlisted, and the basic basis I think of their opposition to Judge Bork was that he was portrayed to them as being a person who threatened the rights of blacks and the rights of women. I do not know that the words “racist” or “sexist” were ever used to describe
Women were frightened. But a lot of ship Council on Civil Rights, wrote: situations against minority rights, women's frightened. A lot has been written to want somebody who you think may want some crazy person on the privacy generally, and abortion choice in rights, criminal defendants' rights premere Court of the people were frightened. Blacks were about this, how blacks, particularly in it. And people were frightened by it. Joseph Rauh, counsel to the Leadership Council on Civil Rights, wrote: Judge Bork has made crystal clear his position against minority rights, women's rights, criminal defendants' rights privacy generally, and abortion choice in particular.

In the words of the Judiciary Committee's report, "Judge Bork's view of the Constitution disregards this country's tradition of human dignity. And people were frightened. Blacks were frightened. A lot has been written about this, how blacks, particularly in the South, went to southern Members of the Senate and said, "We elected you, and we are calling in the chips." Women were frightened. But a lot of other people were frightened, too, because you do not have to be black and you do not have to be a woman not to want some crazy person on the Supreme Court of the United States, not to want somebody who you think may be a sexist, may be opening old wounds, may be an extremist. None of us want that.

So the polls—interesting, is it not, that public opinion polls are taken for a Supreme Court nominee? The polls began to turn and the momentum to shift because frightened people in this country, their fear stirred up by telephone calls and by ads, implored us, "Please don't confirm the nomination of this person who is against basic civil rights and basic human dignity."

That was the picture of Robert Bork. It was not an argument anymore about judicial activism versus judicial restraint. It was not philosophical to any degree. It was a question of, "Stop this terrible person. Stop him at all costs."

People who have known Robert Bork for years could not believe what was happening to him. Week before last, a friend of mine at law school, one of the brightest people in my class, a liberal Democrat—we both studied under Judge Bork at Yale Law School. We knew him in his early days as a professor. We knew him when we were writing all this stuff that has been criticized. This friend of mine, the one who taught me to write, said to me one night: "What have they done to Bob Bork? Such a decent man."

It is really remarkable, I think, Mr. President, that that same note from people who knew him—what have they done to Bob Bork?—was repeated by so many people.

Twenty-three people in the Solicitor General's office, the people who worked with Judge Bork when he was Solicitor General, wrote a letter, and the letter they wrote said: "The Robert Bork we know bears no resemblance to the image of a closed-minded ideologue that some have sought to foster." Not a word about the image that has been fostered about him.

The wonderful testimony of Jewel LaFontant before the committee: a black woman who was Deputy Solicitor General under Bork. She said, "I must say that I do not recognize the Judge Bork I know from so much of what has been said."

Then, that beautiful op-ed piece in the Washington Post written by Robert Bork, Jr. What father would not have his heart swelled to be having a son write about him in such a way? The basic thrust of the piece was, just as my friend at law school said, what have they done to Bob Bork? What have they done to him?

Mr. President, at the same time that this picture is being painted of this grotesque person—"the Frankensteinizing of Robert Bork," as the Wall Street Journal put it—at the same time that this monster was being painted, the opposite position, the rebuttal, was being downplayed. Jewel LaFontant did testify in the Senate Judiciary Committee, but she testified one lunch hour. Only two Senators asked her questions, both of them Republicans.

Then there was the New York Times story, of course, about Prof. John Baker and the phone call he received, and I am not going to dwell on it. The St. Louis Post Dispatch this morning wrote an editorial, and the headline was, "It Was Wrong. But It Didn't Matter." Mr. President, injustice does matter. Even little bits of injustice matter.

Mr. President, the attack on Judge Bork was based very largely on Law Review articles that he wrote back when he was teaching at Yale Law School. It is the job of a law school professor to write. Their tenure depends on it, usually. It is the job of a law school professor to write articles, and it is the nature of the vehicles to criticize works of the U.S. Supreme Court. That is what law school professors do. Law school professors do not write articles saying, "Well, the Supreme Court is right and we are wrong." It is not done. Instead, they write articles criticizing the Supreme Court, criticizing its reasoning.

That is what Robert Bork did. He did it repeatedly. He did it very powerfully. And he criticized the reasoning of the Supreme Court. He criticized the reasoning of the Supreme Court in the case of Griswold versus Connecticut, and people say, "Oh, here's a person who is against privacy." He is not of Rost’s persuasion. He is, I would think, the Griswold case. Everybody criticized the Griswold case at the time.

When Griswold was decided, Mr. President, it was almost universally viewed as a very quirky case by the U.S. Supreme Court. Justice Black, for one, wrote a very strong dissent in Griswold versus Connecticut. Law review articles blossomed, criticizing the Griswold case. To criticize it, you did not have to be for being down that thing of people who are against nothing to do with a matter of public policy. It was a criticism of the reasoning in Griswold. That is what law professors did. Judge Bork did it.

Roe versus Wade: I have a daughter right now who is a third-year student at Yale Law School. She takes a course called "Feminism in the Law." If you can imagine a group of people who are likely to agree with the result of Roe versus Wade, it is a group of people who are against Roe versus Wade.

People who believe in abortion criticize the reasoning of Roe versus Wade. It does not mean that you want to have back-alley abortions. You can be for or against legalized abortion and criticize Roe versus Wade.

Baker versus Carr: Judge Bork has been attacked because he criticized the reasoning of the Supreme Court in the landmark reapportionment case of Baker versus Carr. Many people did, in its day. It is an old issue now. It is behind us. But when Baker versus Carr was decided, it overruled a previous decision of the U.S. Supreme Court—it overruled the Court, itself; it overruled the decision by Justice Frankfurter, who said that if the courts get in the business of drawing district lines and reapportioning legislative districts, they will, in Judge Frankfurter's words, get into the legis­lative thicket. Everybody criticized Baker versus Carr. Everybody did not, I guess, but it was certainly common in its time to criticize it.

It is said, with respect to the case of EuropeanVirgo versus Washington, that the dollars of poll options, the poll tax, that Judge Bork is somehow for poll taxes. He is not. He
said he was not. But he said he could find no legal reasoning for holding that a nondiscriminatory poll tax was unconstitutional; and in so stating, he joined the reasoning of such eminent Supreme Court Justices as Harlan, Stone, Frankfurter, Jackson, Brandeis, Cordoza, and Black, who at one time or another decided exactly the same thing.

For a law professor to criticize the reasoning of the Court does not mean that the law professor is for poll taxes or for malapportioned legislation districts, or for back-alley abortions or for police barging into the bedroom.

But it has been said that Judge Bork is out of the mainstream.

Mr. President, if Judge Bork was out of the mainstream of American jurisprudence and American life he would not be supported in his nomination by former Chief Justice Burger and by Justice Stevens. He would not be supported by former Attorney General Griffin Bell, by former advisor to President Carter, Lloyd Cutler.

Here is a man who has never been reversed by the U.S. Supreme Court. If he was out of the mainstream we would have expected him to have been reversed a few times and if he was out of the mainstream because of articles that he wrote when he was a law professor, Mr. President, why did we confirm him 5½ years ago when he was the President's nominee for the Court of Appeals for the District of Columbia, unanimously? Members who are now on the Judiciary Committee voted for him 5 or 6 years ago when he was nominated for the court of appeals.

It is said that he would open old wounds on racial matters. Here is a man who when his law firm in Chicago said that it was going to limit the number of Jewish lawyers it hired, Bob Bork, then a young partner at the law firm, in a vulnerable position as a partner and said that he would not tolerate this. And here is a man who, when Jewell LaPontant, the Deputy Solicitor General and a black woman, said she was being excluded from certain meetings, seethed inside and made sure that those meetings were open to her.

The description, the mental picture that has been painted of Robert Bork as being a person who opens old wounds, and so on, does not square with Judge Bork's record, and I would not tolerate this. And here is a man who called Brown versus Board of Education perhaps the greatest achievement of our constitutional law, and it is said, "Oh, he is going to open old wounds."

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John Simon, a colleague of Judge Bork at Yale Law School, a person who has long participated in the civil rights movement, the author of a book called "The Ethical Investor," who formerSenators are listening for the answers that they want to hear to specific matters that may or may not come before the Supreme Court.

Now, when a candidate for a Cabinet position goes around and sees Members of the Senate, he expects such questions and he expects to maybe make some promises. I do not think Supreme Court Justices should have to make promises.

And I think the other thing that is wrong with this whole process is that it says to people who aspire to some day be on the U.S. Supreme Court:

When you decide a case, if you are now in a lower court, or when you write a Law Review article, bear in mind how it is going to be characterized during the confirmation process. Bear in mind how your decisions might be characterized in newspaper ads, bear in mind how it is going to be characterized in television commercials.

If another American Cyanamid case comes up do not decide it on the basis of the law. If an American Cyanamid case comes up and you can find no basis in the law for imposing a fine on American Cyanamid, fine them anyhow because if you do not you will be accused of being pro-stereilization.

If you are a professor and you doubt the Court's reasoning in a case like Griswold v. Connecticut or Baker v. Carr, keep your peace.

Mr. President, I would suggest that the precedent that we are setting in the U.S. Senate by our vote against Judge Bork is a precedent which is contrary to the principle of an inde
Create that impression in the academic community and he is dead. He has been assassinated. What are we saying for future academics who may at some time be considered for the Federal Judiciary? I say to Mr. President, what has happened to Robert Bork is wrong. It is wrong. And I am not the only one who recognizes that.

A lot of people say, "Oh, it is inflammatory, the tendency to call it a lynching." I did not call it a lynching. The Washington Post did. The Washington Post that came out against Judge Bork called this a lynching.

And I have talked to Members of the Senate who have already announced that they are going to vote against Judge Bork and they are sheepish about it. I say to them, "What has happened to this man just is not right." And they nod, and a little smile comes over their face, a sheepish smile, and they say, "I know, I know."

It is wrong. And, Mr. President, we are responsible here in the Senate. The man has been trashed in our kitchen. Some of us helped generate the trashings. Others of us yielded to it. But all of us, myself included, all of us have been accomplices to it. All of us who have not spoken out have been accomplices to it. All of us who have sat there, not just members of the subcommittee, but Members of the Senate, and let these ads go on and let this trash go on and let this good man be characterized as some sort of a Frankenstein's monster without raising a voice against it, all of us are accomplices.

And so is the press. And so is the press. Why did not a principled paper like the Washington Post speak out against this whole mischaracterization of this human being? Why does the St. Louis Post Dispatch—a paper I often disagree with, of course, but it has a tradition, a tradition of standing in our house. Some of us helped generate the trashings. Others of us yielded to it. But all of us, myself included, all of us have been accomplices to it. All of us who have not spoken out have been accomplices to it. All of us who have sat there, not just members of the subcommittee, but Members of the Senate, and let these ads go on and let this trash go on and let this good man be characterized as some sort of a Frankenstein's monster without raising a voice against it, all of us are accomplices.

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I just want the record to show that at this point, I yield the floor.

Mr. DANFORTH. Mr. President, do I still have time?

The PRESIDING OFFICER. The Senator has 6 minutes remaining.

Mr. DANFORTH. Mr. President, I just want to reiterate my fundamental point because I think it was misunderstood. I think that clearly there is room for disagreement on matters of judicial philosophy and clearly, law school professors disagree on matters of judicial philosophy as a matter of course. That is what law school is all about. That is not the point.

The point is this. The battle—I am not talking about the Senator from Delaware. The battle as far as the country was concerned was not waged on the issue of judicial philosophy at all. It was not waged on the basic questions of judicial activism or judicial restraint, that age-old conflict on which people have disagreed. It was waged, instead, by those who would and did characterize Judge Bork as a person who was a threat to basic values in this country. They characterized him as the Wall Street Journal, as a Frankenstein. They characterized him as a bad person.

Mr. BIDEN. Mr. President, back on my time for a moment—

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Mr. President, on my time?

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Mr. President, in 15 seconds, the answer is that it was spinning up of interest groups. It was the interest groups' pressure and the interest groups calling in the chits.

I yield the balance of my time to my colleagues from Missouri.

Mr. BOND. Mr. President, I may be the only remaining Senator who has not spoken about Judge Bork. As a freshman Member of this body I had looked forward, as my distinguished senior colleague had pointed out, to a discussion of the issues on the floor. Unfortunately the ball game was over by the time the discussion started.

I would associate myself with the very compelling arguments that my distinguished senior colleague has made, and also the arguments made by the distinguished senior Senator from Washington, the senior Senator from Alaska, the junior Senator from Missouri. These are arguments that I believe, had they been listened to, would have influenced and would have secured the confirmation of Judge Bork. I regret that we have come to a political campaign where we are going to charge that the process was influenced by the power of special interest groups. I am sad that my first experi-
ence with a Supreme Court nomination has shown the way for what I fear will be a continued political campaign waged for and against the future nominees of both Democratic and Republican Presidents. I yield the floor.

Mr. MELCHER addressed the Chair. The PRESIDING OFFICER. The Senator from Montana.

Mr. MELCHER. I understand under the agreement I have 20 minutes.

The PRESIDING OFFICER. The Senator from Montana is recognized.

Mr. MELCHER. Mr. President, I have remarks to make which can be divided into three parts. First of all, the political aspects of the nomination; second, the effect that this has had on the country; third, why I must object to Judge Bork's nomination to the Supreme Court.

Mr. President, of course this is political. The Senate has to vote. Any time there is a confrontation, any time there is controversy on a vote here in the Senate, of course it can be very political.

I do not advocate that, but that is the way it started out, from the time that the representatives of the administration came up to see Senator BYRD, the majority leader, and said, "Here is a number of people that the President is looking at to select one, one of them to be the nominee for the Supreme Court candidacy."

Senator Byrd responded that if they did choose Judge Bork, it would likely be controversial and would likely take some time. The administration or the President saw fit, despite that, to send up the name of Judge Bork. I am not critical of the President for doing that. But once it started that process, it was clear that it would be controversial; that it would take some time.

There is too much time that has been spent on this nomination, and it has not been spent on the nomination of a Supreme Court justice, because of the political aspects of it.

I am also not critical of any group that wants to stir up the grassroots people of this country to put in their input, to say yes or no, this is how you should vote, to write to their Senator to speak out on it. That is the political process we have and it is a very good, fine political process.

We cannot deny to the people to stir up the pot if they want to and get everybody to call if they want to do so, or write letters. That is part of the American tradition and it is constitutional. After all, who is to defy what has worked so well over the past 200 years of this system of Government?

On the easel beside me I have a copy of a full-page ad that was carried in the Helena Independent Record. Helena is our capital. The Independent Record is published here daily. This appeared in this Monday's edition. I just draw your attention to what the ad says. It says:

You can tell a Senator by the company he keeps.

This has been sent to us on a telecopier and we pieced it together. Here is my picture. It does not show up very well from the telecopier, but I presume it is one of the pictures we have sent to the Helena Independent Record, and I presume I look pretty good in it. You cannot tell from this, though. However, that is beside the point.

What does the ad say? It says Senator John MELCHER, and it lists three other Senators and a number of organizations. That is what all this is about. These are different organizations.

Well, I have heard of the American Civil Liberties Union. I have heard of the National Organization for Women. Most of these I have not heard of. Most of these I have not heard of. Why? Because 6 of the organizations are homosexual organizations, 6 out of the 15 are homosexual organizations.

What does this mean? Of course, the ad also says who sponsors it, the Conservative Caucus. The ad also says that whoever reads the ad should call me and say, "Why don't you vote for Judge Bork?"

On the other side, opposite that, the ad says, "Send some money."

It is not an unusual ad, except for one thing. What is unusual about the ad is that six homosexual organizations are listed. What are they trying to demonstrate in that?

How did people react to the ad? Well, we kept track of the calls we had in my Helena office. Helena is not a big city. It is a little over 30,000 in population. I do not know what the circulation of the newspaper is, but it is the daily newspaper in that community. Here are the results since it appeared to call my number in my Helena office. Ninety-three people called and objected to the ad. Some of them said, "I do not care which way you vote." Some said to vote for Bork or vote against Bork, but they objected to the ad.

But out of all of the calls that came up until quitting time last night—I did not check to see if they had any calls today, but they have been slowing down—only 14 for any reason said, "Vote for Bork."

The reaction to the ad was bad. It is probably summarized in a very short editorial that appeared in the Helena Independent Record on Wednesday. The full-page ad was published in that newspaper Monday afternoon and by Wednesday afternoon they had a short editorial statement in the newspaper, saying, "Senator MELCHER gets a bum rap." Then it goes on to say that you can have objections, but what is the reason for mentioning these various groups? They single out the gay rights groups and state, "What does that have to do with McCar- rine?"

"Did they send him campaign contributions? We do not know."

I can respond. Since I have not heard of them, it is obvious none of them sent me campaign contributions and they are not likely to, as a matter of fact.

I think what the newspaper editorial has said sums it up. It is sort of a bum rap. The Senator preceding me, the distinguished senior Senator from Missouri, happened to quote that old adage that Harry Truman used to use: "If you can't stand the heat, get out of the kitchen."

Conservative Caucus, Inc., headquartered out here in Fairfax County, VA, really does not amuse me. I think it is their right to do so. But I do question, out of the hundreds of groups that have taken a position on Judge Bork, why do they have such a high percentage of gay and lesbian groups? What are they trying to do? Even less the ad is attempting to say that possibly I am one of them, and that, of course, has brought out the adverse reaction of the people who have read the ad. I think we have a lot bigger fish to fry in our nomination. I think it is the Congress, this administration. I think it is extremely important that we get on to the business of taking care of what is wrong with the U.S. economy right now than to spending a great deal of time on a cause that is lost, and so I am delighted we are getting to a final vote on Judge Bork's nomination.

I restate, as I have often stated here on the floor, as I have often stated in committee meetings or in my discussions with administration officials, I would like to work with the President. I would like to be part of the process of getting on with taking care of just what is wrong with the economy of this country. There is a lot of uncertainty in what our ideas are. We need to sort out the ones which do not work and get rid of them. I think it is time we face the issue of just where do we go. I cannot urge the President any more fervently than I am doing right now. Let us get beyond the question we are engaged in and get to the root of what is wrong with the economy in this country.

I hope that the next nominee to the President's friends can be quickly confirmed because the economy demands our attention. I want to say emphatically that for almost 7 years I have been offering my judgment on President Reagan's overspending, my judgment on the independent agencies, my judgment on our basic economy, the various factors of that including American agriculture, and other basic industries of mining, minerals, and forest products. I have attempted to work with the administration to prevent Presi
dent Reagan from pursuing this suici-
dal policy of combining huge record-
braking Federal deficits and Federal
debt and trade deficits which, if not
cpyed, will result in the Nation's worst
depression with an economic col-
capse that will rock the world.

President Reagan on this nomina-
tion need not accuse me of politics or
need not accuse me of politics in
gard to his programs. For more than
6 years I have tried to cope with the
weird political philosophy and eco-
nomic fallacy advanced by the Reagan
administration. I have tried to work
with them on that economic fallacy
that they believe is good policy. I have
worked to keep them from the worst
of their failures and I expect to be
here in the Senate after President
Reagan's departure for a specific
reason, to mop up this administra-
tion's legacy of economic suffering.

There is work to be done that could
still alleviate the worst of it. I shall at-
tempt in every way possible to help
this country improve its economic
trade deficit by exporting more U.S.
aricultural commodities and cut back
on the Federal deficit by strengthen-
ing agricultural prices, developing U.S.
ergy resources, cutting back on sub-
sidized metal imports, and developing
U.S. minerals. Although the time
remaining for President Reagan and his
Cabinet is only 15 months, the remain-
ing time should be spent in a com-
bined effort of Congress and the ad-
ministration to blunt the economic
chaos caused by the twin towering
deficits of trade and Treasury so that
the Reagan administration legacy will
not be one of immediate deep recessi-

While the administration will be
gone in 15 months, the appointment
of a Supreme Court Justice, unlike a
Cabinet member, is for life. Usually
that means 20 years or longer, and that
leaves the responsibility of Congress
of us who must either vote for or
against the nominee to the Court. It is
not for political reasons that I cast my
vote against Judge Bork but because
he fails to meet the fundamental test
of interpreting the Constitution on
the rights of Congress and citizens and
the rights of States and their officials
to use the Federal courts to interpret
the constitutionality of the acts of
Congress or the actions of the execu-
tive branch of our Government.

Mr. President, under ordinary cir-
cumstances, I would not take the
Senate floor to describe my views on a
pertinent point in a lawsuit of which I
am the plaintiff, but these are not or-
dinary circumstances. My suit is now
before the U.S. Court of Appeals in
the District of Columbia and is under
consideration by a three-judge panel
appointed by the court to hear and
decide the merits of the case. The
briefs have been submitted. The oral
arguments have been heard by the
judges earlier this month. Judge Bork
is a member of that appellate court,
but he is not a member of the three-
judge panel.

As a plaintiff, I would ordinarily re-
frain from commenting on a significant
legal point in the suit, my suit, now
being considered by the three-judge
panel from that appellate court. My
position as a plaintiff and as a Sena-
tor, in ordinary circumstances, both
out of respect for the court and in rec-
ognition of the court's prerogative to
decide the case without further com-
ment from me, would cause me to re-
frain from commenting on the suit
while it is still being considered. In
particular, I would under ordinary cir-
cumstances refrain from commenting
on the significant issues in the suit.
However, I have the duty as a Senator
to vote on Judge Bork's nomination to
the Supreme Court. Therefore, I must
speak out now in my capacity as a Sena-
tor and in my responsibility as a Sena-
tor to state my views on Judge Bork's
nomination. I have been asked to
speak out now in my capacity as a
Senator and in my responsibility as a
Senator to state my views on Judge
Bork's nomination. It is on this par-
cular point of standing to bring suit
before a Federal court, that I must
review Judge Bork's views and
decisions.

Mr. President, I have done so care-
fully. I voted for Judge Bork to
become an appellate court judge in
1982. At that time, and in the opinions
that he has given as an appellate judge
from 1982 to 1985, Judge Bork's posi-
tion on standing was not in violent
disagreement with the views of other
judges on the appellate court.

The PRESIDING OFFICER. The
Senator from Montana has used the
20 minutes that he has under his con-
trol.

Mr. MELCHER. Mr. President, I ask
unanimous consent for 2 additional
minutes.

The PRESIDING OFFICER. The
Senator may proceed.

Mr. MELCHER. Mr. President, how-
ever, in 1985 in his dissenting opinion
in Barnes versus Kline, Judge Bork set
such a high bar for bringing suit on the
court and greatly shifted his position
on standing for a Member of Con-
gress or States to bring suit on consti-
tutional matters to be decided by
the Federal courts. For me, the most
disturbing aspect of Judge Bork's deci-
sion on standing of Members of Con-
gress indicates that his future decision
on standing would likely be extended
to preclude the Federal courts from
considering cases on basic political
rights under the Constitution. That
includes States or officers of States
bringing constitutional questions to
the courts.

President Reagan's statement re-
garding Senators who oppose the nom-
ination of Judge Robert Bork to the
Supreme Court as being a political de-
cision completely misses the mark. If
President Reagan wants to nominate
to the Supreme Court a conservative
with Judge Bork who matches his pol-
itical philosophy, I can accept
President Reagan's right to his deci-
sion, and I do not criticize him for
making that decision nor accuse him
of just recommending Judge Bork on
turf battles of political posture.

But, Mr. President, I cannot and I
shall not accept President Reagan's
nomination of Judge Bork for the Su-
preme Court and therefore my vote
will be against the nomination.

Mr. President, I ask unanimous con-
sent that the article from the Inde-
pendent Record of Helena, MT, of
Wednesday, October 21, 1987, be print-
ed in the Record at this point.

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

(From the Independent Record, Oct. 21,
1987)
these groups contributed to Melcher's 1982 Senate campaign. However, we have no idea whether that was for or against Bork.

In any event, it was a cheap shot.

If those who support Robert Bork's nomination to serve on the Supreme Court want to buy pork, they should go after President Reagan. Reagan spent the month of August on vacation in California and gave Bork's opposition a big head start in the fight over Bork's nomination.

Now that 54 senators have said they will vote against Bork, the conservatives are resorting to dirty tricks.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Mr. President, I yield as much as 10 minutes if the Senator needs that much, the distinguished Senator from Oklahoma (Mr. Boren).

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. BOREN. Mr. President, I thank the distinguished Senator from South Carolina.

Mr. President, several days ago, after the completion of the hearings in the Senate Judiciary Committee, I issued a brief statement indicating that after examining the record and giving careful thought to the decision that I had concluded that I should vote in favor of the confirmation of Robert Bork to be an Associate Justice of the United States Supreme Court.

At that time I did not make a speech on the Senate floor. I did not call a press conference to announce my decision. I simply issued a statement indicating my personal conclusion as an American and as a U.S. Senator charged with the responsibility to vote on this matter about the course of action which I should follow.

I did not make a long speech to my colleagues, nor hold a press conference because I was in my mind and giving a very careful decision to make, a very close decision to make, a very close consideration of that Senator. I simply thought about the decision that I had to make. Some of the views of Judge Bork are views that I do not find myself fully agreeing with. On the other hand, he has significant qualifications and intellectual capability.

So it was a close question in my mind. It was a very difficult decision to make. I made it thoughtfully, and carefully. And I did not attempt to sway my colleagues by arguing and becoming partisan in the debate because I felt and I feel very strongly that every individual Senator should sit down with his own conscience, should clearly look at the record, and should make the right decision based upon the judgment of that Senator.

I felt that it was my duty to put aside all political considerations and do what I thought was fair and right. And I struggled, Mr. President, to do that. I did not attempt to engage in political horse trading, as we might do on some other issue. There is never anything wrong in protecting the interests of one's own State and constituency, trying to make sure they have the economic benefits that are available to other regions of the country. I have been known on other political issues to try to bargain for the benefit of the farmers or the independent oil producers who are so hard-pressed at this particular point in time. But on a nomination to the Supreme Court, that is not the kind of politics that should be played.

So, Mr. President, when I was asked to come down to the White House and discuss my decision with the President and with others, I declined that invitation because I felt that this was a judgment that I was charged with making for myself as an individual U.S. Senator without regard to any political consideration. Nor did I let party politics enter into my thinking.

There were those who have said to me before, and have said to me since, do you feel uncomfortable being one of the few people on this side of the aisle on the Democratic side of the aisle that is going to vote for the confirmation of Judge Bork?

No, I do not. There are times in which party political considerations should be weighed. I am proud to be a member of my political party. More times than not, the majority of the party will support its candidate on important economic policy questions, and other policies of the day.

But confirmations of Justices to the U.S. Supreme Court are not matters that should become issues in party politics. It is not a time to consider one's self a Democrat or Republican in making that decision. It is a time to consider one's self an American, and a U.S. Senator charged with that responsibility without regard to party politics.

So I do not feel uncomfortable making the decision on that basis. If I had made my decision on any other basis, political horse trading, pressure from the White House, pressure from a political party, or pressure from any other corridor, I would have felt that I had not met my own individual responsibility.

Mr. President, my responsibility was not to decide if Robert Bork is the person that I would have appointed to the Supreme Court of the United States were I charged with the responsibility of making the appointment. The responsibility of a Senator is not to appoint, not to select, but to decide whether or not to appoint. And I believe after reviewing the record that there was no sufficient basis for me to lodge a refusal to consent to this nomination.

Judge Bork is a person of intellectual capability. He has long professional training and background. There is no reason to question his personal integrity. And I simply felt that there was no basis upon which I, as a Senator, should refuse to consent to the nomination of Robert Bork to be a Justice of the U.S. Supreme Court.

If an individual stands on both sides have talked about, that both his strongest supporters and his most critical adversaries have portrayed Judge Bork in ways that I do not think are truly accurate.

If Robert Bork ends up serving on the Supreme Court of the United States, I am convinced that he would surprise both his strongest critics and his strongest supporters by a much more modest approach than either expects. Frankly, I think there are at least three members of the U.S. Supreme Court presently serving who would take positions on matters of ideological division that would be more to the right than the positions that Judge Bork would take were he confirmed. I do not think we should allow these matters to become political litmus tests.

Anyone familiar with my record knows where I have stood on questions of civil rights, of individual rights, or of individual ideology. I reject that. Time and time again, I have seen the litmus test thing. And I believe that this is a litmus test about civil rights, of individual rights, or of individual ideology. I reject that. And I believe that this is a litmus test about civil rights, of individual rights, or of individual ideology. I reject that.
views of particular individuals who might be up for confirmation, if we allow this to become a popularity contest, we will set in motion a process that will undermine the independence of the Court and the ability of the Court to protect the rights of all Americans. For we know that when we give up those that might happen to be unpopular with the general public at the moment.

Mr. President, I have watched this debate with sadness and with concern. There has been far too much polarization, just as I have watched with real concern about my country and its future, as I have seen the kind of polarization in recent days develop on matters of foreign policy, on matters of economic policy, as well as this debate.

Mr. President, the people are not watching to see if we are staying together, Democrats or Republicans. They are watching us to see if we can get together as Americans.

I hope that when the President sends forward the next name, he will do so after long consultation, so that we can present a diversity of thought, avoid polarization, and act with unity as Americans and as U.S. Senators charged with this immense responsibility.

Mr. President, the Senate will vote shortly on the nomination of Robert H. Bork to serve as an Associate Justice of the United States Supreme Court. On October 6 I announced my intention to vote against the confirmation of Justice Bork, and I would like to briefly summarize the reasons for my vote today.

In his legal writings, judicial decisions, and testimony before the Senate Judiciary Committee, Robert Bork has proven himself to be lawyer of intelligence and technical competence, as well as an individual of unquestioned personal integrity. His legal views, however, are one-dimensional, narrow—mainstream of contemporary American society. The Supreme Court has played a leading role in defending the rights of minorities and women. Many of the greatest civil rights advances of this century came about through important Supreme Court decisions, a number of which Judge Bork strenuously opposed while a law professor and private attorney. He has consistently taken a very narrow view of legal protections for women, and there is nothing in his record to indicate a capacity for growth and adaptation in his restricted views on these questions.

Judge Bork’s narrowly legalistic views reject the existence of constitutionally protected privacy rights will leave individual men and women less defended in their ability to control deeply personal decisions relating to marriage, child-bearing, and related issues.

There can be no question that our Nation now finds itself at a very different place today if Judge Bork had been on the Supreme Court over the past 30 years and if his views had prevailed. To attempt to reverse leading Supreme Court decisions would be divisive and destructive for our Nation. No one can predict what the landmark issues of tomorrow will be, but one can say with some degree of certainty that the new Justice we confirm to serve on the Supreme Court will influence the evolution of our society well into the next century. I have concluded that Robert Bork does not have the capacity to find a constitutional basis for the rights that most Americans believe as a part of their heritage. I would add that mine is a difficult decision as I find the pros and cons are close together. But, on balance, and it is a narrow balance, I have concluded that my confirmation to serve as an Associate Justice of the Supreme Court.

Mr. DURENBERGER. Mr. President, I will vote to confirm the nomination of Robert H. Bork to serve as an Associate Justice of the Supreme Court, for reasons that I will state in a moment. The fate of that nomination, unfortunately, is a foregone conclusion here today. The kind of Senate we are or are becoming, I fervently hope is not.

Mr. President, Abraham Lincoln said that the constitutional institutions of this country belong to the people who inhabit them. Our institution, the Senate, belongs not to the future or the past but to us, the 100 men and women who have been chosen by our people to serve here. What we do with the institution we have inherited, and the Senate we pass on to those who will some day occupy the chairs of this Chamber, should be a matter of foremost concern to us all.

Several weeks ago, I made a statement to my Republican Caucus about the Bork nomination. I expressed my desires that a matter of the highest importance, a Supreme Court nomination, be handled in the best traditions of the Senate. By that I meant deliberation, in all the senses of that word: careful consideration of the facts; sub- stance over style; informed and spirited debate; and in the end a consensus would be formed by the Senate, rather than an amalgamation of the views of Senators. After I finished, one of my colleagues told me that it was a good speech—for 1952. That statement crystallizes a concern that we should all share about the state of this institution.

Simply put, the Senate did not deliberate on the nomination of Robert Bork. The chairman of the Judiciary Committee reached his personal decision on the nomination within 48 hours of the President’s announcement; other members of the Judiciary Committee announced their votes in the first hour of the hearings, before the nominee had uttered a single word. The judgment of the Senate was announced, not by the Presiding Officer of the Senate after a rollick, but by the media, after compiling the results from the press releases. And as soon as U.S.A. Today announced the 51st opponent, deliberation, per se, was dead. The debate we have conducted, with the outcome predetermined, gives new meaning to the phrase “all over but the shouting.” This Senator believes we have fallen short of our full constitutional responsibility.

I will not, Mr. President, join my colleagues who have attacked People for the American Way, the Leadership Conference on Civil Rights or any other group. They are watching to see if we are staying to the Constitution and what the Constitution entitles them to do. The fault lies not with the seller in this transaction, but with the buyer, which is all of us.

Special interests did not do this. Television did not do this. Mass mailings and 30-second TV spots didn’t do this. We did it to ourselves by choosing to respond to the clamor, rather than the cherished traditions of this body. The cost of that decision we can only guess at, but the Senate was created to protect minorities in this society: when it suffers, eventually they suffer.

Perhaps I was naïve, as my colleague suggested, to expect so much. But after the smoke finally clears I fervently hope that we as Senators will take a long hard look at ourselves and our processes in light of these events and decide that the past and the future demand more of us then we’ve given.

Mr. President, shortly after I was elected to the U.S. Senate in 1978 I was faced with my first judicial appointment. President Jimmy Carter had nominated Congressman Abner Mikva to the U.S. Court of Appeals for the District of Columbia. I grappled with my choice of standards for evaluating judicial nominees. Article II, section 2 of the Constitution provides that the President’s power to appoint important public officials is to be exercised “by and with the advice and consent of the Senate.” Alexander Hamilton, in No. 76 of the Federalist Papers stated the purpose of advice and consent was “to prevent the appointment of unfit characters.” Senators have interpreted this power in different ways.

Under one standard, the Senate’s role was to evaluate the nominee on the basis of his competence and integrity, the second standard is premised on the view that the President, elected by all
the people, was empowered by the Constitution to appoint office-holders who would further his philosophy and goals. The other standard, a distinctly minority view, was that a Senator would vote his preference on the political issues. The Senate’s standard was very tempting. Abner Mikva’s views were much more liberal than mine. After careful analysis I decided that the proper standard excluded politics from the evaluation. As I stated then, 

The power to “advise and consent” on judicial nominations has never been viewed as authority for the Senate to substitute its judgment for the President’s on the qualifications of a nominee. For two centuries that power has been regarded as authorizing rejection of nominees for only two reasons—lack of integrity or lack of competence. No judicial nominee has ever been rejected simply because the Senate disagrees with his political views. I swallowed hard and voted to confirm Abner Mikva. I have employed that standard for every judicial nomination since. So have most of my colleagues.

As I stand here on the floor of the Senate today, a majority of my colleagues have already announced their opposition to Judge Bork and they announced their decisions weeks before Senate debate began. Whether they have so stated or not, they have changed their mind and we have employed for advice and consent. This, plus the confluence of a number of unique factors have combined to defeat Judge Bork. I am deeply concerned by the precedent we, as a Senate, have set.

The judiciary occupies a unique position in our system of Government. It was designed by our Founding Fathers to be insulated from the passions of the electorate. Although it may sound melodramatic, I have in mind a scene out of an old Western movie of a feverish mob ready to string up a crook. Then, in a dramatic moment, a person dedicated to the law stands up to the crowd and says, “This man is innocent.” Everyone learns that they nearly lynched the wrong man. Judges perform that role in our society. The Founding Fathers recognized it took a special person to stand up to that kind of a mob, one who would exercise independence, one who was not afraid to make waves in his community.

In an effort to attract and hold those kinds of people to the judiciary, the Founding Fathers carved out a special niche for the judiciary in our Government. Judges were given lifetime tenure so they would not have to worry about the popular effect of their decisions. The Founding Fathers decided not to elect judges but rather to have them appointed by the President of the United States.

The process we have used in evaluating nominations has been under attack. It has been said that the spirit of the process envisioned by the Founding Fathers. The hearings were deliberately delayed to allow the public relations campaign to gear up. Millions of dollars were expended to defeat Judge Bork. The electorate was mobilized. What we had was a referendum on Bork, a referendum on a decision. Once it became an election the outcome was predetermined because it was not a contest of equals. The opponents controlled the timing and the agenda of the election. When the time was propitious they selected the issues they wanted to discuss. Judge Bork would have liked to discuss his views on issues, for example, such as criminal law, which are no doubt popular in this country; his opponents had other plans. His opponents had all the tools of an election available to them, including funding and mass media. The reduction of complicated constitutional legal doctrine to the fundamentals unfortunately resulted in a great deal of exaggeration and distortion. Against this vast array Judge Bork was at a great disadvantage because he could not use the issue of judicial campaign for office. Consequently, Judge Bork, who ran against a nebulous and debatable standard, instead of a flesh and blood opponent, lost the election.

Another unique factor in this confirmation was that Judge Bork has written so much on his view of the law. We have a strong tradition in this body that judges not answer questions during the confirmation process about issues that will come before the Court if they are appointed. The exception to the rule is the person who has had the courage of his convictions, taken a stand on issues and written about them. It is ironic that a person who has a written record is scrutinized far more fully than a person who has not written extensively. It will be even more ironic when the next nominee sails through the process because he has not been asked but an unknown quantity has a better chance of confirmation than one with a known record.

Having said all this, Mr. President, let me say again that the problem I face is not the orchestrated campaigns that turned the feelings of many of my constituents against Judge Bork. I was not denied my right to argue the other side in full and open debate in a televised Senate debate by my constituents or by the anti-Bork orchestration. I was denied that right by 54 of my colleagues who decided the fate of the nomination without genuine, time-consuming, exacting deliberation by the Senate.

Mr. President, the Constitution calls for the Senate to give its advice and consent to judicial nominees. That envisions a process in which we gather the evidence and then deliberate as a body to reach consensus. Instead, we have had a process in which Senators have individually come to their conclusions and then marched to a microphone to announce their vote. Since 54 of them announced their opposition before this matter came to the floor this so-called debate is meaningless. Anybody on the Senate floor to support the President’s nomination—or even to reduce unresolvable issues—is a sure loser. That’s not a feeling conducive to deliberative decision-making. This is not the way the world’s most deliberative body should conduct itself.

During the confirmation process I listened to many of my constituents, many of whom asked me to vote against Judge Bork’s confirmation. I listened to their objections carefully. I watched the hearings, studied his writings, and scrutinized the hearing transcript. And then I met with Judge Bork. I probed vigorously on the issues my constituents were concerned about. We sat side by side with glares of camera lights and the pressure of a national hearing. We had an interchange of ideas not possible in the pressurized context of a hearing. I concluded that he was not an extremist. I concluded that the President’s judgment deserved consent. That the only thing that could change my mind would be new facts or understanding of facts brought out by this debate. But I’ve heard nothing but the speculation I heard from the Senators who decided to oppose Judge Bork several weeks ago.

It is impossible to predict how a person will vote when he becomes a Supreme Court Justice. President Eisenhower believed that he was appointing conservatives when he appointed Justices Warren and Brennan. Hugo Black was a member of the Ku Klux Klan before he was appointed to the Supreme Court. If his prior affiliations had been known his confirmation he would never have been confirmed and certainly no one would have predicted that he would become one of the best friends of the Bill of Rights in the history of the Court. The prediction of doom and gloom about Judge Bork’s performance on the Supreme Court must be viewed in light of these monumental miscalculations.

Mr. President, Judge Bork’s real sin is not that he is too extreme but rather that he is too independent; he is not afraid to make waves. We have far too few independent thinkers in public life. Judge Bork has a powerful and curious mind. By this strange confluence of events—the orchestrated campaign, a judicial nominee who has written extensively about the law and a Senate which has seemingly lost its ability to collectively deliberate—we still have prevented him from elevation to the Supreme Court. And we
have changed the process, Mr. President, for the worse, because Judge Bork's opponents, the very people who need someone to stand up to the emotions of the time to protect their interests, believe they've won the battle, but they may have lost the war. We will regret this precedent in the future.

I have been told by many that my own political "independence" requires me to "stand up to the President on this one." Mr. President, in my view independence does not require following the popular course. It requires standing on principle.

And that is why I will vote to confirm the President's nomination of Judge Robert Bork to be an Associate Justice of the Supreme Court.

Mr. GORE. Mr. President, I rise today in opposition to the nomination of Robert Bork.

This not a step I take lightly. When the nomination was announced, I promised to keep an open mind and to consider all of the evidence. I have kept that pledge.

I have listened carefully to Judge Bork and I have given his views careful scrutiny. I have concluded that Judge Bork is a man of integrity and intellect. He is neither a racist nor a bigot.

Mr. President, this nomination has generated a great deal of rhetoric from both sides. It is not my aim to add more heat to the debate. Judge Bork has asked that we lower our voices and, on that score at least, he is correct.

The fact remains, however, that Judge Bork is wrong—terribly wrong—in his conception of the Constitution and the Supreme Court. And that is why, after the Judiciary Committee voted and after I met personally with Judge Bork, I concluded that he should not be confirmed.

In 1803, John Marshall, our first great Chief Justice, declared that it is the duty of the Supreme Court to say what the law is. The capacity of the Supreme Court to carry out that task with wisdom has enormous consequences for our Nation. When the Supreme Court is wrong, as it was when it decided the Dred Scott case and Plessy versus Ferguson, it has the power to sow the seeds of social conflict and oppression. When the Supreme Court is right, as it was when it decided Brown versus Board of Education, it has the capacity to ensure justice for every American.

For me, in other words, the test of a Supreme Court nominee should turn on a simple question: Does the nominee understand the basic character of the Constitution and the special role of the Supreme Court in our system of government? I have concluded that Judge Bork lacks that essential understanding.

Consider Judge Bork's view of original intent. All of us agree that no judge should frustrate the will of the framers. But the questions still remain: Why did the framers use the broad and lasting application when they wrote the Constitution? Why guarantee our fundamental rights? Why did the framers place words like "due process" and "liberty" in the 5th and 14th amendments?

I believe that Woodrow Wilson answered those questions when he wrote that "the Constitution of the United States is not a mere lawyers' document; it is a vehicle of life, and its spirit is always the spirit of the age." In other words, the framers knew that they were drafting a constitution; not the legal equivalent of an automobile repair manual whose directions must be followed in a mechanical fashion. And that is why I will vote to confirm the President's nomination of Judge Bork.

As our country has grown and matured, so has our understanding of the Constitution. We have taken great strides toward eliminating injustice. We cannot reopen old wounds.

Judge Bork's blind reliance on a tortured notion of original intent threatens the progress we have achieved. For example, he apparently believes that the 14th amendment provides little, if any, protection against intrusions by the States into our private lives. In coming to that view, Judge Bork rejects the principled conservatism of Justice John Harlan as well as the wisdom of the man he would replace, Lewis Powell.

Similarly, Judge Bork commands us to follow the original intent while he disregards the words of the Constitution themselves. The ninth amendment states, simply and eloquently, that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Judge Bork has said, however, that this amendment has no meaning. Are we to assume that the framers wrote the ninth amendment intending it to be devoid of content? I, for one, do not think so.

These questions are not merely of academic importance. It is the right to be private that makes each person a free and autonomous individual. But our freedom would be severely tested if the Government could intrude into the intimate details of our lives. Orwell's Big Brother will not break down our doors or peer into our windows so long as the Constitution is honored.

Judge Bork says that he would rely on the legislature, not the courts, to protect privacy and liberty. And so we must ask how well the nominee himself would preserve and protect the principle of majority rule that governs our democratic society. But the answer reveals that Judge Bork has criticized in the strongest terms the Constitution's requirement of one-person/one-vote. Does Judge Bork really favor majority rights? I have regretfully concluded that his selective embrace of majoritarian principles merely favors the powerful at the expense of the less powerful.

Judge Bork also holds the view that Members of Congress do not have standing to sue the executive branch. That assertion, if accepted by the Supreme Court, would unconstitutionally limit the authority of the very branch of Government that best reflects the diversity of our Nation: the Congress. If, as Judge Bork contends, the legislature is the last resort for people whose rights need protection, what are we to do when an imperial executive ignores the law and tramples on the legislature?

Have we not learned by now that all Americans, even the President, must be constrained by the rule of law? Judge Bork had a firsthand view of Watergate. He should know that we cannot permit the public trust to be betrayed. The Supreme Court must hear the pleas of all aggrieved persons; it must enforce legal obligations no matter how high they reach. We cannot allow a Justice on the Supreme Court who would eschew that responsibility.

Mr. President, it is not enough for a Supreme Court Justice to be learned; a Justice must also be wise. A Supreme Court Justice must look deep into the Constitution, into our shared traditions, and into our national history. The job is not easy. It is lonely and hard.

When I look at Robert Bork I don't see the capacity to perform that task. I see intellectual power, but not intellectual growth. I don't see a man who can—as a Justice must—step above ideology.

In a very real sense, when a Supreme Court Justice dons his robes he belongs to the ages. That is why this debate must be nonpartisan. That is why this administration has a duty not to play politics with the next Supreme Court nomination.

I was very disappointed last week that President Reagan responded vindictively to the prospect that this nominee might be rejected. The President said that he would send us another nominee that would be just as objectionable as Judge Bork.

That's not right. We in the Senate will do our job. We will carefully scrutinize any nominee. But the President must do his job as well. We cannot permit the selection of a nominee to be vetoed by special interest groups. I am particularly disturbed by press reports suggesting that some candidates for the Court suffer because they have had the temerity to follow governing
Supreme Court precedent. To my knowledge, we have never before faced the possibility that a judge would be considered unworthy because he granted to the Supreme Court the respect it deserves.

Let this be clear: This Nation will not risk the integrity of our Supreme Court dominated by close minded ideologues. We will not welcome a nominee willing to ignore time-honored precedent and hard-won individual and civil rights. We will not place 18th century lenses in front of our eyes to focus on the Court's cases on law enforcement against violent criminals. We will not permit the clock of social justice to be turned backward.

Let the administration send us, if it wishes, a true conservative, a person who wishes to conserve our accomplishments as well as to conserve fundamental liberties. This body will respond responsibly to a responsible nominee.

For the moment, however, our duty is clear. Judge Bork should not be confirmed. Mr. President, this nomination should be withdrawn. If it is not, then it should be rejected.

Mr. President, the most important aspect of the Supreme Court's caseload is in the critical area of criminal law. Some 30 percent of the Court's cases are criminal law cases, and those cases are the ones which most directly affect the average citizen.

I have no doubt that most Americans care far more deeply about effective law enforcement against violent criminals than about whether homosexual sodomy is protected under the "generalized right of privacy"—which so many Senators seem to consider the pivotal issue of our age.

That is why it is so disturbing that consideration of this nomination has focused almost exclusively upon torts and criticisms of Judge Bork's fine record in other areas, while all but ignoring the fact that his tough but fair approach to criminal law issues is sorely needed on the Supreme Court—and it is needed now.

It is especially disturbing that various Senators have claimed that they favor a conservative, law-and-order Justice even as they reject a nominee who fits those criteria—and also happens to be the most well-qualified judge in the country for the Supreme Court. If not Robert Bork, then whom?

These two positions—claiming to favor a conservative, law-and-order Justice on the one hand, while rejecting Judge Bork on the other—are flatly incompatible.

The current Supreme Court is evenly divided—4 to 4—on the most critical criminal law issues of the day. Incredibly, however, some Senators have attempted to create the illusion that the Court's position on law-and-order issues is securely established, and that it makes no difference if the Senate now rejects a strong nominee on criminal law issues in favor of a more liberal nominee.

For example, Senator Bentsen made the following statement on the floor in defending his rejection of Judge Bork, and it is important to pay careful attention to it. After conceding that Judge Bork is a "law-and-order judge" and commending him for his "strong stand in this area," Senator Bentsen stated:

But let me suggest that the nomination of the Court, Mr. President, and you will see that we will have a law-and-order Supreme Court with or without Judge Bork. That path is already charted. The Rehnquist court has left no doubt in this area. With law-and-order Judges like Scalia, O'Connor, and White, Robert Bork would really be a controversial fifth wheel—rather than a swing vote—on those issues.

With due respect to the Senator from Texas, this statement is directly contrary to the actual facts. After identifying the senators who generally vote to uphold effective law enforcement, Senator Bentsen neglected to mention that the remaining four Justices—Brennan, Marshall, Blackmun, and Stevens—consistently vote the other way.

Let's look at the real facts. Let's look at the actual vote count in the Supreme Court's most critical law and order cases.

Last term, the Court came within one vote of reaching a decision which would have effectively outlawed capital punishment in the United States. The case was McCleskey versus Kemp. The issue was whether capital punishment must be declared unconstitutional if death sentences are not meted out in statistical proportionality in relation to the races of the victims and the perpetrators.

Four Justices who are still on the Court voted to strike down the death penalty in the McCleskey case. Only four Justices who voted to uphold capital punishment are still on the Court. The swing vote which was necessary to uphold the death penalty in that case—Justice Powell—is now gone from the Court.

Unless a strict constructionist, law-and-order judge like Robert Bork is confirmed, the votes will no longer be there to uphold the constitutionality of the death penalty—even though its constitutionality is explicitly recognized in the text of the Constitution and has been accepted as a cornerstone of our criminal law for over 200 years.

This same pattern of 5 to 4 votes on crucial criminal law issues has been repeated in case after case. Let me list only a few examples, although they do not begin to exhaust the list of cases where the Court was one vote away from returning to the antigovernment doctrines of the Warren court:

In Tison versus Arizona and California versus Brown, the Court again came within one vote of striking down valid applications of the death penalty in heinous murder cases. In each case, the vote on the more important questions of the case was 4 to 4. These cases could easily go the other way if a judge like Robert Bork is not confirmed.

It is clear from these cases that a vote for a conservative judge like Judge Bork is the practical equivalent of a vote against the death penalty. There is no escaping it.

In Illinois versus Krull, the Court's 5 to 4 vote only narrowly upheld a perfectly good faith search by police which was based on a statute later declared unconstitutional. Again, the Court is only one vote away from a regime which would seriously obstruct our police by rejecting a good-faith exception to the flawed exclusionary rule.

In Arizona versus Mauro, the Court came within one vote of holding that an accused killer's "Miranda rights" had not been violated even though the police had fully complied with Miranda. The case was asked to be dismissed as an accused, but had merely recorded with the suspect's knowledge a station house conversation he had with his wife at his request.

In Burger versus Kemp, the Court came within one vote of setting aside the conviction of a Georgia murderer merely because his lawyer's partner had represented a codefendant.

And in United States versus Salerno, the Court only narrowly upheld the pretrial detention provisions of the Bail Reform Act of 1984, which are necessary to prevent the pretrial release of known terrorists and serial murderers who present a known and immediate threat to murder innocent people. Although the vote in Salerno was 6 to 3, the Court is still closely divided on this issue and the new Court nominee will play a critical role in future cases on this crucial issue.

These are only a few examples of the important criminal law decisions of the last year alone which have been decided by a sharply divided Court, and often by a single vote. So those who seek to belittle the importance of this nomination to criminal law issues are flatly wrong.

We do not have "a law-and-order Supreme Court with or without Judge Bork."

Instead, we have a Supreme Court which is evenly divided on the major criminal law issues of our time. We have a Supreme Court which is evenly divided on the constitutionality of capital punishment. If a lower Federal court erroneously strikes down the death penalty for a violent murderer today—right now—the Court lacks the five votes needed to uphold a just death sentence.

So I urge my colleagues who actually support a strong law and order Court
to address the issue squarely and honestly.

If they reject an impeccably qualified conservative nominee like Judge Bork, they are serving the interest of those who are desperate to destroy the narrow 5 to 4 majority which upheld law and order prior to Justice Powell's retirement. If they reject Judge Bork, they are paving the way for a Supreme Court which will overturn capital punishment, shake effective law enforcement, and sacrifice the rights of victims and law-abiding citizens to the judicial coddling of violent criminals.

There is no escaping this fundamental issue in this debate. It is far too important to be ignored or evaded any longer.

Mr. METZENBAUM. Mr. President, I ask unanimous consent that the following letters to me from NARAL and Robert Bork's decision not to withdraw Hon. HOWARD from consideration as Associate Justice to be aided and abetted by a President who first changed Robert Bork's record or his controversial. Bork is proud of the role we have played in this historic confirmation debate. We point with satisfaction to the successful grassroots education and mobilization campaign that NARAL has been a part of, which has involved thousands of citizens across the country in the democratic process.

Our pride is reinforced when we receive letters such as the one sent by a NARAL supporter in Washington state who told us, "I feel I've taken part actively in this process and it feels great. Thanks for the leadership." It is regrettable that pro-Bork forces, even while recognizing they have lost their bid to gain his confirmation, have resorted to tactics of intimidation and harassment.

We hope you find the enclosed information useful. Please contact NARAL Legislative Representative, Bob Bingaman, or me if you have any further questions about the enclosed materials.

Sincerely yours,

KATE MICHELMAN, Executive Director.

[From the Boston Globe, Sept. 8, 1987]

WHAT WOMEN HAVE TO FEAR FROM ROBERT BORK

You wouldn't vote for a politician who threatened to wipe out every advance women have made in the 20th Century. Yet your Senators are poised to cast a vote that could do just that. Senate confirmation of Robert Bork to the Supreme Court might cost you the right to make your most personal and private decisions. His rulings might leave you no choice—in relationships, in childbirth, even your career. He must be stopped. Tell your Senators. Our lives depend on it.

If Robert Bork is confirmed to the Supreme Court, he'll be the deciding vote on questions that affect every aspect of our lives.

The fair-minded, deliberate, balanced Supreme Court we're all familiar with will be a thing of the past. A right-wing 5-4 majority will prevail for decades to come.

Robert Bork's writings and his record demonstrate a hostility to rights most women would consider fundamental, from personal privacy to the equality of women and men before the law. And he's threatened to overturn any Supreme Court precedent that stands in his way.

According to Bork, women can be forced to choose between sterilized and losing their jobs. A state can declare the use of birth control illegal and invite your privacy to enforce the law.

You wouldn't even be protected against sexual harassment at work (Robert Bork doesn't believe such coercion is "discriminations.

The fact is, Robert Bork's nomination threatens almost every major gain women have made since we won the right to vote. He would deny women the freedom, fairness and independence we've come to expect as first-class citizens.

Stripped of our most basic Constitutional guarantees of personal privacy and equal protection, women would have no defense against the "moral majority" extremists.

First to go? Your right to make a private decision about abortion. With Bork on the Court, your basic freedom to decide when, whether and under what circumstances to bear children can't be taken away forever.

A state could ban both birth control and abortion—throwing women back to the age when pregnancy was, in effect, compulsory and women risked their lives to terminate a pregnancy.

Far-fetched? Far from it.

Attempts have already been made to officially permit discrimination against women who've chosen abortion—even though abortion is entirely legal. Women who made this profoundly private decision, protected by our Constitution, could be singled out and deprived of their fundamental rights.

We stand firmly behind the accuracy and it feels great. Thanks for the leadership. The White House has consciously attempted to portray Judge Bork as a moderate; they have failed. Judge Bork's supporters have resorted to a last ditch, belligerent attack on our informal campaign in a vain attempt to save a nomination the American public has already rejected.

NARAL is proud of the role we have played in this historic confirmation debate. We point with satisfaction to the successful grassroots education and mobilization campaign that NARAL has been a part of, which has involved thousands of citizens across the country in the democratic process.

Our pride is reinforced when we receive letters such as the one sent by a NARAL supporter in Washington state who told us, "I feel I've taken part actively in this process and it feels great. Thanks for the leadership." It is regrettable that pro-Bork forces, even while recognizing they have lost their bid to gain his confirmation, have resorted to tactics of intimidation and harassment.

We hope you find the enclosed information useful. Please contact NARAL Legislative Representative, Bob Bingaman, or me if you have any further questions about the enclosed materials.

Sincerely yours,

KATE MICHELMAN, Executive Director.

October 23, 1987

CONGRESSIONAL RECORD—SENATE
1. The Roe v. Wade 7-2 majority has narrowed in recent years to 5-4 with Justice Powell casting the pivotal vote in favor of upholding the 1973 qualified right to terminate pregnancy. Since the liberal Justices are old and the conservative ones young, the new right-leaning majority could persist for a long time. Depriving women of the right to an abortion inevitably means depriving women of the right to reproductive autonomy which affects every aspect of women's lives, from the most intimate to the most public.

Yet Judge Bork has criticized Roe v. Wade in sweeping terms that make no mention of the required consequences for women of his judicial philosophy:

"I am convinced, as I think most legal scholars are, that Roe v. Wade is, itself an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority. I also think that Roe v. Wade is by no means the only example of such unconstitutional behavior by the Supreme Court."—Hearings before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess. p. 310 (June 1, 1981) (U.S. Gov't Serial No. J-97-16).

Additional twentieth century rights, central to woman's status, which Judge Bork disparages, either because they are not enumerated in the Constitution or because he interprets statutes to exclude them, include: contraception, Griswold v. Conn., 381 U.S. 479 (1966); equal protection of the law, as applied to gender, Reed v. Reed, 404 U.S. 119 (1971); Miss. Univ. for Women v. Hogan, 458 U.S. 717 (1982); the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942); and freedom from sexual harassment at work, Meritor Savings v. Vinson, 106 S.Ct. 2399 (1986) (dissenting from denial of rehearing en banc).

2. Personal privacy: "The 'penumbral' were considered to be the source of the right of privacy was no more than a perception that it is sometimes necessary to protect actions or associations not guaranteed by the Constitution in order to protect an activity that is The penumbral right has no life of its own as a right independent of its relationship to a first amendment freedom. Where that relationship does not exist, the penumbral right evaporates." Doremus v. Zach, 741 F.2d 1388, 1392 (D.C. Cir. 1984).

Equality of men and women before the law: "The equal protection clause has two legitimate meanings. It can require formal procedural equality, that government not discriminate along racial lines. But much more than that cannot properly be read into the clause * * *. The Supreme Court has no principled way of saying which nonracial inequalities are impermissible." Bork, Neutral Principles and some First Amendment Problems, 47 Ind. L.J. 1, 11 (1971).

Although Judge Bork wrote this article in 1971, as recently as 1985 he described it as representing his philosophy. See e.g., McGurk, An Interview with Judge Bork, Judicial Notice, June 1986 at 1, 7-8.

3. "If a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitutions ought to prevent the mistake by the court." Testimony of Robert H. Bork, Nominee to the District of Columbia Court of Appeals, Jan. 27, 1982, p. 10 (Statement before the Senate Judiciary Committee).

4. In upholding American Cyanamid's "fetal protection policy" (barring women of child-bearing age from jobs involving exposure to certain chemicals unless they consent to be sterilized), Judge Bork said: "These are moral issues of no small complexity, but they are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy . . . . The women involved in this matter were put to a most unhappy choice. But no statute redresses all grievances and we must decide cases according to the law." Oil, Chemical and Atomic Workers International Union v. American Cyanamid, 741 F.2d 444 (1984) (reversing the OSHA invalidation or Cyana­mid's policy).

5. Judge Bork called Griswold (which overturned Connecticut's anti-conception statute in 1965) "an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it." Neutral Principles, 47 Ind. L.J. at 9 (1971).

6. "Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of clarifying sexual advances as 'discrimination.'" Vinson v. Taylor, 760 F.2d 1330 (1985)
7. "The fact is, Robert Bork's nomination threatens almost every major gain women have made since we won the right to vote. He would deny women the freedom, fairness and independence we've come to expect as first-class citizens."

8. "Stripped of our most basic Constitutional guarantees of personal privacy and equal protection, women would have no defense against the 'moral majority' extremists."

9. "First to go? Your right to make a private decision about abortion. With Bork on the Court, your basic freedom to decide when, whether and under what circumstances to bear children could be taken away forever."

10. "A state could ban both birth control and abortion—throwing women back to the age when pregnancy was, in effect, compulsory and women risked their lives to terminate a pregnancy."

11. "Attempts have already been made to officially permit discrimination against women who've chosen abortion—even though abortion is entirely legal. Women who made this profoundly private decision, protected by our Constitution, could be singled out and denied education and employment opportunities."

12. "And a Supreme Court dominated by the right would do nothing to stop it."


8. Recently completed NARAL research shows that, despite the fact that an overwhelming majority of Americans support abortion rights, the current abortion laws of 30 states are more restrictive than federal constitutional law permits. Twelve states have enacted language expressing legislative intent to restrict women's ability to choose abortion and/or to extend legal rights to developing embryos and fetuses. All of these statutes are now held at bay by the federal constitutional doctrine that is at risk.

9. Chief Justice Rehnquist and Justices White, Scalia, and O'Connor all believe that it would be proper for the states to restrict abortion. Judge Bork would create a young five-person majority critical of *Roe v. Wade*.

10. In 1962 nearly 1,600 women were admitted to Harlem Hospital Center in New York City, for incomplete abortions; 701 women were admitted to the University of Southern California-Los Angeles County Medical Center with septic abortions. In 1965, 20% of pregnancy-related deaths nation-wide were due to illegal or self-induced abortion. Six years prior to the *Roe v. Wade* decision, in 1967, it is estimated that 829,000 illegal or self-induced abortions occurred nation-wide.

11. The Danforth Amendment to the Civil Rights Restoration Act, S. 557/HR 1214 (now pending in Congress) would repeal long-standing regulations designed to (a) bar discrimination against a woman who has had an abortion, and (b) require institutions receiving federal aid to treat abortion in the same manner they treat pregnancy or childbirth when providing health insurance or setting leave policy.

12. For example, Justice White’s future actions seem predictable since women appear in his opinions only as mothers. And he sees men (notably those who are able to influence the political process) as the ones to debate the morality of abortion: "I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces its own constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. . . . (in a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by imposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs)." *Roe v. Wade*, 410 U.S. at 221-22 (italics added).

Judge Bork agrees with this approach: "There is no uniform national consensus concerning the moral standards that are now being imposed by the Judiciary . . . the liberty of free men, among other things, is the liberty to make laws, which is increasingly being denied . . . *Roe v. Wade* is the classic instance . . . When the court nationalizes morality by making up these constitutional rights, it strikes at federalism . . . in a central way." Robert Bork, "Foundations of Federalism: Federalism & Gentrification" (April 24, 1982) (unpublished speech delivered to the Yale Federalist Society).
13. "Whatever your personal feeling about abortion, the decision must be up to you—not imposed by any political appointee."

14. "But then, that's precisely why Robert Bork was nominated to the Supreme Court. His expedient reading of the Constitution allows moral majority extremists to hope they can force their dogma on the rest of us under penalty of law."

15. "Beginning with abortion. But extending from there into every aspect of women's lives, personal and professional, as if the U.S. Constitution simply didn't apply to women."

16. "The choice is stark. Your Senator can confirm Robert Bork—inviting right-wing extremists to challenge every right we possess. Or the candidate Robert Bork—upholding the Constitutional standards of freedom and fairness."

17. "This is your chance to determine the course of our country and the status of women in a free society. Act now."

**PLANNED PARENTHOOD**

**FEDERATION OF AMERICA, INC.**


Hon. Howard M. Metzenbaum,

Harry Senate Office Building, Washington, DC

Dear Senator Metzenbaum: Senate supporters of the nomination of Judge Robert Bork to serve on the U.S. Supreme Court have sought to portray the nominee as an innocent victim of a political campaign by outside interests. A great deal has been made of the advertisements by two or three organizations opposing the nominations, with claims that the ads distorted the Judge's record. Our organization published one ad, headlined "Robert Bork's Position in Reproductive Rights: You Don't Have Any," which appeared in the Washington Post and several other newspapers prior to the Confirmation hearings. We wanted to be sure that you and other senators knew that the assertions made in that ad were well-founded and factual, drawn in large part from Judge Bork's own writings and opinions.

As stated by the late Justice Harlan, "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points picked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v. Ullman, 367 U.S. 497 at 542-43 (1961) (dissenting opinion).

Justice Harlan's language was quoted by Justice Powell, writing for the majority in Moore v. City of East Cleveland, 431 U.S. 494 at 502 (1977). In that case, a woman who lived in her home with her son and two grandsons was convicted of violating a housing ordinance of East Cleveland, Ohio, which limited occupancy of a dwelling unit to members of a single family and defined as a "family" only a few categories of related individuals, essentially parents and their children. The United States Supreme Court ruled that the ordinance violated the Due Process Clause of the Fourteenth Amendment. Justice Powell quoted the Supreme Court's statement in Cleveland Board of Education v. LaFleur, 414 U.S. 632 at 639-640 (1974), that "[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Justice Powell went on to say: "A host of cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter.'" (citing Prince v. Massachusetts, Roe v. Wade, Griswold v. Connecticut, and other cases).

In Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court struck down a state law which made it a crime for a married couple to use contraceptives and for physicians to advise such couples about contraceptives. In his Indiana Law Journal article, "Neutral Principles and Some First Amendment Problems" (Fall 1971), at page 9, Judge Bork characterized the right to privacy articulated in Griswold as follows: "The derivation of the principle was utterly specious, and so was its definition." Bork reaffirmed this view in 1985, while sitting on the Circuit Court for the District of Columbia. He said: "I don't think it's a supportable method of constitutional reasoning underlying the Griswold decision." ("Judge Bork is a friend of the Constitution." Conservative Digest Interview, October 1985, reprinted in the June 1986 issue of Judicial Notice, vol. III, No. 4) Thus, we stated in our ad: "[Judge Bork] attacks as 'utterly specious' the landmark Supreme Court decision affirming a woman's right to contraceptives, and exonerates the Connecticut on the use of birth control by married couples in the privacy of their own homes."

Judge Bork has attacked other Supreme Court decisions involving the right to privacy. Speaking of the Court decision that a woman has a constitutional right to abortion, Judge Bork stated in a Senate subcommittee: "I am convinced . . . that Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority." "Reversing Roe v. Wade Through the Courts," an Americans United for Life Conference, held in Chicago on March 31, 1984.

The Supreme Court's appointment to the Supreme Court require the "Advice and Consent" of the members of the Senate, a body of the federal government designed to be responsive in equal measure to the citizens of the many states. U.S. Const. art II, Sec. 2 (2).

**The Human Life Bill: Hearings on S. 158 Before the Subcommittee on the Separation of Powers of the Senate Committee on the Judiciary, 97th Congress, 2nd Session (1982).**

President Reagan has relied on the political support of anti-abortion extremists, and has promised that he would further their agenda. (See attached) Judge Bork has showed his agreement with President Reagan's approach to the nullification of abortion rights and is thus seen as an ideal Court appointee.

In Judge Bork's view, the 14th Amendment guarantee of "equal protection of the laws" does not protect women. See supra number 2.

16. The White House has allied itself with anti-abortion extremists who have launched a deliberate campaign against Roe v. Wade. (See attached) Judge Bork has showed his agreement with President Reagan's approach to the nullification of abortion rights and is thus seen as an ideal Court appointee.

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the child will cause considerable distress," Judge Bork strongly opposed the creation of any constitutional right based upon this emphasis. In Oregon v. Zeh, 741 F.2d 1386 (D.C. Cir. 1984), writing for the court, Judge Bork held that the Navy's policy of mandatory discharge for homosexuals violates the constitutional rights to privacy or equal protection. In his opinion, Judge Bork said: "We do well to bear in mind the concerns expressed by Justice White, dissenting in Moore v. City of East Cleveland." Justice White dissented in City of East Cleveland, dissenting on the ground that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." Justice White would have sustained the statute in East Cleveland if the Court had no power to make constitutional matters such as marriage, child bearing, birth control.

Certainly, all of these instances support the opening statement in our ad that: "The court in Roe v. Wade made a broad reading to the liberty guaranteed by the Due Process Clause. Justice White argued in support of his position that "the Constitution was to be construed so as to require basic and unsettling changes, and to do so, despite any political clamon, when the Constitution fairly interpreted demands it. The justification for the Constitution allows, much less demands, the decision in Roe . . . or in dozens of other cases in recent years." Hearings before the Subcommittee on Separation of Powers, 1981, on "The Human Life Bill," Judge Bork stated: The judiciary have a right, indeed a duty, to require basic and unsettling changes, and to do so, despite any political clamor, when the Constitution fairly interpreted demands it. The justification for the Constitution allows, much less demands, the decision in Roe . . . or in dozens of other cases in recent years." Hearings before the Subcommittee on Separation of Powers, 1981, on "The Human Life Bill." 315. Thus, we stated in our ad: "Bork sees the Court not as a problem-solver, guided by past decisions, but as a reckless troublemaker, aggressively seeking ways to upset past rulings he thinks are wrong." Indeed, in a speech in Canisius College in Buffalo on October 8, 1985, Judge Bork said: "I don't think that, in the field of constitutional law, precedent is all that important . . . if you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it." When the tape of those remarks was played at the Senate Judiciary Committee's hearings, Judge Bork said: "Generally what I said is correct." And he told the Attorney General that the Court's treatment of the Bill of Rights is theoretically the easiest to reform." It was based on such comments that we said: "If a judge finds that the Constitution allows, much less demands, the decision in Roe v. Wade, Bork could radically change the way Americans live."

I hope this is helpful. If you need further information or clarification please don't hesitate to call us.

Sincerely,

WILLIAM W. HAMILTON, JR.,
Director, Washington Office.

BORK AD SOURCE MATERIAL

1. "... there was never any doubt that the Constitution was to be construed so as to give effect, as nearly as possible, to the intentions of those that made it." When a judge finds that the amendments create a general right of privacy . . . he reaches a result far beyond anything the framers intended . . ."—Robert H. Bork, forward to The Constitution and Contemporary Constitutional Theory by Gary L. McDowell, Center for Judicial Studies, Cumberland, VA. 1985, pp. v-x.

2. "Well, the so-called right of privacy was born in the case of Griswold v. Connecticut. It is an important method of constitutional reasoning underlying the Griswold decision."—An Interview with Judge Robert H. Bork, Judicial Notice, Vol. III, No. 4, June 1986.


4. "... but Judge Bork's voting patterns show Bork to be more conservative than the average Reagan appointee . . ."—"It has been widely reported, and acknowledged by some Administration officials, that the Reagan Administration has chosen its judicial nominees from a list of the most conservative federal judges. This is commonly known as the Bork list. That this list is not much more than a form of the most thorough statistical analysis yet made public of the voting patterns of Mr. Reagan's judicial appointees."—New York Times, July 28, 1987, Stuart Taylor, Jr., reporting a Columbia University Law Review Survey.

5. "Most strikingly, Judge Bork's voting behavior in regulation cases reflects an apparently inconsistent application of judicial restraint. In the case with dissents examined in our study, Bork consistently urged that the court defer to agency decisions when a public interest group sued the government. However, in our study, when a business group sued a government agency, Bork very often voted to reverse the agency's decision."

6. "Of course, the Senate must consider more than these voting patterns in evaluating a judicial nominee. We urge that Judge Bork's public statements, academic writings and judicial opinions be closely scrutinized. We particularly urge that the Senate carefully examine Judge Bork's voting patterns in antitrust cases where we have identified as an apparently one-sided approach in at least a significant portion of his judicial decisions. The average Judge Bork is more conservative than the Republican mainstream, but the President's nomination of a man with Judge Bork's record to the nation's highest court can only fuel the current debate about judicial extremism."—Columbia University, Columbia Law Review, Press Release announcing Study, July 27, 1987.

5. “The derivation of the principle was utterly specious, and so that its definition...” “Griswold, then is an unprincipled decision, both in the way in which it defined the right and in the way it defines that right, or rather fails to define it.”... ibid., p. 9.

6. Robert Bork, in favor of a chemical component that offered its women employees a choice of being sterilized or losing their jobs. A Court of Appeals decided such a contract, held that the Occupational Safety and Health Act did not bar an employer’s policy that gave fertile women working at a chemical plant with瞄准 choice of being sterilized or losing their jobs.

In the opinion Judge Bork wrote: “We may not, on the one hand, decide that the company is innocent because it chose to let women decide for themselves which course was less harmful to them, nor may we decide th... the discretionary power. The women involved in the case were put to a most unhappy... The state’s decision, however, is a legitimate reduction to... to constitutional curbs.

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Mr. DODD. Mr. President, first I wish to commend the chairman of the Judiciary Committee, Senator Biden, and the ranking member, Senator Thurmond, for their skill and fairness in conducting the hearings. I also wish to commend the majority leader, Senator Byrd, and the minority leader, Senator Dole, for bringing the nomination to the floor expediently.

Mr. President, 2 weeks ago, I delivered a statement on this floor in which I indicated my intention to vote against the nomination of Judge Robert Bork to be an Associate Justice of the Supreme Court.

I rose today to elaborate on some of the points that I made during my earlier statement and address some additional issues I have had in mind.

Mr. President, as we celebrate the bicentennial of our Constitution, we are reminded that our Nation has flourished for 200 years under that glorious document and the tradition of individual liberty in which it was conceived.

For 200 years, the Supreme Court has served as the last bulwark of protection for the rights of all Americans against intrusions into the realm of individual liberty. The Supreme Court has interpreted the Constitution to include a right to privacy, a right to hold one’s own beliefs, a right to practice one’s own religion, a right to love one’s own spouse, a right to raise one’s own children.
As I have said before, my concern about Judge Bork does not arise from his views on some particular constitutional issues in isolation. We all, on occasion, disagree with particular Supreme Court decisions.

Rather, my concern is that in so many different areas of constitutional law, Judge Bork has repeatedly denounced landmark Supreme Court decisions, particularly those protecting individual rights and liberties.

What is striking about Judge Bork is that he has disagreed with such an extraordinary range of landmark Supreme Court decisions that one must seriously question whether he adequately respects the Court's basic role and adequately appreciates the Constitution's basic protections of liberty and equal justice.

In article after article, speech after speech, Judge Bork has criticized the constitutional decisions of the Supreme Court—not one, not just a few, but scores of decisions. He has called these decisions "unprincipled," "intellectually empty," and "unconstitutional.

His targets have included the Court's major decisions in matters of racial equality, free speech, freedom of religion, personal privacy, family rights, and women's rights, among others. In all of these areas of fundamental constitutional law, Judge Bork has repudiated a body of law and principles which fortunately is now well-established in America.

Judge Bork has written and spoken extensively as a constitutional theorist and commentator for nearly a quarter of a century. Some have suggested that his academic writings should be viewed simply as his effort to engage in intellectual legal debate and are not truly reflective of the positions he might take as a jurist. However, I believe that these public expressions provide an indication of the real Judge Bork—a window on his heart.

Such speeches, writings, and public expressions reflect a man whose position has been one of unremitting opposition to the major developments in the constitutional law of individual rights over the last 25 years. Sadly, these public expressions reflect a man who has failed to appreciate how monumental the landmark decisions of the Supreme Court have been for blacks and women, how important the right of privacy has been, how significant our rights of free speech have been.

As we all know, Judge Bork modified some of his views during his testimony before the Judiciary Committee. But while Judge Bork changed his position on some matters, he reaffirmed most of his basic views, including his objection to any constitutional right of privacy.

In certain other areas, such as equal protection for women under the 14th amendment, he has wrongly engendered views were so vague that they could not allay the concerns created by so many years of contrary writings and speeches.

Judge Bork reads the Constitution not with Judge Learned Hand's "spirit of liberty" but in a mechanical way, as if it were a rigid legal code. When he interprets the broad majestic guarantees of individual liberty and equal protection in our Constitution, he looks for bright line answers as if he was solving a mathematical problem, and seems uncomfortable with real world judgments and distinctions that reflect the fundamental traditions and ideals of our people.

The Constitution addresses Americans' deepest aspirations for liberty and equal justice, and our Justices must read it in that spirit.

In short, I have concluded that over wide and diverse areas of constitutional law, Judge Bork would either overrule settled constitutional understandings that are part of our national fabric, or apply settled understandings in a restrictive way.

I am also concerned that as new issues arise in the years ahead, Judge Bork will approach them with the same general approach that has made him hostile to so many claims of individual rights in the past. One cannot, of course, be altogether certain about anyone's future actions. At the very least, however, Judge Bork's long standing and forcefully expressed views raise the very serious risk that as a Justice on our Nation's highest court, he would not be sufficiently protective of individual rights and liberties under our Constitution.

We have just completed the celebration of the 200th anniversary of the Constitutional Convention in Philadelphia. We must remember, however, that the result of that convention in 1787 was not a completely just and democratic society, but only the beginning of a quest we have yet to complete.

In this day and age, can we take the risk of confirming to the Supreme Court a man who fails to recognize the expansive and evolving nature of our rights and liberties which are imbedded in the very fiber of our Constitution?

I would say no. I do not think that we should take that kind of risk and confirm a nominee who might undo what this country proudly identifies with America and who would fall to read our Constitution expansively as the framers must have intended so as to deal with a dynamic, ever-changing society. It is for that basic reason that I will vote against the confirmation of Judge Bork.

Mr. HELMS. Mr. President, as have others I have spoken many times, on this Senate floor and elsewhere, about my high regard for Judge Bork. I have met with uncommonly dear wife during this difficult time, and I can certainly understand his desire that this matter be concluded so that he can return to a degree of normalcy in his and his family's life.

There are winners and there are losers in almost every issue coming before the Senate. I am not so sure that Senators who consider themselves "winners" today may not realize down the road that they made a tragic mistake on October 23, 1987. Certainly the cause of judicial stability and dignity will lose today when a rollcall vote on Bork's nomination.

But it goes deeper than that. There is ultimate truth in a lot of expressions that we all use frequently. For example, I've heard all my life that we become a part of what we condone—or, those who see the role played by Senator's behind the scenes to defeat Judge Bork—a window on his heart.

Another expression has come to mind many times during the vicious attacks on Judge Bork: People are known by the company they keep. While I know that some of Judge Bork's critics and opponents are well-intentioned and sincere, I believe they are sincerely wrong. But I confess grave concern at the arrogance of many groups and individuals who in many years of controversy and compromise, let alone participated in, the callous attacks upon this good, decent, honorable, brilliant and dedicated man surely will one day have it on their conscience—if, indeed, they don't already do.

Mr. President, I ask unanimous consent that this article be printed in the Record at the conclusion of my remarks.

And, then, Mr. President, the role of the Communist Party USA is especially revolting. On the front page of the September 17 edition of the Communist publication, World Magazine, is a drawing of a huge balled fist, with the words in enormous block letters below, reading: "Knock Out Bork!"

On page 14-A of this Communist newspaper is a story bearing the headline, "High Stakes of the Bork Confirmation Fight!". Mr. President, I ask that this article also be printed in the Record at the conclusion of my remarks.

On the other hand, Mr. President, I want the record to include an article that appeared in the publication, Texas Lawyer, on October 5. This arti-
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cle was written by William Murchison who draws a parallel between Judge Bork and the late Senator Sam J. Ervin, Jr., with whom I had the honor of working when I served on the Judiciary Committee during my first 2 years as a Member of this body. The article is headed, "If Senator Sam Were the Nominee."

I ask unanimous consent that Mr. Murchison's article appear in the Record at the conclusion of my remarks.

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

(From the Washington Blade, Oct. 2, 1987)

BEHIND THE SCENES, BUT NOT ON THE WITNESS STAND
(By Lisa M. Keen)

Throughout the past three weeks of confirmation hearings on the nomination of Judge Robert Bork to the U.S. Supreme Court there have been very few references to Gay rights issues, and Gays have been noticeably absent from the media reports of over 100 witnesses to Bork's record.

But behind the scenes, national Gay organizations, with the help of Bork opponents, have been trying to pressure their senators to oppose Bork's nomination. The strategy is to make it impossible for senators to avoid mentioning the Gay rights issue in their floor debate on Bork.

Officials of the Human Rights Campaign Fund revealed this week that is was one of their lobbyists who supplied Senator Edward Kennedy with a tape recording of a 1983 Bork lecture—a recording Kennedy played at the hearing on Bork's last-scheduled day of testimony. The recording—which demonstrated Bork emphasizing his opinion two years ago that "precedent isn't all that important"—fell in stark contrast to Bork's assurances to the Committee all week long that he respects the need to uphold "long settled" Supreme Court precedents on important civil rights cases.

The dramatic impact of the recording was the focus of most media reports of that Friday hearing, and many newscasters quoted key uncommitted senators as saying they were troubled by Bork's lack of consistency with opinion and views he offered the Judiciary Committee.

Supplying that tape recording is about as good as Gay organizations were able to do to support its lobby effort and to write or send to their senators asking that they not vote to confirm Bork. The efforts of the Lambda Legal Defense and Education Fund and the Los Angeles-based National Gay Rights Advocates to support the Bork nomination were being sent. But, he noted, the number of mailgrams being sent has begun to "fall off rather badly." Endean said he believes Gays were choosing one of the three mailgrams messages which mentions Gay rights specifically or to which senators the mailgrams were being sent. But, he noted, the number of mailgrams being sent has begun to "fall off rather badly." Endean said he believes the battle is won.

Meanwhile, the offices of the senators from Maryland and Virginia report that—with one exception—their senators are undecided and flooded with constituents' mail on the Bork issue.

Pete Loomis, press secretary for the Virginia Republican Senator John Warner, said Warner has been so involved with the Defense Authorization bill, he remains undecided about the Bork nomination. Loomis said Warner plans to "spend extended time" studying the Bork record before the full Senate debate on the nominee. He said his office has received "several thousand phone calls" in the past month "with the usual mixture of people depending on who's orchestrating them at the time." Loomis said that while calls were initially "all pro-Bork," they have now evened out.

A spokesperson for Maryland Democratic Senator Barbara Mikulski's office reported calls there have run about 50-50, too; but letters are running about 60-40 against Bork. Mikulski's office has received 7,500 pieces of mail in all on Bork—3,000 of those arriving on Tuesday of this week. The Mikulski staffer said that Mikulski has not yet committed herself on the Bork vote because she wants to review his testimony and hear the debate on the Senate floor.

Maryland Democratic Senator Paul Sarbanes has also made no public statement as to where he stands on the Bork vote; but the 7,490 constituent calls and letters to his office are running 2 to 1 against the nomination.

Only Republican Senator Fred D. Thompson of Virginia has indicated he plans to support the Bork nomination.

The 14-member Judiciary Committee is scheduled to vote Tuesday. The full senate is expected to take up the Bork nomination in about a month.
The Bork nomination has provoked opposition that is as broad as it is intense. A multitude of mass organizations have drawn a conclusion. A massive grassroots mobilization is waging an all-out drive against Bork. The unprecedented mass opposition to Bork's nomination is an attempt to fill that vacuum and overcome the administration's political paralysis.

Within the Senate Judiciary Committee, there are five sure votes against Bork, five votes for, and 41 indecisions. Since it would take eight "no" votes to block the confirmation in committee, it is likely that it will go to the full Senate.

What is the administration's strategy to anticipate success when the Democrats hold a 54-46 Senate majority? The fact is that it is dealing with a partisan, not a political majority. The liberal lobby and the ultra-right extremists will be shifting their efforts. The rippling effects flowing from the 1986 elections is uneven and an on-going process that has yet to be mastered.

Thirty-three Senate seats, involving seven Democratic and 14 Republican incumbents and two open seats—one held by Sen. Edward Kennedy (D-MA) called the nomination President Reagan's attempt "to impose his reactionary vision of the Constitution on the Senate Court.

Cordelia Scott King, reflecting the universal sentiment in the Afro-American community, said it was impossible to imagine a more knowledgeable person than her husband, Rep. John Lewis, that Bork have been confirmed. She said "we must let our senators know that a vote against Mr. Bork is a prerequisite for our vote in the next election."

With the exception of Sen. Albert Gore (D-Tenn), who says he will wait on the hearings, all Democratic presidential hopefuls oppose confirmation.

The National Education Association, the American Federation of State, County and Municipal Employees, the United Auto­mobile Workers, the United Electrical Workers as well as the Executive Council of the AFL-CIO demand Senate rejection. Defeating the nomination is the NAACP's number one priority—"as it is for People for the American Way, National Urban League, National Organization for Women and many other organizations. Scores of cities and protest demonstrations have been organized with more planned to coincide with the hearings and the Senate vote.

Surely President Reagan's advisers anticipated, if not the full extent, then certainly the basic dimensions of the mass opposition. Surely they anticipated an accommodation with the Iran-contra scandal would not go looking for another setback. Yet, Reagan went ahead anyway. The question is, why?

It's because the Reaganites firmly believe they can win. They aim to use the confirmation flight to deliver a strategic blow against democracy. They see in the move a political initiative through the end of Reagan's term.

The Democrats' inconsistency in the congressional investigation into the Iran-contra affair will be a factor with this new gambit. Instead of utilizing the Iran-contra hearings to mount a resolute defense of democracy, leading Democrats opted for "good faith" of Democratic senators more than it relies on its own good organization and effective mobilization.

The unprecedented mass opposition to this nomination consists of thousands of national and local trade union, civil rights, religious, civil libertarian and other organizations that represent tens of millions of people. Nearly a third of the senators are firm opponents of confirmation. The joint action of all of these forces can mobilize for good faith by voting "no" on Judge Bork.

How? By applying the rule that what's good for the goose is good for the gander. If the ultra-right PACs can target senators from below, so can mass organizations and coalitions opposed to Bork.

A massive grassroots mobilization that gives the senators' constituencies a clear understanding of what's at stake is decisive and should be brought to bear on persuading specific senators to vote against confirmation. The home and Capitol Hill offices of every senator should be flooded with telegrams, postcards, letters and citizens' delegations demanding Bork's rejection for his opposition to civil rights, the Bill of Rights, workers' rights, abortion rights, and his support for the Espionage Act. All these resources should be combined to buy media time. Special and immediate attention should be focused on members of the Judiciary Committee.

Without the ultra-right PACs, Senate's movement does not have to resort to threats and intimidation, especially in the case of sena­tors with active re-election issues. But the message should be unmistakable: the voters' and the movement's memory is not so short as to forget senators who did not oppose the confirmation of a man who would help establish an ultra-right reign on this and the next generation. This is something senators up for reelection in 1988 and 1990 can not afford to forget when it comes time to vote for or against confirmation.

"Civil rights laws are... repugnant to constitutional and legal thought in America. It would leave the nation without valid laws adequate to regulate the actions and relationships of men and women and the responsibilities they owe to the helpless children they create."

And further:

"The role of the Supreme Court interpreter of the Constitution is to be a bulwark and a safeguard of our liberties, to prevent the erosion of what we believe in and what we hold dear in this great republic, and to give effect to the intent of its framers and the people who ratified it as that intent is revealed by its words."

At which point many would say, with resignation in their voices: Anything else, Judge Bork?

I beg to point out that this is not Robert H. Bork speaking. The foregoing is the wisdom of Sam J. Ervin Jr.—Senator Sam, American folk hero; avuncular, Bible-quot­ing, gentle man; president of the Senate, and master of ceremonies for the Watergate hearings.

All America, little more than a decade ago, loved Senator Sam, looked up to him with reverence and awe as the foremost guardian of constitutional liberties. His observations on justice and the intricacies of constitutional law were relayed in every barber shop and classroom. He was our national sage. I am beguiled just now by the thought that he would have been the kind of adversary of the Nixon White House. And maybe America's foremost constitutionalist concurs almost point by point with the kind of arrogance and intimidation, especially in the case of sena­tors with re-election issues. But the message should be unmistakable: the voters' and the movement's memory is not so short as to forget senators who did not oppose the confirmation of a man who would help establish an ultra-right reign on this and the next generation. This is something senators up for reelection in 1988 and 1990 can not afford to forget when it comes time to vote for or against confirmation.
If you were anti-Nixon—as many Americans were—you pro Ervin. The trouble was that many in the Senate's large enough club didn't. To continue the basis of his opposition to Nixon.

Philosophically Ervin was closer to Nixon than to Senator Sam, but he thought that groups opposed to Judge Bork even threatened witnesses not to testify in his behalf.

Let me say this about Robert Bork. Without question, he is one of the most knowledgeable authorities on the Constitution who has ever been nominated to serve on the Court. I have heard no one question the qualifications of Judge Bork, and even his most severe critics have said that his integrity is beyond question.

There was an impressive list of organizations and individuals, both conservative and liberal, Democrat and Republican, who stepped forward in the hearings to support Robert Bork. I would like to list several names: Griffin Bell, of Georgia, who served as Attorney General during the Carter administration; step forth and testify in favor of the Bork nomination, as well as Lloyd Cutler and countless others.

But there came that cacophony of protest, raising questions that had no validity at all, and the bun's rush started. And it was fed day after day by the major news media of this country in a clear orchestrated-preconceived, preplanned, and executed by the schedule.

Mr. President, there is really no question but that Judge Bork is eminently well qualified to serve as a Justice of the Supreme Court. President Reagan knows it. Judge Bork's supporters know it; and Judge Bork's opponents know it. In fact, those who represent the most liberal, far-left elements of our society—those who have professed to be the best.

Those far-left elements recognize that Judge Bork will carry out his duties to uphold the Constitution and the laws of the land as intended by our founding fathers. He will not deprive them of any constitutional rights, but he will deprive them of one thing: A justice on the Supreme Court who will attempt to implement their liberal agenda through judicial activism.

Mr. President, when one looks at the groups opposing Judge Bork, it becomes clear why. Let me give one example which demonstrates the real issue involved in this nomination. In the September issue of Ms. magazine, the following statement appears:

* * * a coalition of civil rights and women's groups, including the NAACP, the American Way, and the National Abortion Rights Action League, is launching a major grass-roots effort to stop (Bork's) nomination. The battle, however, is much larger than Bork. If Bork's nomination is rejected, there is a chance that a new President could appoint a judge even more progressive than Powell and we could begin to win back some things already lost, like gay rights and Medicaid abortion.

So the cat leaps out of the bag. It becomes clear what the liberal special interest groups opposing this nomination have been up to. They have done everything possible to defeat the nomination, regardless of Judge Bork's qualifications, in hopes that they can either prevent President Reagan from filling the vacancy on the Supreme Court, or control the Senate by pointing a more liberal, activist candidate—one who will help implement their social agenda.

I am confident that the American people will eventually learn the truth behind the campaign of misinformation that has been waged to keep one of America's finest jurists off the Supreme Court.

Mr. President, the failure today of the Senate to confirm the nomination of Judge Robert Bork is a sad day for this body and a sad day for this country. As a point of historical interest, in 1930 the Senate failed to confirm the Supreme Court nomination of Judge John J. Parker, a brilliant and highly respected jurist on the 4th Circuit Court of Appeals. It so happens that Judge Parker was from my hometown of Monroe, NC. Judge Parker's nomination was also the target of lies and distortions of a small but vocal group of special interests, and the nomination was defeated due to purely political votes.

Judge John J. Parker was born on November 7, 1885. He completed his undergraduate studies at the University of North Carolina with the highest academic average at the university up to that time. He went on to finish the law program at the university with equal academic excellence.

The history of Judge Parker's nomination is summarized in "Duty and the Law: Judge John J. Parker and the Constitution," a fine book written by William C. Burris, who is an author and professor of political science at Guilford College in North Carolina.

In his book, Mr. Burris relates the distortions that were used to keep Judge Parker off the Supreme Court. Mr. Burris gives a clear example of the disingenuousness of Parker's opponents. He points out that as a politician, Parker was criticized by his political opponents as "an ambitious Republican who wanted to return the State of North Carolina to the Democratic domination. * * *" However, upon his nomination to the Supreme Court, he was opposed as "an unregenerated Southern racist who wanted to keep American blacks in bondage."

In the words of the author:

Both charges were wrong, clearly at odds with the public record. They were based on what his detractors wanted to believe about him rather than anything he ever believed,
said, or did in regard to the question of race and politics.

Mr. President, the charges leveled against Judge John J. Parker were generated falsely by a small group of special interests to foster hate and fear toward Judge Parker—exactly as the opponents of Judge Bork have done.

I imagine that one day a book will be written about the nomination of Judge Bork. Like "Duty and the Law," the book about Judge Bork's nomination will expose the hypocrisy that has been so evident in this debate. It will recall that as soon as the nomination was announced, Members of this body and liberal special interest groups around the country were attempting to instill fear and hatred among the people—totally divorced from the facts about the nominee or his record.

First, we heard his opponents acknowledge that his qualifications were unimpeachable, but the nomination itself was criticized because it would upset the balance of the Court.

Then Judge Bork was charged with being too extreme in his views. No mention was made of his record as an appellate court judge. And when the hearings showed that Judge Bork was not at all extreme in his views, he was accused of being unpredictable. In the last few days, several of our colleagues have said that even though they oppose Judge Bork, they really do insist on a conservative appointment to the Supreme Court—that we should have a conservative court. But they oppose Judge Bork because he has "divided" the country, or lacks "judicial temperament," or "scholarship."

I ask those Senators what happened to the so-called balance theory. If Judge Bork is not confirmed and the next nominee is considered a conservative, and philosophy, we start down the same road with the opposition saying he will upset the "balance" of the court.

Mr. President, I think I have adequately registered my frustration and disappointment with the manner in which the debate has been conducted. Let me offer a few quotes which I think are relevant to this debate. First, William Burris, author of "Duty and the Law," William Burris, who said:

Mr. Parker was only an "incidental," a casualty in the headlong rush of our groups to gain objectives that were more important to them than a fair and balanced evolution of a relatively unknown Federal judge.

Mr. President, that is the essence of what has happened to the nomination of Judge Bork. It has become a "casualty" in a greater struggle of radical groups to gain objectives more important to them than the fair and balanced consideration by the Senate of a Supreme Court nominee.

Next, I quote a part of an editorial from the October 15 edition of the Wall Street Journal:

Editorialists, columnists, and several Democratic Senators are now engaged in an elaborate rationalization of this descent into political falsification. The public is asked to accept their argument that the Bork case is not of the integrity of a single American citizen by Planned Parenthood, People for the American Way, and others was beside the point. That would not, of course, survive as a lesson of the Bork nomination.

The lesson is that up to now, the assault has worked. It intimidated not only Senators who spin like weather vanes, but also Senators made of sterner stuff. This was affirmed in the vote of the Senate Judiciary Committee and in thinly argued justifications for that vote. It is a new kind of politics, and it awaits the official imprimatur of 51 Senators. We hope that someone pauses to see the implications of turning the advice and consent role over to groups whose very livelihood depends on making U.S. politics feverish and false.

Finally, I quote Judge Parker. He said:

A man who puts the welfare of his party above the welfare of his country, is, in the final analysis, either a traitor or a fool.

Mr. President, Dr. Mildred F. Jefferson is a general surgeon with Boston University Medical Center and assistant clinical professor of surgery at Boston University School of Medicine. She asked to testify during the Judiciary Committee hearings but she was told the hearing list had been finalized and was unable to appear.

That is a shame, for Dr. Jefferson is a remarkable American. Though she was not allowed to testify I ask unanimous consent to have printed in the Record a statement by Dr. Mildred F. Jefferson in support of the nomination of Judge Bork, and that her statement appear in the Record at the conclusion of my remarks.

Mr. President, a bit of background about Dr. Jefferson: She is a Texas-born daughter of a Methodist minister. She hopes to be graduated from Harvard Medical School where, I might add, she was graduated magna cum laude.

She has a career-long interest in medical jurisprudence, medical ethics and problems of the medical-law issues, especially their impact on public policy and society. A founding member of the National Right-to-Life Movement, she is currently president of Right to Life Crusade, Inc., having served in the past as chairman of the National Right to Life Committee and in thinly argued justifications for that vote. It is a new kind of politics, and it awaits the official imprimatur of 51 Senators. We hope that someone pauses to see the implications of turning the advice and consent role over to groups whose very livelihood depends on making U.S. politics feverish and false.

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opportunity for all. He is wrong on "women's rights" because he does not know that a woman's right is, in fact, the liberty of the choice mandated by the Supreme Court of the United States.

You will place upon us the yoke of soci­

alists population-planning by fiat of the U.S. Supreme Court.

We need to restore the balance of powers among our four-to-be coequal branches of government. We have gone from the Im­

perial President to the Imperial Court to a now Imperial Congress. We need to reject Robert Bork on the U.S. Supreme Court. On this, we will not compromise; in this, we will not yield.

Mr. HARKIN. Mr. President, I rise in opposition to the nomination of Robert Bork to be an Associate Justice of the Supreme Court.

Earlier this month, after studying Judge Bork's record and his testimony before the Judiciary Committee, I an­
nounced that I would not vote in favor of his confirmation. I believe that decli­
sion is still the correct one.

This is one of the most important votes that will take this year. It is not just a vote about the career of one man. It is a vote about the protection of the rights and liber­
ties of all Americans. It is a vote about the fate of the Constitution and growing document embodying bedrock American values. It is a vote about the balance of power that ac­
counts for the strength and stability of our system of government. It is a significant and historic vote.

As I stated when I first announced that I would oppose Judge Bork's nomination, I am very concerned by his view of what constitutes liberty. This is not merely a theoretical con­
cern. How we view liberty is at the core of how we view the relationship between the people and their Govern­
ment.

Most Americans, and certainly the founders of this Nation, viewed the liberty guaranteed in the Constitution as a guarantee of personal freedom and autonomy. Most Americans be­lieve that only in conflict with those values does the Constitution require government to interfere in our private lives. Judge Bork appears to believe that belief or understand those values.

We need to restore the balance of powers among our four-to-be coequal branches of government to leave the protection of minor­
ity freedoms to majority will.

Judge Bork's view of liberty compels him to resolve any controversy be­
tween the executive and legislative branches in favor of the President over Congress.

And it is Judge Bork's view of liberty that prompts him to reject the principal role of the Supreme Court as the final arbiter and guarantor of individual liberty and equality. And this is a view which is incompatible with the constitutional ideals to which our great Nation as­pires.

Unlike the President and Members of Congress, the Justices of the Su­

preme Court do not have to answer to an electorate. The Constitution is their guide. The Court should feel free to act, but those actions should be based on a solid belief that the Constitu­tion is an evolving document em­
bodying the values that have served us so well for more than two centuries. In my view, Judge Bork does not share that belief or understand those values.

Thus, I will oppose his nomination.

Mr. MATSUNAGA. Mr. President, it is with regret that I have reached the conclusion that I cannot support the nomination of Judge Robert Bork to the U.S. Supreme Court. The contro­
versy over this nomination is unfortu­
nate. The judge is an attorney of con­
siderable attainments. But after much reflection I am unable to give my assent to his promotion to the Su­

preme Court; I would counsel against it.

When his nomination was first an­
nounced, I was dubious whether a jurist of his narrow constitutional views, especially in the realm of civil rights, the rights of women and mi­
norities, could gain confirmation in the Senate. I also had reservations
about his role in the so-called Saturday night massacre at the Justice Department during the last months of the Nixon administration. But I stood ready to be reassured on both counts during the course of the hearings on his nomination.

Unfortunately, the Judiciary Committee hearings, conducted with commendable fairness by the junior Senator from Delaware [Mr. BIDEN], failed to reassure me on either concern regarding Judge Bork. In fact, they had the effect of increasing my doubts. The opposition to his appointment came from a broad cross section of people in many walks of life, including outstanding members of the legal profession itself. Two were former presidents of the American Bar Association, one of whom saw fit to compare his appointment to that of Chief Justice Taney in terms of its potential for engendering civil strife for this great country of ours. Also, the judge's recollections of the "Saturday night" aftermath do not square with those who were in the responsibility for the Watergate prosecution.

The Senate's confirmation powers should never be exercised lightly or arbitrarily, and especially in the case of a Supreme Court nominee of Judge Bork's credentials and career achievements. I am aware, of course, that the nominations of other Supreme Court Justices in our history were controversial, including several who subsequently gained the stature of greatness such as Louis Brandeis and Hugo Black. The performances of Supreme Court Justices have been known to surprise outstanding nominees of the last few decades.

But in the case of Judge Bork I am convinced that the record is overwhelmingly against his becoming a "born again" champion of equal protection under the law for all. His commendably reflected has been sufficiently in the course of his judicial career so as to overcome the concerns raised by his tenure as a provocative law professor. Indeed, there is evidence of these concerns arising as much from his writings on the bench as from the courtroom.

Because the hearings were nationally televised, the American people have expressed themselves on this most divisive appointment, and sentiment has been against him. There are two schools of quite divergent thought as to whether we as Senators should take public sentiment into account in our own deliberations on the matter. Appointment to the highest court in our land hardly lends itself to a popularity contest. Yet, it was said once a long time ago that Supreme Court Justices do follow the country's election returns. For my part the public opinion polls only serve to confirm my own serious reservations about Judge Bork's nomination, Mr. President. I cannot in conscience support the nomination of Judge Robert Bork to the Supreme Court of our land. I will not vote to confirm him and I urge a similar course to my colleagues.

Mr. CHAFEE. Mr. President, I will vote against the nomination of Judge Robert Bork to the Supreme Court. After the Judiciary Committee finished its work, I gave careful consideration to Judge Bork's qualifications. I studied the committee's proceedings, including not only the testimony of Judge Bork himself, but also the views presented by the other witnesses on both sides of the nomination.

Let me first state that I take very seriously the Senate's constitutional role in passing upon Supreme Court nominees. In determining who will serve in the judicial branch of our Government, the President and the Senate each have significant responsibilities. The President's power to nominate and the Senate's power to give or withhold its consent are equally important in this process. I firmly believe it is appropriate for the Senate, when it is desirable to limit a particular nomination in part, to base its decision on the nominee's judicial philosophy.

This has not been an easy decision. By anyone who listened to his testimony will acknowledge, Judge Bork is a constitutional thinker of the highest order. His knowledge of the Constitution, of constitutional jurisprudence, is as broad and impressive as we have seen in any judicial branch nominee. His approach, no less than his opinions, is as believed. That philosophy, I believe, is probably one of most outstanding nominees of the last few decades.

In addition to his evident brilliance as a student of the Constitution, Judge Bork has demonstrated his competence on the bench. He has served ably for the last five years as a judge on the Circuit Court of Appeals for the District of Columbia. In his current position, he has reviewed Supreme Court precedents, and has often written decisions that I would categorize as "mainstream." I supported Judge Bork's nomination for the D.C. Circuit Court and I believe that he has continuing to make the right decision.

Judge Bork's nomination to the Supreme Court is, in my view, an entirely new question. As our ultimate tribunal, possessing literally the last word on constitutional questions, the Supreme Court is the place in our system of government where the Constitution must be viewed and interpreted in the clearest possible light. The decisions of the Supreme Court ring down for decades and generations in history.

Therefore, the Bork decision should be, for every Senator, a decision on whether Judge Bork's view of the Constitution will hold together in light of the decisions of jurisprudence that began with the founders who constituted the Supreme Court and that continues today with the current Supreme Court. I have decided, after much deliberation, that Judge Bork's views of the Constitution are at odds with what I believe to be the fundamentals of American constitutional history and traditions.

At the end of July, shortly after the announcement of the Bork nomination, I wrote a letter to Senator BIDEN, chairman of the Judiciary Committee, outlining my initial concerns about Judge Bork, and requesting that those concerns be raised in the hearings. The issues that I outlined in that letter were among the central concerns of the hearings. Therefore, I have had ample opportunity to consider the implications of the Bork nomination in the areas that most concern me.

My letter to the Judiciary Committee focused on three areas:

First, the right to privacy, and particularly the Roe versus Wade decision.

Second, the Constitution's protection of the rights of minorities and women;

Third, the first amendment's protection of freedom of speech.

Basically, I was troubled by Judge Bork's strict adherence to the philosophy of judicial restraint, or original intent. It is my belief that the Constitution is a wondrous document, not solely rights and freedoms it specifically grants, but also for its striking latitude. That is, the language of the Constitution is explicit enough to give definite outlines to the way society and Government function, but broad enough that the courts can address difficult—and often inequitable—situations not specifically covered in its language.

In my view, Judge Bork's rigid, literal reading of the Constitution denies the broad federalism inherent in our Constitution—that is one of that document's greatest strengths. Using a complex excessively legalistic rationale, he rejects extension of important rights that I believe are protected by the Constitution, if not literally written therein 200 years ago. For example, I would point to Judge Bork's written expressions of disapproval of broad judicial protection for freedom of speech and the right to privacy. In my view, judicial protection in these areas is not only appropriate under the Constitution, but necessary. Although in the intervening years and in his testimony Judge Bork modified some of the views expressed in his writings, for example in the Indiana Law Journal article of 1971, I remain deeply troubled by those views.

Furthermore, I could not overlook Judge Bork's previously stated views on civil rights issues. He once expressed his clear opposition to such laws as the 1963 Public Accommoda-
tions Act and the 1964 Civil Rights Act. Although over the years he distanced himself from these positions, his testimony left me with serious, lingering concerns that as a Supreme Court Justice, Judge Bork views the Constitution in a narrow view of the Constitution to constrict current legal protections of civil rights. Throughout my career, beginning with the introduction of a fair housing bill when I served in the State legislature, the last question in my mind was whether Judge Bork was correctly interpreting the constitutionality of civil rights laws. As I see it, the significant possibility that Judge Bork would come down on the other side of this question is too important to overlook.

In summary, I believe that two of our country's most significant judicial traditions, the protection of individual rights and of minority rights, are potentially endangered by the Bork nomination.

Judge Bork is a man of great integrity and intelligence. During this nomination process his character has been maligncd most unfairly, and the partisan debate on his nomination has obscured the real issues, the issues on which my decision is based. While I regret that the nomination has been transformed into an ideological sideshow, this development has not altered what, in my mind, is the essential question. I should clarify what I believe is Judge Bork's view of the Constitution to be approved to serve as a Supreme Court Justice? My answer is that he should not.

Mr. GRASSLEY. Mr. President, I would like to ask my good colleague from Wyoming, Senator Simpson, if he would yield for a question or two.

Mr. SIMPSON. I would be happy to yield.

Mr. GRASSLEY. The good Senator from Wyoming is a distinguished attorney with whom I have had the great privilege to serve on the Senate Judiciary Committee.

And as the Senator from Wyoming knows, I am not a lawyer. In addition to my years in public service, I have been a farmer from Butler County, IA, most of my life.

There have been some troubling questions lingering in my mind during this debate over Judge Bork, that you as an attorney may be able to answer for me.


Mr. SIMPSON. I say to my fine friend from Iowa that I am quite familiar with the ABA's Code and Rules for attorneys. The Senator from Iowa may know that these serve as guides to members of the legal profession as well as serve as a basis for disciplinary action against attorneys who violate these standards.

Mr. GRASSLEY. I appreciate that explanation, and would therefore like to share with my colleagues, most of whom are attorneys, two or three of these provisions.

The first provision I will read falls within the Code of Professional Responsibility, under Canon 8 which states, and I quote: "A lawyer should assist in improving the legal system."

Under what is called "Ethical Consideration 8-6," it states, and I quote: It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges.

If the Senator from Wyoming would yield again. Does this provision apply to all attorneys, including lobbyists and Senators?

Mr. SIMPSON. It certainly does apply to all attorneys, but unfortunately, particularly in view of the treatment of Judge Bork, ethical considerations will not be sufficient to subject an attorney to disciplinary action.

Mr. GRASSLEY. Well, let me read a different section. Under the same Canon 8, there is a section on disciplinary rules. Disciplinary rule 8-102 is entitled "Statements Concerning Judges and Other Adjudicatory Officers."

Subsection (a) states, and I quote: A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

Subsection (b) states, and I quote: A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

Would my good colleague from Wyoming tell me, do these disciplinary rules apply to all attorneys, including lobbyists and Senators alike?

Mr. SIMPSON. These disciplinary rules most certainly do apply to Senators and lobbyists who are attorneys, but Senators are insulated from disciplinary action by the "speech and debate" clause of the Constitution. Violations of these rules can subject the attorney to disciplinary action, if the attorney is not a U.S. Senator. Sometimes the violating attorney is forever disbarred and prohibited from practicing law.

Mr. GRASSLEY. I would finally like to point out that rule 8.2(a) of the ABA's "Model Rules of Professional Conduct" seems to be similar. It states, and I quote: A lawyer shall make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Mr. SIMPSON. If the Senator from Iowa would yield, these rules also apply to attorneys in the jurisdictions that have adopted them. You see, these rules were adopted only relatively recently by the ABA's house of delegates. I believe it was in 1983.

Mr. GRASSLEY. I want to thank my colleague, and ask his indulgence in the following question. Who is responsible for enforcing these rules?

Mr. SIMPSON. Complaints are handled generally by local or State bar association committees. Ultimately, however, the courts are responsible for enforcing these standards.

Mr. GRASSLEY. Do you have to be an attorney to file a complaint?

Mr. SIMPSON. Absolutely not. Any citizen may file such a complaint. I would add that some complaints are not likely to be given serious consideration—one would need to be quite certain their facts were straight with a solid basis being formed for a complaint.

Mr. GRASSLEY. I imagine that the attorney would have ample opportunity to defend his or her actions, and in my view might obtain fairer treatment than has Judge Bork by some of his detractors.

I want to thank my friend and colleague from Wyoming again for helping explain these rules governing the actions of attorneys. It has been enlightening for me.

And hopefully, it has been at least somewhat disheartening, sobering for certain attorneys who have, shall I say, been playing fast and loose with this judicial nomination process.

Mr. KERRY. Mr. President, I have been listening with great interest when I have been able to, the debate on the floor of the Senate on the nomination of Judge Bork. Most of that debate and much of the commentary surrounding it has been centered on the assertion that "the process has been grossly and inappropriately politicized." In bitter terms, some Senators have suggested this nomination will lose not on its merits but on its unfair politicization.

If the effect of these vitriolic assertions weren't so depressing and injurious to the process they seek to defend, one might find amusement in these charges.

For years, President Reagan has made much of his promise to appoint judges who would carry out his agenda. His pronouncements of intent to do so have never even touched on the subtle. They have been bold, brash, even purposely provocative promises—made in the heat of campaign and for the purpose of campaigning. The President for years has politicized the entire judiciary and judicial selection process. Who among us
has not heard the President's speech—"what we need are judges who will do this or do that." In recent years it was politicized to such an extent that the former GOP chairman of the Judiciary Committee had to be requested to withdraw a judicial questionnaire which overtly sought to eliminate candidates for judgeship who did not adhere to a specific set of political beliefs.

What is clear is that when the President sent the Attorney General and Howard Baker to the Hill to consult on potential nominees those who knew the Bork record were warned about the negative impact of sending Judge Bork. Other potential nominees on their list they were told would pass easily. Nevertheless they chose the path of confrontation—they sent Judge Bork.

Politics and ideology have been a factor in this nomination because the President wants to make judicial accommodation and not confrontation. It is precisely because those presidents sought political questions or interest group pressure groups, not a true philosophy of constitutional issues, from first amendment rights, property, or market power at the expense of individual liberties, not a true philosophy of "neutral principles" as he has professed. Third, there are Judge Bork's reformation, modifications, and newly formulated decisions, and are narrowed to the Supreme Court's judicial record. During the hearings, I was struck by Judge Bork's troubling statements about stare decisis. In discussing the Brandenburg and Hess cases, Judge Bork claimed that he now accepts them, even though he disagrees with them. But as Senator Specter pointed out.

The next case will have a shading and a bill be, and I am concerned about your philosophy and your approach. If you say you accept this one, so be it. But you have written and spoken, ostensibly as an original interpretationist, of the importance of originalists not allowing the mistakes of the past to stand.

This exchange illustrates the holism of Judge Bork's confirmation conversion. While he may say that he accepts cases already decided, we have no assurance that he will indeed follow those precedents in the future, when new cases and new facts arise.

A related point Senator Howell Hefflin raised in his questioning of Judge Bork. As Senator Hefflin pointed out to him. As an Appeals Judge, of course, some of your own personal views are restricted by certain decisions, and are narrowed to the issue that might be before you. If you are confirmed and go on to the Supreme Court, while there will be some restrictions, you will find it well free to express your own beliefs as you see fit to do on the issue that is before you; is that not true?

Judge Bork's response is revealing. He said to Senator Hefflin:

Yes, I would not say I was free in the sense that I was free as a professor; not at all. But obviously, a Supreme Court is freer than a Court of Appeals is.

And as Senator Hefflin put it in his closing statement to the committee:

A life-time position on the Supreme Court is too important a risk to a person who has continued to exhibit—and may still possess—a proclivity for extremism in spite of constitutional prudence.

Even a cursory review of his record yields numerous contradictions, and raises troubling questions.
was wrong to ban literacy tests for voting, calling its decisions that such tests were unconstitutional "pernicious." He has called the Supreme Court's outlawing of a Virginia State poll tax "wrongly decided." And when the Court held that universities may not use raw racial quotas but may consider race, among other factors, in making admissions decisions, Judge Bork disagreed and wrote a biting critique of the carefully crafted opinion written by Justice Powell.

We have a choice—the Supreme Court's position on civil rights, or Judge Bork's. I choose the Supreme Court and not Judge Bork.

We can make the same choice on matters of whether individuals have rights in connection with public education. The Supreme Court has said they do. Judge Bork has said they don't.

The Supreme Court ruled more than 50 years ago that there is a right to teach or study a modern foreign language in school. But Judge Bork, in "Neutral Principles," has argued that this case was "wrongly decided.

The Supreme Court has held that the Constitution gives Americans a choice when it comes to educating their children. If they wish to, they can send a child to private school. Judge Bork thinks this case too was "wrongly decided."

The Supreme Court held that public school officials may not require students to recite a State-sanctioned prayer at the beginning of each day. Judge Bork, in a 1982 speech, disagreed. Once again we can choose—the Supreme Court or Judge Bork? I choose the Court.

Judge Bork has said the Supreme Court was wrong on antitrust matters, too. He has said he found a constitutional under the antitrust laws to protect small businesses, and that even the Congress is wrong on antitrust, accusing Congressmen of being "insane" for failing to find the sustained rigor and consistent thought to protect small businesses, and that electronic surveillance techniques, it is the Constitution. Judge Bork has disagreed.

The Supreme Court has ruled as a matter of constitutional law, no State has the right to prevent married couples from using contraceptives. Yet Judge Bork as recently as 2 years ago said there was "no supportable method of constitutional reasoning" to justify this decision by the Supreme Court in Griswold versus Connecticut.

So once again we can choose. I have similar doubts in the area of speech. The Supreme Court has found that the first amendment provides broad protections to our citizens. Judge Bork has taken the opposite view.

Judge Bork called the Pentagon Papers cases, "instances of extreme deference to the press that is by no means essential or even important to its role," described the Supreme Court stopping criminal prosecution of a newsmen who published the name of a judge who was being secretly investigated by the State judicial review commission that the Supreme Court for protecting "offensive language" and the Supreme Court should have helped the Government suppress the speech.

A full review of Judge Bork's criticisms of the Supreme Court reveal a Judge who does not have minor disagreements with a few areas of constitutional doctrine. His writings, taken as a whole, suggest that he believes the Supreme Court has been seriously out of step with the Constitution. These are not political choices, nor even ideological. These are substantive judgments about judicial philosophy and attitude.

Judge Bork's elevation to the Court would constitute a decision by us to support the renunciation of much of the work the Supreme Court has done over several decades. To confirm the Supreme Court a man who has opposed so many of the Supreme Court's past decisions, decisions which remain the law of the land, is to send by such a confirmation a clear signal to the Supreme Court and to the Nation that we, like Judge Bork, believe these decisions have been wrong.

I believe the opposite. Accordingly, I would rather that this Senate renounce Judge Bork than renounce the Supreme Court's work of the decades past.

The second reason Judge Bork should not be confirmed is his position that individual liberties cannot exist except insofar as they can be found according to a "neutral" reading of the Constitution.

Judge Bork has described these beliefs as a consequence of the need for judicial restraint. In Judge Bork's view, a judge's role is, in his own words:

"...to discern how the framers' values, defined in the context of the world they knew, apply in the world we know."

But a review of Judge Bork's writings and opinions suggest however, that this "value neutral" principle has not been followed by him in practice. Instead, Judge Bork has shown selective allegiance to original intent jurisprudence to achieve the very results-oriented jurisprudence he has disavowed.

This is particularly apparent in the area of individual rights. Here Judge Bork says that there is a very limited scope to constitutionally protectable personal liberties, because only a few are clearly described in the text of the Constitution.

Yet in order to make this argument, Judge Bork has to ignore the plain language of the Ninth Amendment which says plainly that the listing of the rights in the Constitution do not disbar the people's inherent "unenumerated rights."

There is historical evidence that many of the framers were concerned that the adoption of a bill of rights, by its express inclusion of some rights, could be interpreted to exclude all others, and that this was the reason the ninth amendment was adopted. While there is significant scholarly debate about the meaning and purpose of the ninth amendment, it has been interpreted to mean that it cannot simply be disregarded. The propounder of "neutral" jurisprudence and "original intent," Judge Bork, would do just that, relegating the ninth amendment to nothing more than, in Judge Bork's words a "water blot" on the Constitution.

Beyond the issue of whether or not Judge Bork is adhering to "Neutral Principles" in his rejection of the ninth amendment to the Constitution and by any meaningful, there is an inherent philosophical issue. Like the Supreme Court, I believe there are fundamental liberties which are protected under the ninth amendment. Judge Bork apparently does not.

Judge Bork has even expressed views suggesting that the entire Bill of Rights does not deserve the respect given the original portion of the Constitution, calling the Bill of Rights "a hastily drafted document on which little thought was expended." To me, this is an incomprehensible statement. The Bill of Rights is one of the fundamental documents of our democracy. I wonder how Judge Bork would justify this alarming statement with his current view of himself as one adhering to the "original intent" of the framers, when Samuel Adams, Thomas Jefferson, John Hancock, and James Madison among others of our Founding Fathers emphasized the importance of the Bill of Rights, and urged its incorporation into the Constitution.
Thus, we have a choice here, too. Do we wish to reaffirm our national commitment to the Bill of Rights and to a judicial philosophy which believes that the people have inherent rights, confirmed by the ninth amendment? Or do we wish to confirm Judge Bork and repudiate these ideals?

The third issue which merits Judge Bork's rejection is his shifts of position during his confirmation hearings. Many have remarked on the almost casual disregard of views which he has expressed strongly and frequently in his writings. A Supreme Court Justice is a lifetime appointment, and the shifts are not on small matters. Perhaps influencing political attitudes to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation.

This is not a mainstream view of the first amendment. It would mean that a town council ban all books by James Scott Fitzgerald, without fear of challenge on first amendment grounds.

In 1979, Judge Bork reaffirmed these views in a speech in Michigan. He said that:

> There is no occasion . . . to throw constitutional protection around forms of expression that do not directly feed the art, or indeed any form of expression, are capable of influencing political attitudes. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation.

In 1984, in a letter to the ABA Journal, Judge Bork partially modified these views, saying that:

> Moral and scientific debate are central to democratic government and deserve protection.

Significantly, he did not include artistic or literary expression in this formulation. In an interview just 3 months ago, Judge Bork reaffirmed that position, saying:

> There comes a point at which the speech no longer has any relation to those processes. When it reaches that point, speech is really no different from any other human activity that is constitutionally protected.

Yet in the hearings, Judge Bork for the first time disavowed all of that. Not only does he say that he doesn't believe it now, he says that he never really did believe it. When Chairman Brown asked him "When did you drop that idea?" Judge Bork responded "Oh, in class right away." He also said that "I have since been persuaded—in fact I was persuaded by my colleagues very quickly, that a bright line made no sense." Judge Bork now tells us that "there is now a vast corpus of first amendment decisions that I accept as law. It does not disturb me. I have no desire to disturb that body of law."

Any reading of Judge Bork's statements in 1971, 1979, in 1984, and in 1987 prior to his nomination shows us clearly that Judge Bork did advocate significant limitations on first amendment rights. It meant nothing but to accept that only now has he seen the light and that is in the context of a Supreme Court nomination that he has shifted his views so substantially from what they were before.

We come at last to the issue of precedent. As my review of Judge Bork's many disagreements with the Supreme Court indicates, there are a lot of decisions the Supreme Court has made which he never accepted. Anyone trained as a lawyer, or working in the legal system knows of the respect, indeed reverence, which must be given to precedent and to past decisions of the Supreme Court. We know that the principle of stare decisis is the cornerstone and foundation of our legal tradition.

But Judge Bork's own words cast doubt as to how much he accepts this view when it comes to constitutional issues, the heart of the difficult work of a Supreme Court Justice.

Judge Bork has argued as recently as this year that "the role of precedent in constitutional law is less important than it is in a proper common law or statutory model . . . If a constitutional judge comes to a firm conviction that the courts have misunderstood the intentions of the founders, the basic principle they enacted, he is freer than when acting in his capacity as an interpreter of the common law or of a statute to overturn the precedent." Judge Bork went on to say further that "an originalist judge would have no problem whatever in overruling a nonoriginalist precedent, because that precedent by the very basis of his judicial philosophy has no legitimacy."

In other words, if Judge Bork believes the Supreme Court wrongly decided a constitutional case—anything constitutional case—precedent need not be respected. He would have "no problem whatever in overruling a nonoriginalist precedent," because that precedent was illegitimate.

We have seen that Robert Bork has disagreed with the Supreme Court on many constitutional matters precisely on this ground. Many have pointed out that this view would be contrary to the supposed original intent of our Founding Fathers. Given these public pronouncements that a constitutional judge should feel free to overturn precedents he disagrees with, few can imagine any of the sustained like Judge Bork at his word and assume that for him such precedents are illegitimate, and may be overturned.

For this reason particularly, I believe his confirmation by the Senate would send a signal to the Supreme Court itself that is unmistakable and unmissably wrong. It would be that we want to change the direction of the Court, that we want the Court to rethink the fundamental meaning of the Constitution on the lines of the thinking of Robert Bork.

Judge Bork has criticized and rejected Supreme Court precedents dating back to the beginning of this century in several important areas of law. Perhaps Judge Bork is right in all of these cases, and the Supreme Court is wrong. Perhaps courts are unable to deal with economic and other important issues. Perhaps Congress is instinctively incapable of the sustained analysis and intellectual rigor which is essential for good lawmaking. Perhaps Judge Bork's vision is clearer than that of Justices Holmes, Brandeis, Douglas, and Powell. Perhaps all of these cases should be overturned. But perhaps Judge Bork is wrong.

I, for one, am not willing to take that chance. I cannot believe that a whole body of Supreme Court precedents, in vital areas such as civil rights, free expression, and free enterprise, should be overthrown. I am not willing to substitute one man's opinions for an entire body of law, a constitutional tradition of respect for precedent, which we have built in this country over the past 200 years.

There are other areas in which I also have serious problems with Judge Bork—on the War Powers Act, on his deference to the executive branch, on his rejection of congressional standing, and on his actions during Watergate. These issues have been discussed at length by my colleagues. I will not repeat all of those arguments now. But suffice it to say that the Senate has an obligation to take a very close look at this nominee, and to determine whether a man who has expressed such views throughout his legal career is a man whom we trust with the high responsibilities of an Associate Justice of the Supreme Court of the United States.
As Prof. Laurence Tribe of Harvard has written:

"It has arisen the myth of the spineless Senate, which says that Senators always rubber-stamp nominations and Presidents always get their way.

This has not been true historically. It is not the Senate's role to passively accept a duty to closely examine the views, the writings, and the character of any man or woman nominated to the bench of our highest Court. To do any less would not be true to the original intent of the framers of our Constitution.

I believe that a careful examination of Judge Bork's record reveals that he is neither a moderate, nor a conservative. He has consistently ignored precedents of the Supreme Court and settled areas of law. To place this man on the Supreme Court would be to reopen old wounds and to refight old battles. It would not be in the best interest of the American people.

Mr. BIDEN. I would like to thank all of the staff members, both majority and minority, who have worked so hard on the nomination of Judge Robert H. Bork, the Associate Justice of the Supreme Court.

I submit their names for the Record.


Lisa Defusco, Carol Hamburger, Jeff Hill, Jennifer Dickson, Elizabeth Gardner, Baxter Matthew McCoy, Cecilia Swensen, Peter Skowyra, John Tangi, Betty Lanier, Judith Lovell, Peter Smith, Jane Suber, Andyoski, Carenbauer, Mansel Long, Joyce Biancuzzo, Roger Cole, Betty Lanier, Judith Lovell, Carolton Bettenhaus, Denise Milford, Mary McFall John Leader, Tracy Essig, Wanda Baker, and Tricia Thornton.

JUDICIARY COMMITTEE REPORT FLAWS

Mr. HATCH. Mr. President, at the outset, I would like to restate what I believe to be a number of the key issues of the hearings. Chairman BIDEN can be proud of the procedural fairness with which he conducted the Senate Judiciary Committee hearings on Judge Bork's nomination. At the same time, I must state that those same hearings were decidedly lacking in substantive fairness. This should not reflect negatively at all upon the Senator from Delaware because he certainly cannot control the charges, allegations, and partial truths presented over and over again by witnesses. Nonetheless many of the witnesses presented a particularly slanted view of the law and demonstrated a lack of understanding of Judge Bork's abilities and reasoning processes.

Senator BIDEN took the time to review my concerns about the substance of the Judiciary Committee Report. I thank him for that. I feel that I owe him a similar courtesy. Inasmuch as I just received his views of the Record a few minutes ago, I shall be limited in the breadth of my responses, but nonetheless I stand by my original assertion that the committee report is sophomoric and slanted.

Mr. President, permit me to elaborate. In what Senator BIDEN refers to as "Inconsistencies 3-10" he once again asserts that:

Judge Bork's view of the liberty clauses— and his notion of the rights that I believe all Americans have—does stand alone among Judges who have sat on the Supreme Court.

The Senator from Delaware stated this same point in earlier debate on the Senate floor. In his eloquence, my colleague from Delaware said that every other Justice has crossed the Rubicon on the privacy right, for example, "But Judge Bork has not even put a boat in the water."

Mr. President, I urge my colleagues to check the river banks again; there are many other boats still on Judge Bork's side of the stream. Moreover those who have launched from the safe shores of the Constitution have been swept downstream into the rapids of judicial activism and unprincipled jurisprudence.

Let us count the boats still with Judge Bork on the bank defined by the Supreme Court's abortion decision in Roe versus Wade, 1973. In the cases of Carey versus Population Services International, Bergland versus United States, Carey versus Population Services International, and Carey versus Population Services International, under the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's rooms of truck stops, it is not difficult to imagine their reaction.

Moreover the Chief Justice has dissolved in no less than six other cases based on the reasoning of the so-called privacy doctrine. One of these was the Supreme Court's decision in Roe versus Wade, an abortion case. He reasoned that the majority's writings and the character of any judicial legislation than it does of a determination of the intent of the drafters of the 14th amendment.

The Chief Justice also dissented in Carey versus Population Services International.

If those responsible for the due process clause could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's rooms of truck stops, it is difficult to imagine their reaction.

The Court is most vulnerable and comes closest to illegitimacy when it deals with judge-made constitutional law having little if any recognizable roots in the language or design of the Constitution.

The Chief Justice, it is safe to say, has not left the safe shores of the Constitution.

The next boat lying beside Judge Bork's belongs to Justice White, President Kennedy's appointee. Justice White has opposed Roe versus Wade as "an improvident and extravagant exercise of the power of judicial review. He opposed Roe versus Wade on other privacy related cases. He wrote the opinion against homosexual privacy protections. He said in that case:

"It would be difficult, except by fiat, to limit the claimed right of homosexual conduct beyond that where they are committed in the hospital or in the abortion clinic."

He was joined in that opinion by Chief Justice Burger and Justices
Rhenquist and O'Connor. Justice White is not a drift in the rapid shift of judicial activism.

The next boat safely ashore on the banks of the Constitution is that of Justice Black. He joined in the first case to ever mention the alleged privacy doctrine, Griswold versus Conn. Justice Hugo Black stated:

My Brother Goldberg has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice" or is "contrary to the collective conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not "consider their personal and private notions." One may ask how they can avoid considering them. The Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "(collective) conscience of our people. Moreover, one would certainly have thought that the language of the Ninth Amendment to find that the Framers vested any such awesome veto powers over lawmaking, either by the States or by Congress. This being in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the Framers, the Constitution and Bill of Rights points the other way. **

Justice Black sounds like Judge Bork. Or Judge Bork sounds like Justice Black. In any event, they are neither alone in their views.

Another Justice whose boat remains beside Judge Bork's is Justice Scalia. We must remember that Justice, then Judge, Scalia joined Judge Bork's opinion in Drenenburg that denied homosexuals any constitutional privacy right. Justice Scalia's views on privacy must not be a secret because every advertisement suggests he will be one of the four to vote with Judge Bork in future abortion cases.

Finally Judge Bork's boat seems to be accompanied by a veritable fleet of ships unwilling to venture out into the constitutional storm that would result if the Court abandoned completely the well tested meaning of the Ninth Amendment.

We must put this entire issue of privacy into context. Judge Bork and all the others we have discussed have consistently enforced the privacy rights against unreasonable searches or the privacy right to worship or the privacy right to speak or the privacy right against self-incrimination to name a few specific constitutional privacy rights. But this free-floating privacy notion that some say includes protections for homosexual conduct was not manufactured until 1965. Where was the right until then if it was not found in the Constitution?

In order to make the law fit his conclusion that all Justices are different from Judge Bork, Senator Biden twisted the record on some Justices. For example it has been said that Justice Black accepted the broad substantive due process rights notion in the Skinner sterilization case. This is not a correct reading. Skinner was decided exclusively on equal protection grounds and not without a substantive due process or the right to privacy. Skinner held that a State law requiring sterilization of recidivist robbers, but not embezzlers, constituted "clear, pointed, unmistakable discrimination," and therefore offended the equal protection guarantee of the 14th amendment.

Justice Black joined this case on equal protection, not privacy or due process grounds. In fact, Black declined to join Stone's separate opinion which was based on due process. Senator Biden clearly rests his notion that most of the current Supreme Court agree with his own private notion of substantive due process on the recent unanimous decision in Turner versus Safley. This is misleading. Turner was about a super-protected, substantive due process right of privacy or marriage. The case arose in a prison context, raising fairly narrow questions. In Turner, State prisoners challenged the constitutionality of a prison regulation that permitted prisoners to marry only if the superintendent of the prison determined that there were compelling reasons for doing so. Obviously, the State generally permitted its citizens to marry without requiring that they show a compelling reason for doing so. One question raised, therefore, was whether this legislative classification survived equal protection scrutiny. The Court reviewed the applicable prison cases and summarized the proper analysis as follows:

"When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. Indeed, the approach of this case is similar to Justice Bork's reasonable basis test for equal protection. The clear basis for a reasonable distinction between prisoners and law-abiding citizens would be "legitimate penological interests." In the case of marriage, Turner, the Court would have reasonably reached the conclusion why the prison regulation against marriage is incompatible with those "penological interests."

Even if this is a due process case the reasoning is not that of privacy. After all, prisoners of necessity are deprived of liberty after the due process of a trial. The prisoners' claims that they have lost the liberty to marry are indeed analyzed according to the established standard whether this additional liberty loss is justified by the States' interest in the orderly confinement of prisoners. A prison case, unlike a due process case, does not have the adequate basis of concluding a general privacy or liberty right extends to other circumstances. Under this reasoning of equal protection reasoning, Judge Bork, too, would have joined Turner. Now, we may ask how they can avoid the question of constitutional rights in focus. The general privacy right questioned by Judge Bork was not manufactured by judges until 1965. This whole fanfare over Judge Bork reinforces the fact that no Justice Black, nor Justice O'Connor, and other Justices I have mentioned, have not embraced substantive due process privacy rights—have been slanted or creatively "reinterpreted" to fit the desired conclusion, namely that Judge Bork is somehow isolated on this vital question.

By the way, it is interesting to note what issues the Senator from Delaware did not discuss. The privacy doctrine was made by judges and can be unmade by judges. If it were actually in the Constitution, this would not be true. Judge Bork is opposed not because he is the sole voice against the general privacy notions, but because he may well be the fifth and deciding vote against this exercise of raw judicial activism.

In any event, this response to my argument makes my point. The facts of the law—namely that Justice Black, or Justice O'Connor, and other Justices I have mentioned, have not embraced substantive due process privacy rights—have been slanted or creatively "reinterpreted" to fit the desired conclusion, namely that Judge Bork is somehow isolated on this vital question.
lently in a public school classroom; the competing litigant asserts the right to a classroom free of all religious activity or symbolism. Again, one will prevail; one will not. It is axiomatic, however, that expanding one litigant's set of rights will have to contract the rights of the other litigant at the same time."

This does not mean, as the Judiciary Committee Report asserts, that the Constitution is a zero-sum system. The Constitution can be changed to incorporate both litigants. As in the case of Roe, the Constitution contains legal limits and laws. Those limits will acknowledge some rights and discredit others. This is obvious.

Thus any case before the Supreme Court features rights and liberties asserted by both litigants. The Court never has the luxury of saying "you are both right and we will grant both of your rights at the same time." Unfortunately the Court exists to make tough choices between rights.

The notion that "expanding the liberty of one expands the liberty of all" is a hollow-sounding sentiment with no relation to the reality of the legal world. It is also interesting to note that the Senator does not choose to quibble with No. 4. This points out that substantive due process is the unprincipled legal tool used to reach the dangerous conclusions in Dred Scott—that blacks are only property lacking rights—in Lochner—that economic rights prevent health and safety regulations—and in Roe—that unborn children have no protections.

Mr. President, the Senator from Delaware overlooks several other inconsistencies. I do not know why he found no arguments against those assertions, but he did not.

In dealing with inconsistencies 11, 14, and 12, Senator Biden states that my objections to his understanding of Judge Bork's views of precedent are without substance. Twice in the next section, he proceeds to question whether Judge Bork ultimately agreed with the imminence rationale of Brandenburg or disagreed with it, contending that "you can't find an alternative rationale" for that case. By raising the second point, Senator Biden proves my point in the first.

Judge Bork did not embrace at any point the reasoning of Brandenburg. He continued to question, to my understanding, both whether subversive speakers—the KKK advocating murder of blacks in this case—ought to be allowed to "have their way" and whether subversive speakers ought to be permitted to do their damage right up to the point that danger is imminent. At that point, Judge Bork noted by admitting he would offer no protection to the Nazis, it may be too late. On both points, Judge Bork's religious activity/compulsory education activity, I mentioned only one in my first cursory writing. In any event that is not the point. The point is that Judge Bork did have an alternative rationale for "accepting" Brandenburg. That alternative rationale is none other than the doctrine of stare decisis. Senator Biden demonstrates that he did not understand the significance of Judge Bork's views on precedent by insisting that he had to choose between agreeing or disagreeing with the rationale of that case. In doing so, he says that the few words of the first amendment do not justify Holmes' elaborate subversive speech reasoning, yet he still found a respected legal means to "accept" the clear and present danger test. That legal means is his theory of precedent.

Senator Biden's report might have mentioned it, but it must have discounted it—as I earlier mentioned—if the Senator did not understand or of the fundamental applications of that doctrine in Judge Bork's jurisprudence.

What Senator Biden refers to as "Inconsistency 16," Senator Biden assumes that my criticism of the so-called privacy doctrine is limited to the Bowers case. That assumption is incorrect. I will happily accept this opportunity to discuss some of the cases raised in defense of the so-called privacy doctrine in the report. Many of these cases have nothing to do with privacy.

In Pierce versus Society of Sisters, 1926, for example, the Supreme Court held that the liberty interest in the due process clause protected the right of parents to send their children to private schools. The opinion did not even mention the first amendment. Yet in subsequent cases, the Supreme Court has abandoned the due process rationale and rerationalized Pierce to a first amendment's disposition. Thus, in Griswold versus Connecticut, 1965, Justice Douglas' majority opinion referred to Pierce as a first amendment case establishing the principle that "the State may not, consistent with the spirit of the First Amendment, contract the spectrum of available knowledge." Similarly, in Wisconsin versus Yoder, 1972, the Supreme Court held that the Amish had the right to remove their children from compulsory education after the eighth grade and cited Pierce as a case protecting the free exercise rights of parents "with respect to the religious upbringing of their children." This case involved the same constitutional liberty—a parent's right to control the education of his or her child—but the rationale was wholly different from that advanced in Pierce.

Meier versus Nebraska, 1923, which held that a State could not prohibit the teaching of foreign languages in the public schools, was originally decided on the due process rationale. But in Griswold, this case, like Pierce, was also rerationalized on first amendment grounds.

According to the Court, the generalized "right of privacy" found in Griswold was rooted in the due process rationale from the first, third, fourth, and fifth amendments of the Bill of Rights. In Roe versus Wade, 1973, the Supreme Court rerationalized the privacy right as a substantive due process right, "founded in the Fourteenth Amendment's concept of personal liberty."

Similarly, in Rochin versus California, 1952, the Supreme Court held that pumping a suspect's stomach to discover evidence of drug possession violated the due process clause. In Schmerber versus California, 1966, by contrast, the Court protected an individual from a coercive seizure of an individual's blood under a different rationale. That is, in Schmerber, the Court could not compel an individual suspect of drunk driving to undergo a blood test, the Court reasoned that (1) the overriding function of the fourth amendment is to protect personal privacy against unwarranted intrusion by the state. Similarly, in Winston versus Lee, 1985, the Court held that the State could not force a defendant to undergo surgery to remove a bullet which would not be linked to him to the crime. The Court held that such a search was "unreasonable" under the fourth amendment. Thus, this was the same protection under a different rationale.

Similarly, the Senator's criticism of the due process clause is flatly incorrect when he attempts to establish that the only issue is the extent of the privacy right. It is this kind of misstatement that has badly distorted this process.

With regard to "Inconsistency 17," I am happy to take the chance to once again discuss Judge Bork's remarkable civil rights record.

Both as Solicitor General and as a judge on the D.C. circuit, Judge Bork has never advocated a position less sympathetic to minority or female plaintiffs than that ultimately adopted by the Supreme Court or Justice Powell. In other words, he has consistently been just as sympathetic or more sympathetic to civil rights than the current Supreme Court and the Justice he would replace. I realize that the one exception to this rule would be cases where a Federal law or policy was "unreasonably" applied under civil rights laws. In such cases, the Solicitor General is compelled to defend the legality of Government actions except in the most egregious cases.

Let me mention a few cases that demonstrate new moments of examination. In the General Electric versus Gilbert绳
case, Judge Bork argued for an advance in title VII law by establishing that pregnancy can be the basis for discrimination. Interestingly Justice Powell voted against Bork's position, the position favored by women, in that case.

Even though his argument was rejected by Justice Powell and the majority of the Supreme Court, Judge Bork's position is today the law of the land. Congress passed the Pregnancy Discrimination Act in 1978 to overcome the Supreme Court's restrictive reading of title VII and adopt the position you argued in the Court. In this instance, Judge Bork's position eventually prevailed but only over the objection of the Supreme Court. This is a further instance where Judge Bork was at the vanguard of the civil rights movement fighting to win important protections for women and minorities. With the case and others in mind, it is hard to understand how anyone could criticize the Judge for opposing every major advance in civil rights law, including back the clock on civil rights.

To the contrary, he was responsible for many of those advances and for propelling the civil rights clock forward. To this end he wrote another essay. In 1976, Judge Bork was responsible for the case of Washington versus Davis concerning the disparate impact on minorities of written examinations given to job applicants. Judge Bork, then Solicitor General, contended that an employment test with a discriminatory effect should be unlawful under title VII. This, too, was heralded at the time as a civil rights advance. The Supreme Court decided the case against Bork's broader reading of the law and in favor of an intent test. Justice Powell once again disagreed with Bork's reading of the civil rights law. I would like to emphasize that I do not offer these observations as a commentary on Justice Powell's record. My purpose is only that it is short-sighted to assume personal discretion about when to intervene in these cases. This shows that Judge Bork was not "just doing his job" which would be a high compliment. Nonetheless he was exercising his own discretion in filing amicus briefs.

In those 19 cases, Bork sided with the minority or female plaintiff 17 times. In the two cases where he felt compelled by law to argue against the minority or female, the Supreme Court agreed with him. Thus, 19 out of 19 times Judge Bork was at least as sensitive to civil rights as Justice Powell and the Supreme Court and 17 of 19 times he sided with minorities and women.

In a vain attempt to respond to this outstanding record, some have said this means little because Judge Bork was only defending Government against private interests. This is an indication of Bork's independence and dedication to the law because he is not, as some would like to make us believe, the perfect image of what President Reagan would prefer in a Justice. The President's administration, would prefer to require a showing of intent prior to imposing penalties for discriminatory actions. This is an indication of Bork's independence from partisan activity and from the law because he is not, as some would like to make us believe, the perfect image of what President Reagan might want in a Justice. The President's administration has continually argued for intents analysis over effects analysis in these cases, yet in this case Bork was on the other side. Those who have attacked the judge's civil rights record seem to have forgotten that he strove to advance civil rights forwhom the Constitution should be read as "color blind" because it allowed some citizens to be given preferences over others in redistricting plans. As I understand it, one of the Justices at oral argument in this case challenged Bork by suggesting that legislators should not be allowed to take race into account when drawing election district lines. You responded: "Asking legislators not to think about race when drawing district lines is like my asking you not to think of the word hippopotamai in the next five seconds." Judge Bork then waited a full 5 seconds and then proceeded with his argument. Once again, this is hardly the work of one insensitive to civil rights. This is hardly the work of a conservative judicial activist.

Judge Bork won again in Lau versus Nichols (1974). This case was a landmark in its day. It mandated bilingual education and held that title VI, and possibly even the Constitution, reached actions that were discriminatory in effect, though not in intent. Many, particularly many in President Reagan's administration, would prefer to require a showing of intent prior to imposing penalties for discriminatory actions. This is an indication of Bork's independence from partisan activity and from the law because he is not, as some would like to make us believe, the perfect image of what President Reagan might want in a Justice. The President's administration has continually argued for intents analysis over effects analysis in these cases, yet in this case Bork was on the other side. Those who have attacked the judge's civil rights record seem to have forgotten that he strove to advance civil rights for whom the Constitution should be read as "color blind" because it allowed some citizens to be given preferences over others in redistricting plans. As I understand it, one of the Justices at oral argument in this case challenged Bork by suggesting that legislators should not be allowed to take race into account when drawing election district lines. You responded: "Asking legislators not to think about race when drawing district lines is like my asking you not to think of the word hippopotamai in the next five seconds." Judge Bork then waited a full 5 seconds and then proceeded with his argument. Once again, this is hardly the work of one insensitive to civil rights. This is hardly the work of a conservative judicial activist.

Before leaving this subject, we need to examine some of the victories for civil rights Judge Bork won as Solicitor General. The classic example is the 1976 case of Runyon versusMcCrary outlawing discriminatory private contracts under section 1981. This established that section 1981—a 100-year-old civil rights law—could be applied to actualize contracts, not just restrictive covenants. Because Bork prevailed in this case, there now exists a Federal course of action against racially restrictive covenants. In other words, those who accuse the judge of limiting the sweep of civil rights laws have not taken into account your action to make some discriminatory contracts invalid under this old law. This makes ludicrous those allegations that he would allow racially discriminatory contracts. In fact, he was responsible for the legal means to outlaw them. Moreover, it is important to note that any doctrine may use race-conscious methods to enhance minority voting strength. This victory might offend some who think the Constitution should be read as "color blind" because it allowed some citizens to be given preferences over others in redistricting plans. As I understand it, one of the Justices at oral argument in this case challenged Bork by suggesting that legislators should not be allowed to take race into account when drawing election district lines. You responded: "Asking legislators not to think about race when drawing district lines is like my asking you not to think of the word hippopotamai in the next five seconds." Judge Bork then waited a full 5 seconds and then proceeded with his argument. Once again, this is hardly the work of one insensitive to civil rights. This is hardly the work of a conservative judicial activist.

Judge Bork also won a victory for women in Corning Glass versus Brennnan, the 1974 case involving the applicability of the Equal Pay Act to women who work on different shifts from men. In this victory for women, he established that the Equal Pay Act barred men from earning more than women for substantially equal work. This expanded the applicability of the Equal Pay Act—a significant advancement for the principle of equal.
pay for equal work. Women seeking equal economic opportunities still benefitted today from Judge Bork’s actions more than a decade ago.

As you can see, we could easily go on through many more great civil rights victories—actions that speak far louder than the hollow words of Bork’s critics. Let’s look at just one more group of cases, however. Bork also won the 1975 case of Abemarie Paper versus Moody, involving the showing an employee had to make to demonstrate that a preemployment test was discriminatory, and the 1976 case of Franks versus Bowman Transportation, involving retroactive seniority status for victims of discrimination.

In each of these cases, Judge Bork’s victories made it easier for a plaintiff to prove employment discrimination by simply producing statistical evidence of discrimination. In other words, intent was not a prerequisite to civil rights enforcement. This grants broad latitude to civil rights plaintiffs.

This exercise could go on. We could examine case after case to demonstrate the breadth of Judge Bork’s philosophy. He laid many of the foundation stones for the modern civil rights issues. He laid the basis of our modern constitutional law. The President has made no special effort to impress President Reagan. This is the profile of a classic independent judge, the kind we should want on the Supreme Court.

Judge Bork also decided the Laffey versus NW Airlines case concerning the applicability of the Equal Pay Act to stewardesses.

In this instance, he found that female stewardesses may not be paid less than male pursers. Thus, the airlines were found to have discriminated against the females. The Supreme Court denied certiorari in this case. Once again, it is impossible to characterize his position as insensitive to women or “opposing every major advance in civil rights.” Incidentally, he also ruled in that case that the backpay awards under the Equal Pay Act should be determined by figuring women’s total earnings, not by the kind of win for women’s rights that this case represents. This kind of hard evidence makes charges about Judge Bork’s insensitivity to women’s rights sound very hollow.

Once again a comparison to the Justice. Judge Bork would replace is probably in order. Judge Bork is supposed to upset the balance on women’s issues by replacing Justice Powell. And, in fact, we would all agree with women’s groups that Justice Powell was very sensitive on these issues. It is interesting, however, that he voted against women in gender discrimination cases 22 of 32 times. For instance, Justice Powell voted for the Grove City case in 1983. The same cannot be said of Judge Bork who voted for women and minorities time and again.

We could examine case after case which show an inclination to uphold rights, including those of women. Mr. Emory versus Secretary of the Navy involving the application of civil rights review to the Navy’s promotion decisions.

In this case Judge Bork again reversed a district court’s opinion. The district court had held that the Navy’s promotion decisions were immune from judicial review for civil rights deficiency. Judge Bork stated that “The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated.” This is hardly language one would expect from one who is making a major effort of closing the courts to civil rights claimants. To the contrary, this is an opinion—reversing a lower court—opening the military to judicial scrutiny. Once again, the accusations do not seem to square with the reality of the Judge Bork’s judicial record. Indeed, it is interesting to note how many of these cases—Palmer, Wick, Emory—were
cases in which you voted to reverse a lower court which had ruled against the civil rights plaintiffs. The special interest groups opposing the judge purport to review his record based only on a small fraction of the cases you have heard—the nonunanimous ones. So the cases I just cited were all excluded from these reviews because the three-judge panel was unanimous—despite the fact that the lower court had ruled the other way. This only illustrates how statistics can be skewed.

We could look at other cases, such as Norris versus District of Columbia, where the judge rejected a district court's attempt to dismiss a prisoner's complaint of mistreatment or Doe versus Weinberger where he ruled against the Government and ensured due process rights. When I say that the report is slanted it is because it does not tell the complete story but only selects certain facts. This judicial record on civil rights is unassailable.

Senator Biden again discounts this record in "Inconsistency No. 20." His point is that appellate court judges are bound by precedent and lack discretion and the application of law, which is wrong. Bork's actions speak louder than his words. He has consistently voted to preserve fundamental rights. When the facts are known, they are hard to distort.

The last quote is grossly taken out of context. In fact, the third footnote of the Harper case in full states:

While the Virginia poll tax was born of a desire to disenfranchise the Negro (citing an earlier case) and to determine whether on this record the Virginia Tax in its modern setting serves the same end.

The Court states itself that there is no evidence of racial discrimination before the Court. Justice Black states it even more plainly: ** the Court's decision is to no extent based on a finding that the Virginia law as written or as applied is being used as a device or mechanism to deny Negro citizens the right to vote ** 383 U.S. at 672.

For the report to repeat the outright falsehood that the Harper case was associated with discrimination is an outrageous breach of the Senate staff's professional responsibility.

Moreover, the report does not list the Justices who found that nondiscriminatory State poll taxes are legal: Hughes, McReynolds, Brandeis, Sutherland, Jackson, Reed, Burton, Clark, Black, and Douglas. Hughes and Black were consistent with my main point. Senator Biden repeats again the misleading quotations—taken out of context—relative to the equal protection clause.

Before undertaking an examination of Judge Bork's view, however, we need to reexamine the operation of the equal protection clause. Application of the clause is a two-step process. The first question is coverage. On that point, the report does not mention the equal protection clause regardless of sex, race, creed, color, or any other distinguishing characteristic. The second question is the standard of protection to be granted. This is the question which has been extensively debated in judicial and legal circles.

In the first place, this view is in complete harmony with the words of the 14th amendment which protect "any person." Frankly, the alternative view under which some groups receive great protection and others practically none is difficult to reconcile with the Constitution's language guaranteeing equal protection to every person. Ironically, the equal protection clause as read under the alternative view is less equal because it favors some groups much more than others. Judge Bork's view does not share this infirmity. Judge Bork's equal protection is equal. Under Judge Bork's view, an individual need only be a person to qualify for equal protection. Thus, Judge Bork gives legal force to the aspirational language of the Declaration of Independence: "We hold these truths to be self-evident that all persons are created equal and endowed by their Creator with inalienable rights."
again during the hearing, he reads the Constitution to cover every "person."

Besides being equal, Judge Bork's reading of the equal protection clause is also fair. Under this approach, which has been adopted by the majority of the Court, the question is: Are the men and women of this country equal in the eyes of the law? The Constitution, you will recall, guarantees that no person shall be deprived of life, liberty, or property without due process of law. It also guarantees equal protection of the law under the Constitution.

The reason for concern over Judge Bork's equal protection seems to be a misunderstanding, in fact, three misunderstandings. In the first place, despite Judge Bork's persistent efforts to the contrary, his colleagues refused to be defeated. They pumped the conclusion that the reasonableness test is nothing more than the old rational basis test, which was almost synonymous with an absence of scrutiny under the old three-tiered analysis. This is not the case. Judge Bork's equal protection is far more protective than the rational basis test. Under Judge Bork's equal protection, anytime a State or the Congress wants to create a sex-based distinction, it will have a substantial burden to show why that distinction is justified. Judge Bork could only think of two possible examples of sex distinctions that might be sustained, all-male combat units and separate toilet facilities. These distinctions are so obvious as to be almost ludicrous. Yet this makes the point. Other distinctions will fall.

The second misunderstanding is that somehow Judge Bork's reliance on original intent might cause the resurrection of antiquated gender stereotypes that were prevalent during the 39th Congress. This misunderstands the nature of Judge Bork's jurisprudence. He reads the words of the Constitution, which protect "any person," and does not attempt to read the minds of men long dead. The 39th Congress wrote the language, "nor deny to any person the equal protection of the laws." This is the law to be applied, regardless of whether the 39th Congress was able to live up to the principle it drafted. We know that the 39th Congress did not fully live up to the principle of racial equality that it wrote into the Constitution. But the principle governs, not the personal shortcomings of men who lived over a hundred year ago. As Judge Bork said in his 1971 Law Journal article, the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. Thus Judge Bork repeatedly stated, his reasonableness standard will bring at least as much, perhaps more, protection than current standards. No one has questioned his integrity and his word on this point stands.

Finally, the third misunderstanding results from a few incomplete statements made by Judge Bork in "off-the-cuff" interviews. For instance, we have often heard that Judge Bork said that Judge Bork reinstated the complaint in an equal protection action alleging un-
constitutional discrimination between male and female prisoners.

In Planned Parenthood versus Heckler, Judge Bork voted to invalidate an HHS regulation requiring federally funded family planning centers to notify parents when teenagers seek birth control services.

We could list still further cases, including his argument as Solicitor General in the General Electric versus Gilbert case that discrimination on the basis of pregnancy amounts to sex discrimination. As we have discussed, the Supreme Court did not accept his argument. His position ultimately had to be won by a subsequent act of Congress.

The important thing to realize is that these are actual public acts with public consequences. These were not provocative musings of a professor in a scholarly journal. These are his actual actions and they, in every instance, benefit women.

In sum, Judge Bork's equal protection is truly equal. On the question of whether every woman has a right to abortion according to the language of the Constitution. On the separate question of standard, it will provide at least as much protection for women and minorities as is currently provided by the Nation's Highest Court.

Unfortunately this Chamber, the junior Senator from Oregon told us that, at his request, the Library of Congress had investigated whether there was any case in which the Supreme Court had rethought the rationale of a decision. The junior Senator from Oregon reported that the Library of Congress had found no such case.

If no such rereationalization were readily discoverable in the United States Reports, it would not be surprising. Once the Supreme Court has reached a proper result based upon a particular rationale, it does not go through a constant process of issuing advisory opinions correcting its reasoning. Indeed, even when a similar case later arises, principles of stare decisis will often dictate that the Court not revisit a doctrine it has already established in applying settled law to new facts. Notwithstanding these conditions, one can readily locate several prominent examples of the Supreme Court's rereationalizing the constitutional foundation of particular liberations.

In Pierce v. Society of Sisters (1922), for example, the Supreme Court held that the liberty interest in the due process clause protected the right of parents to send their children to private schools. The opinion did not even mention the first amendment. Yet in subsequent cases, the Supreme Court has abandoned the due process rationale and rereationalized Pierce as a first amendment decision. Thus, in Griswold v. Connecticut (1965), Justice Blackmun majority opinion referred to Pierce as a first amendment case establishing the principle that "the State may not, consistent with the spirit of the first amendment, contract the spectrum of available knowledge." Similarly, in Wisconsin v. Yoder (1972), the Supreme Court held that the Amish had the right to remove their children from compulsory education after the eighth grade and cited Pierce as a case protecting the free establishment of parents' "with respect to the religious upbringing of their children." This case involved the same constitutional liberty—a parent's right to control the education of his or her child—but the rationale was wholly different from that advanced in Pierce.

Meyer v. Nebraska (1923), which held that a State could not prohibit the teaching of foreign languages in the public schools, is another case decided under a substantive due process rationale. But in Griswold, this case, like...
Pierce, was also recharacterized on first amendment grounds.

According to the Court, the generalized "right of privacy" found in Griswold was rooted in a "penumbra" emanating from the first, third, fourth, and fifteenth amendments. In Roe v. Wade (1973), the Supreme Court recharacterized the privacy right as a substantive due process right "founded in the 14th amendment's concept of personal liberty and desperate conditions of life." As Professor Jerry F. Gold (1980), a law professor at the University of California, Berkeley, noted, "It is clear that the Court has always dealt with substantive due process claims as if they were a different kind of right than the procedural rights of the Bill of Rights offer adequate protection under a different rationale. In holding that the State could not compel an individual suspecting of drug use to undergo a blood test, the Court reasoned that "[t]he overruling function of the fourth amendment is to protect personal privacy against unwarranted intrusion by the State." In Schmerber v. California (1966), by contrast, the Court protected an individual's right to bodily integrity under a different rationale: ""There is no Federal right to judicial evolution as new rights are discovered under a common law theory of Federal common law is rooted in an excessive faith in the wisdom of Federal judges. Senator Packwood states that the only time the Supreme Court "stumbled" in its discovery of common law rights in large, complicated, and novel cases, the Court was convinced that the Court had simply overruled its own decision in Plessy versus Ferguson, when the Court tolerated the internment of Japanese Americans during World War II. This shows a remarkable, indeed, incredible degree of judicial inconsistency and lack of respect for a written Constitution." The Justices of the Supreme Court have frequently stated that the Court's action in Schmerber "in its discovery of common law rights in large, complicated, and novel cases, the Court tolerated the internment of Japanese Americans during World War II. This shows a remarkable, indeed, incredible degree of judicial inconsistency and lack of respect for a written Constitution." Senator Packwood's attempt to found the case of "founded in the 14th amendment's concept of personal liberty and desperate conditions of life." As Professor Jerry F. Gold (1980), a law professor at the University of California, Berkeley, noted, "It is clear that the Court has always dealt with substantive due process claims as if they were a different kind of right than the procedural rights of the Bill of Rights offer adequate protection under a different rationale. In holding that the State could not compel an individual suspecting of drug use to undergo a blood test, the Court reasoned that "[t]he overruling function of the fourth amendment is to protect personal privacy against unwarranted intrusion by the State." In Schmerber v. California (1966), by contrast, the Court protected an individual's right to bodily integrity under a different rationale: ""There is no Federal right to judicial evolution as new rights are discovered under a common law theory of Federal common law is rooted in an excessive faith in the wisdom of Federal judges. Senator Packwood states that the only time the Supreme Court "stumbled" in its discovery of common law rights in large, complicated, and novel cases, the Court was convinced that the Court had simply overruled its own decision in Plessy versus Ferguson, when the Court tolerated the internment of Japanese Americans during World War II. This shows a remarkable, indeed, incredible degree of judicial inconsistency and lack of respect for a written Constitution." The Justices of the Supreme Court have frequently stated that the Court's action in Schmerber "in its discovery of common law rights in large, complicated, and novel cases, the Court tolerated the internment of Japanese Americans during World War II. This shows a remarkable, indeed, incredible degree of judicial inconsistency and lack of respect for a written Constitution."
ments I once heard urged against the admission of rights into this system; but, I conceive, that it may be guarded against. It was believed that a right to hold a contract to work however many hours he wanted to, and in Atkins v. Children's Hospital, the Court found an insufficient showing as to whether the work was less than a minimum wage. Under Senator Packwood's theory there can be no conceivable argument that these cases were wrongfully decided, and the State thought to regulate any of these activities. Senator Packwood's theory would also prohibit States from requiring doctors to notify parents when their minor children were going to have an abortion.

Senator Packwood's theory would also make patently correct Professor Tribe's argument that one of the rights retained by the people and beyond the power of the States to regulate is homosexual sodomy. The Supreme Court rejected Professor Tribe's argument in Bowers v. Hardwick last year.

Under Senator Packwood's view of the Constitution, all laws against drug use, incest, suicide, prostitution, and the like would be unconstitutional. This means either that Senator Packwood believes that the Constitution requires society to tolerate such conduct in its midst or that he is lying when he states that he holds this implausibly broad, though rhetorically appealing, vision of the Constitution. Perhaps, he would contend that his constitutional theory would not create such rights. But he plainly stated that it encompasses "every right that you could conceivably have," and there is no way to distinguish these "rights" from other unprotected ones. Thus, if he seeks a judge who will rule that the unenumerated right to abortion is protected while finding no protection for a right to contract to sell one's labor at less than the minimum wage, then he seeks a judge who will simply agree with his political agenda rather than one who will decide cases according to law, or even according to Senator Packwood's own alleged theory of the Constitution.

Notwithstanding recent statements to the contrary, Senator Packwood's recent constitutional theorizing appears to be a pretext to mask the fact that he made the decision about Judge Bork long before the Senate began based on a single-issue litmus test—abortion. Soon after the nomination was announced, Senator Packwood publicly stated that he would not only vote against Judge Bork, but also would vote against any other candidate unless Senator Packwood was convinced "beyond a reasonable doubt" that Judge Bork would not vote to overturn Roe v. Wade. It is therefore clear beyond a reasonable doubt that Senator Packwood made his decision about how to excise the advice and consent power based on a single-issue political litmus test.

Following Senator Packwood's speech, Senator Biden asked that he had spent more than 120 hours personally researching the privacy question. "I am a bald-faced liar," he said. His research, he said, had taken him to every single Justice of the Supreme Court in the past 70 years, "accepted a generalized right to privacy," and that Judge Bork's refusal to do so demonstrated his extremism. That is a bald-faced lie. His research, he said, had taken him to every single Justice of the Supreme Court in the past 70 years, "accepted a generalized constitutional right to privacy, and many since have rejected finding any such right in the Constitution.

The earliest cases to which Senator Biden was referring are Roe v. Wade, a State law restricting the teaching of German, and Pierce v. Society of Sisters, which invalidated a State requirement of public school attendance. Neither case mentions privacy. Rather, both were decided on the basis of liberty of contract—the same basis upon which the Court routinely struck down progressive social legislation, such as the minimum wage.

The first case to find a generalized right of privacy—Griswold v. Connecticut in 1965—was not unanimous. Justices Black and Stewart dissented and explicitly rejected a generalized right of privacy. As Justice Stewart wrote, "I can find no . . . a general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court." Evidently 120 hours of personal research was inadequate for Senator Biden to exhaust available sources, although this quote is readily available in every first-year constitutional law casebook.

If we are to accept Justice Stewart's constitutional scholarship rather than Senator Biden's, then no justice, rather than every justice, accepted a generalized right to privacy between 1917 and 1965.

Since 1965, moreover, numerous justices have rejected a generalized right to privacy. Justices Rehnquist and White for example, dissented in Roe v. Wade. Justice O'Connor dissented in both abortion cases decided since she has been on the Court, arguing that "(t)he Court's abortion decisions have already worked a major distortion in the Constitution."

Ironically, Justice Scalia's only pronouncement in the privacy area was as a member of the Circuit Court in Drinenburg v. Zech, an opinion by Judge Bork highly critical of the Supreme Court's past privacy decisions. That case determined that there is no protected privacy right for Navy officers to engage in homosexual sodomy.

The last year, in the Court's latest, and Justice Powell's last, pronouncement on the generalized right to privacy, a majority of the Court in
Bowers versus Hardwick rejected the argument that there was a constitutional right to engage in private, consensual homosexuality. That opinion was written by Justice Byron White and joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor.

The irony of Senator Biden's "privacy" argument is that most of the cases which he regards as "right to privacy" decisions have little or nothing to do with privacy. Meyer and Pierce involved the classroom, Roe versus Wade is about a woman going to a clinic to have a medical procedure, and Griswold itself, despite the rhetoric, did not involve prosecution for private conduct in the marital bedroom, but was a test case about doctor's public distribution of contraceptives.

Mr. BIDEN. Mr. President, I yield 3 minutes to the Senator from Florida.

Mr. CHILES. Madam President, this Member of the U.S. Senate has become well acquainted with the written articles and decisions of Judge Robert Bork. Probably, I am more familiar with this nominee's ideas than any other in my Senate career.

I know this is also the case with many of my colleagues. Our scrutiny has occurred because of the Senate's role in advising and consenting on nominations and certainly because of the importance of this particular nomination. The degree of our knowledge is expansive because professor and later Judge Bork has written a great many articles and decisions.

Frankly, I did not thoroughly enjoy the process. As I told Judge Bork, I have not read that many law reviews and articles and decisions since law school.

But this exercise was far more important than my law school studies and far more educational. I not only learned about Judge Bork but I learned about myself. I was led to consider and formalize what I believe the Constitution means to me.

What I discovered in this process is that the constitutional philosophy of Judge Robert Bork is very different from that of Lawson Chiles. It was in this consideration that I found myself unable to support Judge Bork.

Many Floridians have expressed a concern that opposition to Judge Bork means that I am opposed to the appointment of a conservative to the Supreme Court. Nothing could be further from the truth. I have and will continue to support conservative nominations. My record on such is clear.

After reading and studying Judge Bork's opinions and writings, I have come to the conclusion that he is not an advocate of constitutional conservatism. Our Constitution and our Republic was conceived, in essence, to protect the people from the excesses of Government. Our Founding Fathers understood that all powerful Government was a threat to the individual's liberties.

The Constitution spells out clearly the powers of Government and in doing so aims to limit those powers. What it does is draw the line between the powers of Government and the individual rights of the people. The role of the Supreme Court is to apply the Constitution to ensure that this line is not crossed and individual rights are firmly drawn and our freedoms are not usurped by the Government. That to me is the conservative viewpoint, and it is my viewpoint.

My problem with Judge Bork is that he does not see it that way.

If the Congress or State legislatures enact laws that infringe on the rights of an individual, I believe the Court has the responsibility to rule accordingly.

Bork, in drawing the line between the powers of Government and the rights of individuals, he too often sides with the powers of Government. That disagrees with what the protections that the Constitution was intended to provide for all Americans.

To be more specific, I believe the Constitution is the protector of individual rights for all persons. I believe such protection extends to the family and its precious relationships.

My respect for this tradition and my belief that family rights should be just that—rights of the family—are challenged by Judge Bork's decisions and writings.

Judge Bork and I are both advocates of strong States rights. However, we part ways when he gives away certain family rights to the States.

Judge Bork rejects legal rights for noncustodial parents and grandparents to even visit their children and grandchildren.

Bork has criticized court decisions which have upheld the rights of parents to choose between public and private education for their children.

He has rejected the rights of married couples to choose to use contraceptives.

Judge Bork has criticized Supreme Court decisions which struck down a law that allowed sterilization. Bork does not believe the Constitution provides for protection against mandatory sterilization.

Judge Bork would not afford equal protection under the Constitution to illegitimate children. He contends that an illegitimate child does not have the same rights as a legitimate child to recover after the death of a parent.

Judge Bork's writings "cloud" the long standing tradition of separation of church and state in this country. He does not believe the establishment clause of the first amendment prohibits Government involvement in religious but merely forbids one religion from being favored over another by the Government.

Judge Bork also troubles this Senator by his willingness to turn his back on a century of laws and Supreme Court decisions. Antitrust is a key example.

Judge Bork's antitrust philosophy can be summed up in one sentence. Bigger is better as long as it is efficient.

Judge Bork has been outspoken in his view that efficiency is the only goal of antitrust law. Since large corporations are by Bork's analysis more efficient, their activities should go largely unchecked. Obviously, this view ignores the concerns of small businesses. It is often the threat of small business competitors which serve to check the potential excesses of big business. The check provided by small business was to minimize the possibility that the Federal Government would intervene in the market. Legislative history shows that these concerns prompted Congress to enact the antitrust laws in the first place.

Judge Robert Bork has repeatedly rejected legislative initiatives which protect and assist small businesses.

As a Senator who has initiated legislation and actions to protect small business, I reject Judge Bork's stand; 99.7 percent of businesses in Florida are small businesses; 55.1 percent of the work force are employed by small businesses. Judge Bork's obsession with economic efficiency in antitrust law would remove the legal protections that enable innovative new small businesses to enter the market and prosper.

Judge Bork's views on open Government laws are also fundamentally at odds with this Senator's. As a sponsor of Florida's Sunshine Act and the Senate version of the Federal Sunshine law, I am disappointed by Judge Bork's record interpreting open Government statutes; statutes that carry with them a presumption of public access to the executive branch. Judge Bork's decisions reflect no hesitation to defer to a Government agency's refusal to disclose information to the public. On several occasions he has written opinions which expand the narrow circumstances under which an agency may withhold information.

In a case interpreting the Federal Government's Sunshine Act, Judge Bork joined an opinion ruling in favor of an agency's right to withhold the minutes of its meetings simply because part of that meeting dealt with its involvement in civil litigation. I filed a brief of dissent with the Court of Appeals. We argued that because the litigation was over, the information should be released especially in light of the statute's presumption of openness. Judge Bork however, believes
that the information should never be disclosed.

Judge Bork's position on open Government is but one example of his willingness to bend over backward to defer to the executive branch of the Federal Government for the sake of the individual interest asserted.

Judge Robert Bork also totally rejects the rights of Members of Congress to have standing to bring suit against the executive branch.

I disagree. I believe my rights as a U.S. Senator representing the people of Florida should also include my right to sue on behalf of those constituents in areas where I believe their rights are being threatened by any administration.

For example, as a U.S. Senator, I sued former Interior Secretary James Watt over the issuance of leases for phosphate mining in the Osceola National Forest in Florida. I believe such action was crucial to protecting the forest and the people of Florida's right to enjoy its unique natural beauty.

And, I filed suit against Attorney General Meese and Defense Secretary Weinberger charging them with dereliction of duty in operating the Krome North alien detention center in south Florida. As a U.S. Senator who used every legislative means available to keep convicted alien felons out of Krome, I resorted to the courts to protect the citizens of Dade County from such felons who are housed in a minimum security INS processing center.

Judge Bork has testified in opposition to a constitutional amendment to balance the budget on the grounds that it may not work or be enforceable, it may only force Congress to take action to reduce the deficit or it may result in judicial dominance in the budget process. As one who has toiled long and hard toward a reduction in the deficit and a balanced budget, I support a balanced budget amendment and would welcome any assistance toward that goal including from the judiciary.

I also disagree with Judge Bork on limits on Federal campaign spending. Judge Bork believes such limits are unconstitutional under the first amendment's protection of free speech. I disagree with Judge Bork's position and do not believe free speech protections apply to the expenditure of millions and millions of dollars on political campaigns. Such expenditures reduce the importance of the individual voter, and our Constitution should protect that voter. In fact, I have introduced legislation to limit the total amount of money political action committees (PAC's) can contribute to a candidate to $300,000 an election cycle. In my view, politics of millions and millions of dollars on political campaigns is not appropriate with respect to the selection of a member of the U.S. Supreme Court. My door is always open to my colleagues who have expressed such a concern. I want to take this opportunity to make a few observations about the process of evaluating a judicial nominee. A couple of short comments. Some of my colleagues have felt that the process, the debate on the Bork nomination, has been mired in the perception that the Supreme Court would be harmed by this Senate debate. They suggested Judge Bork should seek a withdrawal of his name from Senate consideration.

With all due respect to my colleagues who have expressed such a view, I disagree.

Indeed, quite to the contrary. This debate on the man, the process, the Constitution, the Court, the media involvement, the country and its future, has been extraordinary in its depth of thought, analysis, perspective, and emotion.

The debate, I believe, has been helpful to provide a greater understanding, good or bad, of the process.

Also, I want to acknowledge the courage of Judge Bork, who sought his day in court, his day in the U.S. Senate, who sought a full and complete airing of the pros and cons of his nomination. He sought this debate.

This is what the nomination process is all about as it was intended to do. This is our obligation as U.S. Senators. Simply because an issue is controversial as this nomination has been is no reason for the debate not to be held. Although I disagree with the likely outcome, I believe the debate is important; step to the future. All of us as a result of the debate have been put on notice about the disturbing emerging trend of blatant media involvement in moving public opinion about nominees to the Supreme Court.

If anything, in this Senator's mind that operates a change to what the framers of the Constitution envisioned in the senatorial advise and consent process, it is the advertising campaign. This concern has not expressed as much for myself as by colleagues.

The PRESIDING OFFICER: Will the Senator withhold? The Senator from Nebraska has exceeded the 2
Mr. KARNES. Madam President, I ask unanimous consent to have the remainder of my text printed in the Record.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KARNES. Madam President, I have already submitted a long and detailed statement relating my analysis of the nomination of Robert Bork to be an Associate Justice on the U.S. Supreme Court. I will not recount the factors that led me to conclude that Judge Bork is eminently qualified to serve on the Court, except to say that my support is as strong as ever. Barraging a dramatic change of heart by several of my colleagues, the Bork nomination will fail. I can only hope that some will reconsider. The Senate will go down this road again soon with another nomination. I want to take this opportunity to make a few observations about the Senate process of evaluating a judicial nominee.

Some of my colleagues felt that the Nation, the President, and the Supreme Court would be humiliated by this Senate debate. They suggested Judge Bork seek a withdrawal of his name from Senate consideration. With all due respect to my colleagues who have expressed such a view, I disagree. Indeed, quite the contrary, this debate on the man, the process, the Constitution, the Court, the media involvement, the country, and its future has been extraordinary in its depth of thought, analysis, perspective, and emotion. This debate, I believe, has been helpful to a greater understanding—good or bad—of the process. Also I acknowledge the courage of Judge Bork who sought his day in court—sought a full and complete airing of the pros and cons of this nomination—sought a debate. This is what the nomination process is designed to do, this is our obligation as U.S. Senators. Simply because an issue is controversial, as this nomination has been, is no reason for the debate not to be held. And although I disagree with the likely outcome, I believe the debate is an important step to the future. All of us as a result of the debate have been put on notice about the disturbing emerging trend of bluster media involvement in moving public opinion about nominees to the Supreme Court. If anything operates as a challenge to what the framers of the Constitution envisioned in the senatorial advice and consent process, it is this advertising campaign. The concern is not expressed as much for the nominee's judicial philosophy, such publicity is a part of the job—the concern is more for the view of Americans toward their U.S. Supreme Court. I am concerned that the high regard for the Court is on the wane. The American people are not disinterested souls on the sideline. They are the constituents who are judging our performance on this important matter, as are they supposed to be. I feel we are threatening the independence of the judiciary by blurring the distinction between the legislative branch and the apolitical judicial branch. Personally, I don't know if the country or the Constitution can stand it.

Frankly, Madam President, I don't think the framers would be pleased with our performance. I believe we are about to exercise our power of advice and consent in precisely the manner in which they did not want us to, reaching the wrong result for all the wrong reasons.

Madam President, I fear the defeat of the Bork nomination will reveal that we have lost sight of our duty. Have we forgotten that our goal in considering a Supreme Court nominee is to set aside our normal predilection toward political considerations in our decisionmaking process and to make our decision on less passionate grounds—on the candidate's intellectual, character, legal capability? Obviously, these considerations are not the predominant factors in this debate, for if they were, Judge Bork would already have been confirmed unanimously. Other factors are at work here.

Madam President, we have a job to do as Senators. Our job is to pass judgment on a distinguished jurist who has been nominated by the President of the United States to fill a vacancy on the highest court in the land. By all accounts, he is qualified and deserving of our approval. At this point, I would refer you to the report of the Judiciary Committee, to the first page, where we find the committee's basic contention about Judge Bork. This contention is that Judge Bork's jurisprudence is fundamentally at odds with the express understanding of the framers. This is the crux of the issue. But, Madam President, who among us can deny that Judge Bork's entire career is devoted to the concept of judicial restraint, the idea that judges should not be restrained by law according to the intent of the framers, not create law to fit their own personal views on how the Constitution should have been written had they been in Philadelphia to help draft the document? It is this concern about the judicial restraint that is fundamentally at odds with the views of his detractors, and it is this aspect of Bork's career that has incurred the wrath of much of the Senate.

But there is another judgment process that is going on at the same time. Our constituents are judging our performance on this important matter, as they should. Members of this body are the ones who will be held accountable for the way in which we deal with the Bork nomination. The Constitution requires this obligation to the electorate. From what I can see, many of our constituents are as displeased with the process and the result of this nomination as I am. Madam President, the American people are not disinterested souls on the sideline. They are the people whose laws are subject to interpretation by the Supreme Court. They are America, this is their Senate, and this is their Constitution that we are dishonoring with a warped application of our duty to advise and consent.
tion that selects the nominee: unquestioned integrity and strong character, judicial temperament, knowledge and understanding of the law, and an ability to recognize the rights of the individual and the rights of society.

Mr. THURMOND. Madam President, I suggest that you hold strictly to the time because we are running very close. Thank you.

THE PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Madam President, I yield 3 minutes to the Senator from Virginia.

Mr. WARNER. Madam President, this is my second speech with respect to Judge Bork.

I ask unanimous consent that the record of what I said on October 8, the day prior to his decision to hang in, be printed in the Record and follow the remarks that I state today.

THE PRESIDING OFFICER. Without objection, it is so ordered.

Mr. WARNER. Madam President, as I pointed out in my earlier remarks and has now been confirmed by the passage of time, our system of government by which the nominee to the Supreme Court are chosen has failed in this case.

Although this Senator has remained undecided, purposely, so that he could have the benefit of the wisdom of other Senators, of constituencies, and other parties interested, indeed, the remarks I am about to make and the vote that I shall cast on Judge Bork will not have an impact on this body. It is my hope that we have learned from this experience never to repeat the errors we have made in future nominations.

I understand why members of the Judiciary Committee have a duty to state their intentions at the conclusion of their hearing, but it would be my hope that in the future other Senators withhold their final judgments until such time as they have had the benefit of a full debate here on the Senate floor.

I do not think the executive branch can look upon their participation with clean hands. I was saddened to see the castigation of "lynch mob." I am devoted to this President personally and particularly. I think he is one of the finest men I have ever known in my life and I intend, as I have through these many years, to give him my full support. But that remark was unconscionable. It was never the见过

Mr. WARNER. Madam President, yesterday the leadership of the Senate discussed the Bork nomination and the responsibilities of this body. I am hopeful that we will proceed to a full floor debate.

We pride ourselves on being one of the oldest, if not the oldest, deliberative bodies here in the United States of America. The issues revolving around this nomination are being deliberated in almost every place in congressional debate.
October 23, 1987

America but here where that debate should take place. By the full Senate on the floor of this Chamber.

This Senator, out of respect for the traditions of this institution, the U.S. Senate, and for the dignity of the Senate, has not declared his intentions as to how he would vote. I have done that for, I believe, valid reasons.

If I have not had the opportunity, nor do I believe many others have had, to examine with care the record compiled by the Senate, I should have. When the record was given to Senators at the end of last week, there has been inadequate time to review this voluminous report.

Second, some Senators have taken the floor to read carefully prepared statements or to make remarks, but we have not looked at each other, into the vitals of our goal, and provided one another with the benefits of reasoning, argumentation, and confrontation that are essential to a full debate, a debate that I think this case merits.

Third, this Senator has been engaged for some several weeks as comanager of the Senate Armed Services authorization bill for 1988. That required well over several weeks as comanager of the Senate Armed Services authorization bill for 1988. That required well over 20 days of debate on the floor. As such, I was deprived of the opportunity to spend as much time as I would have liked to review the testimony of the witnesses who appeared before the Judiciary Committee.

The Senate's advise and consent responsibility to nominees to the judicial branch, most particularly to the Supreme Court, is one of the most important duties given to this body by the Constitution. I take this responsibility, I am certain, as do others in this Chamber, very seriously and want to have the opportunity to participate in debate as a whole.

The constitutional responsibility under advise and consent, in connection with the judicial branch, I believe, is unique. It is distinguishable, I believe, from our responsibility to nominees for Cabinet posts, senatorial military, or ambassadorial posts. Cabinet officers are an extension of the President and the Presidents choices should carry convincing weight.

I put judicial nominees in a separate category because in many respects the third branch of our Government, the judiciary, is created by a joint effort between the executive branch and the advice and consent responsibility of the Senate to approve nominations.

The judiciary is an independent third branch of our Government, the role of the Senate in helping to create this branch through its advice and consent responsibility is among the Senate's chief responsibilities under the Constitution. It requires, in my judgment, the collaborative efforts of the Senate as a whole.

To the extent one does not consider itself discharged of this responsibility simply because the Committee on the Judiciary has rendered its report, and some Senators have made statements. In the case of Judge Bork, we have not had the opportunity for a full Senate debate on the floor; to exchange our views, confront one another in a manner that the American people would see; and they established the U.S. Senate. That concerns me.

In the history of this body, there was a time when we did the advice and consent without the benefit of any committee structure. It had not been created, and Members took it upon themselves to participate in heated debate, and arrived at a consensus of the Senate. We should do that in this important case.

Theoretically, and I say this without any disrespect to any of my colleagues, it was of us sought to announce ahead of a floor debate how we are going to vote on this nomination it would eclipse the necessity for this debate and the debate would be lifeless. If not useless. I feel very strongly that we would have then surrendered our responsibility.

This Senator out of respect for the traditions of this institution, the Senate acting as a whole, and out of respect for the nomination and the person to whom that nomination has deliberately not made a declaration, nor am I about to announce my intention to do so. I would not make that declaration because I continue to hope that this body will proceed as I have outlined to debate as a whole to reach this decision.

Accordingly, Mr. President, I hope that the Senate leadership will soon arrive at an appropriate schedule and that we may commence this important debate. This Senator will make his declaration at an appropriate time either in the course of that debate or at the time the vote is taken.

I thank the Chair for the opportunity to express the views of this institution, the Senate, as a whole.

Mr. BIDEN. Madam President, I yield 1 minute to the Senator from Arizona.

Mr. DeCONCINI. Madam President, yesterday in my statement on the nomination of Judge Bork, I commented on an article written by Gordon Jackson that concerned my deliberations on the nomination. That article contained allegations that the writer labeled to come from the "Washington rumor mill" and that he conceded "cannot be substantiated." I was understandably upset by the use of this kind of rumor in a political analysis. It seemed to me that it must be the result of some kind of a mistake. I am pleased to be able to report to my colleagues that, indeed, it was a mistake.

Yesterday, I reported that the byline on the article was Gordon Jackson, and the article was entitled "Executive Vice President, a quarterly publication of the Heritage Foundation. I have now received a letter from the Heritage Foundation completely disassociating the Foundation from the Article. The letter explicitly states that the article was not authorized by the Foundation to write the article and that its publication violated the Foundation's internal clearance procedures. The letter also states that the article does not reflect the views of the Heritage Foundation.

I was not surprised to receive this letter, because I have always had the highest respect for the Heritage Foundation. I believe, that it has been a highly valuable resource for the Congress and for the country. I have also had the highest regard for its ethical standards. I have this morning accepted a personally delivered apology from the Executive Vice President of the Heritage Foundation, and I am sending such a letter to the Arizona Republic which I am sure they would want to print. I have assured the Foundation that as far as I am concerned the incident is closed and that, as I have in the past, I look forward to working with the Heritage Foundation on other issues.

The unanimous consent that the letter from the Heritage Foundation be printed in the Record.

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

THE HERITAGE FOUNDATION,
Hon. DENNIS DECONCINI,
U.S. Senate, Washington, D.C.

DEAR Senator DECONCINI:
Your statement on the floor this afternoon during debate on the Bork nomination brought to my attention an article that appeared recently in The Arizona Republic regarding your role in the confirmation process of Judge Bork.

Let me assure you in the strongest of terms that the article was not authorized by The Heritage Foundation. In disregard of our internal clearance procedures, the article had not been reviewed by the author's superiors, nor does it reflect my views or the views of anyone else here at Heritage.

The article reflected the views of Gordon Jackson, former managing editor of Policy Review. Although many of us here disagree with your views on the Bork nomination, there was no intent to defame or to repudiate the personal attacks contained in the article.

We at The Heritage Foundation have appreciated the opportunity to work with you from time to time on issues of mutual interest, and look forward to working with you again in the future.

Sincerely,

PHIL N. TELLUCK,
Executive Vice President.

Mr. LAUTENBERG addressed the Chair.

Mr. BIDEN. Madam President, I yield 1 minute to the Senator from New Jersey.

Mr. LAUTENBERG, Madam President, Judge Bork should not become Justice Bork.

I do not reach this decision as a lawyer. I am not a lawyer. Before I came here, I was a practicing lawyer. I practiced law in New York City for 20 years.

But, Madam President, I do not have to be a lawyer to know what my responsibility is. The Constitution says, in article II, section II, paragraph 2, the President "shall nominate, and by and with the advice and consent of the Senate shall appoint..." judges of the Supreme Court.

We are here to give our advice. To give or withhold our consent. We do not answer to any special interest group. We answer to the voters who sent us here. We answer to our conception of what America and its laws should be—and what kind of Supreme Court nomination we strongly support—to interpret those laws, and breathe life into the rights and liberties we hold so dear.

We have a great responsibility. Just as the President is empowered to make nominations, we are entrusted with the power to reject them.
We sit in review of someone who would sit as one of nine members of a separate branch of Government. This is not some post within the executive branch, some post in the President's own administration. For that, perhaps we can give more latitude. Perhaps, we can take a wider view.

We sit in review not of some nominee to a district or circuit court. For that, perhaps we can accept a wider diversity of personal views. Perhaps, we can say more about the person's obedience to precedent and the word of the higher courts.

But, we sit in review of a nominee to the highest court. The Court does not merely find the law, it shapes it. The Court can feed the growth of our liberties and the moral height of our Nation, or it can stum them, starve them, and deny them their flowering.

We have a duty to exercise judgment. We have a duty to decide for ourselves, is this the person the Nation needs? My answer is no.

This nominee would close the door to justice. The courts of our Nation stand as a check against the tyranny of the majority. It stands as a defender of the individual and as the protector of the rights established in the Constitution and our laws.

In America, the courts are the haven of the minority—against the tyranny of the majority. They are the defender of the rights of men and women, rights enshrined in our Constitution, rights inherent in ourselves, as people. That concept of the courts, that concept of rights, has been at the heart of the debate about Robert Bork.

There has been a lot said about his views on particular cases. Throughout his career, he has repeatedly and consistently, criticized Supreme Court decisions.

He attacked decisions upholding the right of privacy, a right that has kept government out of some of the most intimate, personal decisions Americans make. He attacked decisions protecting family, about children, about the relationship between husband and wife.

Judge Bork faulted decisions that struck down poll taxes—a tax on the vote itself, a tax that kept blacks from exercising their right to vote. He said he did not see enough proof of bias by the legislature. We should defer to the legislature.

But that deference did not hold for the Congress when it outlawed literacy tests in the Voting Rights Act, to preserve the equal voting rights of blacks. Then, Judge Bork was ready to reject the majority rule. He said Congress had no business saying that literacy tests should be banned.

Judge Bork opposed the laws that stopped discrimination in accommodations. Laws that said that a motel, a restaurant, or a diner could not turn away a black, or a Jew, or some other kind they did not like. He opposed those laws because he said they intruded on individual's rights. Whose rights? The rights of blacks, Jews, and other targets of hatred? No. The rights of the bigot behind the counter.

He said he could not find women under the coverage of the equal protection clause.

He opposed the Supreme Court's decisions that upheld the principle of one man, one vote.

He opposed the Court when it upheld the right of free speech that wasn't purely political.

For someone who is called a conservative, he has given good cause to fear that he would set out to wreak great change. He is quoted to say, "If you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it."

"I don't think precedent is all that important. I think the importance is what the framers were driving at, and to go back to that."

Of course, he has minimized that statement. He has said he would live with cases that are well settled. But, his views, his philosophy, his years of writing, give reason for concern.

In a sense, Judge Bork has been dragged slipping and sliding across the line of a legal tug of war. He has been yanked in one case, in defense of the give and take, laid out real issues. I watched any part of the hearing would say, Judge Bork and I, and so many Americans, disagree. Judge Bork would say, "If it is not in the specific words of the Constitution, it is not there. He would say, no, the people do not retain rights. So, if you cannot find the right to privacy or any other right, in the words of the document, it does not exist. Judge Bork would stand for a rigid, unyielding view of rights, when the hallmark of our Constitution and our system of laws has been its flexibility, its vitality, its ability to adapt to changing times and expanding conceptions of liberty.

I do not say Judge Bork isn't smart. He is brilliant, I do not say he is a bigot. I do not say he is not a skilled lawyer. But, because of how he approaches the law, I do not think he should sit in the ninth chair on the Supreme Court.

Now, some have objected. They say those who oppose Judge Bork have politicized the process. They say we have set a precedent, a bad one. They say Judge Bork is a victim of a special interest campaign.

It's unfortunate. Because I think, on the whole, the debate has been a good one. I think any citizen who watched any part of the hearing would have been impressed. The questions, the give and take, laid out real issues. I think the chairman of the committee deserves our praise. The hearings were fair, open, and shed light on a constitutional debate that all the Nation could see.

The Senate did not politicize the process. Let us be honest, the President did not tell his advisers, go out and find me the smartest, the best candidate for the court, and I don't care what his ideology, what his substantive views are. He chose Robert Bork because of his views. And, we cannot and should not ignore them.

As I said at the outset, few responsibilities of the Senate are as important as its duty to advise and consent on nominees to the Supreme Court. It is a duty that calls upon us to determine, not just if a candidate is intelligent, honest or learned, but whether he will breathe life into the rights and liberties of our people, enshrined in our Constitution and laws. Judge Bork, the first test. But, I cannot place my faith in him to pass the second. So, I will vote against the confirmation of Judge Bork.

Mr. ARMSTRONG addressed the Chair.

Mr. THURMOND. Madam President, I yield 2 minutes to the distinguished Senator from Colorado.

Mr. ARMSTRONG. Madam President, I thank my distinguished friend for yielding.

ACKNOWLEDGING THE PUBLIC SERVICE OF JUDGE ROBERT H. BORK

Mr. ARMSTRONG. Madam President, I send a resolution to the desk
and ask for its immediate consideration.

The PRESIDING OFFICER. Is there objection?

Mr. BIDEN. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. ARMSTRONG. Is it in order for the clerk to state the resolution so that the Senator from Delaware may know to which he objects to?

The PRESIDING OFFICER. The Senator from Colorado will withhold. The resolution will go over, but the resolution will be stated by the clerk.

Who yields time for the clerk to read the entire resolution? The resolution does not have a title on it.

Mr. THURMOND. Madam President, I yield 2 minutes and that is all I can yield.

Mr. ARMSTRONG. I yield the time for the reading of the resolution. I am surprised, may I say to my friend, the chairman of the Judiciary Committee, that he would object to the consideration of a resolution even before he knows what it is. And, in fact, I think its content and substance is something with which he could agree.

The PRESIDING OFFICER. The clerk will read the resolution.

Mr. ARMSTRONG. I yield my time for that purpose.

The legislative clerk read as follows:

S. Res. 301

Whereas the Senate of the United States, on September 9, 1987, resolved to “avoid negative attacks calculated to impugn the character, integrity, or patriotism of a candidate”; and

Whereas an unprecedented negative campaign was launched against the nomination to the Supreme Court of Judge Bork and was fueled with millions of dollars from special interest groups, including tax-exempt organizations; and

Whereas that campaign has set a deplorable precedent for the politicization of our courts and for future attempts to control the judicial process; and

Whereas the Senate has, on two previous occasions, unanimously confirmed Robert Bork to high federal office, first as Solicitor General of the United States and then to his present position on the U.S. Court of Appeals for the District of Columbia Circuit; Now, therefore, be it

Resolved, that:

(1) The Senate assures Judge Robert Bork of our admiration for the integrity and intelligence he has demonstrated in his long and distinguished career as a legal scholar, dedicated teacher, and eminent jurist.

(2) The Senate thanks Judge Robert Bork for his extraordinary testimony during his prolonged confirmation hearings, by which he focused national attention, during this bicentennial year of our Constitution, on the fundamental liberty which gave life to that document.

The PRESIDING OFFICER. The clerk has used the 2 minutes allotted by the Senator from South Carolina.

Mr. ARMSTRONG. Madam President, I ask unanimous consent that I may yield 2 minutes and that is all I can yield.

Mr. BIDEN. Madam President, I yield 2 minutes to the Senator from New York.

Mr. MOYNIHAN. Madam President, we are now in the final hour of a constitutional debate of considerable, some would say historical importance. Just this morning the death of one of the National Law Schools offered me his view that there has not been its like since the Court packing debate of 1937, a full half century ago.

If I have one anxiety it is that in passing judgment on Judge Bork’s nomination the Senate might be thought somehow to be judging his character as well. That is to say that in voting not to accept the nomination we will somehow have expressed a negative judgment of the man. Not so. Judge Bork is a personal acquaintance; I would like to think a friend. This circumstance has occasioned any number of conversations with other Senators over the past 3 months. For certain, I have invariably spoken of him in the high terms in which I regard him. But may I report to the Senate that I have never heard anything different in response. Those who also knew him as a scholar, a jurist, a public servant continued to think of him as they had done; those new to his personal and intellectual histories have simply joined us as fellow admirers.

That many of us hold different views of the Constitution is nothing unusual and nothing untoward. Our history as a state commences with just such argument. Long may it persist. It is the stuff of citizenship and community.

I have previously on October 9, announced that I cannot support the nomination. I ask unanimous consent, however, that that statement be reprinted at this point in order that it be part of this debate.

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

THE NOMINATION OF JUDGE ROBERT H. BORK

TO THE U.S. SUPREME COURT

Mr. MOYNIHAN. Mr. President, for more than a quarter century, Judge Robert H. Bork has been an important intellectual force in the law. He has strived to develop a coherent constitutional philosophy to guide judicial decisionmaking. He has been a formidable critic of antitrust policy. His world has been that of reflection and action, having been a lawyer, professor, Solicitor General, and Federal Judge.

In all this Judge Bork has commanded the respect of those who disagree with him. I am one such. And more, I have, for example, the greatest admiration for his steadfast opposition to legislative efforts to strip the Supreme Court of jurisdiction in various areas of public policy. It is thus with regret that I must oppose the confirmation of a Justice of the Supreme Court.

I share with others an unease about Judge Bork’s views on such matters as equality for women. And I must admit to great disappointment that a man of his powers chose to be so muddied in his testimony skirting on the already sufficiently muddled issue of “original intent.” If we are to believe the Attorney General, Supreme Court Justices, in passing on the constitutionality of statutes, must look to the original intent of the writers of the Constitution.

This is a seemingly sensible statement. But let us, as Holmes once said, wash it with cynical acid and see what remains.

Little.

To begin with, we have no transcript of the proceedings of the Philadelphia convention debates which were taken, but fitfully and subject to all the errors that attend after-the-fact reconstructions. All we know is that the Constitution itself states. The words of the document were clearly intended, and that is as far as the idea can take us.

But the great muddle, if I may be permitted, the howler in all this is that there is one thing of which we can be absolutely certain, which is that the framers never intended the Constitution to be a living document.

I yield time?
"I regret imposing this diversion on the Senate, but the matter, in my view, needed stating.

To return to the central issue before us, which is to say, Judge Bork's constitutional vision. It is his vision of privacy which troubles me most. I cannot vote for a jurist who simply cannot find in the Constitution a general right of privacy.

Talk of original intent! Which, if I may be allowed a final digression, is somehow extended the Federalist Papers. The Founders of the Constitution were watching a Connecticut anti-contraceptive statute in 1791, and the denial of the right of privacy. Evaluating the right of privacy is a fundamental protection for the individual and the family against unwarranted state intrusion. Its importance is such that I cannot support anyone for a Supreme Court appointment who would not recognize it.

I am not more troubled by Judge Bork's view of what the Constitution does not bar racially restricted covenants or de jure segregation in the public schools of the District of Columbia. It is an interpretation that he has personally opposed to such practices, or that he would not overturn the cases of Shelley versus Kraemer and Bolling versus Sharpe, and the related policy. The question is, is it satisfactory that Judge Bork would bar racially restricted covenants under an interpretation of a statute—for if the legislation did not exist, then presumably he would find no prohibition against them?

Judge Bork finds the rationales in the Supreme Court's decisions to be wanting in the cases involving racially restricted covenants and de jure segregation in the public schools of the District of Columbia. But surely abortion of a later stage can be invoked to outlaw the former; and for that matter, the latter could be held unconstitutional because discrimination may be so unjustifiable as to shock the conscience!
It is the right of representatives of the people, have the right and state, the democratically elected representatives, to make forcefully. I hope someone will step forward to do it.

Sincerely,

SYDNEY HOOK
Emeritus Professor of Philosophy, New York University; Senior Research Fellow, Hoover Institution.

As Hoc Committee for Principled Discussions of Constitutional Issues

STATEMENT OF SUPPORT

We are witnessing an incredible assault on the Supreme Court, unparalleled perhaps since the battle to prevent Justice Brandeis' confirmation seventy years ago. The undersigned feel that reasoned analysis is needed as an antidote to emotions which may have affected even those Senators who should guide their colleagues' judgment.

Judge Bork is assaulted for being outside the "mainstream" of American constitutional interpretation and for threatening liberties protected by the Constitution. Our country has witnessed many 5 to 4 or 6 to 3 decisions on important issues, with majorities and minorities split beyond the pale all who challenge it. For the last 15 years or more we have witnessed the only legitimate one, and to exclude as beyond the pale all who challenge it. For the cases where we have witnessed the only legitimate one, and to exclude as beyond the pale all who challenge it. For the large, are secure, and it betrays scant confidence in the American people—who are after all the final guarantors of our liberties—hysterically, that one appointment to the Supreme Court, of a scholarly judge, a former professor in one of our most distinguished law schools, a man already once confirmed unanimously by the Senate for the second most important court in the country, threatens those liberties.

We do not know how Judge Bork, were he a member of the Supreme Court, would rule on the issues that seem to arouse the most anxiety: on whether the states have the right to require notice to parents on abortions for children, or whether states may require a moment of silence in school, or how far affirmative action under the Fourteenth Amendment and the relevant statutes can extend, and on other issues. But however he would rule, some of these and other matters which arouse such concern in those fiercely opposed to him come out, the major structure of our liberties will be secure with Judge Bork on the Court.

The mainstream of interpretation of the Constitution includes both those who would give it the most expansive interpretation and allow judges to exercise a wide power to rectify wrongs and expand rights as they see fit, and those who see a more limited role for the Court. The framers of the framers of the Constitution and the Amendments, and who support a larger role for the democratic branches of government. "The question," as Justice Brandeis' confirmation hearings show, is to short-circuit what should be a debate over principles, and pronounce an unjustified edict of excommunication from the democratic political community.

Judge Bork stands within a legitimate mainstream of constitutional interpretation, one which includes Justice Brandeis and Justice Frankfurter and other eminent jurists, and which asserts that when the Constitution is silent the legislatures, federal and state, the democratically elected representatives of the people, have the right to speak. It is deceptive to argue that a more restrained interpretation of the liberties protected by the Constitution threatens those liberties. Our liberties have been extended as much by state legislative and congressional action in the past few decades as by interpretations of the Constitution by the Supreme Court. Our liberties, in the large, are secure, and it betrays scant confidence in the American people—who are after all the final guarantors of our liberties—hysterically, that one appointment to the Supreme Court, of a scholarly judge, a former professor in one of our most distinguished law schools, a man already once confirmed unanimously by the Senate for the second most important court in the country, threatens those liberties.

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Mr. MOYNIHAN. I would like their honors to know that I, too, am disturbed by aspects of this debate. The single most disturbing event to me was the campaign by the National Conservative Political Action Committee on behalf of Judge Bork. It is in my view a disgrace that this contemptible organization should have sought to associate itself with this honorable man, and it is lamentable—dare I say more—that the President has associated himself with this smear. Yes, I said smear.

Ages ago the Earl of Chesterfield admonished his son: "Take the tone of the company you are in. I cannot doubt that were it left to Judge Bork he would want no part of the company of NCPAC. Here is their paid telephone communication as introduced into the Record by the distinguished Senator from Arkansas:

Mr. President, the following is a paid telephone communication that has gone into many States, from South from West. We have four affidavits stating that this is in fact the wording of the telephone conversation, done by computer. I will read this statement at this time to my colleagues:

"Senator Humphrey. Hello, this is Senator Gordon Humphrey. In my role as Honorary Chairman of the National Conservative Political Action Committee, I decided to speak to you by telecomputer because of the urgent need for citizens to rally behind the President. President Reagan needs your support in his effort to have Judge Robert Bork confirmed to the United States Supreme Court."

"Please hold for an important message from President Reagan."

"President Reagan. Judge Bork deserves a careful highly civil examination of his record, but he has been subjected to a constant litany of character assassination and intentional misrepresentation. Tell your Senators to resist the politicization of our court system, and support the appointment of Judge Robert Bork to the Supreme Court."

"Announcer. As the President and Senator Humphrey said, it's absolutely vital you call the sound of the tone."

"And, if at all possible, please consider making a contribution to help win this important battle. If you would like to make a contribution, please tell me your name at the sound of the tone."

"Please tell me your telephone number at the sound of the tone, so that one of our volunteers can contact you."

"Thank you for your support. Good evening."

Madam President, as Senators well know, NCPAC is, as Judge Bork is, a lawless organization. Why do I say this? Because, as the Senate also knows, in the days when its founder, the late Mr. Terence Dolan claimed to have elected a dozen or so Senators in 1980, there followed a hugely distasteful sequence of illegal activities and, to say again, contemptible campaign tactics. In the end, however, my campaign was not overturned and in the aftermath I determined to take NCPAC on as a matter of principle.

Contempt for the law cannot be allowed, especially election law in a representative democracy. I pursued, I pursued, I pursued.

It took 4 years.

But law prevailed.

On May 15, 1986, Judge Goettel of the District Court, S.D. New York, issued summary judgment for the Federal Election Commission against NCPAC. In order that the record should contain the complete account of the conduct of NCPAC (and its co-conspirator Mr. Arthur J. Finkelstein), I ask unanimous consent that the Federal Supplement be printed in the Record at this point.

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

FEDERAL ELECTION COMMISSION, Plaintiff, v. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, Defendant.

(No. 84 Civ. 0866 (GLG)) United States District Court, S.D. New York.

Federal Election Commission brought action against political action committee alleging committee illegally contributed more than $5,000 to a candidate for political office. On cross motions for summary judgment, the District Court, Goettel, J., held that committee's consultant expenditures would be deemed to be contributions to candidate, and that the committee's consultant expenditures were deemed claims to act in reliance on Federal Election Committee advisory opinion, where committee's action in developing and implementing, through common political consultant, nearly identical campaign with candidate overstepped wording of advisory opinion.

Summary judgment for Federal Election Commission.

ELECTIONS 317.1 Political action committee's consultant expenditures were deemed contribution to primary candidate's campaign, resulting in violation of $5,000 limit on contributions by multicandidate political committees, though committee claimed to act in reliance on Federal Election Commission advisory opinion, where consultant's central rule in both committee and candidate's efforts, and the showing of the two efforts, demonstrated impermissible
degree of coordination which overstepped the wording of advisory opinion.


Henry Sparks, Christopher & Blondi, McLean, Va. by Robert R. Sparks, Jr., of counsel and Ford, Marrin Esposito & Witmeyer, New York City by William P. Ford, of counsel, for defendant Nat. Conservative Political Action Committee.

OPINION

Goettel, District Judge: The Federal Election Commission (the "FEC"), a federal agency empowered to exercise jurisdiction to administer, interpret and enforce the Federal Election Campaign Act of 1971 ("FECA"; "the Act"), brought this action against the National Conservative Political Action Committee ("NCAP") seeking declaratory and injunctive relief. NCAP is a non-profit, nonmembership organization registered in the District of Columbia to support or oppose candidates for elective office. During the period in question (March 1981–April 1982), NCAP was associated with an independent expenditure committee known as the New Yorkers Fed Up With Moynihan campaign.

In January 1982, the FEC received a complaint from the New York State Democratic Committee alleging that independent expenditures reported by NCAP for its anti-Moynihan campaign should be treated as contributions to Caputo and his authorized political consultant. The complaint further alleged that these contributions exceeded section 441a(a)(2)(A)'s $5,000 limit on contributions to a candidate and that NCAP had violated section 434(b)(2)(A)(ii) by failing to report these contributions. The FEC found reason to believe these allegations and, in April 1982, began an investigation. In September 1983 the FEC found probable cause to believe that NCAP had violated section 441a(a)(2)(A)'s $5,000 limit on contributions to a candidate and that NCAP had failed and, on February 6, 1984, the FEC brought this action to enforce the provisions of the Act.

II. Discussion

Section 441a(a)(2)(A) of the Act forbids a multicandidate political committee from making a contribution "to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceeds $5000." 2 U.S.C. §441a(a)(2)(A) (1982). Expenditures made "in cooperation, consultation, or concert, with .... a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate ...." U.S.C. §441a(a)(2)(A) (1982). FFC regulations clarify this language. According to those regulations, the language encompasses anything that includes an expenditure "made with the cooperation or with the prior consent of, or in consultation with, or at the request of or suggested by any person involved in the specific transaction or activity with respect to which the advisory opinion [was] rendered.

Footnotes at end of article.
and 8. Second, NCPAC's coordination with Caputo and Finkelstein, for that matter, did not fall within the "communication" sanctioned by the FEC. Finally, Caputo and Moynihan were more like opponents than like the candidates in the "advisory opinion" fashioned by the FEC.

A. Finkelstein's Role

In the two "situations" upon which it relies, NCPAC hypocritically claims an advertising interest in both the Caputo and Moynihan campaigns. FEC. While Finkelstein's contribution certainly did not create the "campaign" in any meaningful sense, his deliberate efforts to influence the outcome of the campaign, for example, by making independent expenditures designed to defeat the candidate's future opponent. In fact, FEC. According to Finkelstein, the advisory opinion that NCPAC is relying on to support its contention that Caputo and Moynihan are not in "communication" in the same sense as the hypothetical candidates in the FEC's advisory opinion. NCPAC's expenditures were not only hurting Moynihan, they were aiding Caputo. More importantly, NCPAC's anti-Moynihan activities are clearly implicated by NCPAC's anti-Moynihan activities. Finkelstein's central role in both the NCPAC and Caputo efforts, the obvious coordination between the two efforts, their shared goals and parallel strategies, and the posture of Caputo/Moynihan contest to each other demonstrates an impermissible degree of coordination and preclude any reliance on the advisory opinion. Any such reliance would override the wording of the advisory opinion and contradict its underlying spirit as well. Simply put, the advisory opinion does not sanction NCPAC and a Republican candidate to develop and implement, through a network of political consultants, nearly identical campaigns—regardless of whether those campaigns take place during the primary or general election season.
such a violation ....


"For the purposes of this section, preceding a period of not more than 6 months, which has received contributions and expenditures, and has made contributions to 5 or more candidates for Federal office ...." 2 U.S.C. § 431(a)(4) (1982).

"Fraud and deception" includes, inter alia, "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office ...." 2 U.S.C. § 431(a)(4)(B) (1982).

"Section 343a(b)(1)(D)(i) requires multi-candidate political committees to disclose all contributions made to other political committees," including those to a political candidate." 2 U.S.C. § 434(c)(1)(D)(i) (1982).

"Caputo exaggerated his military record and was found to have committed suicide after the press exposed the exaggerations." Pinkelstein served on NCPAC's board of directors. 3 Section 437g(a)(1) of the Act provides, in pertinent part.

"If the Commission, upon receiving a complaint, has reason to believe that a violation of section 437g(a)(1) has occurred, it shall determine whether a specific transaction or activity is a 'specific transaction or activity'״. 2 U.S.C. § 437g(a)(1) (1982).

"The national convention of the Republican party, which was held in April 1980, selected its presidential candidate for the upcoming general election. The firm would do all the research for a consultant or vendor regarding for whom they have been retained by the chairman or vice chairman, notify the person of the alleged violation. The Commission sidecourt of such alleged violation."

"The New York State Democratic Committee has never reviewed this question or any similar question."


"Caputo exaggerated his military record and was found to have committed suicide after the press exposed the exaggerations."

"If the Commission, upon receiving a complaint, has reason to believe that a violation of section 437g(a)(1) has occurred, it shall determine whether a specific transaction or activity is a 'specific transaction or activity'״. 2 U.S.C. § 437g(a)(1) (1982).


"An "independent expenditure program in opposition to the election of a candidate for the Democratic nomination for the Senate in State A," conducted, establish, or maintain a campaign committee, or engage in any other activity that the FEC has determined that the NCPAC, as part of its independent expenditure program in opposition to the election of a candidate for the Democratic nomination for the Senate in State A, has committed or is about to commit a violation of the Act. 2

"If the Commission, upon receiving a complaint, has reason to believe that a violation of section 437g(a)(1) has occurred, it shall determine whether a specific transaction or activity is a 'specific transaction or activity'״. 2 U.S.C. § 437g(a)(1) (1982).


"If the Commission, upon receiving a complaint, has reason to believe that a violation of section 437g(a)(1) has occurred, it shall determine whether a specific transaction or activity is a 'specific transaction or activity'״. 2 U.S.C. § 437g(a)(1) (1982).


Madam President, I yield the floor.  

Mr. BIDEN. Madam President, I should announce to all of my colleagues that only three more Senators will be able to speak on this side. I yield 3 minutes to the Senator from Massachusetts, the majority leader; and I retain 6 minutes for myself.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Madam President, as this debate draws to a close, it is worth reflecting on two things—the nomination that will be rejected today, and the nomination still to come.

In choosing Robert Bork, President Reagan selected a nominee who, over the course of a highly controversial career, has demonstrated a relentless hostility to the widely accepted and indispensable role of the Constitution and the Supreme Court in protecting a broad range of individual rights and liberties.

The fundamental flaw in this nomination is that Robert Bork's constitution contains no real right to privacy for individuals against Government intrusion, no real protection for women against sex discrimination, no real support for civil rights, and no real limit on Presidential power.

The hearings on this nomination were thorough—and balanced. The national debate on the nomination was extensive—and fair. The American people have been involved—and they should have been—because it is their Constitution and their constitutional rights which are at stake, because that is what advice and consent means in America.

In rejecting Judge Bork, the Senate and the American people are making clear that the Constitution is the same living historic document of American liberty that it has been since the days of John Marshall, the greatest Justice of all.

Some have suggested that the White House attitude toward the Senate on the next nominee will be to send us the hair of the dog that bit them. I hope that President Reagan will resist that intemperate impulse. Like does not cure like. If we receive a nominee who thinks like Judge Bork, who acts like Judge Bork, who opposes civil rights and civil liberties like Judge Bork, he will be rejected like Judge Bork.

It is as simple as that. If the administration does not learn from the Bork mistake, they will repeat the Bork mistake.

President Richard Nixon made a similar error in 1970, when he submitted the nomination of G. Harrold Carswell for the supreme Court after Clement Haynsworth was rejected by the Senate. As we all remember, Mr. Carswell was rejected too—and rightly so.

This battle has been intense, and neither side is eager to repeat it. But President Reagan should be under no illusion. The Senate of the United States will always be vigilant, and will never be too exhausted, to defend the Constitution or oppose a Supreme Court nominee when the basic rights and liberties that define democracy in America are at stake.

This is the role of the Senate throughout our history, from the rejection of George Washington's nomination of John Rutledge in 1795, to the rejection of Robert Bork today. And that history and precedent will be high in our minds now, as we prepare to consider the next nomination that President Reagan will submit.

I urge the Senate to reject the nomination of Robert Bork.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Madam President, I yield 5 minutes to the senior Senator from Utah.

The PRESIDING OFFICER. The Senator from Utah has been yielded 5 minutes.

Mr. HATCH. Madam President, as far as I am concerned, this has been a deborkle. From the opening gun of this debate we have heard charges that Judge Bork is an extremist. As I repeatedly stated, I felt that charge was wholly unfounded. I spent much of my time rebutting that point and in my view Judge Bork is a nominee in the finest tradition; in theory. In reality, however, the real issue here is not whether Judge Bork is an extremist. If that were the issue, we would not have this debate. The reason we are having this debate is precisely because Judge Bork is not an extremist. If he were an extremist, he would never gain the four votes necessary to have his views prevail amongst the extraordinary individuals who comprise the Court. If he were an extremist, his views would rarely if ever have an effect on the direction of legal policy.

The reason we are having this debate is precisely because Judge Bork is not an extremist. If he were an extremist, he would never gain the four votes necessary to have his views prevail amongst the extraordinary individuals who comprise the Court. If he were an extremist, his views would rarely if ever have an effect on the direction of legal policy.

As my colleagues and numerous news accounts of this issue have conceded, Judge Bork replaces Lewis Powell, whom many have regarded as the "swing vote."

This brings us to the real issue of this debate. Judge Bork's nomination represents the first time in 30 years that a majority of the Supreme Court will not be bound by the jurisprudence of judicial activism. The real issue is judicial activism versus judicial restraint. The real reason Judge Bork is under attack is that he is so much like Chief Justice Burger, whom many have regarded as the first woman Justice; Justice Scalia, whom we unanimously approved last year; and Justice White, a Kennedy nominee.

Judge Bork is so much like these four in his philosophy of judicial restraint that he will help comprise a new majority and that is why we are having this debate. That is why Judge Bork can be opposed and stop nothing at this block this nomination. Because his opponents have stopped at nothing, the solemn and dignified process of advise and consent has been tarnished by innuendo and intrigue.

In my last few moments I would like to dispose of some of the remaining myths that have been employed against Judge Bork, and I will call this the deborkle, because I believe it has been that bad.

Myth one, the privacy notions. I spoke extensively on this yesterday and, frankly, I think there is no question that there are other Justices who never found this general right to privacy, including O'Connor, Rehnquist, Black and Scalia, and I submit for the Record my remarks on that issue:

The greatest myth of this debate is that Judge Bork would be the only Judge in history to reject the privacy doctrine. In his own style the Senate Judiciary Committee chairman said that every other Justice has crossed the Rubicon, but Judge Bork has not even put a boat in the water. Frankly the chairman needs to count the boats in the marina again. Judge Bork's boat is not the only one to remain safe on the banks of the Constitution while others have launched out and been swept downstream into the rapids of judicial activism. Judge Bork is accompanied by a whole fleet. O'Connor—the woman Justice—has never endorsed a single application of privacy in any context. To the contrary, she said in a recent case that "the Court's abortion decisions have already worked a major distortion in the Constitution."

Rehnquist—the Chief Justice has voted 8 times against any form of so-called privacy rights. White—President Kennedy's nominee, too, has voted 8 times against privacy. He said in 1967 that sexual privacy rights that "Court is most vulnerable and comes closest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."

Black—This great Justice voted against Griswold and said "Nor does anything in the history of the amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and Bill of Rights points the other way."

Scalia—our newest Justice, who voted with Judge Bork 98 percent of the time on the D.C. Circuit, joined Bork in Dred Dremenburg cases against homosexual privacy rights.

This general privacy doctrine was only manufactured by judges in 1965. Yet because it was made by judges and can be undone by judges we are having this fight over Judge Bork.

Myth two is civil rights, and I submit for the Record my remarks on that point:
Bork has never as SG or as judge advocated a single position less favorable to minorities than the Supreme Court.

Myth two—Neither Judge Bork approved of discriminatory poll taxes yet we hear in Judiciary Committee report that this case had something to do with private racially discriminatory contracts. Runyon v. McCrary.

1-man, 1-vote—Judge Bork supports the Baker v. Carr case giving courts a major role in apportionment. Moreover, Judge Bork supports Justice Stewart's formula that strikes down state apportionments that frustrate the majority will.

Judge Bork has never, as Solicitor General and judge, he never advocated a single position less favorable to minorities than the Court. He is not for poll taxes, literacy tests, or private discriminatory contracts. He supports one-man, one-vote, but he does have intelligent things to say about all of those.

Myth three—women's rights. As Solicitor General and judge, he never advocated a single position less favorable to women than the Supreme Court, and submit for the Record my remarks on that issue:

As Solicitor General and Judge never advocated a single position less favorable to women than the Supreme Court.

Equal Protection—Judge Bork has clearly said that Equal Protection on the separate issue of what standard of review applies strikes down state apportionments that frustrate the majority will.

Myth four—natural law. I will just submit for the Record my remarks on that issue:

Fawn Hall said there were rights beyond the Constitution and was derided. The Judiciary Committee report says one Senator claimed "My rights are not derived from the Constitution ... they represent the essence of human dignity, and some Professors and others have referred to the Fedged in delight.

The real issue is not inherent rights. We settled that in 1776 not 1987. The real issue is whether the people themselves identify and define those rights in the Constitution and statutes or whether unelected judges identify and enforce their notions of rights regardless of what the Constitution says.

And myth five, common occurrence. We have heard that many Justices have been rejected and this is common, it was said. The Senate has confirmed 53 Justices over nearly 100 years without blatant and unabashed political campaigning like this one has had. Never before have we seen TV distortions, full-page ads with 57, 84, and 99 errors and distortions and outright lies; fundraising campaigns, telephone solicitation campaigns, extensive lobbying by outside groups, postcard campaigns, political threats, and counter threats.

I have to consider a new amendment based on this proceeding. We have had a debate on amending the Campaign Financing Act to include Supreme Court Justices. We may need a Fair Campaign Practices Act for Supreme Court Justices because this one has not been done right and if those same-time, I must state that political at least we need to guarantee that the politics are fair.

Finally, we stand on the brink of a great constitutional crisis. If we continue down this course, the independent and impartial judicial system stands in jeopardy. No American wants his life, liberty, or property to depend on a judge who is primarily concerned about tomorrow's headlines or tomorrow's confirmation proceedings. No judge can be fully expected to be fully independent and faithful to the law if his own career hangs in the balance.

Madam President, I would like to restate what I have said at the conclusion of the hearings. Chairman Biden can be proud of the procedural fairness with which he conducted the Senate Judiciary Committee hearings on Judge Bork's nomination. At the same time, I must state that those same hearings were decidedly lacking in substantive fairness. This should not reflect negatively at all upon the Senator from Delaware because he certainly cannot control the charges, allegations, and distortions that have been presented over and over again by witnesses. Nonetheless many of the witnesses presented a particularly slanted view of the law and demonstrated a narrow understanding of Judge Bork's abilities and reasoning processes.

Senator Biden took the time to review my concerns about the substance of the Senate Judiciary Committee report. I thank him for that. I feel that I owe him a similar courtesy. Inasmuch as I just received his views in the Record a few minutes ago, I shall be limited in the breadth of my response, but nonetheless I stand by my original assertion that the committee report is sophomoric and slanted.

Madam President, permit me to elaborate. In what Senator Biden refers to as "Inconsistencies 3-16," he once again asserts that "Judge Bork's view on the liberty clauses—and his notion of the rights that I believe all Americans have—does stand alone among Justices who have sat on the Supreme Court."

The Senator from Delaware stated this same point in earlier debate on the Senate floor. In his eloquence, my colleague from Delaware said that every other Justice has crossed the Rubicon on the privacy right, for example, "but Judge Bork has not even put a boat in the water."

Madam President, I urge my colleagues to check the river banks again; there are many other boats still on Judge Bork's side of the stream. Moreover those who have launched from the safe shores of the Constitution have been swept downstream into the rapids of judicial activism and unprincipled jurisprudence.

Let's count the boats still with Judge Bork on the bank defined by the words and structure of the Constitution as amended. The first boat belongs to the first and only woman Justice—Justice O'Conner.

Irrespective of what we may believe is wise or prudent policy in this difficult area, the Constitution does not vest in this Court the authority to strike down laws based on our notions of desirable social policy, "wisdom," or "common sense."

Just last year, Justice O'Connor dissented when the Court refused to allow parents to counsel with their minor children prior to an abortion. She said then: "[T]he Court's abortion decisions have already worked a major distortion in the Constitution." Justice O'Connor also joined Justice White's opinion in the Harwick case last year in which the Court refused to extend any general privacy right to homosexual conduct. The only woman Justice has never endorsed any application of a right to privacy in any context.

The Court still is reluctant to make that stay on the Constitution's side of the Rubicon: Chief Justice Rehnquist's bank. The Chief Justice dissented in Roe versus Wade, the 1973 abortion case. He reasoned that the majority's privacy opinion "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the 14th amendment."

The Chief Justice also dissented in Carey versus Population Services Inc. saying: If those responsible for the due process clause could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in men's restrooms of truck stops, it is not difficult to imagine their reaction.

Moreover the Chief Justice has dissented in no less than six other cases based on the reasoning of the so-called privacy doctrine. One of these was the
homosexual privacy case, where he said "the Court is most vulnerable and comes closest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." The Chief Justice, it is safe to say, has not left the safe shores of the Constitution.

The next boat lying beside Judge Bork's belongs to Justice White, President Kennedy's appointee. Justice White has opposed Roe versus Wade as an improvident and extravagant exercise of the power of judicial review." He opposed seven other privacy-related cases. He wrote the opinion, against homosexual privacy protections. He said in that case: "It would be difficult, except by fiat, to limit the claimed right of homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed.

The Chief Justice, according to the banks of the Constitution is that of Justice Black. He dissented in the very first case to ever mention the alleged privacy doctrine, Griswold versus Connecticut Justice Hugo Black stated: "We must put this entire issue of privacy, adultery, incest, and other sexual crimes even though they are committed.

My Brother Goldberg has adopted the recent discovery that the ninth amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice" or is "contrary to the collective conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not "consider their personal and private notions." One may ask how they can avoid considering them. The Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Supreme Court can use to determine what traditions are rooted in the "collective" conscience of our people. The judgment of the Court is based exclusively on equal protection grounds and said absolutely nothing about substantive due process or the right to privacy. Skinner held that a State law requiring sterilization of recidivist robbers, but not embezzlers, constituted "an intolerable encroachment on the right of the individual to determine, in accordance with his conscience and his religious beliefs, the manner in which he shall raise his children." He opposed seven other privacy-related cases.

Another boat to print the words and structure of the document is that of Justice Black. In any event, they are neither of those.

Frankly Judge Bork's boat seems to be accompanied by a veritable fleet of ships unwilling to venture out into the constitutional storm that would result if the Court abandoned completely the words and structure of the document.

In order to make the law fit his conclusion that all Justices are different from Judge Bork, Senator BIDEN twisted the words of the judges. For example, it has been said that Justice Black accepted the broad substantive due process rights notion in the Skinner sterilization case. This is not a correct reading. Judge Black's reasoning was based on a substantive due process rationale for that case. Skinner held that a State law requiring sterilization of recidivist robbers, but not embezzlers, constituted "an intolerable encroachment on the right of the individual to determine, in accordance with his conscience and his religious beliefs, the manner in which he shall raise his children." This was the only workable principle he could find.

The boat lying beside Justice Bork's most resembles that of his own private notion of substantive due process on the recent unanimous decision in Turner versus Safley. This is misleading. Turner was not about a superprotected, substantive due process right of privacy or marriage. The case arose in a prison context, raising fairly minor issues for the Court. The prisoners challenged the constitutionality of a prison regulation that permitted prisoners to marry only if the superintendent of the prison determined that there were compelling reasons for doing so. Obviously, the State generally permitted its citizens to marry without requiring that they show a compelling reason for doing so. One question raised, therefore, was whether this legislative classification survived equal protection scrutiny: whether the State had valid reason for adopting a different rule for prisoners. In short, they are seeking to establish a general privacy principle to apply in prison cases and summarized the proper analysis as follows: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.

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when you expand the liberty of any of us, you expand the liberty of all of us." This is pure nonsense. If this were true, there would be no lawsuits.

In every lawsuit, the litigants on either side of the case contend that they possess superior legal rights and liberties. Consider the following example: One litigant asserts the right and liberty to have an abortion on demand; the competing litigant asserts the right and liberty of a parent to counsel their minor parent prior to an abortion. This is a case that will likely come before the Supreme Court. It is not hypothetical. Regardless of how you may feel about this issue, you must concede that one set of rights and liberties will prevail and the other will not. There is no way to grant both sets of rights and liberties. By definition, to expand one litigant's rights is to contract the other.

Let's look at another example. Our Constitution, in certain cases, often holds that the liberties and rights of one party can not be expanded without the consent of the other party. Senator BIDEN demonstrates that the Constitution is a zero-sum system. The Constitution can be changed to incorporate any rights the people require. It does mean, however, that the Constitution contains legal limits and laws. Those limits will acknowledge some rights and discredit others. This is obvious.

Thus any case before the Supreme Court features rights and liberties asserted by either litigants. The Constitution, however, does not expand the liberty of one party at the expense of another, and never has the luxury of saying that one set of rights and liberties is worth more than where he stands on giving such married people's right to privacy.

In dealing with "Inconsistencies 11, 14, and 12," Senator BIDEN states that his objections to his understanding of Judge Bork's views of precedent are without license. Then in the next section, he proceeds to question whether in each case he ultimately agreed with the imminence rationale of Brandenburg or disagreed with it, contending that you can't find an alternative rationale for that case. By raising the second point, Senator BIDEN proves my point in the first.

Judge Bork did not embrace at any point the reasoning of Brandenburg. He continued to question, to my understanding, both the merger of subversive speakers—the KKK advocating murder of blacks in this case—ought to be allowed to have their way and whether subversive speakers ought to be permitted to do their damage right up to the point that danger is imminent. At that point, Judge Bork noted by referring to the Nazis, it may be too late. On both points, Judge Bork had concerns. I mentioned only one in my cursory writing. In any event that is not the point. The point is that Judge Bork did have an alternative rationale for accepting Brandenburg. That alternative rationale is none other than the doctrine of stare decisis. Senator BIDEN demonstrates that he did not understand the breadth and significance of Judge Bork's views on precedent by insisting that he had to choose between agreeing or disagreeing with the rationale of that case. In fact, he stuck by his opinion that the few words of the first amendment do not justify Holmes' elaborate subversive speech reasoning, yet he still found a respected legal means to accept the clear and present danger test. That legal means is his theory of precedent.

Senator BIDEN's report might have mentioned it, but it must have slipped his mind mentioned—at the time he did not understand one of the fundamental applications of that doctrine in Judge Bork's jurisprudence. What Senator BIDEN refers to as "Inconsistencies 13 and 15" have been amply clarified above. I will not dwell further on those points.

The PRESIDING OFFICER. Who yields time?

Mr. HATCH. I would be happy to yield 1 minute to Senator SYMMS.

THE PRESIDING OFFICER. The Senator from Idaho.

Mr. SYMMS. I thank the distinguished Senator from Utah, and I thank the distinguished Senator from Utah for the efforts that he has put into this confirmation process throughout the year.

Madam President, I made my position clear yesterday and spoke at great length on the floor in favor of Judge Bork. I ask unanimous consent today, just to restate my strong support for Judge Bork and the reasons within the Record yesterday, but I have discovered this morning an article which was in the Wall Street Journal, October 21, 1987, by Milton Friedman and Gerhard Casper.

The PRESIDING OFFICER. The Senator from Idaho has used his time.

Mr. SYMMS. Madam President, I ask unanimous consent that it be printed in the Record, and also "The Bork Trophy" from the Wall Street Journal yesterday to show how the liberal propagandists have done in this fine judge.

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

PEOPLE VERSUS BORK: TALE OF TWO POLLS

(By Milton Friedman and Gerhard Casper)

A recent Harris Poll purports to show that a substantial majority of the American people oppose the confirmation of Judge Robert Bork to the Supreme Court. The poll actually shows how a pollster can determine the answer by the way he asks the question—as the following comparison of the actual Harris Poll and a hypothetical alternative demonstrates.

Poll A: As you know, the Senate is holding hearings on whether or not to confirm President Reagan's nomination of Judge Robert Bork to be a justice of the U.S. Supreme Court. Have you seen or followed any of the hearings on TV or in the newspapers:

(1) Seen or followed (2) not seen or followed
(n) (not sure)

Now let me read to you some statements about the Bork nomination. For each tell me if you agree or disagree.

HARRIS POLL

If President Reagan says that Judge Bork is totally qualified to be on the Supreme Court, then that's enough for me to favor the Senate confirming his nomination.

Bork has said: "When a state passes a law prohibiting a married couple from using birth control devices in the privacy of their own homes, there is nothing in the Constitution that says the Supreme Court should protect such married people's right to privacy." That kind of statement worries me.1

Judge Bork seems to be well informed about the law, and I think his role is worth more than where he stands on giving minorities equal treatment, protecting the privacy of individuals, or other issues.

Judge Bork seems to be too much of an extreme conservative, and if confirmed, he would do the country harm by allowing the Supreme Court to turn back the clock on rights for minorities, women abortion, and other areas of equal justice for all people.

ALTERNATE POLL

If Senator Ted Kennedy says that Judge Bork is totally unqualified to be on the Supreme Court, then that's enough for me to oppose the Senate confirming his nomination.

Bork has said: "a judge has to make sure that the accused person gets an entirely fair trial. But beyond that, I do not think the scale should be weighted on the side, unfairly weighted on the side of a criminal." That kind of statement pleases me.2

1 In fact, Judge Bork has never made the statement. In response to a Journal inquiry, a Harris spokesperson on Monday acknowledged, "That was not a question we used. We just used it to facilitate the question."—ed.

2 (This is a direct quote from Judge Bork's testimony to the Senate Judiciary Committee.—ed.)
Even the opponents of Judge Bork concede that he is a distinguished legal scholar, well informed about the law, having been a private lawyer, law professor, solicitor general, and Supreme Court justice. These qualifications are more important than whether I agree with every opinion he has expressed.

Bork is a jurist who consistently supports court decisions that substituted the political opinions of the Supreme Court for the judgment of both Congress and the Constitution. He would help to stretch the kind of government—of laws, not of men—envisioned by the Founding Fathers.

If these deliberations are serious, the evidence on this page and elsewhere the past 2 weeks should cause some thoughtful senators to reconsider. The true record of Judge Bork could not be more different from the claims of Archie Bunker ads and Archie Bunker senators.

Contrary to the smears, Robert Bork has not been a racist, sexist, sterilizer or with the statesmanship to admit they were initially misinformed. Sadly, the more Bunker senators.

His civil-rights record? No one could be more different from the men-envisioned by the Founding Fathers.

As the Senate takes up Robert Bork's nomination to the Supreme Court, we would like to believe that there might be some nominees to the Supreme Court, we would claim of Archie Bunker ads and Archie Bunker senators.

If so, that is what I wanted to present, that this is a superb man, and my only regret, if it should not be, is I think we will look back with embarrassment in years to come that we rejected such a remarkable man who could have brought such yeart and vitality to the Court and would have enriched the deliberative process of the body, the interchange and intercourse of ideas and legal theories, and in an exciting and spirited way. We will have lost that.

And we will probably lose it in the future, even if a Democratic President should provide us with a Democratic nominee. I think we will have denied ourselves people of provocative views, provocative ideas, of writers of law reviews, provocative professors. But so be it. But we must think of the best interests of our country in the future and certainly of the best interests of the Supreme Court.

I thank the distinguished ranking member for yielding.

Mr. THURMOND. Madam President, I now yield 10 minutes to the able Republican leader, Senator Dole.

The PRESIDING OFFICER. The Republican leader is recognized.

Mr. DOLE. Madam President, we are going to vote in about 30 minutes. I am certain that everyone has pretty much made up their minds so that anything anybody says, or has said in the last couple of days, will really not make that much difference.

But I think it is worth reflecting on what has happened over the last few days.

I can recall Judge Bork coming to my office and a number of us, maybe 16 of us, saying that he ought to hang in there. He had already said the day before that he was under no illusion about his being confirmed by the Senate. I think he was struggling at that time to decide whether he wanted to extend this or just to drop it, to let the American people move on to something else.

But I think he was convinced, that there are principles involved and principles at stake that go far beyond the selection of one Supreme Court Justice.

There were some who have said this debate would be a waste of time and made efforts on this floor to do it in 2 minutes. They told me that minds were made up, that we ought to move on to other business.

Our purpose, my purpose, was to get the job done and get the full story told. The American public in years to come will have a very fine idea of a very fine man that it did not have through the distorted advertising campaign that slapped this remarkable gentleman around throughout the United States and created fear in our countrymen.
I did not agree at the time, and I think the debate has been useful. It is never a waste of the Senate’s time to pause and reflect when the reputation of one of this Nation’s finest public servants is on the line. The next time it is raised, I would hope that we would not find ourselves in the position that, “We ought to rush the judgment because that nominee does not have a chance.”

It certainly is not a waste of time if not only my colleagues but the American people now understand that the independence of the judiciary has been placed in jeopardy by a confirmation process that has, in too many respects, resembled a no-holds-barred political campaign, complete with high-powered lobbying activities and questionnable radio and TV ads.

Judge Bork was not running for the Supreme Court. He was nominated. He should have gone through a confirmation process, and he did. Many of my colleagues on both sides in the Judiciary Committee spent a lot of time and a lot of effort to make certain that the means to me—is fairness; it means not jumping to some questionable radio and TV ads. We now understand, is that the real philosophy of judging, debate about the proper judicial creation of a substantive civil rights claims, the Legal Defense Fund agreed with Bork’s position 9 of the 10 times.

A review of Judge Bork’s appellate court record reveals a similar pattern. Judge Bork has never joined a decision less sympathetic to minority or women’s rights than that adopted by either the Supreme Court or the Judge he would replace, Justice Powell.

I think we all know how easy it is in this game of politics, though he was not supposed to be in a game of politics, to hurl charges of racism or sexism and how hard it is to refute those charges, especially when the firepower of a mass media campaign is employed against you. Not only does Judge Bork’s record refute the charge, but so does his personal history, as explained to the Judiciary Committee by Howard Crane, by Ms. Jewel LaPorte, by respected friends and associates, of the Judge, like Lloyd Cutler.

I say that charge is not accurate.

We have heard a lot about the right of privacy. One of the critics most critical of Judge Bork and the NAACP Legal Defense Fund filed briefs in the Supreme Court on substantive civil rights claims, the Legal Defense Fund agreed with Bork’s position 9 of the 10 times.

A review of Judge Bork’s appellate court record reveals a similar pattern. Judge Bork has never joined a decision less sympathetic to minority or women’s rights than that adopted by either the Supreme Court or the Judge he would replace, Justice Powell.

The L.A. Times and Washington Post accounts tell a story of how the opposition strategy was developed and implemented. I might say the Boston Globe had a good account of that, too. It was developed from the daily meetings of interest-group leaders and Senate staffers, the strategic delay before the hearings, the polling and identification of political themes that would “sell” in the South and elsewhere; the coordination of ad campaigns with the committee proceedings. We now hear that there may have been outright intimidation of witnesses at the hearings.

Madam Chairman, in the past few days, some of my colleagues have tried to right this slanted version of Judge Bork’s views. I will, very quickly, because of the shortage of time, focus on one or two of those.

First, let us look at Judge Bork’s civil rights record. There has been a lot of rhetoric in this debate, but I have yet to hear a Bork opponent stand up on this floor and cite any evidence that would connect him to a reversal of a single civil rights gain. In fact, if you look at Judge Bork’s record as Solicitor General and D.C. Circuit Judge, you see that not only did he do nothing to turn the Civil Rights clock back, but, to the contrary, he worked hard to push it forward, as many of us have done on the Senate floor.

During the time that Judge Bork was the Solicitor General, there were many cases in which he elected to participate as a “friend of the Court,” even though the Government was not a party. Nineteen times Solicitor General Bork took this action to speak directly to substantive issues under the Federal civil rights laws; 17 of those briefs urged the Supreme Court to reverse the lower court in favor of minority and women plaintiffs. In a word, Solicitor General Bork did not retreat on the constitutional responsibility of this body, the responsibility to advise and consent, would be short circuited. But by his courageous refusal to throw in the towel and quietly walk away, Judge

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Mr. BYRD. Madam President, I ask unanimous consent that the distin-
guished Republican leader have an addi-
tional 5 minutes.

Mr. DOLE. That leaves us with the
vote. Nobody is in doubt about the
vote. The President is not in doubt about
the vote. Judge Bork's wife
Mary Ellen, who stood by his side and
listened to much of the debate, is not
in doubt about the vote.

Nothing that has happened before
matters. We have had time to study
the record, to discuss and debate it,
and to give it the sober reflection it de-
serves and our oath requires.

Mr. President, more than anything
else, this nomination is about judicial
restraint, and about an outstanding
judge who adheres to that philosophy.
The interest groups have spent a lot of
money and twisted a lot of arms in
order to keep the interest groups out
of focus during this confirmation
process. Had this debate not occurred,
they would have succeeded. But the
debate has confirmed what the minori-
ty report of the committee states so
clearly: The fundamental issue in-
volved here is who governs America.

Will our most difficult and import-
tant choices be made by judges ap-
pointed for life—accountable to no one
and—as some of my colleagues would
have it—unrestrained by the written
law? Will we license these judges to
discover rights, impose restrictions
and narrow choices on their own sub-
jective views of liberty and morality?
That is one side.

On the other side, will we require
that judges faithfully follow the writ-
ten law and preserve for the elected
representatives of the people the
choices not foreclosed to them by the
Constitution. The question we face is
not whether Government will have a
say, but rather who in Government
will decide the reach of our liberties.
For 200 years, the answer has general-
ly been, if the Constitution is silent,
the decision is for the people and their
elected representatives.

My colleagues would not readily re-
linquish to the judicial branch the au-
thority to enact statutes. Why then
should we sign over to the courts the
people's right to amend the Constitu-
tion? It is far more difficult to correct
an error in a constitutional interpreta-
tion than a misreading of a statute. In
both cases, however, the basic issue is
the same. Will ours be a government
of laws or men?

The American people have felt the
sting of judicial activism. They under-
stand that the scales have been tilted
in favor of the criminal because of it.
They understand that they have less
of a voice in how their schools are run,
how their tax dollars are spent, and
how their neighborhoods are protect-
ed because of it. They understand that
judicial activism is a formula for deny-
ing them a say on issues like the death
decision and reliance for pornography.
Attention has been divorced from
these and other fruits of judicial activ-
ism, but only temporarily.

Madam President, let me conclude
by stating one final area of concern. It
seems to me that, as a result of the
hearings and the debate, we know a
great deal about how Judge Bork may
have voted on certain cases decided 10,
20, or even 80 years ago. What has not
gotten much attention, in my opinion,
is how Judge Bork is equipped to
decide the issues that will confront the
Supreme Court in the future—issues
that none of us can anticipate, in areas
that none of us can know.

To me, the question we ought to be
asking ourselves is whether Judge
Bork will face those unknown issues
with fairness, intelligence, compassion,
and creativity. And whether he will
bring to those issues an understanding of
the limitations of judicial solutions
and a healthy respect for the roles of
the other branches of Government.

An examination of Judge Bork's
writings, record, and experience,
makes the answer to that all impor-
tant question quite clear. We should
confirm this nominee.

We are not going to do it but we
should. And again I would say thanks
and I thank the President for saving the
process. For that I think Judge Bork
deserves a great deal of credit.

The PRESIDING OFFICER. Who
yields time?

Mr. BIDEN. I yield 6 minutes to the
majority leader.

The PRESIDING OFFICER. The
distinguished majority leader.

Mr. BYRD. Madam President, we
are coming to an end of a very long
debate on the nomination of Robert
Bork to the Supreme Court. It has not
been the happiest of debates. There
has been a great deal of controversy.

Now, we are about to vote on the
nomination. Robert Bork asked for such
a vote. He deserves a vote. That is why
we are elected, to go on record even
though, the Senate will not consent to
the nomination of Judge Robert Bork
to the Supreme Court.

For the good of the country I believe
it would be wise for the President and
the Senate to set a new tone for the
President's next nominee to the Su-
preme Court. Indeed, it is my very
great hope that the spirit of coopera-
tion that we are trying to build with
the President on solving the budget
will carry over to the next choice
to the Supreme Court.

I hope that we have all learned from
the experience that nominations breed
controversy. There has been an excess of charge
and countercharge. The actions of the out-
side interest groups, on both sides of
the debate, have contributed to the
crisis. But the White House knew before it proposed Judge Bork's
name that his nomination would be
controversial. The White House did
not heed that warning. The White
House backs away from a policy of re-
linquishing to the judicial branch the
authority to enact statutes. Why then
should we sign over to the courts the
people's right to amend the Constitu-
tion? It is far more difficult to correct
an error in a constitutional interpreta-
tion than a misreading of a statute. In
both cases, however, the basic issue is
the same. Will ours be a government
of laws or men?

The American people have felt the
sting of judicial activism. They under-
stand that the scales have been tilted
in favor of the criminal because of it.
They understand that they have less
of a voice in how their schools are run,
how their tax dollars are spent, and
nate a conservative. The Senate has not been averse to the appointment of judges who are conservative in their judicial philosophy.

Sandra Day O'Connor is a conservative judge. Chief Justice Rehnquist is a very conservative judge. Judge Scalia is a conservative judge. But none of them has given cause to underrate the authority of the Senate as did Judge Bork's nomination.

I believe that whatever was going on outside the hearing room did not affect the outcome of the Judiciary Committee hearings. I believe Judge Bork was given a fair shake by the committee. The chairman of the committee, Senator Biden, gave every Senator, including this one, a full opportunity to probe Judge Bork's legal philosophy.

Judge Bork explained his views openly and extensively before a divided Senate. The balance rested with four uncommitted Senators, including this Senator, who stated at the beginning of the hearings that he favored then, and I favor now, the nomination of a conservative judge to the Supreme Court.

Their commitment could just as easily have swung behind Judge Bork as against him. We were open to persuasion. We were not persuaded. Indeed, all four of the uncommitted Senators swung against him.

The majority of the full committee became unsettled by Judge Bork's overly narrow interpretation of law. That feeling of unease reflected the unease of many Americans that there was no assurance that Judge Bork would protect their rights. This is the reason for the rejection of Judge Bork's nomination by the full Senate.

In addition, I have particular objections to Judge Bork, including his views on the right of privacy, congressional standing, and the role of the independent counsel. The balance of statements in the Record detailing my opposition.

Madam President, the Constitution, as Franklin Roosevelt once stated, is a "layman's document, not a lawyer's contract." The people of America may not know exactly what to make of all of the legalisms that they have heard during this debate. I am not sure that I understand all of the legalisms. I am pretty sure I have not. But the people do know that they have rights that are protected by the Constitution of the United States. It is a faith summed up by one great democratic assertion by the people out there in the field, in the mines, in factories, in the schoolrooms, and in the churches of America. "I have my constitutional rights." The American people do not want these rights to become a mere formality in the face of an "intellectual feast." Indeed when Judge Bork was asked why he wanted to serve on the Court his answer was, "I could be an intellectual feast."

The American people do not want the majesty of the Constitution reduced to a narrow legalism. Judge Bork's judicial philosophy unsettles the faith in the Constitution that all Americans have said to share.

For all of Judge Bork's brilliance, he has not given this Senator and the majority of the Senators an assurance that he understands this basic sentiment about people's rights.

Madam President, we have heard much about pressure. We have all had pressure. And it has not been a one-way street. I had over 2,000 telephone calls in my little West Virginia office in the Hart Building in 1 day. I had over 2,400 telephone calls on another day. That might not be out of the ordinary for a large State like California, or New York. But for West Virginia, with less than 2 million people, that is a lot of calls. But by the way, those calls came from all over the Nation. Those calls were coming from all over the Nation. Obviously they were generated. They were organized by special interest groups around the Nation. I do not find any fault with that except that I had to rearrange my office staff and it made it difficult for West Virginia constituents to get their calls through. But that is all right. We can expect that. But let us not go hog wild over this idea there has been pressure only from one side in this debate. It has come from both sides.

Madam President, it is time to move ahead, to begin the process of clearing the air, and to look forward to filling the vacancy on the Court. Let the dead past bury its dead.

JUDGE BORK AND THE RIGHT OF PRIVACY

Mr. President, among the many concerns I have about Judge Bork's jurisprudence, there were protested by none higher than the unease with which I observe his constricted view of the rights all of us have. In stark briefness, Judge Bork thinks that those rights are very limited in number and subject to majority limitation. Even as to the rights which are spelled out in the Constitution and the Bill of Rights, his respect is tentative and hesitant. He once said that the Bill of Rights was a hastily drafted ill-thought-out piece of work. With this kind of view of what is expressly set out in our basic charter, is it any wonder that he gives the back of his hand to the thought that unexpressed rights may be protected by the general provisions of the Constitution and that it is a judge's responsibility to apply history, tradition, precedent, and his perception of the community's values to discern and to protect those rights?

The framers of our Constitution did not believe with Thomas Hobbes and Blackstone and the other theorists of Government that when men enter society they yield their natural rights to the entity which they have created and that they retain only those rights which they had the forethought to write down expressly. No, the framers believed what the Declaration of Independence says).

All men are created equal • • • endowed by their Creator with certain inalienable rights • • • among (which) are life, liberty, and the pursuit of happiness.

As many philosophers and scholars have pointed out, the framers of the Declaration did not believe that all men were equal in ability or intelligence or opportunity; they were equal in the rights they possessed, the rights granted them by their God. "To recognize these rights," the Declaration goes on, "governments are instituted among men." The natural rights which all of us possess in the natural state are not by joining together in order better to protect those rights made in the condition at the behest of the majority unless we had in the charter by which we formed the Government taken infinite care to list each one, cross every "i," dot every "i," and rewrite the "end." As every student of history knows, the framers at Philadelphia did not feel the necessity to include a Bill of Rights because they had not delegated to the National Government to be created the authority to infringe our rights. But the opposition rhetoric and the possibility that Government might through use of some delegated powers actually restrict those precious rights brought Madison and others to the argument for a Bill of Rights. And yet, as Madison worried, listing some rights, because it was not possible to list all, might raise the implication that only the listed rights were protected until unknown ones were indeed subject to the will of the majority.

No doubt exists as to the response to this concern. Madison explained it to the House of Representatives, others explained it elsewhere. No inference was to be left to be drawn. The ninth amendment was the response:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

What we have in the ninth amendment is a rule of construction. Because some rights are listed, it is not open to anyone to argue that other rights are subject to the abridgment of Government. During the hearings, Judge Bork said something to this effect, that it was a rule of construction, that it was like the 10th amendment. In that regard. The 10th also provides a rule for construction:

The powers not delegated to the United States by the Constitution, nor prohibited
by it to the States, are reserved to the States respectively, or to the people.

Now, the ninth amendment does not itself protect any rights. Contrary to the suggestion of an individual Justice here and there and to the writings of a few scholars, the ninth amendment does not identify a limitation on the power of government. It identifies no rights and it does not deny the Government any power. It says, instead, that there are rights in addition to those set out in the first eight amendments. In fact these additional rights are not equally spelled out there gives the Government no warrant to take them away.

What is the implication of that rule of the ninth amendment. Obviously, the implication is that these other rights must be discerning by our reasoning applied to our history, to our traditions, to the consensus of the community with respect to the values we hold dear. And those rights are elements of our liberty. That liberty, Mr. President, is protected against abridgment by the National Government by the due process clause of the 5th amendment and against abridgment by the States by the due process clause of the 14th amendment. No person is to be deprived of life, liberty, or property without due process of law. That is what is meant by the phrase "substantive due process of law." No matter how elaborate the procedure that Government uses, there are some aspects of life, liberty, or property that Government simply may not take away.

A radical idea? An eccentric point of view? Hardly, Mr. President. Some of our greatest Justices followed this interpretation. It is the well-settled doctrinal position of the Supreme Court. Applying this doctrine, the Supreme Court in the case Justice Black, Justice Cardozo, and Justice Frankfurter, among others, applied some of the provisions of the Bill of Rights, substantive limitations on Government, to the States through the due process clause of the 14th amendment. Some guarantees applied to the States, Justice Cardozo wrote for the Court, not because they were expressly spelled out in the Bill of Rights, but because denial of the right "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Certain proscriptions, he wrote, are implicit in the concept of ordered liberty.

Justice Harlan, one of the truly conservative giants among judicial conservatives, was eloquent in Poe versus Ullman in 1981, an opinion Judge Bork would do well to study closely. Due process, wrote Justice Harlan.

Is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than they might imagine.

The liberty protected against abridgment by the due process clause, he continued, "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and abridgments of personal, liberty or property, without rational justification." And what that means, he added, is that certain interests require particularly careful scrutiny of the state need asserted to justify their abridgment.

What Justice Harlan was talking about there and what he found violative of the due process clause was Connecticut's law which prohibited the use of contraceptive devices even by married couples in the privacy of their own bedrooms. The Justice did not think, indeed he knew the contrary, that this right was expressly protected by any provision of the Bill of Rights. The right was instead a part of the liberty which the due process clause denied the power to the State to abridge, unless an extreme case existed justifying the official action. When we talk of a "right to privacy," what leaps to mind is the controverted abortion cases or the controverted homosexual rights case. Those cases are merely one element of the right of privacy and not nearly the most important one.

A long line of privacy cases, concerning one broad right subsumed in the concept of liberty protected by the due process clause, runs through the United States Reports. A State, caught up in a nativist fervor, banned the teaching to students, in public or private schools, of a foreign language. Another State banned the right of parents to educate their children in private, religious schools. The Supreme Court, applying what Justice Harlan termed, "a reasonable and sensitive judgment," held that the right of privacy be a protected liberty and struck down both State actions. A State provided for the sterilization of some convicted defendants but not others in an appallingly race-conscious listing of included and excluded crimes. The Supreme Court, recognizing the fundamental interest each of us possesses in procreation, held the law unconstitutional. A city enforced a zoning ordinance in such a way to deny a grandparent the right to have in her household two grandchildren of different sons, and the Court, in an opinion by Justice Powell, whom Judge Bork joined, held that the official action was a denial of the right of privacy.

The right of privacy is itself a powerful tradition in our society. It does forbid Government to intrude into the relationship between husband and wife, between parents and child, without a compelling reason. Judge Bork, I am sure, along with Justice Black, "likes his privacy as well as the next person." He just does not think it rises to the level of a protected interest. I mention Justice Black for a reason. He did dissent from the Court's decision voiding the Connecticut contraceptive statute. Justice Black may well be the only Justice, at least in modern times, to have concurred in Judge Bork's view that unenumerated rights are not protected by the Constitution. Where that carried Justice Black is instructive.

The right to marry, Are these privacy rights, these liberties, so to our values that Judge Bork finds it impossible to discern any protection for them in the Constitution? Oh, I realize, he said during the hearings that it is possible that at some time in the future when one of these rights is an issue in a case before him some litigating attorney may be able to cite some place in the Constitution where one or another liberty is protected. But as another witness observed, rights do not play peek-a-boo waiting to jump out or be bounced on. Judge Bork has been writing about some of these cases for a decade or two and the fact that he has not made the effort to identify where, if not in the places he rejects, a right may be found to be protected suggests an alarming lack of interest in these rights. And true, he did say that the views of Justices Harlan Frankfurter, Cardozo, and others about the fundamental liberties protected but not expressly set out in the Constitution constituted a "powerful tradition." That "powerful tradition" is one he has continually and strongly rejected. And true, he did say he had come to accept a large number of precedents which he had previously criticized and rejected and that he would apply them in the future. But, Mr. President, he did not say that about any of the cases I have discussed; rather, he rejects the whole concept of unenumerated rights. If the framers did not write it down in plain language, it is beyond Judge Bork's ken.

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We all know, Mr. President, that the Government must in order to convict a criminal defendant prove him guilty beyond a reasonable doubt. That protection against Government arbitrariness goes back into the mists of history. Government traditionally follows it. But, Mr. President, the framers did not include a clause in the Constitution saying that Government must prove criminal guilt beyond a reasonable doubt. Ordinarily, that presents no problem, because, as I said, it is traditional that Government assumes that burden. But in the Winship case in 1970 the Court had before it a situation in which a State provided for conviction of an offense on a standard less than beyond a reasonable doubt. The Court had no difficulty in finding that the reasonable doubt standard, though nowhere expressed in plain words, was a fundamental requirement of the due process clause. Justice Black dissented. And the standard says there is a "whole notion of congressional standing." He reiterated that point several times during the hearings. "The whole notion of congressional standing" is outside the range of the conceivable.

I believe that the right of privacy is a fundamental right, an aspect of liberty which the due process clauses protect. Our liberties will be very problematical if ever we come to the stage where Judge Bork's views become the law of the land.

**JUDGE BORK AND CONGRESSIONAL STANDING**

Judge Bork is known as one of the Nation's foremost exponents of judicial restraint. I think that our Federal courts have attempted to do too much. They have attempted to do too many things that properly are the province of the political branches. But general propositions were never carried so far. There is no formula that tells us once and for all times what is too activist and what is just about right. That decision changes as circumstances change. That depends upon the facts and the particular controversy before the courts.

Certainly, it was not too activist for the Supreme Court to hold that electronic surveillance came within the scope of a reasonable expectation of privacy. The search and seizure clause, even though the framers and ratifiers had no concept of telephones and telegraphs and radio and television. The fourth amendment protects a reasonable expectation of privacy. I concur in the sentiment of Justice Black. The whole notion of congressional standing is outside the range of the conceivable.

Now, I do not know where Judge Bork stands on Winship. If he is consistent with Justice Black. But the point is that his jurisprudential view of unenumerated rights leaves all of us at the mercy of the majority, a fact which he views with equanimity.

I believe that the right of privacy is a fundamental right, an aspect of liberty which the due process clauses protect. Our liberties will be very problematical if ever we come to the stage where Judge Bork's views become the law of the land. If Judge Bork is consistent he should be with Justice Black. But the point is that his jurisprudential view of unenumerated rights leaves all of us at the mercy of the majority, a fact which he views with equanimity.

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**STANDING**

Standing keeps the Federal courts in their place. I accept the doctrine as a constitutional construction. Even if it were not of constitutional construction the Federal courts would have to adopt a rule to that effect upon prudential grounds. The rule effectuates the doctrine of separation of powers and it enforces the presumption against judicial activism.

Viewing the matter through the prism of judicial restraint and his concern for separation of powers, Judge Bork has, I am afraid, too broadly drawn a line. He refuses to admit the possibility that Members of Congress can be injured, either personally or in answer. Rather, a litigant must be actually or potentially certain of being harmed before he may ask a Federal court to rule that what has caused him harm is contrary to the Constitution.

No, standing has been derived by the courts, by the Supreme Court, from an understanding of what the judicial power is. It does not allow Federal courts to decide abstract questions of constitutional law just because someone is interested in obtaining an answer. Rather, a litigant must be actually or potentially certain of being harmed before he may ask a Federal court to rule that what has caused him harm is contrary to the Constitution.

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I am unable to agree with Judge Bork on his refusal to recognize any form of congressional standing, not because as a man of the Senate I believe in passing the lawmaking function to the courts or believe in passing executive power to the courts. I believe there is a proper role for the courts to play in doing precisely what they were created to do: to interpret the Constitution to resolve concrete disputes between the branches. The courts do all the time in litigation brought by private parties to challenge congressional or executive action. When Congress passes a law parties who are adversely affected by it may challenge it in court and the courts, ultimately the Supreme Court, will interpret the Constitution to determine if Congress has power to act. The Supreme Court did just that with the campaign finance reform laws, with the legislative veto. The Supreme Court did just that with the campaign finance reform laws, with the legislative veto. The Supreme Court did just that with the campaign finance reform laws, with the legislative veto.

**CONGRESSIONAL RECORD-SENATE**

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ecutive gives rise to an injury. He does believe, however, that if any standing is recognized the flood gates are down, the tide will sweep over us, the courts will become the "most dangerous branch of all." Let us look at that from a simple perspective and then move to the area that we are talking about. He is concerned about the President suing Congress, the Department of State suing the Department of Defense, lower courts suing judges on higher courts. The "slippery slope" argument, in other words. But there are clear situations in which members of the Government can suffer injury at the hands of another branch and have been allowed to sue and should be allowed to sue. Judges under article III of the Constitution are entitled to salaries which cannot be reduced during their term of office. A few years ago, attempting to interdict a pay increase for all Government personnel, we passed a measure which would have reduced the pay. The increase did not go into effect, but because the President did not immediately sign the measure the increase went into effect for a few hours of one day. The judges sued, claiming their pay had been reduced. They had suffered a personal injury, but also they suffered an institutional injury because the guarantee in article III was designed to protect judicial independence. They were permitted to sue and they won in the Supreme Court. The Court interpreted the Constitution and held for them, as it proposed should have on its interpretation of the Constitution. Would anyone, Judge Bork, argue that the judges should have been denied standing to bring their suit? No. In article II, it is also provided that the President's salary may not be reduced during his term of office. If we in Congress should pass a law, perhaps over his veto, reducing his salary, thus injuring him personally and institutionally (because the guarantee is one to assure Presidential independence), why should we deny Judge Bork, argue that he should be denied standing to bring suit to contest this personal and institutional injury? Obviously not. But Judge Bork would deny standing to us. Let us look at Kennedy versus Sampson and Barnes versus Kline. They both concern the so-called "pocket veto" provision of the Constitution. A bill is presented to the President and ordinarily he must sign it or return it with his veto within 10 days (Sundays excepted) to prevent it from becoming law. But if Congress by adjourning prevented the President from returning a bill with his veto it does not become law. The question is purely one of constitutional construction. What kind of adjournment prevents a bill from being returned? Is it only a final adjournment? Could it be an adjournment of a few days within a session? What if for all the adjournments except for the final adjournment of Congress both Houses leave an officer on hand to receive returns from the President? In both cases, the President claimed a constitutional adjournment prevented him from returning a bill and it was thus dead, this pocket vetoed. In Kennedy versus Kline, the adjournment was for approximately 2 months between the first and second sessions. Kennedy versus Sampson involved an intra session adjournment of 6 days by the Senate and 7 days by the House. In both cases, each House had authorized an officer to receive messages and returns from the President. In both cases, the Court of Appeals for the District of Columbia Circuit held that Members had standing and that Congress by its adjournment had not prevented the President from returning the bills, so that his attempted pocket veto in each instance was invalid. In one case, the Court interpreted Article I, Section 8, Interfering with the President's duty of receiving messages from the President's" as a party and the Speaker of the House and the House Bipartisan Leadership Group intervened as well. Judge Bork, dissenting in Barnes versus Kline, rejected standing for the individual Members and he rejected standing for the Senate. "The constitutional problems would seem to be identical," he said. And, indeed, the constitutional problems are the same. The constitutional answer is the same as well, and Judge Bork, I am afraid, has gotten the answer wrong. In both cases, it is almost inconceivable that a private plaintiff could have had standing to challenge the President's pocket veto. Kennedy versus Sampson involved a bill providing a grant program and no one could plausibly claim that he was sufficiently likely to have shared in the program to have standing. Barnes versus Kline involved congressional provisions to assure observance of human rights in our assistance to El Salvador and the lack of private standing is evident. The Member or institutional standing had to exist in order to get a judicial construction of the validity of both pocket vetoes. That is, in my view, it was necessary but not alone sufficient. There had to be an injury to the Member or the institution and Judge Bork just does not see one. The veto clauses of the Constitution create a limited exception to the Constitution's scheme of separation of powers. Congress would legislate and the executive would execute. But in order to protect the President against an overbearing or threatening Congress, the Constitution afforded the President a measure of defense. He could participate in the legislative process by signing a bill or, contrarily, by vetoing it and requiring Congress to pass over his veto by a supermajority vote. In fact, the framers were adamant that the President's veto was to be limited, that he was not to have an absolute veto, because they voted down a proposal that Congress was unable to override a veto. To protect Congress, the framers provided that the President had to act within 10 days; in order to protect the President, the framers provided that if Congress was unable to override the veto from returning the bill within 10 days it was dead. The clause is carefully crafted to protect both Congress and the President. But the most important thing about the provision is that it authorized a limited Presidential intrusion into the Congress's own arena. To permit the President to enlarge his power beyond those limits reduces congressional power and imbalances the scale of separation of power. Both the cases concerned the exercise of congressional lawmaking. In both, Congress had appointed officers to receive messages from the President. In both, there would not have been a long period of uncertainty about whether a bill was to become law. In one, a matter of days and in the other a period of about 2 months were the lengths of time Congress would have had to take up a possible override of the President's veto. Yet, by his construction of what an "adjournment" is and what "prevented" him from returning a bill, the President enlarged his power in the lawmaking process and cut back on Congress' power. In both instances, the President claimed standing to sue or not to override a veto was denied by the unilateral action of the President. Did Congress suffer no injury? Did the Members of Congress who drafted and led the fight for the vetoed bills suffer no derivative injury? It is hard to imagine that taking away a measure of Congress' legislative authority did it and its Members no injury. Hard, perhaps, but Judge Bork sees no injury. Now, of course, whether Congress did suffer an injury or not depends upon whose construction of the pocket veto clause is correct, Congress' or the President's. Precisely. That is absolutely the case with every such claim. The question of the merits is often inseparable from the preliminary issue of standing. In two prior cases, the Pocket Veto Case and the Wright case, in which, by the avowal status of the kinds of bills involved, private plaintiffs did have standing because they were injured by the denial of the benefit of the bills by the pocket veto, the Supreme Court construed the pocket veto clause and determined whose construction of the clause was correct. There is nothing about the construction of pocket veto which makes the Supreme Court's construction more or less plausible. So, here, the Congress will have its power enlarged or diminished, held to its proper scope or
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abridged, depending upon whose construction of the pocket veto clause is correct.

That kind of circularity is inherent in the standing inquiry. It exists frequently if not invariably in determining private plaintiff standing. Is Congress a party to a suit? It is the Standing Committee, not the individual Member, which is the plaintiff. Are we to decide as a class of citizens whether there is an appearance of a conflict of interest? No, Mr. President, I believe it would be unconstitutional to submit it to the Senate. The point is that resolution of these disputes depends upon a proper and conclusive and definitive construction of a constitutional provision, a construction that is within the province of the courts. We should not submit everything to the courts. But some of them involve construction of the Constitution. Some of them involve executive branch assertion of authority (and, truly, assertions of authority by the Congress) which will diminish the power properly belonging to one or the other branch. The President may choose to cross the threshold or not under our point of view without complying with the advice and consent requirement of submitting the name to the Senate. The President may choose to conclude an executive agreement with another country without complying with the advice and consent requirement of submitting the name to the Senate. The point is that resolution of these disputes depends upon a proper and conclusive and definitive construction of a constitutional provision, a construction that is within the province of the courts. We should not submit everything to the courts. But neither should we keep every dispute out of the courts.

If, for example, a President’s action, as in the pocket veto cases I have detailed, intrudes into congressional prerogatives and injuries congressional interests, I believe, and Judge Bork does not believe, that Congress has a right to ask the courts for their construction as to whose claim is right. I am pleased to say that was the view of the Justice whom Judge Bork has derided, Judge Bork’s view of constitutional jurisprudence, none so goes to the core of my concern as his one-sided disposition to favor the executive in separation-of-powers disputes. That the framers created a tripartite system of national government is evident and admitted, but in most instances when there is a dispute Judge Bork always seems to conclude that the executive is the first and most powerful branch of Government and deservedly so.

Judge Bork, as Solicitor General during the Watergate affair and since, has taken the position that Congress may not authorize the appointment of a special prosecutor or independent counsel. He rigidly views the functions of such an office to be inherently executive, constitutionally committed to the discretion and power of the President, and not subject for any reason to be reviewed by legislatively imposed constraints designed to serve the public interest.

Mr. President, as everyone knows, the Ethics in Government Act of 1978, which created the office of independent counsel (at first, the office of special prosecutor), may not be portrayed as one of those “turf” battles for power between the Congress and the President. Congress was confronted with a solid fact: the existence of an untenable situation when someone high in the executive branch, perhaps in the Department of Justice, is accused of a serious criminal offense and the Department of Justice is responsible for investigating, deciding whether to prosecute, and proceeding to prosecute. At best, there is an appearance of a conflict of interest; at worst, there is a conflict of interest. This state of affairs is not unique to this administration, which has a record number of appointed independent counsels carrying on investigations; it was not unique to the Nixon administration and the Watergate affair. During the Teapot Dome scandal, a concerned Congress, questioning the ability of an executive branch in which Cabinet officers were implicated in criminal conduct to conduct an impartial investigation, authorized the President to employ special counsel to investigate and to prosecute if necessary and the President complied. The result was the conviction and incarceration of the Secretary of the Interior, among others. During the Truman administration, the situation was the appointment of a Special Assistant to the Attorney General to investigate charges of corruption within the administration. When the Special Assistant inquired into the Attorney General’s conduct, the Special Assistant was fired, and President Truman immediately fired the Attorney General. But it was only after a new administration was sworn into office that things were successfully initiated against corrupt Truman administration officials.

In order to regularize and to rationalize the process of appointing officers independent of those who are being investigated or who are associated with those who are being investigated, Congress enacted the Ethics in Government Act of 1978. Congress did not intrude itself into the process. We have no role to play. We cannot exercise any power under the act to harm the President or anyone in the executive branch. It is not a case of Congress attempting to cross any forbidden line to claim any power we do not have.

Mr. President, the act is implemented by the courts. It is making a preliminary finding that an independent counsel is necessary and then the appointment is made by a special, article III court. The Constitution expressly empowers Congress to provide for such an appointment process. After providing for appointment of officers by the President with the advice and consent of the Senate, article II, section 2, clause 2 authorizes Congress to establish by law inferior offices and to vest the appointment of such inferior officers, as Congress think proper, ** in the courts of law.” Moreover, in the Siebold case, in 1880, the Supreme Court expressly approved a decision of Congress to vest in the courts the appointment of officers with the responsibility to supervise Federal elections in the South, a function which looks to be as executive as investigating and prosecuting criminal offenses. Again, in his testimony before Congress sought to denigrate this authority. He argued that this part of the appointments clause was an ill-considered after-thought and Siebold a decision in which the issue I have discussed was a hasty, inadvertent, and ill-considered action by the Court.

I am reminded that Judge Bork once referred to the Bill of Rights as essentially a hastily-composed and not well thought-out piece of work.

For someone who regards himself, someone who wants us to regard him, as an exponent of original intent who adheres to the literal language of the Constitution, this is a pretty strange attitude. The fact is that the Constitution authorizes Congress, when Congress thinks it is “proper,” to vest the appointment of an inferior officer in the courts. I certainly think it is proper, and I think the consensus of views outside the executive branch of the Government thinks it is proper, to
assure the American people that corruption and wrongdoing are going to be investigated and exposed and punished. I certainly think it is proper to recognize that there can be high unpaid executive branch both the awful temptation to look the other way when they suspect an associate of wrongdoing and to provide a way in which the people and the country would not have occasion to think that coverups are taking place.

Mr. President, the necessary and proper clause of the Constitution gives Congress the power "to make all laws which shall be necessary and proper for carrying into execution" not only the specific powers given Congress but also "all other powers vested by the Constitution in the Government of the United States, or in any Department or officer thereof." There we have the word "proper" again, and we have the word "necessary." Congress cannot do just anything and everything. He certainly can provide in specific, triggering circumstances for the appointment, by a court of law, as authorized in the appointment clause, of someone in the executive branch with statutorily assured independence to conduct investigations and to prosecute wrongdoing. We would have shirked our responsibility had we failed to do so.

And yet, Judge Bork follows an abstract, sterile line of reasoning that is not cognizant of the real world and which ignores a provision of the Constitution to which he professes rigid adherence to the conclusion that nothing can be done. He would wring his hands and say that a situation of this kind cannot be provided to government simply must be endured.

I do not think so. Congress does not think so. I am sure the American people do not think so. And we should not. The Constitution is not based on the personal character of this or any other judge. As Solicitor General, he argued more civil rights cases than anybody else. He is a man of the highest qualifications, and he is an able judge, and he is a man of true compassion. No one has questioned his character. He is a man of unquestionable ability to conduct investigations and to prosecute wrongdoing.

Mr. BIDEN. I did not object.

Mr. THURMOND. I ask unanimous consent for an additional 5 minutes.

Mr. GARN. Madam President, I would remind the Senate that a former Chief Justice Burger testified for him, and gave him a high rating, and thought he would make an excellent judge. Chief Justice Burger has no axe to grind. He is retired now. He is chairman of the Centennial Commission on the Constitution. Everyone in the country respects him. He has been President Ford has the highest esteem for him. And he would not have dared introduce him if he had not felt he was well qualified and would be fair and reasonable.

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I would remind the Senate that six former Attorneys General have testified for Judge Bork, former Attorney General Richardson, former Attorneys General William Smith, Edward Levi, dean of the law school in Chicago, William Rogers, under Eisenhower and Mr. Browne under Eisenhower— all of these men of character.

I would say to you I do not know how many witnesses testified on one side or the other, but the quality of the witnesses ought to have something to do with it. If you try a case before the jury, the quality of the witnesses has something to do with it. And a judge will charge a jury, and there can be one witness over all others. In this case, we have outstanding people, outstanding Americans who are known nationwide for their character and integrity who testified here in his behalf. I would remind the Senate that one of these former Attorneys General was Griffin Bell, of Atlanta, a former circuit court judge, and appointed Attorney General by President Carter, a Democrat. And I would say to you that Judge Griffin Bell is held in high esteem by all who know him. Certainly his testimony is not biased. Why would he be biased?

I would remind the Senate that Lloyd Cutler, an able lawyer here in Washington who served under President Carter as his chief legal adviser, came and testified for this man, for Judge Bork. Why would he do that if he did not think he would be fair? He is a Democrat, called himself a liberal Democrat, yet he said this man is well qualified, and that he should be confirmed. I would remind the Senate that two Governors came and testified in person, Governor Thompson, of Illinois, and Governor Thornburgh, of Pennsylvania, and they both said he is a fine man, he is an able judge, and he ought to be confirmed.

I would remind the Senate—the PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. Madam President, I believe I have 5 minutes left.

Mr. THURMOND. Madam President, the distinguished chairman of this committee has assured me that I could have 5 more minutes. I ask unanimous consent that be granted.

The PRESIDING OFFICER. Is there objection?

Mr. BIDEN. I did not object.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. I ask unanimous consent for an additional 5 minutes.

Mr. GARN. Madam President, reserving the right to object, I will not object, but I put the Senate on notice there will be no further extensions after this one. We had a time agreement to vote at 2 p.m. If people agree to time agreements, we should abide by them. I shall not object to this one, but this is the last extension of time that I will agree to.

The PRESIDING OFFICER. The Senator from South Carolina has approximately 10 minutes.

Mr. THURMOND. Madam President, the Wall Street Journal yesterday had an editorial entitled "The Bork Trophy." I want to read an excerpt from that.

Contrary to the smear, Robert Bork has not been a racist, sexist, sterlizer, or bedroom spy in his career as a Yale law professor. U.S. Solicitor General, or appeals judge. His civil rights record? As judge—

This is very brief, it is a very pithy statement—

as judge he's sided with the minority plaintiff in seven of eight cases. As Solicitor General, he ordered Northwest Airlines to pay stewardesses as much as male pursers for comparable jobs. He wants a new reasonableness standard for the 14th Amendment that would effectively adopt the Equal Rights Amendment. Privacy? He ridicules the right to privacy and privacy rights. He referred to settled First, Fourth, and Fifth Amendment rights to privacy. Another excerpt from this editorial.

The Liberal Advocacy Institute has scheduled a seminar for Monday on how the left—

I repeat—

How the left beat Judge Bork. The theme is "facts count, but symbols may count even more." With the success of this campaign, in short, it will be open season on the independence of the judiciary.

The symbols that were brazen lies about a distinguished character. He is a man of treasuring. No one has questioned his character. He is a man of unflinching courtesy, and he is a man of true compassion. No one has raised any point as to those qualifications.
The PRESIDING OFFICER (Mr. Reed). The time will come to order. Mr. THURMOND. Mr. President, I can yield if they wish to talk.

Mr. President, I remind the Senate that eight past Presidents of the American Bar Association, the ones who belonged to the giant bar association in the world, came and testified in person in favor of Judge Bork and said they thought he would make an exceptional Justice on the Supreme Court of the United States.

I just want to say in closing that this man has been a lawyer, a practicing lawyer, a successful lawyer. He has had that experience. He has been a law teacher for 8 years at one of the finest law schools in the United States. Yale Law School, probably next to the University of South Carolina Law School. [Laughter.]

I remind the Senate, also, that he has been Solicitor General of the United States. He has represented the President of the United States and the Justice Department in arguing cases before the Supreme Court of the United States. He has had that experience.

I remind the Senate, too, that this man has been a circuit judge, is a circuit judge, has been for 6 years. He has written 150 decisions. He has participated in over 400 decisions. Not one of those decisions has ever been reversed by the Supreme Court. He must be somewhat in the mainstream, or the Supreme Court would reverse him in some instance if he had not been.

Mr. President, in the 33 years I have been in the Senate, I have never known a man to come before the Judiciary Committee—and we have had hundreds come before the committee for confirmation—I have never known a man who was as qualified to be on the Supreme Court of the United States.

If we do not confirm this man, we are tangling up a scholar; we are tangling up a patriot; we are tangling up a great judge, one who would adorn the Supreme Court with honor.

In my opinion, our Nation is going to suffer if we do not put this man on the Supreme Court. I realize that the odds are against him. I understand that 55 are going to vote against him. It is their privilege if they want to do so, but I think they will regret it—just like Senator Mansfield and others who voted against Judge Haynesworth for the Supreme Court made a mistake then. Why do you not correct your mistake now? Simply because you have committed yourself, can you not change, if you think now you should change?

Mr. President, I hope the Senate will do the right thing. I hope the Senate will confirm this man, who has every qualification to be a member of the Supreme Court. I hope that this Senate will not make the error of turning down one of the finest scholars and one of the best prospects we have ever had for the Supreme Court of the United States.

Mr. President, I previously discussed a number of false and misleading allegations brought against Judge Bork.

Today I will present additional allegations. I will attempt to give the true facts and circumstances giving rise to these misleading statements.

Allegation. Judge Bork will ban the use of contraceptives by married couples.

Fact. This charge involves the case of Griswold versus Connecticut, the case invalidating Connecticut's statute banning the use of contraceptives. To put the decision in perspective, Judge Bork noted that Griswold, even in 1965, was for all practical purposes never more than a test case. The Griswold case arose because a doctor had brought an action to test the constitutionality of the statute. There is no recorded case in which this 1878 law was used to prosecute the use of contraceptives by a married couple. The only recorded prosecution was a test case which occurred prior to Griswold involving two doctors and a nurse, and in that case the State itself moved to dismiss.

Judge Bork in his testimony noted that this "nutty" Connecticut statute which was held unconstitutional was never used to punish a married couple for use of contraceptives. His objection to this case was based solely on the rationale that the Court used. His principle objection to the majority opinion in this case was the Court's construction of a generalized right of privacy, not tied to any particular provision of the Constitution, to strike down a concretely "silly" law which it found offensive. This criticism was exactly the same as that of Justices Black and Stewart.

Justice Black's dissent, joined by Justice Stewart, made precisely the same point.

While I completely subscribe to the view that our court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them.

Judge Bork has stated repeatedly that if the State had actually sought to enforce the law against a married couple, questions under the Fourth Amendment as well as under the concept of fair warning would certainly have been presented.

Judge Bork has stated repeatedly that if the State had actually sought to enforce the law against a married couple, questions under the Fourth Amendment as well as under the concept of fair warning would certainly have been presented.

Allegation. Judge Bork's views would lead to back alley abortions.

Fact. This preposterous charge is totally unwarranted and presumably relates to Judge Bork's comments on the court's decision in Roe versus Wade. Judge Bork has explained that the right to privacy under the Due Process Clause of the Constitution, a right to terminate a pregnancy, is not really about privacy, but is more accurately described as a right to personal autonomy or liberty. Privacy refers to an interest in anonymity or confidentiality, whereas liberty describes freedom to engage in a certain activity. The question is whether any provision of the Constitution recognizes an individual's right to terminate pregnancy, despite State efforts to regulate it. Judge Bork testified that the Court's ruling made no attempt to ground such a right in the Constitution except to say that it was "founded in the 14th amendment's concept of personal liberty and restrictions upon State action." Judge Bork stated that this case of this standard gives no guidance as to why some liberties not specified in the Constitution should be protected and others not.

In fact, Judge Bork's criticism of Roe versus Wade relates to a serious and wholly unjustifiable judicial usurpation of State legislative authority. A judge who uses the due process clause to give substantive protection to some liberties but not to others has no basis for decision other than his own subjective view of what is good public policy.

Judges should abide by their constitutionally assigned role of interpreting and applying the law, not bend and ignore the law according to their policy preferences in order to reach the results they desire.

Thus, Judge Bork's comments on Roe versus Wade related to judicial philosophy rather than result-orientated judicial science. On this basis it is simply unconscionable to accuse him of promoting "back-alley abortions.

Allegation. Judge Bork views the first amendment as protecting only political speech.

Fact. Judge Bork's testimony fully answered the concern of some committee members expressed with regard to his 1971 Indiana Law Journal article where he stated that the first amendment applies only to political speech. He has long since publicly abandoned that view. He was just talking about its theoretical view. Judge Bork has stated:

As the result of the responses of scholars to my article, I have long since concluded that the forms of moral, sexual, and scientific debate, are central to democratic government and deserve protection.

He has also indicated publicly that he believes that protection is afforded to moral speech, fiction and art. He draws the line for protection of material which are judicially determined to be obscene or pornographic. Judge
Bork told the committee that he is comfortable with the vast body of Supreme Court decisions on the first amendment protections afforded to speech and to freedom of the press. Judge Bork's judicial writings fully support these statements. In the case of Ollman versus Evans, a professor of political science brought a suit against two newspaper columnists claiming that his statements were defamatory in a newspaper column with the result that he was denied a nomination for position of chairman of a department at a university. The U.S. District Court for the District of Columbia entered summary judgment in favor of the columnists and appeal was taken. The court of appeals, reversed and remanded. The U.S. District Court for the District of Columbia held that challenged statements were entitled to absolute first amendment protection as expressions of opinion, and the professor appealed. The court of appeals, in an opinion written by Circuit Judge Starr, held that these statements were constitutionally protected expressions of opinion, and the case was affirmed.

In this case, Judge Bork described not only his first amendment philosophy, but also his readiness to apply constitutional values to new threats that the framers could not have possibly foreseen. Judge Bork's opinion was criticized in a dissent by Judge Scalia, whom the Judiciary Committee and the Full Senate unanimously approved for Associate Justice 1 year ago. Judge Scalia sharply criticized Judge Bork for taking too expansive a view of individual liberties protected by the Bill of Rights. In Ollman, Judge Bork stated: We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave unto our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the core of these clauses. Perhaps the framers did not envision the libel action as a major threat to that free discussion. Nevertheless, the libel action has become a threat to the central meaning of the first amendment, why should not judges adapt their doctrines?

Applying the constitutional values found in the first amendment to modern circumstances, Judge Bork concluded that, while existing Supreme Court decisions had already established some safeguards to protect the press from the chilling effect of libel actions. In explaining this, he stated: In the past few years, a remarkable upsurge in libel actions, accompanied by startling damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit the criticism as would governmental regulation that the first amendment would almost certainly prohibit.

Accordingly, Judge Bork held that the lawsuit should be dismissed on the first amendment ground that the circumstances surrounding the allegedly defamatory statements showed them to be mere "rhetorical hyperbola" and therefore not actionable.

In the suit against Merrell Dow Pharmaceuticals, Inc., Judge Bork vigorously applied first amendment protections against harassing libel actions in the context of scientific speech. In Brown & Williamson Tobacco versus FTC, Judge Bork joined by Judge Scalia and Judge Edwards, vacated an injunction against false and deceptive cigarette advertising because it prohibited an extremely narrow class of advertisements that the Court concluded would not be deceptive under the Government's theory. In Quincy Cable TV versus FCC Judge Bork joined Judge J. Skelly Wright in invalidating a regulation requiring cable television operators to carry general television programming of local broadcasters.

In reaching this conclusion we are not unmindful of the desirability of continuity in constitutional law. Nevertheless, when convinced of former error, this court has never felt constrained to follow precedent. In constitutional questions, precedent depends upon amendment and not upon legislative action. This court throughout its history has freely exercised its power to reexamine the basis of constitutional decisions. This has long been accepted practice, and this practice has continued to this day.

Judge Bork testified before the Judiciary Committee: Times come, of course, when even a venerable precedent can and should be overruled. The primary example of proper overruling is Brown v. Board of Education. The case which outlawed racial segregation accomplished by government action. Brown overthrew the rule of separate but equal laid down 86 years before in Plessy v. Ferguson. Yet Brown, delivered with the authority of a unanimous Court, was clearly correct and represents perhaps the greatest moral achievement of our constitutional law. The result in which Bork has maintained throughout his career. For example, in a 1968 article in Fortune magazine, he wrote: The history of the Fourteenth Amendment, for example, does indicate a core value of racial equality that the Court should elaborate into a clear principle and enforce against hostile official action. Thus the decision in Brown v. Board of Education, invaliding public-school segregation, was surely correct. However, Judge Bork has repeatedly stated that the mere fact that a judge regards a prior decision as incorrect is insufficient, an entirely arbitrary, to justify it being overruled. At his hearings for the Supreme Court, he stated that: overruling should be done sparingly and cautiously. Respect for precedent is a part of the great tradition of our law. Similarly, at his confirmation hearings in 1982, when he was nominated to his present position on the U.S. Court of Appeals for the Dis-
trick of Columbia Circuit, Judge Bork stated that:

For example, if a court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the court. If that were not true, the commitment that was made off this table in 1938, I think the value of precedent and of certainty and of continuity in the law is so high that I think a judge ought not to overturn a prior decision unless he thinks it is absolutely clear that prior decision was wrong and perhaps pernicious.

Judge Bork was asked at the recent hearings which specific factors he would weigh in deciding whether a prior decision ought to be overruled. He noted at the outset that more is required than that the prior opinion simply be judged wrongly decided:

* A judge must have great respect for precedent. It is one thing as a legal theorist to criticize the reasoning of a prior decision, even to criticize it severely, as I have done. It is another and more serious thing altogether to base a more or less complete rejection of a prior decision. That requires much careful thought.

In determining whether a prior decision ought to be overruled, Judge Bork stated how he would proceed:

I think I would look and be absolutely sure that the prior decision was incorrectly decided. That is necessary. And if it is wrongly decided—and you have to give respect to your predecessors’ judgment on these matters—the presumption against overruling remains, because it may be that governmental and private institutions have grown up around that prior decision. That requires much careful thought.

If you construe the Constitution incorrectly, Congress is helpless. A tape of these remarks was played at the hearings in an effort to challenge Judge Bork’s statement of his views of precedent. During the question and answer session following this address, in making the distinction between precedent in constitutional law and precedent in statutory law, Judge Bork stated, as he has repeatedly, that a court must always be willing to reexamine precedent. He neglected to add, as he always had before, that many areas of law are too settled to be overruled by a single omission—as if Judge Bork were, in one question and answer session, repudiating all his previous, and subsequent, comments about precedent—but, as Judge Bork stated at the hearing:

Before we get off that tape, Senator, I would like to say this: you have in your hand an interview with Judge Bork after interview where I have said some constitutional decisions are too embedded in the fabric of the nation to overturn.

It is important to emphasize that Judge Bork was indicating only that precedent in constitutional law is less binding than precedent in statutory law. In his remarks before and during his appearance before the committee, he repeatedly identified several areas of constitutional law which he believes cannot now be overruled, regardless of whether a judge would have adopted their reasoning as an initial matter.

Mr. President, I think that Judge Bork’s writings and testimony over the years demonstrates that he does have a real regard for precedent and the charge that he would overrule many important decisions is absolutely baseless.

Allegation. Judge Bork committed an illegal act, when in 1973, as Acting Attorney General, he dismissed Archibald Cox.

Fact. This allegation is absolutely not accurate. Judge Bork acted in a totally legal, ethical and concerned manner in the execution of President Nixon’s directive to dismiss Watergate Special Prosecutor Archibald Cox, and took all necessary efforts to ensure that the Watergate investigation continued without disruption, delay or interference. The committee heard from Judge Bork and others concerning the events of October 20, 1973, and the period thereafter. Judge Bork’s action was the subject of extensive testimony in 1973 and 1982 before this committee as well as the House of Representatives in 1973. As with those previous examinations of Judge Bork’s conduct in the so-called Saturday night massacre and its aftermath, the hearings on his nomination for the Supreme Court confirmed the reasonableness of Judge Bork’s actions throughout the episode and highlighted his important contributions to the continuation and ultimate success of the Watergate investigation.

Despite the depth in which the events of October 20, 1973, had been explored in the intervening 14 years, it was apparent from the news reports before these hearings commenced that Judge Bork’s opponents would attempt to draw the nominee’s integrity into question through references to the Saturday night massacre. Such an attempt was made during the American Bar Association’s deliberations. Judge Bork was reported to the committee by Judge Harold Tyler. During these hearings, the dismissal of Archibald Cox was largely a nonissue.

As he had previously testified, Judge Bork described for the committee the circumstances which resulted in his decision to carry out the Presidential directive to dismiss the Special Prosecutor. It was clear to then-Attorney General Elliot Richardson, who met with the President at the White House, that Cox’ dismissal was inevitable. Neither Richardson nor Judge Bork doubted that the President could unilaterally order the discharge of a prosecutor who was an employee of the Executive branch. Richardson previously had received a legal opinion that the President had such authority. The issue, therefore, was not whether Cox could be fired, but merely who would carry out the order. Unlike Richardson, who felt he was personally bound by a congressional pledge not to dismiss Cox except for extraordinary improprieties, and Deputy Attorney General William Ruckelshaus, who regarded himself as similarly bound, Judge Bork had no such personal obligation. Judge Bork was then the Solicitor General and third and last in the Justice Department’s line of succession. He thus could carry out the President’s order. Judge Bork told the Judiciary Committee:

My first thought... was the fact that we were in an enormous governmental crisis. I don’t know if everybody remembers... the sense of panic and emotion and crisis that was in the air. It was clear... from my conversations with Mr. Richardson and Mr. Ruckelshaus that there was no doubt that Archibald Cox was going to be fired by the White House in one form or another. The only questions was how much bloodshed there was in various institutions before that happened.

Judge Bork understood that this action would be enormously unpopular, but he regarded it as clearly necessary in order to alleviate a serious governmental crisis. Forced to make a decision quickly, he acted courageously and selflessly. Although he has in¬
clined initially to leave the Government after doing so, Judge Bork was urged not to resign by Richardson and Ruckelshaus, who regarded his remaining as Acting Attorney General crucial in order to provide leadership and continuity for the Justice Department during this critical time. Recognizing the importance of his position, Judge Bork was determined to provide the necessary leadership.

At the hearings, former Attorney General Elliot Richardson testified that:

I believed that the President would accomplish the firing in one way or another. I believed that he had the legal right to do so. I believed that Bork was not personally subject to the same commitments I have made to Cox and the Senate Judiciary Committee, and was thus personally free to go forward with this action, and that his doing so, in the circumstances, was in the public interest.
I was concerned that if he did not, as I said, a chain reaction would follow, meaning that the dominoes could fall indefinitely, far down the line, leaving the Department without a strong and adequately staffed leader, which was a serious concern. We had a situation in which not only Ruckelshaus and I, but all my top staff, were picking up and leaving. The question of my legal and practical role with respect to how do you maintain the continuity and integrity of the investigation in these circumstances.

Philip Lacovara, Archibald Cox's counsel on the Watergate Special Prosecution Force, submitted a statement to the committee in which he noted his personal disagreement with the decision to dismiss Cox but stated that the White House wanted to dismiss Cox for what were reasoned and reasonable motives and that his conduct was in all respects honorable. The only witness actually involved in the decision to dismiss Cox and the events leading up to that dismissal, former Attorney General Richardson, testified that Judge Bork's actions were in the best interest of the Nation.

During the course of the hearings before the committee, those who referred to the vacated district court opinion in the Nader versus Bork case as support for the allegation that Judge Bork acted illegally in dismissing Archibald Cox pursuant to the President's order. The opinion of Judge Herbert Gesell in that case was never subject to appellate review because the plaintiffs chose to seek dismissal of the case rather than attempt to sustain Gesell's straining decision in the court of appeals. Judge Bork, believing that Judge Gesell had ordered Judge Gesell to vacate his ruling, and he did so, thereby rendering it of no legal consequence whatsoever.

Archibald Cox testified before Congress in November 1973, regarding the President's authority under the law to order his discharge:

"I think the President had the power to instruct the Attorney General to dismiss me. And Mr. Bork, I don't know that.

Additionally, the timing of the explicit rescission of the special prosecutor regulations was in Cox's view, at most a "technical defect." Cox did not participate in the Nader versus Bork case and stated during his congressional testimony that he "wished the suit hadn't been filed."

Judge Bork and former Attorney General Richardson explained during their testimony that neither had any doubt on October 20, 1973, that the President could lawfully direct the dismissal of Special Prosecutor Cox. As Judge Bork stated at his 1987 hearings:

"The fact is none of us thought that regulation was a bar to a presidential order. We assumed the President could do this over an Attorney General's regulation."

In Judge Bork's view, the explicit Presidential directive to the Acting Attorney General effectively rescinded the Justice Department regulations appointing Cox, and no existing court decision held to the contrary. Given the criticalness of the situation that existed on October 20, 1973, and the unanimous view at the time that the President's order was a lawful one, it is apparent that Judge Bork was concerned and an important factor in the formal revocation of the regulations, as Archibald Cox stated, was nothing more than a "technical defect."

The 1975 report of the Watergate Special Prosecution Force, stated in part:

The "Saturday Night Massacre" did not halt the work of WSPF, and the prosecutors' special prosecution Fund was established the following Tuesday. Bork placed Assistant Attorney General Henry Petersen, head of the Criminal Division, in charge of the investigations. WSPF had been conducting. Both men assured the staff that its work would continue with the cooperation of the White House without interference from the White House.

In his statement submitted for the record in 1987, Mr. Lacovara recounted that Judge Bork had assured him on the evening of Saturday, October 20, 1973, that he wanted the staff assembled by Archibald Cox to remain intact and to continue their investigations as Justice Department employees. The same message was conveyed by Judge Bork and Henry Petersen at a meeting with other members of the Watergate Special Prosecution Force on Tuesday, October 23, 1973. Judge Bork testified that he "understood from the beginning that his moral and professional life were on the line if something happened to those investigations and prosecutions, and that is why he was adamant" that the special prosecution force lawyers should continue their work.

Mr. President it is important to note that the recent Judiciary Committee hearings established that Judge Bork undertook to identify an appropriate person for the special prosecutor post early during the week following the Cox discharge, and that he recommended appointment of a new special prosecutor to the President well before the decision to do so was made at the White House. Two witnesses, Professors Dallin Oaks and Thomas Kauper, gave unrebuted testimony based on conversations each had with Judge Bork, probably Monday, October 22, but certainly not later than Tuesday, October 23, that Judge Bork was then searching for a qualified and respected person to replace Cox as special prosecutor. As the testimony of Professor Oaks confirmed, Judge Bork focused early on Leon Jaworski as the primary choice to be the new special prosecutor. The former American Bar Association president enjoyed a widespread reputation for unimpeachable integrity and the personal qualities deemed essential in order to inspire public confidence and ensure the success of the Watergate prosecutions.

The Judiciary Committee's recent hearings left no doubt that, by keeping the special prosecution force intact in the wake of Cox' dismissal and by ensuring the appointment of a capable new special prosecutor with full guarantees of independence, Judge Bork made a highly significant contribution to the ultimate success of the Watergate investigations and prosecutions.

Finally, it should be noted that the efforts of Judge Bork's opponents to raise a credibility issue from insignificant differences in recollection of events after the Cox dismissal proved completely unavailing. Judge Bork testified that he assured Messrs. Ruth and Lacovara on Monday, October 22, 1973, that he wanted the Watergate investigations to proceed as they had before Cox' dismissal and that he would tolerate no interference with the investigations so long as he remained Acting Attorney General. Mr. Petersen, who was also present at the October 22, 1973, meeting, and Mr. Lacovara submitted written statements to the committee confirming that such was indeed the message conveyed by Judge Bork. While Judge Bork's recollection is that he mentioned his support for pursuit of the White House tapes at this meeting, the explicitness of the reference is unimportant. Mr. Lacovara stated that he "specifically recalled the assurances that Judge Bork and Assistant Attorney General Petersen gave that the investigations would proceed on an objective, thorough, and professional basis and would seek whatever evidence was relevant in determining guilt or innocence of the persons under investigation." Mr. Lacovara concluded that "the substance of Judge Bork's testimony accurately reflects the tone and direction of these statements to the senior staff of the Watergate Special Prosecution Force in the hours and days after his dismissal of Special Prosecutor Archibald Cox."

The actions of Judge Bork during the critical events of October 1973 have withstood the most exacting kind of scrutiny over a 14-year period. The renewed inquiry into those actions by some during the recent hearings disclosed nothing that would impugn in any way Judge Bork's integrity, judgment or commitment to the rule of law. To the contrary, what emerged from this most recent examination of Judge Bork's role in the so-called "Saturday Night Massacre" is an even clearer picture of a courageous and principled man. He was forced suddenly...
ly into a crisis not of his making, and sought to serve the national interest. He succeeded in doing so in a way that has had a lasting and beneficial impact on this country. His exemplary performance during these hearings strengthens the case for his confirmation to the Nation's highest court.

The PRESIDING OFFICER. The Senator from Delaware is recognized.

Mr. BIDEN. Mr. President, how much time do I have?

The PRESIDING OFFICER. Seven minutes.

Mr. LEAHY. Mr. President, the Senate is not in order.

The PRESIDING OFFICER. The Senate will be in order.

Mr. BIDEN. Mr. President, we have reached the end of the debate on this nomination, and I believe that 57 of my colleagues—56, counting me—are likely to vote "no." The question is why they are voting "no."

I think Senator Dole, the minority leader, set out, without perhaps knowing it, why. He said that this debate was about the role of the Court and the role of Congress. He said—and I am paraphrasing—that the American people do not want a court yielding to criminals,yielding to subversion.

I would suggest that not only do the American people not want a court yielding to criminals, but also, they do not want a court that does not find that a grandmother has a constitutional right to see her blood child, because the Constitution says they exist, in spite of my Government, not because of my Government. My Government does not confer upon me the right to marry, the right to procreate, the right to speak. It protects those rights. Judge Bork, like many of my colleagues, has a fundamental disagreement with that premise. He believes that the rights flow from the majority through the Constitution to individuals—a notion I reject and that I believe the vast majority of the American people reject.

I believe, as my distinguished colleague from Oregon yesterday pointed out, that these guarantees of our Constitution have their roots in the Magna Carta, right through the Declaration of Independence and the Constitution. They use terms such as "justice," "liberty," "welfare," "tranquility," "due process," "just compensation"—all in precise terms, for which Judge Bork seeks precision.

I respectfully suggest that Shirley Hufstedler, a former Secretary of Education, said it best. She said:

They are words of passion. They are words of dedication. They are words that cannot be drained of their emotional connotation. They mean something. They embody the soul of the constitution and its capacity to encompass changes in time, place, and circumstance.

They are words of high rights as the right to be left alone, in the words of one of our famous conservative jurists.

Or, as our former colleague Sam Ervin used to say, quoting an eloquent educator about the ties between the Magna Carta, the English petition of right, the Declaration of Independence and the U.S. Constitution:

These are the great documents of history. Cut them, and they will bleed with the blood of those who fashioned them and those who have nurtured them through the succeeding generations.

"Ordered liberty," "postulates of respect for the liberty of the individual," "values deeply rooted in this Nation's tradition"—these are the words of those who believe none of these can ever be destroyed. There are words and phrases for which Judge Bork seeks precise meaning, resulting in his very narrow interpretation of the Constitution.

Mr. President, notwithstanding what my colleagues have said on this floor, this has been a great debate. This has been a debate about a fundamental principle:

How does one interpret the liberty clause in the Constitution? How does one view those ennobling words? Must they be the rights that we have found in the textual context of the Constitution as Judge Bork insists or are they broader?

Mr. President, I have listened attentively to this debate over the past 3 days.

In the limited time I have, I would like to respond to some of the major complaints by those speaking in favor of Judge Bork's confirmation.

Last night, my good friend, the Senator from Wyoming, said that this body ought to reflect on a single question: How did this happen? Maybe one day we will find out, the Senator said. So he doesn't have to wait. Let me offer some answers now.

I suspect Senators Simpson and I would not disagree at all over what it is we think happened here—but I also suppose we would ultimately agree that one thing that is about to happen is that the confirmation of Judge Bork will fail.

Now, how did this happen?

It happened in this Senator's opinion, because "never before in the history of this process has there been such an indepth discussion of constitutional issues." Those are not my words, they are the words of the Senator from Alaska, who testified in favor of the confirmation.

It happened in the words of the New York Times because "those who watched the Judiciary Committee hearings saw perhaps the deepest exploration of fundamental constitutional issues ever to capture the public limelight."—(Stuart Taylor, October 19, 1987, New York Times.)

It happened because Senators listened, read, and studied the writings of Judge Bork, the record of the hearings, the committee report and the minority views.

The presentation of these constitutional issues was so extensive that I felt at the outset of the Senate's debate on the confirmation that we would not hear from any Senator charges that the hearings were biased or inadequate or failed to provide Judge Bork a fair hearing.

I am gratified that such charges have been almost entirely absent.

What criticism we have heard of the hearings is a really a criticism that opponents of Judge Bork did not listen well enough to him or did not consider fully the prestige of the witness for him or did not understand how unfounded concerns raised about him were.

But I trust my colleagues to consider and assess the evidence and the arguments.

Still, although we have heard almost no criticism of the hearings and the debate over constitutional issues in those hearings—and now on the floor—a number of other complaints have been raised, as if to explain that events or considerations other than the hearings actually dictate what is about to happen. Let's look at these.

Is it happening because the Senate has reached beyond the acceptable bounds of its responsibilities in providing advice and consent, as the Constitution provides? This was a suggestion of the Senator from Texas.

No, it is not why.

As Senator Leahy explained yesterday, and as I have explained in several speeches I have given on the Senate's...
role in advice and consent, everything that the committee examined and considered is appropriate, indeed, sometimes obligatory, consideration for the Senate.

Is it happening because the Senate has failed to see that President Reagan has won electoral victories that entitle him to bend the Court to his judicial ideology?—again, an argument of the good Senator from Texas. No, that is not why.

The Senate understands that in 1986 President Reagan actively campaigned against many currently in this body, trying to keep them out of the Senate just so he could have even more latitude in appointing ideologically fixed judges. He lost that electoral test overwhelmingly, as Senators Mitchell and Davis reminded us yesterday.

Is it happening because certain interest groups or other organizations mapped strategy in a "war room" and controlled each day's witnesses opposed to the confirmation by having all say the same "big lie," as both the Senator from Iowa and the Senator from Wyoming argued?

No, that is not why.

It cannot seriously be contended that witnesses with the independence and caliber of Secretary of Transportation William Coleman, the Mayor of Atlanta Andrew Young, Congresswoman Barbara Jordan, Judge Shirley Hufstedler, Vilma Martinez, Philip Kurland, and Larry Tribe can be "controlled" by anyone, or made to say anything other than what they believe.

Is it happening because, as in the view of the Senator from Iowa, these groups engaged in a so-called second hearing, outside this Chamber, a hearing in which Judge Bork's supporters were not heard because that hearing amounted to a political campaign in which a judicial nominee cannot participate?

No, that is not why.

To be sure, the question of confirming this nominee has caught the public's attention and eye. But he was hardly represented in all that public attention.

Able advocates, including several very able Senators, including Lloyd Cutler, including news personalities such as George Will, appeared regularly on television news shows, on programs like Nightline, and on the Sunday press interview shows. They gave strong presentations of Judge Bork's positions.

What is more, the nominee himself appeared in televised hearings for 32 hours.

And he had the full benefit of White House and Justice Department publicity.

And groups that favor Judge Bork's confirmation were advertising and publicizing as well—as the material I submitted for the Record last evening amply testifies.

Is it happening because the Senate is politicizing the confirmation process?—again, an argument of the good Senator from Texas. No, that is not why.

As has been ably pointed out here by several of my colleagues, the President has politicized the judicial selection process throughout his Presidency. Nowhere has that politicization been more evident than in the case of this nominee.

Judge Bork is the favorite of the ideological right. The President was warned that this appointment would be extremely controversial—he was advised by both the majority leader and myself not to politicize the process by sending his name up.

The President chose to go his own way, which is his right. It then becomes the Senate's duty to examine that nominee on the terms on which he has been offered to us—not on some kind of crass basis of counting votes for and against, but by evaluating whether the ideology of this nominee would be good for the Nation.

This, as I have said, is just what the Senate, in this Senator's view, has done.

Why, then, this outpouring of criticism, of sharp attack, of recrimination? Why are these things happening?

The answer that comes to this Senator is that the proponents of Judge Bork's confirmation are trying to ensure—if they can—that this body reprise the principled stand it has taken to the advice and consent process and to the evaluation of this nominee—that it give up its appropriate role under the Constitution.

The idea is to make it appear that the Senate has been swayed by improper influence, that it has produced irrational fears in the minds of the American public that it has engaged in falsification and distortion.

How else can you explain the way these inflammatory terms—falsehoods, lies, distortions, smear campaigns, slander—have been thrown around in these debates? These terms and worse have been applied recklessly throughout this debate. Statements that would ordinarily be called arguments, or summaries, or evaluations have been inadmissible as distortions and falsehoods. It is as if anything the proponents disagree with gains the label of a lie or a misrepresentation.

Why is this being done? To make what occurred here, what has been honorably done in the service of the Constitution, appear to be some kind of travesty, or perversion.

It is nothing short of an effort in institutional intimidation.

In this Senator's view, it will not work. The stakes are too high, the responsibilities too serious.

When we did examine the merits of Judge Bork, we discovered a serious disagreement, one that goes to the very heart of this country's understanding of the Constitution. I am proud to have been a part of that examination.

The time I have left, I must remind the body of what, in my view, this process has been all about.

As I have said, I believe that the hearings before the Judiciary Committee saw, as the New York Times reported, "a riveting debate of fundamental constitutional issues ever to capture the public limelight."

We have demonstrated the foresight of Chief Justice Marshall's reminder that:

"We must never forget that it is a constitution we are expounding—intended to endure for ages to come and to be adapted to the various crises of human affairs."

As we are about to begin our solemn duty of voting on the nomination of Judge Bork to be an Associate Justice of the Supreme Court, I return to a matter of fundamental principle—a principle with which I started when the hearings began.

The principle is this: I believe that all Americans are born with certain inalienable rights. As a child of God, my rights are not derived from the majority, the State or the Constitution. Rather, they were given to me and to each of our fellow citizens by the creator and represent the essence of human dignity.

It is with this spirit that the framers of our Constitution met in Philadelphia 200 years ago.

As the distinguished Senator from Oregon, Senator Packwood, so eloquently described to us yesterday, the framers did not meet to write on a blank slate. They were not the first to contemplate the notion of inalienable rights, of unenumerated rights.

The framers stood in a 700-year tradition that recognized that individuals have certain inchoate rights—rights that they have because they exist, and rights that they retain unless they are specifically relinquished.

Thus, the guarantees of our Constitution have their roots in the Magna Carta's "per legem terrae." Indeed, the English courts recognized that there are certain rights "which are fundamental; which belong to the citizens of all free governments." And it is to secure those rights for which "men enter into society."

This tradition led the framers of our great Government to use terms that are both magnificent and ambiguous—terms such as: justice, liberty, welfare, tranquility, due process, property, just compensation."
These are grand terms—terms that to this day both stir and confound us. Bork would note from one of the most distinguished witnesses to appear before the committee: Shirley Hufstedler, a former Court of Appeals Judge and the Secretary of Education under President Jimmy Carter. This is what Judge Hufstedler had to say about these terms:

They are words of passion. They are words of dedication. They are words that cannot be drained of their emotional content. None can be cabbined without destroying the soul of the Constitution and its capacity to encompass changes in time, place and circumstance.

From these “words of passion” comes a tradition of Supreme Court jurisprudence that has recognized fundamental principles of liberty. I have touched upon these principles before. They have been expressed in different ways, but we understand the message they convey.

“The right to be let alone. Ordered liberty. Postulates of respect for the liberty of the individual. Values deeply rooted in this Nation’s tradition. This is how the Supreme Court has defined concepts as old as the Magna Carta. This is how Justices Brandeis, Frankfurter, Harlan, and Powell have approached the Constitution, among many others—this is how most Americans have come to approach the Constitution.

The writings and testimony of Judge Bork show him to be at odds with this tradition and history. Indeed, had his philosophy been the governing one for this country, the Supreme Court would not have served—as we all know it has—as the last bulwark of protection for our rights when the Government has unduly intruded into the realm of individual liberty.

Senator Sam Ervin our late colleague, was fond of quoting an eloquent phrase that the tells of the Magna Carta, the English Petition of Right, the Declaration of Independence and the U.S. Constitution—

These are the great documents of history. Cut them, and they will bleed with the soul of the Constitution and its fundamental rights that are imbedded in the fiber of our Constitution—that are imbedded in the fiber of our Nation.

I yield the answer—after detailed and extensive hearings, after a serious debate on the floor of the U.S. Senate—is clear.

The Nation cannot take that risk.

I urge the rejection of Judge Robert H. Bork to be Associate Justice of the U.S. Supreme Court.

CONCLUSION

Finally, let me add a personal note. There has been much talk about a smear campaign, about a personal attack on Judge Bork, about the damage that has been done to his honor and his integrity, and even about how people may be gloating or joyfully congratulating themselves about Judge Bork’s defeat.

This Senator will have none of this. Throughout these proceedings, I have respected Judge Bork’s honor and I have believed in his integrity. I continue to do so.

There can be no joy for this Senator in defeating a person of Judge Bork’s personal caliber. Although we try not to take defeats of this kind personally—and the people in this body know the anguish of defeat well—judicial nomination battles always involve just one person at a time, and they can become intensely personal to the nominee. I find no joy in this situation.

I do have a solemn responsibility as a U.S. Senator, and I have attempted to discharge it. I could not shrink from count against Judge Bork’s honor and integrity, and I hope no one in the Senate will misunderstand the kind of judgment that this body is making.

For Judge Bork and his family, I ask that no one make that mistake.

And to Judge Bork and his family, I can only wish them well.

Mr. President, I can see you are about to lift your gavel and I am probably wearing on the patience of my colleagues but I must indicate all those who have chosen to engage in the debate on principle and hope and pray the President of the United States sends us a woman or a man next upon whom we all can be in agreement.

I yield the floor.

The PRESIDING OFFICER. The Senator’s time has expired.

The Senator from South Carolina has a minute.

Mr. THURMOND. Mr. President, I would like for the Presiding Officer to admonish the audience in the galleries there will be no outburst when the outcome is announced.

The PRESIDING OFFICER. The Senator from South Carolina is correct. The Chair advises those in the galleries expressions of approval or disapproval are not permitted and will not be tolerated. Those in the galleries are asked to refrain from audible conversations during the calling of the roll and the vote is announced.

The Senator from South Carolina has approximately 45 minutes.

Does the Senator have more time?

Mr. THURMOND. I yield back the remainder of my time.

The PRESIDING OFFICER. The Senators yield back the time. All time is gone.

The question is, Will the Senate advise and consent to the nomination of Robert H. Bork, of the District of Columbia, to be an Associate Member of the Supreme Court?

Mr. WALLOP. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask that order be maintained in the Senate, that Senators remain at their seats and that the clerk repeat the responses after each response.

The PRESIDING OFFICER. Regular order will be followed.

The clerk will continue calling the roll.

The assistant legislative clerk resumed and concluded the call of the roll.

The result was announced—yeas 42, nays 58, as follows:

[Rollcall Vote No. 348 Ex.1]
nays are 58, the nomination is not confirmed.

Mr. BYRD. I move to reconsider the vote by which the nomination was rejected.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The President will be immediately notified of the Senate's action.

LEGISLATIVE SESSION

MILITARY CONSTRUCTION APPROPRIATIONS, FISCAL YEAR 1998

The PRESIDING OFFICER. Under the previous order, the Senate will now return to legislative session to consider H.R. 2906, which the clerk will report.

The legislative clerk read as follows:

A bill (H.R. 2906) making appropriations for military construction, the National Aeronautics and Space Administration, the Department of Defense for the fiscal year ending September 30, 1998, and for other purposes.

The Senate proceeded to consider the bill which had been reported from the Committee on Appropriations, with amendments, as follows:

(The parts of the bill intended to be stricken are shown in boldface brackets, and the parts of the bill intended to be inserted are shown in italics.)

H.R. 2906

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1998, for military construction functions administered by the Department of Defense, and for other purposes, namely:

MILITARY CONSTRUCTION, ARMY

For acquisition, construction, installation, and equipment of temporary or permanent public works, naval installations, facilities, and real property for the Army as currently authorized by law, and for construction and operation of facilities in support of the functions of the Commander in Chief, [§500,160,000] $974,430,000, to remain available until September 30, 1992: Provided, That of this amount, not to exceed [§132,120,000] $128,120,000 shall be available for study, planning, design, architect and engineer services, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor: Provided further, That of the funds appropriated for "Military Construction, Army" under Public Law 98-473, $1,115,950,000, to remain available until September 30, 1992: Provided, That of this amount, not to exceed [§121,506,000] $115,000,000, shall be available for architect and engineer services, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor: Provided further, That of the funds appropriated for "Military Construction, Air Force" under Public Law 98-473, [§1,115,950,000] $1,115,950,000, to remain available until September 30, 1992: Provided, That of this amount, not to exceed [§6,800,000] $6,800,000 shall be available for study, planning, design, architect and engineer services, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor: Provided further, That of the funds appropriated for "Military Construction, Defense Agencies" under Public Law 98-473, $1,505,072,000, to remain available until extended: Provided, That of the funds appropriated for "Military Construction, Air Force" under Public Law 98-473, $1,380,855,000 is hereby rescinded: Provided further, That, of the funds appropriated in this Act for NATO infrastructure, no more than 35 per centum may be utilized to support non-construction activities.

MILITARY CONSTRUCTION, ARMY NATIONAL GUARD

For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the Army National Guard, and contributions therefor, as authorized by chapter 133 of title 10, United States Code, and military construction authorization Acts, [§185,052,000] $194,325,000, to remain available until extended: Provided, That of the funds appropriated for "Military Construction, Army National Guard" under Public Law 99-173, $2,500,000 is hereby rescinded.

MILITARY CONSTRUCTION, AIR NATIONAL GUARD

For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the Air National Guard, and contributions therefor, as authorized by chapter 133 of title 10, United States Code, and military construction authorization Acts, [§126,475,000] $165,716,000, to remain available until extended: Provided, That of the funds appropriated for "Military Construction, Air National Guard" under Public Law 98-473, $200,000 is hereby rescinded: Provided further, That of the funds appropriated for "Military Construction, Air National Guard" under Public Law 99-173, $3,300,000 is hereby rescinded.

MILITARY CONSTRUCTION, ARMY RESERVE

For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the Army Reserve as authorized by chapter 133 of title 10, United States Code, and military construction authorization Acts, [§95,100,000] $95,100,000, to remain available until extended: Provided, That of the funds appropriated for "Military Construction, Army Reserve" under Public Law 99-173, $1,800,000 is hereby rescinded.

For acquisition, construction, installation, and equipment of temporary or permanent public works, naval installations, facilities, and real property for the Army as currently authorized by law, including personnel in the Naval Facilities Engineering Command and other personal services necessary for the purposes of title 10, United States Code, and military construction authorization Acts, [§1,115,950,000] $1,115,950,000 is hereby rescinded: Provided further, That of the funds appropriated for "Military Construction, Defense Agencies" under Public Law 98-473, $1,900,000 is hereby rescinded: Provided further, That of the funds appropriated for "Military Construction, Air Force" under Public Law 98-473, $1,380,855,000 is hereby rescinded: Provided further, That of the funds appropriated for "Military Construction, Defense Agencies" under Public Law 99-173, $3,300,000 is hereby rescinded.

NORTH ATLANTIC TREATY ORGANIZATION INFRASTRUCTURE

In the Congress of the United States of North Atlantic Treaty Organization Infrastructure programs, for the acquisition of personal property, for the acquisition and construction of military facilities and installations, including international military construction and installation projects, the collective defense of the North Atlantic Treaty Area as authorized in military construction Acts and section 2006 of title 10, United States Code, [§386,000,000] $386,000,000, to remain available until extended: Provided, That of the funds appropriated for "North Atlantic Treaty Organization Infrastructure" under Public Law 99-173, $8,000,000 is hereby rescinded: Provided further, That, of the funds appropriated in this Act for NATO infrastructure, no more than 35 per centum may be utilized to support non-construction activities.

For acquisition, construction, installation, and equipment of temporary or permanent public works, installations, facilities, and real property for the Army as currently authorized by law, and for construction and operation of facilities in support of the functions of the Commander in Chief, [§500,160,000] $974,430,000, to remain available until September 30, 1992: Provided, That of this amount, not to exceed [§132,120,000] $128,120,000 shall be available for study, planning, design, architect and engineer services, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor: Provided further, That of the funds appropriated for "Military Construction, Army" under Public Law 98-473, $6,300,000 is hereby rescinded: Provided further, That of the funds appropriated for "Military Construction, Air Force" under Public Law 99-173, $18,500,000 is hereby rescinded: Provided further, That none of the funds appropriated for planning, design, or construction of military facilities or family housing may be used to support the relocation of the 407th Highway Wing from Spain to another country.

For acquisition, construction, installation, and equipment of temporary or permanent public works, installations, facilities, and real property for the Army as currently authorized by law, and for construction and operation of facilities in support of the functions of the Commander in Chief, [§500,160,000] $974,430,000, to remain available until September 30, 1992: Provided, That of this amount, not to exceed [§132,120,000] $128,120,000 shall be available for study, planning, design, architect and engineer services, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor: Provided further, That of the funds appropriated for "Military Construction, Air Force" under Public Law 98-473, $6,300,000 is hereby rescinded: Provided further, That none of the funds appropriated for planning, design, or construction of military facilities or family housing may be used to support the relocation of the 407th Highway Wing from Spain to another country.

For acquisition, construction, installation, and equipment of temporary or permanent public works, installations, facilities, and real property for the Army as currently authorized by law, and for construction and operation of facilities in support of the functions of the Commander in Chief, [§500,160,000] $974,430,000, to remain available until September 30, 1992: Provided, That of this amount, not to exceed [§132,120,000] $128,120,000 shall be available for study, planning, design, architect and engineer services, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor: Provided further, That of the funds appropriated for "Military Construction, Army" under Public Law 98-473, $6,300,000 is hereby rescinded: Provided further, That none of the funds appropriated for planning, design, or construction of military facilities or family housing may be used to support the relocation of the 407th Highway Wing from Spain to another country.

CONGRESSIONAL RECORD—SENATE October 28, 1987
For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the reserve component of the Navy and the Marine Corps, as authorized by chapter 133 of title 10, United States Code, and military construction authorization Acts, not less than $250,000,000 is hereby rescinded.

For expenses of family housing for the Air Force for construction, including acquisition, replacement, addition, expansion, extension and alteration and for operation and maintenance, including debt payment, leasing, minor construction, principal and interest charges, and insurance premiums, as authorized by law, as follows: For construction, $116,129,000; for operation and maintenance, $694,809,000; $386,000; in all $396,513,000; $830,253,000. Provided, That the amount provided for construction shall remain available until September 30, 1992. Provided further, That of the funds appropriated for “Family Housing, Air Force” under Public Law 99-173, $2,400,000 is hereby rescinded. PROVIDED further, That of the funds appropriated for “Family Housing, Air Force” under Public Law 99-173, $12,300,000 is hereby rescinded.

For expenses of family housing for the activities and agencies of the Department of Defense (other than the military departments) for construction, including acquisition, replacement, addition, expansion and alteration and for operation and maintenance, leasing, and minor construction, as authorized by law, as follows: For construction, $1,186,000; for operation and maintenance, $18,514,000; in all $20,700,000. Provided, That the amount provided for construction shall remain available until September 30, 1992. Provided further, That of the funds appropriated for “Family Housing, Air Force” under Public Law 99-173, $1,248,277,000, $20,700,000, is hereby rescinded.

For expenses of family housing for the Army for construction, including acquisition, replacement, addition, expansion, extension and alteration and for operation and maintenance, including debt payment, leasing, minor construction, principal and interest charges, and insurance premiums, as authorized by law, as follows: For construction, $316,990,000; $355,190,000; for operation and maintenance, $1,287,277,000; for debt payment, $2,906,000; in all $1,424,723,000; $1,064,373,000. Provided, That the amount provided for construction shall remain available until September 30, 1992. Provided further, That of the funds appropriated for “Family Housing, Army” under Public Law 99-173, $19,400,000 is hereby rescinded.

For expenses of family housing for the Marine Corps for construction, including acquisition, replacement, addition, extension and alteration and for operation and maintenance, including debt payment, leasing, minor construction, principal and interest charges, and insurance premiums, as authorized by law, as follows: For construction, $355,479,000; $500,000; for operation and maintenance, $534,223,000; $256,790,000; for debt payment, $2,022,000; in all $781,159,000; $743,313,000. Provided, That the amount provided for construction shall remain available until September 30, 1992. Provided further, That of the funds appropriated for “Family Housing, Navy and Marine Corps” under Public Law 99-173, $8,800,000 is hereby rescinded.

Family Housing, Air Force

For expenses of family housing for the Air Force for construction, including acquisition, replacement, addition, expansion, extension and alteration and for operation and maintenance, including debt payment, leasing, minor construction, principal and interest charges, and insurance premiums, as authorized by law, as follows: For construction, $166,129,000; for operation and maintenance, $694,809,000; $386,000; in all $396,513,000; $830,253,000. Provided, That the amount provided for construction shall remain available until September 30, 1992. Provided further, That of the funds appropriated for “Family Housing, Air Force” under Public Law 99-173, $2,400,000 is hereby rescinded. Provided further, That of the funds appropriated for “Family Housing, Air Force” under Public Law 99-173, $12,300,000 is hereby rescinded.

Family Housing, Navy and Marine Corps

For expenses of family housing for the Navy and Marine Corps for construction, including acquisition, replacement, addition, expansion, extension and alteration and for operation and maintenance, including debt payment, leasing, minor construction, principal and interest charges, and insurance premiums, as authorized by law, as follows: For construction, $355,479,000; $500,000; for operation and maintenance, $534,223,000; $256,790,000; for debt payment, $2,022,000; in all $781,159,000; $743,313,000. Provided, That the amount provided for construction shall remain available until September 30, 1992. Provided further, That of the funds appropriated for “Family Housing, Army” under Public Law 99-173, $19,400,000 is hereby rescinded.

For expenses of family housing for the Army for construction, including acquisition, replacement, addition, expansion, extension and alteration and for operation and maintenance, including debt payment, leasing, minor construction, principal and interest charges, and insurance premiums, as authorized by law, as follows: For construction, $316,990,000; $355,190,000; for operation and maintenance, $1,287,277,000; for debt payment, $2,906,000; in all $1,424,723,000; $1,064,373,000. Provided, That the amount provided for construction shall remain available until September 30, 1992. Provided further, That of the funds appropriated for “Family Housing, Army” under Public Law 99-173, $19,400,000 is hereby rescinded.

For expenses of family housing for the Marine Corps for construction, including acquisition, replacement, addition, expansion, extension and alteration and for operation and maintenance, including debt payment, leasing, minor construction, principal and interest charges, and insurance premiums, as authorized by law, as follows: For construction, $355,479,000; $500,000; for operation and maintenance, $534,223,000; $256,790,000; for debt payment, $2,022,000; in all $781,159,000; $743,313,000. Provided, That the amount provided for construction shall remain available until September 30, 1992. Provided further, That of the funds appropriated for “Family Housing, Navy and Marine Corps” under Public Law 99-173, $8,800,000 is hereby rescinded.
ceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 percent.

Sec. 116. The Secretary of Defense is to include the Cumulative Appropriations and Committees on Armed Services of the plans and scope of any proposed military exercise involving United States personnel 30 days prior to its occurrence, if amounts expended for construction, either temporary or permanent, are anticipated to exceed $100,000.

TRANSFER OF FUNDS

Sec. 117. Unexpended balances in the Military Family Housing Management Account established pursuant to section 2831 of title 10, United States Code, as well as any additional amounts which would otherwise be transferred to the Military Family Housing Management Account during fiscal year 1988, shall be transferred to the appropriations for Family Housing provided in this Act, as determined by the Secretary of Defense, based on the sources from which the funds were derived, and shall be available for the same purposes, and for the same time period, as the appropriation to which they have been transferred.

Sec. 118. Not more than 20 percent of the appropriations in this Act which are limited for obligation during the current fiscal year shall be obligated during the last two months of the fiscal year.

TRANSFER OF FUNDS

Sec. 119. Funds appropriated to the Department of Defense for construction in prior years shall be made available for construction authorized for such military department by the authorizations enacted into law during the first session of the One Hundred Congress.

Sec. 120. The Secretary of Defense is to provide the Committees on Appropriations of the Senate and the House of Representatives with a report by February 15, 1986, containing details of the specific actions proposed to be taken by the Department of Defense during fiscal year 1986 to encourage other member nations of the North Atlantic Treaty Organization and Japan to assume a greater share of the common defense burden of such nations and the United States.

Sec. 121. For military construction or family housing projects that are being completed with funds otherwise expired or lapsed, the funds [shall] may be used to pay the cost of associated supervision, inspection, overhead, engineering and design on those projects and on subsequent claims, if any.

Sec. 122. Notwithstanding any other provision of law, the Secretaries of Defense, Army, Navy and Air Force are required to maintain legislative liaison with the Senate Appropriations Committees on military construction and budgetary policy and fiscal management of the Military Construction and Military Family Housing appropriations in a manner identical to the manner described as of September 30, 1986:

Provided, That nothing in this section shall prevent the Secretaries of the Army and Navy from realigning legislative liaison and fiscal policy and henceforth to military construction to correspond with the method employed by the Air Force on September 30, 1986.

Sec. 123. Notwithstanding any other provision of law, including the certification requirements provided in section 210 of title 23, United States Code, the Secretary of the Army is directed to provide funds for the design of access roads for the New Cumberland Army Depot, Pennsylvania and for the Tobyhanna Army Depot, Pennsylvania, within funds provided in this Act.

Sec. 124. None of the funds appropriated in this Act for use by the Department of Defense in fiscal year 1985 may be used for the purpose of the design or construction of any facilities relating, directly or indirectly, to the deactivation, relocation or transfer of any part of the 47th Tactical Fighter Wing at Nellis Air Force Base, Nevada.

Sec. 125. None of the funds appropriated in this Act for use by the Department of Defense in fiscal year 1988 may be used for the purpose of the design or construction of any facilities relating, directly or indirectly, to the deactivation, relocation or transfer of any part of the 5th Fighter Interceptor Squadron, at Minot Air Force Base, North Dakota.

Sec. 126. It is the sense of the Congress that all facility cost, with the relocation of the Tactical Fighter Wing at Torrejon Air Base, Spain, to another location, should be the responsibility of the Secretary of Defense.

Sec. 127. None of the funds appropriated in this Act for planning and design activities may be used to initiate design of the Pentagon.

Sec. 128. Notwithstanding any other provision of law, the Secretary of Defense shall notify the Committees on Appropriations of the House of Representatives of the construction or design of any facilities relating, directly or indirectly, to the deactivation, relocation or transfer of any part of the 5th Fighter Interceptor Squadron at Minot Air Force Base, North Dakota, if funds appropriated by this or any other Act for the Department of Defense may be obligated or expended for the purpose of the design or construction of any facilities relating, directly or indirectly, to the deactivation, relocation or transfer of any part of the 5th Fighter Interceptor Squadron at Minot Air Force Base, North Dakota, Colorado, until the Strategic Defense Initiative Organization (SDIO) has begun the development of the Phase One Strategic Defense Initiative Defense Base (SDIDB) Architecture and the Follow-on Strategic Defense System Architecture and the Committees on Appropriations of the Senate and the House of Representatives have thereafter received an interim report from SDIO on the Phase One System Architecture and follow-on architecture that the National Test Facility will be testing and evaluating; and until SDIO has provided a detailed report to the Committees on Appropriations of the Senate and the House of Representatives that the facility is capable of meeting the necessary criteria of the National Test Facility and the other components of the National Test Bed to produce the simulation, evaluation, and demonstration data needed to determine whether a proposed ballistic missile defense system satisfies the criteria of technical feasibility, cost-effectiveness at the margin, and survivability.

Provided, That, none of the funds appropriated by this or any other Act for the National Test Facility or any other component of the National Test Bed may be used to provide any operational battle management, command, control or communications capabilities for an early deployment of a defensive missile defense system.

Provided further, That, the goal of the National Test Facility and other components of the National Test Bed shall be to simulate, evaluate, and demonstrate architectures and technologies that are technically feasible, cost effective at the margin, and survivable.

Sec. 129. None of the funds appropriated in this Act may be obligated or expended for the purpose of transferring any equipment, operation, or personnel from the Edgewood Arsenal, Maryland, to any other facility during fiscal year 1988.

Sec. 130. In addition to the purposes for which it is now available, the property account established by section 121(b) of the Act of January 2, 1976, as amended (43 U.S.C. 161) thereinafter may be used for purposes involving any public sale of property by any agency of the United States, including the Department of Defense, or any private sale, transfer, exchange, or disposition, or any contract involving the sale or transfer of any property created by property described by acts of Congress that have established various military bases, or any contract involving the sale or transfer of any property created by property described by acts of Congress that have established various military bases.

Sec. 131. The Secretary of the Army shall permit the construction of a chapel on land under his jurisdiction at Dugway Proving Ground, Utah, by the Church of Jesus Christ of the Latter-Day Saints.

(b) The Secretary shall make available such land at the Dugway Proving Ground as the Secretary determines adequate for the construction of the chapel referred to in subsection (a).

(c) The chapel shall be constructed at no cost to the United States and shall be operated and maintained by the Church of Jesus Christ of the Latter-Day Saints at no expense to the United States.

Sec. 132. (a) The Secretary of the Army may impose such terms and conditions on the construction of a chapel at the Dugway Proving Ground as the Secretary determines appropriate to protect the interests of the United States.

Sec. 133. Subsection 2828(g) of title 10, United States Code, is amended:

(a) in paragraph (4), by deleting "Secretary of a military department," and inserting in lieu thereof "Secretary concerned,", and by inserting after the word "constructed" the phrase "or rehabilitated to residential use";

(b) by adding the following new paragraph after paragraph (9)(B):

"(C) In addition to the contracts authorized by paragraph (7) and subparagraphs (A) and (B), the Secretary of the Army may enter into one or more contracts under this subsection for not more than a total of 3,500 family housing units, the Secretary of the Navy may enter into one or more contracts under this subsection for not more than a total of 2,500 family housing units, the Secretary of the Air Force may enter into one or more contracts under this subsection for not more than a total of 2,000 family housing units, and the Secretary of Transportation, the Secretary of Commerce, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force may enter into one or more contracts under this subsection for not more than a total of 300 family housing units, or a combination thereof,

(c) in paragraph (9), by deleting "September 30, 1989" and inserting in lieu thereof "September 30, 1989.

Sec. 134. Section 802 of the Military Construction Authorization Act, 1984 (10 U.S.C. 2821 note), is amended:

(a) in subparagraph (a), by (1) inserting after the word "constructed", the phrase "or rehabilitated to residential use", and (2) by deleting "Secretary of a military department," and inserting in lieu thereof "Secretary concerned,";

(b) in subparagraph (b), by deleting the phrase "not"

(c) in subsection (b)(6), by adding at the end the phrase "unless the project is located on Government-owned land, in which case the contract period may not exceed the original contract term."
Mr. DOLE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The absence of a quorum has been suggested. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SASSER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The pending business is S. 2906.

Mr. SASSER. The military construction bill?

The PRESIDING OFFICER. Yes.

Mr. SASSER. Mr. President, the military construction bill represents a reduction in the President's budget request of $1.6 billion. I would point out to my colleagues that that is a reduction of 16 percent. No other appropriations bill approved by the Senate this year has reduced the budget request to this extent. In fact, Mr. President, term in Congress that we are presenting today is actually smaller than the bill the Senate approved last year. As a matter of fact, it is $14 million less and that is a real decrease in spending for this portion of the defense budget.

Mr. President, I am not proud of the fact that we have had to take such large reductions from the budget requests. I believe that there are substantial modernization and other construction needs remaining to be addressed. But we have discharged our duty to do our share toward reducing the Federal deficit.

The bill that we are recommending to the Senate today provides for the highest priority military construction needs while balancing the need to substantially moderate defense spending and addressing the problem of the budget deficit.

Mr. President, I will not unduly take the Senate's time to discuss the details of the military construction recommendation. Among the recommendations that we have made is for the Department of Defense to provide the Congress with a study of alternative defense structures, changes in the existing force structure which will result in a net reduction in U.S. defense spending.

In my view, these changes can most effectively be brought about if our allies are forced to wake up and realize that they are not meeting their share of the military defense and security and defense responsibilities.

If our allies began to pay more of their fair share and assumed a more equitable share of the military defense burden throughout the world, the United States would be able to reduce our Active Force structure and replace that with less expensive National Guard and Reserve unit components.

I am aware that many experts are saying that it is not reasonable to believe that our allies are going to begin paying a larger share of the common defense, and perhaps they are not. But we will never know until the full weight of the U.S. Government is brought to bear on this problem. The recommendations that we have made are designed to help bring about a friendly pressure on our allies. I hope the administration and the Department of Defense will join the Congress in pressing this issue.

Mr. President, we are awaiting the arrival of the distinguished ranking minority member of the subcommittee. I am advised that he will arrive momentarily.
Mr. President, I suggest the absence of a quorum and I ask unanimous consent that the time for the quorum call shall not be charged to either side.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will call the roll.

The assistant legislative clerk proceeds to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the reported bill and the amendments be reported.

Mr. President, I yield the floor.

Mr. SASSER. Mr. President, I wish to express my appreciation at this time to the distinguished ranking member of the subcommittee, Senator SPECTER, for his help and support throughout the year. I look forward to continuing to work with the distinguished staff member as we approach the conference and final action on this bill.

Mr. STENNIS. Mr. President, I am pleased to present before the Senate today the military construction appropriation bill for fiscal year 1988. This bill, which provides approximately $8.4 billion in total funding for fiscal year 1988, reflects the diligent care and able effort which our entire committee has put together to avoid the sequester on November 20.

In particular, however, it is evidence of the hard work and excellent leadership of subcommittee Chairman Sasser and the ranking minority member, Senator SPECTER, and the highly skilled work of the staff of their subcommittee: Mike Walker, Jane McMullan, Rick Pierce, and Penny German.

I now wish to briefly highlight a few important points regarding this bill.

First and foremost, I am pleased to report that this bill is below the 302(b) allocation for budget authority and outlays. As I have previously indicated, this is essential for all appropriation bills which are to be taken up for consideration on the Senate floor.

Second, the committee's recommended $8.4 billion in total funding is below the President's request of $10 billion and just slightly above the House-passed level of $8.3 billion.

Finally, I would ask my colleagues to resist any further amendments adding additional funds which would violate the bill's spending ceiling set by the subcommittee's 302(b) allocation. Let me also mention that the Senate rules do not permit legislative amendments on appropriation bills.

In conclusion, I firmly support this bill and ask that it be adopted so that we can proceed to conference with our House counterparts in a timely manner.

Mr. President, I yield the floor.

Mr. SASSER. Mr. President, I ask unanimous consent that the committee amendments be agreed to en bloc, provided that no point of order shall be considered as having been waived by reason of this agreement, and that the bill, as thus amended, be considered as original text for the purpose of further amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

The committee amendments were agreed to en bloc.

Mr. DOMENICI. Mr. President, I rise in support of H.R. 2906, the fiscal year 1988 military construction appropriation bill, as reported by the full Appropriations Committee.

I commend the distinguished chairman and ranking member of the subcommittee, the Senator from Tennessee and the Senator from Pennsylvania, for reporting a bill consistent with the subcommittee's 302(b) allocation pursuant to the budget resolution.

Mr. President, this is the first appropriations bill that has come before the Senate since the initial sequester order under the Balanced Budget and Emergency Deficit Control Reaffirmation Act was issued by OMB on October 20.

As my colleagues know, defense programs, excluding military personnel, will be subject to a 10.5-percent across-the-board reduction if the Congress and the President do not develop the $23 billion deficit reduction package mandated in the Balanced Budget Reaffirmation Act.

The bill now before us provides a clear picture of the situation now confronting the Senate. The military construction bill is essentially at the level of the Gradison baseline from which the Gramm-Rudman sequester would occur in the event of no further action. This bill achieves no savings toward the $23 billion in deficit reduction that we must put together to avoid the sequester on November 20.

If my colleagues would like to get a realistic look at the likely effect of the pending sequester, all they have to do is take the total new budget authority provided for the military construction projects in this bill and reduce that amount by 10.5 percent.

The estimated sequester for this bill alone is a reduction of $0.9 billion in budget authority and $0.3 billion in outlays for fiscal year 1988.

As an illustrative case, my colleagues might want to use their own State as an example. For New Mexico, $8 million of the $76.5 million provided in the bill for military construction projects could be permanently canceled if the final sequester order takes place on November 20.

We need a plan to find the $23 billion in mandated deficit reduction to avoid the across-the-board cuts that confront us in one short month. I urge us to work together to that end.

AMENDMENT NO. 1039

Mr. SASSER. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk reads as follows:

The Senator from Tennessee (Mr. Sasser), for Mr. Hollings (for himself and Mr. Sasser) proposes an amendment numbered 1039.
Mr. SASSER. Mr. President, I ask unanimous consent that further reading of this amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the end of the bill, add the following new section:

"SEC. 1. LAND CONVEYANCE, FORT JACKSON, SOUTH CAROLINA.

(a) Sections 840 of the Military Construction Authorization Act, 1986 (Public Law 99-167), is amended—

(1) by striking "and" at the end of subparagraph (B);

(2) by striking the period at the end of subparagraph (C) and inserting in lieu thereof "; and "; and

(3) by adding at the end thereof the following new subparagraph:

"(D) for a water systems improvement project at Fort Jackson at an estimated cost of $2,400,000, and for family housing improvement projects at Fort Jackson at an estimated cost not to exceed $6,400,000.".

Mr. SASSER. Mr. President, I say to my colleagues I offer this amendment on behalf of the distinguished Senator from South Carolina [Mr. Hollings].

This amendment is identical to an amendment approved by the Senate on the defense authorization bill.

Simply stated, it permits the sale of land at Fort Jackson, SC. Under this provision, the Secretary may utilize the proceeds of this sale for a water system project on the base and for family housing improvements.

I would say to my colleagues that this amendment does not add to the spending contained in this bill.

I believe this amendment is acceptable and has been cleared with the distinguished ranking member.

Mr. SPECTER. Mr. President, the amendment is acceptable to this side of the aisle.

Mr. SASSER. Mr. President, I yield back the remainder of my time on this amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 1039) was agreed to.

Mr. SASSER. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. SPECTER. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 1040

Mr. SASSER. Mr. President, I send another amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Tennessee [Mr. Sasser] for Mr. Danforth (for himself and Mr. Sasser) proposes an amendment numbered 1040.

Mr. SASSER. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 7, line 4, strike "$165,716,000" and insert in lieu thereof "$170,016,000".

Mr. SASSER. Mr. President, I offer this amendment on behalf of the distinguished Senator from Missouri [Mr. Danforth]. This amendment would provide $4,300,000 in new budget authority for the Air National Guard. These funds are provided for the construction of two projects at Lambert Field, St. Louis, MO. The projects are a munitions maintenance storage facility for $1,200,000, and $3,100,000 for alterations to the squadron operations facility.

Mr. President, these projects at Lambert Field are fully justified. They were authorized by an amendment offered on the Senate floor to the defense authorization bill.

This amendment is within the 302(b) allocation.

Mr. President, I am advised that this amendment has been cleared with the distinguished ranking member.

Mr. SPECTER. Mr. President, this amendment is acceptable.

Mr. SASSER. Mr. President, I yield back the remainder of my time on this amendment and move its adoption.

The PRESIDING OFFICER. All time having been yielded back, the question now is on agreeing to the amendment.

The amendment (No. 1040) was agreed to.

Mr. SASSER. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. SPECTER. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 1041

Mr. SASSER. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Tennessee, Mr. Sasser, for Mr. Stevens (for himself and Mr. Sasser) proposes an amendment numbered 1041.

Mr. SASSER. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 4, line 23, delete "$507,865,000" and insert in lieu thereof "$602,865,000".

Mr. SASSER. Mr. President, I offer this amendment on behalf of the distinguished Senator from Alaska, Mr. Stevens, and myself. Simply stated, this amendment would provide funds for preconstruction activities on a new facility to support the White House Communications Agency. This project is fully justified.

The White House Communications Agency is a critical link in the effectiveness of White House operations. I have carefully reviewed the project and believe that the additional space and improvements are indeed needed. The project is authorized. The amendment we are offering permits the obligation of only a modest amount of outlays during fiscal year 1988. So the outlays in this bill will still be kept within the 302(b) allocation.

Mr. STEVENS. Mr. President, this amendment adds $5 million to begin site preparation and preconstruction activities for the White House Communications Agency Support Complex at Anacostia Naval Station in Washington, DC. The administration requested this facility in the budget as a priority program to alleviate serious deficiencies in communications and security for the White House Communications Agency.

The Appropriations Committee agreed with the requirement for the project, but deferred funds due to the severity of our section 302(b) budget allocation for military construction appropriations. While these funds were denied in committee, our report stipulates that this action was done "without prejudice." Subsequent to our full committee action, we have determined that site preparation and preconstruction planning for this project only requires $5 million. The outlay impact of this allowance has been determined by the Congressional Budget Office to be within the limits of the budget allocations for the military construction appropriation bill. While this amendment permits preparatory activity to begin, we expect the funding required for construction will be included in the fiscal year 1989 budget request.

I am advised this amendment has been cleared on both sides and I want to thank the chairman of the Military Construction Subcommittee, Senator Sasser, for this patience and willingness to accommodate this amendment. I urge adoption of the amendment.

Mr. SASSER. Mr. President, I am advised that this amendment has been cleared with the distinguished ranking minority member.

Mr. SPECTER. Mr. President, this amendment is acceptable to the Republican side of the aisle.

Mr. SASSER. Mr. President, I move adoption of the amendment.

The PRESIDING OFFICER. All time has been yielded back. The question now occurs on agreeing to the amendment.
The amendment (No. 1041) was agreed to.

Mr. SASSER. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. SPECTER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

PERMANENT TEMPORARIES

Mr. DECONCINI. Mr. President, I would like to convey my deep respect to the chairman of the Military Construction Subcommittee for his diligent efforts to report out a bill which recommends new fiscal year 1988 appropriations of $8,492,396,000 or $1,580,559,000 under the budget request. This bill has achieved this despite the difficulties imposed by the Republican congressional inaction and delay on the defense authorization bill. In addition to the vital spending for military construction and family housing and the correlating effects of improving force readiness and improving personnel retention, this bill includes the imperative issues of defense burden sharing and the U.S. policy in the Persian Gulf.

I would also like to discuss the situation at Fort Huachuca, AZ, with the chairman. In 1942, a two-story barracks was constructed at a cost of $1,235. This facility was intended to accommodate 116. Forty-five years later, it will cost double what it would in a new building this summer. While this bill includes $11,235. This facility was intended to accommodate 116. Forty-five years later, it will cost double what it would in a new building this summer. While this bill includes $11,235.

Mr. DECONCINI. I thank my distinguished colleague, Senator Sasser, the senior Senator from Tennessee and chairman of the Appropriations Subcommittee on Military Construction. In the committee's version of the military construction appropriations bill for fiscal year 1988, H.R. 2906, I note that two military construction projects in Indiana have been deferred. A barracks complex at Fort Benjamin Harrison in Indianapolis and a weapons development and test facility at the Navy's Weapons Support Center in Crane, IN, have been deleted from the fiscal year 1988 program.

Mr. SASSER. Mr. President, I can assure my colleagues that there were no concerns with these projects other than strictly budgetary considerations. While the Senate Appropriations Committee did not fund these projects, the House of Representatives in its military construction appropriations bill did allow for them. In fact, these projects are currently the subject of deliberations by the House and Senate Armed Services Committees, that the Senate will recommit to the House Appropriations Committee positions and fund these projects in conference.

Mr. QUAYLE. I thank my colleague for that assurance, and I express to him my deep appreciation for his time and consideration.

Mr. SASSER. Mr. President, I believe there is one remaining amendment under the unanimous-consent request, an amendment by the Senators from Alaska, Mr. Murkowski, and Mr. Stevens, and once we deal with that amendment, which is acceptable to the managers, I will be prepared to yield back the remainder of my time and go to third reading.

Mr. SPECTER addressed the Chair.

The PRESIDING OFFICER. The PRESIDING OFFICER. The Senate from Pennsylvania.

AMENDMENT NO. 1042

(Purpose: To deny funds for projects in the United States that use the engineering, architectural, and construction services of any foreign country that does not provide such services to the United States in return to the projects.

Mr. SASSER. Mr. President, on behalf of Senators Murkowski and Stevens, I send an amendment to the Senate, and I ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will read the amendment.

The assistant legislative clerk read as follows:

The Senate from Pennsylvania, Mr. Specter, for Mr. Murkowski (for himself and Mr. Stevens), proposes an amendment numbered 1042.

Mr. SPECTER. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the end of the amendment add the following:

<IN GENERAL.—

(1) None of the funds appropriated by this Act may be used to carry out within the United States, or within any territory or
possession of the United States, any military construction project of the United States which involves any service of a foreign country during any period in which such foreign country is listed by the United States Trade Representative under subsection (c).

(2) Paragraph (1) shall not apply with respect to the use of a service in a military construction project if the Secretary of Defense determines that—

(A) the application of paragraph (1) to such service would not be in the national interest;

(B) services offered in the United States, or in any foreign country that is not listed under subsection (c), of the same class or kind as such service are insufficient or are not of a satisfactory quality, or

(C) exclusion of such service from the project would increase the cost of the overall project by more than 20 percent.

(b) Determinations.—

(1) By no later than the date that is 30 days after the date on which each report is submitted to the Congress under section 181(b) of the Trade Act of 1974 (19 U.S.C. 2418) or by the United States Trade Representative, the United States Trade Representative shall make a determination with respect to each foreign country of whether such foreign country—

(A) has fair and equitable market opportunities for services of the United States in procurement, or

(B) has fair and equitable market opportunities for services of the United States in bidding, for construction projects that cost more than $500,000 and are funded in whole or in part by the United States government of such foreign country or by an entity controlled by such foreign country.

(2) In making determinations under paragraph (1), the United States Trade Representative shall take into account information obtained in preparing the report submitted under section 181(b) of the Trade Act of 1974 and such other information as the United States Trade Representative considers to be relevant.

(c) Listing of Foreign Countries.—

(1) The United States Trade Representative shall maintain a list of each foreign country with respect to which an affirmative determination is made under subsection (b).

(2) Any foreign country that is added to the list under subsection (b) shall remain on the list until the United States Trade Representative determines that such foreign country does permit the fair and equitable market opportunities described in subparagraphs (A) and (B) of subsection (b)(1).

(3) The United States Trade Representative shall annually publish in the Federal Register the entire list required under paragraph (1) and shall publish in the Federal Register the modifications to such list that are made between annual publications of the entire list.

(d) Definitions.—For purposes of this section—

(1) the term "service" means any engineering, architectural, or construction service;

(2) each foreign instrumentality, and each territory or possession of a foreign country, that is administered separately for customs purposes shall be treated as a separate foreign country;

(3) any service provided by a person that is a national of a foreign country, or is controlled by nationals of a foreign country, shall be considered to be a service of such foreign country;

Mr. SPECTER. Mr. President, the amendment I am offering for Senators Murkowski and Stevens is identical to one adopted by this body as part of the defense authorization bill and is being offered today because of the uncertain future of the authorization bill.

Mr. President, this amendment essentially provides that funds will not be provided for projects in the United States that are undertaken under federal, architectural, and construction services of any foreign country that does not provide such services of the United States access to the markets of the foreign country.

Mr. MURKOWSKI. Mr. President, the purpose of this amendment is to help unlock the doors that prevent U.S. firms from even bidding on public works projects in certain foreign markets.

With this amendment, we are saying: If you continue to keep your construction, architectural, and engineering markets closed to our firms, then we have no choice but to close our construction markets to your firms. Simple reciprocity.

The Senate is on record in support of this approach, Mr. President. Similar amendments attempting to achieve the same result have been adopted on the trade bill, the Department of Defense authorization bill, and the Commerce Committee markup of the Airport and Airways Improvement Act. I am grateful to my colleagues on the Appropriations Subcommittee on Military Construction and my colleagues on the full committee for their willingness to accept the amendment on this bill as well.

Today, the U.S. public works and military construction market is wide open to foreign competition. And that's the way it should be, provided our firms enjoy a reciprocal arrangement.

Quite simply, my amendment would exclude, with specified exceptions, firms from countries that close their public works markets from participating in military construction projects in the United States and its territories.

This is a message that needs to be sent, Mr. President, especially to our friends in Japan where we have made little progress in opening their markets.

And this is a message that needs to be sent, Mr. President, especially to our friends in Japan where we have made little progress in opening their markets.

American engineering, construction, and architectural firms that have tried to do business in Japan over the past 20 years know what it's like to have the door slammed in their face.

They've been told, in no uncertain terms, that foreigners need not apply to do business in Japan. And it's not because our firms aren't competitive—the whole, our construction, engineering, and architectural firms are far superior in many aspects of engineering and construction technology than are the Japanese firms they would compete against.

But excellence alone hasn't opened the door to the Japanese construction market. The door to that market remains closed today—locked tight against foreign intrusion as a result of a closed Japanese bidding system that excludes all but Japanese firms.

Here in America though, Japanese firms have enjoyed free access to our construction projects.

Consider that in 1980, Japanese participation in the United States construction market totaled $50 million. Today, that figure is $2.2 billion. Meanwhile, American participation in the Japanese market is virtually non-existent—the only case I know of where an American construction firm has been successful in Japan was the firm that built the storefronts for two Mrs. Field's Cookie Stores in Tokyo.

There's no doubt that the United States market is free and open to Japanese firms, while theirs is closed to ours.

And we have patiently sought to end this lack of reciprocity.

One of the focal points of our efforts has been the Kansai Airport project in Osaka, Japan—the first of an estimated $62 billion in public works projects the Japanese are planning to build in the coming decade.

Kansai is particularly meaningful because it has become a symbol meaning "closed to American participation."

Our Embassy in Japan has pressed the issue, as have officials from Commerce, the Office of the U.S. Trade Representative, and the U.S. industry itself. I've met with Japanese officials in Japan.

We have been assured by the Japanese that the situation would change. But it hasn't changed.

We have met, we have talked, we have been patient. But nothing has been done.

The time has come to act. And act every time we have the opportunity.

The Department of Defense military construction appropriations bill is just such an opportunity.

I want you to know how close this issue is to me. Very recently, the Army Corps of Engineers awarded a $14 million construction contract at Port Wainwright, near Fairbanks, AK.

The contract was awarded to Konikke Gumi of Osaka, Japan—home of
the Japanese airport project which has become synonymous with the term "foreigners need not apply."

Well, the irony isn't lost on this U.S. Senator, Mr. President. Fairbanks, AK is my hometown and I think it is an outrage that a firm from Osaka can win a military contract in Fairbanks, when firms from Fairbanks or any other American town can't even bid fairly on public works projects in Connecticut.

It's time to change that situation, Mr. President. This amendment can help keep this from happening in the future.

It's simple. If any country won't allow American firms to bid on its government-funded projects, then its firms can't win U.S. military construction projects here in the United States.

Let me add that the amendment also provides the Secretary of Defense the flexibility to override the requirement for reciprocity if:

First. National security considerations require otherwise;

Second. There is need for a level of service or quality that is not available in the United States or other countries with whom we enjoy reciprocity, or:

Third. The exclusion of firms from a particular nation would raise the cost of a project by more than 20 percent.

Mr. President, this is not a protectionist provision. Our domestic military construction market is wide open, and it will remain wide open to firms from countries whose markets are open to us.

My amendment is not like the provisions we sometimes insert into laws which state that we must buy American, or we must use American firms. Instead, this provision states that the U.S. military construction market is open to everybody, provided they play fair in their markets.

We are not asking the Department of Defense to carry more than their fair share. We are simply asking them to do their part. The Office of the U.S. Trade Representative can't do it alone. The industry can't do it alone. The war against foreign trade barriers takes place on many fronts. The Department of Defense should not be excused from the fight.

Mr. President, we are not asking for an unfair advantage, just a level playing field.

Before us is the opportunity to send a very important message:

Vast, lucrative American military construction markets will remain open to foreign firms only as long as foreign public works construction markets are open to American firms.

This is the right time. This is the right bill. I urge the adoption of the amendment.

Mr. President, I am advised, as the distinguished chairman of the subcommittee has already stated for the record, there is no objection on behalf of the majority to the amendment.

Mr. SASSER. That is correct. This amendment is acceptable, Mr. President.

Mr. SPECTER. Mr. President, accordingly, I move adoption of the amendment.

The PRESIDING OFFICER (Mr. Daschle) said, if all time is yielded back, the question is on agreeing to the amendment.

The amendment (No. 1042) was agreed to.

Mr. SPECTER. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. SASSER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. SASSER. Mr. President, that concludes the amendments that are listed in the unanimous-consent request. I wish to again express my appreciation to the distinguished ranking minority member for his splendid cooperation during the course of developing this bill and bringing it to the floor.

Mr. President, I would ask for the yeas and nays and yield back the time remaining on the bill.

The PRESIDING OFFICER. There is a sufficient second. There is a sufficient second.

The yeas and nays were ordered.

Mr. SPECTER addressed the Chair.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I commend the distinguished chairman of the subcommittee, Senator Sasser, I thank him for his collegiality in working together on this bill.

The PRESIDING OFFICER. Is all time yielded back? If all time is yielded back, the bill is open to further amendment. If there be no further amendment to be proposed, the question is on the engrossment of the amendments and third reading of the bill.

The amendments were ordered to be engrossed and the bill to be read a third time.

The bill was read the third time.

Mr. SASSER. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The Chair would indicate that under the previous order the vote on final passage will occur next Tuesday.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. STEVENS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. STEVENS. Mr. President, I just want to say a word about the handling of the military construction appropriation.

I think it is a most difficult problem to face the issues of how to allocate the moneys for defense in this very tight budget situation, and the two Senators in charge of this bill this year have done an admirable job.

I hope the Senate will overwhelmingly approve the recommendations of Senator Sasser and Senator Specter. This is a bill that is under the budget estimate, and it is one that I think meets the very vital needs of the country.

Having been a Senator who has managed the major bill, an appropriations bill, for several years, I am familiar with the difficulties that are faced in the military construction area, and I just want to go on record as commenting these two Senators for the report that is before us and urging the Senate as a whole to approve it on Tuesday.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MURKOWSKI. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

REVIEW OF ONGOING SALES OF UNITED STATES MILITARY TECHNOLOGY TO CHINA

Mr. MURKOWSKI. Mr. President, last night the Senate adopted a resolution calling upon the administration to review ongoing sales of United States military technology to China, if China fails to support a United Nations arms embargo of Iran. It further calls upon the administration to make strong representations to China conveying the concern of the Senate over Chinese Silkworm sales.

As we all know, China has been supplying Silkworm missiles to Iran despite repeated official protests by the United States that these sales threaten the safety of international shipping in the Persian Gulf. According to published estimates, China has supplied about 30 of the missiles to Iran.

Our worst fears have now been realized. Last Thursday, a Silkworm missile hit a U.S.-owned tanker, the Sungari, causing major damage. Last Friday, another Silkworm hit the U.S.-flagged Sea Isle City inflicting 18 casualties, including two U.S. merchantmen aboard that vessel, the captain, who we understand has been blinded, and the radio operator. This week, a
Silkworms were important for trade and commerce, particularly with China. The United States wanted to prevent China from acquiring advanced technologies and weapons, so an arms embargo was imposed. This resolution was being considered by the Senate.

President FORD introduced a resolution to add Senator CRANSTON and Senator GLENN as cosponsors. He read a letter from Pearl Campbell, a tobacco barn owner, about his barn and why it should be designated as a historic site.

Mr. FORD, Mr. President, I ask unanimous consent that Senator MERRIER and Senator GLENN be added as cosponsors of S. 1600. S. 1600 is a bill that develops an independent FAA. As more Senators and their staffs have an opportunity to read and study this bill, more Senators are joining as cosponsors.

I am very pleased with the response and very pleased with the questions. I am very pleased that we are moving in the direction that we are, so I encourage those that might be listening, that either they or their staffs will look at S. 1600.

KENTUCKY TOBACCO BARN

Mr. FORD, Mr. President, they say that beauty is in the eye of the beholder. I received a letter from Pearl Campbell of Carlisle, KY. Enclosed in that letter is an article written by G.C. Myers, and it is entitled "G.C. Says: Some folks say I'm only a barn, but my Master says I'm his castle."

So he reflects that, as it relates to tobacco country, how important that barn is and all that.

Mr. President, I ask unanimous consent that the letter from Pearl Campbell and the article by Mr. Meyers be included in the Record.

Mr. President, I yield the floor.

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

CARLISLE, KY.

October 6, 1987.

Senator WENDELL H. FORD,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR: I have enclosed a copy of a story I thought you might be interested in reading that was published in our local weekly newspaper, "The Carlisle Mercury," Carlisle, KY., August 27, 1987. Mr. Myers, a local merchant who owns and operates a retail drug store, the Carlisle Drug, 129 E.

Main St., Carlisle, KY. 40311, in our little town of about 1,520 people and Nicholas County (County of which Carlisle is the county seat) has no degree in journalism but I think his column about "A Tobacco Barn" has merit and worthy of some type of recognition from our representative in Congress.

I spoke with Mr. Myers about his article and he told me he paid to have it printed in our local, weekly paper but he felt like it was in his heart a column dedicated to our hard working tobacco farmers of our area. He told me they write about all kinds of houses, small, large, old, new, log, round, even "castles." So, he said, this ones for "The Farmers' Castle," his "Tobacco Barn." Hope you enjoy it.

Sincerely,

PEARL CAMPBELL.

(From the Carlisle (KY) Mercury, Aug. 27, 1987)

G.C. SAYS: "SOME FOLK'S SAY I'M ONLY A BARN, BUT MY MASTER SAYS I'M HIS CASTLE."

Tobacco became the State's first major cash crop back in 1787, when James Wilkin­

son negotiated with the Spanish for the right to ship cured bacon down the Mississippi to New Orleans. Now, I'm thinking in my own mind, that was a long time ago, before we became the 15th State, June 15, 1792. It's no wonder that tobacco barns (like so many things we come to think of, we don't believe it) have become stately landmarks, a natural part of our beautiful Kentucky scenery.

She asked me if I had ever seen a round barn! I told her no (as you can tell I was not contributing much to this conversation), but that I saw a picture of one in a magazine once. She said that she had heard her mother speak of one back when she was growing up in Daviess County, but she thinks, that was over 150 years old. "Round barns," she said, "withstand the strongest of winds you know."

"Goodness gracious," I thought.

She told me that back in the old days, the majority of barns were painted only one color. Farmers mixed red iron oxide with skimmed milk and lime—and got a paint of sorts which hardened and coated the barn like a plastic. The mixture was a brown color and weirs were red. The Red color was the standard color, got a firm foothold on the farmer and hung on. Hams and well, from September through December when tobacco is cut and housed. "Things will soon be buzzing around here about next week." Tobacco became the State's first major cash crop back in 1787, when James Wilkin­

son negotiated with the Spanish for the right to ship cured bacon down the Mississippi to New Orleans. Now, I'm thinking in my own mind, that was a long time ago, before we became the 15th State, June 15, 1792. It's no wonder that tobacco barns (like so many things we come to think of, we don't believe it) have become stately landmarks, a natural part of our beautiful Kentucky scenery.

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"Goodness gracious," I thought.
MEDICARE CATASTROPHIC ILLNESS COVERAGE ACT

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 1127. The clerk will report.

The legislative clerk read as follows:

A bill (S. 1127) to provide Medicare catastrophic illness coverage, and for other purposes.

The Senate resumed consideration of the bill.

The PRESIDING OFFICER. The pending question is on the committee amendment as modified.

Mr. DURENBERGER. Mr. President, the late President John F. Kennedy nearly 25 years ago admonished us all to turn our attention to meeting the needs of our senior citizens.

He said, in a special message to Congress, that there was an increase in the life span and in the number of our senior citizens presents this Nation with increased opportunities: The opportunity to draw upon their skill and sagacity and the opportunity to provide the respect and recognition they have earned. It is not enough for a great nation merely to add new years to life—our objective must also be to add new life to those years.

Mr. President, in the spirit of this statement, many of us here are celebrating this long-overdue consideration of a catastrophic illness insurance bill in the U.S. Senate. We are for thousands of elderly and disabled persons and their family members who have faced catastrophic illnesses in the past an unfortunate 22 years late. How many American families have been devastated financially and emotionally by catastrophic illness? How many more names will be added to that list in the next year if we fail to act?

For this Senator, just one more name will be too many. This is a serious problem. This year nearly 2 million people on Medicare will spend more than $1,700 out of their own pockets, without reimbursement. Of those who are hospitalized, which represents about 3 million beneficiaries each year, the average out of pocket costs are $4,000. This is too much for most seniors to pay. We must add this protection to the Medicare Program.

There is where we start today. First, to eliminate fear; second, stop waste; third, provide protection for those who only have Medicare and no supplementary insurance either private coverage or Medicaid; and fourth, to provide cost effective protection to all 32 million beneficiaries.

The bill which we are considering and to which I will speak at greater detail in the future is a very good bill. Not only is it long overdue, Mr. President; not only does it eliminate fear; not only does it prevent waste and duplication in insurance benefits; not only does it provide protection for several million currently not protected; but, Mr. President, it provides people like my parents, who are 76 and 80 years of age today, with one important element of the Medicare Program which they have never had. That is the protection against the unknown.

I have heard it said that, yes, acute care medical or medical catastrophic is fine, but there are more serious catastrophic problems facing the elderly of America and I suppose that is true. But if you, like I, have sat down with elderly parents—mine have lived now for 15 years on fixed incomes—and once a year watch their premiums rise, watch their confusion rise, and watch their fears and their concerns about their tomorrow's increase, you would know that the best place to start is if you are going to provide catastrophic protection, to provide protection everywhere. Mr. President: with the hospital, with the doctor, with the drugs, with all of those important elements of this medical system that if you do not have, you do not make it.

We will do long-term care. We will provide as a nation for the nursing home care and the respite care and a lot of other things that our elderly need. We will do that. But we must begin with the most important catastrophic problem, that over which they have no control: hospital, doctors, and the like.

As I indicated, this will not be the end, Mr. President, of our efforts, but merely the beginning of a very important effort to tackle the most serious problem in Medicare today.

This is a bipartisan effort, but it took a leader. Many of us have been authors of catastrophic insurance legislation almost since the time we came to the Senate. But perhaps no one but the chairman of the Finance Committee has spent as much time or committed as much as this distinguished gentleman has for catastrophic health insurance protection. Not just for elderly Americans but his concern is for the poor, his concern for employed Americans who suffer the same problem with potential financial catastrophe are well known to all of us who served with him on the Finance Committee.

So it is the author of this legislation who has, in so many similar occasions during the course of this year, brought us Republicans and Democrats together on an important piece of legislation to whom we should give the credit for what we are about to do.

Mr. President, as I indicated, I will have more to say on the rationale, if you will, for catastrophic in the next day or so. I think many of my colleagues are concerned about the cost of this program and many of my colleagues are concerned about whether we are not merely providing for some very large expanded benefits which neither we, this generation, nor our parents, nor our children will have the capacity to close.

I would just say to them, and I will have more to say on this later, that we have reached a threshold in insuring Americans with this bill because, for the first time, the beneficiaries of this particular Medicare benefit will be paying for the costs of this benefit. And they will be paying, Mr. President, a lot less for a catastrophic feature included in the Medicare Program than 87 percent of them are now paying for separate catastrophic via television salesmen in the MediGap or supplementary market.

So as we explore these costs, as we explore this new form of burden, I think it is also appropriate to say to my parents' generation that they have decided in this legislation to shoulder a burden, not being passed on to their children, not being passed on to their grandchildren. It is their own burden, and the way this bill is constructed, they have decided to undertake it.

I think we, of all generations, have come to an appropriate conclusion about how to keep that burden light and that yoke sweet.

I think it is an opportunity that we need to seize. I think it is appropriate that the President of the United States has recognized this. He has called for catastrophic and he has worked very hard with the members of this committee in bringing us to the point where not only on this catastrophic but on some of the other amendments that will be considered,
we are, as an institution, and we are, as the responsible representatives of our constituents in this National Government, pretty much of one mind. In an area usually subject to great benefits, the area of benefits to elderly Americans, Mr. President, that is unusual.

**AMENDMENT NO. 1043**

(Purpose: To require maintenance of effort by employers who are providing health care benefits that are duplicative of new or improved Medicare benefits)

The PRESIDING OFFICER. The Senator from Michigan.

Mr. RIEGLE. Mr. President, I rise to offer an amendment for myself and Mr. GRASSLEY. I send the amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Michigan (Mr. RIEGLE), for himself and Mr. GRASSLEY, proposes an amendment numbered 1043.

Mr. RIEGLE. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place, insert the following new section:

SEC. MAINTENANCE OF EFFORT.

(a) IN GENERAL.—During the period described in subsection (c), if an employer provides health care benefits to an employee or retired former employee (including a Federal employee or retired former employee) that are duplicative of new or improved health care benefits provided under this Act or the amendments made by this Act, the employer shall—

1. provide additional benefits to the employee or retired former employee that are at least equal in value to the duplicative benefits;

2. refund to the employee or retired former employee an amount equal to the actual present value of the duplicative benefits.

(b) REGULATIONS.—The Secretary of Labor may issue such regulations as are necessary to carry out this section.

(c) EFFECTIVE DATE.—This section shall be effective—

1. during the 1-year period beginning on the date of enactment of this Act; or

2. in the case of an employer who is providing duplicative health care benefits to employees or retired former employees under a collective bargaining agreement that is in effect on the date of enactment of this Act, until the expiration of the agreement.

Mr. RIEGLE. Mr. President, I am offering this amendment for myself and Senator GRASSLEY. I have discussed this with the managers on both sides. I understand it is acceptable to both sides. I will give a brief explanation as to what it does.

Mr. DURENBERGER. Will my colleague yield?

Mr. RIEGLE. Yes.

Mr. DURENBERGER. The Senator from Michigan is correct that for those of us who have been working on this bill the Senator's amendment is not only acceptable but very appropriate. I am opposed, however, that one of the Senators on this side has not yet had the opportunity to examine the amendment so I cannot say that this side will accept it until he has had that opportunity, which I trust will happen in the next few minutes.

Mr. RIEGLE. Does the Senator expect he will do that now or in short order? Or is it something we might have to carry over?

Mr. DURENBERGER. It is my expectation we will know that within the next several minutes.

Mr. RIEGLE. Fine.

Mr. BENTSEN. Will the Senator yield?

Mr. RIEGLE. Yes.

Mr. BENTSEN. The Senator is correct so far as this side of the aisle is concerned. It is an excellent amendment and I am quite supportive of it. Hopefully, it will be accepted this afternoon.

Mr. RIEGLE. I thank the Senator. Before getting into an explanation, let me say that I commend very much the Finance Committee and very particularly the chairman, the Senator from Texas, for the tremendous effort the committee has made this year to move on a number of very important and difficult issues. Certainly, the trade bill falls into that category; the catastrophic insurance legislation before us falls into that category. We have had certain revenue requirements imposed upon us by reconciliation and the committee has reported that legislation. We, in addition, have an area of United States-Canadian trade activity. That is an area where we have been actively at work.

Leading into that have been very extensive hearings where all points of view have been sought and heard. It is not often that a committee has as many major issues to have to take up and deal with in one legislative session as we have seen in this instance this year.

I would say as a new member of the committee how impressed I am by this committee, how well it works, the leadership the chairman has given us, the staff on the committee also working through these issues, and the fact that we are here on the floor today with this catastrophic health care legislation.

So I commend the chairman and I thank him for his leadership. I think he served the Senate enormously well and I am proud to be a member of this committee.

Mr. BENTSEN. I thank the distinguished Senator. He has entered this very complex field extremely quickly and he has mastered it well. We appreciate his contribution.

Mr. RIEGLE. I appreciate the comments of the chairman.

If I may, let me offer a brief explanation of my amendment.

The amendment that we have offered will protect millions of senior citizens who already have catastrophic benefits provided by their employers or former employers.

Our amendment would simply require those employers to continue to provide equally valuable benefits that do not duplicate the new benefits provided in the Catastrophic Health Care bill.

Under the catastrophic proposals in both the House and Senate, the burden of paying for catastrophic coverage would be shifted from employers onto the backs of retirees, who will be required to pay higher basic and supplemental premiums.

But the amendment we are offering today prevents this inequity. It requires employers who are currently offering catastrophic health care benefits to maintain their effort by providing additional benefits that do not duplicate those in the bill before us today. In the absence of providing additional benefits, employers would be permitted to refund the actuarial value of the overlapping benefits.

This requirement would be transitional and would last only 1 year, or in the case of collective bargaining agreements, until those agreements expire. This should allow sufficient time for employers and retirees to adjust to the new benefits provided under the Catastrophic Health Care bill.

The duplication of benefits is a vast problem left unresolved by S. 1127, the catastrophic bill. It affects a wide cross-section of American workers and retirees. Approximately 4.3 million retirees and their dependents are covered by employer-sponsored health insurance, including 16 percent of the population over age 65.

This amendment prevents employers from gaining an unintended economic windfall at the expense of retirees. According to the Department of Labor, employers spent about $4.6 billion to provide retiree health insurance coverage in 1985, some of which duplicates the expanded Medicare coverage in S. 1127. According to the Washington Business Group on Health, 95 percent of the Fortune 500 companies provide retiree health care benefits—another study showed for smaller firms it was as high as 42 percent.

This amendment coordinates employer-sponsored health care plans, including the Federal Government and Federal retirees, with the expanded Medicare coverage so as to supplement, not duplicate, its catastrophic benefits.
The PRESIDING OFFICER. The Senator from Minnesota.
Mr. DURENBERGER. Mr. President, I compliment our colleague from Michigan for recognizing a problem and in dealing with it in perhaps not a permanent solution but it certainly provides for the period of time, for a year after catastrophic goes into effect, for opportunity, opportunity on the part of employees and employers in this country, to renegotiate the health insurance relationship. It certainly provides plenty of alternatives for a variety of employer-employee relationships, either the maintenance of a catastrophic premiums, or by offering the employee the opportunity of the catastrophic premiums, or by a level of effort by paying some or all of an equivalent amount, or to refund, if you will, or to pay to the employees involved, a dollar denominated in this country, I certainly endorse his position that it is so valuable to all of us in supporting this amendment.

Mr. BENTSEN addressed the Chair.
Mr. DURENBERGER. Mr. President, it is true that one of the Senators on the other side of the aisle cannot be here. It is understood that he has some question in mind concerning the amendment. And he urgently requested that further consideration of the amendment be put over until next Tuesday.
Under the circumstances, I do not see that we have any choice but to do that.
Mr. DURENBERGER addressed the Chair.
The PRESIDING OFFICER. The Senator from Minnesota.
Mr. DURENBERGER. Mr. President, in further questioning, it appears that one of the Senators on the other side of the aisle cannot be here. It is understood that he has some question in mind concerning the amendment. And he urgently requested that further consideration of the amendment be put over until next Tuesday.
Under the circumstances, I do not see that we have any choice but to do that.
Mr. DURENBERGER addressed the Chair.
The PRESIDING OFFICER. The Senator from Minnesota.
Mr. DURENBERGER. Mr. President, it is true that one of the Senators on this side initiated the concern. Because he is a member of the Finance Committee who has previously expressed concern about exactly how this issue was going to be resolved, because we cannot communicate with him right now, I think it is appropriate to recommend this because it is a very good amendment, and I know it is not everything that the Senator from Michigan thought we ought to do. He has made some modifications from his original position that I think deserve the consideration for everyone.
I would also say, Mr. President, that since we began this discussion, others have expressed some concern not necessarily with the content of the amendment, but with the fact of it which means they just have not had the time to deal with the amendment as I know the Senator from Michigan and the chairman of the Finance Committee would like them to deal with it.
While it is regrettable that we got almost to the passage, I would recommend we take it up on Tuesday.
Mr. RIEGLE. I wonder, Mr. President, if it would be appropriate—we presented the amendment at the desk, and it has been read—if it can be set aside, and kept there so it can be brought up again presumably on Tuesday and dealt with. Is that an acceptable approach?
Mr. BENTSEN. Mr. President, I assume we do just that and when we get back to this particular piece of legislation that this amendment would be the first order of business.
The majority leader of course may have something that will precede this particular legislation.
Mr. BYRD. Mr. President, I understand then that there can be no further action on this bill today. I understand Mr. R orn is interested in the amendment, and he is not here. He is on his way back to Delaware. That being the case, we will have to put this measure over until Tuesday.
Mr. President, I believe the military construction appropriations bill was advanced to third reading. Was it?
The PRESIDING OFFICER. The Senator is correct.
MR. BYRD. Was it advanced beyond third reading?
The PRESIDING OFFICER. The yeas and nays on the military construction bill have been ordered. It is the Chair's understanding that will occur on Tuesday.
MR. BYRD. Has all time been yielded back?
The PRESIDING OFFICER. All time has been yielded back.

EXPRESSING THE SENSE OF THE CONGRESS THAT UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 3379 (XXX) SHOULD BE OVERTURNED
Mr. BYRD. Mr. President, I ask unanimous consent that the Foreign Relations Committee be discharged from further consideration of Senate Joint Resolution 205 and that the Senate proceed to the immediate consideration of Senate Joint Resolution 206.
Mr. DURENBERGER. Mr. President, there is no objection on the Republican side.
The PRESIDING OFFICER. Hearing no objection, it is so ordered.
The clerk will report the joint resolution as follows:
A joint resolution, (S.J. Res. 205), expressing the sense of the Congress that United Nations General Assembly Resolution 3379 (XXX) should be overturned, and for other purposes.

There being no objection the Senate proceeded to consider the joint resolution.
Mr. MOYNIHAN addressed the Chair.
The PRESIDING OFFICER. The Senator from New York.
Mr. MOYNIHAN. Mr. President, I express my appreciation to the majority leader and the acting minority leader for making this possible, and especially to the distinguished chairman of the Committee on Foreign Relations and the distinguished ranking minority member, who specifically arranged that this resolution be held at the desk.
Mr. President, this is a matter of some importance. And I hope the Senate will take satisfaction, as I do,
in bringing it forward. A number of Senators have spoken to me about it today, including the distinguished Senator from Arizona [Mr. McCain] who expressed his particular interest. I know others share that interest. And it gives me the pleasure and distinct honor of an official visit by the President of the State of Israel, the first such visit ever made. As the 40th anniversary of the founding of the United Nations approaches, it became increasingly anomalous that while Prime Ministers of Israel have frequently been in this country, and have, of course, been welcomed, we have never extended to Israel that final act of recognition, of acceptance, of acknowledged admission into the society of nations; that is, a state visit from the head of that state.

This anomaly seemed all the more inexcusable because the Secretary of State has been attempting to bring about international negotiations that would further resolve, to the extent that this age will permit, the situation of the Middle East. So here on the Senate floor we unanimously adopted a resolution declaring the sense of the Senate that the President of Israel should be invited for a state visit. Happily, President Reagan has done just that. And in a short while President Chaim Herzog will be with us.

On the occasion of a state visit by President Herzog to Australia a year ago, the Australian House and Senate unanimously adopted a resolution calling attention to the single most grievous assault on the legitimacy of the State of Israel; which is to say, U.N. General Assembly Resolution 3379, that infamous document adopted on November 10, 1975, which declared Zionism to be a form of racism and racial discrimination.

Mr. President, that event was a horrid event. It was, in a way, a declining event. It was, as I said at the time, an epitaph as to the true nature of the totalitarian assault on democratic institutions. The event, although seeming to have suddenly appeared in a conference of the nonaligned nations in Mexico City, was, in fact, the culmination of a campaign that had been begun 4 years earlier by the Soviet Union in a two-part article in Pravda. This article was written by Pravda's then assistant foreign editor. In its most grim and obscene passages, it declared, for example, that the massacre of Russians of all denominations—including so very many Jews—at Babi Yar in the Ukraine was a collaboration of the SS and the Zionists. This article equated the Zionists with the Nazis and the racial doctrine of the Nazis.

A more explicitly Fascist proposition had been put in the Middle East. As a lie as could be told was told; and, as Goebbels had forecast, if a lie is big enough, some will believe it. Indeed, on that day, November 10, a majority—not large, but a sufficient majority—of the members of the United Nations did in fact vote to endorse that calamity.

The Israeli Permanent Representative in the United Nations on that occasion was Camps. He stood up and spoke with the utmost brilliance in denunciation of the act, calling attention to the fact that that date, November 10, was the very same day of Kristallnacht in Nazi Germany; the occasion, when, for the first time, anti-Semitism broke out into the streets in the form of sanctioned public violence. On that day, the horrors of the Holocaust commenced their movement toward the death camps.

This was a man who could speak to such an occasion. He was a member of the Guards Armored Division in World War II, the division that saved the organization. That's, if I may say, a distinguished Irishman. He was born in Belfast. He was the son of the rabbi of all Ireland. After the war he emigrated to America and went to work in all manner of public services and in the publishing business. And in a ballot in the Israeli Knesset, which is a secret ballot, he was chosen President, to the surprise of some, to the joy of many in his nation, and to great satisfaction in ours.

Mr. President, having learned of the action of the Australian House and Senate, I have talked many times with President Herzog about what we might do to overturn that infamous resolution. As we said when the resolution was adopted, the United Nations would not recover; that, once done, until undone, this resolution would only grow darker. It is to be adopted unanimously, as I believe it will be, this afternoon. I look forward to its adoption in the House. I look forward to its approval by the President, who, I cannot doubt, will wish to do this.

Then I think we could consider the availability of the parliamentary unions to send it to other democracies. We might then begin to concert our efforts in New York at the General Assembly such that a year from now, we could achieve the same results as in Australia to overturn the resolution. And we would make it plain that if this is accomplished, a new day can begin for the United Nations. If it is not, things will only grow darker.

The resolution has failed utterly to achieve any of the purposes the Soviet Union had in mind. Chief among them was to deny the legitimacy of the State of Israel and, by extension, democratic nations in the Third World and in the Second and First Worlds, if one could take those terms.

The Soviet Union itself is beginning to ask about reestablishing relations with Israel. I do not preclude the possibility that the Soviets will reconsider what they did, but it is not necessary to our effort that they should do.

We can summon a majority to support this measure. When we do, we will all have Prime Minister Hawke and our other friends in Australia to thank. But I hope the rest of the world might note that the first Parliament, the first Congress, the first representative body to follow the Australian initiative was this one.
It is with a great sense of honor and expectation, Mr. President, and in anticipation of Mr. Herzog's visit, that I move the passage of the joint resolution.

Mr. D'AMATO. Mr. President, I rise today on behalf of the joint resolution introduced by my good friend and colleague from New York, denouncing an event which occurred 12 years ago. On November 10, 1975, the United Nations passed a resolution equating Zionism with racism and discrimination.

This resolution expresses the Senate's strong indignation of U.N. General Assembly Resolution 3379. The joint resolution also states that UNGA 3379 has hurt Middle East peace efforts and has escalated religious animosity. It is totally inconsistent with the Charter of the United Nations and an unacceptable misrepresentation of Zionism.

The Senate acted on this matter 2 years ago. A joint resolution I sponsored with several of my colleagues was engrossed in the 99th Congress. That joint resolution condemned UNGA 3379 and called upon parliaments of all countries to reject it.

In 1986, I wrote our representative to the United Nations, Ambassador Vernon A. Walters, and urged him to circulate copies of Public Law 99-90 among the delegations of the United Nations and urge them to join the United States repudiation of Resolution 3379. I would like to quote from his December 19, 1986, response to this request:

The passage of [UNGA. 3379] was indeed one of the darkest days in the history of the United Nations. For my part, I subscribe in full to the position of P.L. 99-90, and I particularly appreciate the call that the resolution makes for Parliaments of all countries that value freedom and democracy to repudiate Resolution 3379. Gradually we have been able to make some headway here at rolling back the pernicious influence of that resolution. UNGA Resolution 3379 on Zionism singles out for slanderous attack the national movement which gave birth to the State of Israel. Worse, it promotes the very racism it purports to overturn.

Ironically, the resolution actually promotes the very racism it purports to preclude.

Unfortunately, it is neither the beginning nor the end of a campaign by several United Nations' members to undermine the nation of Israel. The United States has repeatedly vetoed U.N. Security Council votes condemning Israel.

This joint resolution today cannot erase the tragedy of 12 years ago. It can, however, rally the opinion of this Nation which prides itself on racial and ethnic equality and opportunity and, in turn, rally world opinion. Although we are only one vote in the United Nations, we must continue to try to reverse UNGA Resolution 3379.

The President pro tempore, Charles E. Herzog, will be in the United States during the second week of November. This is the first visit ever by an Israeli head of State. Mr. President, this body can warmly welcome this distinguished leader by unambiguously expressing our support for the resolution calling for the overturn of the UNGA 3379.

Mr. President, I commend my good friend from New York for sponsoring this important joint resolution and I urge the Senate to pass it unanimously.

Thank you, Mr. President.

THE PRESIDING OFFICER. If there be debate on the joint resolution, the question is on the engrossment and third reading of the joint resolution.

The joint resolution was ordered to be engrossed for a third reading, was read the third time, and passed, as follows:

S.J. Res. 205

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby—

(1) Declares that United Nations General Assembly Resolution 3379 (XXX), which equates Zionism with racism—

(a) Has been unhelpful in the context of the search for a settlement in the Middle East;

(b) Is inconsistent with the charter of the United Nations;

(c) Remains unacceptable as a misrepresentation of Zionism; and

(d) Has served to escalate religious animosity and incite anti-Semitism;

(2) Recommends that the United States Government should lend support to efforts to overturn Resolution 3379 (XXX) in the United Nations.

Mr. MOYNIHAN. Mr. President, I move to reconsider the vote by which the joint resolution was passed.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. MOYNIHAN. I thank the majority leader and the Chair and I yield the floor.

The PRESIDING OFFICER. The Senator from Wisconsin.

THE GOOD, GRAY NEW YORK TIMES IS FLUTTERING ITS EYELASHES

Mr. PROXMIRE. Mr. President, what is the most impossible situation you can imagine? Mother Teresa punching out Heavyweight Boxing Champion Mike Tyson? President Reagan declaring that what this country needs is a good, solid dose of recession, and he's going to do his best to get it over and done with? Well, maybe.

But how about this? How about anybody falling in love with an economist? How about a solid, staid institution like the good, gray New York Times falling in love with an economist? Well, that is impossible. Or is it? No, indeed. In fact, Nobel Laureate Robert Solow. Doubt it. Just listen to this from today's editorial page of that good, gray, oh so strict and straitlaced, intellectual guru of us all. Here goes:

In awarding Robert Solow its prize in economics, the Nobel Committee cited the M.I.T. professor's research in growth theory. The Committee could have added that Mr. Solow is the economist's economist. A delightful exception in an academy that usually saves its highest honors for the narrowest of specialists.

Professor Solow has had important things to say about almost every aspect of modern economics. What's more, he has the lucid writing style to make his ideas broadly accessible, as well as the political sophistication to have been a key policy adviser to President Kennedy.

He is equally at home teaching freshmen economics in the back of a drafting room. Something else the Nobel Committee failed to cite—

And, here it comes, Mr. President. The New York Times concluded its love note with this shaft right out of cupid's quiver. Just listen. The Times concluded:

Those who know him say Mr. Solow is the nicest guy you're ever likely to meet.

So, Mr. President, nothing is impossible.

Mr. MOYNIHAN. Mr. President, will the distinguished Senator from Wisconsin yield?

Mr. PROXMIRE. I am happy to yield to my good friend, the distinguished Senator from New York.

Mr. MOYNIHAN. With his characteristic perspicacity and energy the Senator from Wisconsin has spotted the article in the New York Times calling our attention to Bob Solow. If you say the New York Times has fallen in love, it is because Bob Solow is about the most lovable man you will ever meet. Indeed, he is probably the smartest man you will ever meet. But love does not make one lovable. He is just a wonderful man.

For the last 10 years it has been his turn to win this prize, although the wait never bothered him one little bit. It has come to him, as good things in life will.

He is married to Barbara, an economic historian of the greatest distinction. Her work on Irish land reform, published in 1971 and entitled "The Land Question and the Irish Economy, 1870-1952," is a model work encompassing nearly half a century of economic and political struggle.

She has recently published a new book, "British Capitalism and Caribbean Slavery: The Legacy of Eric Williams."

Bob is a great skier and a formidable sailor of small craft. He is a wonderful teacher. He is a great father, a boon companion, a magnificent economist, and, what is more, he has been part of...
the intellectual life behind the political career of statesman such as WILLIAM PROXMIRE.

How many times has Senator Proxmire stood on this floor talking of the need for education, the need for research, and the need for investment in human beings? It is, in part, due to that Wisconsin soil from which he springs, but also due to something more. It is part of a system of knowledge.

It was Robert Solow who first introduced the concept, and has now won a Nobel Prize for demonstrating that the old notion that economic production is primarily a function of investment in land and capital is false. He disproved the assumption that the more you save, the more machines you make and the more mines you dig, the more product you will have. It is, instead, technology that drives economic growth. Technology grows out of innovation, which is driven in their education; in their ideas; and in their science.

He has shown that the real dynamic of our age has been knowledge. It is knowledge which brings wealth. Although most might say you should get wealth in order to acquire knowledge, Bob has proven that if you get knowledge you will acquire wealth.

I thank the distinguished chairman of the Committee on Banking. It is most appropriate that he, as chairman of this distinguished committee, chooses to hear Bob Solow.

I count myself as one of those who love and admire Bob and his wife Barbara.

Mr. PROXMIRE. Mr. President, I am astonished and overwhelmed. I had no idea the Senator from New York would be here when I came over to make this little pitch about Robert Solow receiving a Nobel Prize.

I was particularly surprised with the remarks of the distinguished Senator from New York. Talk about a man for all seasons. I have served on the Banking Committee for some 26 years, the Banking Committee for 30 years, and so forth. Here is a man who has not served on either of those committees.

Mr. PROXMIRE. Mr. President, I would like to commend my good friend from Tennessee, Senator Sasser, for the strong leadership he has shown in guiding the fiscal year 1988 military construction appropriations bill through the Senate. It has been an honor for me to serve on the Military Construction Appropriations Subcommittee and to work closely with Senator Sasser on this bill.

I would like to comment on section 129 of the bill the committee reported on October 16. That section deals with reporting requirements for the National Test Facility that the Strategic Defense Initiative Organization wants to build at Falcon Air Station in Colorado. This facility would be part of the national test bed that SDI wants to build to test various ballistic missile defense systems.

I would like to thank Senator Sasser for including in H.R. 2906, at my request, this language and the accompanying committee report language on the National Test Facility. I also would like to recognize the important contribution my good friend from Alaska, Senator Stevens, made in drafting this language.

By way of background, Mr. President, I believe that the national test bed, if properly run, can be an important component of the SDI research program. The test bed, according to SDI, is supposed to provide a comprehensive capability to demonstrate and evaluate alternative ballistic missile defense system architectures and technologies, including battle management, command, control, and communications.

The National Test Facility at Falcon Air Station, which SDI says costs $100 million to build, would be a key component of the national test bed, which, all told, could cost as much as $1 billion.

Indeed, it is very important that if we proceed with SDI research we have the correct mechanism to determine whether a particular SDI defense system is feasible, whether it is cost effective at the margin, and whether it is survivable against Soviet countermeasures.

Off an SDI cold start system doesn't meet those three important criteria, then we should not deploy that system. And the national test bed, if it is operated properly and honestly, should be able to tell us if a defense system meets all three.

Just as importantly, the national test bed should be simulating, testing, and evaluating the battle management computer hardware and software that would run the defense.

It doesn't do any good to build all these weapons and sensors if you can't operate and coordinate them into an effective and survivable defense system. That's the job of the battle management system, which consists largely of the computer hardware and software to run the defense.

The problem, Mr. President, is that the details of the national test bed and the National Test Facility are vague and poorly defined at this point. Congress, for example, doesn't know whether this facility actually will be set up to test whether SDI defense systems are feasible, cost effective at the margin, or survivable.

And at this point, there is no firm architecture or architectures to guide SDIO in the development of a national test bed. In fact, the national test bed concept is a year behind schedule, largely because of the fact that SDIO has not had a clear idea of what kind architecture the test bed will be testing. An architecture is SDI's term for the blueprint it would use to set up the missile defense system.

Section 129 of the bill and the accompanying committee report address these problems. They state that none of the funds appropriated in this or any other act can be obligated or expended for National Test Bed Components of the National Test Facility until the Strategic Defense Initiative Organization has begun the development of the phase 1 system architecture and the follow-on strategic defense system architecture and the Appropriations Committees have received an interim report from SDIO on these architectures that the test bed will be testing.

SDIO will soon begin its phase 1 system support effort, which will be developing its phase 1 system architecture. This would be an architecture for a first phase deployment of strategic defenses. Sometime next year, SDIO also will begin its follow-on architecture study, which will be developing an architecture for a deployment after the phase 1 deployment.

Section 129 does not delay the actual construction of the facility at Falcon—that is, it doesn't prevent SDIO from beginning the site work for the building, laying the bricks and mortar, erecting the walls, and so forth.

Section 129, however, does prevent any funds from being spent on the national test bed components of the National Test Facility. By NTB components, we mean the computer and communications hardware and software that will be installed in the National Test Facility to make it operational.

In other words, SDIO can begin construction of the building, which isn't very other act can be obligated or expended in any way, but the architecture the test facility will test.

But it makes no sense to begin installing and integrating the NTB components into that facility until SDIO and the Congress has a more refined architecture developed that the facili-
ty will be testing. Section 129, therefore, prevents any money from being spent on those components until development of the phase I SDS architecture and follow-on SDS architecture has begun and the committee has had an opportunity to conduct a preliminary review of those architectures. Section 129 also mandates that the test bed and test facility honestly and fairly test whether SDI systems are technically feasible, cost effective at the margin, and survivable. The section states unequivocally that the goal of the National Test Facility and the national test bed shall be to stimulate, evaluate, and demonstrate architecture and support technologies that meet these three criteria. Furthermore, the section requires SDIO to submit a detailed report to the committee on how the test bed and test facility will accomplish this goal.

I emphasize the word “detailed” here. SDIO should not think that it can give the committee a cursory report on how this important goal will be met.

Finally, section 129 prohibits the national test bed and the national test facility from being converted into an operational battle management center for an early deployment of strategic defenses. The committee report elaborates on this point and states further that the committee does not want to see the test bed and test facility dedicated to any type of near term or early deployment of strategic defenses. The committee believes that the test bed should support the goals that meet these criteria of a long-term research program.

In other words, the committee does not want the national test bed and the national test facility to be used in any way to aid an early deployment of strategic defenses.

In summary, Mr. President, the national test bed and national test facility should be established to provide us with reliable, unbiased data on whether various defense systems are feasible, cost effective, and survivable. We should not be spending money on components of the test facility until we have a firm idea what kind of architecture will be tested. And we should not be setting up the test bed to aid early deployment of SDI.

The provisions in section 129 and the committee report ensure that these goals are met.

I think Senator Sasser has done an excellent job in the way he has handled that.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. BYRD. Mr. President, I ask unanimous consent that there be a period for morning business not to extend beyond 10 minutes and that Senators may speak therein.

The PRESIDING OFFICER. Without objection, it is so ordered.

CANDACE H. BECKETT WINS LAW SCHOOL ESSAY COMPETITION FOR THE BICENTENNIAL OF THE U.S. CONSTITUTION

Mr. BYRD. Mr. President, yesterday, at 2:30 p.m., the chairman of the Commission on the Bicentennial of the U.S. Constitution and the former Chief Justice of the U.S. Supreme Court, the Honorable Warren E. Burger, presented a $10,000 check to the winner of the law school essay competition for the bicentennial of the U.S. Constitution. This very distinguished competition was open to all law school students across the United States. The winner of this competition is a very talented and successful lady, Ms. Candace H. Beckett. Ms. Beckett is presently attending the University of Maryland School of Law, and she happens to be the wife of one of my policy staff members, Mr. David A. Corbin. Ms. Beckett received her bachelor's degree in sociology and history from the University of Illinois. She has a master's degree in the administration of justice from Southern Illinois University, and a masters degree in sociology from the University of Hawaii. She will graduate from law school this December and will then complete her doctorate degree in sociology from the University of Chicago. She told us that she has already accepted a position for the fall of next year with the Washington, D.C., firm of Finley, Kumble, Wagner, Heline, Underberg, Manley, Myerson & Casey.

Mr. President, I commend Ms. Beckett for winning this prominent competition, and I ask unanimous consent that her essay be printed in the RECORD.

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

ESSAY SUBMITTED TO THE COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION

LAW SCHOOL ESSAY COMPETITION

"Does the allocation of power between the federal and state governments and among the branches of the federal government contribute to the preservation of individual liberty and the functioning of our government?"

During the 200-year history of the American Constitution, the United States has evolved from 13 disunited States into the most powerful and productive country in the world. Under the framework of government designed in 1787, the United States has neither merely survived, but prevailed despite two world wars, a Great Depression, and more than one constitutional crisis. All the while, the United States has maintained a democratic society that is enviable in nature. The people have not only been preserved, but have been increased.

Fundamental components of the successful governmental framework formulated by the Founding Fathers are the twin pillars of American constitutionalism, separation of powers and federalism. It must be emphasized, however, that these are not against doctrines. They have been sources of folly and frustration and have created problems for officials in all levels of government, and in every branch of government. They have rendered the American government less than efficient, and, at times, have permitted abuse of individuals.

Opposition to separation of powers has a long, distinguished history. For two centuries its critics have pointed out that the system results in a large uncoordinated, unaccountable, does not permit outside involvement and accountability, and does not permit outside involvement and accountability, and it results in a government in formulating and sustaining coherent policy. Skeptics of separation of powers included such famous names as Benjamin Franklin, Patrick Henry and Thomas Paine.

The turn of the twentieth century, Woodrow Wilson questioned the system. He charged that separated powers had led to congressional supremacy, and because congresional power is in the hands of committees, it had resulted in government by committee. Wilson later challenged the basic premise of the doctrine because it illustrated the principle that "You cannot compound a successful government out of antagonisms.

"No living thing can have its organs offset against each other as checks, and live," he wrote.

Wilson was typical of many political observers of his time. In 1939, an author noted that his contemporaries "dispute the value and even the reality of the theoretical division of governmental institutions." 1

Recently, Lloyd Cutler has called for restructuring the American political system along the lines of the British parliamentary system. He charges that with the powers fractionalized power, it constitutes a structural weakness in government. 2

Federalism too, has been a source of confusion and problems. By reserving to the states the powers not granted to the federal government, there has always been the question of who has what power. For nearly four score and seven years after the founding of the nation, this produced one crisis after another as witnessed by the Virginia and Kentucky Resolutions, the Hartford Convention, and the Nullification Crisis. The Civil War determined that the national government is supreme, but the precise boundaries of state and national powers remained in dispute. For the next hundred years, the supremacy of the national government, in too many instances, particularly in the area of civil rights, was guaranteed only by federal troops.

The Supreme Court's decisions in National League of Cities v. N. San Antonio Metropolitan Transit Authority 3 which deal with the question of whether...
er state sovereignty restricts Congress in exercising its power under the commerce clause, reveal the current difficulties in deriving who has what power. Furthermore, Congress is not the more intimate since the government has traveled from the day when Alexander Hamilton wrote: "It will always be far more easy for the state governments to encroach upon the national authorities than for the national government to encroach upon the state authorities." In fact, George Washington was the first to note that "the mind of man. This brilliantly

The Framers feared a government that would become too mighty. The document was not a product of history, not visionary dreams. The Founding Fathers were aware that governments collapsed, as well as rose. Gibbons' classic, "The Decline and Fall of the Roman Empire" was published in 1776—the year it all began. Across the ocean, a government based on the understanding that while the Constitution is underwritten guarantees of rights. They understood that while the Constitution is constitutional authority among the three branches of government and between the national and state governments. To further control power, they made the different national and state officials answerable to different constituencies. After splitting constitutional authority into pieces, they balanced the pieces against each other. "Ambition must be made to counteract ambition," wrote Madison. Thus, the Fathers designed a system where in those passions would check each other, rather than a system that would collapse. Consequently, the legislative power is balanced by an executive veto. The executive power of appointment is balanced by the congressional obligation to advise and consent. The courts, both the legislative and executive branches with its ability to nullify acts of either, provide the reign of Terror. "Experience must be our only guide. Reason may mislead us," warned John Dickinson at the Constitutional Convention. World history as well as the fallings of the states under the Articles of Confederation gave the Framers no unrealistic expectations about the goodness of man. "We have, probably, had too good an opinion of human nature," Thomas Jefferson said in 1786. It is true, George Washington in 1786. "If men were angels, no government would be necessary," explained Madison. The Fathers were not anti-democratic. They were realistic and aware of man's cruder nature, and therefore could not trust direct democracy. Consequently, they filtered the people's potentially destructive passions through elected officials. Knowing that liberty also could be threatened by the officials the people elected, the Fathers distrusted elites as well. History showed that those in power often grow too bold and overreached, and that power often becomes concentrated in a single class or group. Therefore, the Framers opposed a system where all authority could become localized in the hands of all of the people, legislative, executive, and judicial, in the same hands," Madison declared, "may justly be pronounced the very definition of tyranny." The Framers understood the oppressive nature of governments, even ones operating under written guarantees of rights. They had just fought a revolution because King had usurped power and abused individual liberty. To insure that the government would not become too mighty by oppressing the people it was to serve, the Framers placed ultimate power in the electorate. They were unwilling, however, to

trust the judgment of people alone. After acknowledging that governments were needed because men were not angels, Madison proceeded to explain: "You must first establish a government to control the gov- erned; and in the next place oblige it to con- control itself. ** Experience has taught mankind the necessity of auxiliary precau- tions." Thus, they designed a system to block the overreach—a system of government that contained the conditions that entrapments of tyranny. The Framers dispersed constitutional authority among the three branches of government and between the national and state governments. To further control power, they made the different national and state officials answerable to different constituencies. After splitting constitutional authority into pieces, they balanced the pieces against each other. "Ambition must be made to counteract ambition," wrote Madison. Thus, the Fathers designed a system where in those passions would check each other, rather than a system that would collapse. Consequently, the legislative power is balanced by an executive veto. The executive power of appointment is balanced by the congressional obligation to advise and consent. The courts, both the legislative and executive branches with its ability to nullify acts of either, provide the reign of Terror. "Experience must be our only guide. Reason may mislead us," warned John Dickinson at the Constitutional Convention. World history as well as the fallings of the states under the Articles of Confederation gave the Framers no unrealistic expectations about the goodness of man. "We have, probably, had too good an opinion of human nature," Thomas Jefferson said in 1786. It is true, George Washington in 1786. "If men were angels, no government would be necessary," explained Madison. The Fathers were not anti-democratic. They were realistic and aware of man's cruder nature, and therefore could not trust direct democracy. Consequently, they filtered the people's potentially destructive passions through elected officials. Knowing that liberty also could be threatened by the officials the people elected, the Fathers distrusted elites as well. History showed that those in power often grow too bold and overreached, and that power often becomes concentrated in a single class or group. Therefore, the Framers opposed a system where all authority could become localized in the hands of all of the people, legislative, executive, and judicial, in the same hands," Madison declared, "may justly be pronounced the very definition of tyranny." The Framers understood the oppressive nature of governments, even ones operating under written guarantees of rights. They had just fought a revolution because King had usurped power and abused individual liberty. To insure that the government would not become too mighty by oppressing the people it was to serve, the Framers placed ultimate power in the electorate. They were unwilling, however, to
have to enlarge its conception of public power to include economic power." 29
29 The Federalists delivered their own intellimental assault. In Harvard Law Review,
Justice Department Solicitor General Gerald Stern challenged the Court's bias against
the New Deal's use of the commerce clause. 30 Going back to the Framers for
guidance, he argued that in the commerce clause the Founding Fathers provided
nothing more than a test for the commerce power it needed to resolve the problems of trade that the
could states not solve on their own. That argument was consistent with the constitutional order established in 1787.
In speeches and government briefs, New Dealers cited Stern's argument as they chal­ 31
lenged the Court for a broader interpreta­
tion of the commerce clause. 32
Thus, a "switch in time that saved nine" 33
did not, but it was a positive, not a nega­
tive step. It involved a constitutional con­rontation of the first order that brought forth the best creative instincts from the advocates and the best judgment of the high Court.
The New Dealers' confrontation with the Court also illustrated the wisdom of the Founders in having established the system which the members of each branch hold office: the President for four years, Sena­
to for sixteen years, and Representatives for two years. Supreme Court Justices for life. Roosevelt accumulated more power and held it for a longer time than any other person in American history. In 1937 and 1941, he was overwhelmingly elected and reelected presi­dent, and his political party gained significant majorities in both Houses of Congress. Throughout his time in office, he was powerful enough to control both branches of government. But the third branch, the Supreme Court, composed of appointees of previous administrations, pro­vided a check on swift, sweeping legislation. By the time the Court had converted to the New Deal line of thinking, another congressional election had taken place and Roos­velt's opponents in Congress had rallied, thus preventing the New Deal juggernaut from running out of control.
The "Madisonian Clockwork" 34 allowed for New Deal reforms, but curbed the potential for legislation that may well have trans­formed American government into a "different government" for years to come. 35 Furthermore, he had the power to control Congress by creating a "smoke screen" of legislation that was designed to temporarily divide the two branches of government. But the third
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The Constitution was consistent with the view that of the branches of government. The different branches do work together far more than is asserted. 36 The Supreme Court, for example, has constantly striven to eliminate these deadlocks. 37

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The "Madisonian Clockwork" 34 allowed for New Deal reforms, but curbed the potential for legislation that may well have trans­formed American government into a "different government" for years to come. 35 Furthermore, he had the power to control Congress by creating a "smoke screen" of legislation that was designed to temporarily divide the two branches of government. But the third branch, the Supreme Court, composed of appointees of previous administrations, pro­vided a check on swift, sweeping legislation. By the time the Court had converted to the New Deal line of thinking, another congressional election had taken place and Roose­velt's opponents in Congress had rallied, thus preventing the New Deal juggernaut from running out of control.
The Court provides the valuable check upon the government, subject only to the laws that govern them. Since Marbury v. Madison, when Justices became the interpreters of the Constitution, an individual member of the Supreme Court has the power, by pursuing his suit, to check a law passed by Congress and approved by the President. Before becoming a Justice, Robert Jackson noted: "Law suits are the chief instrument of power in our system. Struggles over power that in Europe call for regiments of troops, in America call on the judges to enforce the law against the government." 43 This instrument of power has enhanced liberty for all Americans. From the 1940's to the 1960's, black Americans found the Court to be the branch of government willing to force to America to live up to its promises to all of its citizens. Likewise, unsuccessful with the other government branches, environmental, consumer press, and labor groups have turned to the courts.

You cannot eat the Bill of Rights goes an oft-quoted tragi comical event in European history during the 1930's, revealed the reality of the phrase. In the United States, however, the three branches of government, with the Supreme Court, defend and defend and defend, that individual liberty and economic security need not be incompatible. While a lot of attention has been given to the Roosevelt Court, the justices, less attention has been paid to its role in preserving individual liberties, and this is unfortunate. During that turbulent decade, the American government met the economic crisis without tossing aside the Constitution and the Bill of Rights. 65 Based on the equal protection clause, this landmark case further insured that no one was to be deprived of life, liberty, or the right of assembly.

During that turbulent decade, the American ship of state has sailed in quite troubled waters. 64 W. Wilson, Congressional Government 28-31 (1961); J. Rohr, To Run a Constitution 60-66 (1985). The American ship of state has sailed through some mighty rough storms and it undoubtedly will have to weather many more. But it has a solid structure thanks to the Constitution writers of 1787. The crew may get out of hand, at times, but the sturdy vessel keeps them out of the water.

The emphasis on individual rights displays the respect it has been accorded of the American government since Day One, 1787. The people, said Jefferson "are the best judges of the preservation of our liberty." 1 A dependence on the people is, no doubt, the primary control on the government, wrote Madison. 2 This characteristic has separated the United States from much of the world. During periods of social convulsions or political turmoil, when so many other countries move in the direction of restricting democracy (i.e., banning elections and closing presses), the United States has moved in the direction of expanding democracy. To Americans, the illus of democracy are best cured by more, not less, democracy. This is what the Fathers intended for the Constitution because it would result in a government a more perfect Union. The people, not institutions or states, are sovereign.

In this sense, Chief Justice Warren could comment that the tenure of his greatest consequence for all Americans. 3 Based on the equal protection clause, the Framers intended for the Constitution to be a framework of government that each American is armed with the means to make his or her own fight. Chief Justice Warren was typical of the Supreme Court's which in recent decades has abolished the "white primary," 4 racial gerrymandering, 5 and tax as a condition for political representation. 6 The Court has been typical of the United States, in general. Through constitutional amendments, suffrage has been extended to include people with black skins, women, and eighteen-year-olds, and the "poll tax" has been abolished. By the 1950's and 1960's, Constitutional Law has been the law of legislation strengthening statutes protecting the right to vote. By 1965, the executive branch was fully on board as President Johnson approved for the first time a law to make sure every American the right to vote and hold office.

Despite their distrust of popular democracy, the Framers never questioned that government should be accountable to the people, for the people constitute the most important "precaution" against the abuse of power. The people select who will govern and throw out of office those who betray that trust. Through elections, the people evaluate and check the so-called power elite, and provide the greatest protection of their own liberties. "We the people," through separation of powers and separation of branches, have prevailed. The doctrines have their faults, but they have successfully performed their most valuable tasks. Recent events have again demonstrated the sagacity of the Framers in recognizing that "men are not angels," and constructed a framework of government sufficient to deal with that. 7 Over the years, the doctrines have been instrumental components of a Constitution that has allowed Americans to enjoy "life, liberty, and the pursuit of happiness" by providing a safe, stable government that not only guards against tyranny, but promotes liberty. The American ship of state has sailed through some mighty rough storms and it undoubtedly will have to weather many more. But it has a solid structure thanks to the Constitution writers of 1787. The crew may get out of hand, at times, but the sturdy vessel keeps them out of the water.

footnotes

56 The detention of Japanese aliens during World War II does not contradict this point. This unfortunate event occurred in the 1940s, and was a wartime measure. See Korematsu v. United States, 323 U.S. 214 (1945).
55 The Roosevelt Court, which in recent decades has successfully performed their most valuable tasks. Recent events have again demonstrated the sagacity of the Framers in recognizing that "men are not angels," and constructed a framework of government sufficient to deal with that. 7 Over the years, the doctrines have been instrumental components of a Constitution that has allowed Americans to enjoy "life, liberty, and the pursuit of happiness" by providing a safe, stable government that not only guards against tyranny, but promotes liberty. The American ship of state has sailed through some mighty rough storms and it undoubtedly will have to weather many more. But it has a solid structure thanks to the Constitution writers of 1787. The crew may get out of hand, at times, but the sturdy vessel keeps them out of the water.

103 U.S. 168 (1881).
56 272 U.S. 52, 293 (1926).
57 106 S. Ct. 3181, 3187 (1986).
62 Van Alstyne, supra note 11, at 1709.
63 For previous announcements of the death of federalism, see Tribe, supra note 24, at 17 n.9.
64 A. Tocqueville, Democracy in America 1901 (1945). This unfortunate event occurred in the 1940s, and was a wartime measure. See Korematsu v. United States, 323 U.S. 214 (1945).
69 325 U.S. 262, 311 (1942).
70 314 U.S. 684 (1942).
71 5 U.S. (1 Cranch) 137 (1803).
72 R. Jackson, The Struggle for Judicial Supremacy x (1941).
73 For the detention of Japanese aliens during World War II does not contradict this point. This unfortunate event occurred in the 1940s, and was a wartime measure. See Korematsu v. United States, 323 U.S. 214 (1945).
74 268 U.S. 653 (1925).
75 293 U.S. 354 (1939).
76 301 U.S. 243 (1937).
Mr. BYRD. Mr. President, I ask the distinguished acting Republican leader, Mr. DURENBERGER, if Calendar Orders No. 369 through 381 of the Executive Calendar have been cleared on that side of the aisle.

Mr. DURENBERGER. The majority leader is correct. They have been cleared.

Mr. BYRD. I thank the distinguished Senator.

LEGISLATIVE SESSION

Mr. BYRD. Mr. President, I ask unanimous consent that the Senate go into executive session to consider Calendar Orders No. 369 through 381; that those nominations be considered en bloc and agreed to en bloc; that the President be immediately notified of the confirmation of the nominees; and that the motion to reconsider be laid on the table.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The nominations considered and confirmed en bloc are as follows:

DEPARTMENT OF DEFENSE

John J. Welch, Jr., of Texas, to be Assistant Secretary of the Air Force.

Kathleen A. Buck, of Virginia, to be General Counsel of the Department of Defense.

Stephen M. Duncan, of Colorado, to be an Assistant Secretary of Defense.

IN THE AIR FORCE

The following-named officer, under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

To be brigadier general

To be lieutenant general

IN THE ARMY

The following-named officer to be placed on the retired list in grade indicated under the provisions of title 10, United States Code, section 1370:

To be lieutenant general

The following-named officer for appointment to the grade of lieutenant general on the retired list pursuant to the provisions of title 10, United States Code, section 1370:

To be lieutenant general

The U.S. Army National Guard officers named herein for appointment as a Reserve Commissioned Officer of the Army, under the provisions of title 10, United States Code, sections 593(a), 3371 and 3384:

To be major general

To be brigadier general
Col. John W. Schaeffer, Jr., FR, U.S. Army.

To be major general

To be major general

IN THE NAVY

The following-named officer for appointment to the grade indicated, under the provisions of title 10, United States Code, section 601(a), in conjunction with assignment to a position of importance and responsibility designated by the President under title 10, United States Code, section 601(a):

To be lieutenant general

The following-named officer to be placed on the retired list pursuant to the provisions of title 10, United States Code, section 593(a), 3371 and 3384:

To be major general


Eilertson, and ending Earl H. Harley, which nominations were received by the Senate and appeared in the Congressional Record of September 30, 1987.

Mr. BYRD. Mr. President, I move en bloc that the nominations be reconsidered.

Mr. DURENBERGER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BYRD. Mr. President, I ask that the President be immediately notified of the confirmation of the nominees.

The PRESIDING OFFICER. Without objection, it is so ordered.

LEGISLATIVE SESSION

Mr. BYRD. Mr. President, I ask unanimous consent that the Senate return to legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

BICENTENNIAL MINUTE

October 23, 1895: Clinton P. Anderson born

October 23, 1985: Clinton P. Anderson, a distinguished U.S. Senator and Secretary of Agriculture, was born in Centerville, SD. In 1917, gravely ill with tuberculosis, he entered a sanatorium in New Mexico. His health restored, Anderson succumbed to the attractions of New Mexico's turbulent political and business climate, and made that State his home until his death in 1975.

In 1940, following service as a regional New Deal agency administrator, Anderson won a seat in the U.S. House of Representatives. Several years later, his effective House committee investigation of wartime food shortages led President Truman to appoint him Secretary of Agriculture. In that position, he directed post-World War II programs to deal with national commodity shortages and European food needs.

In 1949, Anderson began his 24-year Senate career. During those years, he served at various times as chairman of...
the Interior Committee, the Committee on Aeronautical and Space Sciences, and the Joint Committee on Atomic Energy. Always in fragile health, Anderson cofounded Medicare. He was the first to voice U.S. interest in peaceful uses of atomic energy. The landmark 1964 Wilderness Act, of which he was a principal author, represented the culmination of his career-long interest in resources conservation.

Senate historian Richard Baker concludes in his biography of Anderson that the New Mexico Senator:

Served at a time when issues that traditionally had been associated with the West—those involving management of energy, land, and water resources—rapidly evolved into national issues. Anderson's distinction as a legislator came because he was able to reconcile and balance the interests of his State and region with those of the country at large. When he advocated legislation of obvious value to his State, he did so in terms that colleagues from other regions found difficult to deny.

92D ANNIVERSARY OF THE BIRTH OF SENATOR CLINTON P. ANDERSON

Mr. BINGAMAN. Mr. President, I rise to thank the distinguished minority leader for his comments on the occasion of the 92d anniversary of the birth of Senator Clinton P. Anderson. The people of New Mexico appreciate his kind words about the career and accomplishments of one of the greatest public servants New Mexico has known since its statehood in 1912. I want to take this opportunity to add a few thoughts about what all of us in this body might be able to learn from the career of Senator Anderson.

I would suspect that most of my colleagues in the Senate are familiar with the great many legislative accomplishments of Senator Anderson. But today I will only mention his accomplishments in the area of conservation. Those have been well documented in "Conservation Politics," a book by Senator Anderson, and "The Wilderness Act," written by the distinguished minority leader. It was through the Senate, and the Joint Committee on Atomic Energy, that Anderson played a key role in enacting: The Wilderness Act, the Land and Water Conservation Fund Act, the Outdoor Recreation Act, the Water Resources Act, the Upper Colorado Storage Project Act, and legislation authorizing the Navajo Indian irrigation project, the San Juan-Chama Transmountain Diversion Act, and the Public Land Law Review Commission.

Clinton Anderson's effectiveness is captured by the bottom-line words of Richard Mcardle, who was Chief of the Forest Service from 1952 to 1962: "Without Clinton Anderson, there would have been no Wilderness Law."

Dr. Baker's history of Clint Anderson's Senate career is interesting not just to New Mexicans and to conservationists. As the distinguished minority leader's comments indicate, Anderson's Senate career has some instructions for all of us in the Senate today. It is a road map on how to be an effective leader in the Senate.

Of course, few of us have been lucky enough to be endowed with the great talents and personal qualities which were given to Clinton Anderson. We cannot all be blessed with his great intelligence, his creativity, his high energy, his innate sense of fairness, and his indifference to acquiring power for its own sake. But we can learn from the goals he set, the attitudes he fostered, the habits he practiced.

For example, Anderson rose above any particular region's interests, any particular State's interests, and any special personal interest. In all that he did, Clinton Anderson put the long-term interests of the Nation first. Then he strove to be sure that the interests of his own State of New Mexico matched those national interests. He was able to be objective and receive its fair share of the benefits of national policies he worked so hard to implement.

He was not an ideologue. He was principled, but he was not inflexible. He was also pragmatic. He was able to distinguish the desirable from the possible.

He was humble enough to pride himself on being a facilitator of other men's and women's ideas.

He aspired to be a mediator. He negotiated between Indians and Anglos, between residents of the San Juan and Rio Grande River basins, between State engineers and the Bureau of Reclamation, between developers and preservationists, and between the House and the Senate.

But he avoided entanglements in petty personality clashes and jurisdictional fights.

He kept his eye on long-range objectives, and fine-tuned his sense of timing about when he could take effective action on proposed legislation.

When he saw the time was right, he carefully orchestrated every step of his legislative initiatives.

He insisted that the legislation he sponsored be fully supported by the best scientific research and analysis available. He demanded that his staff spend hours doing careful study of any issue before briefing him. And staff judgments as to the political implications of staff recommendations were out of bounds. "You tell me the facts," he would tell his staff. "I will worry about the political side."

In committee work, he was always well briefed. He was on top of the substance and procedure of every issue he considered. In command of the issues, he could persuade wavering colleagues. And as a committee chairman, he was always scrupulously fair.

I yield the floor, Mr. President.

THE LOSS OF A DEAR FRIEND: PHIL MCGANCE

Mr. ROCKEFELLER. Mr. President, my staff and I, the U.S. Senate and, most of all, the people of West Virginia have lost a dear friend: Phil McGance, who died yesterday morning, years before his time, at the age of 49.

Phil McGance worked in this body for 20 years, on the staff of my predecessor, Senator Jennings Randolph. Coming to Senator Randolph's staff, after graduating from West Point, and serving in the Army, Phil rose to become Senator Randolph's administrative assistant, his alter ego, his closest friend—and virtually a son.

When I came to the Senate, Phil had already made plans to join Senator Randolph in starting a consulting firm downtown. But because of his extraordinary knowledge of West Virginia and the Senate, I asked Phil if he would stay on and help me get my Senate office started. With typical generosity, good humor and a commitment to service, Phil agreed to stay on for "a few months." And with typical generosity, good humor, and commitment to service, he stayed for more than a year; sharing his experience, wisdom and insight; doing extraordinary work for the Senate and for West Virginia.

It is impossible to express how much Phil McGance worked for West Virginia—and how much West Virginia and our people meant to him. For years,
Phil was involved in virtually everything that Senator Randolph worked on, and Senator Randolph was both chairman of the Public Works Committee and a ranking Democrat on the Labor and Human Resources Committee. West Virginia had a desperate need for improved infrastructure, and in the 2 years that I had the road, a bridge, a dam, or a sewer system that Phil McGance didn't work on, fight for, or care passionately about. He knew every project: the history, the politics, what it meant to the community. Virtually every community in West Virginia benefited from Phil McGance's energy, his dedication, and his ability.

And West Virginia had a desperate need for human services: for better schools, for food stamps, for black lung benefits, for safer coal mines and other workplaces—for the whole range of services that help combat poverty and give people an opportunity to build better lives. And Phil worked on those problems with the same energy and passion, helping Senator Randolph on many of the historic pieces of legislation that came through the Labor Committee during the 1960’s and 1970’s.

He was the total public servant; his commitment to his work and to the people he represented was extraordinary. In early 1983, I began trying to help an ailing steel company, Wheeling Pittsburgh, survive despite going into chapter 11, and a crippling strike. Phil McGance had worked with Wheeling Pitt since 1977. He knew the head of the steelworkers union; he knew the key people at the agencies that had worked with Wheeling Pitt. He set up what we called a full-time Steelworkers shop in Wheeling, staffed by a person who would run the clinic: trying to help management, workers, the Government, and the banks find solutions that would enable Wheeling Pitt to survive.

A full-fledged pension and bankruptcy law without a license; he helped mediate, without a title, simply because he was trusted by everyone. And because everyone knew that Phil had no other agenda but to help the company survive and save the jobs for the Ohio Valley. When we flew to Wheeling in November 1985, to celebrate the settlement of the strike which ensured the company’s survival, it was one of the happiest days of Phil’s life.

Above all, he was an extraordinary friend. The intensity he brought to his work coexisted with a great generosity and warmth and a terrific sense of humor. Politics is a tough business, getting things done in Government can be frustrating, and the problems Phil battled were numerous and never ending. Through it all, however, he was always optimistic, upbeat, hopeful; he never succumbed to cynicism or defeatism. He buoyed the spirits of everyone around him.

I was going to conclude by saying that. West Virginia would never truly know how much Phil had done for them. But one nice thing is that so many did know. He had thousands of friends—in West Virginia and around the nation—who will always think of him with affection, respect, and gratitude. We will always be disappointed that he left us much too early, but we’ll always be grateful for the times we had together.

SITUATION IN TIBET

Mr. PELL. Mr. President, in a recent editorial, the New York Times addressed the tragic situation in Tibet. The Times wisely urged the Chinese to undertake a dialog with the representatives of the Tibetan people on a new relationship between China and Tibet. The Times suggested India’s relations with the Himalayan nations of Nepal, Bhutan, and Sikkim as a model. India’s relationships with Nepal and Bhutan provide a good model for a future China-Tibet relationship. Both Nepal and Bhutan are sovereign nations. They are bound to India by certain treaties, which are essential for these landlocked nations, but both are nonetheless sovereign nations. Both are members of the United Nations.

Sikkim, by contrast, provides a most unhappy precedent. Sikkim was a sovereign nation until it was gobbled up by India in 1975. Today Sikkim is just a state in the Indian union, although its people—like the Tibetan people—yearn for their own country, with a government of their own choosing.

There are other parallels between Sikkim and Tibet. In both cases, citizens of the occupying power have resettled their own nationals in the Himalayan state. In both cases, the population of the occupying power far exceeds the indigenous population. As resettlement proceeds, a unique and wonderful culture is being overwhelmed.

The Himalayan peoples have the same fundamental right of self-determination as do other nations. As Princess Yangchen of Sikkim points out in her letter, we are all diminished when the ‘principle of self-determination is sacrificed for the demands of the moment.’ We must not overlook the tragic plight of Sikkim and Tibet.

Mr. President, we ask unanimous consent that the letters of Princess Yangchen and the Makranskys be printed in the Record.

There being no objection, the letters were ordered to be printed in the Record, as follows:


TIBETANS ARE PRISONERS IN THEIR OWN COUNTRY

SIKKIM NO MODEL

To the Editor:

"Stand Up For Decency in Tibet" was correct in criticizing the Administration's support for China's policies in Tibet. However, the concluding suggestion that Sikkim could be a model for China's relations with Tibet was misguided.

Sikkim has been virtually annexed by India. Six months later, as the fall of Saigon dominated the world's headlines, a division of Indian troops completed the occupation there in a manner now known by India as merely another Indian state. It does not have, as Tibet does, even a nominal suggestion of autonomy.

In addition, Indian policies, while far less ruthless than those of the Chinese, have been far more effective in eradicating the culture of their new subjects. As a result, there is little to suggest that Sikkim is anything but a model to be avoided.

In this context, it is worth noting that the Reagan Administration policy on Tibet is based on the belief that Chinese-United States relations are more important than the human rights of six million Tibetans. That is shocking but not very surprising. The Sikkimese have not forgotten that the Ford Administration sat silently in support of another large power, India, whileIndian policies, while far less ruthless than those of the Chinese, have been far more effective in eradicating the culture of their new subjects. As a result, there is little to suggest that Sikkim is anything but a model to be avoided.

We Himalayans watch with resignation as the United States supports the aggressors in Sikkim and in Tibet, all while championing human rights. We hope that one day the United States will realize that the international principle of self-determination is devalued each time it is sacrificed for the demands of the moment.

To the Editor:

As a research scholar in Asian studies and his wife, both speakers of the Tibetan language, we visited Tibet recently for a month, traveling widely and talking to many Tibetans. We returned to the United States early last month, and after having read about the demonstration in Lhasa (front page, Oct. 3), feel compelled to share some of our observations.

Before 1950, Tibet was a sovereign Buddhist country run independently by the Government of the Dalai Lama. In 1950, Tibet was invaded and seized by China, a predominantly Han Chinese, an ethnic and language group separate from the Tibetans. Since then, the Communist Chinese have destroyed virtually all the religious and cultural institutions of Tibet, and one million people (of the original six million) have died by torture, execution or starvation.

In spite of this, incredibly, the Chinese Government claims the Tibetans welcome the presence of the Han Chinese. It also claims Tibetans have benefited from recent policies offering economic aid and permission to build monasteries. Our experience is contrary to these claims. Here is what we saw and heard:

The single most prevalent sight in Tibet's main cities is Chinese soldiers. Lhasa and Shigatse are armed camps. It is evident that the Chinese do not feel welcome. When talking with the Tibetans, we noted a pervasive fear of being overheard by informants. They changed the subject abruptly when a Chinese walked by. A common experience is that appearances, beatings and executions are still going on as the Chinese response to any discussion of Tibetan autonomy, and a number
of Tibetans are still serving prison sentences from the time of the Cultural Revolution. The most common word we heard was "torsong"—destroyed. We asked about the monasteries and religious texts and art—destroyed: homes, family members—destroyed.

We saw massive number of Han Chinese in the main cities, where they now form a majority. The Peking Government began moving large numbers of Chinese into Tibet in the early 1960's. Chinese hold all positions of responsibility and authority, but met almost none who could say even "yes" or "no" in Tibetan. Evidently, the Chinese feel no need to learn how to speak to Tibetans. They are there simply to take over. The Tibetans will soon be engulfed by the Chinese, along with their language and culture.

Mr. HEINZ. Mr. President, most of the instances of fraud I have discussed over the last few weeks have been quite substantial. Multimillion dollar steel fraud, multinational coffee fraud, and multicorporation wood fraud have all figured in these brief statements. It would be easy to deduce from these examples that customs fraud only occurs in major industries on a large scale. Today's fraud clearly dispels that notion. Customs fraud can and does strike small companies in limited areas as well as the multinational giants. No company, be it large or small, is exempt from this menace lurking on our docks and in our airports.

Mr. HELMS. Mr. President, yesterday the police department of Drammen, Norway, made public its report on the Kongsberg Vepenfabrik's transfer of critical technology to the Soviet Union. Senators will recall that Kongsberg was the partner with Toshiba in the multi-million dollar dismantling of the milling machines and the accompanying computer technology for the improvement of Soviet submarine propulsion technology, an international crime which the Senate has already roundly condemned.

Mr. President, the Norwegian police report contains many disturbing revelations. Foremost among them is the evidence of still more breaches of technology security, conducted with the cooperation of firms in France, Italy, Germany, and possibly, England. The report details many of the transactions which, when considered in aggregate, amount to a roadmap of treachery.

Mr. President, these revelations, and the others contained in the police report, no doubt contain much that is embarrassing to the Government of France. I commend the Norwegian officials responsible for this investigation for facing up to their responsibilities. We have had indications that the Norwegians plan to implement serious measures to toughen their enforcement of their security in technology export and the United States should welcome those moves.

Mr. President, a troubling aspect of these revelations has emerged because of the reactions of one country, France, to the ongoing investigation in Norway. As it became clear that at least one French company would be implicated in the report, word came to the United States that the Government of France did not consider the affair worthy of serious attention. My conversations with administration officials confirmed this report, and on Wednesday, October 22, I wrote to the Ambassador of France in Washington to register my concerns.

Mr. President, I ask unanimous consent that my letter be printed at this point in the Record.

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

U.S. SENATE

COMMITTEE ON FOREIGN RELATIONS,


Dear Mr. Ambassador: Recent revelations of high technology machinery sales to the Soviet Union by the French company Ketler-Forest, and the mild reaction to them by the French Government, have dismayed and confused many friends of France in the United States Senate. I take this opportunity to stress to you that the impact of this sale, and the steps taken to deal with it by the French Government, are of grave concern to all Americans.

I am aware that the French Government has acknowledged the sales, which took place in the mid-1970's. However, I am troubled to learn in discussions with officers of the French Government recent reports for the serious transfer that the Government of France considers these violations to be "minor and isolated," and that the violations will not "prompt a change in procedure for export authorizations" by the French Government.
Mr. Ambassador, if these reports are true, they reflect a fundamental misunderstanding of the impact which these sales had, as well as a misunderstanding of the intent with regard to the resolve of the United States to make COCOM work.

First, the Japanese company Toshiba clearly did not sell the whole machine to the Soviets, which precipitated strong legislation in the U.S. Congress earlier this year, would never have taken place if the French Government had opened the door to the Soviets. Second, the report of French satisfaction with the status quo in authorization procedures lends an impression, however undesirable, that the French do not consider major advances in Soviet offensive weapon capability a matter for concern.

In short, Mr. Ambassador, the original sale was indeed a major breach in the defense of the West, and any attempt to conduct business as usual in light of such a breach cannot be welcomed anywhere in the West.

The Senate of the United States is on record with regard to the serious approach which the American people want us to take towards technology transfer violations. I urge your government to help us achieve our common goal of technology security, and to reject any counsel which invites an attitude of ease and nonchalance in the face of this important issue.

In that sense of cooperation, I request that you provide your Government's position on the following points:

1. In 1979 a U.S. person observed five Forest machine tools being prepared for shipment to the Soviet Bloc. These machines were seven axis machines.
   a. Are these machines now?
   b. Was a license issued for these machines? If so, why?
   c. If the machines were limited to three axis capability, what efforts has the French Government taken to ensure that they were not up graded to seven axis capability?
   d. How are these machines currently engaged?
   e. Are there any outstanding service or parts contracts with these machines?
   f. Please provide a full inventory of all Forest machine tool exports to the Soviet Bloc from 1976 to present.

Mr. HELMS, Mr. President, I have written letters to the Ambassadors of Germany, Great Britain, and Italy to ask that their Governments recognize the concern which all Americans have for the issue of technology security.

This Senate is on record—on the trade bill with regard to the actions of the Toshiba Corp., and I believe the world is aware of our desire to make sure that our technology transfers remain secure, I am gratified to receive word today from the French Embassy in Washington that the French have met with American officials in Paris yesterday, and I am told that the Government of France will shortly be making a statement about the issue of technology security.

Mr. President, I trust that the Government of France will make such a statement, and I am hopeful that all Western governments will be making this technology more secure than ever. I hope that the Norwegian police will receive full cooperation from other governments involved—France, Italy, West Germany, and Great Britain—and that their lack of cooperation up to this point, as described in the report, will quickly be supplanted by their wholehearted support of this investigation. I cannot allow the ghost of glasnost to induce a false sense of ease about this most important issue.

Finally, Mr. President, there is the question of end users in the Soviet Union. With the exception of the Baltic Naval Shipyard, the Norwegian police do not identify the end user or the use to which these sophisticated machines are being put. We can only use our imagination based on almost 70 years of experience dealing with this regime. Are these machines being used for nuclear weapon production or military jet engine production? We do not know, but it is imperative that we find out.

Mr. President, I ask unanimous consent that the Norwegian police report be printed at this point in the Record.

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

INVESTIGATION OF THE TRANSFER OF TECHNOLOGY FROM KONGSBERG VAPENFABRIK TO THE SOVIET UNION

In a letter dated 9 March 1987 sent to the head of the Police Security Service, the Public Prosecutor gave the following instructions with regard to the investigation:

"I take the liberty of recapitulating on the following:

1. On Friday 27 February 1987, the Director General of Public Prosecutions was briefed on the matter by Director General B. Barth from the Ministry of Foreign Affairs.
2. That same day, following consultations with yourself, inter alia, the Director General decided that the matter would be subject to investigation.
3. It was further decided that the undersigned was to be in charge of the case on behalf of the prosecuting authorities.
4. On Monday 3 March 1987, I met with Director General Barth and Head of Department of the Ministry of Foreign Affairs. The purpose of this meeting was three-fold:
   a. To announce that an investigation had been instituted.
   b. To determine the Foreign Ministry's plan of action for the immediate future in connection with ongoing investigation under the Foreign Ministry's inspectorate.
   c. What information was to be given in response to possible inquiries from the media.

Upon my request, Mr. Ulrich, Deputy Head of Police Security Services, was also invited to attend the above meeting, and I assume the responsibility.

4. Later that day, you informed me of your decision to assign the investigation to the Chief of Police in Drammen, and that the National Security Bureau would provide the necessary assistance—to which I have no objection.

5. On Friday 6 March 1987, a meeting was held at the National Security Bureau where a plan for the investigation—including work program—was drawn up and discussed in further detail.

6. I take it that I will be kept informed of the progress of the investigation at appropriate times, and that questions of particular importance will be discussed with me in advance. Whenever necessary, I shall report directly to the Director General of Public Prosecutions.

7. I emphasize the importance of maintaining close contact between the investigations.


I take it that this letter will be included in the criminal case file, so as to ensure that the Director General's decision to institute investigations receives sufficient priority."

During the course of the investigation, however, information was revealed indicating that Kongsberg Vapenfabrikk could also be suspected of having sold several other numerical control systems to the Soviet Union, in violation of COCOM Regulations. This suspicion was reported by the police to the authorities. As a result, the Public Prosecutor decided, on 17 June 1987, to institute investigations into a number of other deliveries of numerical control systems to the Soviet Union.

During week 23, the Director General of Public Prosecutions decided that all deliveries of numerical control systems from Kongsberg Vapenfabrikk where the U.S.S.R. was the end-user, were to be investigated. It was further decided that the Drammen Chief of Police was to be in charge of this investigation, which was to be given top priority. The Chief of Police was consequently relieved of his normal duties, in order to concentrate his efforts exclusively in this case.

In connection with this extended investigation, the Public Prosecutor issued the following instructions, dated 13 July 1987:

"The Director General of Public Prosecutions has decided that all deliveries of numerical controllers from Kongsberg Vapenfabrikk, with the U.S.S.R. as end-user, are to be investigated.

The investigation is to be assigned to the Chief of Police in Drammen and is assumed to be conducted with the directives and routines already established for the ongoing investigation of the delivery of 4 NC 2000s to Toshiba.

At the event of the investigation—and perhaps more particularly, the examination of documents—should give cause for suspi-
tion of irregularities concerning other deliveries of high technology to the U.S.S.R., appropriate investigation must ensue.

As to deliveries to countries other than the U.S.S.R. and which are covered by COCOM restrictions—our initial aim is merely to draw up a general survey of the number of deliveries involved, when these deliveries take place and, of course, the goods delivered.

I emphasize the importance of giving this case top priority.

It is assumed that the technical experts will be kept posted of developments at all times, and that they will continue with their own work, parallel to the police investigation.

Furthermore, the police must, as soon as possible—and, if necessary, through the Foreign Ministry, find out whether and how COCOM lists are assigned to the COCOM itself. I await a further discussion on this subject.

Pursuant to the above instructions, and on the basis of information revealed during the investigation so far, the police has, in addition to the technology mentioned above, also investigated Kongsberg Vapenfabrikks' sale to the Soviet Union of numerical controllers of models CNC 300 and CNC 2000, PC 150 M, Repair Shop, PM 500, as well as the delivery/compromising of the numerical controllers' system program listings and necessary equipment to make use of these listings.

On 2 October 1987, the Director General of Public Prosecutions received information from the Ministry of Trade regarding a contract (the FORM contract) for the sale of a computer aided designing and manufacturing system (CAD/CAM). The contract was concluded on 10 July 1986 between Kongsberg Trade and the purchasing organization KOVO I Czechoslovakia. On 2 October, Deputy Director General of Public Prosecution, Mr. Alseth, informed the Drammen Chief of Police that the Director General had decided that the matter was to be investigated, and that this investigation was to be assigned to the Drammen Police Department.

This investigation order was confirmed in writing a letter dated 5 October 1987 from the Deputy Director General of Public Prosecutions.

B. Summary of investigation results

This investigation has been directed at sales from Kongsberg Vapenfabrik to the Soviet Union as end-user, and, in one case, to the People's Republic of China as end-user, of numerical controllers of the following models: CNC 300, CNC 2000, and CNC 2000 SAJO.

Mini-computer of the following model: KS 500 (which is also a part of NC 2000 and PC 150 M).

Computer programs of the following models: HAL program and NMG program.

PM 500—programming equipment. Equipment which enables the Soviets to upgrade the NC 2000 system program, such as


The FORM contract with Czechoslovakia, which consists of the following main components:

NORD 505 computer from Norsk Data with peripherals, and Kongsberg drafting system.

Kongsberg CAD/CAM program DMS. Swedish finite element method program FEMAPAC.

As for the numerical control systems, they have all been installed on third country control systems capable of operating 3 axes simultaneously.

CNC numerical controllers are "freely programmable", according to COCOM Regulations, not allowed for export to countries of the "Eastern Bloc".

Applications may, however, be filed with the national authorities for permission for such exports (government may permit). In such cases, permission must be restricted to CNC control systems capable of operating a maximum of 2 simultaneous axes.

Technically speaking, therefore, all sales of CNC 300 control systems to the Soviet Union constitute a breach of COCOM Regulations. However, we shall revert in the below to the question of why Kongsberg Vapenfabrik cannot be held liable in this respect.

During the period starting in September 1976 and ending in July 1984, Kongsberg Vapenfabrik exported a total of 32 CNC control systems to the Soviet Union, 29 of which were capable of operating 3 axes simultaneously, and one CNC 203 system capable of operating 4 axes simultaneously.

CNC numerical controllers are "freely programmable", according to COCOM Regulations, not allowed for export to countries of the "Eastern Bloc".

Applications may, however, be filed with the national authorities for permission for such exports (government may permit). In such cases, permission must be restricted to CNC control systems capable of operating a maximum of 2 simultaneous axes.

As part of the investigation, and in order to be able to assess the control systems' capabilities, it has been necessary to collect as much information as possible concerning the machine tools that have resulted from such investigations have led us to suspect that machine tool builders in France, West Germany, Italy and Japan have also been involved in such activities. COCOM Regulations also indicate that a company in Britain on one occasion has delivered two machine tools in violation of COCOM Regulations. For further reference, see chapter IV below.

In conjunction with the sale of NC 2000 control systems attached to Toshiba machine tools, Kongsberg Vapenfabrik also sold two units of PC 150 S programming equipment and the HAL and NMG software programs. The investigation has established that this equipment has a computer capacity which requires the permission of Norwegian authorities for export to the "Eastern Bloc". Such permission was granted in reply to an application for export from 29 October 1986. In this particular case, and the sale is therefore in compliance with regulations.

Where the Repair Station/Dynamic Test, Membrane-static test station, and PM 500—programming equipment.

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therefore does not have the status of an international organization.

Because COCOM Regulations is not per se a punishable offence, and all resolutions and directives adopted within the committee must therefore be incorporated into the respective national legislation.

In Norway, the "Provisional Act of 13 December 1946, no. 3 on the Ban on Exports" is the central instrument in cases of violation of COCOM Regulations. The penalty limits amount to fines or imprisonment for up to 6 months unless it can be shown that the relevant statute of limitation is two years.

Another statutory provision that may apply is Section 166 of the Penal Code, which fixes a penalty of fines or imprisonment for up to two years for persons giving untruthful evidence to a public authority. In this case, the limitation period is 5 years.

In this connection, it must be emphasized that the lack of appropriate legal provisions, including the short limitation periods, has constituted a major problem with regard to punishing the persons responsible for breaches of COCOM Regulations revealed by the police investigation.

III. ACCOUNT OF THE INVESTIGATION

Immediately after the Chief of Police had been instructed, on 3 March 1987, to head the Kongsberg Vapenfabrik's sale of the 4 numerical controllers to Toshiba, with the Soviet Union as end-user, he personally engaged as Public Prosecutor and the Head of the Police Security Service, an investigation group, consisting of police officers from the Police Security Service and Kongsberg and Drammen Police Departments. The group's headquarters were established in the Drammen Police Department.

Communication lines and reporting routines were set up between the organizations involved, and the necessary resources of technical and other equipment were obtained through the Ministry of Justice. It may be worth mentioning that, given the order to investigate all deliveries of numerical control systems from Kongsberg Vapenfabrik, the acquisition of appropriate computer equipment was considered absolutely essential to establishing a general outline of the enormous amounts of data contained in the document seizures.

As already mentioned in the above, the object of the investigation was to inquire into the numerical control systems, the machine tools, etc., which were all quite unknown to the police investigators. It was therefore soon established that the assistance of technical experts outside the police force would be required. With the Public Prosecutor's authorization, Head of Research H.K. Johansen and Research Officer O. Garberg, both from the Norwegian Defence Research Institute, were engaged as technical experts. They have since worked as part of the investigation group and have continuously provided expert opinions based on document seizures and police interrogations.

During the initial phase of the investigation, the group's efforts were concentrated on the documents already handed over in conjunction with the investigation order, while the technical experts simultaneously engaged as Public Prosecutor and the Head of the Police Security Service, an investigation group, consisting of police officers from the Police Security Service and Kongsberg and Drammen Police Departments. The group's headquarters were established in the Drammen Police Department.

Out of a number of different occasions in several persons questioned have been as cooperation information required by the investigators has finally been found, there are still some gaps in the documentation, most probably as a result of the extended scope of the investigation, seizures had to be carried out on.

We have found no information or any other evidence indicating that documentary evidence has been deliberately removed/destruction, or otherwise be dealt with in an illegal fashion that has taken place.

Following the closing down of the Data Systems Division, the Government established Kongsberg Trade, which was purely a trade organization, responsible for the sale of products from Kongsberg Vapenfabrik and other companies to Eastern Europe.

The police has so far seized more than 280,000 document pages, which form the basis of the investigation.

During the course of the investigation so far, a total of 62 witnesses and 15 suspects have been questioned, some of them on several occasions. The interrogations have been difficult and time-consuming, due to the nature of the case, and because not all the persons questioned have had cooperation information required by the investigators has finally been found, there are still some gaps in the documentation, most probably as a result of the extended scope of the investigation, seizures had to be carried out on.

The police investigators have been questioned, some of them on several occasions. The interrogations have been difficult and time-consuming, due to the nature of the case, and because not all the persons questioned have had cooperation information required by the investigators has finally been found, there are still some gaps in the documentation, most probably as a result of the extended scope of the investigation, seizures had to be carried out on.

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so far, and who, according to the organi-
zation’s statutes of limitation, has been insufficiently 
responsible for what at any given time is never 
known. It has so repeatedly happened that it has 
been impossible to establish who was re-

lation, and two reserve control systems, 
chine tool builders 
RIES 
tool builders in France, West Germany, 
number of 33 units to the Soviet Union 
A. Introduction 
statutes of limitation. 
export to the Soviet Union and China. The 
rected at the sale of PC 
programming equipment, delivery/

duced delivery of a CNC controller, a machine tool capable of operating 
5 simultaneous axes to Baltic Shipyard, which manufactures submarine propellers, we have seen fit to deal with three of these deliveries in particular. 
A. Introduction 
are manufactured for military submarine propellers. It has a rotary table with a 
diameter of 4 metres, which limits the diameter of the propeller machined accordingly. 
In addition, another CNC 300 control system, production no. 1169, was delivered 
0n a Raifter Forrest machine tool, model H 

C. Kongsvensa Vapenfabrikk’s NC 2000 
1976 Kongsberg Vapenfabrikk pro-
duced a new type of numerical controller with the designation CNC 2000. However, 
controller was overdimensioned, because it 
was delivered on a "Western Bloc", which 
controller applied for an export licence, but it 
was impossible, as all documentation of this 
ype from the relevant period has been 
destroyed in the Ministry of Trade. The same 
is also probably true with regard to the 
equivalent documentation at Kongsberg Va-
penfabrikk. The police, at any rate, has 
not been able to find these applications during 
its searches. 
As already mentioned, investigators were 
also required to establish the type of ma-
Cheri accordingly, in order to support the conclusions 
arrived at with respect to their number of simulta-
aneous axes. 
were to the Soviet Union as 
user, and 2 to the People’s Republic of China as end-user. 
Of this total number, there are 2 deliv-
eries where there is insufficient information to 
draw any definite conclusion as to their compliance with regulations. 29 deliveries 
are legal, since NC 2000 operate 2 simulta-
aneous axes; 55 deliveries are illegal, since NC 
2000 operates 2 simultaneous axes; 7 deliv-
eries are illegal, since NC 2000 operates 3 
simultaneous axes; 10 deliveries are illegal, since NC 2000 operates 4 or more 
simultaneous axes, since NC 2000 operates 5 simultaneous axes and 4 deliveries are illegal, since NC 
2000 operates 9 simultaneous axes.
As mentioned previously, the machine tools controlled by NC 2000 have also been subject to investigation, and it may be generally concluded that the machines equipped with controllers operating more than 3 simultaneous axes are also, for this very reason, to be considered as illegal. In addition, and the machine tools operating 2 simultaneous axes are illegal because of their excessive slide travel.

The majority of these machine tools violate COCOM Regulations for other reasons (excessive motor power, too accurate and too many coordinated spindles).

With regard to the applications for export licenses for NC 2000, it may be generally concluded that Kongsberg Vapenfabrikk applied for, and received export licenses from the Ministry of Trade for all its deliveries. However, in the applications, Kongsberg Vapenfabrikk has stated that it did not in compliance with the specifications of the NC 2000 control system originally approved were not in compliance with, and, in an appendix to the list, confirming the application for export licence, and for which such licence was granted.

As concerns the specific NC 2000 deliveries, the following conclusions may be drawn:

NC 2000 controlling 2 axes simultaneously—29 units

This applies to production no. 4006-4011, 4012-4018, 4035, 4036, 4041, 4055, 4071, 4072, 4075, 4077-4080, 4088, 4094, 4095, 4097 and 4098. These controllers were delivered attached to machine tools from Schiess and Dorries. From Kongsberg Vapenfabrikk's own documentation, it appears that 5 production numbers (4025, 4028, 4039, 4087 and 4088) controlled 2 axes simultaneously, whereas the goods actually delivered controlled 3 axes simultaneously; in other words the specifications contained in the documentation do not agree with the products themselves.

As regards the remaining production numbers, documents indicate that they were to control 2 simultaneous axes. In other words, the products were in keeping with the documents, but not in keeping with what Kongsberg Vapenfabrikk was licensed to export. All these controllers were delivered to Kongsberg Vapenfabrikk's own documentation, it appears that 5 production numbers (4025, 4028, 4039, 4087 and 4088) controlled 2 axes simultaneously, whereas the goods actually delivered controlled 3 axes simultaneously; in other words the specifications contained in the documentation do not agree with the products themselves.

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NC 2000 controlling 3 simultaneous axes—55 units

This applies to production no. 4001-4004, 4020-4034, 4037, 4040, 4042, 4050, 4063-4067, 4068, 4073, 4081, 4082, 4087, 4088 and 4096. These controllers were delivered to Innocenti, Schiess, Donauwerke, Toshiba and KTM. All of the deliveries are in breach of COCOM Regulations, since they all have 3 simultaneous axes, as opposed to the 2 allowed.

In addition to this breach of regulations, it may also be concluded that:

23 of the machine tools from Innocenti violate COCOM Regulations, because of excessive slide travel (max. allowed is 3000 mm) and/or excessive motor power (max. allowed is 20 kw) (Item No. 1091(b)(1) (1) and (3)).

21 of the machine tools from Schiess violate COCOM Regulations, because of excessive slide travel (max. allowed is 3000 mm) and/or excessive motor power (max. allowed is 20 kw) (Item No. 1091(b)(1) (1) and (3)).

2 machine tools built by KTM/Kearner & Trecker to China may also be in violation of COCOM Regulations, Item No. 1091(b)(1) (1) and (3).

Kongsberg Vapenfabrikk applied for, and received export licenses from the Ministry of Trade conducted any further check prior to authorizing the export of the products, with the result that the products were not in compliance with the documents, nor with the relevant export license, which stipulated 2 simultaneous axes, according to the embargo list.

NC 2000 controlling 5 simultaneous axes—10 units

This refers to production no. 4099-4109, of which 5 machine tools from Toshiba violate COCOM Regulations, since they control 5 simultaneous axes, as opposed to the 2 successive axes allowed, cf. Item No. 1091(b)(1) (1) and (3).

On the basis of available documentation, the machine tools are illegal, since they have 5 simultaneous axes, cf. COCOM Regulations Item No. 1091(b)(2)(X6).

From Kongsberg Vapenfabrikk's documentation, it appears that all these systems were to control 3 axes simultaneously, in addition to, in the majority of cases, a number of non-simultaneous additional axes; i.e. the product coincides neither with the documents, nor with the relevant export license, i.e. 2 simultaneous axes, according to the embargo list.

NC 2000 controlling 9 simultaneous axes—4 units

This refers to production no. 4085, 4086, 4091 and 4092, controlling machine tools from Donauwerke's own documentation, it appears that these systems were to control 3 axes simultaneously, with 2 non-simultaneous additional axes; i.e. the product coincides neither with the documents, nor with the relevant export license, i.e. 2 simultaneous axes, according to the embargo list.

From Kongsberg Vapenfabrikk's documentation, it appears that all these systems were to control 3 axes simultaneously, in addition to, in the majority of cases, a number of non-simultaneous additional axes; i.e. the product coincides neither with the documents, nor with the relevant export license, i.e. 2 simultaneous axes, according to the embargo list.

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of up to 11 metres, and simultaneously increased their production capacity. Furthermore, this equipment works with a higher degree of precision than allowed according to COCOM Regulations. It is, however, noteworthy that Kongsberg Vapenfabrikk has provided the Soviet Union with software enabling them to design the new, and more precisely suited to producing tool paths for double-curved surfaces, such as propellors, turbine blades and aircraft parts.

F. Kongsberg Vapenfabrikk's PC 150 M

PC 150 is based on a NORD 100 computer, and the investigation has shown that it does not violate COCOM Regulations. Furthermore, as regards this point is made in item E.

G. The HAL program

The HAL program was bought by Kongsberg Vapenfabrikk from Toshiba in connection with the sale to Baltic Shipyard of the PC 150 programming station. The knowledge and technical means available to the Soviets for determining the parameters a. to f. is something we know nothing about. The HAL program is, however, use- ful precisely due to the fact that it is purely a CAM tool, and has nothing to do with propellor design as such. Such sales are legal, as the NC 2000 controllers are particularly suited to producing tool paths for double-curved surfaces, such as propellors, turbine blades and aircraft parts.

It may be concluded that the NMG program is purely a CAM tool, and has nothing to do with propellor design as such.

The NMG program is legal, for the same reasons as indicated for the HAL program under item G.

I. KS 500 Repair Shop

In 1981, in connection with the sale of several NC 2000 controllers, Kongsberg Vapenfabrikk installed a KS 500 Repair Shop in Volgodonsk.

This Repair Shop consists of Test Station/Dynamic Test, a KS 500 computer, a KS 500 programming equipment.

Where KS 500 and the Membrane station are concerned, Kongsberg Vapenfabrikk has delivered programs, to be included in the COCOM embargo list of Kongsberg Vapenfabrikk's software, in the same way in which the above-mentioned NC 2000 controllers were supplied with, at least part of the listings, and given the necessary relevant training on the equipment.

In practical terms, this means, however, that the Soviets would need to have the system program listings as well. It has been ascertained that the PDFs were supplied with at least part of the listings, and given the necessary relevant training on the equipment.

It may be concluded that the NMG program is purely a CAM tool, and has nothing to do with propellor design as such.
NC 2000 is a "hardwired" version of CNC 2000, intended for the Eastern European market. It was launched on the market in 1977 and its program is identical to that of the NC 2000, but it has been modified to control the KS 500 mini-computer. "Hardwired" means that the system program is burnt into a Read Only Memory (ROM). Kongsberg Vafenfabrikk has used a special ROM for NC 2000, called EPROM.

Kongsberg Vafenfabrikk has chosen EPROM programming because of the danger of the system program being altered in an unauthorized installation, and the system is in compliance with COCOM regulations, provided that certain precautionary measures are taken.

The program for contents of the EPROM may, however, be modified and thereby the controller's capabilities, if one has the reprogramming equipment at one's disposal, sound knowledge of reprogramming procedures and the system program list.

The investigation has been directed at establishing whether Kongsberg Vafenfabrikk has delivered these facilities, and thereby enabled the Soviets to reprogram the NC 2000 controllers delivered.

It has also been established that Kongsberg Vafenfabrikk has sold 2 pieces of EPROM programming equipment, model PM 500, together with the 2 PC 150 S systems, to Volgodonsk in connection with the Toshiba delivery.

PM 500 reprogramming equipment cannot be used on NC 190 S, whereas NC 2000 is, on the other hand, prepared for such equipment.

The equipment was sold as "spare parts" for the PC 150 S, and was not mentioned in the application to the Ministry of Trade for an export license.

If the Soviets also have the system program on NC 2000, and the necessary training in how to use it, then Item No. 1091(a)(1) has been violated.

It has been established that Kongsberg Vafenfabrikk has provided training in assembly programming on KS 500, and this could be enough to be able to read the list, albeit with some difficulty. If they, moreover, have been given training in the structure of the program, they should have no difficulty whatsoever.

This is, however, a fair chance that these listings may have been compromised; Kongsberg Vafenfabrikk personnel had to have the listings with them when travelling to the Soviet Union to complete installation work, for example, and the chance of ensuring safe storage of such listings in the Soviet Union, during fairly long stays, seems almost out of the question.

Although no decisive evidence can be produced in this respect, it may be concluded that the system program listing has been compromised, and that the Soviets are capable of upgrading NC 2000 to control any number of axes. Any limitations in this respect lie in the capacity of the machine tools themselves.

It is, moreover, a fair chance that the Soviets really need to upgrade any of the NC 2000 controllers they have purchased, with regard to their number of axes, since the restrictions are based on the requirement that the Soviets have control systems with the number of simultaneous axes required, and therefore do not need to upgrade them. This limitation is that the Soviets have obtained this reprogramming equipment, so as to be able to do their own maintenance and adjustment work on the 4 NC 2000 controllers installed at Baltic Shipyard.

In support of such an assumption is the fact that in his letter to Kongsberg Vafenfabrikk, 26 April 1987, the KS 500 mini-computer manager, asked Kongsberg Vafenfabrikk to upgrade only two of the machine tools at Baltic Shipyard. The remaining two machine tools were bought by the Soviets themselves, and to do this, they needed the system program listing of the controllers in question.

The same question could also be raised in connection with the sale of NC 2000 controllers to Volgodonsk, and sale of the Repair Shop in this connection.

The Ministry of Trade has been asked whether Kongsberg Vafenfabrikk ever applied for an export license for PM 500 reprogramming equipment and, if not, whether such export would have been authorized.

In reply to this inquiry, the Ministry of Trade states that they can find no record of an export license having been granted for such equipment, which is substantiated by the investigation, in that no license has been found, and none of the parties questioned on the matter has been able to document the occurrence. The Ministry of Trade further states that if PM 500 enables the Soviets to upgrade NC 2000, no export license would have been granted.

K. The FORM delivery to Czechoslovakia

The FORM delivery concerns the sale of a computer aided designing and manufacturing system (CAD/CAM) from Kongsberg Trade to Czechoslovakia. This contract was signed on July 10, 1986.

The principal components of the contract are:

NORD 505 Computer with peripheral equipment,
Kongsberg drafting equipment,
Kongsberg computer program (DMS),
Swedish finite element method program (FEMPAC).

The application for an export license for a NORD 505 computer, the drafting equipment and the DMS program was filed with the Ministry of Trade on 24 February 1986.

The application was submitted to the COCOM for consideration, was there approved, and the relevant export licence issued by the Ministry of Trade on 13 November 1988.

On 16 July 1986, the final contract with FORM was signed and, at this stage, the FEMPAC program had become part of the delivery.

No export license was applied for concerning this Swedish FEMPAC program and, as a result, the matter was never brought up before the COCOM.

During week 9, the implementation test (DMS/FEMPAC) was carried out at Kongsberg Vafenfabrikk.

FEMPAC was delivered on 15 or 16 March 1987, integrated with the other computer program (DMS).

Following the decision to close down Kongsberg Trade, and following the Kongsberg Trade's having the necessary export equipment, the FEMPAC program was still part of the delivery.

It was obvious that other parties to take over the contract had to be found, and by July a draft agreement between Kongsberg Trade and ICAN in Horten had been drawn up concerning the take-over of the contract.

The FEMPAC program was not included in this agreement, and it was provided that ICAN should apply for an export license for the program.

On 30 July last, Kongsberg Trade filed an application requesting that ICAN be authorized to take over the export license issued by the Ministry of Trade on 13 November 1986.

At this stage, it was decided that the FORM contract was to be investigated by FEMPAC program.
The report goes on to state that FEMPAC enables finite element analysis, which would make the CAD part of the system so powerful as a designing tool that it should be considered whether this program extension ought to be submitted for renewed consideration within the COCOM.

The Ministry of Trade considered granting ICAN permission to implement the contract, but without the FEMPAC program.

On 16 September last, the Ministry refused ICAN's application for an export license for the FEMPAC program.

The grounds for this refusal were that the equipment constituted a supplement to the equipment for which an export license had already been granted, and that inserting FEMPAC of the program would imply a strengthening of the software which would lead to an increase of the DMS equipment's performance, and therefore also of the cost, which had been approved by the COCOM. At the same time, ICAN was informed that the Ministry had the powers authorizing the implementation of the contract, even without the FEMPAC program.

As mentioned earlier, the prosecuting authorities were first notified of this illegal delivery on 2 October 1987.

It may be concluded that the FEMPAC program has been delivered without Kongsberg Trade's having the necessary export license, and that this system, as a supplement to the main delivery, which was legal, constitutes a breach of the premises on which COCOM's approval of said sale was based.

v. CONCLUSION IN RESPECT OF RESPONSIBILITY FOR VIOLATIONS OF COCOM REGULATIONS AND CRIMINAL LIABILITY.

This chapter will deal with the individual responsibility for violations of COCOM Regulations as described above, and that meaning, furthermore, violations will be considered in relation to the statutory provisions which apply.

A breach of COCOM Regulation does not constitute a criminal offence as such. It is up to the individual COCOM country to pass national legislation aimed at combating the illegal export of strategic goods. In Norway, the "Provisional Act on the Ban on Exports of 13 December 1948 No. 30" is the legislation that primarily applies in such cases. Section 166 of the Norwegian Penal Code may also apply, if, in order to obtain an export license, false information is given in the application filed with the Ministry of Trade.

A. Machine tools

As pointed out in the above, document seizures made at Kongsberg Vafenfabrikk, and statements given by Kongsberg Vafenfabrikk employees have revealed a number of data concerning the different machine tools to which Kongsberg Vafenfabrikk's numerically controlled systems were attached. If these machine tools were exported to the "Eastern Bloc" with the specifications as stated in these documents, it must be ascertained whether these exceed the limitations of COCOM Regulations. As regards
the specifications of the individual machine tool, see Appendix I.

One aspect that has not been investigated, however, is whether the authorities in the countries involved—Norway, France, and Belgium—have granted permission for such exports, or possibly brought the question before the COCOM. Hence, it cannot be concluded, on the basis of the results of the Norwegian investigation, that the machine tool builders Innocenti, Schles, Donauwerke, Dorries, KTM and Forest in Belgium, in fact, violated the COCOM regulations.

The same may not be said of Toshiba Machine Company, Japan. The British Police in Leesburg of 4 machine tools has been investigated by Japanese police, the conclusion of which is that such sale constituted a breach of COCOM Regulations.

As mentioned previously, the police authorities in the countries involved have been approached and notified of the matter, and it must therefore be up to them to institute possible investigations in their home countries. Norwegian police has also offered to collaborate as far as possible, and to place all details concerning the machine tools at its disposal. But, as also mentioned, no response has yet come from the French police authorities.

In July 1987, it appears that the question of a COCOM embargo has been raised. Again, no response has yet been established.

B. Kongsberg Vapenfabrik's CNC 300/CNC 2000

As already stated, this numerical control system is freely programmable (softwired, not hardwired) and, as such, constitutes a breach of COCOM Regulations' Item No. 1091(a)(ii). Kongsberg Vapenfabrik has, moreover, failed to apply for an export licence in compliance with Item No. 1091 Note 3(d) (Government may permit). Any export licence granted would have been restricted to 2 simultaneous axes, since this is the maximum number allowed, according to COCOM Regulations' Item No. 1091 Note 3(d)(ii).

The question to be raised is therefore whether Kongsberg Vapenfabrik is responsible for these factual violations of COCOM Regulations.

One of the seized documents showed that one of the deliveries pertaining to 23 CNC 300 controllers to Ratier Forrest, for export to the Soviet Union had been submitted to the COCOM in Paris for consideration from 21 to 23 June 1976. In order to establish which conclusions this meeting had reached, the Foreign Ministry and Ministry of Trade were requested to inquire into the matter.

From the Foreign Ministry's reply of 6 July 1987, it appears that the question of the COCOM embargo had been brought up in February/March 1976 by the British and American COCOM delegates. The reply goes on to say:

"The matter was discussed at a COCOM working group meeting from 21 to 23 June 1976 (where also Norway, but not France, was present). The authorities have granted permission for sale, between COCOM countries, of goods under embargo were brought into the discussion and it was agreed that part contract was not responsible for safeguarding themselves against exports contrary to COCOM Regulations. The part contract was still a controlling 3 simultaneous axes. It must therefore be up to them to institute possible investigations in their home countries.

The very first time NC 2000 was put into daily use of non-strategic goods was on 17 August 1977. An appendix to the list contains comments to its contents, and the authorities do NC 2000 in the American market is a newly developed product to which embargo regulations do not apply.
On the basis of the above information, it must be ascertained that which Kongsberg Vapenfabrikker entered on its list was an NC 2000 controller capable of operating 2 simultaneous axes, whereas it had only been stated in the application that it would be capable of controlling 3 simultaneous axes. As a consequence, the sale was an offence against Section 5 of the COCOM Regulations. The Ministry of Trade has, however, ruled that only the controllers were sold, and therefore the goods were non-strategic. The Ministry of Trade has, however, ruled that only the controllers were sold, and therefore the Controllers Act and Section 166 of the Penal Code are applicable to this sale.

"Our conclusion is that:

The Ministry of Trade has no knowledge of any general permission having been granted to export control systems of model NC 2000. All applications for the export of NC 2000 controllers are subject to individual assessment by the Norwegian authorities, in relation to the requirements of the COCOM regulations.

Kongsberg Vapenfabrikker's product list should, as a matter of precaution have been more explicit, stating that the NC 2000 controller on said list was the version exportable under document IL-1091 (a) (except), since the version for which an export licence was required under document IL-1091 Note 1, is net embargo-free, but subject to individual assessment by the Norwegian authorities, in relation to the requirements of this Note.

Based on the above, therefore, it must be concluded that all deliveries of NC 2000 controllers capable of operating 3 axes simultaneously constitute a breach of COCOM Regulations.

Objectively speaking, these sales constitute an offence against Section 5 of the Export Bans' Act and against Section 166 of the Penal Code, but in both cases the statutes of limitations have expired in respect of all the above sales of NC 2000 controllers.

No permission has been granted to export NC 2000 control systems where it has explicitly appeared that the version in question is capable of controlling 3 simultaneous axes.

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Objectively speaking, these sales constitute an offence against Section 5 of the Export Bans' Act and against Section 166 of the Penal Code, but in both cases the statutes of limitations have expired in respect of all the above sales of NC 2000 controllers.

No permission has been granted to export NC 2000 control systems where it has explicitly appeared that the version in question is capable of controlling 3 simultaneous axes.

B. NC 2000 controlling 4 simultaneous axes

The export to the "Eastern Bloc" of numerical control systems capable of operating 4 axes simultaneously is, under all circumstances, a breach of COCOM Regulations.

One of the witnesses maintains, however, that the machine tools to which these controllers were attached only had 3 simultaneous axes, and did not, therefore, make use of the fourth simultaneous axis. He explains that, to simplify matters, an old software version was used which was programmed for 4 simultaneous axes. Without drawing any formal conclusion as to the correctness of this witness' contentions, this point cannot be regarded as having any major significance, since it has been established that the fact that a controller operates 3 axes simultaneously is enough to constitute a breach of COCOM Regulations.

As concerns the question of criminal liability, the conclusion must therefore be the same as for the NC 2000 systems controlling 3 axes simultaneously.

c. NC 2000 controlling 5 axes simultaneously

This delivery, which took place in connection with an order for the polishing machines, includes the last 10 controllers that were sold, and it may be safely concluded that this sale of NC 2000 controllers capable of operating 5 axes simultaneously constitutes a breach of COCOM Regulations' Item 1091(a)(ii).

In the specific case, Kongsberg Vapenfabrik did apply for an export licence on 7 September 1983. The application to the Ministry of Trade refers to the COCOM list, and stipulates that the goods are non-strategic—"a case of giving false information to a public authority, and subsequently an offence against Sections 1 and 2 of the Penal Code. This offence is not subject to statute of limitations.

In January 1982, Forrest Line contacted Kongsberg Vapenfabrikker's office in France (KV-France), asking for a quotation for 8 NC 2000 controllers. The offer was drawn up on 10 February 1982, and Forrest Line inquired as to whether the same software as provided in CNC 300 controllers could be supplied. It has, however, been maintained that Bernard Green, already at this early stage, gave instructions to deliver CNC 300 software, despite his being made explicitly aware of the final regulation. The controllers were therefore subject to individual assessment by the Norwegian authorities, in relation to the requirements of the COCOM regulations.

On 7 March 1983, Forrest Line placed an order, where the axes were described as 3 simultaneous axes, with 2 non-simultaneous axes. A production order and a confirmation of order were drawn up by the technical manager responsible for the product, who had also taken part in the negotiations.

The control systems were subsequently manufactured with 5 simultaneous axes. An application for an export licence containing the "usual information" was sent to the Ministry of Trade on 7 September 1983, on the basis which the relevant export licence was granted.

Delivery took place from September until the end of the year. The implementation test was carried out in France, and the machine tools were delivered to three factories in the Soviet Union.

Bernard Green and the above-mentioned technical manager responsible for the product will be charged with an offence against Section 166, subsections 1 and 2, of the Penal Code.

The Export Bans' Act is subject to statute of limitations in this respect.

On 6 June 1983, an agreement was concluded in Moscow concerning the delivery of 2 "quite similar" controllers, evidently for reserve purposes.

The contract was concluded between Kongsberg Vapenfabrikker, represented by B. Green, on the one hand, and Stankoimport, on the other. The contract stipulates three—and not two—simultaneous axes.

The application for an export licence was sent on 22 September 1983, and the control systems were delivered to two factories in Leningrad, on 21 December 1983 and 3 July 1984 respectively.

Bernard Green will also here be charged with an offence against Sections 166, subsections 1 and 2, of the Penal Code, as the export licence application was worded in the "usual" manner.

The Export Bans' Act is subject to statute of limitations in this respect.

d. NC 2000 controlling 9 axes simultaneously

This applies to four NC 2000 controllers which were delivered together with machine tools from Toshiba Machine Company to Soviet Union, and it may be safely concluded that this delivery constitutes a breach of Item 1091(a)(ii).

This sale also constitutes an offence against Section 5 of the Export Bans' Act, but this Act is subject to statute of limitations, and hence cannot be applied to the offence in question.

In respect to the above sale, Bernard John Green was charged, on 29 April 1987, with an offence against Section 166, subsections 1 and 2, of the Penal Code.

There have been questions as to why Bernard Green was the only person charged, and whether others in the Data Control Division were aware of the existence of such unlawful practices. To this, it must be said that Green maintains that the heads of the Data Control Division were acquainted with the matter. Both heads of division, however, deny having had such knowledge. The prosecuting authorities are aware, however, that they were not familiar with the restrictions contained in the COCOM regulations, nor did they have anything to do with the export licence application.

A new head of division was appointed shortly after said application was sent. He maintains that he neither had any knowledge of the unlawful delivery, nor had anything to do with the export licence application. Nor has any such allegation been made by any of the persons involved.

The technical personnel involved in manufacturing the equipment were aware of its capability of controlling 9 axes simultaneously. The machine tools were manufactured with 5 simultaneous axes. They were not familiar with the restrictions contained in the COCOM regulations, nor did they have anything to do with the export licence application.

2. Kongsberg Vapenfabrikker's CNMC 200 control systems

As mentioned in chapter IV, Kongsberg Vapenfabrikker has sold 3 such CNC 2000 controllers to the machine tool builder Rattan Foreign, which re-exported the controllers on their only machine tool to the Soviet Union.

As mentioned above, the COCOM controller is not per se banned for export to the "Eastern Bloc". However, permission to export such controllers may be granted, provided they are restricted in such a way as not to operate more than 2 axes simultaneously. An absolute condition, however, is the Ministry of Trade's prior permission (cf. Government may permit) Item No. 1091 Note 3(d).

CNC 2000 is also entered on Kongsberg Vapenfabrikker's Embargo list as being a strategic product.

Enclosed with the application for an export licence sent to the Ministry of Trade was an import certificate from France, stating that the CNC 2000 system was to control 2 axes simultaneously, and an export licence was therefore issued.

The investigation has shown that there is no doubt that the persons at Kongsberg Vapenfabrikker involved in this sale were fully aware that the 3 CNC 2000 controllers were to be re-exported to the Soviet Union, and that they were to operate 5 simultaneous axes. These facts must also have been known at the time the application for an export licence was filed.

The matter is, however, subject to statute of limitations, both under the Export Bans' Act and Section 166 of the Penal Code.

E. Kongsberg Vapenfabrikker's PC 150 M, PC 150 S, Hol and RMG program

As regards the above equipment, it must be concluded that their export did not constitute a breach of COCOM Regulations, as no such application was ever made.
The conclusion in respect of this sale was that it was approved by the Ministry of Trade, an approval which was confirmed in the Ministry's letter of 24 September 1987. However, this same letter points to the fact that Kongsberg Vapenfabrikk, had not ap­plied for a licence to export strategic technology, i.e. PM 500, nor would Kongsberg Vapenfabrikk have granted such a li­cence, if an application had been filed.

The matter is, however, subject to statute of limitations, under the Export Bans' Act and since under Section 56 of the Penal Code.

Therefore, it must be concluded that there is no proof of Kongsberg Vapen­fabrikk's having violated COCOM Regula­tions although there is very strong sus­picion in this respect.

We refer, moreover, to chapter IV, Item I, Repair Shop, as both items deal with the PM 500 programming equipment.

H. FORM delivery to Czechoslovakia

As for this delivery, Kongsberg Trade has applied to the Ministry of Trade, and re­ceived an export licence for a NORD 608 computer, as well as accessory peripheral equip­ment, Kongsberg drafting equipment and CAD/CAM computer programs (DMS).

It was also granted a licence for the export of the Swedish computer pro­gram FEMPAC, which should have been done. The delivery to Czechoslovakia took place in March 1987.

The export licence application was drawn up by Bernard Green, and, as mentioned in the above, did not include the FEMPAC program. On 10 July 1986, a contract, in which the FEMPAC program was included, was signed.

On 13 November 1986, an export licence was granted, following consideration by the COCOM, and based on the information con­tained in the application.

Bernard Green will be charged with infring­ement by intent of the Export Bans' Act.

The technical director will also be charged with infringement by negligence of said Act. In the prosecuting authorities' opinion, he should have checked the licences prior to delivery. It must be added, however, that he was misled by the "alarm" after delivery had taken place.

1. Closing remarks

The investigation of this case has not been concluded. A number of further inter­rogations and documentary investigations are still to be completed, especially since Norwegian police is dependent on the col­laboration of its foreign counterparts in order to complete its interrogation of impor­tant witnesses abroad.

The remaining investigations cannot, how­ever, change the facts accounted for in this report, i.e. the technology that Kongsberg Vapenfabrikk has sold to the Soviet Union as end-user. These investigations may, how­ever, contribute to establishing a clearer pic­ture of the distribution of responsibility.

Drammen Police Department, 14 October 1987.

Tore Johansen,
Chief of Police.

Abbreviations

Norwegian

Styreregistr.

Forhandlingsnummer

Akser

Side

Kontraktdato

Prod.

Kontr.nr.

English

Styreregister

Register

Numerical controller model.

Ax

Part.

Date of contract

Spindles.

Number of spindles on machine.

DODD.

Mr. Dodd. Mr. President, it is with great sadness that I rise today to re­member a good friend of mine, Joseph B. Flavin, who died recently at the age of 58. Joe was not only a skilled executive, he was a good friend and a man to whom I frequently turned for advice on the economy and other matters affecting the business of our Nation.

Joe was born in St. Louis in 1928, and received his masters degree from Columbia University's Graduate School of Business, in 1958. By this time he had already climbed up the corporate ladder, before moving to Xerox in 1968, first as a group leader and then as president of International operations. In 1975 he took the helm of the Singer Co.

When Joe arrived, the company was losing $10 million a year. Joe har­nessed his energy and implemented a dynamic plan to turn Singer around.

Joe opened up the doors of the execu­tive suite, he managed by walking around, and he took steps to boost morale that had been lagging prior to his arrival.

Joe also refocused Singer. When he took over, the company was a conglom­erate unguided by a workable vision for the future. Joe provided that vision. He sold off unprofitable lines that Singer did not have exper­tise to make, and he emphasized electronics and high technology. When Joe took over in 1975, defense electronics contributed less than 20 percent to Singer's revenues; by 1986, 80 percent of Singer's $1.73 billion in sales came from high tech.

Of course, this was not without some cost, but Joe did what he had to do. The old days had and ended when the sewing machine was a fixture in every American home and the word "Singer" was a fixture on every sewing ma­chine. Consumer tastes had changed, and Japanese firms from their manu­facturing plants in Taiwan had begun to cut into Singer's market share. Last year, Joe Flavin formed a new compa­ny, SSMC, Inc., to take over Singer's sewing machine and office furniture businesses, and spun this off. Such was the cost of establishing Singer as a company with a strong future, com­petitive in the world marketplace.

Mr. President, Joe Flavin was an ex­cellent example to all of us. In his work he was not afraid to meet the challenges of the ever-changing global marketplace, and in all aspects of his life he exemplified a rare energy and optimism. I know that his leadership will be greatly missed in the business community. To his family I offer my sincerest condolences. And I say again that all of us who knew Joe feel that we have lost an extraordinary friend.
The following bill was read the first and second time by unanimous consent, and placed on the calendar:
H.R. 2939. An act to amend title 28, United States Code, with respect to the appointment of independent counsel.

EXECUTIVE AND OTHER COMMUNICATIONS
The following communications were laid before the Senate, together with accompanying papers, reports, and documents, which were referred as indicated:
EC-2029. A communication from the Acting Under Secretary International Affairs and Commodity Programs, Department of Agriculture, transmitting, pursuant to law, a report on the initial commodity and country allocation table for food assistance under Titles I/III of Public Law 480 for fiscal year 1989; to the Committee on Agriculture, Nutrition, and Forestry.
EC-2030. A communication from the Assistant Deputy Secretary of the Navy (Shipbuilding and Logistics), transmitting, pursuant to law, a report on the initial commodity and country allocation table for food assistance under Title II of Public Law 480 for fiscal year 1988; to the Committee on Agriculture, Nutrition, and Forestry.
EC-2031. A communication from the Deputy Assistant Secretary of the Navy (Shipbuilding and Logistics), Department of the Air Force, transmitting, pursuant to law, a report relative to converting the Public Work Facilities at the Naval Air Station, Cecil Field, Florida, to performance by contract; to the Committee on Armed Services.
EC-2032. A communication from the Principal Deputy Assistant Secretary of the Navy (Shipbuilding and Logistics), transmitting, pursuant to law, a report relative to converting the grounds maintenance function at Carwell Air Force Base, Texas, to performance by contract; to the Committee on Armed Services.
EC-2033. A communication from the Secretary of the Navy, transmitting, pursuant to law, a report relative to transferring the obsolete submarine ex-TURBOT (ex-as-427) to Dade County, Florida; to the Committee on Armed Services.
EC-2034. A communication from the Principal Deputy Assistant Secretary of the Navy (Shipbuilding and Logistics), transmitting, pursuant to law, a report relative to converting the Training Devices and Simulators function at Fleet Aviation Specialized Operational Training Group Detachment, Moffett Field, California; to the Committee on Armed Services.
EC-2035. A communication from the Principal Deputy Assistant Secretary of the Navy (Shipbuilding and Logistics), transmitting, pursuant to law, a report relative to converting the Training Devices and Simulators function at Fleet Aviation Specialized Operational Training Group Detachment, Barbers Point, Hawaii; to the Committee on Armed Services.
EC-2036. A communication from the Assistant General Counsel (Legal Counsel), Department of Defense, transmitting, pursuant to law, a report of individuals who filed DD Form 187, Report of DoD and Defense related Employment, for FY 1986; to the Committee on Armed Services.
EC-2037. A communication from the Chief, Program Liaison Division, Office of Legislative Liaison, Department of the Air Force, transmitting, pursuant to law, a report of the developmental and research contracts of $50,000 or more, by company; to the Committee on Armed Services.
EC-2038. A communication from the Secretary, Interstate Commerce Commission, transmitting, pursuant to law, notification that the parties involved in Formal Docket No. 35018, Coast Trading Corporation, al, v. The Baltimore and Ohio Railroad Company, et al, will be unable to complete all evidentiary proceedings related to this complaint within the time period specified by law; to the Committee on Commerce, Science, and Transportation.
EC-2039. A communication from the Deputy Secretary, Department of Transportation, transmitting, a draft of proposed legislation entitled "To improve the U.S.-flag marine"; to the Committee on Commerce, Science, and Transportation.
EC-2040. A communication from the Secretary of Transportation, transmitting, a draft of proposed legislation entitled "To authorize the Secretary of Transportation to transfer operating responsibility, property, and systems to the Chagres National Forest boundary changes, as provided by ANILCA;" to the Committee on Commerce, Science, and Transportation.
EC-2041. A communication from the Associate Deputy Chief, Department of Agriculture, transmitting, pursuant to law, a report entitled "Lumber Annual Report to Congress on the Automotive Technology Development Program FY 1987;" to the Committee on Energy and Natural Resources.
EC-2042. A communication from the Associate Deputy Chief, Department of Agriculture, transmitting, pursuant to law, a report entitled "Lumber Annual Report to Congress on the Automotive Technology Development Program FY 1987;" to the Committee on Energy and Natural Resources.
EC-2043. A communication from the Secretary of Health and Human Services, transmitting, a draft of proposed legislation entitled "To amend the Social Security Act authorizing the Secretary of Health and Human Services to charge fees for receiving and responding to requests for information from the Federal Parent Locator Service, and for other purposes;" to the Committee on Finance.
EC-2044. A communication from the Secretary of Labor, transmitting, pursuant to law, a report entitled "Report of Congress on the Expenditure and Need for Worker Adjustment Assistance Training Funds Under the Trade Act of 1974;" to the Committee on Finance.

REPORTS OF COMMITTEES
The following reports of committees were submitted:
By Mr. BURDICK, from the Committee on Environment and Public Works, without amendment:
H.R. 314. A bill to designate the new U.S. courthouse in Birmingham, Alabama, as the "Hugo L. Black United States Courthouse" (Rept. No. 100-207).
meat, poultry, and fish, and for other purposes; to the Committee on Agriculture, Nutrition, and Forestry.

SAFE FOOD STANDARDS ACT

Mr. LEAHY. Mr. President, I send to the desk a bill which my staff and I have been working quite hard on in the past few months. I'd like to take a few minutes to give a description of its contents. I think it addresses a critical problem facing American agriculture today.

We in American agriculture realize that we must maintain public confidence in the safety of our food. That is why, as chairman of the Senate Agriculture Committee, I am introducing today the Safe Food Standards Act of 1987.

In recent months there have been a number of media reports raising questions about the safety of the fresh meat, poultry, and fish available to our consumers. Much more important to me than these media reports are the hundreds of scientific studies that document the number of people made ill by food borne disease and the number of dollars that are lost while they are sick.

For instance, the National Research Council, the research arm of the National Academy of Sciences, has estimated that up to 4 million people get sick from salmonella each year.

The thrust of these studies has been confirmed by expert agency witnesses before our committee. Information submitted by the Food and Drug Administration indicates that there are over 9 million cases of food borne illness each year, resulting in 7,000 to 9,000 deaths annually.

Experts from the Department of Agriculture, the National Science Foundation, and the EPA have testified that the illnesses caused by salmonella and campylobacter alone cost the American economy over $1.2 billion each year in medical and lost productivity. The total cost to the economy may be over $40 billion for all forms of food borne illnesses.

We must face the fact that fresh meat, poultry, and fish are the source of some of this contamination. As the chairman of the Senate Agriculture Committee, I cannot ignore the conclusions of the Secretary of Agriculture's food safety and inspection study that "meat and poultry products are responsible for a majority of food borne illnesses."

Make no mistake about it, American farmers and ranchers produce the best meats, vegetables, dairy products and poultry in the world. We need to insure the high quality and nutritious content of these products reaches the American consumer. It is in the producer's interest and in the processor's interest, to have satisfied and healthy consumers.

However, many of the inspection procedures upon which we rely today have not been substantially improved for years. The present system of visual and physical inspection of carcasses was developed during World War II.

The dedicated public inspectors just do not have the tools they need to do the job. They cannot see the bacteria or the chemical contaminants that can make you sick. It is clear that new standards are needed to better protect the public from bacteria and chemical contamination of meat and poultry.

The comprehensive legislation I am introducing today will address these problems at all levels of the food chain—from animal feed, through the packing plant, all the way to the consumer's kitchen. This bill will update our inspection procedures and help restore public confidence in the safety of our red meats, fish, and poultry. I'm hopeful that this legislation can set the stage for moving our inspection system into the 21st century.

The bill has several elements:

First, the Secretary of Agriculture is required to develop a system to trace animals back to their source so that programs can be dealt with on the farm or the feedlot when possible.

Second, at the food processing stage, we must develop a set of health based standards that will reduce the public's exposure to harmful bacteria and reduce the incidence of food borne illness. The current inspection process must be supplemented with a scientific, statistical sampling system designed to detect bacteria and other harmful microbiological contaminants, as recommended by the National Research Council. These new inspection procedures will insure that the food being delivered to the consumer in our food supply is not contaminated with harmful bacteria.

Third, at the food processing stage, we must develop a set of health based standards that will reduce the public's exposure to harmful bacteria and reduce the incidence of food borne illness. The current inspection process must be supplemented with a scientific, statistical sampling system designed to detect bacteria and other harmful microbiological contaminants, as recommended by the National Research Council. These new inspection procedures will insure that the food being delivered to the consumer in our food supply is not contaminated with harmful bacteria.

Fourth, no matter how successful any new safety program is, it cannot totally eliminate bacterial contamination from fresh meat. Consumers must be educated on proper cooking and storage methods. That is why this bill will fund direct education, State demonstration programs, and a consumer hotline to give the public the information they need.

Finally, this bill will provide protection to USDA line inspectors and private employees who testify about unsafe practices in civil actions involving the provisions of this act.

In summary, Mr. President, I believe that this legislation is both comprehensive and balanced. It is comprehensive because it addresses in a systematic manner, from top to bottom, the safety of the meat, poultry, and fish purchased by American consumers.

It is balanced because it recognizes that food safety is the responsibility of the food producer, food processor, and food consumer.

Last June, the Agriculture Committee held hearings on this important issue. Since that time, my staff and I have met with dozens of representatives from industry, from producer groups, consumer advocates, scientists, and Government experts. I am convinced that the time has arrived for us to take the next step in defining the process to produce a safe food supply. This bill is fair and balanced, and it will ensure a safer food supply well into the 21st century.

In closing, I wish to thank the many individuals and groups whose input was so valuable in developing this legislation.

Mr. President, I ask unanimous consent that a summary and a section-by-section analysis be printed in the Record.

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

SUMMARY OF THE SAFE FOOD STANDARDS ACT OF 1987

(Offered by Senator Patrick Leahy to maintain the confidence of the American consumer in our food supply by reducing foodborne illnesses)

TESTING OF MEAT, POULTRY AND FISH PRODUCTS

To improve the safety of the meat, poultry and fish products consumed in the United States, and substantially reduce foodborne illnesses, this bill will address the problem of bacterial contamination in meats, poultry and seafood by improving current inspection procedures and programs.

Standards and programs for meat and poultry products will be established by the Secretary of Agriculture. Programs for fish and seafood products will be established by the Secretary of Commerce.

In establishing these standards, the Secretary will consult with the National Research Council, the Secretary of Health and Human Services, as well as industry and public interest groups. In all cases, they must consider the potential impact on the industry and the reduction of foodborne illnesses.

(Fish and fish products under the jurisdiction of Health and Human Services or the EPA will remain under that jurisdiction).

Baselines and Initial Standards: Within fifteen months of enactment, the Secretary will establish baseline levels of contamination for each slaughtering plant and for each type of product. These standards will be established and based on levels which will result in a reduction of severe foodborne illnesses. These "baseline" levels will be used to establish initial standards.

The standards will then be published in the Federal Register for public and industry comment.

Warnings and Fines: Meat and poultry plants in violation will be targeted for further sampling during a review period of up to 120 days. If violations continue, a warning will be issued and the plant will be publicly identified. Prior to public identification,
tion, the company will have an opportunity for a review of the decision. After identification, fines for additional violations will be $3,000 for each of the first 5 days and $10,000 for each following day. For fish and seafood, persistent violators will be fined $10,000 for each day of violation after a warning.

Closing Slaughtering Plants: Inspection procedures for meat and poultry will be withheld from plants persistently exceeding standards. Fines will be levied for any fines, and their identity will be published.

TRACING MEAT PRODUCTS

To trace contaminated meats back to the source, the Secretary must develop procedures (records, tagging, branding etc.) so meat and poultry, and products thereof, can be traced from the packing plant back to the producer.

VOLUNTARY ANIMAL FEED INSPECTION PROGRAM

A voluntary program to test animal feed for contamination will be established and administered by the Secretary of Agriculture who will publish the standards in the Federal Register after providing opportunity for public comment. Standards and tolerances currently established by FDA will not be superseded.

SAFE FOOD STANDARDS ACT OF 1987—SECTION-BY-SECTION ANALYSIS

(Submitted by Senator Patrick Leahy)

The purpose of this bill is to maintain the confidence of the American consumer in the safety of the food supply by reducing the incidence of foodborne illness in the United States. This objective will be met by increasing public awareness of the proper handling of meat, poultry and fish, implementing a scientific statistically based sampling procedure to test for contamination of meat and poultry, requiring Federal inspection of fish by the Department of Commerce, protecting employees of slaughtering plants and inspections of Federal meat and poultry inspection laws and improving the quality of animal feed.

1. TESTING OF MEAT AND POULTRY PRODUCTS

In addition to the current United States Department of Agriculture (USDA) inspection programs, meat and poultry products which have been approved for human consumption will be statistically sampled and tested for contamination by pathogenic microorganisms, such as bacteria, harmful to humans. The samples will be tested to determine whether they meet certain standards designed to protect human health.

Consultation: In deciding whether to develop a standard for a pathogenic microorganism, such as Salmonella or Campylobacter bacteria, that could be present in poultry or meat products, the Secretary of Agriculture shall consult with the National Research Council, the Secretary of Health and Human Services, industry and public interest representatives.

Reduction of Severe Foodborne Illnesses: The Secretary shall develop standards to substantially reduce the incidence of severe foodborne illness in the United States but must consider alternative methods of reducing such illnesses and the adverse impacts, if any, on the affected industry.

Each standard will be based on a percentage of sampled meat or poultry products, approved for human consumption, that contain pathogenic microorganism at levels determined by the Secretary that are likely to result in severe foodborne illness.

Baselines and Initial Set of Standards: Within three months after enactment, the Secretary shall develop sampling procedures to be used on a voluntary basis, or similar establishment, to determine the levels of contamination by pathogenic microorganisms, such as Salmonella and Campylobacter bacteria. These "baseline" levels of contamination shall be established at each such plant within fifteen months after enactment and shall be used in determining the initial set of standards.

Public Input on the Standards: The Secretary shall publish in the Federal Register for public and industry comment each standard at least 90 days prior to taking and testing samples under these procedures.

Warnings to Violators: If a pathogenic microorganism is found in excess of a standard set forth in the Federal Register, the Secretary may impose a civil penalty on any slaughtering plant or similar establishment and target them for additional sampling or other monitoring, beginning no earlier than 90 days after publication. The Secretary shall establish a review period not to exceed 120 days during which the slaughtering plant will be monitored. If during that monitoring the standards identified in the notification are not exceeded, the Secretary shall issue a warning to the slaughtering plant and publish the identity of the establishment in the Federal Register.

Prior to publishing the name of the slaughtering plant in the Federal Register the company shall have an opportunity for an administrative review of that decision.

Federal Assistance to Improve Conditions: The Secretary shall establish a program designed to provide assistance in the form of advice or information to each slaughtering plant issued a warning.

Fines will be levied for additional violations during the 6-month period after the identity of the establishment is published in the Federal Register. For each day in which violations of the standards set forth in the Federal Register notice occur, the establishment shall be fined $3,000 and after the fifth such day the fine will be doubled.

Closing Slaughtering Plants: The Secretary shall not provide inspection services to any slaughtering plant or similar establishment that fails to pay any fine assessed thereunder under this section within 30 days after the fine is assessed by the Secretary.

The Secretary shall design a program to monitor each establishment that is fined for such time period as the Secretary determines is appropriate considering the potential risk to human health and the number of fines assessed. The Secretary shall establish procedures to withhold inspection services to each establishment that persistently exceeds standards during the monitoring period.

The identity of each establishment undergoing this intensive monitoring shall be published in the Federal Register. The Secretary shall establish procedures for administering any civil penalty on any establishment or similar establishment, under this section within such conditions as are determined appropriate by the Secretary.

II. TRACING MEAT PRODUCTS

The Secretary must develop procedures so that cattle, sheep and swine, and food products made from those animals, are capable of being traced from the slaughtering plant back to the producer. These procedures can involve recordkeeping, tagging, marking, implanting, branding, lot processing, or any other procedure that will result in records, so that contamination found in meat products or animals can be traced back to its source.

In the alternative, the Secretary may permit different identification requirements that take into account industry practices or custom so long as they are designed to allow most cattle, swine, or sheep to be traced from the slaughtering plant, or similar establishment, back to the producer.
The Secretary of Commerce shall administer a program designed to detect contamination by pathogenic microorganisms, harmful to humans, found in statistically selected samples of fish, shellfish, or fish products, intended for human consumption, taken at fish processing plants and from persons who catch or grow fish commercially.

Consultation: In developing standards for pathogenic microorganisms that could be present in fish products intended for human consumption, the Secretary shall consult with the National Research Council, the Secretary of Health and Human Services, the Administrator of the Environmental Protection Agency, the States, the National Institutes of Health, and public interest groups.

Exception: Standards can not be set requiring the destruction of contaminated fish products already being regulated, with respect to those microorganisms, by the Secretary of Health and Human Services, the Administrator of the Environmental Protection Agency.

Baseline: The Secretary shall set standards based on a percentage of sampled fish products intended for human consumption that contain such pathogenic microorganisms at levels determined to be safe by methods that are likely to result in severe foodborne illness.

Exemption: Standards can not be set requiring the destruction of contaminated fish products already being regulated, with respect to those microorganisms, by the Secretary of Health and Human Services, the Administrator of the Environmental Protection Agency.

Reduction of Severe Foodborne Illnesses: The Secretary shall establish and administer a program to test statistically selected samples of animal feed in the United States and shall consider the appropriate methods of reducing such illnesses as well as the adverse impacts on the affected industry.

Applicable to: A person or company that manufactures animal feed intended for use as feed for poultry, sheep, cattle, or swine, may apply for a program designed to reduce pathogenic microorganisms or toxic chemicals that are regulated by other Federal agencies, although the Secretary may use these standards in this voluntary inspection program.

Toll-free Animal Feed Hotline: The Secretary shall maintain a toll-free hotline to provide information regarding the safe processing, handling and development of animal feed.

$2.5 Million Authorized: There is authorized to be appropriated for additional food safety improvements program $500,000 for each of the fiscal years 1988 through 1992.

VIII. REPORT ON EDNATIONAL LABELING OF FRESH MEATS AND POULTRY

The Secretary of Agriculture shall conduct a research program to develop methods to reduce foodborne illnesses in the United States.

VIII. EXEMPTIONS TO STATUTES FOR FOOD SAFETY PROGRAMS

The Secretary of Agriculture shall establish a program designed to provide information, advice, and instructions on the processing or manufacture of animal feed.

$2.5 Million Authorized: There is authorized to be appropriated to carry out an additional food safety improvements program $500,000 for each of the fiscal years 1988 through 1992.

IX. CIVIL ACTIONS FOR INJUNCTIVE RELIEF

Any person aggrieved by a failure of the Secretary to perform any act or duty under a provision of the Federal Meat Inspection Act or the Poultry Products Inspection Act (or any regulation issued under those Acts) that is not discretionary with the Secretary, can file a civil action for injunctive relief. No such action may be commenced prior to 60 days after the plaintiff has given written notice of the alleged violation (accompanied by a supporting affidavit describing personal knowledge of the pertinent facts) to the Secretary. No action may be commenced later than 180 days after person is so aggrieved.

Legal Fees: A court may award costs of litigation (including reasonable attorney fees and expert witness fees) to a plaintiff whenever the court determines such award is appropriate unless the position of the United States taken in the action is substantially justified.
X. EMPLOYEE PROTECTION

No employer may discharge any employee or otherwise discriminate against any employee with respect to his or her compensation, terms, conditions, or privileges of employment because the employee commenced, or caused to be commenced, a civil action alleging his or her discharge or discrimination. On receipt of the complaint, the Secretary shall so notify the employer.

Preliminary Relief: Within 60 days of the receipt of a complaint, the Secretary shall conduct an investigation to determine whether there is reasonable cause to believe the complaint has merit. In the event the Secretary concludes that a violation has occurred, the Secretary shall issue a preliminary order providing relief.

Hearing: Within 30 days after a preliminary order is issued, the person alleged to have committed the violation or the complainant may request a hearing to contest the preliminary decision—however, any such request shall not delay any reinstatement remedy. Any such review or hearing shall be conducted within 120 days of receipt of the request.

Legal Fees and Costs: The complainant shall be entitled to legal fees and costs if the complaint is issued any relief.

Court of Appeals Review: Any final orders issued by the Secretary of Labor may be appealed to the United States Court of Appeals.

Enforcement of Orders: The Secretary of Labor or the complainant in whose favor an order was issued by the Secretary of Labor may file an action in United States District Court to enforce such order.

XI. REGULATIONS

The Secretary of Agriculture shall issue regulations implementing the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), and related Federal meat and poultry inspection programs in accordance with section 533 of title 5, United States Code. Prior to issuing any such regulations, the Secretary shall provide to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate a copy of the regulation and a detailed statement justifying the regulation.

XII. EFFECTIVE DATE

Except as otherwise provided in this Act, this Act and the amendments made by this Act, are effective on date of enactment.

By Mr. MELCHER (for himself and Mr. NICKLES):

S. 1814. A bill to provide clarification regarding the royalty payments owed under certain Federal offshore and Indian oil and gas leases, and for other purposes; to the Committee on Energy and Natural Resources.

NTL-5 GAS ROYALTY ACT OF 1987

Mr. MELCHER. Mr. President, on behalf of myself and Senator NICKLES, today I am introducing a bill to address a problem relating to the determination of the value of natural gas production from certain Federal and Indian onshore oil and gas leases for royalty purposes. The bill clarifies the operation of NTL-5 retroactively in an effort to address this problem formally.

Thus, it appeared that under the Department's NTL-5 rule, producers were to pay royalties based on a value amount well in excess of the market price. However, during this time Department officials advised many lessees that royalty payments would not be based on the artificially high FERC ceiling price. Earlier this year, the Department issued a proposal to modify NTL-5 retroactively in an effort to address this problem formally.

Unfortunately, the NTL-5 issue has now evolved into an extremely difficult situation. Industry, Indian tribes and allottees, and the States have conflicting expectations. Substantial sums hang in the balance. And, I regret to say, all indications point to every sorry result.

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statement, receipt, or other written document deemed appropriate by the Secretary to confirm the terms of sale showing the actual price received.

(e) EXCEPTION.—This section shall not apply to any gas for which, in the Secretary's judgment, the lessee or royalty payor has received less than the highest applicable price under the Natural Gas Policy Act due to a failure to collect amounts under a contract and not as a result of market conditions or considerations.

Subsection 4(b) provides that if the Secretary or a court determines that a lessee or royalty payor on a Federal onshore oil and gas lease has paid more than the value determined under subsection 3(b) the Secretary shall refund the excess amount from Federal mineral receipts. The Secretary may not recoup any portion of the refund from the States.

Subsection 4(b) provides that if the Secretary or a court determines that a lessee or royalty payor on an Indian oil and gas lease has paid more than the value determined under subsection 3(c) the Secretary shall refund the excess amount from Federal mineral receipts. The Secretary may not recoup any portion of the refund from the States.

Subsection 4(c) provides that the total amount of refunds made under this section may not exceed two million dollars ($2,000,000).

Section 5 sets forth the procedures for providing certain notices and conducting audits required by the Act. Subsection 5(c) provides for a report to each Indian Tribe holding an Indian oil and gas lease from which gas within the coverage of the Act was produced. Such report is to contain information on the difference between royalties computed in accordance with NTL-5 and royalties computed in accordance with subsection 3(c) of the Act.

Subsection 5 sets forth recordkeeping requirements.

By Mr. SANFORD (for himself and Mr. SIMON): S. 1815. A bill to amend the Elementary and Secondary Education Act of 1965 to establish a program to promote more effective schools and excellence in education, and for other purposes; to the Committee on Labor and Human Resources.

Effective Schools Development in Education Act

Mr. SANFORD. Mr. President, today I am introducing a bill to broaden and improve effective schools programs developed and implemented by State and local educational agencies.

The effective schools movement is based upon effective schools research and models of school effectiveness. This research shows that instructionally effective schools have five characteristics that differentiate them from ineffective schools: First, strong leadership at the school level; second, high expectations that no child will fall below minimum levels of achievement; third, an orderly school atmosphere conducive to learning and teaching; fourth, student acquisition of basic and higher order skills; and fifth, frequent and consistent evaluation of student progress.

Mr. Sanford. A study by Matthew Miles of the Center of Policy Research issued a January 1983 report on effective schools. It was prepared for the National Commission on Excellence in Education, and it noted
that a representative example of an effective schools program typically is as follows:

The program is aimed at improving teaching practices, student achievement, and student behavior. The continuous movement of children who are not prepared to do academic work and to require that students demonstrate minimum academic mastery at each of the levels of schooling, so that they will be successful.

I am impressed by the mounting evidence that the effective schools programs across this Nation are making an important contribution in improving the education climate in many of our schools, thereby effecting improvement in student achievement and student behavior.

I have been deeply disturbed by the continuing attacks on the public education institutions of this country. I have determined, therefore, that I will use a substantial amount of my energies to enhance, encourage, and support new ideas in education. The effective schools bill that I am introducing in this session of Congress is a step in that direction.

The "even-start" section of the bill would make grants available from the Department of Education to implement pilot programs that combine adult basic education for parents and school readiness training for children into one program. These grants would build upon our knowledge of the positive effects of parental involvement in student learning. Parents who are themselves illiterate or lacking a high school diploma would receive adult basic education as well as education about how to help their young children develop reading skills.

What better role for the Federal Government than to encourage the adoption of effective schools programs. Nowhere is this said with more clarity than in the National Commission for Education Improvement's report, "A Nation at Risk." In discussing the role of the Federal Government in education, the report notes that this role includes "supporting curriculum improvement and research on teaching, learning, and the management of schools; supporting teacher training in areas of critical shortage or key national needs."

There is no doubt that more study and research is needed to determine the dynamics of program implementation and its impact in the school and in the classroom. What is clear is that effective schools programs are occurring, a claim on the significant rate, and that most of the programs are being well implemented.

What is also clear is that effective programs are showing promise for secondary school improvement as well as for elementary schools. The report stresses that this program suggests that effective school usage will expand appreciably over the next few years.

Mr. President, I am pleased that my distinguished colleague from Illinois has joined me in cosponsoring this bill. Senator Simon came to the U.S. Senate with a strong commitment to education. Having been awarded 23 honorary doctoral degrees, his accomplishments are clearly well known and deeply appreciated. I consider it a privilege to have his name associated with this very important legislation.

I would also like to recognize the efforts of Congressman Augustus Hawkins, chairman of the House Education and Labor Committee. He has introduced effective school legislation in the House. Chairman Hawkins is truly a champion in the area of education and a strong supporter of the effective schools concept for several years.

Mr. President, I urge my colleagues to join in support of the "Effective Schools Development in Education Act of 1987."

Mr. SIMON. Mr. President, I am pleased to join my friend and colleague from North Carolina, [Mr. Sanford] as a cosponsor of the bill he is introducing today entitled the "Effective Schools Development in Education Act of 1987."

Effective schools is a relatively new term, but the concept has been "effectively" experimented with for years in a number of schools across the country. Effective schools are usually headed by strong and strict school principals, and their teachers are provided with special training so that they, in turn, will set high standards for all students. This includes a high incentive and reward system for students. Specific, basic curriculums along with parental involvement are mandatory ingredients for success.

Our bill attempts to spread the use of the effective schools concept on a national basis. Research has shown that those schools in poor areas have the greatest number or percentages of educationally deprived children.

Effective schools require a safe and orderly school environment for students to function and flourish in. Effective schools can also include requirements that students must demonstrate a minimum academic mastery at each level of school before they can move to the next level. If we are going to expect teachers and principals to make improvements in student achievement levels, then we must allow them to gain control over their schools and students.

The general purpose of this bill is to:

First, to assist State and local education agencies in increasing school effectiveness programs;

Second, to encourage State and local education agencies to participate in effective school programs;

Third, to disseminate information on school effectiveness;

Fourth, to assist in the research and development of effective schooling practices;

Fifth, to provide technical assistance; and

Sixth, to increase the academic achievement levels through early childhood education programs.

Mr. President, I commend my colleagues, [Mr. Sanford], for his foresight in introducing this legislation and in promoting a tried and true concept that has worked in the effort to improve our Nation's schools.

I would also commend Congressman Augustus Hawkins, the chairman of the House Education and Labor Committee, for introducing similar legislation in the House and for incorporating this legislation into the omnibus elementary and secondary education bill passed this past summer in the House. I urge my colleagues to join in support of the Effective Schools Development in Education Act of 1987.

Mr. President, I ask unanimous consent that the article "Ingredients of a Successful Effectiveness Project," from the March 1985 issue of Education Leadership, be printed in the RECORD.

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

INGREDIENTS OF A SUCCESSFUL SCHOOL EFFECTIVENESS PROJECT

(Charls not printed in RECORD.)

In 1969 the local school board directed 18 elementary schools in Milwaukee to improve...
their achievement levels in reading, math, and language to reflect citywide or national norms. These schools were identified as the low-performing schools in the system. All were located in the central city and served a predominantly low-income and minority student population.

No changes were made in the administration or in teacher or student composition, and no additional monies were allocated to these schools. Yet achievement levels have increased significantly in the last five years.

![FIGURE 1: THE ESSENTIAL ELEMENTS OF EFFECTIVE SCHOOLS](image)

**School Climate**

1. Strong sense of academic mission
2. High expectations conveyed to all students
3. Strong sense of student identification/affiliation
4. High level of professional collegiality among staff
5. Ongoing recognition of personal/academic excellence

**Curriculum**

1. Grade-level expectations and standards in reading, math, and language
2. Planning and monitoring for full content coverage

**Instruction**

1. Efficient classroom management through structured learning environment
2. Academic priority evidenced in increased amount of allocated time
3. Frequent assessment of student progress on a routine basis
4. Direct instruction as the main pedagogical approach
5. Maximizing academic engaged time (time-on-task)
6. Use of accelerated learning approach (planning for more than one year's growth)
7. Reading, math and language instruction and homework check; development lesson, planning and monitoring for full content coverage

**Coordination of Supportive Services**

1. Instructional approach, curriculum content, and materials of supplementary instructional services coordinated with the classroom instructional program
2. Pullout approach used only if it does not fragment the classroom instructional program, does not result in lower expectations for some students, and does not interfere with efforts to maximize the use of time

**Evaluation**

1. Frequent assessment of student progress on a routine basis
2. Precise and informative report card with emphasis on acquisition of basic school skills
3. Serious attitude toward test-taking as an affirmation of individual accomplishment
4. Test-taking preparation and skills

**Parent and Community Support**

1. Regular and consistent communication with parents
2. Clearly defined homework policy that is explained to students and parents
3. Emphasis on the importance of regular school attendance
4. Clear communication to parents regarding the school's expectations related to behavior and academic performance
5. Increasing awareness of community services available to reinforce and extend students learning.

**PROJECT RISE**

Since 1979 these schools have participated in Project RISE, which attempts to raise the performance of low-income, minority students by implementing the essential elements of effective schooling. These elements (see Figure 1) were derived primarily from the research literatures on school effectiveness and from the reported practices of other effective schools.

By the end of the 1983-84 school year, Project RISE had been operating for five years. Figure 2 charts the percentage of elementary students in Milwaukee's 107 elementary schools who were scoring at or above average on standardized tests. The most significant gains occurred between 1979 and 1983, when Project RISE schools to the level set by the school board.

Among the RISE schools, several distinguished themselves from the rest for their exceptional rate of gains and high levels of achievement. Specific changes made by these fast-improving schools fall into four categories: changes in staff attitude, changes in school management and organization, changes in school practices, and changes in curriculum and instructional practices. While each of the 18 schools in Project RISE may have made one or more of these changes, the fast-improving schools made most or all of them.

**CHANGES IN STAFF ATTITUDES**

Staff members verbally and behaviorally expressed the belief that all of their students could achieve regardless of socioeconomic status of past academic performance.

Inservice activities that underscored the educability of all students were offered. These sessions were designed to reduce or refocus the misconception that low-income students are educable of all students were offered. These sessions were designed to reduce or refocus the misconception that low-income students are teachable.

Schools were identified as the fast-improving schools fall into four categories: changes in staff attitude, changes in school management and organization, changes in school practices, and changes in curriculum and instructional practices. While each of the 18 schools in Project RISE may have made one or more of these changes, the fast-improving schools made most or all of them.

Staff members were encouraged to meet and establish networks with practitioners from effective schools throughout the country. The presentations at staff meetings for discussion, adoption, and literature on school and teacher education, changes in school management and organization, changes in school practices, and changes in curriculum and instructional practices. These sessions were designed to refocus the misconception that all of their students could achieve regardless of socioeconomic status of past academic performance.

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**Principals reported a change in their role as building manager to include being an instructional leader.**

**Principals**

1. Clearly defined homework policy that is explained to students and parents
2. Emphasis on the importance of regular school attendance
3. Clear communication to parents regarding the school's expectations related to behavior and academic performance
4. Test-taking preparation and skills

**Parent and Community Support**

1. Regular and consistent communication with parents
2. Clearly defined homework policy that is explained to students and parents
3. Emphasis on the importance of regular school attendance
4. Clear communication to parents regarding the school's expectations related to behavior and academic performance
5. Increasing awareness of community services available to reinforce and extend students learning.
Grade-level standards were defined as those skills, concepts, and learnings that are prerequisite for success at the next grade level.

Grade-level standards were printed on "Yes I can" charts, signed with students, and distributed to parents.

The schools developed a schoolwide policy that expected all students to complete daily homework assignments. The rigorous nature of the homework policies was defended as necessary to bring underachieving students to grade-level proficiency.

Principals and teachers enforced policy by monitoring the doors at dismissal, and late-arriving students were sent back to their rooms to get their homework.

Parents were informed if students were not completing their homework assignments, and the students would be retained after lunch, during recess, or after school in the "homework center" to complete missed assignments.

The schools had schoolwide policies designed to protect instructional time from unnecessary disruptions and distractions.

Some schools identified blocks of time in the daily schedule when the entire school would be teaching reading, math, and language arts as a first step in improving student achievement. In 1984, staff members in the fast-improving schools reported that the majority of their students were not performing at or above grade level, and that plans are now under way to move from effectiveness to excellence. These plans include broadening and strengthening the curriculum, learning better ways of teaching higher order skills, and possibly adopting computer programs, Great Books study programs, oratorical presentations, debates, and so on.

The schools were characterized by well-maintained and orderly environments. Behavioral expectations were developed by the staff, and a commitment was made to consistently enforce them.

The principal conveyed these behavioral expectations to the students at the opening assembly at the beginning of the school year, followed by a discussion of the expectations in each classroom.

Behavioral expectations were printed in the student handbook and distributed to every parent.

Student traffic in the hallways was reduced by the elimination of pullout programs.

Some schools substituted outdoor recess with indoor study breaks throughout the day, which allowed students to casually interact, go to the lavatory, and so on.

The schools clearly articulated grade-level objectives and minimum standards within each subject area.

Staff members were involved in the development of grade-level objectives and standards.
Agriculture for:

States, shall be made in the amounts subsequently for expenses incurred by the Secretary of deposited to the Agricultural Quarantine count shall be known as the to the extent prior estimates were in excess refunded under subsection (c) as subsection (b) and adding a new subsection to read:

"(c) The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of carrying out this section.".

Upon failure to remit any fee under this Title to the Treasury of the United States is imposed is thirty-one days after the close of the calender quarter in which the fee is collected.

Sec. 10. Section 10 of the Act of August 30, 1890, (21 U.S.C. 165) is amended by deleting the first sentence and inserting in lieu thereof:

"The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of carrying out this section."

Sec. 20. Section 2 of the Act of February 2, 1893, (21 U.S.C. 111) is amended by adding at the end thereof:

"The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of carrying out this section."

Sec. 4. Section 4 of the Act of May 29, 1894, (21 U.S.C. 112) is amended by adding at the end thereof:

"The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of carrying out the provisions of this section which relate to the importation of livestock and/or live poultry."

Sec. 5. Section 5 of the Act of May 29, 1894, (21 U.S.C. 113) is amended by adding at the end thereof:

"The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of carrying out the provisions of this section which relate to the importation of livestock and/or live poultry."

Sec. 6. Section 11 of the Act of May 29, 1894, (38 Stat. 784, as amended, 21 U.S.C. 114a) is amended by inserting immediately following the first sentence: "The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of carrying out the provisions of this section which relate to veterinary diagnostics."

Sec. 7. Section 1 of the Act of February 2, 1903, (32 Stat. 781, as amended, 21 U.S.C. 120-121) is amended by inserting immediately following the second sentence: "The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of carrying out the provisions of this section which relate to the exportation of livestock and/or live poultry."

Sec. 8. Section 2 of the Act of July 2, 1962, (21 U.S.C. 134-134h) is amended by deleting the third sentence of section 2(c) (21 U.S.C. 134m) and adding in lieu thereof:

"(c) The Secretary of Agriculture may prescribe and collect fees to recover the costs of carrying out the provisions of this section which relate to the importation and exportation of animals, shall constitute a lien against the animals, cargoes, products, or articles involved."; by amending the fourth sentence of section 2(c) (21 U.S.C. 134m) to read: "Costs collected under this section, except costs related to the importation and exportation of animals, shall be credited to the current appropriation for carrying out animal disease control activities of the Department;" and removing at the end of such Act a new section to read:

"Sec. 14. The Secretary is authorized to prescribe and collect fees to recover the costs of carrying out this section."

"Sec. 15. The Secretary is authorized to prescribe and collect fees to recover the costs of carrying out this Act."

The eighth paragraph under the heading "Bureau of Animal Industry" of the Act of March 4, 1913, (37 Stat. 982, 21 U.S.C. 147a) is amended by deleting section 147a(h) and adding a new section to read:

"(h) The Secretary is authorized to prescribe and collect fees to recover the costs of carrying out this Act."

The following section is inserted at the end of such Act:

"Sec. 16. The Secretary is authorized to prescribe and collect fees to recover the costs of carrying out this Act."

The Act of September 21, 1944, (7 U.S.C. 147a(e)) is amended by adding at the end thereof: "The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of carrying out this section."
the owner of the article sold upon the owner making application therefore with proof of ownership, within six months after such sale, and otherwise the excess shall be deposited to the credit of the person that incurred the costs and shall remain available until expended without fiscal year limitation. The Secretary shall determine the payments as provided by the Secretary, suspend performance of services to persons who have failed to pay such fees, late payment penalty and accrued interest.

Scc. 215. All fees collected pursuant to the statutory authorities referred to in section 214 of this Act and any late payment penalties and accrued interest collected pursuant to this Title shall be credited to such accounts that incur the costs and shall remain available until expended without fiscal year limitation.

TITLE III

Scc. 301. The Secretary of Agriculture may prescribe such regulations as the Secretary deems necessary to carry out this Act. The Secretary of Agriculture may bring an action for the recovery of fees, late payment penalties, and accrued interest which have become due and payable pursuant to this Act against any person obligated for payment of such assessments under this Act in any United States district court or other United States court having jurisdiction in any territory in any jurisdiction in which such person is found or resides or transacts business, and such court shall have jurisdiction to both hear and decide such action.

Scc. 303. (a) For purposes of this Act the term "person" means an individual, corporation, partnership, trust, association, or any other public or private entity, or any officer, employee, or agent thereof.

(b) For purposes of Title I of this Act, the term "vessel" does not include any ferry.

(c) For purposes of Title I of this Act, the term "customs territory of the United States" means the 50 States, the District of Columbia, and Puerto Rico.


(e) For purposes of Title II of this Act, the term "United States" means the States of the United States, the District of Columbia, Guam, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, and all other territories and possessions of the United States.

Agricultural Protection Cost Recovery Act of 1987—Section-by-Section Analysis

Title I of the proposal authorizes the Secretary of Agriculture to assess a fee for each passenger arriving at or destined for a port in the customs territory of the United States aboard a commercial aircraft or vessel. Section 101 also authorizes the Secretary to assess fees for the removal, or pre-clearance or preinspection of commercial vessels, commercial aircraft, commercial trucks, and railroad cars.

Section 102 requires persons issuing tickets for travel into the customs territory of the United States to collect the fee, and remit the fee within 31 days after the close of the calendar quarter in which the fee is assessed. The fees collected with respect to the ticket is issued, the person providing transportation to the passenger must collect the fee before the passenger departs from the port of entry, preclear the vessel and give the passenger a receipt for the fee.

Section 103 authorizes the fees collected under sections 101 and 102 to be deposited in a separate account of the Treasury to be known as the "Agricultural Quarantine Inspection User Fee Account." A penalty shall be assessed for late payments. Any late payment penalty and interest on such overdue fees will be deposited to the Agricultural Quarantine Inspection User Fee Account. From the account, the Secretary of Treasury will refund on a quarterly basis, to any appropriated account the costs incurred by the Secretary of Agriculture for the administration of the Act, and port activities to prevent or preclude preinspection activities carried out by the Secretary of Agriculture in connection with the enforcement of the plant and animal quarantine laws. Section 103 also requires the Secretary of Agriculture to adjust the fees provided in section 102 to reflect the actual costs for the administration of the Act, the activities carried out at ports in the United States and foreign preclearance or preinspection, or the application of any preinspection to the enforcement of the plant and animal quarantine laws, and the maintenance of a reasonable balance in the Agricultural Quarantine Inspection User Fee Account.


Title III authorizes the Secretary to prescribe regulations to carry out the Act.

Section 302 provides the Attorney General with the authority to promulgate regulations of assessments which have not been paid in accordance with this Act and delineates the jurisdiction and venue of the courts to hear and decide any action brought by the Attorney General pursuant to this Act.

Section 303(a) defines the word "person" as used in the Act to mean an individual, corporation, partnership, trust, association, or any other public or private entity, or any officer, employee, or agent thereof. Sections 303 (b) and (d) define, for purposes of Title I, the terms "vessel," "customs territory of the United States," and "plant and animal quarantine laws." "Vessel" is defined to exclude ferries. The "customs territory of the United States" means the 50 States, the District of Columbia, and any other public or private entity, or any officer, employee, or agent thereof.

TITe III

Scc. 301. The Secretary of Agriculture may prescribe such regulations as the Secretary deems necessary to carry out this Act. The Secretary of Agriculture may bring an action for the recovery of fees, late payment penalties, and accrued interest which have become due and payable pursuant to this Act against any person obligated for payment of such assessments under this Act in any United States district court or other United States court having jurisdiction in any territory in any jurisdiction in which such person is found or resides or transacts business, and such court shall have jurisdiction to both hear and decide such action.

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(b) For purposes of Title I of this Act, the term "vessel" does not include any ferry.

(c) For purposes of Title I of this Act, the term "customs territory of the United States" means the 50 States, the District of Columbia, and Puerto Rico.


(e) For purposes of Title II of this Act, the term "United States" means the States of the United States, the District of Columbia, Guam, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, and all other territories and possessions of the United States.

DEPARTMENT OF AGRICULTURE

OFFICE OF THE SECRETARY

WASHINGTON, D.C., July 7, 1987

HON. GEORGE BUSH,
President of the United States.

DEAR MR. PRESIDENT: Transmitted herewith for the consideration of the Congress is a draft bill "To authorize the Secretary of Agriculture to recover costs of carrying out certain animal and plant health inspection programs, and for other purposes." The Department of Agriculture recommends that the draft bill be enacted.

The purpose of this draft bill is to allow the Department to prescribe and collect fees to recover the costs incurred by the Department with respect to carrying out provisions of the laws which relate to veterinary diagnostics; the importation and exportation of animals, animal products, and other articles for animal health purposes; the issuance of phytosanitary certificates for the exportation of plants and plant products. These activities, which include but are not limited to testing, inspection, quarantine, port activities, the examination of records, and cleaning and disinfection, benefit those persons who cause the Department to perform the activity. A 1981 comprehensive report (GAO Report CED 81-49) recommended...
that fees be assessed for several regulatory activities, including those relating to the importation and exportation of animals, because they are designed to aid in the orderly marketing of agricultural commodities and these activities are likely to provide special benefits to the industry. We believe the costs associated with these activities should not be borne by the general public.

In order to facilitate the collection of fees assessed, the draft bill would provide the Secretary with authority to assess a late payment penalty, impose certain liens, and refuse certain services. The draft bill would provide that overdue fees shall accrue interest.

The draft bill provides that funds collected under title II of the draft bill shall be credited to accounts that incur the costs and shall remain available until expended. Funds collected for port activities under title I of the draft bill will be credited to a special account in the Treasury from which the costs of the program will be paid. Under current procedures, most costs are financed from appropriated funds. Approximately $87.5 million in program costs will be recovered annually from the various fees should this draft bill become law.

We advise that enactment of this proposed legislation is an important chapter not only in introducing a resolution to designate June 12 to June 19, 1988, as "Old Cars Week," to the Committee on the Judiciary.

By Mr. REID:

S.J. Res. 208. Joint resolution designating June 12 to June 19, 1988, as "Old Cars Week." Let us honor those who preserve our history by engaging in the hobby of collecting, restoring, and maintaining motor vehicles of historic and special interest.

The development of the automobile is an important chapter not only in the history of transportation, but also in the history of our nation. Cars have become a part of our way of life. Indeed, statistics indicate that 90 percent of American households have cars, with 50 percent owning more than one. In fact, Americans own 26 percent of the world's automobiles and drive about 1.6 trillion miles a year. Truly, we are a Nation on wheels.

The automobile is an integral part of American culture. Our country's highway system connects our States and promotes a national community, while...
affording families the opportunity to enjoy long vacations by automobile and see the beauty of our country first hand. In America we have drive-in restaurants, drive-in theaters and drive-through banks. The automobile is ingrained in our society.

For these reasons, I join my colleagues in the Senate to cosponsor this resolution. Let us celebrate the automobile and in doing so celebrate an important aspect of American culture and history.

ADDITIONAL COSPONSORS
S. 249
At the request of Mr. Dornan, the name of the Senator from Connecticut [Mr. Wicker] was added as a cosponsor of S. 249, a bill to grant employees parental and temporary medical leave under certain circumstances, and for other purposes.

S. 465
At the request of Mr. Metzenbaum, the name of the Senator from New York [Mr. Moynihan] was added as a cosponsor of S. 465, a bill to amend chapter 44, title 18, United States Code, to prohibit the manufacture, importation, sale or possession of firearms, not detectable by metal detection and x-ray systems commonly used at airports in the United States.

S. 1083
At the request of Mr. Glenn, the name of the Senator from South Carolina [Mr. Hollings] was added as a cosponsor of S. 1083, a bill to create an independent oversight board to ensure the safety of U.S. Government nuclear facilities, to apply the provisions of OSHA to certain Department of Energy nuclear facilities, to clarify the jurisdiction and powers of Government agencies dealing with nuclear wastes, to ensure independent research on the effects of radiation on human beings, and for other purposes.

S. 1109
At the request of Mr. Harkin, the names of the Senator from Missouri [Mr. Danforth] and the Senator from Minnesota [Mr. Durenberger] were added as co-sponsors of S. 1109, a bill to amend the Federal Food, Drug, and Cosmetic Act, to require certain labeling of foods which contain tropical fats.

S. 1519
At the request of Mr. Launenberg, the names of the Senator from Kansas [Mr. Dodge] and the Senator from North Dakota [Mr. Burdick] were added as cosponsors of S. 1519, a bill to authorize the President of the United States to award congressional gold medals to Lawrence Dobie and posthumously to Jack Roosevelt Robins in recognition of their accomplishments in sport and in the advancement of civil rights, and to authorize the Secretary of the Treasury to sell bronze duplicates of those medals.

S. 1532
At the request of Mr. Riegle, the names of the Senator from West Virginia [Mr. Rockefeller] and the Senator from Maryland [Ms. Mikulski] were added as cosponsors of S. 1532, a bill to amend the Internal Revenue Code of 1986, to extend through 1992 the period during which qualified mortgage bonds and mortgage certificates may be issued.

S. 1578
At the request of Mr. Stevens, the name of the Senator from Rhode Island [Mr. Pell] was added as a cosponsor of S. 1578, a bill to amend chapter 83 of title 5, United States Code, to provide civil service retirement credit for service performed under the Railroad Retirement Act, and for other purposes.

S. 1600
At the request of Mr. Ford, the names of the Senator from Maryland [Ms. Mikulski], the Senator from Montana [Mr. Melcher], and the Senator from Ohio [Mr. Glenn] were added as cosponsors of S. 1600, a bill to enhance the safety of air travel through a more effective Federal Aviation Administration, and for other purposes.

S. 1663
At the request of Mr. Domenici, the names of the Senator from New York [Mr. Moynihan] and the Senator from Nevada [Mr. Hoyer], the Senator from Montana [Mr. Melcher], the Senator from Minnesota [Mr. Durenberger], and the Senator from Alabama [Mr. Sessions] were added as cosponsors of S. 1663, a bill to reauthorize the Child Abuse Prevention and Treatment Act and other related acts, dealing with adoption opportunities and family violence.

S. 1742
At the request of Mr. Domenici, the names of the Senator from New York [Mr. Moynihan] and the Senator from New Mexico [Mr. Bingaman] were added as cosponsors of S. 1742, a bill to provide for the minting and circulation of one dollar coin, and for other purposes.

S. 1752
At the request of Mr. Baucus, the names of the Senator from Montana [Mr. Harkin], the Senator from Montana [Mr. Melcher], the Senator from New Mexico [Mr. Bingaman] were added as cosponsors of S. 1752, a bill to establish a Commission to study the effects of deregulation of the airline industry.

S. 1788
At the request of Mr. Trible, the name of the Senator from Michigan [Mr. Bingaman] was added as a cosponsor of S. 1788, a bill to protect the aquatic environment from certain chemicals used in antifoulant paints, and for other purposes.

SENATE JOINT RESOLUTION 172
At the request of Mr. Bradley, the names of the Senator from Missouri [Mr. Bond], the Senator from Mississippi [Mr. Cochran], the Senator from Utah [Mr. Gann], the Senator from Tennessee [Mr. Gramm], the Senator from Indiana [Mr. Lugar], the Senator from Oregon [Mr. Packwood], the Senator from Washington [Mr. Adams], the Senator from Oklahoma [Mr. Boren], the Senator from Arkansas [Mr. Bumpers], the Senator from Illinois [Mr. Dixon], the Senator from Georgia [Mr. Fowler], the Senator from Ohio [Mr. Glenn], the Senator from South Carolina [Mr. Hollings], the Senator from Michigan [Mr. Levin], the Senator from West Virginia [Mr. Rockefeller], and the Senator from Alabama [Mr. Shelby] were added as cosponsors of Senate Joint Resolution 172, a joint resolution to designate the period commencing April 20, 1987 and ending February 27, 1988, as "National Visiting Nurse Association Week."

SENATE JOINT RESOLUTION 196
At the request of Mr. Packwood, the names of the Senator from Arizona [Mr. D'Amato] and the Senator from Indiana [Mr. Quayle] were added as cosponsors of Senate Joint Resolution 196, a joint resolution to designate February 4, 1988, as "National Women in Sports Day."

SENATE JOINT RESOLUTION 203
At the request of Mr. D'Amato, the name of the Senator from Texas [Mr. Gramm] was added as a cosponsor of Senate Joint Resolution 203, a joint resolution calling upon the Soviet Union immediately to grant permission to emigrate to all those who wish to join spouses in the United States.

SENATE JOINT RESOLUTION 205
At the request of Mr. Moynihan, the names of the Senator from Illinois [Mr. Simon], the Senator from Minnesota [Mr. Bentsen], the Senator from Michigan [Mr. Levin], the Senator from Massachusetts [Mr. Kennedy], the Senator from New Hampshire [Mr. Rudman], the Senator from Maryland [Mr. Sarbanes], the Senator from Pennsylvania [Mr. Specter], the Senator from West Virginia [Mr. Wallop], the Senator from Iowa [Mr. Grassley], the Senator from Indiana [Mr. Quayle], the Senator from South Dakota [Mr. Daschle], the Senator from California [Mr. Wilson], the Senator from South Carolina [Mr. Hollings], the Senator from Vermont [Mr. Leahy], the Senator from Delaware [Mr. Roth], the Senator from Idaho [Mr. Symms], the Senator from Maine [Mr. Mitchell], the Senator from Minnesota [Mr. Bentsen], the Senator from Alabama [Mr. Sessions], the Senator from Oklahoma [Mr. Boren], the Senator from Delaware [Mr.
Biden), the Senator from West Virginia [Mr. Byrd], the Senator from Kansas [Mr. Dole], the Senator from Rhode Island [Mr. Pell], the Senator from New York [Mr. D'Amato], the Senator from New Jersey [Mr. Torricelli], the Senator from Colorado [Mr. Witt], the Senator from Nevada [Mr. Hecht], the Senator from Arizona [Mr. McCain], the Senator from New York [Mr. D'Amato], the Senator from New Jersey [Mr. Torricelli], the Senator from Rhode Island [Mr. Chafee], the Senator from Connecticut [Mr. Donnell], the Senator from Virginia [Mr. Warner], and the Senator from Tennessee [Mr. Gore] were added as co-sponsors of Senate Joint Resolution 205, a joint resolution expressing the sense of the Congress that United Nations General Assembly Resolution 3379 (XXX) should be overturned, and for other purposes.

SENATE RESOLUTION 301—ACKNOWLEDGING THE PUBLIC SERVICE OF JUDGE ROBERT H. BORK

Mr. Armstrong (for himself and Mr. Dismukes) submitted the following resolution; which was ordered to lie over under the rule:

S. Res. 301

Whereas the Senate of the United States, on September 9, 1987, resolved "to avoid negative attacks calculated to impugn the character, integrity, or patriotism of a candidate"; and
Whereas an unprecedented negative campaign was launched against the nomination to the Supreme Court of Judge Bork and was fueled with millions of dollars from special interest groups, including tax-exempt organizations; and
Whereas that campaign has set a deplorable precedent for the politicization of our courts and for future attempts to control their excesses; and
Whereas the Senate has, on two previous occasions, unanimously confirmed Robert Bork to high federal office, first as Solicitor General of the United States in 1971 pursuant to his present position on the U.S. Court of Appeals for the District of Columbia Circuit; Now, therefore, be it

Resolved That:

(1) The Senate assures Judge Robert Bork of our admiration for the integrity and intelligence he has demonstrated in his long and distinguished career as a legal scholar, dedicated teacher, and eminent jurist.
(2) The Senate thanks Judge Robert Bork for his extraordinary testimony during his prolonged confirmation hearings, by which he focused national attention, during this bicentennial year of our Constitution, on the importance to this country of a Constitution that has defined a life to that document in 1787 and give vitality to it now.
(3) The Senate extends to Judge Robert Bork, and to his family, our esteem for the grace and courage they have shown during the confirmation process just ended.
(4) The Senate affirms its determination that, in its constitutional capacity and in all other proceedings, witnesses will be accorded proper respect and need never fear intimidation or reprisal for their testimony.

SENATE RESOLUTION 302—EXPLAINING THE CONCERN OF THE SENATE REGARDING THE SITUATION IN FIJI

Mr. Pressler submitted the following resolution, which was referred to the Committee on Foreign Relations:

S. Res. 302

Whereas the Nation of Fiji has entered into a period of unparalleled challenge to its democratic character, integrity, or patriotism of a Fijian citizen political supremacy in the Pacific Ocean region is in the national interest of the United States of America; Now, therefore, be it

Resolved, That the United States Senate—
(1) supports the entitlement of the people of Fiji to democratic political institutions based upon free, fair and openly contested elections;
(2) opposes the usurpation of democracy in Fiji; and
(3) supports reconsideration of the Fijian sugar import quota by the United States Government as an expression of opposition to the violation of democratic principles and processes in Fiji.

Mr. Pressler. Mr. President, on May 14 of this year, the Royal Fiji Military Forces, under the direction of Col. Sitiveni Rambuka, overthrew the duly elected Government of Fiji. That action ended over 16 years of successful political democracy in that small island nation.

Since May, political, economic, and social conditions in Fiji have deteriorated seriously. Despite the entreaties and appeals of Fiji's partners in the British Commonwealth, Fiji's military rulers have refused to restore the rights guaranteed to all Fijians under Fiji's 1970 Constitutional Act. In fact, at a meeting of its members in Vancouver, Canada, last week, the Commonwealth voted to expel Fiji from the organization.

It is clear that the military regime of Col. Sitiveni Rambuka has no intention of honoring the right of non-native Fijians to enjoy the liberties guaranteed by Fiji's constitution. In particular, the Rambuka regime is determined to unilaterally rewrite that constitution to guarantee a minority of Fijian citizens political supremacy in perpetuity.

Fiji's ethnic composition is unique. No other nation has quite the same racial circumstances. Yet, for those who honor democracy and recognize its practical worth in managing the affairs of a society of diverse peoples, those circumstances are not an acceptable excuse to violate the civil rights and liberties of full citizens. Any government based on the negative principle of minority rule by a particular ethnic group is abhorrent to a world that is gradually becoming more democratic.

Therefore, I believe the United States Senate should go on record as opposing what has occurred in Fiji. My resolution would do just that. Quite simply, it says that the United States Senate supports the restoration of democracy for all Fijians. It also expresses support for a reconsideration of Fiji's American sugar quota by the United States Government. This action would be consistent with the economic sanctions already adopted by Australia, New Zealand, and other Commonwealth nations. It is also consistent with our administration's suspension of the very small amount of assistance we provide Fiji. This regime must quickly see sense and end any penalties that will fall upon all Fijians if democracy is not restored soon. The longer we delay our denunciation of the abdication of democracy in Fiji, the more encouragement it will give to the enemies of democracy.

AMENDMENTS SUBMITTED

PRICE-ANDERSON ACT AMENDMENTS

JOHNSTON (AND MCCLURE) AMENDMENT NO. 1038

(Ordered to lie on the table.)

Mr. Johnston (for himself and Mr. McClure) submitted an amendment intended to be proposed by them to the bill (S. 746) to amend the Atomic Energy Act of 1954, as amended, to establish a comprehensive, equitable, reliable, and efficient mechanism for full compensation of the public in the event of an accident resulting from the activities undertaken under contract with the Department of Energy involving nuclear materials; as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

SHORT TITLE

Section 1. This Act may be cited as the "Price-Anderson Act Amendments Act of 1987".

FINDING AND PURPOSES

Sec. 2. (a) The Congress finds and declares that—
(1) an equitable, efficient, reliable, and comprehensive system, established in advance of any accident involving nuclear materials subject to the Atomic Energy Act of 1954, as amended, that provides a mechanism for full compensation of the public in the event of such an accident is in the public interest;
(2) the basic framework established under section 170 of the Atomic Energy Act of 1954, as amended, and the essential ele­
ments on which the nuclear industries have achieved those fundamental objectives and, accord­
ingly, should be retained;
(3) the responsibility of the Federal Gov­ernment, as set forth in this Act and the implementa­tion of, and recognition that develop­ments toward, in radioactive waste management, have made it imperative that the Federal Government explicitly assume its responsibility in this Act to pro­vide full, equitable, and sufficient compensa­tion to the public for all damages and inju­ries arising out of a nuclear incident relate­
ing to such activities, including activities pursuant to the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10101 et seq.) and activities authorized as Waste Isolation Pilot Project (Project 77-13-f) pursuant to fiscal year 1980 Department of Energy for National Se­curity Programs Appropriations (Public Law 98-164); and
(4) based upon the experience gained in implement­ing the present system of provid­ing insurance or financial protection for nuclear materials, and in light of develop­ments that have taken place since the Con­gress enacted the 1970 amendments to the Atomic Energy Act of 1954, as amended, it is appropriate and in the public interest for the Congress to consider such experience and developments and to make such changes as will advance the fundamen­tal objectives set forth in clause (1).

(b) The purposes of this Act are—
(1) establish an equitable, efficient, reli­able, and comprehensive system, in advance of any accident involving nuclear materials, which provides a mechanism for full compen­sation of the public in the event of such an accident for both present and future nuclear material activities; and
(2) incorporate in such system the experi­ence gained and the developments that have taken place since the Congress last ex­tended and amended the system.

FINANCIAL PROTECTION

Sec. 3. Section 170 b. of the Atomic Energy Act of 1954, as amended, is amended to read as follows:

"c. (1) The amount of financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in subsection (b) of this section if it may be determined that, as a result of the time to time, taking into consideration such factors as—

(A) the cost and terms of private insurance;

(B) the type, size, and location of the li­censed activity and other factors pertaining to the hazard; and

(C) the nature and purpose of the li­censed activity.

For facilities designed for producing substantial amounts of electricity and having a rated capacity of one hundred thousand electrical kilowatts or more, the amount of financial protection required shall be the maximum amount available at reasonable costs and on reasonable terms from private sources. Such financial protection may in­clude private insurance, private contractual indemnity, or any other financial proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe.

(2)(A) In prescribing such terms and con­ditions for licensees required to have and maintain financial protection equal to the maximum amount required to be available from private sources, the Commis­sion shall, by rule initially prescribed not later than twelve months from the date of enactment of the Price-Anderson Act Amendments of 1984, as amended, and thereafter increas­ing such maximum amount, private liability insurance available under an industry retro­
spective rating plan providing for premium charges to be made in whole or in part until public liability from a nuclear incident exceeds or appears likely to exceed the level of the primary financial protection required under this section, if such incident is a nuclear incident: Provided, That such insurance is avail­able to, and of, all of the licensees of such facilities without regard to the manner in which they obtain other types or amounts of such financial protection. The standard deferred premium which may be charged for individual facilities taking into account under such a plan shall be not more than $50,000,000 in 1987 dollars (but not more than $12,000,000 in 1987 dollars in any one requirement) for any facility required to maintain the maximum amount of financial protec­tion.

(2)(B) The amount which must be charged a licensee under the industry retrospective rating plan required pursuant to subparagraph (A) of this paragraph following any nuclear incident arising out of nuclear materials, shall be the licensee's pro rata share of the aggregate public liability claims and costs arising out of the nuclear incident. Payment of any State pre­mium tax charged a licensee under the deferred premium provided for in this Act shall be the responsibility of the licensee and shall not be included in the retrospec­tive premium charged to the licensee under this section. The Commission is authorized to es­tablish a maximum amount which the ag­gregate deferred premiums charged for each facility within one calendar year may not exceed. The Commission may establish amounts less than the standard premium for individual facilities taking into account such factors as the facility's size, location, and other factors pertaining to the hazard.

(C) The Commission shall establish such availability of funds to meet any assessment of deferred premiums within a reasonable time when due, and may provide reinsur­ance to the public insurance fund or the special fund or any other insurance fund created in accordance with the resources of private industry and insurance. Any agreement by the Com­mission with a licensee or indemnitor to guarantee the payment of deferred premiums may contain such terms as the Commis­sion deems appropriate to carry out the pur­poses of this section and to assure reimb­ursement to the Commission for its pay­ments made due to the failure of such li­censee or indemnitor to meet any of its obli­gations arising under or in connection with financial protection required under this sub­section including without limitation terms creating liens upon the licensed facility and the resources thereof, or other property or revenues of such licensee to secure such reimbursement and consent to the automatic revocation of any license.

(3) The Secretary of the Treasury shall, from the balance of deferred premiums to be assessed pursuant to paragraph (2)(A) of this subsection, the aggregate payments in any one year by or on behalf of persons in­volved in a nuclear incident not to exceed the amount of financial protection provided in that year pursuant to paragraph (2)(A) of this subsection.

(4) The funds provided by financial protec­tion pursuant to this subsection in any year by or on behalf of such persons indem­nified and, where appropriate, the funds provided as a result of the issuance of obli­gations required pursuant to clause (i) of this para­graph, shall be the exclusive source of pay­ments for public liability claims where such liability does not exceed the amount of fi­nancial protection required under section 170b.

(5) The total of obligations issued pursuant to clause (i) of this subparagraph for any given nuclear incident, including any in­terest to be paid on such obligations, shall not exceed amounts provided in appropria­tion Acts.

(6) Redemption of obligations issued pursuant to clause (i) of this subparagraph, including any interest to be paid on such obli­gations, shall be made by the Commission from the proceeds for the sale of any securities issued pursuant to paragraph (2)(A) of this subsection as a result of the nuclear in­cident for which such obligations were issued.

(VII) Obligations issued pursuant to clause (i) of this subparagraph shall bear interest at a rate determined by the Secretary of the Treasury, which shall not be less than the yield on United States obligations of comparable maturity. The Secretary shall consider the average market yield on out­standing marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction proceeds for the sale of any securities issued under chapter 31 of title 31, United States Code, and the purposes for which securities may be issued under such Act are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, payments, and sales of any securities issued under this section shall be treated as public debt transactions of the United States.

SEC. 4. INDUSTRY RETROSPECTIVE AGREEMENTS FOR LI­CENSI EES OF NUCLEAR REGULATORY COMMISSION.

Section 170c. of the Atomic Energy Act of 1954, as amended, is the aggregate annual deferred premiums assessed pursuant to paragraph (2)(A) of this subsection for a nuclear inci­dent are insufficient to indemnify public li­ability claimants, a plan providing for such indemnity in a timely manner as such public liability claims arise, the Commission is authorized to issue, and shall request the Congress to issue, such legislation to the Secretary of the Treasury for the purpose of compensating such claimants, in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Commission and the Secretary of the Treasury.

(2) The aggregate amount of such obliga­tions, including any interest to be paid on such obligations, shall not exceed the amount of deferred premiums to be assessed pursuant to paragraph (2)(A) of this subsection for such nuclear incident.

(3) With respect to liability for a nuclear incident covered by an industry retrospec­tive rating plan required pursuant to this subsection, the aggregate payments in any single year by or on behalf of persons in­volved in any such accident not to exceed the amount of financial protection provided in that year pursuant to paragraph (2)(A) of this subsection.

(4) The funds provided by financial protec­tion pursuant to this subsection in any year by or on behalf of such persons indem­nified and, where appropriate, the funds provided as a result of the issuance of obli­gations required pursuant to clause (i) of this para­graph, shall be the exclusive source of pay­ments for public liability claims where such liability does not exceed the amount of fi­nancial protection required under section 170b.
INDEMNIFICATION AGREEMENTS FOR ACTIVITIES UNDERTAKEN UNDER CONTRACT WITH THE DEPARTMENT OF ENERGY

Sec. 6, Section 170d of the Atomic Energy Act of 1954, as amended, is amended to read as follows:

"(d) In addition to any other authori-

zation or power deriving from or pursuant to section 170 d, the Secretary shall until August 1, 1987, enter into agreements of indemnification with its con-
tractors for the construction or operation of production or utilization facilities or other activities undertaken under section 22 of the Atomic Energy Act of 1954, as amended, involving activities under the risk of public liability for a nuclear incident.

"(C) The authority conferred upon the Secretary pursuant to subparagraph (a) to enter into agreements of indemnification with contractors shall include contracts entered into by the Secretary for the purpose of carrying out such activities as the Secretary is authorized to undertake, pursuant to the provisions of this Act or any other law, involving the transportation of such materials to a storage or disposal facility, and the construction and operation of any such site or facility.

"(2) For the purpose of compensating public liability claims, as defined in section 11 w. of this Act, arising out of activities involving the storage or disposal of spent nuclear fuel, high-level radioactive waste, or transuranic waste, including the transportation of such materials to a storage or disposal facility, or disposal at such a facility, and the construction and operation of any such site or facility, the Secretary shall make available such funds as may be necessary, in an amount not to exceed the aggregate level of liability for a single nuclear incident established under subsection (1)(A) from the nuclear waste fund established pursuant to section 302 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10320).

"(3) Public liability claims arising out of activities involving the storage or disposal of all other spent nuclear fuel, high-level radioactive waste, or transuranic waste produced as a result of the generation of electricity in a civilian nuclear power reactor, including the transporta-
tion of such materials to a storage or disposal site or facility, and the construction and operation of any such site or facility, shall be compensated in accordance with the provisions of this Act, and from the same source of funds applicable to all other contractors indemnified pursuant to this subsection.

"(4) In the case of a nuclear incident that occurs outside the United States, the amount of the indemnity provided by the Secretary pursuant to this subsection shall not exceed $100,000,000.

"(B) The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Secretary.

"(C) A contractor with whom an agree-
mament of indemnification has been executed and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this section, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or de-

fense founded in the Federal, State, or mu-

cipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

"Provided, however, that any such approval for public liability under this subsection, together with the amount of any financial protection required, shall apply to any and all agreements of indemnification under which the Secretary or his predecessor may be re-

duired to indemnify any person, and all such agreements of indemnification shall be entered into pursuant to section 170 d, as amended, and will in accordance with such procedures, take whatever action is necessary, including approval of appropriate compensation plans, to compensate the

AGGREGATE LIABILITY FOR A SINGLE NUCLEAR INCIDENT

Sec. 6, Section 170a, of the Atomic Energy Act of 1954, as amended, is amended to read as follows:

"(a) In the event of a nuclear incident occurring outside the United States, the amount of the indemnity provided by the Secretary pursuant to this subsection shall not exceed $500,000,000.

"(B) The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Secretary.

"(C) A contractor with whom an agreement of indemnification has been executed and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this section, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

"Provided, however, that any such approval for public liability under this subsection, together with the amount of any financial protection required, shall apply to any and all agreements of indemnification under which the Secretary or his predecessor may be required to indemnify any person, and all such agreements of indemnification shall be entered into pursuant to section 170 d, as amended, and will in accordance with such procedures, take whatever action is necessary, including approval of appropriate compensation plans, to compensate the
public in full for all public liability claims resulting from a disaster of such magnitude. Such compensation and relief of all States considered approved for purposes of a plan or plans.

The compensation plan number ed shall report annually to the Congress on the operations under this section.

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(B) avoided unnecessary duplication of effort with that of other parties similarly situated;
(C) made frivolous claims on defenses; and
(D) attempted to unreasonably delay the presentation or adjudication of such claims".

**JUDICIAL REVIEW OF CLAIMS ARISING OUT OF A NUCLEAR INCIDENT**

**SEC. 11.** (a) **CONSIDERATION OF CLAIMS.** Sections 170 and 2012 of the Atomic Energy Act of 1954, as amended, is amended—

(1) in the first sentence—

(A) by striking "a catastrophic nuclear occurrence" each place it appears and inserting "a nuclear incident"; and

(B) by striking the extraordinary nuclear occurrence" each place it appears and inserting "the nuclear incident";

(2) in the second sentence, by inserting after "court" the first place it appears the following: "(including any such action pending on the date of the enactment of the Price-Anderson Act Amendments of 1987)"; and

(3) by adding at the end the following new sentence: "In any action that is or becomes removable pursuant to this paragraph, a plaintiff for removal shall be filed within the period provided in section 1446 of title 28, United States Code, or within the thirty-day period beginning on the date of the enactment of the Price-Anderson Act Amendments of 1987, whenever occurs later."

(b) **DEFINITION OF PUBLIC LIABILITY ACTION.**—Section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2210c), as previously amended by this Act, is further amended by striking the following at the end of the first subsection:

"hh. The term 'public liability action', as used in section 170, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 170, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident occurred, unless such law is inconsistent with the provisions of such section."

(c) **SPECIAL CASELOAD MANAGEMENT PANEL.**—Section 170 n. of the Atomic Energy Act of 1954 (42 U.S.C. 2210nn) is amended by adding at the end the following new subsection:

"(3)(A) Following any nuclear incident, the chief judge of the United States district court in which the nuclear incident occurs may appoint a special caseload management panel (in this paragraph referred to as the 'management panel') to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if—

(i) the United States district court having jurisdiction under paragraph (a) determines that the nuclear incident is likely to exceed the amount of primary financial protection available under subsection e.; or

(ii) the chief judge of the United States district court (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the 'management panel') to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if—

(1) the United States district court having jurisdiction under paragraph (a) determines that the nuclear incident is likely to exceed the amount of primary financial protection available under subsection e.; or

(2) with respect to public liability actions (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the 'management panel') to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if—

(1) the United States district court having jurisdiction under paragraph (a) determines that the nuclear incident is likely to exceed the amount of primary financial protection available under subsection e.; or

(2) the chief judge of the United States district court (or the judicial council of the judicial circuit) determines that cases arising out of the nuclear incident will have an unusual impact on the work of the court.

(B)(i) Each management panel shall consist of one or more members who are United States district judges or circuit judges; and

(ii) Members of a management panel may include any United States district judge or circuit judge of another district court or court of appeals, if the chief judge of such other district court or court of appeals consents to such assignment."

(3) "It shall be the function of each management panel—

(i) to coordinate related or similar claims for hearing, resolution, and payment of claims as appropriate; and

(ii) to establish priorities for the handling of different classes of cases;"

(4) "(a) assign to cases a particular judge or special master; and

(b) (i) to appoint special masters to hear particular types of cases, or particular elements of any case, or to promulgate special rules of court, not inconsistent with the Federal Rules of Civil Procedure, to expedite cases or allow more equitable consideration of claims; and

(ii) to implement such other measures consistent with existing law and the Federal Rules of Civil Procedure, as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident; and

(5) "(i) to assemble and submit to the President such data, available to the court, as may be useful in estimating the aggregate damages from the nuclear incident;"

(6) "DATE OF RESPONSIBILITY OF NUCLEAR REGULATORY COMMISSION AND DEPARTMENT OF ENERGY"

**SEC. 12.** Section 170 p. of the Atomic Energy Act of 1954, as amended, is hereby amended by striking "1983" and inserting in lieu thereof "2013, and the Secretary shall submit to the Congress by August 1, 1997, and every ten years thereafter,"

**CONFORMING AMENDMENTS**

**SEC. 13.** (a) Sections 170, 2012, 2210c, and of section 170 of the Atomic Energy Act of 1954, as amended, are hereby amended by inserting after "1983" and inserting in lieu thereof "2013, and the Secretary shall submit to the Congress by August 1, 1997, and every ten years thereafter,"

**PRESIDENTIAL COMMISSION ON CATASTROPHIC NUCLEAR ACCIDENTS**

**SEC. 14.** Section 170 of the Atomic Energy Act of 1954, as amended, is hereby amended by adding at the end the following new subsection:

"q. **PRESIDENTIAL COMMISSION ON CATASTROPHIC NUCLEAR ACCIDENTS.**—(1) Not later than ninety days after the date of the enactment of the Price-Anderson Act Amendments of 1987, the President shall establish a commission (in this subsection referred to as the 'study commission') in accordance with the Federal Advisory Committee Act (5 U.S.C. App.) to study means of fully compensating victims of a catastrophic nuclear accident that exceeds the maximum amount of financial protection required of licensees covered by an industry retrospective rating plan required by subsection b., or the amount of aggregate public liability claims through an administrative agency instead of the judicial system;

(2) recommendations for any standards or procedures that are necessary to establish priorities for the hearing, resolution, and payment of claims when awards are likely to exceed the amount of funds available within a specific time period; and

(3) recommendations for any special standards or procedures necessary to decide and pay claims for latent injuries caused by the nuclear incident.

(a)(A) The Chairperson of the study commission may receive compensation at the maximum amount of financial protection required of licensees covered by an industry retrospective rating plan required by subsection b., or the amount of aggregate public liability claims through an administrative agency instead of the judicial system; and

(c) Each member of the study commission shall hold office until the termination of the study commission, which may be terminated by the President for inefficacy, neglect of duty, or malfeasance in office."

**SEC. 15.** Each member of the study commission shall receive compensation at the maximum rate now or hereafter prescribed by law for each day such member is engaged in the work of the study commission. Each member may also receive travel expenses, including per diem in lieu of subsistence under sections 5702 and 5703 of title 5, United States Code.
"(5) The final report required in paragraph (3) shall be submitted to the Congress not later than the expiration of the two-year period beginning on the date of the enactment of the Price-Anderson Amendment of 1987.

(6) The study commission shall terminate upon the expiration of the two-month period beginning on the date on which the final report required in paragraph (3) is submitted.

LIABILITY OF LESSORS

Sec. 15. Section 170 of the Atomic Energy Act of 1954, as amended by this Act, is further amended by adding at the following new subsection:

"(t) LIMITATION ON LIABILITY OF LESSORS.—No person under a bona fide lease of any utilization or production facility, for any legal liability arising out of or resulting from a nuclear incident resulting from such facility, unless such facility is in the actual possession and control of such person at the time of the nuclear incident giving rise to such legal liability."

DEFINITIONS

Sec. 16. (a) Subsection s. of section 11 of the Atomic Energy Act of 1954, as amended, is amended by inserting at the end thereof the following:

"In the event that the Secretary of Energy, in carrying out any activity that the Secretary is authorized or directed to undertake pursuant to this Act or any other law involving the risk of public liability for a nuclear incident as a result of the storage or disposal of, or research and development on, spent nuclear fuel, high-level radioactive waste, or transuranic waste (including the transportation of such materials to a storage or disposal site or facility, and the construction of any such site or facility), undertakes such activity in a manner that involves the actual physical handling of spent nuclear fuel, high-level radioactive waste, or transuranic waste (or the transportation of such materials to a storage or disposal site or facility, and the construction of any such site or facility), the Secretary shall be considered as if he were a contractor with whom an indemnity agreement has been entered into pursuant to subsection 170 d. of this Act."

(b) Subsection t. of section 11 of the Atomic Energy Act of 1954, as amended, is amended in clause (1) by inserting "and any other person" the following: "as defined in subsection (s)."

(c) Section 11 of the Atomic Energy Act of 1954, as amended, is amended by adding at the end thereof the following new subsection:

"(u) See. As used in section 170, the term '1987 dollars' means in any year an amount that is adjusted to reflect the effects of inflation for the period between such year and the year of the enactment of the Price-Ander­son Act Amendments Act of 1987. The rate or measure of inflation shall be measured by the percentage change in the implicit price deflator for the Gross National Product published by the United States Department of Com­merce."

PUNITIVE DAMAGES

Sec. 17. Section 170 of the Atomic Energy Act of 1954, as amended, is further amended by adding a new subsection 170 s. as follows:

"s. (1)(A) No court may award exemplary or punitive damages unless in any action with respect to a nuclear incident against a person on behalf of whom the United States is obligated to make payments under this subsection, the court determines, by a preponderance of the evidence, that such incident was caused by willful misconduct, malfeasance, or wrongful act on the part of the United States or of any of its instrumentalities or agencies, or of any private contractor or supplier thereto, who violates (or whose employee violates) any law or regulation or order related to nuclear safety prescribed or issued by the Secretary of Energy pursuant to this Act, or the Radium-186 (as defined by reference by the Secretary for purposes of the Radium-186 Law in any pertinent regulation) as a result of such violation. If any violation under this subsection is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty.

"(B) The court shall award exemplary or punitive damages under this subsection only if the court determines, by a preponderance of the evidence, that such violation was committed in bad faith or with reckless disregard for the reasonable probability of such violation.

"(2)(A) No court may award exemplary or punitive damages unless in any action with respect to a nuclear incident against a person on behalf of whom the United States is obligated to make payments under this subsection, the court determines, by a preponderance of the evidence, that such incident was caused by willful misconduct, malfeasance, or wrongful act on the part of the United States or of any of its instrumentalities or agencies, or of any private contractor or supplier thereto, who violates (or whose employee violates) any law or regulation or order related to nuclear safety prescribed or issued by the Secretary of Energy pursuant to this Act, or the Radium-186 (as defined by reference by the Secretary for purposes of the Radium-186 Law in any pertinent regulation) as a result of such violation. If any violation under this subsection is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty.

"(B) The court shall award exemplary or punitive damages under this subsection only if the court determines, by a preponderance of the evidence, that such violation was committed in bad faith or with reckless disregard for the reasonable probability of such violation."

PRECAUTIONARY EVACUATIONS

Sec. 18. (a) Costs Incurred by State Governments.—Section 11 w. of the Atomic Energy Act of 1954, as previously amended by adding at the end the following new subsection:

"(6) Limitation on Liability of Lessors.—Sec­tion 170 c. of the Atomic Energy Act of 1954, as amended by adding at the end the following new subsection:

"(i) subsection 170 c. with a licensee of the Commission that is required to maintain less than the maximum amount of financial protection;

"(ii) subsection 170 d. and

"(iii) subsection 170 k.

"(2) Nothing in this subsection affects the authority of any court to award exemplary or punitive damages under State law in any instance other than an instance subject to paragraph (1)."

DEFINITIONS

Sec. 19. The Atomic Energy Act of 1954, as amended, is further amended by adding a new section 334A as follows:

"Section 334A. LIMITATION ON AWARD OF PUNITIVE DAMAGES FOR VIOLATIONS OF DEPARTMENT OF ENERGY REGULATIONS.—(a) Any person who has entered into an agreement of indemnification under subsection 170 d. (or any subcontractor or supplier thereto) who violates (or whose employee violates) any law or regulation or order related to nuclear safety prescribed or issued by the Secretary of Energy pursuant to this Act, or the Radium-186 (as defined by reference by the Secretary for purposes of the Radium-186 Law in any pertinent regulation) as a result of such violation. If any violation under this subsection is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty.

"(b) The court shall have the power to compromise, modify, or set aside in whole or in part, the order of the Secretary, or the court may remand the proceedings to the Secretary for such further action as the court may direct.

"(c)(1) The Secretary shall have the power to compromise, modify, or set aside in whole or in part, the order of the Secretary, or the court may remand the proceedings to the Secretary for such further action as the court may direct.

"(2) Any person against whom a penalty is assessed under this paragraph may, within sixty calendar days after the date of imposition of the civil penalty, institute an action in the United States court of appeals for the appropriate judicial circuit for judicial review of such order in accordance with chapter 7 of title 5, United States Code. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in part, the order of the Secretary, or the court may remand the proceeding to the Secretary for such further action as the court may direct.

"(3)(A) In the case of any civil penalty with respect to which the procedures of this paragraph have been elected, the Secretary shall issue an order amending or setting aside the order, the date of receipt of the notice under paragraph (1) of the proposed penalty.

CIVIL PENALTIES

Sec. 20. The Atomic Energy Act of 1954, as amended, is further amended by adding a new section 170 p. as follows:

"Sec­tion 170 p. LIMITATION ON AWARD OF PUNITIVE DAMAGES FOR VIOLATIONS OF DEPARTMENT OF ENERGY REGULATIONS.—(a) Any person who has entered into an agreement of indemnification under subsection 170 d. (or any subcontractor or supplier thereto) who violates (or whose employee violates) any law or regulation or order related to nuclear safety prescribed or issued by the Secretary of Energy pursuant to this Act, or the Radium-186 (as defined by reference by the Secretary for purposes of the Radium-186 Law in any pertinent regulation) as a result of such violation. If any violation under this subsection is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty.

"(b) The court shall have the power to compromise, modify, or set aside in whole or in part, the order of the Secretary, or the court may remand the proceedings to the Secretary for such further action as the court may direct.
jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

"(C) Any election to have this paragraph apply may not be revoked except with consent of the Secretary and the Congress.

"(4) If any person fails to pay an assessment of a civil penalty after it has become a final judgment, the Secretary may institute an action to recover the amount of such penalty in any appropriate district court of the United States. In such action, the validity and appropriateness of the assessment order or judgment shall not be subject to review.

"d. The provisions of this section shall not apply to

"(1) The University of Chicago (and any subcontractors or suppliers thereto) for activities associated with Argonne National Laboratory;

"(2) The University of California (and any subcontractors or suppliers thereto) for activities associated with Los Alamos National Laboratory, Lawrence Livermore National Laboratory, and Lawrence Berkeley National Laboratory;

"(3) American Telephone and Telegraph Company (and any subcontractors or suppliers thereto) for activities associated with Sandia National Laboratory;

"(4) Universities Research Association, Inc. (and any subcontractors or suppliers thereto) for activities associated with Fermi National Laboratory;

"(5) Princeton University (and any subcontractors or suppliers thereto) for activities associated with Princeton Plasma Physics Laboratory;

"(6) The Associated Universities, Inc. (and any subcontractors or suppliers thereto) for activities associated with the Brookhaven National Laboratory; and

"(7) Battelle Memorial Institute (and any subcontractors or suppliers thereto) for activities associated with Pacific Northwest Laboratory.

CRIMINAL PENALTIES

Sec. 20, Section 223 of the Atomic Energy Act of 1984, as amended, is further amended by adding a new subsection c. as follows:

"(c) Any officer, employee, or person acting as employee of a person in any capacity, or any subcontractor or supplier, shall be subject to the authority of the Secretary for purposes of nuclear safety-related rules, regulations, or orders prescribed by or issued under authority of the Secretary to enforce, implement, or apply such rules, regulations, or orders.

OFFICE OF INSPECTOR GENERAL FOR NUCLEAR PROGRAMS

"Sec. 208A. (a) There shall be established within the Department an Office of Inspector General for Nuclear Programs to be headed by an Inspector General for Nuclear Programs who shall be appointed by the President, by and with the advice and consent of the Senate, solely on the basis of integrity and demonstrated ability in management of duties assigned to the Inspector General for Nuclear Programs in this section and with regard to political affiliations or activities relating to health, safety, or environmental management in the administration of nuclear programs.

"(b) The Deputy Inspector General for Nuclear Programs shall report to, and be under the general supervision of, the Secretary or, to the extent such authority is delegated, the Deputy and Assistant Deputy for Nuclear Programs or the Deputy for Nuclear Programs who shall be appointed by the President, by and with the advice and consent of the Senate, solely on the basis of integrity and demonstrated ability in management of duties assigned to the Inspector General for Nuclear Programs in this section and with regard to political affiliations or activities relating to health, safety, or environmental management in the administration of nuclear programs.

"(c) The Deputy Inspector General for Nuclear Programs may not be removed except with the consent of the Secretary and the Congress semiannual reports summarizing the activities of the Office during the immediately preceding six-month periods ending March 31 and September 30.

"(d) There shall be in the Office an Assistant Deputy Inspector General for Nuclear Programs who shall be appointed by the President, by and with the advice and consent of the Senate, solely on the basis of integrity and demonstrated ability in management of duties assigned to the Inspector General for Nuclear Programs in this section and with regard to political affiliations or activities relating to health, safety, or environmental management in the administration of nuclear programs.

"(e) The Inspector General for Nuclear Programs or the Deputy may be removed from office by the President, by and with the advice and consent of the Senate, solely on the basis of integrity and demonstrated ability in management of duties assigned to the Inspector General for Nuclear Programs in this section and with regard to political affiliations or activities relating to health, safety, or environmental management in the administration of nuclear programs.

"(f) The Inspector General for Nuclear Programs shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of title 5, United States Code, and the Deputy Inspector General for Nuclear Programs shall be compensated at the rate provided for level V of the Executive Schedule under section 5316 of title 5, United States Code.

"(g) It shall be the duty and responsibility of the Inspector General for Nuclear Programs—

"(1) to supervise, coordinate, and provide policy direction for auditing and investigative activities relating to the promotion of health, safety and sound environmental management in the administration of the nuclear programs and operations of the Department;

"(2) to recommend policies for, and to conduct, supervise, or coordinate other activities relating to the operation of health, safety and sound environmental management in the administration of the nuclear programs and operations of the Department;

"(3) to recommend policies for, and to conduct, supervise, or coordinate other activities relating to the operation of health, safety and sound environmental management in the administration of the nuclear programs and operations of the Department; and

"(4) to keep the Secretary and Congress fully informed of the operations of the Department and to recommend corrective action concerning serious problems or deficiencies identified and brought to the attention of the Secretary or the Congress.

"(h) The Inspector General for Nuclear Programs shall, in accordance with applicable laws and regulations governing the civil service, appoint an Assistant Inspector General for Audits and an Assistant Inspector General for Investigations.

"(i) The Inspector General for Nuclear Programs or the Deputy shall have particular responsibility for—

"(1) identifying and bringing to the attention of the Secretary for purposes of nuclear safety-related rules, regulations, or orders prescribed by or issued under authority of the Secretary to enforce, implement, or apply such rules, regulations, or orders, any significant problems or deficiencies relating to health, safety, or environmental management in the administration of nuclear programs, or operations of the Department, and

"(2) to recommend corrective action concerning serious problems or deficiencies identified and brought to the attention of the Secretary or the Congress.

OFFICE OF INSPECTOR GENERAL FOR NUCLEAR PROGRAMS

Sec. 21. The Department of Energy Organization Act (Public Law 95–91, as amended) is amended by adding a new section 208A as follows:

"OFFICE OF INSPECTOR GENERAL FOR NUCLEAR PROGRAMS

"Sec. 208A. (a) There shall be established within the Department an Office of Inspector General for Nuclear Programs to be headed by an Inspector General for Nuclear Programs who shall be appointed by the President, by and with the advice and consent of the Senate, solely on the basis of integrity and demonstrated ability in management of duties assigned to the Inspector General for Nuclear Programs in this section and without regard to political affiliations or activities relating to health, safety, or environmental management in the administration of nuclear programs and operations administered or financed by the Department, and (B) the identification and prosecution of violations of nuclear safety-related rules, regulations, or orders prescribed by or issued under authority of the Secretary to enforce, implement, or apply such rules, regulations, or orders, expressly incorporated by reference by the Secretary for purposes of nuclear safety; and

"(4) to keep the Secretary and Congress fully informed of the operations of the Department and to recommend corrective action concerning serious problems or deficiencies identified and brought to the attention of the Secretary or the Congress.

"(b) The Inspector General for Nuclear Programs shall, in accordance with applicable laws and regulations governing the civil service, appoint an Assistant Inspector General for Audits and an Assistant Inspector General for Investigations.

"(c) The Deputy Inspector General for Nuclear Programs shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of title 5, United States Code, and the Deputy Inspector General for Nuclear Programs shall be compensated at the rate provided for level V of the Executive Schedule under section 5316 of title 5, United States Code.

"(d) It shall be the duty and responsibility of the Inspector General for Nuclear Programs—

"(1) to supervise, coordinate, and provide policy direction for auditing and investigative activities relating to the promotion of health, safety and sound environmental management in the administration of the nuclear programs and operations of the Department; and

"(2) to recommend policies for, and to conduct, supervise, or coordinate other activities relating to the operation of health, safety and sound environmental management in the administration of the nuclear programs and operations of the Department; and

"(3) to recommend policies for, and to conduct, supervise, or coordinate other activities relating to the operation of health, safety and sound environmental management in the administration of the nuclear programs and operations of the Department; and

"(4) to keep the Secretary and Congress fully informed of the operations of the Department and to recommend corrective action concerning serious problems or deficiencies identified and brought to the attention of the Secretary or the Congress.

OFFICE OF INSPECTOR GENERAL FOR NUCLEAR PROGRAMS

"Sec. 208A. (a) There shall be established within the Department an Office of Inspector General for Nuclear Programs to be headed by an Inspector General for Nuclear Programs who shall be appointed by the President, by and with the advice and consent of the Senate, solely on the basis of integrity and demonstrated ability in management of duties assigned to the Inspector General for Nuclear Programs in this section and without regard to political affiliations or activities relating to health, safety, or environmental management in the administration of nuclear programs, or operations of the Department, and (B) the identification and prosecution of violations of nuclear safety-related rules, regulations, or orders prescribed by or issued under authority of the Secretary to enforce, implement, or apply such rules, regulations, or orders, expressly incorporated by reference by the Secretary for purposes of nuclear safety; and

"(4) to keep the Secretary and Congress fully informed of the operations of the Department and to recommend corrective action concerning serious problems or deficiencies identified and brought to the attention of the Secretary or the Congress.
shall be enforceable by order of any necessary in the performance of the functions as services, including services of experts and operations with respect to which the Secretary when necessary for any recommendations, and other material available to responsibilities under this section; persons of Government service employed possession pertaining to the performance of func­ tions as it deems advisable.

REVIEW OF DEPARTMENT OF ENERGY NUCLEAR ACTIVITIES

SEC. 22. (a)(1) The President shall, as soon as practicable but not later than one hundred and twenty days after the date of enactment of this Act, appoint a panel of five independent, highly-qualified individuals to make recommendations to Congress for regulation and oversight of Department of Energy nuclear activities.

(2) The recommendations shall include alternative and/or additional regulatory regimes applicable to the Department of Energy's nuclear programs that would provide for—

(A) reasonable assurance of the public health and safety;

(B) public confidence in the Department of Energy's management;

(C) increased accountability for management and operations;

(D) efficient and effective oversight, and

(E) timely discovery and reporting of potential problems.

(3) Based on the panel's evaluation carried out according to subsection (b), the President shall report by January 20, 1888, to the Congress and with specific recommendations, policies, and procedures that would achieve the goals set out in paragraph (2).

(b) The panel established by subsection (a) shall—

(1) review regulations of health, safety, and environmental aspects of the Department of Energy nuclear activities and applications, including laboratories, production facilities, waste management facilities, and transportation programs;

(2) evaluate existing regulatory regimes (including, but not limited to, those of the Nuclear Regulatory Commission, Environmental Protection Agency, Department of Transportation, and Health and Human Services) for potential application to the Department of Energy nuclear programs.

Such evaluation shall assess the relevance of these regimes to the Department of Energy's nuclear programs, each Department's potential impact on their programs affecting national security.

(c)(1) The Secretary shall designate one member of the panel who shall serve as chairman and who shall set the dates of hearings, meetings, and other official panel functions in carrying out the purposes of this section. The panel, in developing its recommendations, is authorized to hold hearings as it deems advisable.

(2) The panel members shall be selected from persons who shall serve as chairman and who shall set the dates of hearings, meetings, and other official panel functions in carrying out the purposes of this section. The panel, in developing its recommendations, is authorized to hold hearings as it deems advisable.

(3) Members of the panel shall receive no pay on account of their service on the panel, but while away from their homes or regular places of business in the performance of services for the panel, members shall be allowed expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses pay payable for level GS-15 of the General Schedule.

(C) Except as otherwise provided in this paragraph, such director and staff—

(i) shall be appointed subject to the proviso of title 5, United States Code, governing appointments in the competitive service, and

(ii) shall be paid in accordance with the provisions of chapter 51 and subchapter III of title 5, United States Code, for persons employed on an intermittent or temporary basis, in the same manner as persons employed intermittently in the Government service are allowed expenses pay payable for level GS-15 of the General Schedule.

(5) Subject to such rules as may be adopted by the panel, the panel may procure temporary and intermittent services from experts and consultants to the same extent as is authorized by section 3103(b) of title 5, United States Code, but at rates determined by the panel to be reasonable.

(6) Upon request of the panel, the head of any Federal agency may detail, on a reimbursable basis, any of the personnel of such agency to the panel in carrying out the panel's duties.

(7) The panel is authorized to secure from any department or agency of the United States, or from the instrumentality of the Executive Branch of Government, any information it deems necessary to carry out its functions under the Act and each such department, agency, and instrumentality is authorized and directed to furnish such information to the panel upon request.

(8) The chairman of the panel shall request the head of each Federal department or independent agency which has an interest in the recommendations with respect to matters under evaluation by the panel.
appoint a liaison officer who shall work closely with the panel and its staff. These committees or agencies shall include, but not be limited to, the Nuclear Regulatory Commission, the Environmental Protection Agency, the Department of Transportation, the Department of State, the Occupational Safety and Health Administration, and the Department of Energy.

(9) The panel shall terminate within sixty days after submission of the report set forth in subsection (a).

(d) There are hereby authorized to be appropriated such sums as may be necessary to carry out the purposes of this section.

Mr. JOHNSTON. Mr. President, today I am submitting with my colleagues and ranking minority member, Senator McClure, comprehensive legislation to reauthorize and extend the Price-Anderson Act. The Price-Anderson Act provides a system for public compensation in the event of a nuclear accident. There is an urgent need to act on this legislation.

On July 30, the House of Representatives passed H.R. 1414 to modify and extend Price-Anderson. H.R. 1414 is pending on the Senate calendar, as is S. 748, the bill that was reported by the Committee on Energy and Natural Resources in June. The Senate must act on this important legislation. We cannot afford to wait any longer.

Existing authority under the Price-Anderson Act expired on August 1, and we must take action quickly to renew the act. We delayed taking action on S. 748 or H.R. 1414 prior to the August recess at the request of other Senators. The Environment and Public Works Committee has completed action on a Price-Anderson bill but no report has been filed. Far too much time has elapsed. We must clearly one of these pending bills for action.

Today we are introducing an amendment to S. 748 to extend the Price-Anderson system for compensating victims for damages resulting from a nuclear accident at our Nation's nuclear power reactors licensed by the Nuclear Regulatory Commission and at facilities operated by the Department of Energy. S. 748, as reported by the Energy and Natural Resources Committee, addressed only the portions of the Price-Anderson Act relating to public liability coverage for DOE contractors' activities. The amendment we are introducing today is a substitute for S. 748, which attempts to combine the best elements of our bill with those of the bill produced by the Environment and Public Works Committee.

The Price-Anderson system is a comprehensive, compensation-oriented system of liability insurance for DOE contractors and NRC licensees operating nuclear power reactors. The purpose of Price-Anderson is to provide a nuclear indemnification system for DOE contractors, to ensure continuing public protection in the case of a nuclear accident, and to provide a mechanism for full compensation of the public in the event of such an accident.

Price-Anderson, there would not be such a pool of funds available. In the absence of Price-Anderson, compensation to victims of a nuclear accident would likely be seriously limited. Price-Anderson, therefore, is a landmark piece of legislation. Without Price-Anderson, the likelihood of serious nuclear incidents would increase.

The need to extend the Price-Anderson Act is perhaps even more important as it relates to DOE contractor activities. DOE contractors are covered under the Price-Anderson indemnity provisions of current contracts, but with expiration of the act, DOE has lost its authority to indemnify contractors under Price-Anderson in new contracts. Therefore, any existing indemnity agreements will expire at the end of the current fiscal year and cannot be renewed. Two of these agreements have already expired. If the act is not renewed, DOE contractors—those involved in atomic energy defense, uranium fuel preparation, and nuclear waste disposal—will be without the comprehensive, no-fault insurance system provided by Price-Anderson.

Congress must act quickly to preserve this public compensation system that would be employed in the event of a catastrophic nuclear accident resulting from these essential activities carried out by the Federal Government.

The Federal Government will not shut down these essential activities simply because it cannot indemnify its contractors under the Price-Anderson system. Contractors will continue to do work for the Department of Energy. The Department has the authority under Public Law 85-804 to indemnify its contractors, and it will do so. The Department has already renewed contracts for operation of two major facilities using its indemnity authority under Public Law 85-804.

So there is an urgent need to extend and reauthorize the Price-Anderson Act not to protect the contractors or the nuclear utilities but to protect the public. Public protection in the case of a catastrophic nuclear accident is far superior under a renewal of the Price-Anderson system. In the absence of Price-Anderson for DOE contractor activities, compensation for victims would be less predictable, less timely, and potentially inadequate compared to the compensation that is available under the current system.

The amendment to S. 748 that we are introducing today would extend authority for the Price-Anderson indemnification system for DOE contractors for 30 years. It would increase the amount of public compensation immediately available after an accident to $6.8 billion per incident. In the event that damages exceed $6.8 billion cap, the legislation establishes an expedited mechanism for congressional action on additional compensation measures.

In addition, the bill adds new authority to provide for greater accountability of contractors, subcontractors, and suppliers in the performance of their duties under contract with the Department of Energy for nuclear activities.

The Energy and Natural Resources Committee felt that exercise of this authority by DOE could reduce the likelihood of serious nuclear incidents.

S. 748 grants the Secretary of Energy new authority to impose civil and criminal penalties on contractors for violations of DOE rules, regulations, and orders related to nuclear safety. This authority parallels that provided to the Nuclear Regulatory Commission in the Atomic Energy Act with respect to NRC licensees. S. 748 provides for civil penalties of up to $100,000 per day for violations of DOE nuclear safety rules, regulations, or orders. The bill also provides authority for criminal penalties in the case of knowing or willful violations of these rules, regulations, or orders on the part of individual directors, officers, or employees of DOE contractors.

Additional mechanisms for ensuring safe operations by DOE contractors included in S. 748 are the establishment of an inspector general for nuclear programs and the establishment of an independent panel of make recommendations for permanent regulation and oversight of DOE nuclear activities. These provisions are positive steps toward ensuring continued safe operation.

It is important that the Senate extend the Price-Anderson Act. The compensation system established by this act has been a good one, and we must extend the act to allow that system to continue.

I ask unanimous consent that a section-by-section analysis be printed in the Record.

There being no objection, the Section-by-Section analysis was ordered to be printed in the Record, as follows:

**SECTION-BY-SECTION ANALYSIS—SUBSTITUTE FOR S. 748 PRICE-ANDERSON ACT AMENDMENTS ACT OF 1987**

**SECTION 1**

This section sets forth the short title of the bill, the "Price-Anderson Act Amendments Act of 1987."

**SECTION 2**

This section contains the findings and purposes of the Act. The purposes include establishment of an equitable, efficient, reliable, and comprehensive system, in advance of civil and criminal penalties, which provides a mechanism for full compensation of the public in the event of such an accident.
This section amends subsection 170 b. of the Atomic Energy Act of 1954 to provide that licensees of the Nuclear Regulatory Commission operating facilities of 100,000 kilowatts or more of electrical capacity, will pay a retrospective premium following a nuclear accident of up to $60 million per facility (but not more than $12 million in any one year). These amounts would be adjusted to account for inflation. Total coverage in any nuclear accident, assuming 110 licensed reactors, would be $8.76 billion, including $160 million in private insurance that each licensee must carry.

This section also authorizes the Commission to borrow from the U.S. Treasury for the purpose of compensating claims up to the overall level of protection in the event that the annual deferred premiums are insufficient to provide for valid claims. Commission borrowings would be repaid with interest from the balance of the deferred premiums paid.

This section amends subsection 170 c. of the Atomic Energy Act of 1954 to extend until August 1, 2017 the authority of the Commission to indemnify licensees.

This section amends subsection 170 d. of the Atomic Energy Act of 1954 to extend until August 1, 2017 the authority of the Secretary of Energy to indemnify contractors to the Department engaged in nuclear activities under the risk of public liability. The Secretary is required to indemnify contractors for claims up to the aggregate level of liability established for accidents at facilities of Commission licensees. Assuming 110 licensed reactors, this limit would be set at $6.76 billion.

The section extends the coverage under the Act to activities involving storage, transportation or disposal of nuclear waste and to accidents involving nuclear material that has been stolen.

This section amends subsection 170 e. of the Atomic Energy Act of 1954 to establish the aggregate level of liability for a nuclear accident at not to exceed the total of funds that would be made available through the deferred premium system for Commission licensees plus the amount of required private insurance. The amount would be $6.76 billion for 110 licensed reactors. In the event of an accident involving damages in excess of the amount of aggregate liability, Commission liability would be limited to the amount of the aggregate liability limit set under subsection 170 e. Such compensation plans would be considered by Congress under expedited procedures set forth in subsection 170 f. of the Act and take whatever action is necessary.

This section amends subsection 170 f. of the Atomic Energy Act of 1954 to provide for the submission of compensation plans to Congress whenever it appears that public safety or the environment is threatened by a nuclear incident. If Congress approves the plan, it must be submitted to the Secretary of Energy for action.

This section extends the coverage of the Act to accidents involving storage, transportation or disposal of nuclear waste and to accidents involving nuclear material that has been stolen.

This section amends subsection 170 g. of the Atomic Energy Act of 1954 to provide for the appointment of a special caseload management panel to coordinate and assign cases arising out of a nuclear incident.

This section amends subsection 170 h. to remove the statute of limitations on damage claims from a nuclear incident, leaving only the requirement in existing law of a three-year discovery rule.

This section amends subsection 170 i. to provide for court review of legal costs paid in actions under the Act.

This section amends subsection 170 l. to provide for consolidation of claims in actions under the Act following a nuclear incident. Existing law provides for such consolidation only in the event of an extraordinary nuclear occurrence. Subsection 170 n. is also amended to provide for the appointment of a special caseload management panel to coordinate and assign cases arising out of a nuclear incident.

This section amends subsection 170 o. to provide for the submission to Congress of reports by the Commission and by the Secretary of Energy prior to the new expiration date for the Act.

This section contains conforming amendments.

This section establishes a Presidential Commission on Catastrophic Nuclear Accidents to study means of fully compensating victims of a catastrophic nuclear accident.

This section amends subsection 170 p. to provide for the submission to Congress of reports by the Commission and by the Secretary of Energy prior to the new expiration date for the Act.

This section amends subsection 170 q. to provide for consolidation of claims in actions under the Act following a nuclear incident. Existing law provides for such consolidation only in the event of an extraordinary nuclear occurrence. Subsection 170 n. is also amended to provide for the appointment of a special caseload management panel to coordinate and assign cases arising out of a nuclear incident.

This section amends subsection 170 r. to provide for the submission to Congress of reports by the Commission and by the Secretary of Energy prior to the new expiration date for the Act.

This section contains conforming amendments.

This section establishes the authority of the Department of Energy to establish an independent panel to review alternative methods for regulating the nuclear activities of the Department of Energy. The panel is required to report its recommendations to Congress and the President by January 20, 1989.

Mr. McClURE. Mr. President, I am pleased to join my colleague, Senator Johnston, in cosponsoring this long-awaited legislation to renew and amend the Price-Anderson Act, which expired on August 1 of this year. It is comprehensive in that it addresses renewal of the Act and expansion of the Department of Energy as well as for commercial nuclear power licensees. Its enactment is crucial to assure prompt and adequate compensation to potential victims in the unlikely event of a nuclear accident.

Our amendment is comprehensive legislation to renew and amend the Price-Anderson Act, which expired on August 1 of this year. It is comprehensive in that it addresses renewal of the Act and expansion of the Department of Energy as well as for commercial nuclear power licensees. Its enactment is crucial to assure prompt and adequate compensation to potential victims in the unlikely event of a nuclear accident.

S. 748, reported out of the Energy and Natural Resources Committee last March, addressed only those aspects of the Price-Anderson statute affecting the Department of Energy's nuclear activities. Meanwhile, a parallel effort by the Environment and Public Works Committee produced a bill in August, yet to be filed by that committee, which addressed primarily the commercial nuclear powerplants licensed by the Nuclear Regulatory Commission.

Speaking for myself and, I believe, also for Senator Johnston, we would prefer not to deal with Price-Anderson and commercial nuclear powerplants in a piecemeal fashion. Rather, we would like to combine the best elements of each committee's bill into a single vehicle for floor consideration. Unfortunately, efforts to do so have proven unsuccessful. Therefore, Senator Johnston and I have chosen to submit this proposed compromise which merges features from both measures.

The reason for this comprehensive approach is quite obvious: Any victim of a catastrophic nuclear accident, should it occur, would not care from what facility the radiation was released. He would only be concerned about receiving prompt compensation for his property or to his health. We need to provide any such potential victims adequate protection, no matter what kind of facility might be involved in the accident.

This leads me to another point that should be obvious: Any victim of a catastrophic nuclear accident, should it occur, would not care from what facility the radiation was released. He would only be concerned about receiving prompt compensation for his property or to his health. We need to provide any such potential victims adequate protection, no matter what kind of facility might be involved in the accident.

Meanwhile, nuclear plants are still running, the Department of Energy is...
still contracting for its work, and no one is panicking. So why all the hoopla about Price-Anderson renewal, when Congress has so much other pressing business to attend to?

The answer is quite revealing. On the one hand, our present complement of commercial powerplants is grandfathered into the present Price-Anderson indemnity coverage, which would provide for a pooling of nuclear plant retrospective premiums, combined with $180 million of private insurance, to make available to the public approximately $700 million in compensation in the event of a nuclear accident. The only threat to the commercial nuclear industry posed by a failure to renew Price-Anderson legislation is in connection with future plants. Since orders for new plants do not appear to be imminent, I see no reason why this generation of nuclear plants should be overly anxious about Price-Anderson renewal.

On the other hand, the impact of Price-Anderson expiration on DOE contractors is somewhat different. With DOE characterized as a pressing crisis within DOE has so far turned out to be a nonevent. Prior to the Price-Anderson expiration date, we were hearing that contractors would be unable to renew their contracts at the end of this year, and that somehow, the Federal Government would find a way to continue this work, even if it had to use Federal employees to get the job done.

The Department has, in fact, found a way, and it is Public Law 85-804. This statute provides the Department with authority, very similar to that prospective, Price-Anderson coverage now available under the present Price-Anderson law, would be better off with $7 billion under the legislation we propose to you now—again with expedited congressional procedures to obtain additional funds, if necessary.

Or alternatively, if a DOE contractor now indemnified under Public Law 85-804 experiences an accident, would the victims receive adequate relief under Public Law 85-804, where all defenses are made available to the defendant, and no streamlined procedures are available for setting the claims? I doubt it. Clearly a victim would be better off under the Price-Anderson provisions that we propose to renew in our bill; that is, waiver of all defenses for the defendant, and streamlined procedures for victims’ compensation and settlement of claims.

From a victims’ compensation perspective, Price-Anderson coverage under the bill we offer is not only desirable but preferable to the alternatives. So if we care about these potential victims, and if we care about a responsible, balanced, and comprehensive piece of legislation to take care of these potential victims, then we should adopt this bill to renew and amend the Price-Anderson Act.

I urge my colleagues to support Senator Johnston and myself in our effort to enact a balanced and comprehensive piece of legislation to bring back and expand upon the provisions in Price-Anderson that have served us so well in the past, and that can best protect us in the future.

MILITARY CONSTRUCTION AP-PROPRIATION, FISCAL YEAR 1988

HOLLINGS AND SASSER AMENDMENT NO. 1039

Mr. SASSER (for Mr. Hollings, for himself and Mr. Sasser) proposed an amendment to the bill (H.R. 2906) making appropriations for military construction for the Department of Defense for the fiscal year ending September 30, 1988, and for other purposes; as follows:

At the end of the bill, add the following new section:

SEC. 1. [LAND CONVEYANCE, FORT JACKSON, SOUTH CAROLINA.]


(1) by striking “and” at the end of subparagraph (B);

(2) by striking the period at the end of subparagraph (C) and inserting in lieu thereof “; and”; and

(3) by adding at the end thereof the following new subparagraph;

“(D) for a water systems improvement project at Fort Jackson at an estimated cost of $2,300,000, and for family housing improvement projects at Fort Jackson at an estimated cost not to exceed $6,400,000.”

DANFORTH AND SASSER AMENDMENT NO. 1040

Mr. SASSER (for Mr. Danforth, for himself and Mr. Sasser) proposed an amendment to the bill H.R. 2906, supra; as follows:

On page 7, line 4, strike “$165,716,000” and insert in lieu thereof “$170,016,000”.

STEVENS AND SASSER AMENDMENT NO. 1041

Mr. SASSER (for Mr. Stevens, for himself and Mr. Sasser) proposed an amendment to the bill H.R. 2906, supra; as follows:

On page 4, line 23, strike “$597,865,000” and insert in lieu thereof “$602,865,000”.

MURKOWSKI AND STEVENS AMENDMENT NO. 1042

Mr. SPECTER (for Mr. Murkowski, for himself and Mr. Stevens) proposed an amendment to the bill H.R. 2906, supra; as follows:

At the end of the bill, add the following:

SEC. 2. DENIAL OF FUNDS FOR PROJECTS USING CERTAIN SERVICES OF FOREIGN COUNTRIES THAT DENY FAIR MARKET OPPORTUNITIES.

(a) In General.

(1) None of the funds appropriated by this Act may be used to carry out within the United States, or within any territory or possession of the United States, any military construction project of the Department of Defense which uses any service of a foreign country during any period in which such foreign country is listed by the United States Trade Representative under subsection (c).

(2) Paragraph (1) shall not apply with respect to the use of a service in a military construction project if the Secretary of Defense determines that—

the application of paragraph (1) to such service would not be in the national interest.

(b) Services offered in the United States, or in a foreign country, that is not listed under subsection (c), of the same class or
kind as such service are insufficient or are not of a satisfactory quality, or
(C) expansion of such service from the project would increase the cost of the
overall project by more than 20 percent.

(b) DETERMINATIONS.
(1) Not later than the date that is 30 days after the date on which each report is
submitted to the Congress under section 181(b) of the Trade Act of 1974 (19 U.S.C.
2241(b)), the United States Trade Repre-
sentative shall make a determination with respect to each foreign country of whether
such foreign country
(A) denies fair and equitable market opportunities
for construction projects that cost more
than $500,000 and are funded (in whole or in part) by the government of such foreign
country or by an entity controlled by such foreign country.
(B) in making determinations under paragraph
(1), the United States Trade Repre-
sentative shall take into account
fair and equitable market opportunities
for construction projects that cost more
than $500,000 and are funded (in whole or in part) by the government of such foreign
country or by an entity controlled by such foreign country.
(C) EFFECTIVE DATE.—This section shall be
effective—
(1) during the 1-year period beginning on
the date of enactment of this Act; or
(2) in the case of an employer who is pro-
viding duplicative health care benefits to
employees for services of the
United States or the
United States Trade
Representative
shall make a determination with
respect to each foreign country of whether
such foreign country
(A) denies fair and equitable market
opportunities for services of the United States in
procurement, or
(B) fair and equitable market opportunities
for services of the United States in bid-
ing,
for construction projects that cost more
than $500,000 and are funded (in whole or in part) by the government of such foreign
country or by an entity controlled by such foreign country.

(c) REGULATIONS.—The Secretary of Labor
may issue such regulations as are necessary
to carry out this section.

(2) in the case of an employer who is add-
ited under section 181(b) of the Trade Act
of 1974 and such other information as
the United States Trade Representative
considers to be relevant.

(d) REPORTS.—The Secretary of Labor
shall annually publish in the Federal
Register the entire list required under para-
graph (1) and shall publish in the Federal
Register any modifications to such list that
are made between annual publications of
the entire list.

(e) DEFINITIONS.—For purposes of this sec-
tion
(1) The term "service" means any engi-
neering, architectural, or construction serv-
ices.
(2) Each foreign instrumentality, and each
territory or possession of a foreign country,
that is administered separately for customs
purposes shall be treated as a separate for-
ign country.
(3) Any service provided by a person that is
a national of a foreign country, or is con-
trolled by nationals of a foreign country,
shall be considered to be a service of such
foreign country.

CATASTROPHIC ILLNESS
COVERAGES

RIEGLE (AND GRASSLEY) AMENDMENT NO. 1043

Mr. RIEGLE (for himself and Mr.
GRASSLEY) proposed an amendment to
the bill (S. 1127) to provide for Medi-
care catastrophic illness coverage, and
for other purposes; as follows:

At the appropriate place, insert the fol-
lowing new section:

SEC. 81Hb. MAINTENANCE OF EFFORT.
(a) In General.—During the period de-
scribed in subsection (c), if an employer pro-
vides health care benefits to an employee or
retired former employee (including a Feder-
al employee or retired former employee) that
are duplicative of new or improved
health care benefits provided under this Act
or the amendments made by this Act, the
employer shall—
(1) provide additional benefits to the em-
ployee or retired former employee that are
at least equal in value to the duplicative ben-
efits; or
(2) refund to the employee or retired
former employee an amount equal to the ac-
tuarial present value of the duplicative ben-
efits.

(b) REGULATIONS.—The Secretary of Labor
may issue such regulations as are necessary
to carry out this section.

(c) EFFECTIVE DATE.—This section shall be
effective—
(1) during the 1-year period beginning on
the date of enactment of this Act; or
(2) in the case of an employer who is pro-
viding duplicative health care benefits to
employees for services of the
United States or the
United States Trade
Representative
shall make a determination with
respect to each foreign country of whether
such foreign country
(A) denies fair and equitable market
opportunities for services of the United States in
procurement, or
(B) fair and equitable market opportunities
for services of the United States in bid-
ing,
for construction projects that cost more
than $500,000 and are funded (in whole or in part) by the government of such foreign
country or by an entity controlled by such foreign country.

NOTICES OF HEARINGS
COMMITTEE ON ENERGY AND NATURAL RESOURCES

Mr. JOHNSTON. Mr. President, I
would like to announce for the public
that hearings have been scheduled
before the full Committee on Energy
and Natural Resources.

The hearings will take place
Monday, November 9, and Tuesday,
November 10, 1987, at 9:30 a.m. in
room SD-366 of the Senate Dirksen
Office Building in Washington, DC.

The purpose of this hearing is to re-
cieve testimony concerning the Green-
house Effect and Global Climate
Change.

Those wishing to submit written
statements should write to the Com-
mittee on Energy and Natural Re-
sources, U.S. Senate, Room SD-364,
Senate Dirksen Office Building, Wash-
ington, DC 20510-6150. For further
information, please contact Leslie Black
at (202) 224-9607.

SUBCOMMITTEE ON WATER AND POWER

Mr. INOUYE. Mr. President, I
would like to announce for the infor-
mation of the Senate and the public the post-
ponement of a joint hearing before the Subcom-
mittee on Water and Power of the Committee on Energy
and Natural Resources and the Select
Committee on Indian Affairs.

The hearing concerning S. 1415, the
Colorado Ute Indian Water Rights
Settlement Act of 1987, which was pre-
viously scheduled for October 20, 1987,
will be rescheduled for a later date.
Notification of the Senate and the public
will be made as soon as a new date is selected.

AUTHORITY FOR COMMITTEES TO MEET

SUBCOMMITTEE ON GOVERNMENT EFFICIENCY,
PENTATIONAL, AND THE DISTRICT OF COLUMBIA

Mr. BYRD. Mr. President, I ask
unanimous consent that the Subcommittee
on Government Efficiency, Pentational,
and the District of Columbia, of the Committe-
on Governmental Affairs, be authorized to meet
during the session of the Senate on
Friday, October 23, 1987, to resume
open hearings on the Office of Surface
Mining's Abandoned Mine Land Program.

The PRESIDING OFFICER, With-
out objection, it is so ordered.

SUBCOMMITTEE ON PRIVATE RETIREMENT PLANS
AND OVERSIGHT OF THE INTERNAL REVENUE
SERVICE

Mr. BYRD. Mr. President, I ask
unanimous consent that the Subcommittee
on Private Retirement Plans and Oversight
of the Internal Revenue Service of the Committee
on Finance be authorized to meet during the ses-
sion of the Senate on October 23, 1987,
to hold a hearing on Small Business
Retirement and Benefit Extension
Act, S. 1426.

The PRESIDING OFFICER. With-
out objection, it is so ordered.

SUBCOMMITTEE ON IMMIGRATION AND REFUGEE
AFFAIRS

Mr. BYRD. Mr. President, I ask
unanimous consent that the Subcommittee
on Immigration and Refugee
Affairs of the Committee on the
Judiciary, be authorized to meet during the
session of the Senate on October 23, 1987,
to hold a hearing on S. 1611, Legal
Immigration Reform.

The PRESIDING OFFICER. With-
out objection, it is so ordered.

COMMITTEE ON FOREIGN RELATIONS

Mr. BYRD. Mr. President, I ask
unanimous consent that the Committee
on Foreign Relations be authorized to meet
during the session of the Senate on
Friday, October 23, 1987, to hear Defense
Secretary Weinberger testify on the current
situation in the Persian Gulf.

The PRESIDING OFFICER. With-
out objection, it is so ordered.

ADDITIONAL STATEMENTS

U.S. ASSISTANCE TO NSZZ SOLIDARNOSC

Mr. SYMMS. Mr. President, both
the Senate and the House of Repre-
sentatives are now on record in sup-
port of providing $1,000,000 to the
Polish Independent Trade Union,
NSZZ Solidarnosc, for fiscal year 1988.

The House, at the urging of New
York Congressman Jack Kemp, has
added language to the foreign oper-
ations appropriations bill for fiscal
year 1988. The Senate has, by voice
vote, approved an amendment to the

State Department authorization bill setting aside $1,189,000 from the economic support fund for fiscal years 1988 and 1989 for the exclusive use of NSZZ Solidarnosc. A similar amendment will shortly be offered to the appropriations bill on the Senate side, explaining the same leadership from that body.

I believe we have, through our support of Solidarnosc, struck a tremendous blow for freedom in Poland. I am particularly gratified that Congress has once again taken a stand so decisively against giving in to the various threats which have emanated from the Jaruzelski regime. Moreover, that regime should understand that Congress is determined to support Solidarnosc in its continuing fight for freedom.

Mr. President, I ask that a letter to Congressman Jack Kemp from the clandestine executive leadership of Solidarnosc, the Temporary Coordinating Commission (TKK), be printed in the Record.

The letter follows:


Mr. Jack P. Kemp,
U.S. Congressman, Washington, DC.

Dear Sir: Authorised by the clandestine executive leadership of NSZZ Solidarnosc in Poland—the Temporary Coordinating Commission (TKK)—I would like to express our warm thanks for your continuing support for our struggle. Your help—and that of your colleagues—gives us not only the means to struggle, but more importantly the hope to succeed.

Our request for aid from abroad in the 1988 calendar year totals 1,380,000 dollars. This includes support for each of the ten regional NSZZ Solidarnosc organisational structures and for the central body headed by my President, Lech Walesa; for the purchase of printing and communication equipment from abroad; for financial, medical and legal aid on a regular basis to jailed and economically repressed persons and their families; for the continued operation of the Coordinating Office Abroad in Brussels; and for the maintenance of a fund designed to aid independent publications and organizations through which we are able to keep in touch with our Union and request our support. All these needs are listed in the enclosed document entitled "The NSZZ Solidarnosc Budget for Aid from Abroad in 1988" and the enclosed document entitled "The NSZZ 'Solidarnosc' Budget for Aid from Abroad in 1988".

The TKK accepts responsibility for receipt and distribution of foreign donations to NSZZ 'Solidarnosc' via the Coordinating Office in Brussels directed by Jerry Milewski, who is designated to represent our Union in the West. More specific guidelines are spelled out in the mentioned document and are based on the principle that all aid be distributed directly to Solidarnosc's local structures and for the central body headed by our President, Lech Walesa, who is responsible for the maintenance of a fund designed to aid independent publications and organizations with which we are in touch. For the maintenance of a fund designed to aid independent publications and organizations with which we are in touch.

The list follows:

1. Aid fund:
   - 1.1. Financial and legal aid on a regular basis to repressed persons and their families
   - 1.2. Reserves

2. Organizational fund:
   - 2.1. The national leadership
   - 2.2. The secretariat
   - 2.3. Regional structures

3. Equipment fund (purchase and transport from abroad)
   - 3.1. Printing equipment
   - 3.2. Spare parts and printing materials
   - 3.3. Communication and computer equipment
   - 3.4. Other equipment

4. The Brussels office fund

5. Support fund:
   - 5.1. Support for independent organizations, groups and individuals not associated with NSZZ 'Solidarnosc'
   - 5.2. Support for independent press and publishing houses not associated with NSZZ 'Solidarnosc'

Subtotal

Total


Temporary Coordinating Commission (TKK) of NSZZ 'Solidarnosc'

HONORING FLOYD J. MCCREE AND LEEBERTA MCCREE

Mr. RIEGLE. Mr. President, I rise today to pay tribute to Floyd and Leebertha McCree. They have given much, in time and energy dedication to make Flint, my hometown, and Genesee County, MI, a better place for those who live there. Their dedication is an inspiration for all of us.

Mr. McCree, who has served as mayor and as a city council member, became aware of the useful role of policies in our society through his father who was a precinct captain in his birthplace of Webster Groves, MO. Floyd attended political meetings and helped in campaigns during his youth. This early experience sparked his interest in public service and his acceptance of leadership roles—both of which continue today.

Following his service in World War II, Floyd McCree came to Flint and, after a short period at Chevrolet, he was employed by the Buick Foundry. Within United Auto Workers Local 599, he was elevated by his fellow workers to the highest of local and statewide union offices. He was upgraded to supervisor of Buick Foundry Maintenance before taking his present position as Genesee County Recorder of Deeds.

In the area of government service, he was appointed to the Genesee County Board of Supervisors in 1956. In 1958, he was elected City Commissioner of the Third Ward, and held that position for many years without opposition. In 1964, his fellow commissioners elected him Mayor pro tem, and in 1966, elected him to Mayor. Other names may be more familiar, but Floyd McCree was the very first black mayor of a major city.

The McCree family includes Floyd's wife, Leeberta, their children, Anita, Byron, Marsha, and Melvin. Melvin has carried on the McCree tradition of service to their city as a member of the Flint City Council.

Floyd and Leeberta McCree and their family are truly an important and vital resource to the Flint community and I am pleased to join in honoring them. Their early and unwavering support for my career are something I will always personally cherish.

Floyd McCree and his family—always involved, always concerned, and always there to help—are and always will be one of Flint's first families.

Mr. President, I ask unanimous consent that the list of Mr. McCree's affiliations be included in the Record after my remarks.

The list follows:

Other Past and Present Affiliations

M.C.D.C.
Church School.
Genesee Township Economic Development.
Mayor in the State of Michigan.
Federation of the Blind.
gram.
Fund Drive.

*Masons).
•Mr. 
-Rappahannock Record in Kilmarnock,
earned him a legendary reputation.
writes,
he had never met H.R., Mr. Hull
the newspaper the obituary of former Re­
publican Congressman H.R. Gross of Iowa,
with Alzheimer's Disease. My mind
used to walk over to the House Chamber
from the Library of Congress, where I was
doing research or writing papers, to sit in on
the debates. There was no question but that
Harold Royce, Mr. Gross' first names, and
for House of Representatives. The “144”
stood for a gross, which is 12 times 12. The
symbolism was subtle, but profound.
If we ever do succeed in balancing the fed­
eral budget, that would be H.R. Gross' en­
during mantra. I think he would show that
this feudal old Midwesterner's values and
dreams were indeed the stuff of which
America was made.

Mr. CHafee. Mr. President, I am pleased to join a number of my distinguished colleagues in cosponsoring S. 1575, the AIDS Federal Policy Act of 1987. By providing funding for voluntary, confidential AIDS testing and counseling, as well as protection against discrimination, this measure represents the solid commitment of this Congress to address the AIDS epidemic with effective and thoughtful action.

As of January 12, 1987, 16,867 Americans had died of AIDS. As of October 12, 1987—just last week—the death toll was 24,698. It is now estimated that 1.5 million Americans are infected with the AIDS virus. Among this latter group, the risk of developing AIDS rises with each year that passes after infection. Experts estimate that by the end of 1991, the total number of cases in this country will reach 270,000—

with a staggering 178,000 deaths, unless better treatments are found. In the year 1991 alone, it is estimated that 54,000 people will die of AIDS, a figure roughly equal to the American death toll of the entire Vietnam war.

Americans have been calling for a national response to this crisis. This is a call I have heard. Last June I worked with my Republican colleagues to develop an education, treatment, and research bill for AIDS. Later, this bill was incorporated into a bipartisan Senate bill, S. 1220, of which I am a co-sponsor. Yet, this bill only addresses part of the issue. As I said last June, "we have a long way to go * * * we must have a sensible approach to testing and counseling through funding of voluntary confidential testing * * * and assure that the civil rights of those who have or will develop the disease will not be violated."

I am pleased to say that S. 1575 does just that.

S. 1575 provides for $400 million for each of the next 4 years to establish and support AIDS testing and counseling centers throughout the United States. While testing is still not accurate enough to give an "answer" for this disease, it has been shown that testing for the AIDS virus accompanied by appropriate counseling on preventive behavior is effective in slowing the spread of the disease.

This measure mandates strict confidentiality of test results, while still giving physicians and counselors the discretion to disclose information on a limited basis where there is genuine medical need. Results can be disclosed to blood banks, the State health officer, spouses and other known sexual contacts, and health care workers.

The final segment of the bill establishes Federal prohibitions against discrimination on the basis of antibody status or diagnosis in employment, housing, public accommodations, and government services, except when there is a bona fide medical justification for discrimination as prescribed by the Centers for Disease Control to prevent transmission.

THE LEONID YUSEFOVICH FAMILY OF MOSCOW

Mr. BURDICK. Mr. President, when I was in Israel a few months ago, I was privileged to meet a former Soviet geophysicist who had just recently emigrated to Israel, and now lives at Kibbutz Kfar Blum. This man's deep appreciation for life in a free land made a powerful impression on me, and strengthened my resolve to do what I can to help Soviet Jews who wish to emigrate.

During my uplifting visit to Kfar Blum, members of the Yusefovich family expressed their concern for the Leonid Yusefovich family of Moscow. Leonid and his family had applied to emigrate in 1980. Their determination to join family members in Israel was so great that Leonid suffered through a 36-day hunger strike last spring. Like many Soviet Jews, Leonid Yusefovich was willing to pay a very high price for freedom. In this particular case, his suffering was not in vain. I was informed on Monday that Leonid, his wife and their young children have received permission to emigrate.

Mr. President, the happy resolution of the Yusefovich case gives me hope that the spirit of glasnost will mean eventual freedom for the thousands of Soviet Jews who wish to emigrate. There are encouraging signs—prisoners of conscience have been released, exit visas have been granted to some prominent refuseniks, and there has been an increase in the overall level of
emigration. But, while progress has been made in some areas, it is also true that harassment of activists continues, and the Soviet Government continues to ignore its obligations under the Helsinki accord.

Mr. President, while I am pleased to share with my colleagues the good news about the Yusefovich family, I would also like to take this opportunity to urge my colleagues to take full advantage of the current climate in United States-Soviet relations, and redouble their efforts on behalf of Soviet Jews. We simply cannot afford this opportunity slip by. Too many families are counting on our help.

S. 1911—the Steel Retirement Benefits Funding Act of 1987

Mr. QUAYLE. Mr. President. As a U.S. Senator from the largest steel-producing State in the Nation, I would like to commend the Senators from Pennsylvania and Ohio for their thoughtful legislation designed to alleviate the pension funds burden present to the steel industry. Pension benefits and shutdown benefits are, indeed, a serious and expensive problem for the manufacturing industry generally. I thank the sponsors of this legislation for giving me an opportunity to review the legislation prior to its introduction and I am flattered that they have asked me to cosponsor the bill, though for reasons stated below, I must decline to do so at this time.

The Steel Retirement Benefits Funding Act would transfer responsibility for so-called shut-down benefits from the steel companies' pension plans to a Steel Retirement Benefits Authority which would receive certain equity or debt instruments from the steel companies. The impact of this bill on the companies, pension plans, workers and the Federal Government is difficult to assess and I have asked affected parties to supply me with the necessary data to make such an assessment possible. None of the data has been supplied and I am unable to form a position on the bill.

Specifically, I asked for the following information:

First. What is the maximum amount of liability of each steel pension fund that could be transferred to the Steel Retirement Benefits Authority?

Second. What is the funded status of each company's pension plans both before and after such transfers occurred?

Third. Would the steel companies support the stronger funding standard for pensions contained in the Finance or Labor and Human Resources Committee's reconciliation packages if this steel-specific legislation is passed?

I understand that what this solution will be less expensive to the taxpayers and pension plan premiums than current law; assuming the Pension Benefit Guaranty Corporation takes over a number of seriously underfunded pension plans. What is the projected cost of current law and this proposal under (a) a favorable prognosis for the steel industry and (b) under an unfavorable prognosis?

I have requested answers to these questions, I have received answers neither from the steel companies nor from other supporters of this legislation. As a responsible elected official, I cannot cosponsor this legislation until such time as I have the necessary data to enable me to assess the impact of this proposal.

NAUM MEIMAN

Mr. SIMON. Mr. President, imagine, if you will, walking through the zoo on a beautiful autumn day. The sun is shining and you walk at your own pace, with family or friends, looking at the animals as you pass them. Then, as you are walking past the monkey cage, you notice one monkey that seems to be trying to leave his cage, but he can't, he is locked in. And you walk by, with the freedom you are given because you are a human being. An American human being.

There are places in the world, however, where people are treated like those animals in cages; they are "locked in" and cannot leave. We, as Americans, walk by. Naum Meiman wants to leave the Soviet Union. He should be allowed to leave. We, as humans, must do all we can to help him emigrate to Israel. Action must be taken now. We cannot keep "walking by."

I urge my colleagues to work on behalf of Naum and others like him. I urge Soviet officials to grant him an exit visa immediately, so he can spend the remainder of his life in Israel.

THE RETURN OF THE PORK-BARREL CONGRESS

Mr. NICKLES. Mr. President, as my colleagues know, the President in his news conference last night released the final deficit figure for fiscal year 1987. The amount, $148 billion, though well below the previous year's devastating $221 billion, is still a far cry from a balanced budget.

Unfortunately, next year's deficit is now expected to skyrocket mostly because Congress can't stop old spending habits. I would like to submit an article about this problem that recently appeared in the Wall Street Journal in case any of my colleagues missed it. The article was written by Tom Miller, editor of the annual Competitive Enterprise Index, which rates Congress on its votes on issues of competition and free-market principles.

I hope this article will give each of us pause to consider the choices we are going to have to make this year to seriously work on bringing down the deficit. We simply cannot afford this opportunity slip by. Too many families are counting on our help. We simply cannot afford this opportunity slip by. Too many families are counting on our help.
October 23, 1987

The same could be said of the current Congress as a whole. In the House, 111 members sport “Perfect Porker” scores of 0. Leading them are House Majority Leader Thomas P. Home, Whip Tom Davis, Budget Committee chairman William Gray, Ways and Means Committee chairman Dan Rostenkowski, Energy and Commerce Committee chairman Joe L. Barton, and the House Works Committee chairman James Howard, and presidential candidate Richard Gephardt. Henry A. Boren, H. R. Hertel, John E. Davis and Robert Livingston lend some bipartisan flavor to this bottom rung of the House pig pen, but the average House Republican PBS score is 33, compared with the average House Democrat score of 9.

A similar partisan division appears among senators. The average Senate Democrat PBS score is 9, while the average rating among Senate Republicans is 57. Twenty-eight Democratic senators reside in the Hog Heaven of “0” scores, paced by porkmeister general Robert Byrd and presidential contenders Joseph Biden, Albert Gore and Paul Simon. At the bottom of Republican Senate ranks, charting the ever-reliable Lowell Weicker (10), Charles Grassley (20) and John Heinz (25).

To be sure, there are a few exceptional members of Congress who curb their appetites when it comes to pork-barrel spending and special-interest subsidies. Republicans Phil Gramm and Don Nickles sport perfect PBS scores of 100 in the Senate. Republicans Don Lunger (94) and Dick Armey (89) top the House. Responsible Democrats include Charles Stenholm (61) and Buddy MacKay (50) in the House, and William Proxmire (50) in the Senate.

But with an election year coming up, and spending caps currently thrown to the winds on what should be “easy” budget cuts, these recent trends appear ominous.

COMMENDING JOSEPH BRODSKY ON SELECTION AS THE WINNER OF THE 1987 NOBEL PRIZE FOR LITERATURE

Mr. D'AMATO. Mr. President, I rise today to call to the attention of my colleagues and of all Americans the award of the 1987 Nobel Prize for Literature to Joseph Brodsky, who was expelled from the Soviet Union in 1972, is an American citizen and a resident of New York City.

The academy selected Brodsky for this most prestigious award for his “all-embracing authorship, imbued with clarity of thought and poetic intensity.” The award was announced at 1 p.m. local time, on October 22, 1987, in Stockholm, Sweden, by Prof. Sture Allen, permanent secretary of the Swedish Academy.

Brodsky is a prominent figure in New York’s literary circles and is well known and widely respected around the world. Indeed, it is reported that he was at lunch in London with his friend John le Carre, the famous espionage novelist, when a friend rushed in to announce that Brodsky had won the Nobel Prize for literature.

I take note of this situation because, as a former chairman of the Commission on Security and Cooperation in Europe, and of the Helsinki Commission, I have spent years pressuring the Soviet Union to become a fully respected member of the community of nations.

I look forward to the day when “Socialist legality” in the Soviet Union becomes equal justice under law. I look forward to the day when the KGB is as tightly leashed as the FBI. I look forward to the day when we are no longer forced to use the occasion of awards to great writers and poets to point out the shortcomings of the Soviet system and press for Soviet compliance with their international human rights and humanitarian obligations.

Mr. President, I think it is important for our colleagues and all Americans to realize the magnitude of the loss the Soviet Union suffered when they expelled Joseph Brodsky, and the magnitude of our good fortune when
he decided to become an American citizen and moved to New York. In a New York Times article by Frances X. Clines entitled “Poet Reflects on Fortunes of Literature,” which appeared in today’s edition, the poet is quoted as saying, “If the hapless combination you can think of. I’m a Russian poet, an English essayist and a citizen of the United States. I ask unanimous consent the article I just mentioned and two other New York Times articles from today’s edition be printed in the Record immediately following my remarks. One of these articles is entitled “Exiled Soviet Poet Wins Nobel Prize in Literature,” by Howell Raines, and the other is entitled “Some Basic Brodsky In Poetry and Prose.” I also ask unanimous consent that two articles from today’s edition of the Washington Post, both by David Remnick, be printed in the Record immediately following my remarks. The other is entitled “Joseph Brodsky’s Art of Darkness.”

The material follows:


EXILED SOVIET POET WINS NOBEL PRIZE IN LITERATURE

(HOWELL RAINES)

STOCKHOLM, October 22—Joseph Brodsky, an exiled Soviet-born poet who writes in Russian and English, won the Nobel Prize in Literature today.

The Swedish Academy in its formal announcement cited both Mr. Brodsky’s essays and the poetry for which he is better known in honoring him “for an all-embracing authorship, imbued with clarity of thought and poetic intensity.”

In its press release, the academy also paid tribute to Mr. Brodsky’s “heroic commitment” to his art, noting that as a young undergraduate poet in Leningrad he was imprisoned in an Arctic work camp for “parasitism,” and was later deported from the Soviet Union in 1972. He now lives in New York and was a part of the year at Mount Holyoke College in Massachusetts.

“I’m sort of doubly proud as a Russian and an American,” Mr. Brodsky said today after learning of the award while lunching in London with John le Carre, the British novelist.

HOPES TO SEE SON

The 47-year-old poet and essayist expressed the hope that the award, coupled with the new policy of glasnost or openness, might create an opportunity for him to see his 20-year-old son, Andrel, who lives in Leningrad.

“Obviously the whole situation in the country has considerably improved compared with what I left 18 years ago,” he said with a laugh, “but I got the prize for literature, not politics.”

In announcing the selection, Prof. Sture Allen, permanent secretary of the Swedish Academy, insisted there was no political message in it for the Soviet Union, where Mr. Brodsky’s works are banned. But a member of the five-person selection committee, Goran Malmqvist of Stockholm University, struck a defiant note.

Professor Allen also said he didn’t know what the Soviet political leadership would say, “but that is something we don’t bother about.”

“They may raise their eyebrows as they did with Soyinka and Pasternak, but they wouldn’t come out. There is a very, very fine writer who was brought up and started writing in Russia,” he said.

ANOTHER OPINION FROM SOVIET

Today in Moscow, Gennadi I. Gerasimov, a Soviet deputy and government spokesman, said, “the tastes of the Nobel Prize committee are somewhat strange sometimes,” and added that he would have preferred V. S. Naipaul, the novelist who lived in Trinidad, as a winner.

The 18-member Swedish Academy was said by a variety of sources to be determined this year to select a laureate who had an international reputation, indisputable artistic standing and productive years still ahead. The academy has been the subject of ridicule for choosing a series of laureates who were elderly or obscure.

Mr. Brodsky is the second youngest person to win the literature prize. Albert Camus was 44 when he won in 1957. This year’s prize carries a cash award of about $350,000. The formal presentation for Nobel laureates traditionally takes place in Stockholm on December 10.

Although the deliberations are secret, an academy member confirmed that Mr. Brodsky was a finalist last year. A colleague, Wole Soyinka, a Nigerian poet, won. This year, according to some accounts, Mr. Brodsky won over a list of finalists including Mr. Naipaul, Octavio Paz, a Mexican poet, and poet and the reputed runner-up, Camilo Jose Cela, a Spanish poet born in 1916.

RAPTUROUS RECEPTION

Today, the Swedish Academy seemed to have achieved its goal of avoiding the sarcastic response that has greeted selections such as that in 1984 of Jaroslav Seifert, an 83-year-old Czechoslovak poet. The reaction to Mr. Brodsky’s selection from the critical and academic communities was rapturous.

“He is the best living Russian poet,” said Susan Amert, an assistant professor of Russian literature at Yale University.

“There are a small number of writers at any given moment who are going to be part of literature and he’s one of them,” said the writer and critic Susan Sontag. “Not every great writer gets a Nobel Prize and not every Nobel Prize goes to a great writer. This is an important prize going to a really serious, committed, great writer.”

Mr. Brodsky’s award was announced here in the traditional way, as the hour at 1 P.M., Professor Allen stepped into a crowded meeting room in the stock exchange building in the Old Town. His face pressed against the door and his face crumbling slightly with excitement, he said Mr. Brodsky’s name and a cheer went up, indicative of the following the author has among the literary class.

“A DIVINE GIFT

“For Brodsky, poetry is a divine gift,” said the biographical statement distributed to reporters. It noted the “luminous intensity” of his verse and his treatment of “the mystery of the English idiom” in a collection of poems published in 1986, “History of the Twentieth Century.”

That year, Mr. Brodsky, 23, and a 1966 essay collection, “Less Than One,” also in English, served to cement Mr. Brodsky’s claim. But the poetry on which he built his reputation, first published in the West in 1967, is written in Russian and translated by him and friends into English.

“I haven’t written in English,” Mr. Brodsky said today. “I’m writing in English because I like it. I’m a sucker for the language, but the good old poems I’m still writing in Russian.”

Born into a Jewish family in Leningrad on March 2, 1940, Mr. Brodsky was a student at school at 15 and worked as a laborer and at sea, as a stoker. He was also teaching himself Polish and English, writing poetry and doing research for his political dissident writings that are described as verging on musical performances.

Scholars place him in the Russian modern tradition of Osip Mandelstam, who died in Stalin’s death camps, and Anna Akhmatova, a towering figure in Russian poetry who led the campaign that got Mr. Brodsky released from prison in 1965 shortly before her death. In English, his influences range from John Donne to the modern poets W. H. Auden and Robert Lowell.

ADVOCATE OF HUMAN RIGHTS

Auden and Lowell both became friends and sponsors after Mr. Brodsky arrived in the West—drown to him by the conviction, often expressed by admirers, that Mr. Brodsky was “the real thing.”

“When he sat down to write a poem, he tried, not to be a poet, but to be a human being. He spent his life trying to understand how people feel.”

“His rise was meteoric. Beginning from the first poems, everybody was sure that the best Russian poet since Osip Mandelstam, Tomas Venclova, an assistant professor of Russian literature at Yale, who met Mr. Brodsky 20 years ago.

Mr. Brodsky prefers to be known as a poet rather than as a critic of the Soviet Union, he has been a prominent advocate of human-rights causes and press freedom. One of his most powerful essays deals with the Soviet authorities’ refusal to let him visit his parents in Leningrad before his mother, a translator, died in 1982, and his father, a photographer, died in 1984.

Today, there was the first hint of a thawing attitude toward Mr. Brodsky in the land that, according to friends, he still loves passionately. Mr. Gerasimov and the publisher Roger Straus confirmed that the Soviet literary magazine Novy Mir was seeking permission to publish some of Mr. Brodsky’s poems.

He first saw print in that journal in 1983 when it published his epigram to a poem by Miss Akhmatova.


SOME BASIC BRODSKY IN POETRY AND PROSE

Columns of grandsons, stiff at attention:

gun carriage, coffin, riderless horse.

Wind brings no sound of their glorious Russian trumpets, their weeping trumpets of war.

Splendid regalia deck out the corpse:

thundering Zhukov rolls toward death’s mansion.


It’s not the statue itself that matters here, because Comrade Lenin is depicted in the usual quasi-romantic fashion, with his hand on the pillow instead of on the gun, making the masses, what matters is the pedestal.

For Comrade Lenin delivers his oration standing on the top of an armored car. It’s done in the style of early Constructivism, so popular nowadays in the West, and in general the very idea of carving an armored car out of stone and giving a kick to a back of a certain psychological acceleration, of the sculptor being a bit ahead of his time. As far as I know, this is the only monument to a man on an armored car that exists in the world. But his respect alone, it is a symbol of a new society. The
old society used to be represented by men on horseback.

"A Guide to a Renamed City" (1979), describing a statue of Lenin outside the Finland Station in Leningrad, in "Less Than One: Selected Essays."

In the autumnal blue of your church-hooded New England, the porcupine sharpens its golden needles against Bostonian bricks to a point of needless, blinding shine.

White foam kneels and breaks on the altar.

Curiosity flowing his way, Mr. Brodsky loved of life itself as he sought to account for what the novelist John le Carre, in "A Part of Speech," said about cliche notions that the turmoil of thought and poetic intensity makes you sensitive to, the academic cited Brodsky for his "aesthetic force" in the Soviet Union itself is a crucible for great poets.

"It's a Russian literature that got it," he said. Then he added with a smile: "And it's an American citizen that got it."

He recalled the pride of past Nobel awards to Pasternak and Solzhenitsyn. "I hope the academy's not doing that," he said.

Brodsky's order a whiskey. "I'm a Russian poet, an English essayist and a citizen of the United States."

"It's a great mistake to think that way," he said. "Oppression, the attendant hardships, can (A) stifle you (B) simply kill you, and (C) make you so much of your energy so that you may become a more accomplished ethical writer than esthetic writer."

"Literature invents its own rules," he said at another point, emphasizing that language itself is its own reward.

"The Happiest Combination"

For himself, the poet admitted to longing to see his son, last glimpsed 15 years ago in the Soviet Union when he was 5 years old. But he said that while the hunger to see Russia again did come upon him at times, it was not "paramount" in his life. "I don't allow my imagination to travel in that direction," he said, his smile fading.

"I'm the happiest combination you can think of," he insisted. "I'm a Russian poet, an English essayist and a citizen of the United States."

His own understanding in literature, he said, ranges beyond the classical Russian poets to modern Polish poets, English metaphysical poets, Faulkner, Proust, Melville and W. H. Auden.

He said literature remains a great moral force in the Soviet Union. "If I've been any good, it's because of the fierce competition," he said.

"But more than a moral force it is an esthetic force," he went on, trying to describe the Soviet audience for poetry. "It's sort of the medium that creates a certain mental, intellectual and ultimately linguistic plane of recourse, and that's what is great about it."

"Well, of course, there's a peculiar help almost in reverse fashion on the part of a centralization," he said, because a good poet, one way or another, almost becomes "a national property," he said, in reaching "a certain linguistic plateau above which you must rise."

Mr. Brodsky thought a moment and, as if recalling his own path through the language, continued. The moment you rise above the top, the community says, "We don't like it."

Brodsky's work has long appeared in underground publications—or samizdat—but the Soviet government has not, until now, allowed his poetry to appear in the official journals. However, Brodsky said the journal Novy Mir will print some of his poems in December.

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"You touched so brief a fragment of time."

Dr. Zihivago." The novel will be published soon, Solzhenitsyn accepted the award, but officials did not allow publication of his "literary investigation" into the Soviet prison camps.
The strangeness of that group is pretty typical of the course of what happens to literature from where I come from," Brodsky said.

Brodsky said he hoped his award would draw attention to the Russian poets he admires most, including friends like Alexander Osnip Mandel-Phenomenon, poets of the past such as Osmip Mandel-Brothers, Marine Tsvetaeva and Anna Akhmatova.

"I don't want to appear modest," he said, "but this award should be looked on as a prize for the true poets of this century." He said he was aware that he was one of the great writers of the century—James Joyce and Marcel Proust among them—have been overlooked by the academy.

Asked in London what he would do with the prize money, Brodsky made one of his rare grammatical errors in English. "To spend," he said.

(Moscow correspondent Celestine Bohlen contributed to this report.)

[From the Washington Post, Oct. 23, 1987]

Joseph Brodsky's Art of Darkness
(By David Remnick)

New York—Already poets and readers across Russia are calling one another to celebrate Joseph Brodsky's Nobel Prize as if it were their own. "I'm celebrating, too," the poet said in London yesterday. "I'm going out to get smashed."

And Soviet officials will celebrate the fact that after decades of repressing and, perhaps more cruelly, not publishing the greatest living poet of the Russian language, they are permitting the official journal Novy Mir to publish the work of a poet who was denied him. "About that, I will not celebrate too much," Brodsky says.

Only these Russians who have read his books, listened to his readings or attended Brodsky's legendary readings in the communal apartments of Leningrad before the government exiled him 16 years ago know the unique pitch of his voice and his turn of mind, his "Elegy for John Donne" and "Lullaby of Cape Cod."

"I visited once, briefly, his apartment in London yesterday. He worked as a neurosurgeon, a fellow Leningrader and one of the few friends from home, but I was an assistant to the neurosurgeon for some reason. You know, the normal movie screenings—all the "this and that, I'm not interested."

"Poems, novels—these things belong to the nation, to the culture and the people. They've been stolen from the people and now the stolen things are being returned to their owners, but I don't think their owners should be grateful to receive them," Brodsky says. He sits in the back-yard garden of his building in the West Village. His cat Mississippi springs on and off his lap. "How do I feel? Robert Frost once said, in a similar context, in one of his poems, that to be social is to be forgiving. But I'm not allowing myself to be forgiven.

Brodsky speaks with the weary darkness of a dying man. Part of his bearing, the rolling eyes and conducive staginess, shrieks, derivative of the man of Drinks and Performance, but it is authentic, too. Literary and personal suppression, an 18-month term in a work camp, exile, the lack of serious readers—all of it wears on him. You can even see it in his face. Brodsky is 47 but looks 10, 15 years older. His health is bad as well. He has undergone two by-pass operations and last spring doctors cleared a clogged atrial valve. "I'm not in the West."

When he talks of old age Brodsky says, "That's not a subject I worry over." He has not quit smoking. "I just can't seem to do it.... He gets his sentence after pack of cigarettes with the dumb Tilliveforever aband- don of a teen-ager. Friends worry if he has surrendered to the numbing images that grate on the boy."

Brodsky would still like to see a woman among the people among whom he lives. "...A language is a much more ancient and inevitable thing than a state, I belong to the Russian language. As to the state, from my point of view, the measure of a writer's triticism is not oaths from a high platform, but how he writes in the language of the people among whom he lives... Although I am long overdue to cease to be a Russian poet. I believe that I will return Poets always return in flesh or on paper...."

It seems now that Brodsky will return only on paper. Physical return is a hope abandoned. For years he lobbied the Soviet government for permission to return. His appeals were ignored, and now even those disembodied voices from Leningrad are denied him—Alexander and Maria Brodsky are dead. Brodsky would still like to see a few friends from home, but "quite frankly I'd rather they came here to see me."

"My poems getting published in Russian doesn't make me feel in any fashion, to tell you the truth. I'm not trying to be coy, but it doesn't tinkle my ego. If anything, I feel a little bit fatigued toward all this, I'm used to my condition, being on my own, totally autonomous. I don't want to dive into that mud slide, which is what I consider the literary process."

"I don't believe in that country any longer. I'm not interested. I'm writing in the language, and I like the language. I really don't know how to explain it to you. Condition is... it's people, basically. And I'm one of them. And I'm more or less enough for myself. When I'm writing a poem, I'm devoid of autobiographical interest for me. Maybe it's ego-centric. Whatever it is, I feel free to use it. When Thomas Mann arrived in California from Germany, they asked him about German literature. And he said, 'German literature is where I am.' It's really a bit grand, but if a German can afford it, I can afford it."

"Now I am quite prepared to die here. It doesn't matter at all. I don't know better places, or perhaps if I do I am not prepared to make a move."

Once upon a time there was a little boy, He lived in the most unjust country in the world. Which never happened... "Of course all human accounts should be considered de-generates. Which never happened..."

"Early in the morning when the sky was still full of stars, the little boy would rise and, after having a cup of tea and an egg, accompanied by a radio announcement of a new record in smelted steel, followed by the army choir singing a hymn to the Leader, whose picture was pinned to the wall over the little boy's still warm bed, he would run along the snow-covered granite embankment, along the snow-covered granite embankment to school."

...It is a big room with three rows of desks, a portrait of the Leader on the wall behind the teacher's chair, a map with two hemispheres, one of which is legal. The little boy takes his seat, opens his briefcase, puts his pen and notebook on the desk, and prepares himself to hear drivel.—From Brodsky's essay, "An Essay on Old Age."

The little boy, Brodsky, was the son of middle-class Jewish parents. His father was disturbed by the idea of a religious education in accordance with some serpentine ruling that Jews should not hold substantial military rank. The family got by mainly on the earnings of Brodsky's father, and the three of them lived in a communal apartment, a space described in Proustian detail in the essay, "In a Room and a Half."

"Brodsky's work is at once the most admired and the most deplored. Mornings he would sit in school and try to avoid the gaze of Lenin, whose portrait was on every classroom wall. In every photograph, a malior, as a geologist, would come and do auble notes. It wasn't so much ideology as the numbing images that grated on the boy: 'There was baby Lenin, looking like a cherub in his blond curls. Then Lenin in his twenties and thirties, bald and upright, with that meaningless expression on his face in which could be missed, if it was preiorly a sense of purpose,' This face in some way haunts every Russian and suggests some form of standard for human appearance because it is the man who knows his sentences."

It was time to begin an education: literary and sentimental. Reading the classics of Russian and English when he could—Dostoievsky, Platonov, Frost and Auden among his favorites—Brodsky began to work.

"I caught up in the proletariat the way Marx describes it." He worked as a stockbroker, a typographer, a mailler, as a geologist's assistant traveling to the Tien Shan Mountains and Central Asia. He worked with the dead. "I had this fantasy of becoming a neurosurgeon. You know, the normal Jewish boy fantasy, but I wanted to be a neurosurgeon for some reason. So I started, I didn't feel comfortable at the corner, opening up corpses, taking the inards, opening skulls, taking the brains out..."

At the same time as he began his physical labor, he started his literary work, learning English in order to translate John Donne, learning Polish in order to translate the poems of Czeslaw Milosz—an eventual Nobel Prize winner who would one day nominate Brodsky. And he began to write his own poems, too, publishing a few of them in a friend's publication, St. Petersburg. These early efforts won the approval of Anna Akhnatova, a fellow Leningrader and one of the few friends from home.

In his early twenties Brodsky was already considered an original. The mark of his poetry has always been an extraordinary combination of everyday life and the sublime. "Atmospheres," "_communist_—something that
annoy some of his countrymen, who would prefer he hail Pushkin a bit more than Frost, the motherland more than Cape Cod. From the start, Brodsky's politics were the perilous pursuit of the individual mind at play. His music was his own.

"I knew Joseph from the old days when we were young," says Lev Loseff, an emigre now writing literature at Dartmouth College. "Old St. Petersburg was the seat of opposition and artistic refinement, but during Stalin's time the city was downgraded to a provincial town. I was too much of a socialist realist. He was the incarnation of the city's noble, refined poetic tradition of Pushkin. Suddenly poetry was alive again in Joseph Brodsky."

Clearly, Brodsky was a poet of consequence, for by 1963 a Leningrad paper was denouncing the 23-year-old as "a drone of literature, an enemy of every parasite whose pornographic and anti-Soviet poetry" was corrupting the young. The paper said that the young man affected "velvet trousers" and "an American accent" and flew to the West. He was harassed by the police and twice thrown into a mental institution. The paper said that he was a "parasite whose corruption the young man affected the poetic tradition of Pushkin." "Every life has a file, if you will," he says now, standing in a sort of Novem­ber­lshenko­like uniform and looking like he'd completely missed the dreary life of socialist realism. He was the reincarnation of the city's noble, refined poetic tradition of Pushkin. Suddenly poetry was alive again in Joseph Brodsky.

"It's rather an exhilarating feeling. It's 6 or 7 when you get up and go out into the fields wearing your Wellingtons or high boots and know that at this very hour half the nation does the same thing, which gives you, with the benefit of hindsight, a satisfaction in doing those things, too, a knowl­edge that you are not a fool, that you are not a butcher's bush, and getting up on crook­ed legs, walks the road to the heart of the continent." His strange condition, his "apartness," suits him. He doesn't want to be either the crème de la crème or a martyr. "I'd rather be a ordinary guy, especially in a democracy that has no need of martyrs. I'm not even a poet. I'm an ordinary guy and I think that's the most appropriate position for a poet in society. In order to say or comprehend any truth about existence you have to get your­self out of the fray. You have to more or less listen to yourself."

"I should have spent all my life being a politician, but whether he is an honest man or given to lies; whether he is an ambitious man. One should define oneself first of all in, how­ever, that the way he lives his life revolves around writing. He gets up early and tries to work. "If I can get somewhere, I'm all right."

In the exile tradition of Dante or Ovid, Brodsky, as he writes in a poem, "survives like a fish in the sand: crawls off into the desert, dark and getting away. He has lost his way and has been scattered. He has lost his tracks like a line of writing into the heart of the continent." His strange condition, his "apartness," suits him. He doesn't want to be either the crème de la crème or a martyr. "I'd rather be a ordinary guy, especially in a democracy that has no need of martyrs. I'm not even a poet. I'm an ordinary guy and I think that's the most appropriate position for a poet in society. In order to say or comprehend any truth about existence you have to get your­self out of the fray. You have to more or less listen to yourself."

"A man should know about himself two or three things: whether he is a coward; whether he is honest man or given to lies; whether he is an ambitious man. One should define oneself first of all in; however, that the way he lives his life revolves around writing. He gets up early and tries to work. "If I can get somewhere, I'm all right."

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"A man should know about himself two or three things: whether he is a coward; whether he is honest man or given to lies; whether he is an ambitious man. One should define oneself first of all in; however, that the way he lives his life revolves around writing. He gets up early and tries to work. "If I can get somewhere, I'm all right."
"In the West you have every opportunity for civilization to triumph. But what do you do when there are no opportunities? This is a large issue. The species goofed long ago. One has a choice, either to learn or not to learn. And in thinking about this, one often asks whether one can choose not to learn. It's as simple as that.

"It's partly the fault of the institutions of education. But it's partly the decision to be reached broadly. Literature is, simply the most focused form of the demands on the evolution of the species. It imposes a certain responsibility, moral, ethical and aesthetic responsibility, and the species simply doesn't want to oblige.

"Literature, art too, makes your daily operation, your daily conduct, the management of your affairs in the society a bit more complex. It puts what you do in perspective, and people don't like to see themselves in that perspective. They don't feel quite comfortable with that. Nobody wants to acknowledge the insignificance of his life, and that is very often the reason for reading a poem.

Brodsky's English is good enough for complicated conversation and elegant prose, but his writing is full of Russian idiomaticness. The translations are clumsy. Even poems that mostly work in English end up with wretched lines such as "Therefore, sleep well. Sweet dreams. Knit up that sleeve. Sleep as those only do who have gone pee-pee." Reading some of the translations in the collection "A Part of Speech," Robert Hass writes: "It's like a architect designing through the ruins of a noble building."

"Such clumsiness hurts. Language is the body on which Brodsky lives in. The table in his back yard is cluttered with an old Russian typewriter, pencils, pens, yellow manuscript pages. He is writing a long love poem and wants to be rid of his guests and get back to it.

"What really motivates me is specifically my Russian anomaly. It lives its own life within me and sometimes just sort of pops up to the surface, you know?" By writing his poems, he ensures that no oppression, no hatred can ever be the last one, can defeat him in the end. "What gets left of a man amounts to a part. To a part of speech.

He says goodbye to his guests and walks to the corner candy store for a few packs of cigarettes.

**UNANIMOUS CONSENT AGREEMENT**

Mr. BYRD. Mr. President, I have previously been authorized by the Senate to proceed to Calendar Order No. 374, H.R. 2890, Department of Transportation appropriations bill after consultation with the minority leader. I have consulted with the minority leader and, upon the disposition of the catastrophic illness legislation, it is my plan to proceed to the consideration of the Department of Transportation appropriation bill.

The Republican leader knows that I am about to make this request, and it has his approval.

Mr. President, I ask unanimous consent that upon the disposition of the catastrophic illness legislation, it is my plan to proceed to the consideration of the Department of Transportation appropriation bill.

The PRESIDENT OFFICER. Is there objection?

Mr. BYRD. That being Tuesday, that is so ordered.

Mr. BYRD. Mr. President, I ask unanimous consent that on Tuesday, next, all time having expired on the military construction appropriation bill, H.R. 2906, that action on the bill be resumed, and that the vote occur on passage of the bill at 9:15 A.M.

The PRESIDENT OFFICER. Is there objection? Without objection, it is so ordered.

Mr. BYRD. Mr. President, that requires a waiving of paragraph 4 of rule XIII. I ask that rule be waived.

The PRESIDENT OFFICER. Is there objection? Hearing none, it is so ordered.

RESUMPTION OF CONSIDERATION OF THE MEDICARE CATASTROPHIC ILLNESS COVERAGE LEGISLATION

Mr. BYRD. Mr. President, I ask unanimous consent that upon the disposition of the military construction appropriation bill on Tuesday next, without further action and debate or motion, the Senate then resume consideration of the Medicare catastrophic illness coverage bill, S. 1127.

The PRESIDENT OFFICER. Without objection, it is so ordered.

Mr. BYRD. Mr. President, at that time the status of the measure will be precisely as the status of this moment; the pending amendment as of this moment will then be the pending amendment.

**RESUMPTION OF APPROPRIATION BILL**

Mr. BYRD. Mr. President, it will be my intention upon the disposition of the military construction bill and the disposition of the catastrophic illness bill on Tuesday next to go to the Department of Transportation appro-
priation bill. I have the authorization by previous order to proceed to that bill after consultation with the minority leader.

RESERVATION OF LEADER TIME

Mr. BYRD. Mr. President, I ask unanimous consent that after the two leaders or their designees have been recognized under the standing order on Tuesday next, there be a period for morning business with Senators being permitted to speak therein for not to exceed 5 minutes each to extend until the hour of 9:30 a.m.

The PRESIDING OFFICER. Is there objection?

Mr. DURENBERGER. There is no objection.

The PRESIDING OFFICER. The Chair hears none. It is so ordered.

MILITARY CONSTRUCTION VOTE RESCHEDULED FOR 9:30 A.M.

Mr. BYRD. Mr. President, I ask that the previous order be entered for the vote to begin on final passage of the military construction appropriations bill, which was ordered for 9:15 a.m., I ask that that be changed to 9:30 on Tuesday next.

The PRESIDING OFFICER. Without objection, it is so ordered.

THIRTY-MINUTE ROLLCALL VOTE

Mr. BYRD. Mr. President, I ask unanimous consent that that rollcall vote, which has been ordered, be a 30-minute rollcall vote, and that the call for the regular order be automatic at the conclusion of 30 minutes, and that there be no quorum call prior thereto.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DURENBERGER. There is no objection to that.

Mr. BYRD. I believe, Mr. President, that the order has already been entered for the resumption of the Medicare catastrophic illness bill upon the disposition of the military construction appropriations bill on Tuesday next. Am I correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. BYRD. I thank the Chair.

PROGRAM

Mr. BYRD. Mr. President, the Senate will come in at 9 o'clock on Tuesday morning next.

After the two leaders have been recognized under the standing order, a period for morning business will extend until 9:30 a.m. Senators will be permitted to speak during that morning business for not to exceed 5 minutes each.

At 9:30 a.m., the Senate will proceed, without a quorum call, to vote on the final passage of the military construction appropriation bill. That will be a 30-minute rollcall vote with the call for the regular order automatically occurring at the expiration of the 30 minutes.

Upon the disposition of the military construction appropriation bill, and without any further intervening action or debate, the Senate will go to the military construction appropriation bill—some action has been taken on that bill. The Senate will resume where it left off today. There is an amendment pending by Mr. RISKE.

Upon the disposition of the catastrophic illness bill the Senate will take up the transportation appropriation bill, Mr. President. So there will be several rollcall votes on Tuesday.

RECESS ON TUESDAY AT 12:45 P.M. UNTIL 2 P.M.

Mr. BYRD. I add this request, Mr. President, that the Senate stand in recess on Tuesday at the hour of 12:45 p.m. until the hour of 2 o'clock p.m. to accommodate the two party conferences.

Mr. DURENBERGER. Reserving the right to object, and I shall not, I would remind the majority leader and my colleagues that during that period of recess it is my expectation that the Minnesota Twins will be at lunch in some dining room in the Capitol and the majority leader, the Presiding Officer and everyone here will be invited to share in the joy of winning the World Series.

Mr. BYRD. I thank the distinguished Senator.

The PRESIDING OFFICER. Without objection, the request of the majority leader is ordered.

Mr. BYRD. Mr. President, does the distinguished Senator have any further statement he would like to make or any further business to conduct?

THE WORLD SERIES

Mr. DURENBERGER. I think we have made our point. I would certainly invite the majority leader and anyone else who has not had the opportunity to enjoy what we call the homer dome, to enjoy baseball in Minnesota in that special way in which we in Minnesota have come to enjoy it.

I also have, if you have not noticed, one of those famous homer hankies in my pocket. If the majority leader would promise to come to the final game which we now expect to be on Sunday rather than Saturday, I would be happy to provide the majority leader with my homer hankie which worked very well in the first two games of the Series and which I expect to work very well in the last two as well.

Mr. BYRD. Mr. President, I thank the distinguished Senator. He is very generous and considerate, I must say. However, I must say that, while I will be watching the seventh game of the Series Sunday on television, I have attended only three baseball games in 35 years. I have been in Washington 35 years as a Member of Congress. I attended three baseball games here in Washington when the Washington Senators were here. Two of those games were on the same afternoon, a doubleheader. I took a troop of boys to the game.

So eventually, I have gone to one football game in 35 years in the Washington area. That was at halftime to crown the queen when West Virginia played Maryland. I might finish the story by saying I have been to one more in 35 years here, and I walked out of that one before it was over.

I have enjoyed good movies like those that Alistair Cooke used to produce that involved British actors—such as "Elizabeth R," "The Six Wives of Henry the Eighth," "The Gambler," "Jude the Obscure," "The Last of the Mohicans."

I have seen one good movie since I have been in Washington over these 35 years. That was "Paton," I saw it twice. Once at the White House, and on television.

Mr. DURENBERGER. If the leader would yield not on the point of movies but on the point of baseball, I would make the observation that I might not be standing here today if it had not been for the fact that a Minnesota man moved the last baseball team out of Washington and moved it to another State, which will go nameless, but which is full of braggarts about the size of their State and a lot of other things that go on in a large Southern State, sort of in the middle of the country, bordering on Mexico. It will otherwise go nameless.

But the person who had the audacity to take baseball from Washington, DC, then had the audacity in 1976 to stand for election to the U.S. Senate. He was fortunate enough to be able to survive a very difficult primary of the majority leader's party in my State. But he lost in the general election by a rather substantial margin.

I would say that I was aided in my victory that year, at least in some small part, by the many people who, unlike the majority leader, had become devotees of baseball and resented the idea that this particular individual would take this pastime away from Washingtonians.

I will make a second observation. That is that if you come from a State that is big league in baseball, it is much easier to find yourself wrapped up in the sport. I would say probably that West Virginians, while they do not have the opportunity to participate in the big leagues in baseball so that their senior Senator does not have the same opportunity that I might have to attend a game, they certainly get their big league in politics, in government, as the majority leader has indicated on so many occasions, not only to West Virginians but to people all over the country.
IN THE AIR FORCE

The following-named officer, under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

MAJ. GEN. DONALD J. KUTTNER, U.S. AIR FORCE.

The following-named officer under the provisions of title 10, United States Code, section 601, to be reassigned in his current grade to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

LT. GEN. RICHARD A. BURPER, U.S. AIR FORCE.

The following-named officer, under the provisions of title 10, United States Code, section 601, to be assigned to a position of importance and responsibility designated by the President under title 10, United States Code, section 601:

To be lieutenant general

MAJ. GEN. JAMES B. DAVIV, U.S. AIR FORCE.

The following-named officer for appointment to the grade of lieutenant general on the retired list pursuant to the provisions of title 10, United States Code, section 601(a), in conjunction with assignment to a position of importance and responsibility designated by the President under title 10, United States Code, section 601(a):

To be lieutenant general

LT. GEN. EDWARD L. LIGHT, JR., U.S. AIR FORCE.

IN THE ARMY

The following-named officer to be placed on the retired list in the grade indicated under the provisions of title 10, United States Code, section 1370:

To be lieutenant general

LT. GEN. JOHNNY J. JOHNSON, U.S. ARMY.

The following-named officer, for appointment to the grade indicated, under the provisions of title 10, United States Code, section 601(a), in conjunction with assignment to a position of importance and responsibility designated by the President under title 10, United States Code, section 601(a):

To be lieutenant general

MAJ. GEN. ORREN R. WHIDDON, U.S. ARMY.

To be brigadier general

COL. SIMON C. KREVITSKY.

The following-named officer for appointment as reserve commissioned officer of the Army, under the provisions of title 10, United States Code, section 1381:

To be major general

BRIG. GEN. DAVID B. STEPHENS.

To be brigadier general, USAF

COL. JAMES B. DAVIV, U.S. AIR FORCE.

The United States Army Reserve officers named herein for appointment as reserve commissioned officers of the Army, under the provisions of title 10, United States Code, sections 655(a), 3371 and 3384:

To be major general

BRIG. GEN. CLYDE R. CHERBERG.

BRIG. GEN. ROBERT C. HOPE.

BRIG. GEN. FELIX A. SANTONI.

BRIG. GEN. PAUL N. REVIS.

BRIG. GEN. GENE P. HALE.

BRIG. GEN. PAUL R. LISTER.

BRIG. GEN. STEPHEN H. SEWELL, JR.

BRIG. GEN. ROGER H. BUTZ.

BRIG. GEN. CLYDE R. CHERBERG.

BRIG. GEN. ROBERT C. HOPE.

BRIG. GEN. ALVIN W. JONES.

BRIG. GEN. ROBERT C. HOPE.

BRIG. GEN. FELIX A. SANTONI.

BRIG. GEN. PAUL N. REVIS.

BRIG. GEN. GENE P. HALE.

BRIG. GEN. PAUL R. LISTER.

BRIG. GEN. STEPHEN H. SEWELL, JR.

BRIG. GEN. ROGER H. BUTZ.

To be brigadier general, USAF

COL. WOODROW A. PLIER.

COL. BARCLAY C. WELLMAN.

COL. STEPHEN B. BURTON.

COL. CLAIRE W. ROBERTS.

COL. STEPHEN B. BURTON.

COL. PAUL N. REVIS.

COL. ROGER H. BUTZ.
IN THE NAVY

THE FOLLOWING-NAMED OFFICER TO BE PLACED ON THE RETIRED LIST IN THE GRADE INDICATED UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTION 1370:

To be vice admiral
VICE ADM. WILLIAM F. McCauley, U.S. NAVY.

IN THE MARINE CORPS


IN THE NAVY


REJECTION

Executive nomination rejected by the Senate October 23, 1987:
SUPREME COURT OF THE UNITED STATES
Robert H. Bork, of the District of Columbia, to be an Associate Justice of the Supreme Court of the United States.